



Rights of LGBTIQ people in the European Union

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Applying EU anti-discrimination law.
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Agenda

- Discrimination based on sexual orientation
- Rights of intersex and transgender people
- Same-sex relationships

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Discrimination based on sexual orientation

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Sexual orientation as a legally protected characteristic

- no legal definition
- sexual and emotional desire directed towards persons of the same sex (**homosexuality**), the opposite sex (**heterosexuality**) or both sexes simultaneously (**bisexuality**) → **protection limited to LGB persons**
- Legally protected characteristic
- ✓ strongly related to the intimate sphere of the individual
- ✓ related to the marital status of the individual
- ✓ socially "sensitive"

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Protection against discrimination on grounds of sexual orientation – primary law

Article 19 TFEU (competence rule)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred on the Union by the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take **the necessary measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.**
2. By way of derogation from paragraph 1, in order to support action taken by Member States to contribute to the achievement of the objectives referred to in paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt basic principles for Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States.

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Protection against discrimination on grounds of sexual orientation – primary law

Article 21 of the Charter of Fundamental Rights of the European Union

Non-discrimination

1. **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.**
2. Within the scope of application of the Treaties and without prejudice to their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Judgment in Case C-528/13, Léger, EU:C:2015:288

48. Consequently, **that regulation must, among the provisions of the Charter, comply in particular with Article 21(1) thereof, which prohibits any discrimination based, in particular, on sexual orientation.** That provision is a specific expression of the principle of equal treatment, which constitutes a general principle of EU law enshrined in Article 20 of the Charter (see, to that effect, judgments in Römer, C-147/08, EU:C:2011:286, paragraph 59; Glatzel, C-356/12, EU:C:2014:350, paragraph 43).

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Protection against discrimination on grounds of sexual orientation – primary law

A general principle of EU law?

Judgment in Case C-528/13, *Léger*, EU:C:2015:288

48. ‘Consequently, that regulation must, among the provisions of the Charter, comply in particular with **Article 21(1) thereof**, which **prohibits any discrimination based, in particular, on sexual orientation. That provision is a specific expression of the principle of equal treatment, which constitutes a general principle of EU law enshrined in Article 20 of the Charter** (see, to that effect, judgments in *Römer*, C-147/08, EU:C:2011:286, paragraph 59; *Glatzel*, C-356/12, EU:C:2014:350, paragraph 43).

Judgment in Case C-507/18, *Associazione Avvocatura per i diritti LGBTI*, EU:C:2020:289

38. ‘**Directive 2000/78 thus gives concrete expression**, in the area which it regulates, **to the general principle of non-discrimination guaranteed by Article 21 of the Charter** (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 47).

Judgment in Case C-267/06, *Maruko*, EU:C:2008:179

‘It is clear that **marital status and the benefits resulting therefrom are matters which fall within the competence of the Member States** and which Community law does not affect. However, it should be recalled that, **in exercising that competence, Member States must comply with Community law, in particular the provisions relating to the principle of non-discrimination** (see, to that effect, judgments of 16 May 2006 in Case C-372/04 *Watts*, ECR I-4325, paragraph 92, and of 19 April 2007 in Case C-444/05 *Stamatelaki*, ECR I-3185, paragraph 23).

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Protection against discrimination on grounds of sexual orientation – secondary law

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22

Article 1

‘The purpose of this Directive is **to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation**, with a view to putting into effect in the Member States the principle of equal treatment.’

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Regulation in EU law – secondary law

- **Proposal** for a Council Regulation on jurisdiction, applicable law, recognition and acceptance of decisions and official acts concerning the origin of a child and establishing a European Child Origin Certificate COM/2022/695 final (**the so-called rainbow families regulation**)
- **Proposal** for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM/2008/0426 (**the so-called horizontal directive**)
- **Directive 2004/38** on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, pp. 77–123
- **Directive 2012/29/EU** of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, OJ L 315, 14.11.2012, pp. 57–73
- **Regulation (EU) 2021/1060** laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime Fisheries and Aquaculture Fund, as well as financial rules for those funds and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the instrument for financial support for border management and visa policy, OJ L 231, 30.6.2021, pp. 159–706.

