

## SECRETARIAT GENERAL

SECRETARIAT OF THE COMMITTEE OF MINISTERS  
SECRETARIAT DU COMITE DES MINISTRES



Contact: Clare Ovey  
Tel: 03 88 41 36 45

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Meeting: 1310<sup>th</sup> meeting (March 2018) (DH)

Item reference: Action plan (28/02/2018)

Communication from Lithuania concerning the case of L. v. Lithuania (Application No. 27527/03)

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Communication de la Lituanie concernant l'affaire L. c. Lituanie (Requête n° 27527/03)  
**(anglais uniquement)**

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DGI

28 FEV. 2018

SERVICE DE L'EXECUTION  
DES ARRETS DE LA CEDH



**AGENT OF THE GOVERNMENT OF THE REPUBLIC OF LITHUANIA  
TO THE EUROPEAN COURT OF HUMAN RIGHTS**

Gedimino ave. 30, LT-01104 Vilnius, tel. +370 5 266 2990,  
fax +370 5 266 2863, +370 5 262 5940, e-mail k.bubnyte@tm.lt

M<sup>me</sup> Geneviève Mayer  
Department for the execution of judgments of the ECHR  
DGI Directorate General of Human Rights and Rule of Law  
Council of Europe  
F-67075 STRASBOURG CEDEX

28 February 2018

Cc: M<sup>me</sup> Laima Jurevičienė  
Ambassador Extraordinary and Plenipotentiary  
Permanent Representation  
of Lithuania to the Council of Europe

**BY E-MAIL AND MAIL TRANSMISSION**

**UPDATED ACTION PLAN IN CASE L. v. LITHUANIA**

The Agent of the Government of the Republic of Lithuania to the European Court of Human Rights (hereinafter – the Government Agent) with reference to the information submitted in the Action Plan of 15 June 2017 submits updated information concerning general measures for the execution of the judgment of the European Court of Human Rights (hereafter – the Court) of 11 September 2007 in case *L. v. Lithuania* (application No. 27527/03).

***General measures***

***Development of the domestic case-law***

According to the domestic case-law until spring of 2017 the change of records indicating new gender of a person in the official documents was subject to irreversible gender reassignment surgery. By the decisions of 7 April 2017<sup>1</sup> and 2 May 2017<sup>2</sup> the Vilnius City District Court has changed the course of the domestic jurisprudence granting the claims for the legal recognition of a requested gender identity to the applicants who had undergone only the partial gender

<sup>1</sup> Vilnius City District Court case no. e2YT-5329-934/2017

The court, *inter alia*, found that: “The interested parties did not submit any data that the change of the records in the civil status acts would contravene to the public interest or would violate interests of other persons. Accordingly, having regard to the fact that the applicant was diagnosed with transsexualism (ICD-10 diagnosis code F64.0) and is undergoing hormonal therapy, have completed breast reduction and is considering himself as a transgender man, also taking into account that the applicant in social life is recognized as a male person, thus records in the civil status acts should comply with the actual situation”.

<sup>2</sup> Vilnius City District Court case no. e2YT-5326-987/2017

reassignment. Both mentioned decisions were not appealed by the competent State authorities and thus became final. Accordingly for the purposes of the legal recognition of gender identity the requirement of the irreversible gender reassignment surgery was removed.

The domestic court in the landmark decision of 2 May 2017 provided the following finding:

As the legislator has not adopted the law for the regulation of gender reassignment procedures nor has defined at the statutory level the definitions “gender reassignment” or “gender reassignment in a medical way” yet, thus the court is removing the existing legal gap by establishing *ad hoc* that the notion of “gender reassignment” should not be related solely to the irreversible surgical change of a biological sex and should be understood more broadly as individual’s psychological self-identification with a particular gender, as evidenced by both medical data and social behavior of that person. It should be noted that the latter decision of the court was adopted taking into account the judgment of the European Court of Human Rights in case *A.P., Garçon and Nicot v. France* (nos. 79885/12 52471/13 52596/13, 6 April 2017).

Subsequently similar decisions were adopted in other 13 cases, there are some cases which are still pending before the courts. Accordingly, it could be concluded that the above mentioned decisions could be considered as examples of the well established case-law of the domestic courts.

#### *Legislative amendments*

It should be recalled that Ministries of Justice and Health were instructed by the Government of the Republic of Lithuania to prepare necessary legal acts in order to remove existing legal gap and to ensure necessary medical treatment for transgenders<sup>3</sup>.

