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Academy of European Law (ERA)

LGBTQ+ Rights in the EU

Applying EU Anti-Discrimination Law

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Today's programme

- Sexual orientation as a protected ground;
- The rights of intersex and trans individuals;
- Same-sex unions;

Sexual orientation as a protected ground

Sexual orientation as a protected ground

- EU: Market integration/integration of economies;
- Hardly fundamental rights, let alone LGBTQ+ rights;
- CJEU's '*questionable gay rights record*' (D. Kochenov, 2007);
- Treaty of Amsterdam: Article 13 EC (now 19 TFEU):
*'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.**'*
- Adoption Directive 2000/78 (Employment Equality Directive, 'EED');
- Directive 2004/38 (Citizenship Rights Directive, 'CRD');
- Proposal Horizontal Equal Treatment Directive (COM(2008) 426 final)

Sexual orientation as a protected ground

- Treaty of Lisbon 1-12-2009:
 - Article 6(1) TEU: Charter of Fundamental Rights (CFR) binding (for EU institutions, bodies and Member States when implementing EU law);
 - Article 20 CFR: *‘Everyone is equal before the law’*;
 - Article 21 CFR: *‘Any discrimination based on any ground such as (...) or **sexual orientation shall be prohibited**’*;
 - Other applicable provisions CFR (dignity, right to private and family life, etc.);
 - Addition of Article 10 TFEU (‘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**’*;
- 2018: European Parliament (EP) adopts resolution against conversion therapy;
- 2021: European Commission adopts LGBTIQ Equality Strategy 2020-2025;
- 2025: European Commission adopts LGBTIQ Equality Strategy 2026-2030.

Case law relating to sexual orientation

- Acquis communautaire LGBTQ+ friendly? No, see:
 - *Grant v. SW Trains* (case 249/96, 1998): refusal travel concessions no violation on the ground of 'sex';
 - *D & Sweden v. Council* (C-122/99 & C-125/99, 2001): reg. partnership not equal to marriage thus no right to staff benefits for same-sex partner.
- 2000: Adoption 'Employment Equality Directive' (EED): equal rights when 'comparable' to different-sex spouses:
 - *Maruko* (C-267/06, 2008): widower's pension for a surviving same-sex life partner;
 - *Römer* (C-147/08, 2011): supplementary retirement pension in a registered partnership;
 - *Hay* (C-267/12, 2013): collective agreement may not treat those in 'PACS' differently;
 - *Dittrich & others* (C-124/11, C-125/11 and C-143/11, 2012): medical expenses assistance for civil partners of former public servants;
 - *W v. Commission* (F-86/09, 2010); household allowances for officials registered as stable non-marital partners;

Case law relating to sexual orientation

- No legal recognition? No comparability: *Parris* (C-443/15, 2016); survivor's pension for partner in civil partnership;
- 2004: Adoption Citizenship Rights Directive (CRD): EU citizenship -> free movement rights for family;
 - *Coman* (C-673/16, 2018), CJEU: *'The term 'spouse' within the meaning of the provisions of EU law on freedom of residence for EU citizens and their family members includes spouses of the same sex'*.

'For the purpose of this Directive:

...

(2) "family member" means:

- (a) the spouse;
- (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage, and in accordance with the conditions laid down in the relevant legislation of the host Member State;



Case law relating to sexual orientation

- Coman judgment limited in different aspects:
 - Free movement;
 - Registered partnerships?;
 - Timeframe.
- *Trojan and Trojan* ('*Wojewoda Mazowiecki*' case, C-713/23, 2025):
 - EU law requires MS to recognise same-sex marriage concluded in another MS where family life was created or strengthened, even if it does not allow it in its own jurisdiction, and requires it to transcribe the marriage certificate in its civil register if this is the only means of recognizing marriage.
- Polish Supreme Administrative Court (20-3-2026): marriage certificate needs to be transcribed into civil register.
- Greek Council of State (Decision 392/2026, 20-3-2026): confirmation same-sex marriage legislation.

Three years on from landmark ruling, Romania continues to ignore rights of same-sex couples

- **Next steps for Coman:**
 - Start of court case before ECtHR (together with ACCEPT (Romanian LGBTQ Organisation));
 - Start of court case before CJEU on grounds of infringement of EU law; Commission demands “general and consistent non-application of EU legislation”



Relationship two European courts

European Court of Human Rights (ECtHR)

- Council of Europe (CoE);
- 46 Contracting States;

Court of Justice of the European Union (CJEU)

- European Union (EU);
- 27 Member States;
- Opinion 2/13;
 - 51 CFR
 - 52(3) CFR;

Rapid (global) legalisation same-sex marriage

Where Same-Sex Marriage Is Legal

Countries legally guaranteeing same-sex couples the right to marry, by year of law/decision finalized



2025:

