

# LGBTQI+ rights in the EU

## **Applying EU Anti-Discrimination Law**

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# Outline

- Discrimination on grounds of sexual orientation
- Same-gender unions
- Trans people's rights
- Intersex people's rights

# Terminology

- **LGBTQI+** Lesbian, Gay, Bisexual, trans, queer and intersex people
- **Sexual orientation** - refers to each person's capacity for profound affection, emotional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.
- **Gender identity** - refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the gender assigned at birth, including the personal sense of the body and other expressions of gender, including dress, speech and mannerisms. Some people's gender identity falls outside the gender binary.

# Terminology (2)

- **Sex characteristics** - refers to a person's chromosomes, anatomy, hormonal structure and reproductive organs.
- **SOGIESC** - sexual orientation, gender identity and expression, sex characteristics.
- **Intersex** individuals are born with sex characteristics (sexual anatomy, reproductive organs, hormonal structure and/or levels and/or chromosomal patterns) that do not fit the typical definition of male or female. The term 'intersex' is an umbrella term for the spectrum of variations of sex characteristics that naturally occur within the human species.

Source: ILGA Europe

# **Sexual orientation as a protected ground in the EU law**

- Art. 19 of the TFEU – the legal basis for legislation prohibiting discrimination based on, inter alia, sexual orientation.
- Directive 2000/78 with a limited material scope: employment and occupation.
- Art. 21 of the Charter of Fundamental Rights of the EU prohibits discrimination based on, inter alia, sexual orientation in all fields, limited to situations falling within the scope of EU law.

# Sexual orientation as a protected ground

- In Directive 2024/1499 – standards for equality bodies with regards to additional protected grounds, there is a broad consideration of the existing protections for sexual orientation under EU equality law.
- Art 2 of the TEU? - AG Ćapeta, in 2025: by restricting access, particularly for children, to information about 'gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality' Hungary has infringed the requirements of Art. 2 TEU (Case C-769/22).

# Limitations of the EU law

Under Art. 19(1) TFEU, the Council, 'acting **unanimously** in accordance with a special legislative procedure' and with prior consent of the EP is empowered to adopt 'appropriate action to combat discrimination' based on an exhaustive list of grounds, including sexual orientation.

# **CJEU case law - homophobic statements**

*Asociația Accept* (C-81/12) - material scope of Directive 2000/78 includes statements concerning conditions for access to employment.

Homophobic statements may be direct discrimination based on SO even when such statements come from a person presenting himself in the media as playing a leading role in the club without necessarily having legal capacity to represent it in recruitment matters.

# **CJEU case law - blood donations**

Léger (C-528/13) – Restrictions on blood donations by MSM.

Gay donors were treated less favourably than male heterosexual donors.

The French Decree 'may discriminate against homosexuals on grounds of sexual orientation' within the meaning of Art. 21(1) of the Charter.

CJEU referred to the proportionality test to be used by the domestic case to decide whether a permanent exclusion is objectively justified and proportional.

## **CJEU case law - freedom of contracts**

J.K (C-356/21) – Directive 2000/78 protects self-employed persons from discrimination based on sexual orientation.

National law allowing contracting parties to choose with whom to do business except when such a choice is based on sex, race, ethnic origin, or nationality, if used to justify exclusion based on sexual orientation, violates the Directive 2000/78.

# **Rights of same-gender couples**

Article 6(2) and (3) of the consolidated version of Treaty on EU:

MSs must comply with fundamental rights including the prohibition of SO discrimination, when they are applying EU law.

Including treat same-gender couples equally to heterosexual couples when applying law relating to free movement, migration and asylum.

# Same-gender couples and free movement

- The Citizens' Rights Directive (2004/38/EC) does not mention of SO, or of the ability of EU citizens to move and reside freely with their same-gender partners across the 27 MSs.
- EU citizens have a right in registered partnerships to move with their third-country national partners to another MS. With the limitation that the host MS must treat 'registered partnerships as equivalent to marriage.'
- If the host State does not recognise same-gender marriages or partnerships, they fall under the rules on unregistered partnerships. The Directive obliges MSs to 'facilitate entry and residence' to unregistered partners who are in a 'durable relationship'.