In April 2017 the above mentioned ministries agreed that the legal recognition and the medical treatment issues should be regulated separately. The ministries agreed to divide the implementation of those tasks according to their competences and regulation spheres and to form two working groups within the auspices of each respective ministry.

#### Legal recognition

By the order of the Minister of Justice the working group for the preparation of the legal acts concerning legal recognition of gender identity was established consisting of the vice-ministers of Justice and Health, the Government Agent to the ECHR, representatives of the relevant departments of the Ministry of Justice also representatives of the academia and NGOs. The working group prepared the draft law on recognition of gender identity (see enclosed copy of the English translation of the draft) with a view to provide access to administrative procedure for the legal recognition of gender identity for adult unmarried persons who have been diagnosed with transsexualism; there also were prepared necessary implementing legal acts, namely the drafts on the amendment of Article 2.27 of the Civil Code, on supplementation of the Code of Civil Procedure, also on the amendment of the Law on Registration of Civil Status Acts. The draft laws were sent for the consideration to the Ministries of Health, Social Security and Labour, Interior, Ombudsmen for Children Rights, Equal Opportunities Ombudsmen, Centre of Registers and to the Association of Municipalities. The draft law on recognition of gender identity as well was sent to SOGI Unit of the Council of Europe for an expert evaluation, the comments of which were received on 27 February 2018 (see enclosed copy of the letter of the Directorate General of Democracy).

<sup>3</sup> The assignment was adopted during the Government meeting in the form of protocol resolution (22 March 2017, no. 11)



This legislative initiative was in detail presented by one of the members of the working group professor of Law Faculty of Vilnius University V. Mizaras at the round table discussion “Implementation of the European Court of Human Rights judgments in Lithuania: Experience and Prospects – Towards Shared Responsibility” held on 17 November 2017 in Vilnius where execution of the judgment in *L.* case was widely discussed by the participants of the seminar with the participation of the representative of the Department for the Execution of Judgment of the European Court of Human Rights of the Council of Europe Mr Fredrik Sundberg<sup>4</sup>.

#### Medical treatment

By the order of the Minister of Health the working group for the preparation of the description of requirements for medical treatment of gender identity disorder was set up. The working group prepared the description of medical treatment of persons suffering from gender identity disorder (transsexualism – ACD-10 version code F64.0), which would include the treatment of such persons by generalist, psychiatrist, psychologist, endocrinologist and other relevant doctors, comprising all partially reversible interventions, including hormonal therapy, only excluding surgical treatment. The draft description foresees the same diagnostic criteria as ACD-10 version, the final diagnosis of transsexualism must be approved by the medical consultation (a council of no less than three doctors with the aim of assessing the patient’s state of health, diagnosing a disease, identifying and determining treatment options). According to the drafted description once the person is diagnosed with transsexualism he/she shall have access to hormonal treatment. The draft description of the medical treatment prepared by the working group was submitted to the Minister of Health for the approval. As the description of the partial medical treatment of transgender persons has not been approved yet, recently the Government Agent draw attention of the Ministry of Health to the necessity to ensure at least partial medical treatment until the adoption of the necessary legislative amendments.

#### *Estimated future developments*

The description of the medical treatment for transgender persons as concerns psychiatric assistance and hormonal therapy could be approved after additional consultations with the competent authorities (namely the Faculty of Medicine of the Vilnius University and the Lithuanian University of Health and Sciences, also State authorities involved in the regulation of health insurance issues).

As concerns the regulation of gender identity legal recognition, the Ministry of Justice upon comprehensive examination of all the comments received within the consultations with relevant institutions, including the SOGI expert opinion, if necessary would correct the above mentioned draft laws accordingly and would submit them for the consideration of the Government of the Republic of Lithuania. These draft laws subsequently are to be submitted for the consideration before the Parliament.

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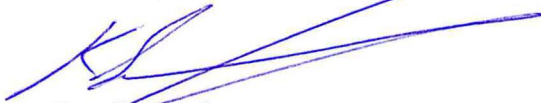
<sup>4</sup> Prof. V. Mizaras in his presentation drew attention to so-called alternative legislative initiative that has been prepared by the group of the parliamentarians aimed at banning legal gender recognition and all medical procedures pertaining to gender reassignment treatment (Draft law on the amendment of Article 2.27 of the Civil Code no. XIIIIP-1327). Later on the mentioned legislative initiative was severely criticized in the conclusions of the Law department of the Parliament in terms of proportionality and legitimate expectations. This draft law also evaluated as unacceptable by the European Law Department under the Ministry of Justice in its conclusions extensively referring to the jurisprudence of the European Court of Human Rights.

