

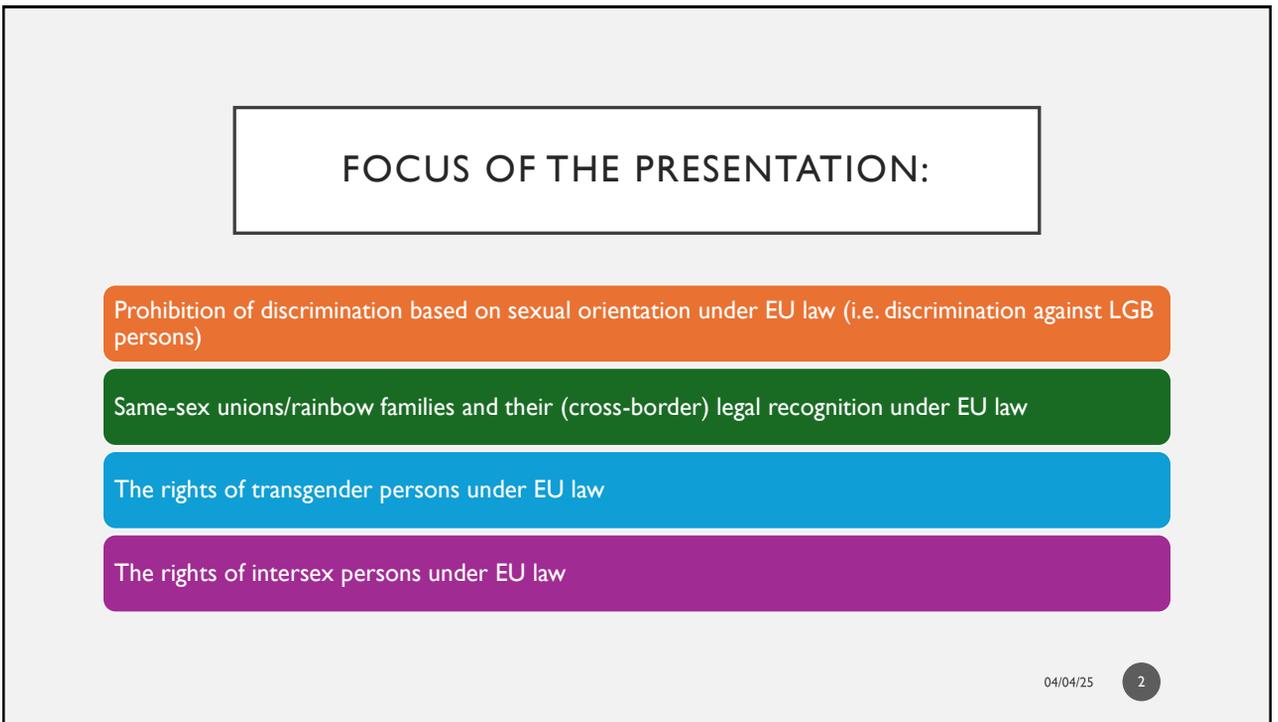


LGBTIQ RIGHTS IN THE EU

Presentation at the ERA Seminar for legal practitioners 'Applying EU Anti-Discrimination Law', Dublin, 3-4 April 2025
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FOCUS OF THE PRESENTATION:

- Prohibition of discrimination based on sexual orientation under EU law (i.e. discrimination against LGB persons)
- Same-sex unions/rainbow families and their (cross-border) legal recognition under EU law
- The rights of transgender persons under EU law
- The rights of intersex persons under EU law

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WHAT IS SEXUAL ORIENTATION?

Who we are attracted to

There are different types of sexual orientation, e.g.:

- Homosexual sexual orientation
- Bisexual sexual orientation
- Heterosexual sexual orientation

Majority of people: heterosexual sexual orientation

- Bisexual and homosexual sexual orientations are minority sexual orientations → persons having minority sexual orientations are, often, discriminated against
- Thus, sexual orientation is a 'suspect classification'.
- Discrimination based on sexual orientation is prohibited by numerous (international) instruments and (national) laws, including under EU law

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WHAT IS A SAME-SEX UNION?

Same-sex unions are unions between two persons of the same sex. The law of each country provides (if at all) for different levels of recognition of same-sex unions (e.g. as marriages, as registered partnerships, as de facto partnerships).

The term 'rainbow families' is widely used to refer to families comprised of a same-sex couple with children.



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WHAT IS GENDER IDENTITY?

'Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms' (Yogyakarta principles)

- The majority of people are cisgender i.e. their gender aligns with the sex they were assigned at birth
- Trans persons = persons whose gender identity does not correspond with the sex they were assigned at birth (they constitute a gender minority)
- Discrimination against trans persons constitutes discrimination based on gender identity



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WHAT IS AN INTERSEX PERSON?

- Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.
- Human rights abuses against intersex people include, but are not limited to:
 - Infanticide
 - Forced and coercive medical interventions
 - Discrimination in education, sport, employment and other services
 - Lack of access to justice and remedies
- Discrimination against intersex persons is discrimination which is based on sex characteristics.

The Data displayed here is based on the European Union Agency for Fundamental Rights (FRA) LGBTI Survey Data Explorer & EU-LGBTI in 2019 Survey Report "A long way to go for LGBTI equality" Published on May 14th 2020

INTERSEX PEOPLE FACE PHYSICAL VIOLENCE & HARASSMENT



42% Among all LGBTI respondents, trans (48%) and intersex (42%) experienced the highest rates of harassment for being LGBTI in the year before the survey.

41% Across the EU, intersex respondents indicate the highest rate (41%) of often or always avoiding certain locations.

28% of intersex people experienced receiving offensive or threatening emails or text messages (SMS) six or more times, in the past 12 months before the survey due to being LGBTI. Even **39%** of those between 15-17 years old! And 27% of intersex people experienced this at least once.



Intersex?
Discrimination?
Intersexphobia?

Intersex individuals are born with sex characteristics that do not fit the typical definition of male or female. This can become apparent at birth or later in life.

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SEXUAL ORIENTATION

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**BINDING EU PROVISIONS/INSTRUMENTS WHICH
EXPLICITLY PROHIBIT (OR ENABLE THE EU TO
PROHIBIT) SEXUAL ORIENTATION
DISCRIMINATION**

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ARTICLE 19(1) TFEU – THE LEGAL BASIS

‘Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or **sexual orientation**.’

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DIRECTIVE 2000/78 – THE DIRECTIVE WHICH PROHIBITS DISCRIMINATION BASED ON SEXUAL ORIENTATION

- Purpose: to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation in the context of employment and occupation (incl. vocational training)
- Problem: limited material scope → (2008 proposal for a Directive which would extend the prohibition to other areas outside employment – but recently it has been decided the proposal will be withdrawn)
- Prohibits direct & indirect discrimination on those grounds, as well as harassment and instruction to discriminate

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ARTICLE 21 EUCFR- THE CHARTER PROVISION WHICH PROHIBITS DISCRIMINATION BASED ON SEXUAL ORIENTATION

'Any discrimination based on any ground such as sex, race, 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'.

No limitation in areas where the prohibition is applicable (unlike Dir. 2000/78), however, there are limits to the scope of application of the EUCFR

- Art. 51 EUCFR: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. [...]'.

A number of other EUCFR provisions (and fundamental human rights which are general principles of EU law) can be relied on by LGB persons and same-sex couples (e.g. Art. 7 EUCFR)

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ARTICLE 10 TFEU – THE MAINSTREAMING PROVISION

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or **sexual orientation**.

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ECJ CASE-LAW INTERPRETING THE PROHIBITION OF DISCRIMINATION BASED ON SEXUAL ORIENTATION

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THE EARLY CASE-LAW: *GRANT* (1998) & *D & SWEDEN V. COUNCIL* (2001)

- Discrimination on the ground of sexual orientation is not discrimination on the ground of sex (contrast with *P v. S & Cornwall - trans*) – use of the 'equal misery' argument (gay men compared with gay women - wrong comparator).
- At that time, discrimination on the ground of sexual orientation was not prohibited by EU law.
- Stable relationships between two persons of the same sex (*Grant*) 'are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex' for the purposes of EU law; also, same-sex registered partnerships were not considered as equivalent to different-sex marriages, for the purpose of granting employment-related benefits (*D & Sweden v. Council*).



