




**APPLYING EU
ANTI-DISCRIMINATION LAW**
SEMINAR FOR MEMBERS OF THE
JUDICIARY



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→ **Intersex and transgender rights**
→ **Sexual orientation discrimination**
→ **Same-sex unions**
in EU law

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Terminological clarifications

Gender identity

Cis
(cisgender)

Trans
(transgender)

Trans: a person whose gender identity does not correspond with the sex registered for them at birth

Gender characteristics

endosex

intersex

Intersex: a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male

Sexual orientation

heterosexual

homosexual

Bisexual /
pansexual

Homosexual: sexually attracted to people of one's own sex or gender

LGBTQI+ = Lesbians, Gay, Bisexual, Trans, Queer, Intersex and more
SOGIESC = sexual orientation, gender identity and expression, and sex characteristics



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The constitutional foundations of EU anti-discrimination law

Article 2 TEU

- The Union is founded, inter alia, on the values of equality and respect for human rights, including the rights of persons belonging to minorities,
- in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

Article 3 TEU

- The Union shall offer its citizens an area of freedom without internal frontiers,
- of vital importance for the free movement of family members
- para 3: the Union 'shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between men and women.'

Article 6 TEU

- the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles
- common to all Member States and
- it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms
- and as they result from the constitutional traditions common to the Member States, as general principles of [EU] law

Article 9

- In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Article 21 EU Charter of Fundamental Rights

- 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.

Article 23 - Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.



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European Convention on Human Rights

❑ European Convention on Human Rights

- ❖ article 8 (right to respect for private and family life)
- ❖ in combination with article 14 (prohibition of discrimination)
 - general prohibition of discrimination,
 - both direct and indirect, in regard to any other rights of the European Convention and Protocols
- ❖ Protocol 12 (ratified by only 20 countries)
 - [<https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=177>]
 - a stand-alone general equality provision
 - prohibits discrimination in relation to the 'enjoyment of any right set forth by law' and 'by any public authority'
 - and is thus greater in scope than Article 14
 - which relates only to the rights guaranteed by the Convention
 - Art. 1: The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as **sex**, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or **other status**.
 - No one shall be discriminated against by any public authority on any ground such as those mentioned in para. 1.



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Two important preliminary issues

- ❑ The **EU** principle of non-discrimination can only be applied where the matter falls **within the scope of Union law**
 - ❖ Otherwise national law is being applied
- ❑ all EU secondary legislation
 - ❖ including the Equality Directives
 - ❖ must comply with the Charter



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Art 21 CFR EU: A free-standing right to non-discrimination

- ❑ Unlike Article 14 of the ECHR
- ❑ the prohibition of discrimination in Article 21 of the EU Charter
 - ❖ is a freestanding right
 - ❖ applying to situations that do not need to be covered by any other Charter provision
 - ❖ It prohibits discrimination 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'.
 - ❖ Article 20 of the EU Charter provides that everyone is equal before the law



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Legal grounds for taking action in primary EU law: Article 10

Article 10 TFEU

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

Article 19 TFEU (formerly 13 TEC)



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Legal grounds for taking action in primary EU law: Art. 19 TFEU

Article 19 TFEU (formerly 13 TEC)

- Procedure to be followed by the Union for the legislative measures in this field
 - These provisions, for combating discrimination based on sexual orientation, were initially established in the Amsterdam Treaty (1999)
- 1. 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**.
- 2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the **basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States**, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.



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The test of the 'analogous situation'

- ❖ to determine whether the applicants can be compared
 - ❖ with another group of people
 - ❖ who are treated more favourably
- ☐ Aristotelian formula: 'likes should be treated alike'
- ☐ discrimination occurs also when
- ❖ states 'fail to treat differently persons whose situations are significantly different' (ECtHR, *Thlimmenos v Greece*, 2000)



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The importance of the comparator

- ❑ Less favourable treatment can be established by making the comparison to someone in a similar situation
- ❑ to determine whether a person was treated less favourably,
 - ❖ it is necessary to identify a suitable 'comparator':
 - ❖ that is, a person in materially **similar circumstances**
 - ❖ with the main difference between the two persons being the 'protected ground'
- ❑ the comparability should be assessed
 - ❖ in light of the aim of the contested measure and not in an abstract context
 - ❖ two groups of people may be considered as being in an analogous situation for the purpose of one particular complaint but not another



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Causation

- ❑ need for a causal link between
 - ❖ the less favourable treatment and
 - ❖ the protected grounds
- ❑ the critical question:
 - ❖ would the person have been treated less favourably had they been of a different sex, of a different race, of a different age, or in any converse position under any one of the other protected grounds?
- ❑ If the answer is yes
 - ❖ then the less favourable treatment is clearly caused by the grounds in question



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TRANSGENDER PERSONS

IN EU LAW AND THE CASE-LAW OF THE COURT OF JUSTICE OF THE UNION

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Trans at work

- ❑ In 1989 the European Parliament adopted
 - ❖ Resolution on trans rights
 - ❖ Remained non legally binding
- ❑ The European Court of Justice (ECJ) provided protection to trans persons at a very early stage
 - ❖ Discrimination **on grounds of sex** also covers cases of gender reassignment
 - Discrimination on grounds of gender identity is discrimination on grounds of sex
 - Very important, since at first only gender based equality was protected



