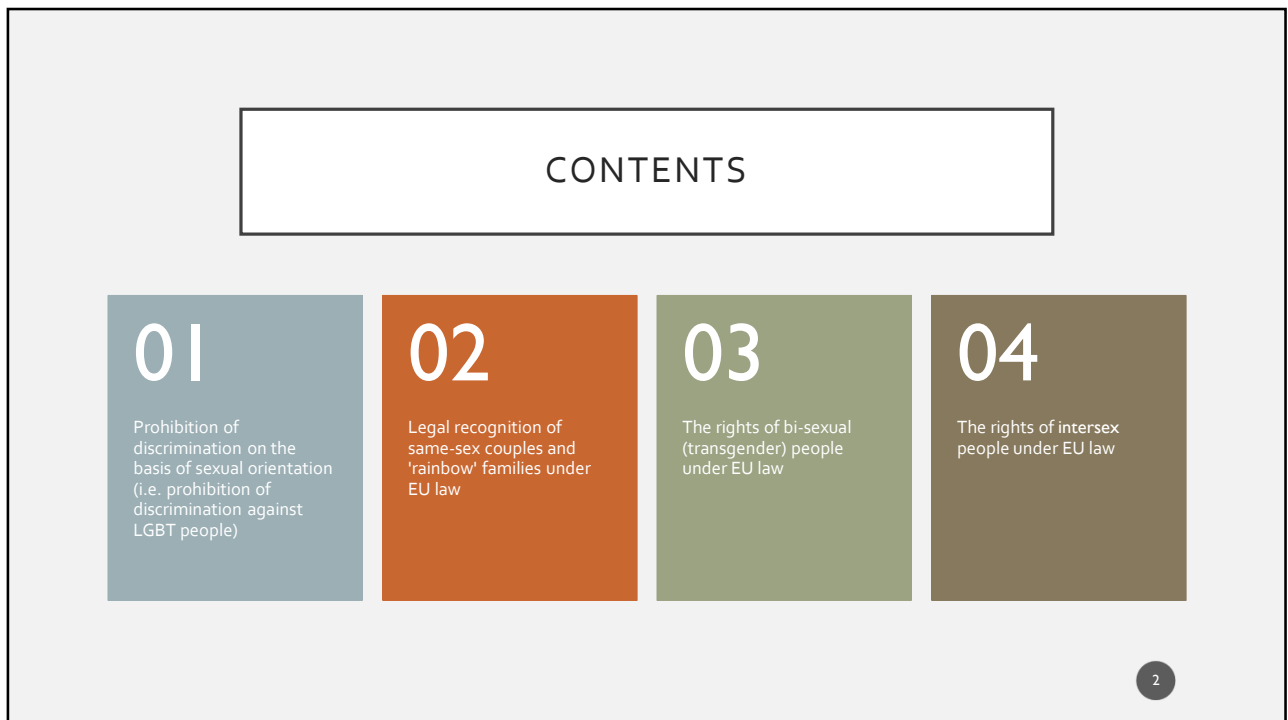




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DEFINITIONS

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WHAT IS SEXUAL ORIENTATION?

Sexual orientation refers to a person's erotic, emotional, sexual, and romantic attraction to a particular gender or genders.

The most common expressions of sexual orientation are heterosexuality (attraction to the opposite sex), homosexuality (attraction to the same sex), bisexuality (attraction to both sexes) and asexuality (the person is not attracted to either sex).

Heterosexuality is the most common type of sexual orientation

- Therefore, homosexuality and bisexuality are types of sexual orientation that are found in the minority of people in a society → therefore, homosexuals and bisexuals are considered 'sexual minorities' and often face discrimination based on their sexual orientation
- For the above reason, sexual orientation is considered a 'prohibited criterion' or 'prohibited ground' for discrimination
- Discrimination on the basis of sexual orientation is prohibited by various international treaties and national laws, as well as under European Union law.

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RELATIONSHIPS BETWEEN INDIVIDUALS OF THE SAME SEX

Each country's legal framework may offer legal recognition of same-sex relationships (same-sex marriage or registered partnership) or may not legally recognise two people of the same sex as a couple.

The term 'rainbow families' is widely used for families consisting of a same-sex couple and their child or children.



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WHAT IS GENDER ID?