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MARUKO (2008), RÖMER (2011), HAY (2013) REGISTERED PARTNERS MUST RECEIVE THE SAME EMPLOYMENT-RELATED BENEFITS & ENTITLEMENTS AS MARRIED COUPLES IF THEY ARE IN A COMPARABLE SITUATION UNDER NATIONAL LAW

- Cases involving Dir. 2000/78 and discrimination on the ground of sexual orientation as regards ‘pay’ (but see *Parris* (2016), where the claim was unsuccessful)
- *Maruko* and *Römer* – at the time, Germany allowed same-sex couples only to enter into a registered partnership, and different-sex couples only to enter into a marriage (i.e. registered partnerships were a status that was only available to same-sex couples).
- *Hay* – at the time, France allowed same-sex couples only to enter into a PACS (registered partnership), whereas opposite-sex couples could enter into either a marriage or a PACS (i.e. PACS was a status available to both same-sex and different-sex couples).
- *Maruko* and *Römer*: survivor’s pension & supplementary pension – *Hay*: special leave and bonus for staff who married --- these were only available to married couples: since same-sex couples could not marry (but only enter into a registered partnership), they were excluded from these benefits.
- ECJ:
 - If for a certain purpose (e.g. survivor’s pensions/supplementary pensions/special leave & bonus) same-sex registered partnerships are considered by a Member State as comparable to marriage, then they must be treated in the same way and the benefits and entitlements reserved for married couples must be extended to registered partners.
 - *Maruko* and *Römer*: It is for the national court to conduct the assessment as to whether registered partnerships and marriages are considered comparable, for the specific purpose that is at issue
 - *Hay*: The ECJ conducted the equivalence assessment itself
 - If under the specific legal system of a MS marriages and registered partnerships are considered comparable for a specific purpose (e.g. supplementary pensions) then they must also be treated in the same manner by employers.
 - If, although they are considered comparable, they are not treated in the same way, there is **direct** discrimination based on sexual orientation prohibited by Dir. 2000/78
 - In *Hay* the ECJ confirmed that the difference in treatment was *direct* discrimination on the ground of sexual orientation even though PACS was open to both same-sex and opposite-sex couples (unlike the registered life partnership in *Maruko* and *Römer*).

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ASOCIAȚIA ACCEPT (2013) AND NH (2020): HOMOPHOBIC SPEECH AMOUNTS TO DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION



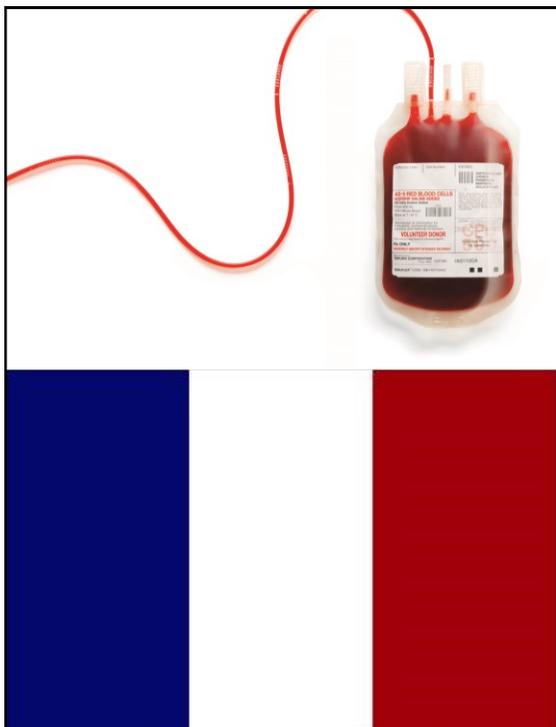
- Do homophobic statements made by a potential employer amount to discrimination based on sexual orientation contrary to Directive 2000/78?
- Homophobic statements made by Mr Becali who was considered to play a leading role in FC Steaua Bucuresti, ruling out the recruitment of a footballer *thought to be gay*; homophobic statements made by Mr NH, a lawyer, ruling out the recruitment of gay persons at his law firm.
- NGOs brought actions claiming that the statements amounted to discrimination based on sexual orientation contrary to Dir. 2000/78; in neither case was the claim brought by ‘a/the victim’ of discrimination.
- ECJ:
 - An identifiable complainant who claims to have been the victim of discrimination is not required for Dir. 2000/78 to be breached
 - Discrimination by assumption is (also) prohibited by Dir. 2000/78
 - (NH) The limitations on the freedom of expression which ensue from the prohibition laid down in Dir. 2000/78 can be justified.

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LÉGER (2015): FIRST AND – SO FAR – ONLY CASE INVOLVING DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION UNDER THE CHARTER

- Only case (to date) where the prohibition of discrimination on the ground of sexual orientation under the EUCFR (Art. 21 EUCFR) was relied on
- French lifetime blanket ban on the donation of blood by MSM
- Was the ban in breach of Art. 21 EUCFR?
- ECJ – the ban *may* discriminate on the ground of sexual orientation, but it can be justified on the ground of public health: up to the referring court to decide whether the measure can be justified and, in particular, whether it is proportionate or whether there is a less restrictive alternative.

