

An Introduction to EU Laws on Gender Identity, Gender Expression and Gender Reassignment

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Overview



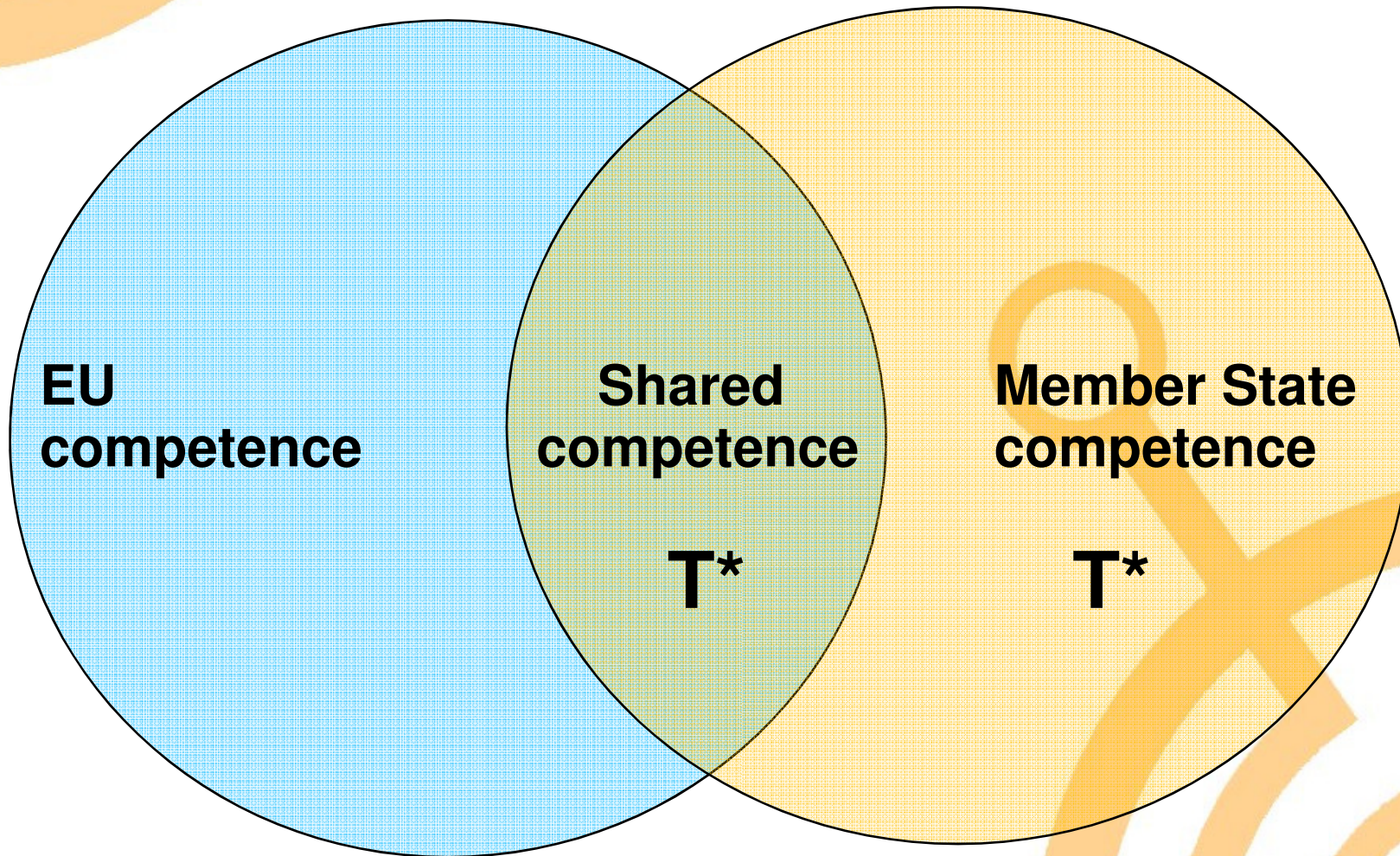
- A few general points on EU law
- EU laws on gender identity, expression & reassignment
- Group exercise
- Advocating for national implementation of EU law
- What next? Advocacy at the EU level
- Questions

Temperature Check



- „I know which EU laws refer to gender identity, expression and reassignment and what they cover“
- „I think LGBT* activists in the country I live in know which EU laws exist and what they cover“
- „I have previously used/refered to (some of) these EU laws in my work“

A very brief Introduction to EU Law



A Very Brief Introduction to EU Law



All trans* relevant EU laws are **directives**:

- A legally binding act of the EU
- Specifies a particular result that member states have to achieve
- Does not specify the means by which the result has to be achieved
- Usually requires member states to pass new national laws or adapt laws (= transposition)
- Provides a timetable by when it has to be implemented by member states

EU Law on gender identity, expression & reassignment



1. Goods and services (2004)

Directive 2004/113/EC

2. Employment & Social Security (2006)

Directive 2006/54/EC

3. Victim's Rights (2012)

Directive 2012/29/EU

4. Asylum (2011 & 2013)

Dir. 2011/95/EU and Dir. 2013/32/EU

Full texts at: www.tgeu.org/EU-law

1. Goods & Services



- „Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services”
- Combats **discrimination based on sex** in access to and supply of goods and services

1. Goods & Services

What does „sex“ cover?

