

# THEMATIC REPORT ON LEGAL GENDER RECOGNITION IN EUROPE

First thematic implementation review report  
on Recommendation CM/Rec(2010)5



STEERING COMMITTEE ON ANTI-DISCRIMINATION,  
DIVERSITY AND INCLUSION (CDADI)

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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on Recommendation CM/Rec(2010)5 of the  
Committee of Ministers to member states on  
measures to combat discrimination on grounds  
of sexual orientation or gender identity**

**STEERING COMMITTEE ON ANTI-DISCRIMINATION,  
DIVERSITY AND INCLUSION (CDADI) –  
Prepared by the CDADI Working Group on sexual orientation  
and gender identity (GT-ADI-SOGI) and the European  
Governmental LGBTI Focal Points Network (EFPN)**

French edition:

*La reconnaissance juridique  
du genre en Europe*

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Cover design and layout: Documents and Publications Production Department (SPDP), Council of Europe  
Cover photo: Shutterstock

This publication has not been copy-edited by the DPDP Editorial Unit to correct typographical and grammatical errors.

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Imprimé aux ateliers du Conseil de l'Europe

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# Introduction

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1. The present thematic report stems from the CDADI decision<sup>1</sup> to complement the comprehensive review of the implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity<sup>2</sup> with thematic reviews on one of the themes covered by CM/Rec(2010)5. In autumn 2021, the Council of Europe's Committee of Ministers tasked the CDADI to review annually a thematic dimension of the Recommendation and to prepare a comprehensive review of the Recommendation by the end of 2025.

2. The first thematic review focuses on legal gender recognition (LGR), **understood as the legal recognition of a person's gender identity, including name, sex/gender marker and other gender-related information, which may be reflected in surnames, social security numbers/personal identification numbers, titles etc., in public registries, records, identification documents (identity cards, passports, driving licences) and other similar documents (educational certificates etc.).** As per Recommendation CM/Rec(2010)5 (Paragraphs 20-22), "Member States should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life"; "prior requirements [...] for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements".

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1. See the exchange of views between the European Governmental LGBTI Focal Points Network (EFPN) and the Steering Committee on Anti-discrimination, Diversity and Inclusion (CDADI) at the CDADI 2nd Plenary Meeting (2-4 February 2021).
  2. Such comprehensive reviews have been carried out twice so far: in 2013: see review report available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805c859a#\\_ftn1](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c859a#_ftn1), and in 2019, see review report available at <https://rm.coe.int/combating-discrimination-on-grounds-of-sexual-orientation-and-gender-i/16809fb2b8>.

3. Cyprus, Lithuania, North Macedonia and Spain have volunteered to participate in this thematic review and use this opportunity to advance their national reform process.

4. This first thematic review gathered in-depth information and opened up an informed dialogue on LGR at national level thanks to the drawing up of national reports, the holding of multi-stakeholder roundtables and the issuing of recommendations in each of the participating countries. This process is also an opportunity for the Council of Europe to tailor its co-operation activities to the needs of member States.

5. The present report provides an overview of the state of play of national legislation on LGR, summarises the development of international standards and compiles examples of good practices to empower stakeholders in addressing the human rights concerns of LGBTI persons (Sections I and II). It also highlights some issues for further dialogue and support from the relevant bodies of the Council of Europe (Section III) and recommendations to the attention of the member States (Section IV).

# Section I – Main observations

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## 1. PUBLIC OPINION AND LEGISLATIVE TRENDS

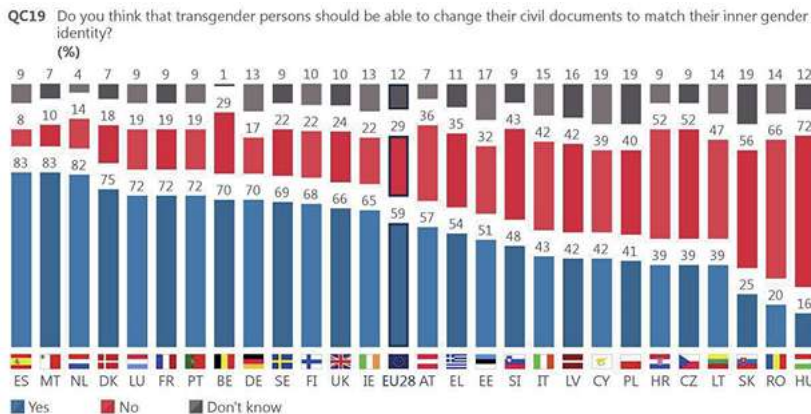
### Overall increased support of public opinion

6. Overall, support towards equal rights for LGBTI persons is reported to have grown in EU members States: the 2019 Eurobarometer survey data<sup>3</sup> shows that in the field of LGR, 59% of respondents think that transgender persons should be able to change their civil documents in accordance with their self-defined gender identity. The survey also reveals substantial differences between member States (see graphic below): 13 countries are well above this average figure: respondents' support goes up to 83% in Spain and Malta or 82% in the Netherlands. Lower figures are recorded in 15 countries, decreasing to 20% in Romania, 16% in Hungary or 12% in Bulgaria.

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3. Special Eurobarometer – Discrimination in the European Union, (2019), European Commission, available at [https://ec.europa.eu/info/sites/default/files/ebs\\_493\\_data\\_fact\\_lgbti\\_eu\\_en-1.pdf](https://ec.europa.eu/info/sites/default/files/ebs_493_data_fact_lgbti_eu_en-1.pdf).





Source: *Special Eurobarometer – Discrimination in the European Union, (2019), European Commission*

7. Beyond the EU, it is encouraging to note that the 2018 IPSOS survey focusing on 16 countries from different regions in the world concluded that 60% of the people surveyed would like their country to do more to support and protect transgender persons.<sup>4</sup>

### Information gap and misperceptions

8. Evaluating public support for transgender persons’ human rights is a challenging task. In particular, the lack of information about the human rights situation of transgender persons among the general public is acute in certain countries, including in some EU countries. Research and monitoring by international agencies, international and local NGOs have helped to bridge the data gap and shed light on attitudes towards LGBTI persons in countries or regions not regularly covered by EU and other surveys. They highlighted higher levels of anti-transgender attitudes and significant pathologising attitudes in some regions and countries, with overall low level of acceptance in

4. The survey included the following countries: Argentina, Australia, Belgium, Brazil, Canada, Chile, China, Ecuador, France, Great Britain, Germany, Hungary, India, Italy, Japan, Malaysia, Mexico, Peru, Poland, Russia, Serbia, South Africa, South Korea, Spain, Sweden, Turkey, and the United States of America. Variations exists between countries: Spain (70%) and Argentina (67%) are most likely to agree while Poland (39%), Hungary, and Japan (both 41%) are least likely to agree. A slim majority of respondents in the United States and France are also in favour of more support with 51 and 52% respectively. The survey is available here: <https://www.ipsos.com/en-us/news-polls/global-attitudes-toward-transgender-people>.

Southeast Europe<sup>5</sup> and pronounced stereotypical attitude towards transgender persons in certain countries, notably in Eastern Europe.<sup>6</sup>

### Slow progress on the legislative side

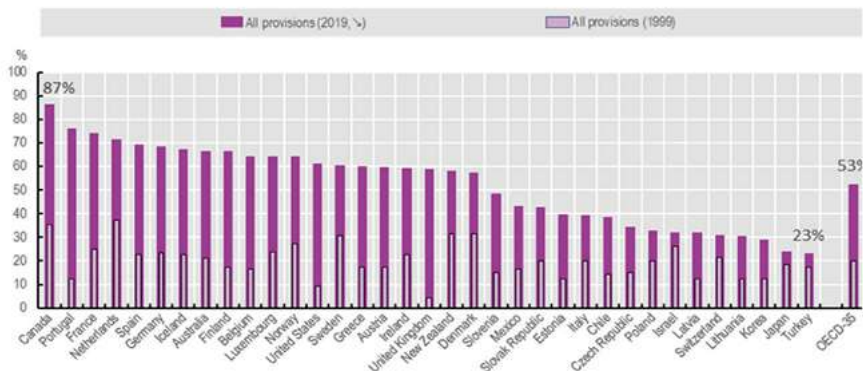
9. On the legislative front, OECD data shows an increase in the share of laws passed that are critical to ensure equal treatment of LGBTI persons over the past two decades (see tables 1 and 2 on the percentage of LGBTI-inclusive legislation passed between 1999 and 2019). For transgender and intersex persons, legislative advances are reported to be slower but ‘good progress’ was noted, in particular when depathologising LGR in the past 10 years: in 2019, 15 OECD countries allowed transgender persons to change the gender marker on their birth certificate and other identity documents without any medical requirement, while there was none in 2009.<sup>7</sup>



Table1: Source: Over the Rainbow? The Road to LGBTI Inclusion, OECD 2020

5. <https://openknowledge.worldbank.org/bitstream/handle/10986/30607/130420-REPLACEMENT-PUBLIC-FINAL-WEB-Life-on-the-Margins-Survey-Results-of-the-Experiences-of-LGBTI-People-in-Southeastern-Europe.pdf?sequence=1&isAllowed=y>.
6. <https://tgeu.org/wp-content/uploads/2021/04/tgeu-under-the-radar.pdf>.
7. See Article by Marie-Anne Valfort , OECD “Beyond the Rainbow: Let’s make LGBTI+ equality a reality” available at [https://www.oecd-forum.org/posts/beyond-the-rainbow-let-s-make-lgbti-equality-a-reality?\\_ga=2.12489844.1394188336.1641393996-239908991.1641393995](https://www.oecd-forum.org/posts/beyond-the-rainbow-let-s-make-lgbti-equality-a-reality?_ga=2.12489844.1394188336.1641393996-239908991.1641393995).