The Government Agent will keep the Committee of Ministers informed on any further developments in the legislative process.

Enclosed:

1. English translation of the Law on Recognition of a Person's Gender Identity, 5 pages.
2. Copy of the letter of the Directorate General of Democracy of the Council of Europe 8 pages.

Respectfully,



Karolina Bubnyte  
Agent of the Government of the Republic of Lithuania  
to the European Court of Human Rights

**DRAFT**



**THE REPUBLIC OF LITHUANIA**  
**LAW ON RECOGNITION OF A PERSON'S GENDER IDENTITY**

**CHAPTER I**  
**GENERAL GUIDELINES**

**Article 1. Objective**

The objective of this legislation is to ensure the personal right to recognition of one's gender identity and to establish conditions and procedures for gender identity recognition.

**Article 2. Principles**

1. Personal gender identity – a person's identification with a specific gender.
2. Personal gender identity recognition – legal confirmation of a transgender person's gender identity, including changes to their sex, name and personal code on their birth certificate in order for these records to reflect the transgender person's gender identity.
3. Reversal recognition of personal gender identity – repeated gender identity recognition, in the case that a transgender person seeks to restore the gender identity corresponding to their biological sex.
4. Transgender person – a person whose biological sex characteristics do not correspond to their personal gender identity.

**CHAPTER II**  
**IMPLEMENTATION OF THE RIGHT TO GENDER RECOGNITION**

**Article 3. Basic principles of gender identity recognition**

1. The right to personal gender identity recognition shall be implemented in the interest of ensuring the successful social and economic integration of transgender people, eliminating discrimination against these individuals, and protecting their right to private life.
2. Transgender persons have a right not to undergo medical reassignment of sex characteristics. Gender identity shall be recognized regardless of whether one has undergone surgical sex reassignment procedures.

**Article 4. Conditions and procedures for gender identity recognition**

1. A person wishing to exercise their right to gender identity recognition shall submit to a civil registry institution a written application in a form, approved by the Government of the Republic of Lithuania or its authorized institution, along with documents substantiating the fulfillment of condition listed in paragraph 2(6) of this Article.
2. The right to gender identity recognition may be exercised only under the following conditions:
  - 1) the individual is a citizen of the Republic of Lithuania;
  - 2) the individual is legally an adult;
  - 3) the individual's legal capacity to exercise one's right to gender recognition has not been restricted by a court decision;
  - 4) the individual is unmarried;

- 5) the individual has not yet exercised the right to gender identity recognition;
  - 6) the individual has been diagnosed, under the legally established procedures, with gender identity disorder, i.e. transsexuality.
3. A person who has obtained the legal gender identity recognition in a foreign country and seeks an equivalent recognition in the Republic of Lithuania shall submit a written request in a form, approved by the Government of the Republic of Lithuania or its authorized institution, as well as a document obtained from the aforementioned foreign country confirming the recognition of one's gender identity. The condition provided in paragraph 2(6) of this Article is not applicable for the purposes of the recognition in the Republic of Lithuania of one's gender identity obtained abroad.
4. The decision to recognize gender identity is adopted by a civil registry institution by signing a form approved by the Minister of Justice of the Republic of Lithuania. Recognition of a transgender person's gender identity shall be implemented by changing the entries as concerns sex, name, surname and personal code on the individual's birth certificate, carried out by a civil registry institution, so that the above reflect their gender identity.

#### **Article 5. Gender identity recognition for minors**

1. The right to gender identity recognition may be exercised by minors over the age of 16, or, with parents' (guardians') consent, over the age of 14.
2. The right to gender identity recognition for minors may be exercised only under the following conditions:
  - 1) the minor is a citizen of the Republic of Lithuania;
  - 2) the minor has not previously exercised the right to gender identity recognition;
  - 3) a children's or adolescents' psychiatrist has concluded that the minor has to undergo the treatment of gender identity disorder.
3. The decision to grant recognition of a transgender minor's gender identity shall be made by the court taking into account each individual situation. To obtain the legal gender identity recognition, the minor must personally submit a request to Vilnius Regional Court.
4. Adopting the decision in regard to gender identity recognition in respect of a minor, in addition to the conditions listed above, the following circumstances must be evaluated:
  - a. whether this is not in conflict with the child's best interests;
  - b. whether the minor is mature enough to understand the consequences of legal gender identity recognition;
  - c. whether the minor is seeking legal gender identity recognition of one's own accord and is not being influenced by any other person;
  - d. whether the minor's objective is to live full-time as another gender.