- ECJ judgment P v S (1996)
- P dismissed by employer because she intended to have gender reassignment surgery
- „Sex“ includes people intending to undergo, currently undergoing, or having undergone gender reassignment

1. Goods & Services



Kinds of discrimination covered:

- Direct discrimination
- Indirect discrimination
- Harassment
- Sexual harassment
- Instruction to discrimination

1. Goods & Services



Direct discrimination:

where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation

Indirect discrimination:

where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex

1. Goods & Services



Harassment:

where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment

Sexual harassment:

where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment

1. Goods & Services



Covers all goods and services offered to the public by public and private sectors

- against payment
- outside of private and family life
- excluding media, advertising and education
- unless justified by a „legitimate aim“ (e.g. protection of victims, privacy/decency, freedom of association, promotion of gender equality, single-sex sports events)

1. Goods & Services



So for example...

- Access to goods and services provided in shops, restaurants, bars, hotels and other venues selling goods or providing services (including online)
- Banking and financial services
- Insurances
- Healthcare
- Housing and accomodation
- Transport, both public and private transport (e.g. taxis)
- Sports facilities, including gyms
- Public services against fees (?)

2. Employment & Social Security



- „Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation”
- Combats **discrimination based on sex** in employment and social security
- „Sex“ again includes people intending to undergo, currently undergoing, or having undergone gender reassignment

2. Employment & Social Security



Kinds of discrimination covered:

- Direct discrimination
- Indirect discrimination
- Harassment
- Sexual harassment
- Instruction to discrimination

2. Employment & Social Security



Kinds of areas covered:

- **Access:** access to employment, self employment and occupation, including promotion;
- **Employment:** employment, including promotion and dismissal;
- **Conditions:** working conditions, including pay;
- **Training:** vocational training and retraining;
- **Unions/Organisations:** membership of, and involvement in an organisation of workers or employers, or other professional orgs.;
- **Social security:** occupational social security schemes, including pensions, sickness, invalidity, industrial accidents and professional diseases, and unemployment benefits.

2. Employment & Social Security



Important for trans* people:

- You cannot be fired because of intending to undergo or undergoing gender reassignment surgery (ECJ: P v S)
- Also applies to partners of workers (e.g. spousal benefits, widow(er)s benefits)
- Sick leave/benefits: should cover absence related to hormone therapy and gender reassignment surgery (but no case law)
- Invalidity benefits: should cover the case of incapacitation as a consequence of gender reassignment surgery (but no case law)

3. Victim's Rights



- „Directive establishing minimum standards on the rights, support and protection of victims of crime”
- All crime victims have rights to receive a wide variety of support and information (Ch. 2), to participate in criminal proceedings (Ch. 3), and to be protected (Ch. 4)
- All victims should be treated without discrimination, including based on gender identity & gender expression
- Training of practitioners: police, court staff, judges, prosecutors, lawyers – any official likely to come into contact with the victim

3. Victim's Rights



- An individual assessment should take place for every victim to prevent repeat victimisation and retaliation
- The assessment should take into account
 - gender identity & gender expression
 - whether it was a hate or bias crime
 - whether it was gender-based violence
- Gender-based violence = „violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately“

3. Victim's Rights



If a trans* person falls victim to gender-based violence, bias or hate crime, the individual assessment should qualify them for **specialist protection and support services**, including:

- Free and confidential victim support services (independent of whether the crime is reported)
- Shelters, trauma support, counselling
- Legal aid
- Reimbursement of expenses

3. Victim's Rights



- Protection from offender and right to avoid contact
- Protection during criminal investigations & proceedings
 - „medical examinations are kept to a minimum and are carried out only where strictly necessary for the purposes of the criminal proceedings”
 - “measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence”
 - hearing without presence of the public
- Protection of privacy
 - including personal characteristics taken into account in the individual risk assessment (e.g. gender identity)

3. Victim's Rights

- Family members, especially of a person who died as result of criminal offence, can also count as victims
- Family members = wide definition, including person in a „committed intimate relationship, in a joint household and on a stable and continuous basis”
- It only covers victims of *criminal* offences
- It is not a hate crime law

4. Asylum

- Asylum Qualification Directive:
„Directive on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection”
- Common Procedures Directive:
„Directive on common procedures for granting and withdrawing international protection”