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Sexual orientation as a legally protected characteristic in CJEU case law

Judgment in Case C-81/12, Asociația Accept, EU:C:2013:275

"Article 2(2) and Article 10(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework of equal treatment in employment and occupation must be interpreted as meaning that **circumstances such as those at issue in the main proceedings may be regarded as 'facts which give rise to a presumption of [...] discrimination'** in relation to a professional football club, **where the statements at issue were made by a person who describes himself as the chief executive of that club and is regarded as such** both by the media and by the public, even though he does not necessarily have the legal capacity to commit or represent that club in matters of employment.

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Sexual orientation as a legally protected characteristic in CJEU case law

Judgment in Case C-507/18, Associazione Avvocatura per i diritti LGBTI, EU:C:2020:289

"The concept of 'conditions for access to employment [...] [or work]', contained in Article 3(1)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, must be interpreted as including **statements made during an audiovisual programme** by a person who claims that he would never employ or allow to work in his undertaking persons of a particular sexual orientation, even if no recruitment procedure was pending or planned, **provided that the link between those statements and the conditions for access to employment or work in that undertaking is not hypothetical.**

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Sexual orientation as a legally protected characteristic in CJEU case law

Judgment in Case C-356/21, TP (Audiovisual technician for public television), EU:C:2023:9

'Article 3(1)(a) and (c) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as **precluding national legislation which has the effect of excluding, on the basis of the free choice of the contracting party, from the scope of protection against discrimination to be granted under that directive, the refusal, on grounds of the sexual orientation of the person concerned, to conclude or extend a contract** for the performance of specific services by that person in **the context of his or her activity as a self-employed person.**'

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Rights of intersex and transgender people

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Protection of transgender rights in EU anti-discrimination law

Intersex persons

- Lack of protection against discrimination based on sex characteristics in EU law
- European Parliament resolution of 14 February 2019 on the rights of intersex people (2018/2878(RSP))
- European Parliament resolution of 8 February 2024 on the implementation of the EU Strategy for LGBTIQ Equality 2020-2025 (2023/2082(INI))

Transgender persons

- Protected against discrimination on grounds of sex
- 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, 21.12.2004, pp. 37–43
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on implementing the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26.7.2006, pp. 23–36
- Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (79/7/EEC), OJ L 6, 10.1.1979, pp. 24–25

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Gender identity as a legally protected characteristic

- no legal definition
- a deeply felt sense of belonging to a particular gender, but only to the extent that it is associated with the desire to belong exclusively to the opposite gender → **protection only** for persons seeking gender alignment (**transsexual persons**)
- protected characteristic derived from *gender* → prohibition of gender discrimination is not limited to discrimination between genders

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Transgender rights in the anti-discrimination case law of the CJEU

Judgment in Case C-13/94, P., EU:C:1996:170

- Since **the right not to be discriminated against on grounds of sex** is a fundamental human right, the scope of Directive [76/207 – ASZ] cannot be limited to discrimination on the grounds that a person is of one sex or the other.
- It **must be extended to discrimination resulting from gender reassignment**, which is based essentially, if not exclusively, on the sex of the person concerned.
- Consequently, **dismissal of a person on the grounds of planned or completed gender reassignment constitutes less favourable treatment compared to persons belonging to the gender that the person concerned represented before the reassignment** in terms of working conditions.
- Tolerating discrimination of the latter kind would mean a failure to respect the dignity and freedom of the persons concerned, which the Court must ensure.