## % of LGBTI-inclusive laws that have been passed

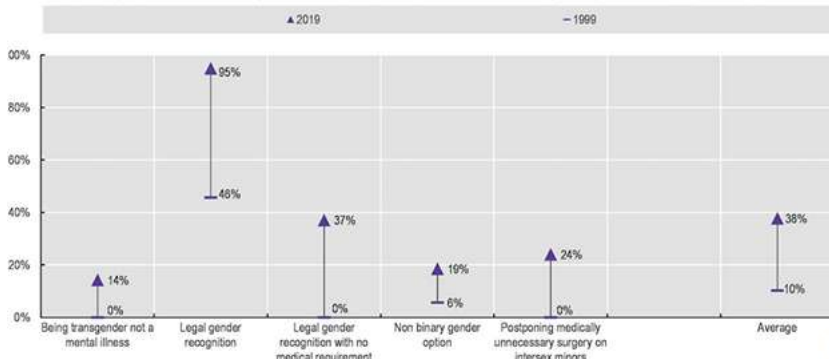


Source: *Over the Rainbow? The Road to LGBTI Inclusion*, OECD 2020; see also <https://stat.link/0ahtgn>

10. With regard to LGR specifically, the results of the OECD questionnaire on LGBTI-inclusive laws and policies (2019) below<sup>8</sup> show that while more States have now LGR laws, a number of issues have seen limited improvements: these relate to not categorising being transgender as a mental illness in national clinical classification; availability of a non-binary gender option on birth certificates and other identity documents; and postponing medically unnecessary sex-normalising treatment or surgery on intersex children.

### Annex Figure 3.C.3. Despite a surge in the number of countries that have passed gender recognition laws, legal inclusion of transgender and intersex individuals remains limited

Evolution of legal LGBTI inclusivity between 1999 and 2019 OECD-wide, by component of TI-specific provisions



Note: This figure reports the share of provisions highlighted in Chapter 2 that are in force in OECD countries in 1999 and 2019, by component of TI-specific provisions – see [Box 3.2](#) for further details on how LGBTI inclusivity is computed.

Source: OECD questionnaire on LGBTI-inclusive laws and policies (2019).

8. <https://www.oecd-ilibrary.org/sites/8d2fd1a8-en/1/3/3/index.html?itemId=/content/publication>.

11. In sum, it is positive to note an overall clear trend in supporting LGBTI persons' rights taking root in Europe. However, progress achieved over the last decade in discussing gender identity or expression issues should be contrasted with the realities of discrimination faced by transgender persons. In fact, according to the surveys of the European Union Agency for Fundamental Rights (FRA), the experience of discrimination by transgender respondents has increased between 2012 and 2019 in all the areas of life surveyed<sup>9</sup>: while in 2012 43 % answered that they felt discriminated, this figure rose to 60 % in 2019.

## 2. ANTI-TRANSGENDER DISCOURSE

12. Major progress was observed regarding the visibility of issues relating to gender identity or expression and sex characteristics over the last decade. However, such progress has been coupled with a rise in opposition towards transgender persons' human rights. A substantial rise in hate speech, both from political figures and leaders, including government representatives, religious leaders, in the media and online was observed by Council of Europe bodies together with an equally sharp increase in physical attacks on LGBTI persons<sup>10</sup>.

13. In her 2021 human rights comment, the Council of Europe Commissioner for Human Rights warned against the costly strategy of public officials and elected politicians scapegoating LGBTI persons for political gain and the perception of impunity such hateful messaging may leave.<sup>11</sup> **Such a trend has been thoroughly documented in the latest ILGA-Europe 2021 Annual review.**<sup>12</sup>

14. Anti-transgender discourse is not only rising in selected countries. As coordinated anti-transgender narratives are spreading throughout Europe (and beyond), it is recognised as a pan-European problem: in its 2021 report on Combatting rising hate against LGBTI persons in Europe, Parliamentary

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9. See [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-lgbti-equality-1\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf).

10. These includes *inter alia*, the CoE Commissioner on Human Rights country monitoring work and human rights comments (see in particular, <https://www.coe.int/en/web/commissioner/-/pride-vs-indignity-political-manipulation-of-homophobia-and-transphobia-in-europe> and <https://www.coe.int/en/web/commissioner/-/human-rights-of-lgbti-people-in-europe-current-threats-to-equal-rights-challenges-faced-by-defenders-and-the-way-forward>, ECRI in its 2020 annual report <https://rm.coe.int/annual-report-on-ecri-s-activities-for-2020/1680a1cd59>, PACE latest report on Combatting rising hate against LGBTI people in Europe (see PACE report at <https://pace.coe.int/en/files/29418/html> and the corresponding Recommendation (2220) 2022 adopted on 25 January 2022 at <https://pace.coe.int/en/files/29710/html>).

11. <https://www.coe.int/en/web/commissioner/-/pride-vs-indignity-political-manipulation-of-homophobia-and-transphobia-in-europe>.

12. ILGA-Europe (2021), Annual Review on the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia, Brussels, 2021, p. 7.

Assembly of the Council of Europe noted that this rising hatred would “not simply be an expression of individual prejudice, but the result of sustained and often well-organised attacks on the human rights of LGBTI people throughout the European continent”, resulting in the perpetuation of gender inequalities and gender-based violence in the search of erasing what is seen as threats to traditional values.<sup>13</sup>

15. In many Council of Europe member States, anti-transgender discourse is reported as heavily relying on anti-gender movements<sup>14</sup>, which consider heterosexuality and gender identity based on biological sex to be the norm. Opponents to transgender persons’ rights have argued that giving attention to gender identity or expression issues would pose a challenge to the human rights of others<sup>15</sup>, implying that there would be a competition for human rights protection when the essence of human rights is about protecting human dignity.

16. The rejection of transgender persons can contribute to excluding them from public life and access to services: it limits their access to education, health care, housing and employment and is particularly felt by those most affected by multiple discrimination. It not only has a devastating impact on the persons concerned but also impedes overcoming gender stereotypes as a whole, obstructs gender equality<sup>16</sup> and harms society’s cohesion.

17. Against this background, a group of United Nations and international human rights experts and monitoring bodies, including the Council of Europe Commissioner for Human Rights have called “on States, faith-based institutions, religious leaders and other stakeholders to consider

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13. See PACE report at <https://pace.coe.int/en/files/29418/html> and the corresponding Recommendation (2220) 2022 adopted on 25 January 2022 at <https://pace.coe.int/en/files/29710/html>. See also at the level of the UN, the reports of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz which are addressing this issue, available at <https://undocs.org/A/HRC/47/27> and <https://undocs.org/a/76/152>.

14. See for a discussion on the influence of anti-transgender groups: Report on the Roundtable with LGBTI defenders organized by the CoE Commissioner for Human Rights, Comm DH(2021)32, 8 December 2021, available at; <https://rm.coe.int/human-rights-of-lgbti-people-in-europe-current-threats-to-equal-rights/1680a4be0e>, see also ECRI’s 2020 annual report at <https://rm.coe.int/annual-report-on-ecri-s-activities-for-2020/1680a1cd59> ECRI noted that the climate of opposition of LGBTI’s persons’ human rights “has gained ground in certain countries in 2020 linked to populist homophobic and transphobic rhetoric and the so-called anti-gender movement”, page 16.

15. See abovementioned Council of Europe Commissioner report on the Roundtable with LGBTI defenders organised by the Council of Europe Commissioner for Human Rights, paragraph 15.