# CJEU case law - employment related benefits and same-gender registered partners

- **Maruko** (C-267/06) - widower's pension under the compulsory occupational pension scheme qualifies as 'pay' under EU law. If, under national law, surviving life partners are considered to be in a comparable situation to surviving spouses in respect of the pension, then excluding them from access to the benefit would constitute direct discrimination based on SO.
- **Römer** C-147/08 - denial of supplementary retirement pension to same gender partner constitutes direct discrimination on the grounds of SO.
- **Hay** C-267/12 - in the context of employment benefits (paid leave and a marriage bonus) same-gender couples who entered into a PACS in France were in a situation comparable to that of heterosexual married couples. Exclusion of PACS partners from benefits under collective agreements is direct discrimination on the grounds of SO.

# **CJEU case law - recognising same-gender marriages**

**Coman** (C-673/16) - at least for the purposes of residency rights beyond 3 months, MSs must acknowledge the same-gender marriages that their citizens conclude with third country nationals in another EU jurisdiction.

A national measure that is liable to obstruct the exercise of freedom of movement may be justified only where such a measure is consistent with the rights guaranteed by the Charter.

# CJEU case law - same-gender parents

*V.M.A.* (C-490/20) - baby of a lesbian couple was a Union citizen and was therefore a direct beneficiary of EU free movement rights.

Bulgaria was required by EU law to issue the baby an ID, to enable a child to exercise the right to move and reside freely within the MSs.

The Spanish authorities lawfully established that there was a parent-child relationship [...]. *V.M.A.* and *K.D.K.* must, therefore, as parents of a Union citizen, be recognised by all MSs as having the right to accompany that child when her right to move freely within EU is being exercised.

# Pending case regarding rainbow families

Pending: Cupriak-Trojan and Trojan (C-713/23)

AG de la Tour's opinion:

Article 20 and Article 21(1) TFEU, read in the light of Art. 7 of the Charter preclude legislation that does not permit the recognition of a marriage 'by **any means** or document that proves a marital relationship' concluded in another MS with a person of the same gender, when exercising freedom of movement, on the ground that the MS does not provide for such a marriage.

# Trans people's rights in the EU law

- The primary law of the EU makes no specific reference to gender identity.
- The text of Art. 19 TFEU reduces the space to include gender reassignment or gender identity as separate grounds in equality laws – both terms are only used in the Recitals of new legislation.
- None of the gender equality directives expressly refer to gender identity.
- In the Recast Employment Directive (2006/54) Recital 3: 'the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex' but it must also apply to 'to discrimination arising from the **gender reassignment of a person.**'

# Mention of gender identity in the Victim's Rights Directive

The Recitals to the Victim's Rights Directive mention GI in three occasions:

- The need to treat the victims of crime in a 'respectful, sensitive and professional manner without discrimination of any kind', including due to 'gender expression' and 'gender identity' (9).
- Violence that is directed against a person because of that person's gender, gender identity or gender expression is gender-based violence (17).
- Individual assessments should take into account the personal characteristics of the victim such as his or her age, gender and gender identity or expression (56).

# Gender identity in the EU asylum law

- Under Art. 13(7)(a) of Regulation 2024/1348 (standard procedures of international protection) interviewers must be 'competent to take account of the personal and general circumstances surrounding the application', including 'gender identity' and 'gender'.
- Art. 34(2)(d) when undertaking an 'appropriate examination as to the admissibility or merits of an application', authorities take account of the personal circumstances, including the applicant's gender and gender identity, to assess whether the acts to which the applicant has been or could be exposed would amount to persecution or serious harm.
- Regulation 2024/1347 ('Qualification Regulation') confirms that '[g]ender related aspects, including gender identity and gender expression, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.'