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Transgender rights in anti-discrimination case law CJEU

Judgment in Case C-117/01, *K.B.*, EU:C:2004:7

"Article 141 EC [157 TFEU – ASZ] precludes, in principle, provisions which, in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950, prevent a couple such as *K.B.* and *R.* [in *which one of the persons has undergone medical gender reassignment but has not been able to legally change their gender* – ASZ] from fulfilling the requirement of entering into marriage [because national law does not provide for same-sex marriage – ASZ], which is necessary for one of those persons to receive part of the other's remuneration. It is for the national court to determine whether, in a case such as that before it, a person in *K.B.*'s situation may rely on Article 141 EC in order to have his right to designate his partner as the beneficiary of a survivor's pension recognised.

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Transgender rights in CJEU anti-discrimination case law

Judgment in Case C-423/04, *Richards*, EU:C:2006:256

'Article 4(1) of Council Directive 79/9/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as precluding a provision which refuses to grant a pension to a person who has changed – in accordance with the conditions laid down by national law – from male to female on the ground that that person has not reached the age of 65, whereas that same person would be entitled to a retirement pension at the age of 60 if he were recognised as a woman under national law.'

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Transgender rights in CJEU anti- discrimination case law

Judgment in Case C-451/16, MB, EU:C:2018:492

'Article 4(1) of Council Directive 79/9/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as **precluding a provision which refuses to grant a pension to a person who has changed – in accordance with the conditions laid down by national law – from male to female** on the ground that that person has not reached the age of 65, whereas the same person would be entitled to a retirement pension at the age of 60 if he were recognised as a woman under national law."

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Judgment in Case C-4/23, Mirin, EU:C:2024:845

'Articles 20 and 21(1) TFEU, read in conjunction with Articles 7 and 45 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that:

they preclude legislation of a Member State which does not allow the recognition and entry in the birth certificate of a national of that Member State of a change of name and gender identity obtained lawfully in another Member State while exercising the freedom of movement and residence, which consequently **requires** that person to **initiate new judicial proceedings in the first Member State for the change of gender identity, which disregards that change already lawfully obtained in the other Member State.**

In that regard, it is irrelevant that the application for recognition and registration of the change of name and gender identity was submitted in the first Member State on the date on which the withdrawal of the second Member State from the European Union became effective.

Transgender rights in CJEU case law – freedom of movement

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Judgment in Case C-247/23, Deldits, EU:C:2025:172

Transgender rights in CJEU case law – GDPR

"1) **Article 16** of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (**General Data Protection Regulation**) **must be interpreted as meaning that: it imposes on the national authority** responsible for maintaining a public register **the obligation to rectify personal data concerning the gender identity of a natural person** if that data is not accurate within the meaning of Article 5(1)(d) of that regulation.

2) Article 16 of Regulation 2016/679 must be interpreted as meaning that:

for the purposes of exercising the right to rectify personal data concerning the gender identity of a natural person contained in a public register, that person may be required to provide relevant and sufficient evidence that can reasonably be required of that person to **demonstrate the inaccuracy of that data. However, a Member State may not, in any case, make** the exercise **of that right subject**, by administrative practice, **to the provision of evidence of having undergone gender reassignment surgery.**

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Protection of the rights of same-sex couples

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Dual protection

Directive 2000/78

- differential treatment of unmarried homosexual partners and unmarried heterosexual partners → direct discrimination on grounds of sexual orientation
- differential treatment of same-sex marriages and registered same-sex partnerships, provided that the nature and purpose of both categories of relationships are equivalent → direct or indirect discrimination on grounds of sexual orientation (depending on the circumstances of the case)
- differential treatment of same-sex partners in informal relationships and opposite-sex spouses → indirect discrimination on grounds of sexual orientation

Directive 2004/38 (Article 21 TFEU)

- obligation to recognise same-sex marriages and filiation relationships between same-sex parents and their children, insofar as this is necessary to ensure the exercise of this freedom

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Refusal to grant protection - marital status as a an admissible criterion for differentiation

*Judgment of the Court of Justice of 17 February 1998
in Case C-249/96, Grant, EU:C:1998:63*

The refusal (...) does not constitute discrimination prohibited by Article 119 of the Treaty or Directive 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

... in the present state of the law within the Community, stable relationships between two persons of the same sex **are not regarded as equivalent** to marriages or stable relationships outside marriage between persons of opposite sex, and **an employer is not therefore required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage** with a partner of the opposite sex. It is for the legislature alone to adopt, if appropriate, measures which may affect that position.