'Gender identity refers to the individual and internal way in which gender is experienced by each person and may or may not coincide with their assigned sex at birth, including how they personally experience the body (which could involve modification of appearance or function through medical, surgical or other means, always with the assumption of free choice) and other gender expressions, including clothing, speech and behaviour' (The Yogyakarta Principles)

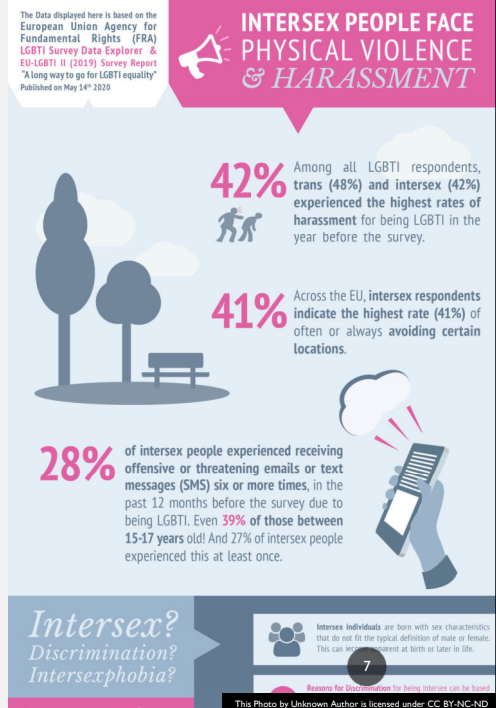
- The majority of people identify with the sex assigned to them at birth - these people are labelled as 'cisgender' (or 'cis')
- Transgender (transgender) people are a sexual minority and are defined as people whose gender identity is different from the sex assigned to them at birth and who wish to present their gender identity in a different way from the sex assigned and legally recorded at birth.
- Discrimination against transgender people is based on gender identity and/or gender.



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WHAT ARE TRANSGENDER PEOPLE?

- Intersex (or intersex) individuals are those born with various physical variations in their sex characteristics (chromosomes, gonads, hormonal profiles, or internal/external anatomy) that do not conform to the classical medical definition of male and female bodies.
- Violations of the human rights of transgender people are common and include the following:
 - Infanticide
 - Mandatory and compulsory medical interventions
 - Discrimination against them in education, sports, employment, and other services
- Discrimination against transgender people is discrimination based on gender characteristics.
- Even today, discrimination on the basis of gender characteristics is not prohibited by legally binding treaties/legislation.



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EUROPEAN LAW AND LGBTIQ RIGHTS

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PROTECTION OF LGBTIQ RIGHTS IN EUROPE - THE FIRST STEPS

- Beginnings of cooperation between European states in Europe after the end of the Second World War:
 - **1949:** establishment of the Council of Europe
 - **1953:** the ECHR enters into force
 - **1952 & 1958:** establishment of the European Communities (Treaties of the EEC, ECSC, EURATOM)

The above treaties made no reference to LGBTI rights.

However, since the 1980s, the EU institutions (mainly the European Parliament) as well as the ECtHR began to recognise LGBTI people (essentially, LGBT people) as a sexual minority and took some steps towards protecting their rights.

In 1999, for the first time we had a provision in the Union's Treaties (then Article 13 TEC - now Article 19 TFEU) which gave the Union the power to adopt legislation aimed at prohibiting discrimination on the basis of certain prohibited criteria, including sexual orientation. To date, there is no prohibition in the Union Treaties (or in secondary law) of discrimination based on gender identity or gender characteristics.