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SAME-SEX UNIONS/RAINBOW FAMILIES

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COMAN (2018): SAME-SEX SPOUSES MUST BE RECOGNISED AS 'SPOUSES' FOR FAMILY REUNIFICATION PURPOSES WHEN THEY MOVE WITHIN THE EU

- Romanian who moved to Belgium and wished to return to Romania
- Married his TCN same-sex partner in Belgium
- Couple relied on EU citizen's family reunification rights under EU free movement law in order for the TCN spouse to be able to reside in Romania
- Interpretation of Dir. 2004/38: does the term 'spouse' include a same-sex spouse?
 - ECJ: Yes (but with limitations...)

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PENDING CASE: C-713/23, JC-T, MT V. WOJEWODA MAZOWIECKI

- 'Must the provisions of Article 20(2)(a) and Article 21(1) TFEU, read in conjunction with Article 7 and Article 21(1) of the Charter of Fundamental Rights of the European Union and Article 2(2) of Directive 2004/38/EC of the European Parliament and of the Council 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 ¹ be interpreted as precluding the competent authorities of a Member State, where a citizen of the Union who is a national of that State has contracted a marriage with another citizen of the Union (a person of the same sex) in a Member State in accordance with the legislation of that State, from refusing to recognise that marriage certificate and transcribe it into the national civil registry, which prevents those persons from residing in that State with the marital status of a married couple and under the same surname, on the grounds that the law of the host Member State does not provide for same-sex marriage?'

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THE VMA CASE (2021)

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VMA

- Cross-border recognition of parent-child relationship between a child and both of her (same-sex) parents
- ECJ: the principle of mutual recognition applies to birth certificates issued by EU Member States, including when they identify two persons of the same sex as the parents of a child, **in situations which involve the exercise of free movement rights.**
- This is especially important for rainbow families, given that a large number of Member States refuse to allow two persons of the same sex to become the joint legal parents of a child in their territory and also refuse to recognise the familial ties that the members of rainbow families have legally established in other countries.
- With this ruling, the Court has ensured that minors who are Union citizens can be accompanied by *both* of their same-sex parents in whichever EU Member State they decide to move. In addition, LGB Union citizens who are married with a person of the same sex can be accompanied or joined in the territory of another EU Member State, not only by their spouse (as was already established in *Coman*) but also by their children.

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VMA

- The ECJ in this ruling, as in *Coman*, refrained from engaging with the thorny question of whether the cross-border recognition of the familial ties between the child and both of her parents is required not only when family reunification rights are claimed in the host Member State but, also, *for all other legal purposes*.
- Delivering a ruling which explicitly requires this would, almost certainly, raise the strong objection of EU Member States who vehemently object to the idea of recognising two persons of the same sex as the joint legal parents of a child.
- This might, as has been the case with the ruling in *Coman*, lead to backlash in the form of non-implementation of the ruling at the national level

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TRANSGENDER PERSONS

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P. V. S & CORNWALL COUNTY COUNCIL (1996)

- **Discrimination based on the fact that a trans person intends to undergo 'gender reassignment' amounts to discrimination on the ground of sex**
- 'Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment'.



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KB V NHS AND ANOTHER (2004)

Discrimination against a cisgender woman who was in a relationship with a transgender man who had undergone gender reassignment. At the time, the UK did not provide a legal framework for the legal recognition of trans persons in the gender they identified with, even if they had undergone gender reassignment; also, the UK did not allow same-sex marriages. This meant that transgender persons could not marry persons who belonged to the sex which was the same as the sex they were legally assigned at birth, and which they could not – at the time – legally change. Since the couple could not marry, the transgender person could not be awarded a survivor's pension as a 'spouse' of his partner.

This amounted to discrimination on the ground of sex. The discrimination did not arise as a result of the choice of the UK legislature to restrict a survivor's pension to 'spouses', but from the fact that the lack of legal framework allowing transgender persons to be legally recognised in the gender they identified with prevented them from satisfying one of the conditions for the grant of that benefit.

