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## LGBTIQ RIGHTS IN THE EU: APPLYING EU ANTI-DISCRIMINATION LAW



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- terminology & non-discrimination grounds
- overview of explicit references to sexual orientation & gender identity in EU law
- discussion of selected case law:
  - employment-related discrimination
  - citizenship and sexual orientation
  - Kokott on Bulgarian case??
- two tricky legal issues



# SOGIESC TERMINOLOGY

**SOGIESC: Sexual Orientation, Gender Identity and Expression, and Sex Characteristics**

- gender / sex
- legal, social and physical sex/gender
- cisgender, transgender, non-binary & gender identity
- intersex & endosex
- third gender, queer, non-binary ...\*



## POLL

X is male, according to their birth certificate, but feels female. X decides to undergo medical transition treatment (gender confirmation treatment). She informs her boss of this intention. Thereupon she is fired.

This dismissal is:

1. **prohibited** under EU law because it constitutes discrimination on the basis of transgender status
2. **prohibited** under EU law because it constitutes sex-discrimination: dismissal on the ground of gender confirmation treatment is essentially dismissal on the basis of sex
3. **allowed** under EU law because it is not sex discrimination: had X been a female to male trans person, the same would have happened
4. **allowed** under EU law because EU law does not protect against discrimination based on gender identity (transgender status)



# PATCHWORK PROTECTION

	employment	goods & services	education	social protection
race	√	√	√	√
sex	√	√	-	√
religion	√	-	-	-
age	√	-	-	-
disability	√	-	-	-
sx. orientation	√	-	-	-
gender identity	transition + regular sex equality protection via sex equality dir	-	-	-
intersex	-	-	-	-



## NON-DISCRIMINATION PROVISIONS & REFERENCES TO SEXUAL ORIENTATION

- Article 21(1) EU Charter: prohibits any **discrimination** based on any ground such as [...] **sexual orientation**.  
*nb scope is limited by art. 51 Charter, to EU institutions and agencies, and to MS only when implementing EU law*
- Article 10 TFEU: in defining and implementing its policies and activities, the Union shall aim to combat **discrimination** based on [...] **sexual orientation**
- Article 19(1) TFEU: EU Council can take appropriate action to combat **discrimination** due to [...] **sexual orientation**.
- Directive 2000/78 ('General Framework dir.'): prohibits discrimination based on **sexual orientation**, religion, age and disability in employment, occupation & vocational training  
*limited scope as compared to race / ethnic origin or sex*
  - pending: EU Commission proposal for directive 2008/0140 (to supplement 2000/78) (basis: art. 19 TFEU (ex art. 13 TEC))



## EMPLOYMENT DISCRIMINATION CASE LAW: SEXUAL ORIENTATION

Employment cases prior to Dir. 2000/78:

- **Grant**, 1998, C-249/96 (equal pay: partner benefits)
- **D v Commission**, 2001, C-125/99 (household allowance for married officials)



## EMPLOYMENT DISCRIMINATION CASE LAW: SEXUAL ORIENTATION & DIR 2000/78

### Pay & Partners

- **Maruko**, 2008, C-267/06 (employment-related survivor's benefits)
- **Römer**, 2011, C-147/08 (employment-related supplementary retirement pension)
- **Dittrich**, 2012, C-124/11 (reimbursement medical expenses civil partners)
- **Hay**, 2013, C-267/12 (national collective agreement: benefits exclusively for married, not civil partners)
- **Parris**, 2016, C-443/15 (survivor's benefits; intersectionality)



# EMPLOYMENT DISCRIMINATION CASE LAW SEXUAL ORIENTATION & DIR. 2000/78

## Discriminatory statements (potential) employers:

- **Accept**, 2013, C-81/12 (discrimination, burden of proof, effective sanctions)
- **Rete Lenford**, 2020, C-507/18 (discrimination, sanctions, collective interest)

other

- **E.B.**, 2019 C-258/17 (calculation of retirement pension)