#### **Article 6. Reversal recognition of gender identity**

1. The right to gender identity recognition may be exercised in reverse by adults, provided that conditions 1-4 listed in Article 4§ 2 are met, and that the decision is necessary taking into consideration the individual circumstances.
2. The court shall make the decision to grant reversal recognition of gender identity taking into account each individual situation. A person seeking reversal recognition of gender identity must submit a request to Vilnius Regional Court.
3. The decision to grant a reversal recognition of gender identity must only be made after the assessment of the following circumstances:

- 1) the validity of the individual's reasons for wanting to exercise one's right to gender identity recognition in reverse;
  - 2) whether exercise of one's right to gender identity recognition in reverse would not undermine the public interests, or another individual's legal expectations or interests.
4. The reversal recognition of gender identity has no effect on any rights or duties that an individual gained after obtaining the gender identity recognition, with the exception of instances in which the rights or duties gained are exclusively related to the individual's gender.

#### **Article 7. Registration of gender identity recognition**

1. The Law on Registration of Civil Status Acts of the Republic of Lithuania states that gender identity recognition must be registered by a civil registry institution.
2. The passport and personal identity card belonging to a person who has exercised the right to gender identity recognition shall be changed according to the procedures established by the Law on Personal Identity Documents and Passports of the Republic of Lithuania. After changing one's passport and personal identity card, the individual who has exercised the right to legal gender identity recognition is required to change other state-issued documents.

#### **Article 8. Right to change name and surname**

When exercising the right to legal gender identity recognition, an individual has the right to change one's name and surname in accordance with the order provided by the laws. The chosen name and surname must correspond to the transgender person's gender identity.

### **CHAPTER III**

#### **CONSEQUENCES OF GENDER IDENTITY RECOGNITION**

#### **Article 9. Changes to personal data**

1. Having exercised the right to gender identity recognition, an individual is recognized in all areas of one's life as the gender shown in one's personal identity documents.
2. Managing personal data belonging to a person who has exercised the right to gender identity recognition, it is mandatory to change that data and documents issued on the grounds of that data in order to reflect the changes in personal data. The individual who has exercised the right to gender identity recognition must personally inform other parties, whether in writing or orally, of the necessity to correct this data and any documents issued on its grounds.

#### **Article 10. Continuation or modification of legal relations**

1. The gender identity recognition has no influence on the rights or duties gained prior to the gender identity recognition, nor those obtained or implemented after this recognition, with the exception of those stated in this Article.
2. If rights and duties arising from legal relations were exclusively related to one's gender and the individual therefore cannot continue to fulfill them after obtaining the legal gender identity recognition, these legal relations are obligated to end, unless the participating parties agree otherwise.
3. The gender identity recognition may under no circumstance be used as grounds to dispense a person from one's liability for criminal offenses or any other actions prohibited by law, to avoid a sentence of correctional measures, sanctions or penalties, nor to invalidate a conviction.



4. The gender identity recognition has no impact on the status of a sentenced person (offender), but correctional measures, penalties or sanctions shall be enforced according to the procedures for persons of the gender that the individual is recognized as after having exercised the right to gender identity recognition. The particularities of penalties to which a person was sentenced before the gender identity recognition shall be regulated by penal legal acts.
5. Having exercised the right to gender identity recognition, the individual does not lose the legally established social and work benefits which they had before exercising this right, unless these benefits, by nature, were intended exclusively for persons of the gender that the individual was recognized as prior to gender identity recognition. The right to pension and other social benefits, after gender identity recognition, shall be implemented according to the procedures for persons of the gender that the individual is recognized as having exercised the right to gender identity recognition.

#### **Article 11. The right to marriage (partnership)**

Having exercised the right to gender identity recognition, a person may enter a marriage (partnership) under the established procedures.