# Gender identity and standards for equality bodies

- Directive 2024/1500 on standards for equality bodies in the field of equal treatment between women and men in employment includes 'gender identity' and 'gender reassignment' in the Recitals.
- Art. 6(1) of the directive defines 'victims' as all persons who consider that they have experienced discrimination within the meaning of Art. 4 of Directive 2006/54 or Art. 4 of Directive 2010/41 irrespective of their 'gender identity'.

# **CJEU case law - gender equality covers gender reassignment**

- CJEU has interpreted EU gender equality provisions to cover 'gender reassignment' and 'gender identity'.
- **P v S and Cornwall County Council (C-13/94)** - EU law prohibits, in employment, discrimination resulting from a person's decision to undertake a process of 'gender reassignment'.
- 'Gender reassignment' in P v S suggests a narrow definition of gender identity.

# CJEU case law - trans people and pension rights

- **Richards** (C-423/04) - Directive 79/7 precluded legislation which denies a person who has undergone male-to-female gender reassignment entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.
- **MB** (C-451/16) - UK law treated MB - because she had undertaken gender reassignment after marriage - less favourably than other women who also were accessing the state retirement pension, but who had retained their birth gender after marrying.

# **CJEU case law - legal gender recognition**

Case C-4/23 (known also as Mirin) - where there was no gender recognition in the MS of origin without the EU citizen satisfying the national rules for legal gender recognition - this hinders 'the exercise of the right which flows from Article 21 TFEU.' It is also inconsistent with the Art. 45(1) of the Charter.

The national authorities may have to respect legal gender recognition obtained by their citizens in other MSs.

# CJEU case law - GDPR and trans people

- **Mousse** C-394/23 - processing personal data of rail customers, relating to a 'Mr' or 'Ms' title, does not come within the scope of Art. 6(1)(f) of GDPR where the 'customers were not informed of the legitimate interest pursued when those data were collected' or the 'processing is not carried out only in so far as is strictly necessary for the attainment of that legitimate interest' or 'the fundamental freedoms and rights of those customers can prevail over that legitimate interest, because of a risk of discrimination on grounds of gender identity.'
- **Deldits** (C-247/23) - Under Art. 16 of GDPR, data subjects are entitled to have inaccurate data about themselves rectified. Hungary could not invoke a lack of procedures for legal gender recognition to prevent individuals from enjoying their rights, under Art. 8 of the Charter and Art. 16 of the GDPR.
- When determining the accuracy of personal data on gender identity, data controllers could not demand evidence of gender affirmation surgery.

# Intersex people's rights in the EU policies

- **Directive 2024/1500** - the first explicit reference to intersex people within EU law. Art. 6(1): 'victims' mean all persons who consider that they have experienced discrimination within the meaning of Art. 4 of Directive 2006/54 or Art. 4 of Directive 2010/41 - irrespective of sex characteristics.
- Soft measures: the **European Parliament 'Resolution of 14 Feb 2019** on the rights of intersex people' calling for the protection of intersex children, the prohibition of medically non-necessary 'sex-normalising surgeries and treatments' without their informed consent.
- **EU LGBTIQ Equality Strategy 2020-2025** - bring an end to intersex genital mutilation and protect bodily integrity, need for MSs to prohibit non-consensual medical interventions.
- **FRA report** of 2025 'Being intersex in the EU'.

# Case law

- No CJEU case law yet, unlike ECtHR.
- **Mousse** and **Deldits** have the potential to impact intersex communities in relation to data on their gender.
- In specific circumstances, the GDPR will either (a) prevent data controllers from collecting information on gender, or (b) require that data controllers reduce barriers to recognising trans people in their lived gender.

# Conclusions

- The legal framework of the EU has a solid basis from which to defend the rights of LGBTQI+ people.
- The current protections for LGBTQI+ communities under EU law are not without critique in terms of material scope and the relevant protected grounds.
- CJEU case law has proven vital for advancing LGBTQI+ rights.

# Discussion