16. See OECD, Over the Rainbow? The Road to LGBTI Inclusion: research showed a significant positive relationship between legal LGBTI inclusivity and gender equality: <https://www.oecd-ilibrary.org/sites/1d7a3c5d-en/index.html?itemId=/content/component/1d7a3c5d-en>.

the negative impact of exclusionary or stigmatising narratives on violence and discrimination against lesbian, gay, bisexual, transgender, and gender diverse (LGBT) persons” in their statement prepared for the International Day Against Homophobia, Transphobia and Biphobia on 14 May 2021.<sup>17</sup>

18. Reflecting on this negative trend and how lack of recognition of gender identity may lead to further stigmatisation, discrimination, harassment, humiliation, and physical and sexual violence<sup>18</sup>, many of the stakeholders participating in the national roundtables organised as part of this review emphasised the need to include protection from hate speech and hate crime as part of a comprehensive approach when addressing LGR to ensure its effectiveness in guaranteeing respect of gender recognition.

### 3. EVOLUTION OF INTERNATIONAL LEGAL THINKING

19. European and international case-law have set out important benchmarks regarding LGR, although existing legal standards do not explicitly refer to transgender and intersex persons.

20. The European Court of Human Rights (the Court) is the judicial institution that has dealt with the largest number of cases related to gender identity and transgender persons.<sup>19</sup> It has embraced evolving social realities and affirmed a right to self-determined gender as an essential manifestation of the right to protection of private life (Article 8 of the European Convention on Human Rights, ECHR). The Court has issued landmark decisions, offering minimum standards for the protection of transgender persons (see below).<sup>20</sup>

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17. <https://www.coe.int/en/web/commissioner/-/the-right-to-freedom-of-religion-or-belief-and-the-right-to-live-free-from-violence-and-discrimination-based-on-sogi-are-both-built-on-a-promise-of-h?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner-staging%2Fthematic-work%2Ffgbti>.

18. Report on Legal Recognition of Gender Identity and Depathologization, Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, 2018, available at: <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/LegalRecognition.aspx>.

19. The Court dealt with the issue substantively for the first time in 1986 in *Rees v the United Kingdom*.

20. There have also been debates as to whether the Court was providing transgender persons with all necessary protections, particularly when using the concept of ‘European consensus’. See for an analysis of the Court’s case-law, including its use of the concept of ‘European consensus’ Polgari, Eszter. “European Consensus: A Conservative and a Dynamic Force in European Human Rights Jurisprudence” *ICL Journal*, vol. 12, no. 1, 2018, pp. 59-84, Pieter Cannoot, *The pathologisation of trans\* persons in the ECtHR’s case law on legal gender recognition* Netherlands Quarterly of Human Rights, Volume 3, Issue 1, 2019, pages 14 to 35. See also the joint dissenting opinion of Judges Sajó, Keller and, Lemmens drawing attention to the weakness of the majority’s argumentation on the lack of European consensus in *Hämäläinen v. Finland* (Application No. 37359/09, ECtHR), 16 July 2014.

Other bodies of the Council of Europe contributed to develop further the non-discrimination and equality dimensions on matters affecting transgender persons, including through CM/Rec(2010)5. The Council of Europe Commissioner for Human Rights, European Commission against Racism and Intolerance and the Parliamentary Assembly have provided further guidance to States<sup>21</sup> and are important references for the Court to acknowledge the continuous evolution of international thinking on LGR.

## a. Right to self-determined gender identity and States positive obligations

21. LGR has been much in focus of the Court's jurisprudence concerning human rights cases of transgender and intersex persons over time. While 'gender identity' was already established to fall within the non-exhaustive list of protected characteristics set out in Article 14 of the European Convention on Human Rights (ECHR) on the right to non-discrimination, the Court has further considered that "elements such as gender identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article 8"<sup>22</sup>

22. In its landmark judgment, *Goodwin v. the United Kingdom (2002)*<sup>23</sup>, the Court ruled for the first time that the applicant had a right to gender recognition and established the corresponding obligation for the State to secure that right.

23. This was the first of a series of judgments in which the Court has further reviewed the means employed by States to comply with their obligation to provide for LGR. The following paragraphs detail the requirements for LGR which the Court considered to be in breach of Article 8 of the ECHR on the right to respect for private and family life.

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21. The Commissioner for Human Rights had had a pioneer role in addressing issues of equality for transgender persons in its Issues papers, ECRI is also addressing the issue in its country monitoring reports. In its judgments, the Court usually refers to PACE resolutions, including Resolution 2048 (2015), as well as CM/Rec(2010)5 (paragraph 20 to 22) which *inter alia* recommends to member States to review prior requirements for legal recognition of gender recognition.

22. See Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence, page 43, para 167. Among these: *B. v. France*, § 63; *Burghartz v. Switzerland*, § 24; *Dudgeon v. the United Kingdom*, § 41; *Laskey, Jaggard and Brown v. the United Kingdom*, § 36; *P.G. and J.H. v. the United Kingdom*. [https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf)

23. *Goodwin v. the United Kingdom*, (Application No 28957/95, ECtHR), 11 July 2002, <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-57974%22%5D%7D>. Goodwin, who had undergone sex reassignment surgery, was denied an amended birth certificate showing her female legal sex marker. As a result, she was unable to access core legal and social benefits in the United Kingdom, including retirement guarantees and marriage.



## b. Removing abusive requirements

### b.1. Sterilisation and medical intervention

24. For the Court, any requirements of irreversible changes in the individual's metabolism would amount to a violation of the right to private life (Article 8 ECHR): this includes medical intervention, or sterilisation requirements. In *YY v. Turkey* (2015)<sup>24</sup>, the Court ruled that sterilisation cannot be made a prerequisite for access to LGR. In its judgment, *A.P. Garçon and Nicot v. France* (2017)<sup>25</sup>, the Court explicitly ruled that the requirement of infertility to obtain LGR violates the right to physical and moral integrity under Article 8. With regard to diagnosis requirements, the Court took a more differential stance, even though it did note that “the psycho-pathologisation of transgender persons reinforces the stigmatisation of which they are victims” (para. 138). Such diagnosis requirements are seen increasingly critically, as they are not compatible with **the international trend toward the full depathologisation of transgender persons**. ECRI recommends<sup>26</sup> that “relevant legislation is amended to allow gender changes in personal documents, without the requirement for completion of full medical gender reassignment procedures, particularly surgery”. International agencies and experts have united to underline the need for a **total abolishment of all forms of pathologisation**, including requiring the assessment by a medical or other expert for LGR (see the 2016 Inter-Agencies Declaration on the occasion of the International Day against Homophobia, Transphobia and Biphobia Pathologisation<sup>27</sup>). Moreover, this trend is also reflected in the increasing number of Council of Europe member States that have reformed their legislation concerning LGR (see Section III on good practices). In its most recent judgment, *X. and Y. v. Romania* (2021), the Court moved towards greater recognition of self-determination to transgender persons: it established that conditioning LGR to gender affirming surgery in a case where the applicants refused such

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24. *Y. Y. v. Turkey* (Application No. 14793/08, ECtHR), 10 March 2015, <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-5032376-6183620%22%7D>.

25. *A.P. Garçon and Nicot v. France* (Application Nos. 79885/12, 52471/13 and 52596/13, ECtHR), 6 April 2017, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-172556%22%7D>.

26. ECRI 5<sup>th</sup> cycle recommendations, available at <https://rm.coe.int/5th-cycle-ecri-recommendations-on-lgbt-issues/16809e7b66>.

27. See Inter-Agencies Declaration on the occasion of the International Day against Homophobia, Transphobia and Biphobia Pathologization – “Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness” For International Day against Homophobia, Transphobia and Biphobia - Tuesday 17 May 2016, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>.



surgery on the ground of the invasiveness of the medical procedure itself (regardless of its impact on fertility) violates Article 8 of the ECHR.<sup>28</sup>

## b.2. Divorce

25. The Court acknowledged that the requirement for married transgender applicants to get divorced before having access to LGR leads to daily situations in which a transgender person faces “inconveniences”. When in the case *Hämäläinen v. Finland* (2015) the Court found that a divorce requirement was not disproportionate, it was due to the availability for the applicant of a genuine option that provides legal protection for same-sex couples almost identical to that of marriage: “if the applicant wishes both to obtain legal recognition of her new gender and to have her relationship with her wife legally protected, Finnish legislation provides for the possibility to convert their marriage into a registered partnership, with the consent of the applicant’s wife”. (§ 77).<sup>29</sup> In contrast, the United Nations Human Rights Committee found in its case *G v. Australia* (2017)<sup>30</sup> that divorce requirements do violate the rights to privacy and equality under Articles 17 and 26 of the International Covenant on Civil and Political Rights. It held that “even though failure to provide access to marriage for same-sex couples may not constitute a violation of the ICCPR, consistency between birth registrations and the Marriage Act was not a legitimate aim”, and concluded that the national policies were inconsistent and discriminatory.