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ECJ case-law on Trans: P v. S and Cornwall

- ❑ Trans are protected by gender equality law
- ❑ Advocate General Tesouro
 - ❖ The Directive on Equal Treatment provides for protection not only in the case where a woman is discriminated against a man
 - ❖ But also for all those cases in which the 'gender' criterion is critical
 - ❖ Without special justification for discrimination
- ❑ The Court
 - ❖ did not follow the entirety of the Advocate General's line of argument in its reasons for judgement,
 - ❖ but in the final judgement
 - ❖ It rejected the argument of historic interpretation that the legislator did not intend to provide for protection from discrimination against trans persons



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ECJ case-law on Trans: P v. S and Cornwall: the comparison

- ❑ The Court:
 - ❖ the scope of the Directive cannot be limited only to the fact that the person belongs to one of the two sexes
 - ❖ it should be expanded to include discrimination on grounds of sex and gender reassignment
 - ❖ comparison: discrimination shall be taken to occur where the applicant is treated less favourably than another person in a comparable situation but belongs to the other sex
 - ❖ it did not accept the argument made by the British government to compare P to another trans who changed from female to male but
 - ❖ compared her to a man who had no intention to proceed to gender reassignment



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Codification of case law into secondary EU law

- ❑ EU secondary law does contain reference to trans persons
 - ❖ the EU equality directives have one pertinent provision:
 - ❖ **Recital 3 of the Recast Directive (2006/54/EC) provides**
 - that the Directive also applies to discrimination arising from '**gender reassignment**'
 - This is a codification of the CJEU's jurisprudence in the case of *P v S and Cornwall County Council* (1996)
- ❑ European legislator 2012
 - ❖ Revision of the directive on Equal Treatment aiming to include discrimination based on gender identity



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ECJ case-law on Trans: pensions

- ❑ **K.B Case (2004) (Request for preliminary ruling)**
 - ❖ article 141 TEC (on equal treatment between men and women) and Directive 75/117/EEC
 - ❖ trans man (with no legal sex change) was not entitled to widowhood pension in the UK, where back then legal sex change was not provided for and therefore marriage possibility was not provided for either,
 - ❖ ECJ: This legislation infringes both ECHR and article 14 TEC



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ECJ case-law on Trans: pensions; the Richards case

□ Richards Case (2006) (Request for preliminary ruling)

- ❖ refusal to grant retirement pension at the age of 60 to trans with no legal sex change (UK)
- ❖ ECJ= article 4(1) of the Directive also covers trans woman → is entitled to retirement pension at the age of 60, just like the rest of women, and not at the age of 65, which is the retirement age for men



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ECJ case-law on Trans: inability of gender reassignment at marriage

□ MB* Case

- ❖ MB = **born and legally** man married (to a woman)
 - was recognized as woman in her passport and driving license, issued by the authorities in the United Kingdom
 - harmonizes his sex, but not legally,
 - because it required the existence of marriage annulment (same-sex marriage was not allowed in the UK then)
 - Contrary to the Richards case, Mrs. MB was, pursuant to the 2004 law on sex recognition, capable of changing her legal sex
 - but in order to do this, she had to sacrifice her marriage and she preferred to keep the latter instead of enjoying the former
- ❖ **She asks for pension at the age of 60 as a woman**

- Advocate General Bobek : the requirement to be unmarried, which in reality is applicable only for trans persons so that they shall have access to retirement, is contrary to article 4 para 1 Directive 79/7

*C-451/16, *MB v. Secretary of State for Work and Pensions*, judgement 28.06.2018



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MB Case (CJEU judgement)

- ❑ CJEU says: it is not required to answer the question if
 - ❖ in general, the legal recognition of gender reassignment may depend on marriage annulment earlier to that gender reassignment' (para 28)
 - ❖ jurisdiction of the Court to proceed to specific control
 - ❖ and due to the still national competence on family status issues
 - ❖ is , eventually, in favour of the applicant in the main proceedings
- ❑ 'article 4, paragraph 1, of the Directive 79/7, which implements the **principle of prohibition of discrimination based on sex** in the field of social security,
- ❑ **shall be observed by the member states each time they exercise their competence in family status issues'** (para 31)



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MB Case (CJEU reasoning)

- ❑ Discrimination = treatment less favourable
 - ❖ Compared to a person who proceeded to gender reassignment after his marriage
- ❑ Comparability of situations
 - ❖ Not in a general and abstract way but
 - ❖ in a particular and specific way
 - ❖ They are comparable here
- ❑ Exemption only
 - ❖ to the cases which are listed in an exhaustive manner in this Directive,
 - ❖ none of this is applicable in the specific case
 - contrary to art. 4 (1) (α) case, in combination with art. 3 (1)(α), 3rd case, and 7 (1)(α) of the Directive 79/7/EEC



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Is medical 'gender reassignment' critical?

