

## 1. Introduction

We submit that the case of *Semenya v. Switzerland* raises important issues in respect of the fundamental rights of professional female athletes with variations of sex characteristics (also sometimes referred to as female intersex athletes), such as the applicant, to respect for their bodily integrity, mental and physical health, reproductive rights, and access to the profession of their choice, as protected under the prohibition of torture and inhuman or degrading treatment (Article 3 ECHR), and the right to respect for private life (Article 8 ECHR), taken alone and in conjunction with the prohibition of discrimination (Article 14 ECHR). It also raises important issues concerning the position of private sports organisations under the Convention, and international human rights law more generally.

This submission first sets out the societal background against which the case should be assessed (part 2). In part 3, it addresses the human rights accountability in a sports context under the ECHR. In part 4, this submission argues that hormonal eligibility criteria for sports competitions violate the individual's right to bodily and mental integrity as protected by Article 3 ECHR. It proceeds to argue, in part 5, that the scope of the State's positive obligations under Article 8 ECHR needs to be interpreted as encompassing a duty to ensure the effective protection of a professional athlete's bodily integrity. In part 6, we set out why hormonal eligibility criteria that are directed at female athletes with a variation of sex characteristics amount to discrimination in breach of Article 14 ECHR in conjunction with Articles 3 and 8 ECHR.

## 2. Societal background

### 2.1 Persisting structural sex and gender discrimination in sports

While modern society is currently undergoing significant changes in the ways sex and gender identity are understood, recognised and organised (see *infra*),<sup>2</sup> rigid gender stereotypes still persist. This is also (and arguably especially) true for the world of professional sports. As the United Nations High Commissioner for Human Rights has pointed out, women and girls are structurally confronted with exclusion and discrimination in sports, which can be due to reasons both external and internal to sports.<sup>3</sup> Importantly, the High Commissioner has also pointed out that broader sociocultural gender norms – such as culturally constructed expectations about a woman's sex characteristics – hinder women and girls from participating in sport.<sup>4</sup> While this structural discrimination affects *all* women, trans and intersex women are especially vulnerable. Indeed, in their recent report on LGBTI (lesbian, bisexual, trans and intersex) women in sport, ILGA Europe, OII Europe,<sup>5</sup> EL\*C<sup>6</sup> and EGLSF<sup>7</sup> also note that sport is “a social environment where sexism and misogyny are still present and deeply linked with the history, structure and dynamics of participation of women in sport”.<sup>8</sup> They held that, bearing in mind this structural sexism in sports, it is “not surprising that women perceived as non-conforming in society at large, due their sexual orientation, gender identity and/or expression, or sex characteristics (SOGIESC), are exposed to additional stigma and societal pressure”.<sup>9</sup>

The start of women's participation in international professional sports only dates back to the beginning of the 20<sup>th</sup> century, and since then, women's full inclusion has been hindered by cultural expectations about women's bodies and appearance.<sup>10</sup> Moreover, the start of women's participation in professional sports also coincided with so-called sex verification tests, since the participation of women was managed through the creation of a strict binary division of athletes.<sup>11</sup> In other words, women's participation in sports has always co-existed with some degree of suspicion towards 'overly masculine' female athletes and the 'policing' of women's bodies. Indeed, while elements such as dominance, strength and stamina are traditionally celebrated in

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<sup>2</sup> S. Patel, “Gaps in the protection of athletes gender rights in sport – a regulatory riddle”, *The International Sports Law Journal* 2021.

<sup>3</sup> UN High Commissioner for Human Rights, ‘Intersection of race and gender discrimination in sport’, A/HRC/44/26, p. 2.

<sup>4</sup> *Ibid.*, p. 3.

<sup>5</sup> Organisation Intersex International Europe.

<sup>6</sup> EuroCentralAsian Lesbian\* Community.

<sup>7</sup> European Gay and Lesbian Sport Federation.

<sup>8</sup> ILGA Europe, OII Europe, EL\*C and EGLSF, “LGBTI women in sport: violence, discrimination and lived experiences”, p. 5, available at: <https://oiieurope.org/wp-content/uploads/2021/08/20210810-violence-and-discrimination-against-LGBTI-women-in-sport-2.pdf>.

<sup>9</sup> *Ibid.*, p. 6.