## c. Quick, transparent and accessible procedures

26. Making possible the change of name and sex in official documents in a quick, transparent and accessible way is a key recommendation of CM/Rec(2010)5. These principles have been taken into account by the Court when examining the implementation of LGR procedures in some member States.

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28. See *X. and Y. v. Romania*, 19 January 2021 (applications no 2145/16 et 20607/16): The domestic courts ad presented the applicants, who did not wish to undergo gender reassignment surgery, with an impossible dilemma » « Either they had to undergo the surgery against their better judgment – and thus forego full exercise of their right to respect for their physical integrity – or they had to forego recognition of their gender identity, which also came within the scope of the right to respect for private life » (violation of Article 8 ECHR).

29. *Hämäläinen v. Finland*, (Application No. 37359/09, ECtHR), 16 July 2014, <https://hudoc.echr.coe.int/fre#%22itemid%22:%222001-145768%22>].

30. *G v. Australia*, Human Rights Committee, Communication No. 2172/2012, 28 March 2017, [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/CCPR\\_C\\_119\\_D\\_2216\\_2012\\_26103\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/CCPR_C_119_D_2216_2012_26103_E.pdf).

27. In its jurisprudence, the Court reviewed the time span between applying for and being granted LGR and found that a transgender person's right to privacy had been violated due to the excessive duration of the proceedings. The Court highlighted that rigid and long judicial LGR procedures leave transgender individuals vulnerable and are contrary to the aims of the ECHR<sup>31</sup>, and that protracted examination of a claim has long-term negative consequences for mental health.<sup>32</sup>

28. In several cases, the Court addressed issues of legal clarity both in terms of language and responsible authorities and concluded that the lack of clarity of the legal framework on LGR amounted to a violation of Article 8. It did reach such a conclusion for example when noting that national courts reached very varying conclusions about the conditions and procedure for LGR<sup>33</sup>, or when it observed that any conclusion on the applicants' request would be "precariously close to speculation" hence creating a situation of legal uncertainty for the applicants. The Court also noted that transparency is lacking when "no provision clearly specifies the body that has jurisdiction to decide on a request".<sup>34</sup>

29. Aspects such as costly and long court or administrative procedures may place substantial economic barriers to LGR in practice. In addition, some transgender persons might be unable to fulfil certain prior requirements for LGR, for instance due to their age or health status.<sup>35</sup> This in turn calls for due consideration to be given to the personal situation of the applicant.

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31. *S.V. v. Italy*, 11 October 2018, (application no. 55216/08, ECtHR), paragraph 72. Following the judgment of the Court, the situation in Italy is reported to have changed substantially.

32. *X v. the former Yugoslav Republic of Macedonia*, 17 January 2019, (application no. 29683/16, ECtHR), paragraph 70.

33. *X. and Y. v. Romania*, 19 January 2021 (applications no 2145/16 *et* 20607/16, ECtHR), paragraph 162.

34. *X. v. the former Yugoslav Republic of Macedonia* (2019), para 69.

35. *Schlumpf v. Switzerland*, 9 January 2009 (application no. 29002/06, ECtHR) concerning the applicant's health insurers' refusal to pay the costs of the reassignment operation on the ground that the applicant had not complied with a two years period requirement before the surgery in order for the costs of the said surgery to be reimbursed. The Court held that this was a violation of Article 8 as the waiting period had been applied mechanically without regard to the age of the applicants (67) and that this would impact the applicant's decision to undergo surgery, see also *D.Ç. v. Turkey*, 7 February 2017 (decision on the admissibility) (application no. 10684/13, ECtHR): the applicant, a transgender person whose reassignment has not yet been carried out, complained of the refusal of the authorities of the Ministry of Justice to bear the cost of the reassignment despite medical evidence which was submitted, clearly showed that the applicant urgently needed treatment.

## d. Age restrictions

30. Explicit or implicit age restrictions may obstruct the best-interest-principle for young as well as elderly transgender persons. In *Schlumpf v. Switzerland* (2009)<sup>36</sup>, the Court held that the personal circumstances of the persons should be prioritised over a mechanical application of the law.

31. In conclusion, the Court's case law has dynamically evolved since it declared a violation of Article 8 concerning the recognition of transgender persons for the first time almost 30 years ago in the case of *B. v. France* in 1992.<sup>37</sup> What was considered a breakthrough at the time needs to continuously evolve not only to reflect the evolution of societal norms and attitudes with regard to gender identity but to offer genuine protection to all, including transgender and intersex persons.

## INTERNATIONAL HUMAN RIGHTS LAW BENCHMARKS

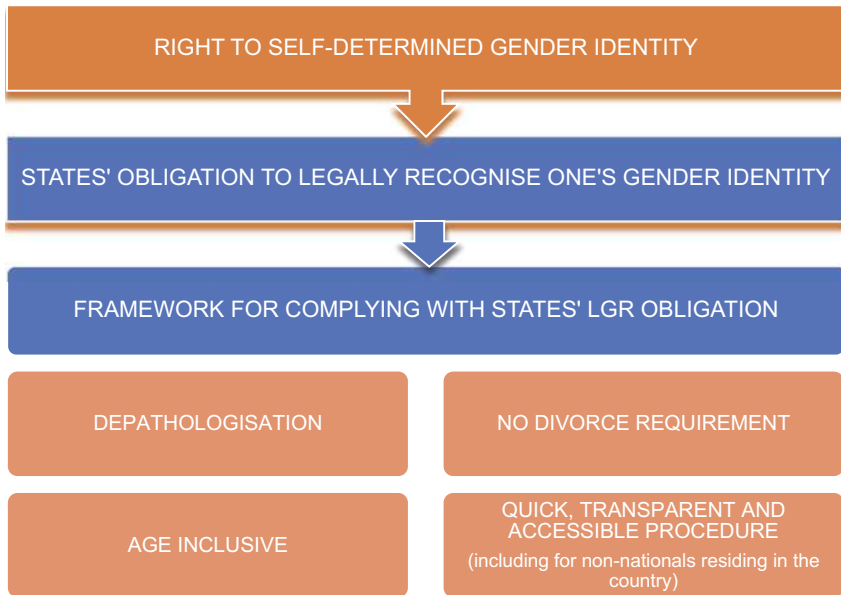


Diagram 1 - International Human Rights Law Benchmarks

36. *Schlumpf v. Switzerland* (application no. 29002/06, ECtHR), 9 January 2009.

37. See *B. v. France*, (application no. 13343/87, ECtHR), 25 March 1992.

## 4. STATE OF PLAY OF NATIONAL LEGISLATION IN COUNCIL OF EUROPE MEMBER STATES ON LEGAL GENDER RECOGNITION (LGR)

32. Several Council of Europe member States, including the four countries participating in the review project have engaged in improving their LGR procedure (or lack thereof) and have used existing Council of Europe support to steer legislative work towards ensuring that access to LGR is based on the declaration of the person with no additional requirement (self-determination model). For all four countries, building consensus on a bill on LGR continues to be a challenging undertaking: the pressure of opponent forces, whether in Parliament, in a coalition government or among high level decision-makers may indeed lead to a lowering of the required level of protection granted to transgender persons in LGR.

33. The national roundtables in all four countries have shown that discussions greatly benefited from experiences of other countries that have successfully passed new legislation on LGR that respects the case-law of the Court. Roundtable participants also expressed interest in being provided with an overview showing how other Council of Europe member States have addressed certain LGR requirements and what are the overall trends in Europe on these. For the present report to support future national debates on LGR reforms, the following paragraphs attempt to summarise the main provisions and requirements for LGR across Council of Europe member States and group together countries' approaches accordingly. The following broad categories are used:

- a) Measures to ensure LGR
- b) Medical requirements
- c) Divorce requirement
- d) Age restrictions

34. This clustering approach draws (and geographically expands) on the 2020 Study on LGR in the EU commissioned by the European Commission.<sup>38</sup> It is based on available data<sup>39</sup> and may not entirely reflect the practice of implementation in the countries concerned. It may however be considered

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38. See [Legal gender recognition in the EU: the journeys of trans people towards full equality](https://ec.europa.eu/info/sites/default/files/legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_sept_en.pdf), European Commission, Directorate-General for Justice and Consumers June 2020, [https://ec.europa.eu/info/sites/default/files/legal\\_gender\\_recognition\\_in\\_the\\_eu\\_the\\_journeys\\_of\\_trans\\_people\\_towards\\_full\\_equality\\_sept\\_en.pdf](https://ec.europa.eu/info/sites/default/files/legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_sept_en.pdf).