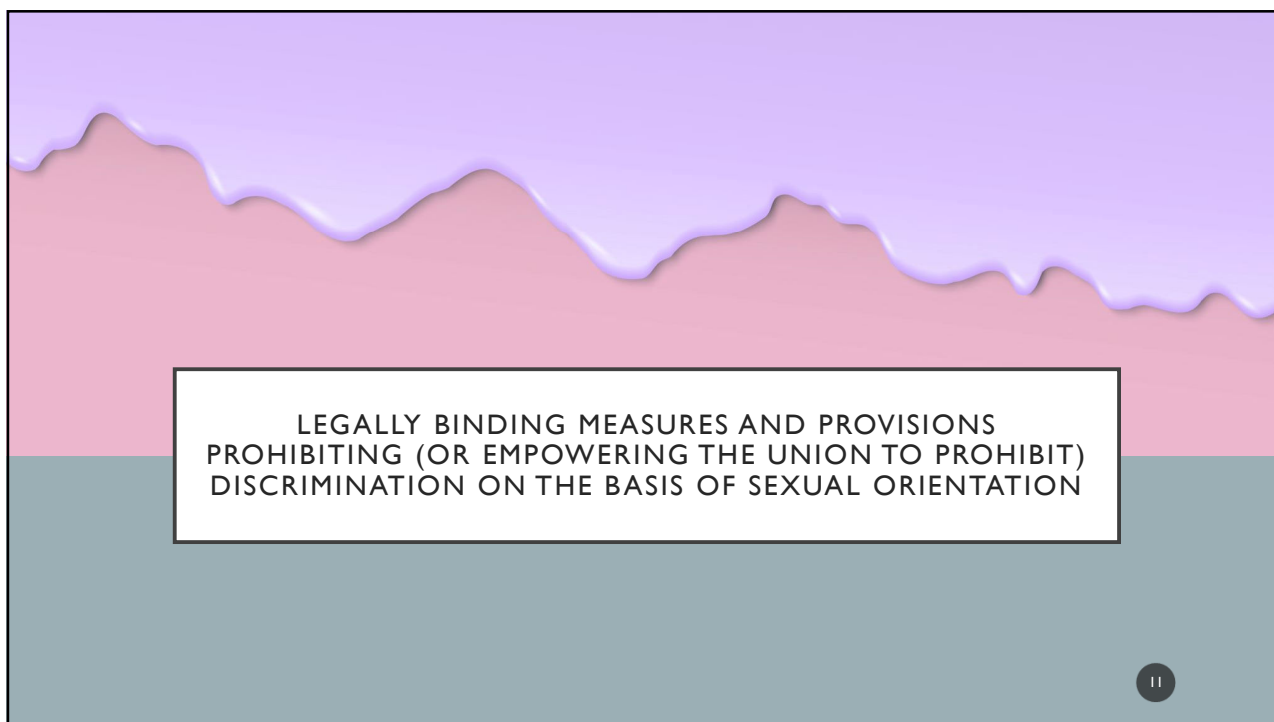
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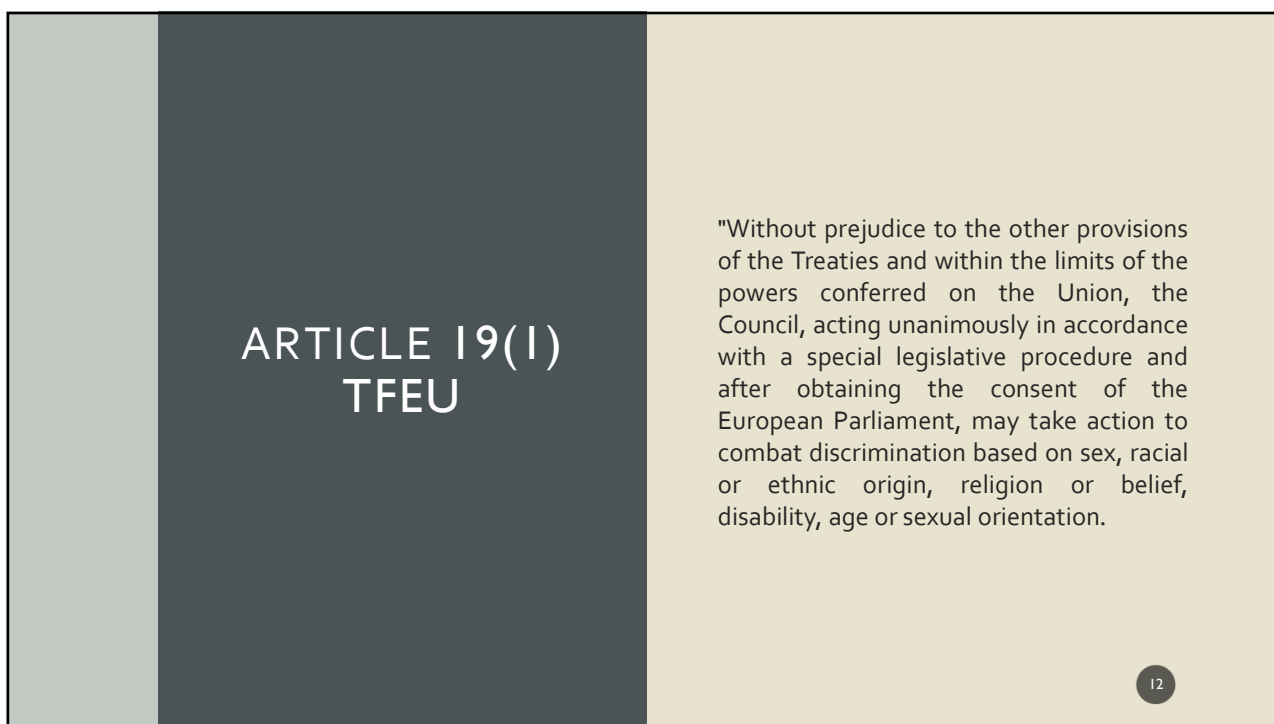
SEXUAL ORIENTATION

