

Advancing LGBTI Equality in the EU: from 2020 and beyond

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Trans and Intersex Discrimination in Europe

In recent years, transgender and intersex people in the EU have experienced important rights advancements. In 2019, legal gender recognition has been obtained by individuals in all 28 EU Member States. Across the EU, national legislatures and courts are increasingly bringing transgender people (either explicitly or implicitly) within domestic non-discrimination protections. Issues relating to gender identity and sex characteristics are, in many Member States, becoming more visible. Transgender and intersex advocates, individually and through LGBTI coalitions, are achieving greater political influence.

Yet, despite this progress, transgender and intersex people continue to face obstacles to equality. Although the possibility of legal gender recognition exists in all Member States, there is no consistency in the procedures to be followed or the requirements which applicants must complete. Without clear legislation, the requirements might even differ per individual in a Member State. Children and non-binary persons have very limited or no access at all to legal gender recognition procedures. Considering the increasing number of people that self-identify beyond the binary 'male' and 'female' classifications, these omissions can be seen as an important gap in domestic law. Nonetheless, some Member States have now started to introduce third gender options in public documents.

A significant number of Member States still mandate sterilisation, surgeries and/or hormone treatment as requirements to obtain legal gender recognition. Member States have to ensure that applicable national laws are interpreted and applied in accordance with their obligations deriving from international human rights instruments, such as the European Convention on Human Rights. In this regard, the judgment of the European Court of Human Rights on 6 April 2017 in the case *A.P., Garçon and Nicot v. France* is particularly relevant, since it ruled that the requirement of compulsory sterilisation for legal gender recognition violated Article 8 of the Convention. Nevertheless, other requirements can also be stigmatising and negatively impact the social, medical and psychological wellbeing of transgender people. Therefore, some states go far beyond this and ensure that no requirements at all exist in order to obtain legal gender recognition. In that case, transgender and intersex people can freely choose their legal gender without any requirement, ensuring them full bodily integrity.

A growing number of Member States have included gender identity as grounds for protecting transgender people against discrimination in their national equality frameworks. Only a small

minority of countries have started to include sex characteristics in these frameworks to protect intersex people against discrimination. This absence of mainstreaming intersex equality has special relevance in the sphere of paediatric healthcare. Despite growing awareness of intersex physical autonomy, there are still reports that – throughout Europe – so called ‘genital normalising’ surgeries are performed on young intersex infants. These interventions take place at such a young age that intersex people are not able to give their fully informed consent.

In its activities, the EU has dealt with the discrimination suffered by transgender and intersex people. In *P v S and Cornwall County Council*¹, the Court of Justice of the European Union (CJEU) – considering the scope of sex discrimination protections within Directive 76/207/EEC – stated that, having regard to the ‘purpose and the nature of the rights which [the Directive] seeks to safeguard’, the principle of non-discrimination between men and women must ‘apply to discrimination arising from the gender reassignment of the person concerned’. In three subsequent cases (*KB v NHS Pensions Agency and Another*², *Richards v Secretary of State for Work and Pensions*³, and *MB v Secretary of State for Work and Pensions*⁴), the CJEU confirmed that EU countries are entitled to establish their own rules for granting legal gender recognition. However, where an individual seeks to access an EU benefit in accordance with their gender, a Member State cannot impose requirements which violate sex equality protections.

Recital 3 of Directive 2006/54/EC – which implements the principle of equal opportunities and equal treatment of men and women in employment and occupation – provides that, ‘in view of the purpose and the nature of the rights which the principle of equal treatment for men and women seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person’. Although Directive 2004/113/EC on sex equality in access to goods and services does not expressly refer to gender reassignment, the European Commission⁵ has argued that the Directive should be interpreted as providing such protection. Gender identity (a broader term compared to ‘gender reassignment’) is formally acknowledged in two pieces of EU secondary legislation: Directive 2011/95/EU (‘Recast Qualification Directive’) and Directive 2012/29/EU (‘Victims’ Rights Directive’).

In 2018, the European Commission published a comparative analysis of ‘Trans and Intersex Equality Rights in Europe’⁶, highlighting the significant levels of inequality facing transgender and intersex people across the EU. The European Commission has furthermore supported the Member States, civil society and businesses in combatting transgender and intersex discrimination, through the organisation of a good practice exchange, the Rights, Equality and Citizenship Programme, Erasmus+

¹ Case C-13/94, judgment of 30 April 1996, ECLI:EU:C:1996:170.

² C-117/01, judgment of 7 January 2004, ECLI:EU:C:2004:7.

³ Case C-423/04, judgment of 27 April 2006

⁴ Case C-451/16, judgment 26 June 2018.

⁵ As indicated for example on page 4 of the Commission’s Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, COM(2015) 190 final of 5/5/2015, ‘[s]o far the CJEU has only ruled on gender reassignment. There is no case law concerning gender identity more generally speaking as covered by the protection against sex discrimination but the Commission considers that the approach should be materially similar.’

⁶ https://ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf

and the EU Diversity Charters. The Commission also developed specific awareness-raising videos⁷ on the discrimination that transgender and intersex people face. In February 2019, the European Parliament adopted a resolution on the rights of intersex people.⁸

Questions for the workshop

- How can unnecessary medical interventions on intersex infants be best prevented in the EU?
- How can the legal and healthcare needs of transgender children be better supported in the EU?
- What are the priorities for Member States to combat discrimination against transgender and intersex people and to advance their equality in the EU?
- What can the European Commission do to support Member States in combatting discrimination against transgender and intersex people and to advance their equality?

⁷ https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=605456

⁸ http://www.europarl.europa.eu/doceo/document/B-8-2019-0101_EN.html