- ❑ the Court used the notion 'gender reassignment'
 - ❖ references to the fact that claimants have undertaken a process of **surgical** transition
 - ❖ Is this a medicalised picture of trans ?
 - ❖ Does it frame trans equality as contingent upon medical interventions?
- ❑ NO, also because of ECtHR case law
 - ❖ [A.P., GARÇON AND NICOT v. FRANCE \(2017\)](#)
 - irreversible nature of the change in their appearance –
 - Meaning that they had undergone sterilisation surgery or medical treatment entailing a very high probability of sterility
 - amounts to a failure by the respondent State to fulfil its positive obligation to secure their **right to respect for their private lives**
 - a **violation of Article 8 of the Convention**



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the Gender Goods and Services Directive (2004/113/EC)

- ❑ extended the scope of sex discrimination
- ❑ to the area of goods and services
- ❑ It covers all persons and organisations
 - ❖ both in the public and private sectors
 - ❖ that make goods and services available to the public
 - ❖ and/or goods and services offered outside the area of private and family life
 - ❖ It excludes the following from its scope of application:
 - media content, advertisement and education.
 - it does not apply in the field of employment and self-employment
 - ❖ Still less than the protection under the Racial Equality Directive



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The Gender Equality Directive (recast) (2006/54/EC)

- ❑ The so-called Gender Equality Directive (recast) (2006/54/EC)
- ❑ guarantees equal treatment on grounds of sex
 - ❖ only in relation to social security,
 - and not to the broader welfare system, such as social protection and access to healthcare and education
 - ❖ in matters of
 - pay (Article 4)
 - occupational social security schemes (Article 5), and
 - access to employment, vocational training and promotion and working conditions (Article 14)



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Trans in secondary EU law

- ❑ the Recast Qualification Directive (2011/95/EU), in Article 10(1)(d), and
- ❑ the Victims' Rights Directive (2012/29/EU), in Recitals 9, 17 and 56,
- ❑ acknowledge gender identity and other gender-related aspects
- ❑ On the contrary, **General Data Protection Regulation** of 2016
 - ❖ does not refer to 'gender identity' in any way,
 - ❖ although it lists information on sex life and sexual orientation as a 'special category of personal data' (Art. 9(1); see also Recitals 71 and 75).
 - ❖ possible that information on gender identity, gender expression or sex characteristics might be included by a broad interpretation of **genetic or biometric data or information on health**
 - ❖ However, a broad interpretation of 'sex' or 'gender' is impossible, since it is **not** mentioned as a **sensitive ground**



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Intersex persons

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Protection offered

❑ Not explicitly but

- ❖ when 'gender characteristics' are specifically mentioned
- ❖ also based on the general equality and non-discrimination principle

➤ And gender equality

- Since gender characteristics are a dimension of gender
- Similarly with trans person

❑ See also European Parliament resolution of 14 February 2019 on the rights of intersex people ([2018/2878\(RSP\)](#))

- https://www.europarl.europa.eu/doceo/document/TA-8-2019-0128_EN.html



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Protection offered

- ❑ Commission Report 2011 entitled 'Trans and intersex people'
 - <https://op.europa.eu/en/publication-detail/-/publication/9b338479-c1b5-4d88-a1f8-a248a19466f1>
- ❑ See also European Parliament resolution of 14 February 2019 on the rights of intersex people ([2018/2878\(RSP\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019R0001))
 - https://www.europarl.europa.eu/doceo/document/TA-8-2019-0128_EN.html
- ❑ However, no CJEU judgments have been issued regarding intersex (or non-binary)individuals



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Discrimination on grounds of homosexuality in EU law

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CJEU CASE LAW ON DISCRIMINATION AGAINST PERSONS IN SAME-SEX RELATIONS

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Lisa Grant (1998) and D v. Council (2001)

❑ Same-sex couples and non equal remuneration

❑ Difference between this case and P case

- ❖ In P case the Court could have also compared the applicant (trans M-W) to a woman who had proceeded to gender reassignment (W-M) but it did not
- ❖ In Grant case, it chose this way without explaining the reason why,
 - whereas the choice to compare the applicant to a man who has a stable relationship with with a woman is even more evident and unbiased than the trans case
 - discrimination based on sex or based on gender reassignment?
 - based on gender combination
 - and the combination still concerns the gender!



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Legislative protection after Amsterdam: Directive 2000/78

- ❑ The Amsterdam Treaty (article 13 TEC, article 19 TFEU)
- ❑ Anti-discrimination legislation amidst two separate directives
 - ❖ the 'Directive on racial equality' 2000/43
 - (implementation of the principle of equal treatment for persons irrespective of racial or ethnic origin in **several sectors** of social life)
 - ❖ and Directive 2000/78/EC on equal opportunities in **employment** as part of labour law
 - general framework for **equal treatment in employment and occupation**, irrespective of several features, such as disability, religion, beliefs, age and sexual orientation
 - Article 1 of Directive 2000/78 provides:
 - '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**, in the **field of employment and occupation**, with a view to promoting the principle of equal treatment in the member states.'