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DIRECTIVE 2000/78

- The purpose of Directive 2000/78: to establish a general framework for equal treatment in employment and occupation and to combat discrimination on the grounds of religion or belief, disability, age or sexual orientation.
- Problem: limited substantive scope → Since 2008, a Commission proposal for a Directive (based on Article 19 TFEU) implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation has been on the table, which (if enacted) would prohibit discrimination based on the above grounds in the following areas:
 - Social protection, including social security and healthcare
 - The social advantages
 - Education
 - Access to and provision of goods and services available to the public, including housing
- It prohibits direct and indirect discrimination based on the above grounds, as well as harassment and ordering the application of discriminatory treatment of persons linked to one of the prohibited grounds.

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ARTICLE 21(1) CFR

"Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political opinion or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

There is no restriction on the sectors to which this prohibition in the Charter applies (as is the case with Directive 2000/78), but there are restrictions on the scope of the Charter.

- Article 51(1) TFEU: 'The provisions of this Charter are addressed to the institutions and bodies of the Union, subject to the principle of subsidiarity, and to the Member States only when they apply Union law. Accordingly, they shall respect the rights, observe the principles and promote the application thereof, in accordance with their respective competences'.

LGBT people and same-sex couples can also invoke other provisions of the Charter and fundamental rights recognised as general principles of Union law (e.g. Article 7 of the Charter).

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ARTICLE 10 TFEU

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

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CASE LAW OF THE EUROPEAN COURT OF JUSTICE IN CASES CONCERNING DISCRIMINATION AGAINST LGBT PERSONS AND SAME-SEX COUPLES

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GRANT V. SOUTH-WEST TRAINS (1998)

- 'an employer's refusal to grant discounts on public transport tickets to a person of the same sex with whom a worker has a stable relationship, where those discounts are granted to the worker's spouse or to a person of the opposite sex with whom the worker has a stable extra-marital relationship, **does not constitute discrimination prohibited by Article 119 of the Treaty or by Directive 75/117**'
- 'equal misery argument': '[...] the requirement that the employee must be living with a person of the opposite sex in order to qualify for the discounts on public transport tickets applies, as do the other alternative requirements laid down in the company's rules, irrespective of the sex of the employee concerned. **Thus, discounts on transport tickets are not granted to a male employee who lives with a person of the same sex, nor are they granted to a female employee who lives with a person of the same sex [...]** [therefore the condition] cannot be regarded as constituting discrimination based directly on sex'.
- "At the present stage of development of Community law, **stable relationships between two persons of the same sex are not equated with relationships between persons of the same sex or with stable extramarital relationships between persons of the opposite sex**. Consequently, an employer is not required by Community law to equate the situation of a person who has a stable relationship with a partner of the same sex with the situation of a person who has a *stable extramarital relationship with a partner of the opposite sex*'.



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MARUKO (2008), RÖMER (2011), HAY (2013) REFUSAL TO GRANT SAME-SEX COUPLES WHO HAVE CONCLUDED A RELATIONSHIP/REGISTERED PARTNERSHIP RIGHTS/BENEFITS GRANTED TO MARRIED (HETEROSEXUAL) COUPLES

- Cases where Directive 2000/78 had been invoked and, in particular, the prohibition of discrimination on the basis of sexual orientation in relation to 'pay'.
- *Maruko* and *Römer* - at the time of the events in the case, Germany only allowed same-sex couples to enter into a registered partnership and only allowed heterosexual couples to marry.
 - *Maruko*: denial of a survivor's pension to the deceased's partner. The CJEU ruled that where marriage and registered partnership are comparable under national law, especially in the area of benefits for surviving spouses/partners, then legislation excluding those in a registered partnership constitutes direct discrimination on grounds of sexual orientation.
 - *Römer*: refusal to grant a supplementary pension to same-sex couples in a registered partnership. The CJEU confirmed its decision in *Maruko* and clarified that situations to be judged under the principle of equal treatment need not be 'identical' but only comparable. Such comparability should not be made in an overall and abstract manner, but in a concrete and clear manner in the light of the relevant provision.
- *Hay* - leave and marriage allowance only for couples who had been married - the bank where *Hay* worked refused to grant him the leave and allowance when he entered into a civil solidarity pact (PACS). At the time of the events in the case, France only allowed same-sex couples to enter into PACS, while heterosexual couples had the option of either marrying or entering into PACS.
 - The CJEU ruled that restrictions on benefits to married workers only, while marriage was only legal between persons of different sexes, constituted direct discrimination on the basis of sexual orientation.