39. The tables included in this section draw from several sources of information. They include the data collected from the research and information documents addressing LGR in the EU and beyond, from TGEU available at <https://tgeu.org/wp-content/uploads/2021/05/tgeu-trans-rights-map-2021-index-en.pdf> and from ILGA-Europe available at [https://www.ilga-europe.org/sites/default/files/Attachments/Rainbow%20Europe%20Index%202021\\_0.pdf](https://www.ilga-europe.org/sites/default/files/Attachments/Rainbow%20Europe%20Index%202021_0.pdf).

as a starting point and may be consolidated with additional data that CDADI working group on sexual orientation and gender identity (GT-ADI-SOGI) and of the CDADI could provide regarding the situation in their countries.

### a. Existence of measures to ensure LGR

Type of measures	Countries
Legal or administrative measures, including case law	<b>39 member states</b> Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Iceland, Ireland, Italy, Latvia, Luxembourg, Liechtenstein, Lithuania, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom.
No procedure laid down (or LGR made impossible*)	<b>8 member States:</b> Albania, Andorra, Armenia, Azerbaijan, Hungary*, Monaco, North Macedonia, San Marino. <i>*Hungary: The March 2020 Omnibus Law replacing the changeable characteristic of “sex” with an immutable “sex assigned at birth” has made LGR impossible.</i>

### b. Medical requirements

Medical requirements	Countries
Self-determination	<b>9 member States* with a self-determination model (see Section IV for details)</b> Belgium, Denmark, Iceland, Ireland, Luxembourg, Malta, Norway, Portugal, Switzerland.  <i>*Some autonomous communities in Spain have also endorsed a self-determination model.</i>

<b>Compulsory medical intervention</b>	<p><b>24 member States</b></p> <p>Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Georgia, Italy**, Latvia, Liechtenstein, Lithuania, Montenegro, Poland, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain*, Sweden, Turkey, Ukraine, United Kingdom*.</p> <p><i>* In some regions only.</i></p> <p><i>** Decisions of the Constitutional Court no. 221/2015 and the Court of Cassation no. 15138/2015) ruled out compulsory medical intervention for LGR.</i></p>
<b>Compulsory sterilisation</b>	<p><b>13 member States:</b></p> <p>Bosnia and Herzegovina, Bulgaria, Cyprus, Czech Republic, Finland, Georgia, Latvia, Liechtenstein, Montenegro, Romania, Serbia, Slovakia, Turkey.</p>
<b>Compulsory medical diagnosis</b> (gender identity disorder or psychological evaluation)	<p><b>27 member States:</b> Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Georgia, Germany<sup>40</sup>, Italy, Latvia, Liechtenstein, Lithuania, Moldova, Montenegro, Netherlands, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Spain*, Sweden, Turkey, Ukraine, United Kingdom.</p> <p><i>* In some regions only.</i></p>
<b>No compulsory medical diagnosis</b>	<p><b>10 member States:</b></p> <p>Belgium, Denmark, France, Greece, Iceland, Ireland, Luxembourg, Malta, Norway, and Portugal.</p>

## c. Divorce requirement

<b>Marriage</b>	<b>Member states</b>
<b>No divorce requirement</b>	<p><b>19 member States:</b></p> <p>Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Ukraine, and the United Kingdom.</p>

40. The German government currently plans to reform LGR legislation. Accordingly, the current procedure of asking for psychiatric assessments as a requirement for LGR would be replaced by an easily accessible self-determination approach.

<p><b>Divorce required or de facto divorce</b></p> <p><i>In some countries, in the absence of recognition of same-sex marriages and/registered partnerships, the existing relationship of a LGR applicant may become legally void or have an unclear status after they access LGR.</i></p>	<p><b>19 member States:</b> Bosnia and Herzegovina, Bulgaria**, Croatia**, Cyprus**, Czech Republic**, Greece, Italy*, Latvia**, Liechtenstein, Lithuania**, Moldova, Montenegro, Poland**, Romania**, Russia, Serbia, Slovakia, Slovenia**, Turkey.</p> <p><i>*Italy: an automatic conversion into a civil partnership is possible for those who want to avail themselves of this possibility, hence mitigating the impact of the divorce requirement.</i></p> <p><i>**in the following countries, a legal void is reported with respect to marital status: Bulgaria, Croatia, Cyprus, Czech Republic, Latvia, Lithuania, Poland, Romania and Slovenia.</i></p>
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## d. Age requirement

Age restrictions	Member States
<p><b>LGR accessible to children</b> (although some restrictions may apply, see below for detailed conditions, where relevant)</p>	<p><b>17 member States</b></p> <p>Austria, Belgium, Croatia, Estonia, France*, Germany, Greece, Iceland, Italy, Luxembourg, Malta, Montenegro, Netherlands, Norway, Portugal, Spain and Switzerland.</p> <p><i>*France: only “emancipated children” upon decision of the judge.</i></p>
<p><b>Self-determination applies</b> (maturity of child is the guiding principle)</p>	<p>Malta, Luxembourg, Spain (in 9 of 17 regions).</p>

## Section II – Good practices

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35. This section includes a selection of national legislation and/or case law about LGR procedure based on self-determination that puts in place quick, transparent and accessible procedures. It also provides examples of countries where discussion on age restrictions regarding LGR have led to revisiting existing legal provisions.

### 1. SELF-DETERMINATION

36. Nine Council of Europe member States have opted for an approach largely based on self-determination, with some limitations in some cases (including age restrictions which is detailed further below). Discussions on the reforms needed to address these limitations continue to take place in those countries and the information reflects the compromises made at the time of legislative change, with the understanding and knowledge of the self-determination models then available.

37. The procedures following the self-determination approach are the most accessible ones where recognition of a person's gender identity is self-defined, and not determined by anyone other than the individual. They do not require compulsory medical intervention, surgery or sterilisation or other intrusive requirements.

#### **Belgium (2018): Legal Gender Recognition Act<sup>41</sup>**

*Abolishment of medical interventions/verifications:* Medical requirements are removed through the 2018 Belgium Gender Recognition Law. LGR is only dependent on a declaration that the applicant is convinced of their gender identity for “a considerable amount of time” (Article 3 para.3) and from the expiration of a waiting period of three to six months (Article 3 para.5).

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41. [https://www.ejustice.just.fgov.be/img\\_l/pdf/2017/06/25/2017012964\\_F.pdf](https://www.ejustice.just.fgov.be/img_l/pdf/2017/06/25/2017012964_F.pdf).



*Procedure:* The applicant makes a declaration of the conviction that the gender mentioned in the birth certificate does not correspond to the intimately experienced gender identity to the civil status officer of the municipality in which the person is entered in the population registry.

#### **Denmark (2014): Act on the Central Register of Persons, 2014<sup>42</sup>**

*Abolishment of medical interventions/verifications:* No medical requirement, no requirement impacting transgender persons' family life. Debates are on-going on the exclusion of children and the inclusion of a six-month waiting period before obtaining LGR, which would *de facto* have the effect of requiring a "real life experience".

*Procedure:* A transgender person files a written application for a new social security number based on their experience of having a gender identity that does not match the recorded gender details. When a new social security number is assigned, the applicant automatically receives a new health card with those details and can request an amended passport, driver's license and birth certificate.

#### **Iceland (2019): Act on Gender Autonomy, 2019<sup>43</sup>**

*Protection against medical interventions/verifications:* The Act prohibits making an intervention, medication, hormonal treatment or other medical treatment, such as psychiatric or psychological therapy, a requirement for changing the registration of sex (Article 4). The Act also ensures that children under the age of 15 can change their registered sex and name in the National Registry with the consent of their parents. If parents' consent is not available, the decision is put before an expert committee (Article 5).

*Procedure:* A request for changing one's registration shall be submitted to Registers Iceland. Alongside a change in sex registration, the applicant has the right to a name change.

#### **Ireland (2015): Gender Recognition Act, 2015<sup>44</sup>**

*Protection against medical interventions/verifications:* The act lists the exhaustive list of requirements of LGR, all relating to simple administrative process without any medical requirements.

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42. [https://www.ft.dk/Rlpdf/samling/20131/lovforslag/L182/20131\\_L182\\_som\\_vedtaget.pdf](https://www.ft.dk/Rlpdf/samling/20131/lovforslag/L182/20131_L182_som_vedtaget.pdf) (in Danish).

43. [https://www.government.is/library/04-Legislation/Act%20on%20Gender%20Autonomy%20No%2080\\_2019.pdf](https://www.government.is/library/04-Legislation/Act%20on%20Gender%20Autonomy%20No%2080_2019.pdf).

44. <https://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html>.