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Employment Equality Council Directive 2000/78/EC (27.11.2000)

- ❖ establishing a general framework for equal treatment
- ❖ in **employment and occupation**,
 - OJ L 303, 2.12.2000, pp. 16–22
- ❖ prohibits discrimination on the basis of
 - sexual orientation,
 - religion or belief,
 - age and
 - Disability
- ❑ in the area of
 - ❖ employment, occupation and related areas such as vocational training and membership of employer and employee organisations
- ❑ applies to persons within the EU
 - ❖ to both the public and private sectors
 - ❖ **but it does not cover nationality-based discrimination**
 - ❖ It also provides a number of specific exceptions from the application of its provisions



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The scope of Directive 2000/78/EC (art. 3)

- ❑ 1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
 - ❖ (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
 - ❖ (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
 - ❖ (c) employment and working conditions, including dismissals and pay;
 - ❖ (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.
- ❑ 2. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless person concerned.
- ❑ 3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.
- ❑ 4. Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces



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Comparison of Directives 2000/43 and 2000/78

- ❑ Wider protection based on race and ethnic origin
 - ❖ More fields
 - ❖ Obligation of authorities supervising equality
 - ❖ Fewer allowed exemptions



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Commission Proposal 2008 for a new Directive

- ❑ sexual orientation, religious belief, disability and age are only protected grounds in the context of **employment**
- ❑ 'horizontal directive' or 'directive on multiple fields other than employment'
 - Proposal for a Council directive on the implementation of the principle of equal treatment of persons irrespective of religion or beliefs, disability, age or sexual orientation {SEC (2008) 2180} SEC (2008) 2181}, / * COM / 2008/0426 final - CNS 2008/0140
 - ❖ On discrimination in the public and private sector
 - in the field of social protection, including social insurance and health care,
 - of social advantages,
 - of education ,
 - of access to and supply of goods and services to the public, including housing
 - ❖ 'without prejudice to national laws' on family status and reproduction rights, which means that there shall be a broad margin of national appreciation.
 - ❖ Pending



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Broad interpretation of "employment" in Directive 2000/78

- ❑ On its scope
 - ❖ E.g. widowhood pension in employment programme is 'salary'
- ❑ **Despite recital 22**
 - ❖ (22) This Directive shall be without prejudice to national legislations on family status and the benefits depending on it.
- ❑ **And article 3 § 3**
 - ❖ 3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.
- ❑ **Direct discrimination based on sexual orientation**
 - ❖ If partners in registered partnership are excluded
 - ❖ While being in comparable situation to married persons
 - ❖ On the specific benefit/ pension/ etc



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CJEU CASE-LAW AFTER AMSTERDAM AND DIRECTIVE 2000/78

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Types of cases

Remuneration and pensions

- C-267/06, *Tadao Maruko v Versorgungsanstalt* (2008)
- C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg* (2011)
- C-124/11, *Dittrich and others v Germany* (2012)
- C-267/12, *Hay v Crédit Agricole Mutuel* (2013)
- C-443/15 *Parris* (2016) [*Pensions in combination with marriage and age discrimination*]

Employment

- C-81/12, *Asociația ACCEPT v CNCD* (2013)

Exclusion of homosexuals from blood donation

- C-528/13, *Léger* (2015)

Asylum and evidence of homosexuality

- C-199/12, C-200/12 and C-201/12, *X, Y and Z* (2013)
- C-148/13, C-149/13 and C-150/13, *A, B and C* (2014)
- C-473/16, *F v. Hungary* (2018)

Free movement

- C-673/16 *Coman* (2018)
- C-490/20 *Pancharevo* (2021)



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CJEU/ECJ Case-law based on Directive 2000/78 (Equal treatment in employment and occupation)

Maruko

- ❑ The facts:
 - ❖ after the death of his registered same-sex partner,
 - ❖ the male complainant wished to claim the 'survivor's pension' from the company
 - that ran his deceased partner's occupational pension scheme
- ❑ The company refused to pay, on grounds that **survivors' pensions** were **only payable to spouses**
- ❑ and the complainant had not been married to the deceased
- ❑ comparability between marriage and partnership
 - ❖ Preliminary ruling by administrative court in Munich
 - ❖ Without marriage, but in partnership (Lebenspartnerschaft)
 - ❖ No widowhood pension
 - CJEU, C-267/06, [Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen](#) [GC], 1 April 2008



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In Maruko (2008) The CJEU accepted that

- ❖ the refusal to pay the pension amounted to unfavourable treatment and
- ❖ the institution of 'life partnership' in Germany created, in many aspects, the same rights and responsibilities for life partners as for spouses
- ❖ that this was less favourable in relation to the **comparator of 'married' couples**
 - in the case where marriage and partnership are comparable according to national law
 - especially in the sector of benefits provided to surviving spouses/partners and state pension schemes
- ❖ for the purposes of this case, life partners were in a similar situation to spouses
 - It went on to state that this would amount to **direct discrimination based on sexual orientation**
 - Thus, the fact that they were unable to marry was **indissociable from their sexual orientation**



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Factor indissociable from the protected ground

- ❑ The rule or practice that is being applied
 - ❖ does not necessarily need to refer explicitly to the 'protected ground'
 - ❖ as long as it refers to another factor
 - that is **indissociable** from the protected ground
 - when considering whether direct discrimination has taken place,
 - one is assessing whether the less favourable treatment is due to a 'protected ground'
 - **that cannot be separated from** the particular factor being complained about



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discrimination by association

- ❑ where an individual is treated less favourably
- ❑ the victim of the discrimination is not themselves the person with the protected characteristic
- ❑ But they are treated less favourably because of their association
 - ❖ with another individual
 - who possesses a 'protected characteristic'



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discrimination by association on the ground of sexual orientation in Poland