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ASOCIAȚIA ACCEPT (2013) AND NH (2020): HOMOPHOBIC SPEECH IS DISCRIMINATION BASED ON SEXUAL ORIENTATION

- Do homophobic statements made by a (*potential*) prospective employer constitute discrimination on the basis of sexual orientation and therefore violate Directive 2000/78?
- CJEU:
 - Associations with a legitimate interest in ensuring compliance with Directive 2000/78 have the right to initiate legal or administrative proceedings to ensure compliance with the obligations under the Directive, **without acting on behalf of a particular complainant or even without there being a particular complainant**
 - In the (most recent) *NH* case, the CJEU was asked and examined whether the prohibition of homophobic statements under Directive 2000/78 restricts the freedom of expression of the person who made the statements in a way that constitutes a violation of this right.
 - The Directive covers acts and statements that create a climate of discrimination against LGBT people - i.e. there does not need to be a specific case of discrimination against a particular LGBT person in the field of employment.

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LÉGER (2015): INVOKING THE PROHIBITION OF DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION UNDER ARTICLE 21 CFR

- Definitive exclusion from blood donation of men who have had sexual relations with other men
- The question whether this exclusion constituted a breach of Article 21 of the Charter.
- The CJEU ruled that this prohibition 'may involve discrimination against homosexuals on the grounds of their sexual orientation, within the meaning of Article 21(1) of the Charter'.
 - In this respect, definitive exclusion from blood donation is intended to minimise the risk of transmitting infectious disease to recipients. Such an exclusion therefore contributes to the general objective of ensuring a high level of protection of human health [...].
 - 'As regards the principle of proportionality, it follows from the case-law of the Court that the measures provided for by national legislation must not go beyond what is appropriate and necessary to achieve the objectives legitimately pursued by the legislation concerned, given that, where there is a choice between several appropriate measures, the least coercive must be chosen and the disadvantages caused must not be disproportionate to the objectives pursued.'
 - The CJEU left it to the national court to decide whether the French authorities' decision was justified and whether it complied with the principle of proportionality.



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SAME-SEX COUPLES/RAINBOW FAMILIES

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COMAN (2018): FREE MOVEMENT AND FAMILY REUNIFICATION OF SAME-SEX SPOUSES

- A Romanian national who had exercised his right of free movement from Romania to Belgium and wanted to return to Romania.
- Married another man legally in Belgium. His husband was a US citizen.
- Romania refused to grant a residence permit to the American on the grounds that he is not recognised as the spouse of the Union citizen and therefore the couple does not derive the right to family reunification from EU law.
- The CJEU has ruled that in cases where 'a citizen of the Union has exercised his right to free movement by actually moving and residing [...] in a Member State other than that of which he is a national, and has, in that connection, established or consolidated family life with a national of a third State of the same sex with whom he has legally contracted a marriage in the host Member State, Article 21(1), TFEU must be interpreted as meaning that the competent authorities of the Member State of which the citizen of the Union is a national may not refuse to grant that national of a non-member State the right of residence in the territory of that Member State on the ground that the legislation of that Member State does not provide for same-sex marriage.



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THE V.M.A.
CASE (2021)



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V.M.A.

- Cross-border recognition of the parent-child relationship between a child and his or her two parents who were of the same sex (women).
- DG Kokott's opinion: 'This is a very sensitive issue, given the exclusive competence of the Member States in the field of citizenship and family law and given the significant differences that exist, to date, in the Union as regards the legal status and rights of same-sex couples.'
- CJEU: the principle of mutual recognition also applies - for the purposes of exercising the right to free movement within the Union - to birth certificates issued by Member States of the Union, even in cases where they list two persons of the same sex as the parents of a child.
- 'Article 4(2) TEU, Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union, in conjunction with Article 4(3) of Directive 2004/38/EC [...], must be interpreted as meaning that, in the case of a minor child who is a citizen of the Union and whose birth certificate issued by the competent authorities of the host Member State lists two persons of the same sex as his or her parents, the Member State of which that child is a citizen is obliged, first, to issue him or her with an identity card or passport, without requiring the issue of a birth certificate by its own competent authorities, and, second, to recognise, as any other Member State does, the document issued by the child's parents.'