4. Asylum: Qualification



Gender identity and membership of a social group

- Definition of a refugee is based on the Geneva convention
- Refugees have „ a well-founded fear of being *persecuted* for reasons of race, religion, nationality, political opinion or *membership of a particular social group*”
- “Gender related aspects, including *gender identity*, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group”

4. Asylum: Qualification



Rules of evidence

- A risk of persecution because of acts engaged in after leaving the country of origin can suffice for qualification, if they are consistent with “convictions or orientations” held before departure

4. Asylum: Qualification

ECJ Judgement

X, Y, Z v Minister voor Immigratie en Asiel (2013)

- Judgement on sexual orientation, not gender identity
- Criminalising laws alone are not sufficient, they need to be applied in practice
- Criminalising laws need to carry severe penalties (imprisonment or death penalty)
- Asking applicants to return and be „discreet“ is not permissible

4. Asylum: Common Procedures



Special Procedural Guarantees

- Applicants can qualify if being persecuted because of reasons related to their gender identity
- Should receive “adequate support, including sufficient time” for access to procedures and to present evidence to support their application

4. Asylum: Common Procedures



Interview procedures

- Examination procedures and interviews should be gender-sensitive
- Staff examining applications and taking decisions should be able to “seek advice, whenever necessary, from experts on particular issues, such as [...] gender issues”
- The person who conducts the interview has to be “competent to take account of the personal and general circumstances surrounding the application, including the applicant’s [...] gender identity”

4. Asylum: Common Procedures



Privacy and Consent

- Decision should not be issued in a way that discloses their gender identity
- Medical procedures should only be conducted to show signs of “past persecution or serious harm” and with the consent of the applicant
- A refusal of medical procedures should not prevent the application from being assessed

Overview of grounds covered



	Gender reassignment	Gender identity	Gender expression
Goods & Services	✓		
Employment & Social Security	✓		
Asylum	(✓)	✓	
Victim's Rights	(✓)	✓	✓

Group exercises



- Discuss the example in your group
- Is it covered by EU law, not covered by EU law or is it unclear/unsure?

Advocating for the implementation of EU law: provisions in the directives



- **Disseminate information and raise awareness about the content of the directives and the rights set out in them**

Goods & Services (Art. 15); Employment (Art. 30); Victim's Rights (Art. 26)

- **Engage in dialogue and work with non-governmental organisations and stakeholders with a legitimate interest**

Goods & Services (Art. 11); Employment (Art. 22); Victim's Rights (R. 62)

- **Ensure that non-governmental organisations can support complainants in judicial and administrative procedures provided for the enforcement of obligations under the directives (e.g. in legal cases)**

- G&S (Art. 8.3); Employment (Art. 17.2); Asylum Proced. (Art. 21.1 & 22.2)

Advocating for the implementation of EU law: provisions in the directives



- **Take positive action to prevent or compensate for disadvantages linked to sex and to ensure full equality in practice**

Goods & services (Art. 6); Employment (Art. 3)

- **Train practitioners likely to come into contact with rights holders**

Victim's rights (Art. 25); Asylum Procedures (e.g. Rec. 16, 26)

- **Collect statistics on numbers and types of crime and gender of victims**

Victim's Rights (Rec. 64 & Art. 28)

Advocating for the implementation of EU law: provisions in the directives



- **Report to the Commission on the implementation of the directives**

Goods & Services (Art. 16); Employment (Art. 31); Victim's rights (Art. 28); Asylum Qualification (Art. 38); Asylum Procedures (Art. 50)

Victim's rights: in effect from Nov. 2015

Asylum procedures: in effect from July 2015

Advocating for the implementation of EU law: provisions in the directives



Equality bodies

- Mandated by Goods & Services directive (Art. 12) and Employment & Social Security directive (Art. 20)
- Require member states to set up equality bodies “for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex” (E&SS Dir. Art. 20.1).
- Equality bodies have to assist victims of discrimination in pursuing complaints, to conduct surveys, publish reports and make recommendations on discrimination related to sex (E&SS Dir. Art. 20.2).



What next?

Possible advocacy demands at EU level



- Come out trans pledge (European elections)
- LGBT Roadmap
- Gender Equality Strategy
- Hate crime legislation
- Horizontal directive?

Resources



Directives, summaries and further resources:

www.tgeu.org/EU-law

www.ilga-europe.org/home/publications/reports_and_other_materials

Guidelines for transposition

The EU Directive on
Victims' Rights (2012/29/EU)

And homophobic and
transphobic crime victims

ILGA
EUROPE

December 2013

Professor Steve Peers
Human Rights Centre, University of Essex

GUIDELINES on the transposition of the Asylum Qualification Directive: protecting LGBTI asylum seekers

Evangelia (Lilian) Tsourdi

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EUROPE



AND THE GENDER
RECAST DIRECTIVE

IMPLEMENTATION
GUIDELINES

ILGA
EUROPE

Equinet
European network
of equality bodies

Dynamic
Interpretation
European
Anti-Discrimination
Law in Practice V



Questions?



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