*Procedure:* A person (at least 18 years of age) can apply for a Gender Recognition Certificate in order to have their gender identity recognised by the State. Once a Gender Recognition Certificate is issued, the gender of the person named on the certificate becomes for all purposes the recognised gender from that date onwards. The procedure is free (see below). The provisions on LGR for transgender children (currently possible between 16 and 18 years old but following a complex, burdensome and costly procedures) and the lack of non-binary recognition have been called into question. These issues are currently included in the on-going review of the Gender Recognition Act.<sup>45</sup>

**Luxembourg (2018): Law relating to the modification of the indication of sex and first name (s) in the civil status and amending the Civil Code<sup>46</sup>**

*Protection against medical interventions/verifications:* The law explicitly prohibits sterilisation and other medical requirements (see Article 2, “The fact of not having undergone medical treatment, a surgical operation or sterilisation cannot justify the refusal to grant the request.” There is no mention of a diagnosis nor waiting period.

*Procedure:* The requirements stated in the law (non-cumulative requirements) are the following: to present oneself publicly with the proper gender identity, to be known accordingly by one’s family, friends, professionals or associations; to have obtained the change of one’s first name so that it corresponds to the person’s gender identity. Court procedures for those below the age of five follow specific procedural safeguards (see below).

**Malta (2015): Gender Identity, Expression and Sex Characteristics Act, 2015<sup>47</sup>**

*Protection against medical interventions/verifications:* The law established that “the person shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity” (Article 3 paragraph 4).

*Procedure:* The applicant writes a “clear, unequivocal and informed declaration” that their gender identity does not match their assigned sex in

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45. <https://www.gov.ie/en/press-release/43aef0-minister-doherty-publishes-her-report-on-the-review-of-the-gender-re/>.

46. <https://legilux.public.lu/eli/etat/leg/loi/2018/08/10/a797/jo>.

47. <https://legislation.mt/eli/act/2015/11/eng/pdf>.

the birth record. That is combined with a copy of the original act of birth, details of the sex and first name the applicant wants registered. The law specifically states that “the Notary shall not request any psychiatric, psychological or medical documents for the drawing up of the declaratory public deed”. (Article 5-2)

#### **Norway (2016): Legal Gender Amendment Act, 2016<sup>48</sup>**

*Protection against medical interventions/verifications:* Persons who are resident in Norway and who feel that they belong to a different gender than they are registered with in the population register, have the right to have their legal gender changed (para. 2). The explanatory addendum to the law clarifies that there are no other requirements and that the process is solely based on self-determination.

*Procedure:* Applications to change legal gender are processed by the tax office (population register authority). The Tax Office’s decision in a case concerning a change of legal gender can be appealed to the State Administrator in Oslo and Viken (para.5).

#### **Portugal (2018): Law on the right to self-determination of gender identity and gender expression and to protection of each person’s sex characteristics, 2018<sup>49</sup>**

*Protection against medical interventions/verifications.* The law “establishes the right to self-determination of gender identity and gender expression and the right to protection of the sex characteristics of each person (Article 1). No one may be required to provide proof that they have undergone medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as well as psychological and/or psychiatric treatments” to exercise that right (Article 9). Young people aged 16-18 will be able to access this procedure with some additional limitations (parental consent and a certificate made by a doctor or psychologist attesting the child’s free will and decision-making capacity.

*Procedure:* “An application [is] filed at any civil registry office, indicating the civil identification number and the first name by which the person intends to be identified, with the possibility of requesting a new birth certificate, in which no mention can be made of changing the registration”. (Article 8).

48. <https://lovdata.no/dokument/NL/lov/2016-06-17-46> (in Norwegian).

49. [https://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=2926&tabela=leis&ficha=1&pagina=1&so\\_miolo=](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=2926&tabela=leis&ficha=1&pagina=1&so_miolo=) (in Portuguese).

## Switzerland (2021): Law modifying the Civil Code and Ordinance on Civil Status<sup>50</sup>

*Procedure:* Article 30bCC of the Civil Code provides that “any person may declare to the civil registrar, orally or in writing, that they want the registration of their sex to be changed”. The Code further states that the said declaration does not affect relationships governed by family law. The Ordinance on Civil Status indicates that the declaration is not subject to any conditions other than those referred to in Art. 30b CC.

## 2. AGE LIMITS

38. There have been on-going discussions in some Council of Europe member States about reconsidering age limits for LGR, especially since age-limits may lead to young transgender persons facing rejection, exclusion or other problems from their environment in everyday life. The paragraphs below focus specifically on the steps taken by some States to ensure a more flexible approach to LGR for children.

39. These include States like Malta or Luxembourg where the legal framework on LGR is without an age limit. Emphasis is placed on the maturity and development of the child. Court procedures for those below age 16 (Malta) and for those below age 5 (Luxembourg) follow specific procedural safeguards: In Luxembourg<sup>51</sup>, the law foresees that in the event of disagreement between the parents of a child aged five years, the most diligent parent applies to the competent authority which rules in the interests of the child. In Malta<sup>52</sup>, the child must have parental consent or the consent of the persons exercising parental authority or the tutor in order to initiate the request. The person exercising parental authority, or the legal guardian, must file an application in the registry of the Civil Court requesting the Court to change the recorded sex and the first name of the child with the express consent of the child. When the application is made on behalf of a child, the Court must: (a) ensure that the best interests of the child as expressed in the Convention on the Rights of the Child are the paramount consideration; and (b) give a

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50. See link to the ordinance adopted on 27 October 2021 which entered into force on 1<sup>st</sup> January 2022: <https://www.bj.admin.ch/bj/fr/home/aktuell/mm.msg-id-85588.html>.

51. See : *Loi du 10 août 2018 relative à la modification de la mention du sexe et du ou des prénoms à l'état civil et portant modification du Code civil*, N° 797 du 12 septembre 2018, 2018, paragraph 99.1.

52. Gender Identity, Gender Expression and Sex Characteristics Act (2015), XI of 2015, 14 April 2014, paragraph 7.

due weight to the views of the child having regard to the child's age and maturity.

40. Others have included children while keeping some age limits. Legislation in Norway<sup>53</sup> for example provides that LGR is possible at any age but imposes certain conditions according to age groups. Children between 6 and 16 must apply together with the person or the persons who have parental responsibility of the child. For children under the age of 6, the application must be filed by the person who has the parental responsibility for the child. If the parents have shared custody, but the application is only filled by one of them, the legal gender may nevertheless be changed if this is in the child's best interest.

### 3. COST AND DURATION OF LGR PROCEDURE

#### Quick, transparent and accessible procedures

41. The following section provides examples of reforms that have addressed certain aspects of the principle of "quick, transparent and accessible procedures" for LGR:

##### Costs:

In **Ireland**: Article 8 para.2 of the 2015 Gender Recognition Act foresees that no fee shall be charged by the Minister for examining the application for a gender recognition certificate.

In the **United Kingdom**, the government recently decided in May 2021 to cut the cost of changing one's legal gender from £140 to £5 in order to make gender recognition more affordable. It reportedly based its decision on the fact that in the National LGBT Survey, 34% of participating transgender persons indicated that the cost of applying for a certificate was holding them back from doing so.

##### Duration of the LGR procedure/Timeframe:

In **Malta**, the Gender Identity, Gender Expression and Sex Characteristics Act provides that the process may take no longer than 30 days from the application (notary letter) to the change in the registry. No further medical pre-conditions have to be fulfilled.

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53. Legal Gender Amendment Act 2016 (*Lovom endring av juridisk kjønn*); The Public Registry Act 2016 (*Folkeregisterloven*).

In **Norway**: The Gender Recognition Act grants individuals the right to have their gender changed in public registers and passports through a simple procedure before the National Registry Office, with decisions being subject to appeal.

In **Portugal**, the administrative procedure for LGR provided for by law stipulates that for a change of name and sex, relevant authorities have to give a decision within eight days of receiving the application.



## Section III –

# Concluding remarks: LGR-related issues for further dialogue in Council of Europe member States

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42. This section aims at highlighting some of the main problems related to LGR which may benefit from further discussions between national stakeholders, with Council of Europe facilitation and support. There are clearly distinct legal and practical situations with regard to LGR across Council of Europe member States. Some states have already put in place some advanced models of self-determination. Others have rolled back existing protection by making LGR impossible. The level of protection for LGR achieved at a certain point in time cannot be considered locked once and for all. Like all human rights, it requires adaptation to present-day needs and adjustments of the legal framework according to impact assessments and latest international trends: this could include for example making their LGR self-determination procedure more inclusive for children, non-citizens residing on their territory or open to non-binary and intersex persons. In other countries, priorities may rather focus on establishing (or re-establishing) minimum protection for LGR, starting with providing legal certainty about procedures and/or depathologising the procedure. Peer-to-peer learning and a sliding scale approach could be used, in which the experience of some Council of Europe members States would help other States in moving up their level of protection.