#### **Article 12. Parenthood**

The gender identity recognition has no impact on parent-child relationships. On birth certificates for children whose parents have exercised the right to gender identity recognition, the father and mother's information shall not be changed.

#### **Article 13. Legal protection for persons having exercised the right to gender identity recognition**

1. Information about the gender identity recognition is confidential and may only be disclosed under the procedures established by legal acts regulating the protection of personal data.
2. The illegal disclosure of the fact that a person has obtained gender identity recognition constitutes a violation of this person's right to respect for private life. Any material or non-material damage incurred by the illegal disclosure of gender identity recognition shall be compensated according to the procedures established by the Civil Code of the Republic of Lithuania and other legal acts.

#### **Article 14. Prohibition of discrimination**

A person may not have one's human rights limited or be afforded privileges based on the fact that one is seeking to exercise or have exercised the right to gender identity recognition.

### **CHAPTER IV RIGHT TO HEALTH CARE SERVICES**

#### **Article 15. Health care services related to gender identity disorder**

1. The transgender persons have the right to access health care services related to medical alteration of sex characteristics, or otherwise related to gender identity disorder.
2. The procedures medically altering sex characteristics, as well as other health care services, including psychological and psychiatric consultations, hormone replacement therapy, surgical operations and other related services, shall be regulated by the conditions established by the Minister of Health of the Republic of Lithuania.

## **CHAPTER V**

### **FINAL REGULATIONS**

#### **Article 16. Validity and implementation**

1. This law, with the exception of Article 2, shall come into force on July 1<sup>st</sup>, 2018.
2. The Government of the Republic of Lithuania or its authorized institution shall adopt legal acts for the implementation of this law by June 30<sup>th</sup>, 2018.



**DIRECTORATE GENERAL OF DEMOCRACY**

*The Director General*

DGI

28 FEV. 2018

SERVICE DE L'EXECUTION  
DES ARRETS DE LA CEDH

Ms Karolina Bubnytė  
Agent of the Government  
of the Republic of Lithuania  
to the European Court of Human Rights  
Gedimino Ave. 30  
01104 Vilnius  
Lithuania

Ref ►

Strasbourg, 27 February 2018

Dear Ms Bubnytė,

I am pleased to hereby respond to your request received on 30 November 2017 for an opinion on the draft law on legal recognition of gender identity, which has been prepared by the Lithuanian authorities to ensure the general measures required for the full and satisfactory execution of the judgment of the European Court of Human Rights in the case *L. v. Lithuania*, and eliminate the legal gap which led to a violation of Article 8 of the European Convention on Human Rights.

I would like to recall that, in November 2016, the Lithuanian Ministry of Social Security and Labour requested support to implement the Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on the grounds of sexual orientation and gender identity, and that a mandate was given by the Ministry to the Equal Opportunities Ombudsperson to further identify specific elements of cooperation.

In February 2017, the Council of Europe's Sexual Orientation and Gender Identity Unit contributed its expert opinion vis-à-vis the three options presented for amending the Civil Code by Lithuania's Ministry of Justice, and on 5 May 2017, a representative of the Unit participated in a Round-table discussion on "Perspectives of securing transgender persons human rights in Lithuania" organised by the Equal Opportunities Ombudsperson and the Committee on Human Rights of the Parliament. This close cooperation has been welcomed by the Committee of Ministers in its decision of 21 September 2017 (1294th meeting, 19-21 September 2017 (DH)) which strongly encouraged the authorities to continue such efforts.

I would like to express our support to the adoption of the draft law on legal gender recognition of gender identity while encouraging the authorities to amend it taking into consideration the recommendations and suggested improvements in the attached expert opinion. The Sexual Orientation and Gender Identity Unit stands ready to further assist the process of adoption of a law.

Yours sincerely,



Snežana Samardžić-Marković

Copy: Ms Laima Jurevičienė, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Lithuania to the Council of Europe



DGI

28 FEV. 2018

SERVICE DE L'EXECUTION  
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**Expert Opinion of the Sexual Orientation and Gender Identity Unit (SOGI Unit)  
of the Council of Europe  
on the  
DRAFT LAW ON RECOGNITION OF A PERSON'S GENDER IDENTITY  
OF THE REPUBLIC OF LITHUANIA**

Following the request received on 30 November 2017 on behalf of the Agent of the Government of Lithuania, the SOGI Unit has proceeded to examine the proposed draft law on legal gender recognition and is pleased to deliver hereafter its overall assessment (I) and recommendations for improvements (II).