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BISEXUAL INDIVIDUALS

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P V S & CORNWALL COUNTY COUNCIL (1996)

- In this case the CJEU ruled for the first time that discrimination based on the fact that a bi-sexual person intends to undergo gender reassignment constitutes discrimination on the basis of sex.
- In those circumstances, it cannot be considered that only discrimination based on the fact that the person subject to discrimination belongs to one of the sexes falls within the scope of the Directive. Having regard to the purpose of the directive and the nature of the rights which it seeks to protect, it is clear that the directive also applies to discrimination based, as in this case, on the change of sex of the person concerned'.
- Indeed, such discrimination is mainly, if not exclusively, due to the gender of the person concerned. Thus, in the event of dismissal on the ground that the person concerned intends to undergo or has already undergone a sex change, the person concerned is discriminated against in comparison with persons of the same sex as the person concerned before the change'.



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*KB V NHS AND
ANOTHER (2004)*

Discrimination against a person who is in a relationship with a bi-sexual person who has undergone gender reassignment is discrimination based on sex, even if the discrimination does not concern a right protected under EU law (widow's pension) but concerns one of the conditions (marriage) for the granting of this right.

K 'Legislation such as that at issue in the main proceedings, which, in breach of the ECHR, renders a couple such as K.B. and R. unable to satisfy the marriage requirement necessary for one of them to be able to receive an element of the other's remuneration, must be regarded as incompatible in principle with the requirements of Article [157 TFEU]'.

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*RICHARDS V SECRETARY OF STATE FOR
WORK AND PENSIONS (2006)*

The refusal to grant an old-age pension at the age of 60 to bi-sexual women (whereas cis women were granted an old-age pension at the age of 60) constituted discrimination on grounds of sex in breach of Directive 79/7 (application of the principle of equal treatment between men and women in matters of social security).

The unequal treatment at issue in the main proceedings is based on the failure of Ms Richards to obtain recognition, for the purposes of the 1995 Old Age Pensions Act, of the new sex which she acquired following an operation.

"the Court of Justice has held that national legislation which prevents a transsexual person, on the ground that it does not recognise his or her new sex, from fulfilling a condition necessary for the enjoyment of a right protected by Community law must, in principle, be regarded as incompatible with the requirements of Community law".

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MB V SECRETARY OF STATE FOR WORK AND PENSIONS (2018)

MB was born in 1948 and her birth sex was male and she married in 1974. This person started living as a woman in 1991 and underwent gender reassignment surgery in 1995. MB does not have a definitive certificate of recognition of the change of sex which she underwent, since the granting of that certificate requires, under the national legislation at issue in the main proceedings, the annulment of her marriage. Both she and her husband wish to remain married for religious reasons.

- In 2008, having reached the age of 60^o, the age at which, under national law, women could receive a State old-age pension, she submitted an application seeking to receive that pension from that age on the basis of the contributions she had paid, in the context of her professional activity, to the State social security scheme.
- Her application was rejected because, in the absence of a definitive certificate recognising the sex change she had undergone, MB could not be considered a woman for the purposes of determining her legal retirement age.

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MB V SECRETARY OF STATE FOR WORK AND PENSIONS (2018)

CJEU:

- The national legislation at issue in the main proceedings makes access by a person who has undergone a sex change to a State old-age pension conditional on the legal retirement age of the persons of the same sex as the person concerned, inter alia, on the annulment of any marriage contracted before that sex change. On the contrary, according to the evidence in the file, that condition of annulment of the marriage does not apply to a person who has retained his or her sex at birth and is married, with the result that that person may receive the State old-age pension from the legal retirement age of persons of that sex, irrespective of his or her marital status'.
- It follows, therefore, that the national legislation in question treats a person who has changed his or her sex after marriage less favourably than a person who has retained his or her sex at birth and is married.

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TRANSGENDER PERSONS

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TRANSGENDER PERSONS UNDER THE EU LAW

- EU law does not include provisions or policies that take into account the situation and the need for protection of transgender people.
- Discrimination against transgender people (i.e. discrimination based on gender characteristics) is not recognised as a prohibited form of discrimination in the EU Treaties (TEU & TFEU) and is not mentioned in the CFR or any other EU document.
- There is no measure of secondary legislation that protects the rights of transgender people or prohibits discrimination against transgender people.
- To date, no cases involving transgender people have been brought before the CJEU.

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