## 1. MOVING AWAY FROM THE LEGACY OF PATHOLOGISATION

43. In the majority of member States, LGR procedures still carry the legacy of pathologisation with medical requirements ranging from forced sterilisation to non-necessary medical procedures, including surgeries and hormonal therapies, undergoing medical diagnosis, psychological appraisals, medically supervised “real-life experience” or other medical procedures or treatment.

44. Requiring sterilisation or irreversible identity change through an operation in the national legislation has been clearly established by the Court as breaching international human rights standards, including Article 8 of the ECHR. The sterilisation requirement is now on its way out, with a decreasing number of countries including such a requirement.

45. Whereas there should not be any coerced medical treatment, the Court’s case law requires and Recommendation CM/Rec(2010)5 calls on member States to provide gender-affirming health services<sup>54</sup> such as hormone treatment, surgery and psychological support to transgender persons and to ensure that they are covered by health insurance<sup>55</sup>.

46. The decision of the World Health Organisation (WHO) to remove transgender-related categories from the Chapter on Mental and Behavioural Disorders of the International Classification of Diseases Version 11 (see the 72nd World Health Assembly (WHA) in 2019)<sup>56</sup> was also a positive step for recognising gender diversity and depathologising it.

47. Despite this evolution, legislation and current discussions on LGR are still dominated by medical considerations in some countries, with LGR being only possible upon medical diagnosis in several countries. Facilitating national and international exchanges between health experts, transgender and intersex civil society and the human rights community may help in moving away from pathologisation: they may help understand why being a transgender person has nothing to do with a mental health condition and why keeping a pathologising approach leads to stigmatisation and the risk of human rights violations.

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54. Explanatory Memorandum to paras. 35-36 of Recommendation CM/Rec(2010)5 with references to the Court’s case-law.

55. Explanatory Memorandum to paras. 35-36 of Recommendation CM/Rec(2010)5 with references to the Court’s case-law.

56. In its previous version - ICD-10 – transgenderism was considered a gender identity disorder in the chapter entitled mental and behavioral disorders. The current version, called ICD-11, ‘gender incongruence’ is defined as a marked and persistent incongruence between a person’s experienced gender and assigned sex.

## 2. REMOVING DIVORCE REQUIREMENT

48. In a relatively large number of Council of Europe member States, a divorce requirement conditions access to LGR, raising issues of compatibility with international human rights law, notably on the right to the protection of private life and non-discrimination (see Section I).

49. Including such a requirement in the law (or in practice) places applicants for LGR in a situation whereby they must choose between their personal self-determination and their right to marriage. In practice, the law makes them renounce their marriage, often against the explicit will of the spouses who wish to remain a legally recognised family unit. Such a requirement has also negative consequences not only for the couple and the acquired rights and protection of the marriage: for the families who have children in their care, the parent who asked for LGR may lose custody rights of the children and the best interest of the children may be at stake.

50. There are however progressive legal and case law developments in Council of Europe member States that have positively addressed these issues: some Council of Europe member States have made it explicit that no one may be required to be single before applying to LGR (see the examples of Denmark, Ireland, Luxembourg, Malta, Norway and Portugal). Some other States' legislation respects the integrity of the existing marriage after LGR (Austria, Belgium, France, Germany, Iceland, Netherlands, Spain, Sweden, Switzerland) and provides for the marriage certificate to be updated accordingly. In the case of Germany, the removal of the divorce requirement in the law came after the Constitutional Court ruled that such a requirement for the purpose of LGR was contrary to the German Constitution, despite the existing option of registered partnership available to same-sex partners. In the Court's view, "The spouses may determine themselves how they will conduct their marriage. If the state pushes spouses towards divorce, this does not only go against the essential characteristic of a marriage as a lasting community of responsibility, but also takes away from marriage the protection guaranteed by Article 6(1) of the German Fundamental Law."<sup>57</sup>

51. These examples may help in reviewing LGR laws that exclude married people and ensure compliance with the Court's jurisprudence highlighting that protection of the acquired rights of marriage needs to be in place, should divorce be required (see *Hämäläinen v. Finland* (2015), Section 1 of this report).

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57. Germany, Constitutional Court, 1BvL 10/05, 27 May 2008, <https://www.icj.org/wp-content/uploads/2012/07/1-BvL-10-05-Federal-Constitutional-Court-of-Germany-English.pdf>.

### 3. MAKING SELF-DETERMINATION-BASED LGR ACCESSIBLE TO CHILDREN

52. Most transgender persons realise that their gender identity does not match their sex assigned at birth before reaching the age of 18.<sup>58</sup> An EU commissioned study further describes how young transgender respondents have “repressed their feelings about their gender identity and delayed coming out for decades rather than years, due to their strong fear of familial rejection or losing their jobs”.<sup>59</sup>

53. International human rights standards<sup>60</sup> are clear in highlighting the need for the best interests of the child to be given prime consideration, also when these interests collide with those of the persons exercising parental responsibility. This includes respecting the child’s right to express views in accordance with age and maturity.

54. Despite this background, relatively few Council of Europe member States have included in their legislation provisions allowing transgender children to have their gender identity legally recognised. While self-determination has been increasingly endorsed for LGR of adults, children are still facing regulations that are based on outdated medical standards or are placing automatic barriers. On the positive side, countries like Malta, Norway or Luxembourg and some regions in Spain have ensured that children have the right to LGR and can exercise this right on the basis of self-determination.

55. While no unified approach on this matter exists, there is a recent evolution to progressively remove age barriers: some States like Finland, Denmark and Sweden have engaged in evaluating the implications of lowering age restriction in an attempt to move away from strict age limits. These discussions together with the positive examples stated above may help other countries willing to re-examine their legislation on this point.

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58. [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-lgbti-equality\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality_en.pdf).

59. [https://ec.europa.eu/info/sites/default/files/legal\\_gender\\_recognition\\_in\\_the\\_eu\\_the\\_journeys\\_of\\_trans\\_people\\_towards\\_full\\_equality\\_sept\\_en.pdf](https://ec.europa.eu/info/sites/default/files/legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_sept_en.pdf).

60. See the UN Convention on the Rights of the Child: the UN Convention on the Rights of the Child (UNCRC): best interests of the child as a primary consideration (Article 3); Non-discrimination (Article 2); Respect for the growing capacity of a child to make decisions about their life (Article 5); right to ‘preserve’ one’s identity (Article 8) ; children’s views to be listened to and given due weight, in accordance with the age and maturity of the child (Article 12).

## 4. INCLUDING NON-BINARY/GENDER-DIVERSE PERSONS IN LGR

56. With human rights law further consolidating the right to change gender from female to male or vice versa, the question has arisen on approaches to be taken on recognising a gender identity that is neither male nor female or is both. In other words, the question of recognising persons who do not fit within the binary system has gained ground.

57. Some member States have introduced legal reforms in order to recognise a non-binary or gender-neutral registration, following principles 3 and 31 of the Yogyakarta Principles +10<sup>61</sup> on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics.

58. Some national courts have already examined issues on non-binary recognition, prompting legislative changes. The below includes examples of countries allowing the registration of gender markers other than male or female, using gender neutral or no gender markers in official documents.

- ▶ Austria: Option “diverse” is available for intersex persons since 2019 (Constitutional Court 15 June 2018 (G77/2018-9)).
- ▶ Belgium: The absence of non-binary recognition in law violates the constitutional right to equality and non-discrimination (Constitutional Court, 19 June 2019 (judgment no. 99/2019<sup>62</sup>)). A new law is now being prepared which would remove all reference to sex in identity documents ID.<sup>63</sup>
- ▶ Germany: Option “diverse” or no sex marker available since 2018 for intersex persons (Federal Constitutional Court, 10 October 2017 (1 BvR 2019/16)).
- ▶ Iceland: Gender neutral registration. Persons registering their gender as “X” are allowed to take gender neutral family names in lieu of patro- and matronymics that designate the person as being someone’s son or daughter (Article 6 of the Act on Gender Autonomy<sup>64</sup>).
- ▶ Malta: Option “X” available since 2018.

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61. See <https://yogyakartaprinciples.org/principle-3/> and [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf).

62. <https://www.const-court.be/public/e/2019/2019-099e-info.pdf>.

63. <https://www.lesoir.be/409408/article/2021-11-30/le-gouvernement-federal-zsupprime-le-genre-de-la-carte-didentite>.