# EMPLOYMENT DISCRIMINATION CASE LAW SEXUAL ORIENTATION & DIR. 2000/78

- pending case: C-356/21 (Poland)
- self-employed worker: works on consecutive short-term contracts
- after uploading a Christmas video with his partner to promote tolerance re same-sex couples: contract terminated and not renewed
- Advise AG Ćapeta, 8 September 2022:
  - directive applicable: self-employment explicitly mentioned; legal form of contract is irrelevant
  - refusal to conclude contract is covered by 'conditions for access to self-employment'
  - freedom to choose contracting party can be restricted to protect other values of a democratic society; employers free to choose the best candidate, but cannot rely on irrelevant characteristics
  - the referring court must set aside the national legislation



## PROVISIONS & REFERENCES TO GENDER IDENTITY

- Directive 2006/54 (Recast (**Sex Equality**) Directive'), recital 3: Dir. also applies to discrimination arising from gender reassignment (codification of CJEU case **P v S and Cornwall County Council**, 1996)
- Directive 2011/95 (Recast Qualification Directive; **refugee law**) recital 30 + Article 10(1)(d) on 'particular social group' (*similar to the sexual orientation refs.*)
- Directive 2012/29 (**Victims' Rights** Directive), in Recitals 9, 17 and 56
  
- *no mentions in Charter, TEU or TFEU*



## EMPLOYMENT DISCRIMINATION CASE LAW: GENDER IDENTITY

**sex equality in employment** (dir. 76/207; now 2006/54)

- PvS, 1996, C-13/94 (dismissal)

**sex equality & pay** (dir. 75/117; now 2006/54)

- KB, 2004, C-117/01 (survivor's pension for trans partner; equal pay)

**sex equality & social security** (dir. 79/7)

- Richards, 2006), C-423/04 (pensionable age)
- MB, 2018, C-451/16 (pensionable age)



## OTHER LEGAL PROVISIONS & CASE LAW SEXUAL ORIENTATION

- Directive 2012/29/EU (Victims' Rights Directive) references in recital 9 and 56
- Directive 2011/95/EU (Recast Qualification Directive) references in recital 30 & art. 10(1)(d) on 'particular social group' a particular social group might include a group based on a common characteristic of sexual orientation'.
  - X, Y & Z, 2013, C-199/12, C-200/12 & C-201/12 (particular social group & evidence)
  - A, B & C, 2014, C-148/13, C-149/13, C-150/13 (particular social group & evidence)
  - F. v Bevándorlási és Állampolgársági Hivatal, 2018, C-473/16 (evidence)



## OTHER LEGAL PROVISIONS & CASE LAW SEXUAL ORIENTATION

### **Citizenship & freedom of movement (art. 21 TFEU & dir. 2004/38)**

- **Coman**, 2018, C-673/16
- **Stolichna Obsthina**, C-490/20, pending (Adv. Opinion AG Kokott d.d. 15 April 2021)

### **Goods & services: blood donations**

- **Léger**, C-528/13 (art. 21 + 52 Charter; dir 2004/33 on technical requirements relating to blood and blood components)



## GAPS

- no references to intersex or non-binary gender anywhere
- no mentions of gender identity in Charter, TEU or TFEU
- General Data Protection Regulation (GDPR, 2016):
  - no references to sex, gender or gender identity at all
  - sex life and sexual orientation mentioned as a 'special category of personal data' (Art. 9(1); see also Recitals 71 and 75).  
possibly: information on gender identity, gender expression or sex characteristics could broadly be interpreted as genetic or biometric data or information on health.
  - However, a broad interpretation of 'sex' or 'gender' is not possible, because it is not mentioned as a sensitive ground.



## SOME POTENTIAL BOTTLENECKS & QUESTIONS

- EU law: discrimination related to pregnancy or maternity = direct discrimination of Women  
(*Dekker Dekker and Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus* (C-177/88, 1990))
  - ECtHR: sterilisation requirement violation of art. 8 ECHR: questions:
    - question: will pregnant *men* and *non-binary* persons be protected against pregnancy-related discrimination?
    - should the construction of pregnancy discrimination as women's discrimination be abandoned and replaced by separate grounds (pregnancy, giving birth, lactation)?
- Art. 4(5) of Dir. 2004/113 (sex equality & goods and services) reads:
  - "This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."
- Do we need a separate non-discrimination provision for gender identity and expression & sex characteristics or do the sex equality directives suffice?