This legislative reform is undertaken in view to ensure the general measures required for the full and satisfactory execution of the European Court of Human Rights judgment in the case *L. v. Lithuania* (11 September 2017, Application no. 27527/03) and eliminate the legal gap which led to a violation of Article 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter - the Convention).

In the case of *L. v. Lithuania*, the European Court of Human Rights found a violation of the Convention due to the absence of a law regulating full gender reassignment surgery, which led to the applicant being unable to undergo such surgery and subsequently change his gender identification in all official documents. The Court held that the Lithuanian authorities must take all necessary measures to remedy the existing 'legislative gap' and put in place a legal framework, allowing persons in the same situation as the applicant to undergo such surgery and to change their official documents accordingly.

**I. OVERALL ASSESSMENT:**

The major leap forward that has been taken in the recent months to execute the *L. v. Lithuania* is warmly welcomed, in particular as regards the legislative and regulatory reforms undertaken to remove the legal gap at the origin of the violation.

We further note with great satisfaction that the Lithuanian authorities decided to regulate the legal and medical procedures separately and formed two working groups, in accordance with the standards of the Council of Europe and as per the SOGI Unit's recommendation (letter of 22 February 2017). It is indeed essential that the two procedures are separate and not interdependent.

While the request for an expert opinion concerns the draft law on legal gender recognition, note is taken that a draft protocol for the medical treatment has been prepared in parallel and communicated to the Ministry of Health. We wish to insist on the complementarity of both procedures, and on the fact that unless both the legal and medical procedures are available, ensuring access to full gender confirmation surgery as well as the possibility to change the name and gender marker in all official documents, the judgment may not be fully executed.

Provided that the procedure to access to medical treatment is adequately regulated, the draft law on Recognition of a Person's Gender Identity is to a large extent satisfactory and demonstrates the willingness of the legislators to provide transgender persons in Lithuania with effective access to legal gender recognition, allowing them to change their names and gender markers in official documents to match their gender identity.

However, in light of the relevant Council of Europe standards, in particular the CM Rec(2010)5 on *measures to combat discrimination on the grounds of sexual orientation and gender identity*, and taking into consideration the position adopted by the Parliamentary Assembly of the Council of Europe in its Resolution 2048/2015 on *Discrimination against transgender people in Europe*, as well as the recent development of the case-law of the European Court of Human Rights, the draft law continues to present shortcomings. In this respect, the following improvements and clarifications are recommended so as to ensure that the law will not be outdated in coming years.

## **II. RECOMMENDED IMPROVEMENTS:**

### **Article 3. Basic principles of gender identity recognition**

#### ***Paragraph 2.***

This is a very important provision, removing the prior requirement of undergoing a medical intervention in order to have access to legal gender recognition. However, the current wording is too restrictive as it targets only "medical reassignment of sex characteristics", and fails to include other forms of medical treatment such as hormone replacement therapy and psychiatric therapy. While such treatments should be made available, they should under no circumstances be conditional to the legal recognition of a person's gender identity. In line with the Council of Europe standards, proof of changes of a physical nature, sterilization, compulsory medical treatment and mental health diagnosis constitute abusive requirements and should be abolished.<sup>1</sup>

For the above reasons, we strongly recommend that the wording of the paragraph 2 be amended so as to **prohibit the request of proof of all forms of medical treatment**, and ensure that transgender persons have access to legal gender recognition regardless of whether they have undergone surgery, hormone replacement therapy, psychiatric treatment, or any other form of medical treatment.

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<sup>1</sup> CM/Rec(2010)5 on *measures to combat discrimination on the grounds of sexual orientation and gender identity*, para.20; PACE resolution 2048/2015 on *Discrimination against transgender people in Europe*, para. 6.2.2.; ECtHR, A.P., Garçon And Nicot v. France, (Applications nos. 79885/12, 52471/13 and 52596/13), 6 April 2017.