- ❑ employee who worked as a shop security guard
 - ❖ took part in an equality parade, excerpts of which were shown on television
 - ❖ After the broadcast, the claimant was informed of his dismissal, his employer submitting that he 'could not imagine a homosexual working for his company'.
- ❑ The Polish courts considered that discrimination could occur regardless of whether the victim had a certain protected characteristic
 - ❖ The claimant's sexual orientation was therefore irrelevant
 - ❖ The courts went on to find that the claimant was discriminated against on the basis of his participation in the march linked to the lesbian, gay, bisexual and trans (LGBT) community
 - ❖ **discrimination by association had taken place and awarded the claimant compensation**
- ❑ Poland, District Court in Warsaw (court of the second instance), [V Ca 3611/14](#), 18 November 2015



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CJEU/ECJ Case-law based on Directive 2000/78: Römer

- ❑ Römer (2011)
 - ❖ The Court clarified that
 - the situations which must be regarded in accordance with the principle of equal treatment shall not have to be 'identical'
 - Provided that they are comparable and,
 - the assessment of this comparability shall not be done in a general and abstract manner,
 - but in a specific and clear way in the light of the relevant benefit



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Dittrich, Klinke and Müller Cases (2012)

- ❑ In the light of the *Maruko* and *Römer* cases,
 - ❖ the German *Bundesverwaltungsgericht* (federal administrative court),
 - ❖ in subsequent cases concerning the grant or not of sickness benefit to registered partners of federal employees,
 - ❖ was confined, in its request for preliminary ruling
 - ❖ to ask ONLY whether the character of the specific benefit was subject or not to article 157 TFEU
 - ❖ admitting the comparability of the two situations (marriage and registered partnership)

➤ C-124/11, *Dittrich*, C-125/11 *Klinke* and C-143/11 *Müller v Bundesrepublik Deutschland* 6 Dec. 2012, ECLI:EU:C:2012:771.



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Dittrich, Klinke and Müller Cases (2012): comparability of marriage and registered partnership

- ❑ the referring court *Bundesverwaltungsgericht* clarifies that
 - ❖ in case where the benefit in question falls within the scope of Directive 2000/78,
 - ❖ the applicants of the case in the main proceedings are entitled to the benefit requested
 - ❖ In particular, under the said Directive, equal treatment between employees with registered partner and spouses would be *de rigueur*,
 - since, concerning the benefit requested, namely the allowance paid to employees in the event of illness
 - the situation of registered partners, of the one part, and of spouses, of the other part, is comparable.
- ❑ the referring court was doubtful
 - ❖ whether the benefit in question should be considered remuneration within the meaning of article 157 TFEU,
 - and therefore falls within the scope of Directive 2000/78,
 - ❖ or benefit in the framework of the general public system of social security or social protection,
 - or similar benefit not falling within the scope of that Directive.

▪ C-124/11 *Dittrich*, C-125/11 *Klinke* and C-143/11 *Müller v Bundesrepublik Deutschland* 6 Δεκ 2012



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CJEU/ECJ Case-law based on Directive 2000/78: Hay (2013)

□ Hay (2013):

- ❖ more favourable treatment of exclusively heterosexual marriage
 - is equivalent to direct discrimination based on sexual orientation
- ❖ Limiting the benefits to married only employees,
 - where marriage is legal only between persons of different sex,
 - constitute direct discrimination based on sexual orientation



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Interim conclusion on civil partnerships

- The States are not obliged by EU law to provide legal protection to same-sex couples
 - ❖ Cf, however, ECHR case-law, Valianatos, Oliari etc.
- However, if national law introduces such an institution
 - ❖ E.g. partnership
 - ❖ Comparability is specifically checked
 - ❖ concerning the specific benefit



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ECJ Case-law based on Directive 2000/78

❑ *Asociația ACCEPT* (2013): homophobic reason and future employment

- ❖ the Court broadened the range of protection
- ❖ so that the cases where there can be no comparison shall be covered
- ❖ because there may not be discrimination to the detriment of a specific homosexual,
- ❖ but such an action (and reason) which creates **a climate favouring discrimination against homosexuals**

❖ Compare Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Ferij NV* [2008] ECR I-05187 CJEU (on ethnic origin and race) (article 8 Directive 2000/43)



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Case law (example): CJEU: *Parris v. Trinity College and Others* (2016)

- ❑ Dr Parris requested that on his death the survivor's pension provided for by the pension scheme should be granted to his civil same-sex partner
 - ❖ He was refused on the basis that they entered into a civil partnership only after he had turned 60
 - ❖ thus not meeting the pension scheme requirements
 - ❖ The civil partnership, however, was established in the UK in 2009
 - ❖ once Dr Parris was over 60 years old; in Ireland, it was only recognised from 2011 onwards
- ❑ possibility of **multiple discrimination**, since the referring court specifically posed this question



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ECJ Case-law based on Directive 2000/78: *Parris* (the decision)

- ❑ The CJEU ruled that
 - ❖ the claim to be married before 60th birthday
 - ❖ to be entitled to pension
 - ❖ **does not constitute discrimination**
- ❖ if a measure is not capable of creating discrimination on any of the grounds prohibited by Directive 2000/78/ EC – when these grounds are taken alone –
- ❖ then it cannot be considered to constitute discrimination as a result of the combined effect of such grounds, in this case sexual orientation and age
 - CJEU, C-443/15, [David L. Parris v. Trinity College Dublin and Others](#), 24 November 2016