# EU LGBTIQ EQUALITY STRATEGY 2020-2025

Series of targeted actions across four pillars:

- 1. Tackling discrimination against LGBTIQ people;
  - 2. Ensuring LGBTIQ people's safety;
  - 3. Building LGBTIQ inclusive societies; and
  - 4. Leading the call for LGBTIQ equality around the world
- 
- The Commission will continue to support measures under the gender equality strategy intended to improve the socio-economic position of women, including those that are relevant for LGBTIQ women.

*[https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025_en)*



# INFRINGEMENT PROCEDURE

- 15 July 2021 the EU Commission started infringement procedure against Hungary
- 15 July 2022: 2nd step: referral to the CJEU
  - alleged violations include EU Charter provisions::
    - human dignity
    - freedom of expression and information
    - private and family life,
    - the right to non-discrimination. Due to the gravity of these violations, the contested provisions also violate the common values laid down in Article 2 TEU.



issue	trans m/f	intersex m/f	non-binary (both trans & intersex)
major problems (arguably)	- legal gender - transition period - daily confrontations with unfitting gender label	- surgery & treatment of newborn babies - invisibility & lack of awareness others - esp. in the past: secrecy re intersex status	- daily confrontations with unfitting gender label - gender discrimination based on appearance
legal gender label: national laws very diverse	- restrictive conditions for change (if possible at all)	- if possible, usually: medical declaration	- not possible in most countries; a few very recent exceptions (e.g. Germany, Malta)
subject to discriminatory treatment based on trans/intersex status	yes, esp. during transition period; before & or after, at least partly depending on whether 'passing'	- lack of info; probably relatively limited because of lack of visibility & lack of awareness; - ignorance may be painful to people concerned	yes, in all respects, especially when presenting as non-binary
subject to 'regular cis-sex(m/f) discrimination'	if passing: 'regular' sex discrimination is likely to be similar to that of cisgenders, e.g. labour market, education etc.	as for (any other) cis people	likely in an exacerbated form because not fitting
subject to sexual orientation discrimination	yes, either before or after transition, unless orientation affected, or bisex etc.	like cisgenders, depending on their orientation	likely in an exacerbated form
medical issues	- surgery / hormones may be required to change legal sex - access to treatment - insurance / costs - discriminatory treatment	- surgery & other treatments for babies (often necessitating life-long medical care) - discriminatory treatment (incl. 'medical curiosity')	- access to gender treatment may be limited (all or nothing) - insurance / costs - discriminatory treatment by medical staff generally
minors	minimum age to access treatment and/or change of legal sex	no possibility to consent to treatment as a baby	like trans (if there are possibilities at all)

## SOME USEFUL SOURCES

- CoE, Thematic report on Legal gender recognition in Europe, June 2022  
<https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3>
- EU LGBTIQ strategy 2020-2025:  
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0698&from=EN>
- FRA report, *EU LGBTI II - A long way to go for LGBTI equality*:  
[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-lgbti-equality-1\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf)
- EU DG Justice and consumers, 'Legal gender recognition in the EU: the journeys of trans people towards full equality', June 2020  
<https://op.europa.eu/en/publication-detail/-/publication/7341d588-ddd8-11ea-adf7-01aa75ed71a1/language-en>
- Peter Dunne, *Sexual orientation discrimination law outside the labour market* :  
<https://www.equalitylaw.eu/downloads/5301-sexual-orientation>
- Van den Brink & Dunne, *Trans and intersex equality rights in Europe - a comparative analysis*  
[https://ec.europa.eu/info/sites/default/files/trans\\_and\\_intersex\\_equality\\_rights.pdf](https://ec.europa.eu/info/sites/default/files/trans_and_intersex_equality_rights.pdf)



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