64. See <https://www.althingi.is/altxt/stjt/2019.080.html>.

- ▶ Netherlands: Option “X” is possible through a judicial procedure since 2018. Some changes to stop registering gender have already been made by local councils of cities like Amsterdam and Utrecht. There are currently discussions in the Dutch Parliament to reform the registration of sex/gender markers.

59. Research and discussions are on-going on what are the most appropriate measures to take with regard to making non-binary recognition possible. For example, some of the measures listed above have also been criticized for their stigmatising effects. In the context of its examination of the human rights of intersex persons, Parliamentary Assembly discussed this issue and recommended “to consider making the registration of sex on birth certificate and other identity documents optional for everyone”<sup>65</sup> In its 2018 study on non-binary gender registration models in Europe<sup>66</sup>, ILGA-Europe detailed models for third gender marker or no gender marker options while posing the human rights implications of the option chosen and being sensitive to categorisation. Experience from member states together with the studies and recommendations already available could help those States which are considering such reforms.

## 5. MAKING LGR ACCESSIBLE TO NON-NATIONALS RESIDING IN THE COUNTRY

60. Human rights protection extends to everyone whether they are nationals or not. The recent Court judgment, *Rana v. Hungary* (2020)<sup>67</sup>, reminded member States of that fact: the Court ruled that restricting access to LGR to a transgender applicant with no birth certificate from Hungary was an unjustifiably restrictive practice which is in breach of the member state’s positive obligation to protect private life under Article 8 of the ECHR. In the case in question, the applicant had been granted refugee status precisely because the person had been persecuted on the grounds of gender identity in the country of origin. The Court hence acknowledged the obstacles faced by migrants approaching their country of residence for changing their registered gender. The consequence of such a ruling may be subject to further discussions among Council of Europe member States, the majority of which give access to LGR only to their nationals.

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65. See PACE Resolution 2191 (2017) available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232>.

66. [https://www.ilga-europe.org/sites/default/files/non-binary\\_gender\\_registration\\_models\\_in\\_europe\\_0.pdf](https://www.ilga-europe.org/sites/default/files/non-binary_gender_registration_models_in_europe_0.pdf).

67. *Rana v. Hungary* (application no. 40888/17, ECtHR), 16 July 2020.

61. Positively, some Council of Europe members States such as Germany, Greece, France, Malta, Luxembourg and Switzerland enable refugees and stateless persons to change their name and/or gender, while Iceland and Luxembourg extend this right to anyone seeking asylum. The Netherlands, Norway and Belgium also enable people born abroad who are not permanent residents or citizens (migrants and foreign residents) to access LGR.

## **6. COMPREHENSIVE APPROACH TO LGR AND ITS IMPLEMENTATION**

62. How LGR is experienced by those concerned depends on a range of laws, policies, regulations, administrative procedures and court rulings that go beyond those specifically about LGR, and include provisions relating to many other areas of life, such as education, employment, health, marriage, child custody, privacy etc.

63. On its own, legal gender recognition does not eliminate discrimination against transgender, intersex and gender-diverse persons. It is also necessary to address the discrimination and violence that transgender people face. In a context where stigma prevails against transgender persons, even when progressive legal provisions exist, implementation practices can still impose unjustified, abusive or discriminatory requirements.

64. Measures in countries with comprehensive legal frameworks on LGR, such as Malta and Portugal, have a broad focus on human rights and the application of gender recognition to other areas of life such as privacy, health and protection from discrimination. They also include comprehensive provisions for implementation with concrete and targeted steps while providing remedies and redress if violations occur.



## Section IV – Recommendations

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65. Overall, this thematic review process has shown solid benefits in supporting planned or on-going reforms in the field of LGR, enhancing the visibility of the human rights issues raised by LGR, facilitating dialogue between all stakeholders and importantly, giving a voice to transgender and intersex persons in the discussions of the issues that affect them in their lives.

66. Based on the lessons learned from this first review, some recommendations are hereby included regarding improvement of legislation and practice for LGR:

### **GENERAL RECOMMENDATIONS:**

67. Comprehensive equal treatment legislation should be accompanied by appropriate policy measures for its implementation and coupled with regular reviews to ensure effective responses to evolving human rights challenges of transgender, intersex and gender-diverse persons.

68. Member States which currently have no anti-discrimination legislation in place specifically protecting gender identity should move towards appropriate legal and policy protection of these grounds.

69. Where hate speech and hate crime legislation does not explicitly recognise criminal acts on the basis of motives linked to the victim's gender identity or sex characteristics, member States should address this gap by legislation that makes it possible to consider these motives as "aggravating circumstances" and giving specific attention to the protection of victims in accordance with existing international standards and guidelines.



## LEGAL GENDER RECOGNITION SPECIFIC RECOMMENDATIONS:

70. In line with the Court's case law and following the example of a considerable number of member States, provisions requiring sterilisation or any other compulsory medical treatment as requirements for LGR should be abolished. A clear separation should be made between the legal gender recognition process and any sex- or gender-related medical care that a person freely decides to undertake based on informed consent. Such treatment should be accessible independently of medical status, age or migration status.

71. In order to better understand the issue of depathologisation in LGR procedures, including the issue of medical treatment, mandatory mental-health assessments and diagnosis, member States should facilitate discussions between transgender persons, intersex persons, civil society organisations representing them, health professionals, human rights experts and authorities.

72. Member States should examine their civil status requirements for LGR to ensure that such requirements do not affect the acquired rights of the spouses and children, and that a solution to protect those rights is in place, in line with the Court's jurisprudence.

73. Member States should ensure that LGR procedures for children centre on the best-interest-of-the-child principle and should review explicit or implicit age restrictions that may obstruct that principle in order to ensure children's access to legal recognition, health and security.

74. In order to capitalise on existing experience of some member States with regard to LGR of **non-binary, gender-diverse and intersex persons**, member States may facilitate inclusive discussion on this topic, and review *inter alia* the necessity of sex/gender markers in official identity and other documents.

75. Member States should engage in the examination of existing restrictions to non-nationals' access to LGR in light of the Court's judgment *Rana v. Hungary* (2020).

# Appendix: key terms and abbreviations

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## KEY TERMS<sup>68</sup>

**Gender identity:** is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech and mannerisms.

**Gender expression:** social expression of an individual's gender identity, including the use of name, pronouns, clothing, haircut, behaviour, voice, or body characteristics.

**Gender/Sex marker:** Legal sex appearing on documents (birth certificates, identification documents, etc.).

**Intersex:** Persons born with biological sex characteristics that do not fit societal norms or medical definitions of what makes a person male or female. Sometimes, a person's intersex status is detected at birth, sometimes it only becomes apparent later in life notably during puberty. There are many forms of intersex, it is an umbrella term rather than a category.

**Legal Gender Recognition:** is understood as the legal recognition of a person's gender identity, including name, sex/gender marker and other gender-related information, which may be reflected in surnames, social security numbers/personal identification numbers, titles etc., in public registries, records, identification documents (identity cards, passports, driving licences) and other similar documents (educational certificates etc.).

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68. Source: Council of Europe's Glossary on Sexual Orientation, Gender Identity or Expression and Sex Characteristics available at <https://rm.coe.int/glossary-on-sogiesc-because.words-matter-en/1680a1f110>.

**Self-determination:** a procedure to access legal gender recognition based on a declaration (such as a statutory or notary statement) by the person concerned, with no additional requirements.

**Sex:** refers to the biological characteristics used to define humans as female or male. These sets of biological characteristics are not mutually exclusive.

**Transgender:** is an umbrella expression referring to persons who have a gender identity different from predominant social expectations based on the person's sex assigned at birth.

## ABBREVIATIONS

<b>CDADI:</b>	Steering Committee on Anti-Discrimination, Diversity and Inclusion
<b>CM/Rec(2010)5:</b>	Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity
<b>FFPN:</b>	European Governmental LGBTI Focal Points Network
<b>ECHR:</b>	European Convention on Human Rights
<b>ECRI:</b>	European Commission against Racism and Intolerance
<b>EU:</b>	European Union
<b>FRA:</b>	Fundamental Rights Agency of the European Union
<b>INGOs:</b>	International Non-Governmental Organisations
<b>LGBTI:</b>	Lesbian, Gay, Bisexual, Transgender and Intersex persons
<b>LGR:</b>	Legal Gender Recognition
<b>GT-ADI-SOGI</b>	CDADI working group on sexual orientation and gender identity
<b>NGOs:</b>	Non-Governmental Organisations
<b>PACE:</b>	Parliamentary Assembly of the Council of Europe
<b>SOGIESC:</b>	Sexual orientation, gender identity or expression and sex characteristics
<b>the Court:</b>	European Court of Human Rights
<b>WHO:</b>	World Health Organisation

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