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E.B., C-258/17 (15 January 2019)

- ❑ Reference for a preliminary ruling
 - ❖ concerning Social policy (Equal treatment in employment and occupation)
 - ❖ and Directive 2000/78/EC (Article 2)
 - ❖ Attempted act of same-sex indecency committed by a civil servant (**ex-policeman**)
 - ❖ **EB was sacked in 1976 for sexual indecency with minors and lost 25% of his police pension**
 - ❖ Disciplinary sanction adopted in **1975** = Compulsory early retirement accompanied by a reduction in the pension entitlement
 - ❖ **the CJEU ruled that Austria must compensate E.B.,**
 - Who was owed his lost pension, going back to 2003
 - by reason of **Article 2 of Council Directive 2000/78/EC**
 - Discrimination on grounds of sexual orientation
 - Effects of the application of Directive 2000/78/EC on the disciplinary sanction



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TP (Audiovisual editor for public television) (2023)

❑ Facts

- In December 2017, that self-employed worker and his partner published a Christmas music video on YouTube aimed at promoting tolerance towards same-sex couples. Shortly after the publication of that video, that worker's shifts were unilaterally cancelled by TP and, subsequently, no new contract for specific work was concluded with him.

❑ The Court: Sexual orientation cannot be a reason to refuse to conclude a contract with a self-employed worker

- ❖ since Directive 2000/78 seeks to eliminate, on grounds relating to social and public interest,
 - all discriminatory obstacles to access to livelihoods and
 - to the capacity to contribute to society through work,
 - **irrespective of the legal form in which it is provided**
 - 'employment and working conditions, including dismissals and pay', within the meaning of Directive 2000/78,
 - must be construed in a broad sense,
 - as covering the conditions applicable to any form of employment or self-employment, whatever the legal form in which it is pursued
 - the concept of 'dismissal'
 - a person who has been self-employed may also find herself obliged to stop working due to her contractual counterparty and thus be in a vulnerable position comparable to that of an employed worker who has been dismissed
 - Case C-356/21 | TP (Audiovisual editor for public television)
 - See also the Opinion of Advocate General Capeta in Case C-356/21 TP (Audiovisual editor for public television)



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Legal bases Justification for less favourable treatment

❑ Objective justification:

- ❑ Racial Equality Directive, Art. 2 (2) (b); Employment Equality Directive, Art. 2 (2) (b); Gender Goods and Services Directive, Art. 2 (b); Gender Equality Directive (recast), Art. 2 (1) (b)

❑ Specific grounds of justification:

Genuine occupational requirement:

- ❑ Gender Equality Directive (recast), Art. 14 (2); Racial Equality Directive, Art. 4;
- ❑ Employment Equality Directive, Art. 4 (1)

Religious institutions:

Employment Equality Directive, Art. 4 (2)

Age: Employment Equality Directive, Art. 6

Protection of public safety:

Employment Equality Directive, Art. 2 (5)



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Article 2 para 5 Directive 2000/78/EC (employment)

- ❑ 5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the **protection of health** and for the protection of the rights and freedoms of others.



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Justification of differentiated treatment of similar cases

- ❑ In some cases
- ❑ the courts may accept that
 - ❖ differential treatment has been carried out
 - ❖ **but that it is acceptable / justified**
 - ❖ justified differential treatment does not constitute discrimination
- ❖ Justification tests involve
 - the assessment of legitimacy of goals pursued and
 - the proportionality of the means employed to achieve those goals



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To justify differential treatment, it must be shown that:

- ❑ the rule or practice in question pursues a **legitimate aim**;
- ❑ the means chosen to achieve that aim
 - ❖ that is, the measure which has led to the differential treatment
 - ❖ is **proportionate** to achieve that aim
 - ❖ Principle of proportionality: the means is
 - 1. suitable
 - 2. Necessary
 - = there is no other means of achieving that aim that imposes **less of an interference** with the right to equal treatment
 - that the disadvantage suffered is the minimum possible level of harm needed to achieve the aim sought
 - 3. *stricto sensu* proportional
 - the aim to be achieved is important enough to justify this level of interference



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Excluding homosexuals from blood donation

- ❑ **Léger case: excluding homosexuals from blood donation**
- ❑ Article 21 of the Charter of Fundamental Rights
 - ❖ principle of prohibiting discrimination on the grounds of, inter alia, sexual orientation
 - ❖ **principle of proportionality**
 - ❖ Court = 'permanent exclusion from blood donation of all the group of men who have sexual relations with other men is **proportional only if there are no less restrictive methods** to ensure **high level protection for the health of the beneficiaries**'
 - ❖ ECJ has left the national court to decide based on the principle of proportionality
 - C-528/13, *Geoffrey Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang*, Judgment of the Court (Fourth Chamber) of 29 April 2015



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Asylum (and methods of proving homosexuality)

❑ X, Y and Z (2013):

- ❖ Homosexuals can receive asylum if homosexuality is standardized criminally and is truly punished in their country of origin

❑ A, B and C (2014)