## Article 4. Conditions and procedures for gender identity

### Paragraph 2.

As regards the conditions to exercise the right to legal gender recognition, the following remarks and suggestions should be taken into consideration:

- 1) The personal scope based on a condition of nationality is too restrictive and discriminatory. We advise to extend the applicability of the law to **all individuals legally residents of Lithuania**.
- 4) The condition of being unmarried, which would force married individuals to divorce prior to having their gender legally recognised is considered an unnecessary prior requirement, and we advise removing “any restrictions on the right of transgender people to remain in an existing marriage upon recognition of their gender” and ensuring “that spouses or children do not lose certain rights”, in accordance with PACE Resolution 2048/2015.<sup>2</sup> Forcing transgender persons to divorce will necessarily have a serious and negative impact on their family life and be contrary to the best interest of their children. The European Court of Human Rights has indicated that transferring a marriage into a registered partnership providing almost identical legal protection was not considered disproportionate<sup>3</sup>, and has further created a positive obligation on states parties to provide legal recognition to same-sex couples as a way to protect their right to respect for their private and family life.<sup>4</sup> In the absence of any form of legal recognition of same-sex couples, we recommend to consider putting in place **measures compensating for a loss in acquired rights of spouses and ensuring that married transgender persons and their families are not disproportionately affected by the requirement to divorce**, resulting in a breach of the principle of non-discrimination and the best interest of the child enshrined in the Convention.
- 6) The requirement for a diagnosis of gender identity disorder under a legally established procedure raises two serious concerns: (i) a medical requirement contrary to the principle of self-determination, and (ii) it conditions the access to legal gender recognition to another procedure that may create yet another legal gap, similar to the one that resulted in the violation of Article 8 in the case *L. v. Lithuania*.
  - (i) The CM/Recommendation (2010)5 and the PACE resolution 2048/2015 call on member states to establish quick, transparent and accessible procedures based on self-determination, that is, by removing unnecessary and abusive prior

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<sup>2</sup> PACE resolution 2048/2015 on *Discrimination against transgender people in Europe*, para. 6.2.3.

<sup>3</sup> ECtHR, *Hämäläinen v. Finland*, (Application no. 37359/09), 16 July 2014

<sup>4</sup> ECtHR, *Oliari and Others v. Italy*, (Applications nos. 18766/11 and 36030/11), 21 July 2015; CoE Commissioner for Human Rights, Human Rights Comment “*Access to registered same-sex partnerships: it’s a question of equality*”, 21 February 2017

requirements, such as proof of medical treatment, including psychiatric diagnosis.<sup>5</sup>  
We therefore recommend **removing the condition of the gender identity disorder diagnosis.**

- (ii) In the event that such a requirement would be maintained, it is essential that the **legal procedure is clearly defined and adopted at the same time as the draft law on legal gender recognition**, at the risk of creating another legal gap effectively preventing the access to legal gender recognition and therefore not allowing for the full and satisfactory execution of the judgment.

## **Article 5. Gender identity recognition for minors**

### ***Paragraph 4.***

The list of circumstances that must be evaluated by the court in deciding to grant recognition of a transgender minor's gender identity bears the risk of leading to arbitrary decisions, in particular concerning the notions of maturity (4.b) and of external influence (4.c.). As such, we recommend

- (i) **removing the compulsory evaluation of those additional circumstances**, or
- (ii) **making them indicative or optional** for the Court to take into consideration, when deemed appropriate and on a case by case basis.

## **Article 7. Registration of gender identity recognition**

### ***Paragraph 2.***

Paragraph two of Article 7 of the draft law in its current wording places the responsibility on the individual whose gender identity has been legally recognised to require the changes in state-issued documents, other than the passport and personal identity card. We are concerned that this may be a disproportionate burden on individuals, who may not be familiar with all the state agencies and registries, thereby risking involuntarily creating a discrepancy in their official documents. Such discrepancy could lead to a disclosure of the person's change of gender and amount to a violation of their right to respect for their private life.

We therefore would advise that, to the extent possible, **state agencies and registries are automatically informed and requested to update the documents** following the legal recognition of a person's gender identity.

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<sup>5</sup> CM/Rec(2010)5 on *measures to combat discrimination on the grounds of sexual orientation and gender identity*, para.21; PACE resolution 2048/2015 on *Discrimination against transgender people in Europe*, para. 6.2.1.;



Alternatively, we would strongly recommend that this procedure is facilitated, by **providing the individuals concerned with a list of those state agencies and public registries**, so that they may undertake all necessary procedures.

## **Article 10. Continuation or modification of legal relations**

### ***Paragraph 4.***

Under paragraph 4 of Article 10, it should be added that measures shall be taken to ensure that transgender persons are placed in prison facilities, or any other place of deprivation of liberty, in accordance with their identified gender.