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RICHARDS V SECRETARY OF STATE FOR WORK AND PENSIONS (2006)

The denial to a trans woman who had undergone gender reassignment surgery of a retirement pension at the age that this was available to (cis) women (i.e. 60), on the ground that she was not recognised as a 'woman' under national law, amounted to discrimination on the ground of sex contrary to Dir. 79/7

→ What amounted to a breach of Dir. 79/7 was not the UK legislation (Pensions Act 1995) which restricted the award of the retirement pension at the age of 60 to 'women'; rather, it was the lack of UK legislation allowing trans persons to be legally recognised in the gender with which they identified and the resultant refusal to read the Pensions Act 1995 as applying equally to cisgender and transgender women, which amounted to a breach of EU law.

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MB V SECRETARY OF STATE FOR WORK AND PENSIONS (2018)

The denial to a trans woman who had undergone gender confirmation surgery of a retirement pension at the age that this was available to (cis) women (i.e. 60), on the ground that she was not recognised as a 'woman' under national law (because she did not acquire a full gender recognition certificate in accordance with the Gender Recognition Act 2004), amounted to discrimination on the ground of sex contrary to Dir. 79/7.

→ In this case, the reason that the applicant was not legally recognised in the gender with which she identified, was not the lack of a legal framework allowing this, but, rather, her objection to annulling her existing marriage, which was a pre-condition for the issuance of a gender recognition certificate.

What amounted to a breach of Dir. 79/7 was not the UK legislation which restricted the award of the retirement pension at the age of 60 to 'women'; rather, it was the fact that the applicable UK legislation at the time required trans women who wished to acquire a full gender recognition certificate to apply to have their marriage annulled (this was in order to prevent the emergence of same-sex marriages [at a time when the UK had not opened marriage to same-sex couples] which would have ensued in case trans persons were married to persons who had the same sex as their acquired gender)

*No marriage annulment = no full gender recognition certificate = trans women who were married prior to undergoing gender reassignment could not be awarded a retirement pension at the same age that cis women who were married could get

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MIRIN (2024)

Case concerning the recognition of a change in legal gender effected in another MS.

- Case involving the exercise of free movement rights ('free movement' case, like *Coman & VMA*).

The Court held that national legislation 'which does not permit a first name and gender identity, lawfully acquired in another Member State, to be registered and which obliges the person concerned to bring new judicial proceedings for a change of gender identity in the Member State of origin, which disregard the fact that the Union citizen has already lawfully acquired the change of his or first name and gender identity in his Member State of residence and has been subject to the procedures laid down for that purpose in that Member State, infringes the requirements under Article 21 TFEU'.

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MOUSSE (2025) & DELDITS (2025) – GDPR CASES

Case C-394/23 *Mousse* (non-binary persons – GDPR Regulation – option only of 'Mr' or 'Mrs' when purchasing train tickets online – no other possibilities (neutral or 'other' were offered))

- The collection of data regarding customers' titles is not objectively indispensable, in particular where its purpose is to personalise commercial communication (it is not in accordance with the principle of 'data minimisation')
- ECJ recognised that the prohibition of discrimination based on gender identity is included within the prohibition of discrimination based on sex

Case C-247/23 *Deldits* (transgender asylum seeker – GDPR Regulation – right to rectification of data relating to gender – administrative practice of requesting proof of gender reassignment surgery)

- Article 16 of the GDPR must be interpreted as requiring a national authority responsible for keeping a public register to rectify the personal data relating to the gender identity of a natural person where those data are inaccurate, within the meaning of Article 5(1)(d) of that regulation.
- For the purposes of exercising the right to rectification of the personal data relating to the gender identity of a natural person that are contained in a public register, that person may be required to provide relevant and sufficient evidence that may reasonably be required of that person in order to establish that those data are inaccurate. However, a Member State may not, under any circumstances, by way of an administrative practice, make the exercise of that right conditional upon the production of evidence of gender reassignment surgery.

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INTERSEX PERSONS

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INTERSEX PERSONS UNDER EU LAW

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- The EU has failed to adopt provisions or policies to accommodate or protect intersex persons.
- Discrimination against intersex persons (i.e. discrimination based on sex characteristics) is not recognised as prohibited discrimination in the constituent EU Treaties (the TEU and TFEU), nor is it mentioned in the EUCFR, or any other EU document.
- There is no EU secondary legislation which protects the rights of intersex persons.
- No cases involving intersex persons have been brought before the ECJ and, thus, no judgments have been issued by the Court regarding intersex persons (if the Court was given the opportunity to rule in situations involving intersex persons it might have chosen – like it did in the context of trans persons – to rule that discrimination against intersex persons is a guise of discrimination on the ground of sex, so at least protection would be provided to intersex persons under the current legal framework of sex equality law).

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