- ❖ taking of evidence of refugee status in cases of application for asylum on the grounds of sexual orientation
- ❖ Court: means of proof
 - similarly to homosexual acts, submitting the applicants to possible 'tests' in order to prove their homosexuality or even the presentation of evidence by the applicants, such as films with their acts,
 - would violate human dignity (article 1 EU Charter of FR)
 - National authorities are not even entitled to receive such evidence based on the free will of the applicant
 - given the fact that this acceptance would encourage other applicants to provide the same and this would, de facto, lead to requiring such evidence

❑ F v. Hungary (Case C-473/16 - 2018)



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Asylum (and methods of proving homosexuality): Case C-473/16, *F v Bevándorlási és Állampolgársági Hivatal*

- ❑ Hungarian authorities rejected the application of a Nigerian national asking for asylum
 - ❖ on the ground that the psychologist's expert report they had commissioned for the purpose of exploring the personality of the asylum seeker had not confirmed his alleged sexual orientation.
- ❑ **The Court found that**
- ❑ the Directive 2011/95/EU on standards for obtaining refugee status **enables the national authorities to commission an expert's report** in the context of the assessment of an application for asylum
 - ❖ in order to better determine the asylum seeker's actual need for international protection
 - ❖ However, **the procedures must be consistent with the fundamental rights** guaranteed by the Charter FR EU (human dignity and private and family life)
 - the impact of such an expert's report on private life is disproportionate
 - ❖ the national authorities and courts **cannot base their decision solely on the conclusions of an expert's report and must not be bound by them**



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SAME SEX FAMILIES AND FREE MOVEMENT

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Free movement of same-sex partners

❑ Directive 2004/38/EC

❑ **Coman** Case C-673/16

- ❖ Romanian citizen **married** legally to a citizen of the USA in Belgium,
- ❖ Romania (the host member state) refuses to issue residence permit to the American husband of the Romanian citizen
- ❖ Request for preliminary ruling before the Court
 - the concept of spouse of article 2 (2)(a) of the Directive 2004/38 / EC, in combination with articles 7, 9, 21 and 45 of the EU Charter of FR
 - also includes the citizen who is not EU citizen but **is same-sex spouse of EU citizen???**
 - Advocate General Wathelet: the term 'spouse' also includes same-sex spouses

• *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, Judgment of the Court (Grand Chamber) of 5 June 2018, ECLI:EU:C:2018:385



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Coman Judgement (C-673/16)

- ❑ Directive 2004/38 article 3 par. 1
 - ❖ ‘for all citizens of the Union who travel or live in a member state other than the one they hold the nationality, as well as their family members..’
 - it does not apply in the case of Coman of Romanian nationality
- ❑ However, the right of free movement and residence of European citizens (article 21 TFEU)
 - ❑ With respect to the right of art. 7 EU CFR (8 ECHR)
 - ❑ which also entails the protection of their personal and family life
 - ❑ in case this has, first, been set up and established in other member-state
 - ❑ residence permit requirements for indigenous citizens of the Union
 - ❑ must not be stricter than the ones provided in Directive 2004/38
 - ❑ the Directive provisions must be implemented in a proportional way



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Coman Judgement, concept of spouse

- ❑ The Court said:
 - ❖ personal status is still under national competence
 - ❖ it is not affected by EU law
 - ❖ HOWEVER, first of all, the term ‘spouse’ in the Directive 2004/38
 - is neutral regarding the sex
 - and additionally, contrary to the recognition of registered partnership, it does not refer to national legislation
 - the obligation of a member state to recognize the marriage between two people of the same sex
 - exclusively for granting the derivative right of residence to the spouse of the European citizen
 - it affects neither marriage nor national identity. It neither threatens the public order of the member state concerned (para 45-46)



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V.M.A. v Stolichna obshtina, rayon 'Pancharevo' case

❑ CJEU (GC), 14 December 2021, *V.M.A. v Stolichna obshtina, rayon 'Pancharevo* (C-490/20)

❑ Facts:

- ❖ two women, a Bulgarian and a British national, having their residence in Spain, had a child together
- ❖ both listed as mothers on the child's Spanish birth certificate
- ❖ did not specify whether one of them or which one was the child's biological mother
- ❖ Bulgarian mother, V.M.A., applied to the Bulgarian authorities for a Bulgarian birth certificate in order to procure a Bulgarian identity document for her child. Her application was rejected



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Pancharevo judgment: The Court found

❑ a Member State cannot refuse to issue to a child

- ❖ who is a national of that state
- ❖ the relevant identity and travel documents
- ❖ notwithstanding the fact that the Member State does not recognise same-sex marriage or parenthood

❑ Art. 21(1) TFEU (free movement of persons)

- ❖ a Member State is required to recognise the family relationships between the child and the two women
- ❖ for the purpose of allowing the child or its mother, who are both nationals of the Member State in question,
- ❖ **to exercise their right to free movement**
- ❖ irrespective of whether the woman who is a national of the Member State is the biological or the legal mother of the child or not.