*Judgment of the Court of Justice of 31 May 2001 in
Case C-125/99 P Sweden v D and the Council,
EU:C:2001:304*

The principle of equal treatment can apply only to persons in comparable situations, and so it is necessary to consider whether the situation of an official who has registered a partnership between persons of the same sex, such as the partnership entered into by D under Swedish law, is comparable to that of a married official.

In making such an assessment, the Community courts cannot disregard the views prevailing within the Community as a whole.

The existing situation in the Member States of the Community as regards recognition of partnerships between persons of the same sex or of the opposite sex reflects a great diversity of laws and **the absence of any general assimilation of marriage and other forms of statutory union.**

In those circumstances, the situation of an official who has registered a partnership in Sweden cannot be held to be comparable, for the purposes of applying the Staff Regulations, to that of a married official

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Granting protection - civil status as an impermissible differentiating criterion

Judgment in the Maruko case, C-267/06, EU:C:2008:179

- By deciding not to grant those persons access to the institution of marriage, which is reserved for persons of different sexes, that **Member State created a separate institution for persons of the same sex, namely registered partnerships**, the conditions of which were gradually made similar to those applicable to marriage...
- ... having regard to that **approximation between the institution of registered partnership and marriage... registered partnership, while not being identical to marriage, has the effect that the situation of persons of the same sex is comparable to that of spouses with regard to the survivor's pension** at issue in the main proceedings
- ...the possibility of receiving a survivor's pension is, under the Vddb, limited to surviving spouses, while surviving registered partners are denied this right. Therefore, **these partners are treated less favourably than surviving spouses with regard to the right to receive a survivor's pension.**
- Assuming that the referring court finds that surviving spouses and surviving registered partners are in a comparable situation with regard to the same survivor's pension, it must consequently be held that a provision such as that at issue in the main proceedings **constitutes direct discrimination on grounds of sexual orientation within** the meaning of Articles 1 and 2(2)(a) of Directive 2000/78

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Granting protection – marital status as an impermissible discriminatory criterion

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

(22) This Directive **does not affect national provisions concerning marital status** and the benefits arising therefrom

Judgment in Case C-267/06, Maruko, EU:C:2008:179

Of course, **marital status** and the benefits resulting therefrom are matters which **fall within the competence of the Member States and Community law does not affect that competence.** However, it should be recalled that, **in exercising that competence, Member States must comply with** Community law, in particular **the provisions relating to the principle of non-discrimination** (see, to that effect, judgments of 16 May 2006 in Case C-372/04 Watts, ECR I-4325, paragraph 92, and of 19 April 2007 in Case C-444/05 Stamatelaki, ECR I-3185, paragraph 23).

- **Judgment in Case C-147/08, Römer**, EU:C:2011:286
- **Judgment in Case C-267/12, Hay**, EU:C:2013:823

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Judgment in Case C-443/15, Parris, EU:C:2016:897

'Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that **national legislation which**, in the context of an occupational pension scheme, **makes the right of surviving registered partners of members of that scheme to a survivor's pension subject to the condition that the registered partnership was entered into before the member reached the age of 60, where national law did not allow the member concerned to enter into a registered partnership before reaching that age limit, does not constitute discrimination on grounds of sexual orientation.**

Articles 2 and 6(2) of Directive 2000/78 must be interpreted as meaning that **national legislation** such as **that** at issue in the main proceedings, **which**, in the context of an occupational pension scheme, **makes the right of surviving registered partners of members of the scheme to a survivor's pension subject to the condition that they entered into a registered partnership before the member reached the age of 60, where national law did not allow the member concerned to enter into a registered partnership before reaching that age limit, does not constitute discrimination on grounds of age.**

Articles 2 and 6(2) of Directive 2000/78 must be interpreted as meaning that **national legislation** such as that at issue in the main proceedings **cannot give rise to discrimination on grounds of the combined effect of sexual orientation and age if that legislation does not constitute discrimination on grounds of either sexual orientation or age considered separately.**

Refusal to grant protection – intersectional discrimination as a challenge for the CJEU?