Liechtenstein & Thailand

- 2000
 - Netherlands
- 2003
 - Belgium
- 2005
 - Canada
 - Spain
- 2006
 - South Africa
- 2008
 - Norway
- 2009
 - Sweden
- 2010
 - Argentina
 - Iceland
 - Portugal
- 2012
 - Denmark
- 2013
 - Brazil
- 2013
 - England/Wales
- 2013
 - France
- 2013
 - New Zealand
- 2013
 - Uruguay
- 2014
 - Luxembourg
 - Scotland
- 2015
 - Ireland
 - USA
- 2016
 - Finland
 - Colombia
 - Greenland
- 2017
 - Australia
 - Malta
 - Germany
 - Austria*
- 2018
 - Costa Rica*
- 2019
 - Ecuador
 - Taiwan
 - Northern Ireland
- 2021
 - Switzerland
 - Chile
- 2022
 - Cuba
 - Mexico
 - Slovenia
 - Andorra
- 2023
 - Estonia
- 2024
 - Greece**

An important case coming up soon.....

- *European Commission v. Hungary, (C-769/22)*;
- EU values case; Art. 1 CFR; Art. 2 TEU;
- Art. 7 TEU (preventive measures, sanctions (voting rights));
- CJEU decision expected on 28 April!



The rights of trans and intersex individuals

The rights of trans individuals

Trans rights:

- 1989: EP adopts resolution on discrimination ‘against transsexuals’;
- 2010: EP adopts Figueireido Report (awareness, accessibility Gender Reassignment Procedures (GRP), reimbursement, gender identity);
- 2026: EP adopts resolution: ‘trans women are women’;
- CJEU case law:
 - *P v. S and Cornwall County Council* (C-13/94, 1996): discrimination due to GRP is sex discrimination;
 - *K.B. v. NHS Pensions Agency* (C-117/01, 2004): survivor’s pension for trans partner after GRP despite non-recognition of birth-certificate;
 - *Richards* (C-423/04, 006): right for trans person after GRP to receive pension earlier (60 v. 65 years);
 - ‘Medicalised approach’;



The rights of trans individuals

Trans rights (continued):

More recent CJEU's case law on 'gender identity':

- *Mirin* (C-4/23, 2024): legal gender recognition (LGR) of 'new' name and gender marker needs to be recognized in other MS (art. 21 CFR);
- *Mousse* (C-394/23, 2025): collection incorrect gender (identity) information violation of art. 5(1)(c) GDPR (data minimization);
- *Deldits* (C-247/23, 2025): refusal recognition LGR/gender data due to lack GRP violation of art. 16 GDPR (right to data rectification);
- *Shipova* (C-43/24, 2026): refusal recognition LGR/gender data violation of arts. 7 & 21 CFR and 4(3) CRD;

The rights of intersex individuals

- 2019: EP adopts resolution on rights of intersex individuals: call for ban on intersex genital mutilation (IGM);
- 2021: European Commission adopts LGBTIQ Equality Strategy 2020-2025;
- 2024: adoption Directive 2024/1499 on standards for equality bodies in the field of equal treatment:
'The Court of Justice has held that 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. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from gender reassignment.'
- 2025: European Commission adopts LGBTIQ Equality Strategy 2026-2030;
- Citizen's initiative: ban on conversion therapy;



LGBTQ+ Rights in the EU and beyond

- **Much work still needed** in the field of:
 - Pride parades/marches (bans in some MS);
 - Conversion therapy (no EU-wide ban yet);
 - the rights of LGBTQ+ asylum seekers (many cases inadmissible);
 - the rights of LGBTQ+ parents;
 - Forced sterilization requirements for gender transition in some MS;
 - Trans rights (anti-trans movement against trans youth, and rights in general; now also from 'pro women' organizations)
 - Rights of intersex people;
 - Etc.
- **Outside of the EU:** (de)criminalization, anti-discrimination, family rights and more;

Challenges for courts & key take-aways?

- Judicial activism or judicial restraint?: Trying to strike balance between rights LGBTQ+ individuals and of States protecting State interests or boundaries between the competences of Member States and the EU;
- Not being too distracted by sensitivity or delicacy of the topic (link with tradition, religion, culture etc.);
- **LGBTQ+ rights are human rights;** rights on privacy, non-discrimination, tax rights, tenancy rights, identity status, marriage status;
- **Prevalence EU law in crossborder situations (with conflicting national laws);**
- **Strict scrutiny for States** to provide weighty reasons to justify differential treatment of LGBTQ+ persons or on the basis of sexual orientation or gender (identity and expression);
- Having **coherency** and **consistency** in judgments & upholding EU law;

A vibrant rainbow flag with horizontal stripes of red, orange, yellow, green, blue, and purple, waving in the wind. The word "Questions?" is written in a large, white, sans-serif font across the center of the flag.

Questions?

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Thank you for your attention!



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