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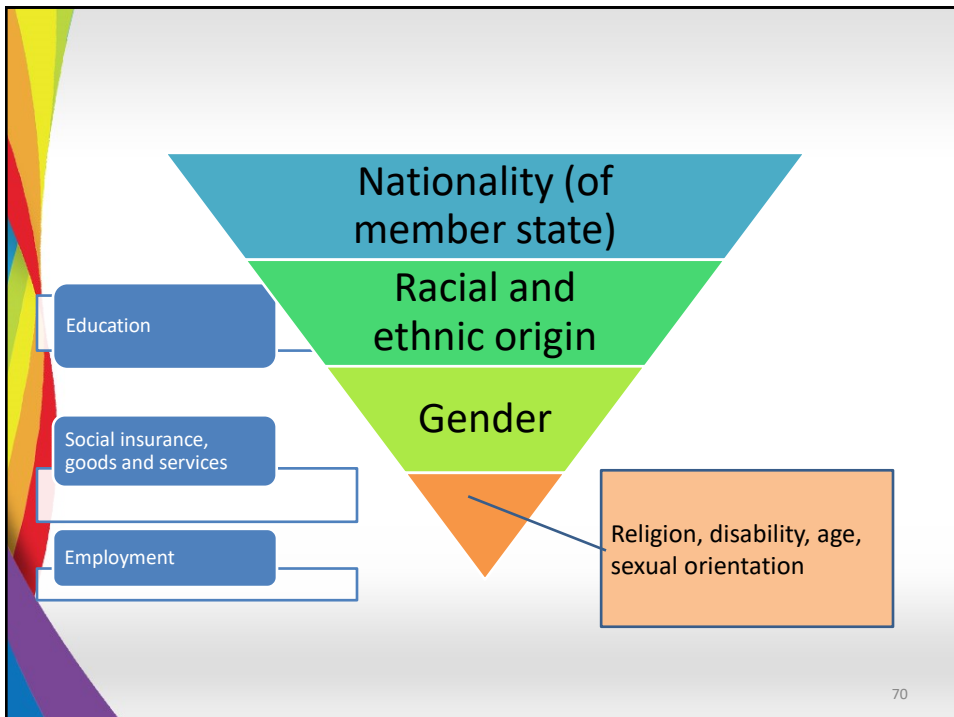
Discrimination based on gender?

- ☐ Contrary to what ECJ recognized about trans,
- ☐ It does not accept that discriminations to the detriment of homosexuals either as individuals or as couples
- ☐ constitute discrimination based on gender
- ☐ Why is this important?
- ☐ Why **isn't** this right?



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How can the different treatment of trans and homosexuals by the ECJ / CJEU be explained?

discrimination based on legal sex is inherent in the exclusively heterosexual marriage

Why didn't ECJ/CJEU keep a homogeneous attitude internally?

different moral and philosophical attitude to transsexuality and homosexuality:

1st (philosophical)
- Transsexuality does not undermine the deeply rooted bipolarity, discrimination and division of roles between women and men given the fact that a trans simply wants to take over the role of their psychological gender

2nd (pragmatic) explanation:
the financial cost is much higher since there are much more homosexuals than trans

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New legislative proposal (2022)

❑ [7.12.2022, COM\(2022\) 689 final, 2022/0401 \(APP\)](#)

- ❖ Proposal for a **COUNCIL DIRECTIVE**
 - on standards for **equality bodies in the field of equal treatment** between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC
- ❖ The aim of this proposal is to establish **binding standards** for equality bodies in the field of:
 - (a) equal treatment between persons irrespective of their racial or ethnic origin,
 - (b) equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, and,
 - (c) equal treatment between women and men in matters of social security and in the access to and supply of goods and services.

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EU publications (open access)

- ❑ [Survey on sexual orientation and gender identity - Key findings report, 2022](https://op.europa.eu/en/publication-detail/-/publication/63dfa12d-0d53-11ed-b11c-01aa75ed71a1/language-en/format-PDF/source-287260253) (<https://op.europa.eu/en/publication-detail/-/publication/63dfa12d-0d53-11ed-b11c-01aa75ed71a1/language-en/format-PDF/source-287260253>)
- ❑ [Legal gender recognition in the EU - The journeys of trans people towards full equality, 2020](https://op.europa.eu/en/publication-detail/-/publication/7341d588-ddd8-11ea-adf7-01aa75ed71a1/language-en/format-PDF/source-search) (<https://op.europa.eu/en/publication-detail/-/publication/7341d588-ddd8-11ea-adf7-01aa75ed71a1/language-en/format-PDF/source-search>)
- ❑ [Trans and intersex equality rights in Europe - A comparative analysis, 2018](https://op.europa.eu/en/publication-detail/-/publication/f63460ca-ebac-11e8-b690-01aa75ed71a1/language-en/format-PDF/source-search) (<https://op.europa.eu/en/publication-detail/-/publication/f63460ca-ebac-11e8-b690-01aa75ed71a1/language-en/format-PDF/source-search>)
- ❑ [The fundamental rights situation of intersex people \(2016\)](#)
- ❑ [Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU - Comparative legal analysis : update 2015](#)
- ❑ [National protection beyond the two EU anti-discrimination directives The grounds of religion and belief, disability, age and sexual orientation beyond employment \(2013\)](#)
- ❑ [Towards an EU roadmap for equality on grounds of sexual orientation and gender identity \(2012\)](#)
- ❑ [Homophobia and discrimination on grounds of sexual orientation in the EU Member States. Part I, Legal analysis \(2009\)](#)



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