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Relationships between persons of the same sex in cross-border situations

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

- Derived right of residence
- ✓ spouse
- ✓ partner with whom a Union citizen has entered into a registered partnership, in accordance with the legislation of the Member State concerned, **if the legislation of the host Member State recognises the equivalence between registered partnerships and marriage**, and in accordance with the conditions laid down in the relevant legislation of the host Member State
- ✓ direct descendants who are under the age of 21 or are dependent, and those of the spouse or partner as defined in point (b);
- ✓ direct ascendants who are dependent and those of the spouse or partner as defined in point (b);

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Relationships between persons of the same sex in a cross-border situation

Judgment in Case C-673/16 Coman, EU:C:2018:385

'Where a Union citizen has exercised his right to freedom of movement by going to a Member State other than that of which he is a national and has actually taken up residence there, in accordance with the conditions laid down in Article 7(1) 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, **and has, in so doing, developed or strengthened family life with a third-country national of the same sex with whom he has entered into a legally valid marriage** in the host Member State, **Article 21(1) TFEU** must be interpreted as **precluding the competent authorities of a Member State** of which a Union citizen is a national **from refusing to grant the right of residence to the third-country national concerned on the ground that the law of that Member State does not provide for same-sex marriage.**

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Relationships between persons of the same sex in a cross-border situation

Judgment C-2/21, RPO, EU:C:2022:502

'Articles 20 and 21 TFEU, read in conjunction with Articles 7 and 24 of the Charter of Fundamental Rights of the European Union and Article 4(3) 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 **must be interpreted as meaning that, in the case of a minor child who is a Union citizen and whose birth certificate issued by the competent authorities of one of the Member States identifies two persons of the same sex as his or her parents, the Member State of which that child is a national is required, first, to issue that child with an identity document or passport** without requiring the prior transcription of the child's birth certificate into its national civil status register **and, second, to recognise, in the same way as any other Member State, a document issued by another Member State enabling that child to exercise, without hindrance, together with either of those two persons, his or her right to move and reside freely within the territory of the Member States.**

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Relationships between persons of the same sex in cross-border situations

Opinion of the Advocate General in Case C-713/23, Mazowiecki Province Governor, EU:C:2025:235

'Articles 20 and 21(1) TFEU, read in conjunction with Article 7 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that:

they do not preclude legislation of a Member State of which a Union citizen is a national from refusing to transcribe into the civil register his marriage to a person of the same sex, contracted in accordance with the law of another Member State, in the context of the exercise of the right of freedom of movement and residence, if there are other means in the first Member State of ensuring that persons of the same sex can have their marriage recognised vis-à-vis third parties.

However, they **preclude the legislation or practice of a Member State of which a Union citizen is a national from refusing to recognise, by any means or document attesting to the marital relationship and the surname chosen by the persons who have entered into marriage, of their marriage, contracted in accordance with the law of another Member State with a person of the same sex in the exercise of their freedom of movement and residence, on the ground that the first Member State does not provide for such a marriage.**

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Conclusions

- Dual nature of protection against discrimination against LGBT+ persons
 - ✓ Limited scope of protection
 - ✓ Diverse subject matter of protection
- The CJEU as the creator of a standard of protection against discrimination against LGBT+ persons
 - ✓ Extending the scope of protection
 - ✓ Extending the subject matter of protection
- The development of CJEU case law as a challenge for national courts?

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**Thank you for your
attention.**

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Wzrost płaźki kamionowy z EuroPrawo

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Równość jako fundament Unii Europejskiej

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