<sup>10</sup> UN High Commissioner for Human Rights, ‘Intersection of race and gender discrimination in sport’, A/HRC/44/26, p. 6-7.

<sup>11</sup> *Ibid.*, p. 7.

sports, they are still predominantly associated with masculinity and in turn, are seen as an advantage in sports.<sup>12</sup> Historic methods of sex verification of female athletes have been strongly criticised for their humiliating nature and inaccuracy.<sup>13</sup> For instance, within the context of athletics, methods ranged from mandatory physical examinations of female athletes to mandatory genetic testing, predominantly focusing on the presence of a Y chromosome (which was wrongly seen as ‘typically’ male and wrongly seen as producing athletic advantage).<sup>14</sup> Later testing methods shifted from mandatory chromosomal testing to hormonal testing (i.e. the level of androgens (testosterone)) on a suspicion based model.

## 2.2 The erroneous universality of binary sex and rising international attention for the bodily integrity of persons with variations of sex characteristics

While sex-testing policies based on stereotypical considerations of womanhood ultimately affect *all* women athletes, they especially target female athletes with variations in sex characteristics. In most societies, human beings are discretely ‘sexed’ into two categories, male and female, leading to the construction of ‘sex’ as a binary notion. However, between at least 1 and 1.7% of the population are born with one or more natural variations of sex characteristics.<sup>15</sup> Persons with variations of sex characteristics thus show that strict and universal sex bipolarity does not exist in human nature, even if it does exist in culture or cultural norms. In other words, standards for ‘normality’ and ‘abnormality’ regarding the presence of certain sex characteristics (such as hormonal levels) in males and females deny the natural, congenital variations that human bodies can show.

Over the last decade, several institutional human rights actors have raised attention for the human rights violations that many people with variations in sex characteristics are confronted with. Central to the discussion is the protection of bodily integrity. Indeed, variations of sex characteristics cannot be explained satisfactorily under the essentialist binary theory of sex, revealing inner contradictions in the theoretical framework.<sup>16</sup> The dominant approach has therefore consisted of surgically or hormonally modifying the ‘abnormality’ shortly after birth, or sometimes during adolescence, to bring the individual concerned in accordance with the binary.<sup>17</sup> Persons with variations of sex characteristics have thus routinely been subjected to medical and surgical sex ‘normalising’ treatments without their personal prior and full informed consent, even though they do not usually face actual health problems due to their status. Several UN bodies have expressed concerns about non-consensual treatment of persons with variations of sex characteristics and have increasingly called for a legal prohibition of deferrable surgical and other medical treatment on children with variations of sex characteristics until they reach an age when they can provide their free, prior and informed consent.<sup>18</sup> Importantly, in October 2017, the Council of Europe Parliamentary Assembly adopted a comprehensive and ground-breaking resolution 2191(2017) “Promoting the human rights of and eliminating discrimination against intersex people”, which also called for a legal prohibition of deferrable sex ‘normalising’ treatment.<sup>19</sup>

## 2.3 Hormonal eligibility criteria for women’s sports competitions and their scientific basis

As Seema Patel points out, evolutions in modern understandings of human variation in sex characteristics and the recognition of human diversity from a human rights perspective has “created tensions with the traditional binary structures of sport”, triggering “a global debate mostly framed around science and athletic advantage” that tends to overlook the human rights of the affected athletes.<sup>20</sup> It is within this context that current eligibility criteria for women’s sports competitions, like the World Athletics ‘Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)’,<sup>21</sup> have to be

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<sup>12</sup> S. Patel, *Gaps in the protection of athletes gender rights in sport – a regulatory riddle*, *The International Sports Law Journal* 2021. As the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the UN Working Group on the issue of discrimination against women in law and in practice, point out in their joint letter to the president of World Athletics: “natural physical traits associated with above-average performance by elite male athletes are applauded and admired” (available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gid=24087>, p. 4).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> EU Fundamental Rights Agency, “A long way to go for LGBTI equality” 2020, 58; Council of Europe Commissioner for Human Rights, *Human Rights and Intersex People*, 2015, available at [https://rm.coe.int/16806da5d4\\_16](https://rm.coe.int/16806da5d4_16).

<sup>16</sup> J. T. Weiss, “The Gender Caste System: Identity, Privacy, and Heteronormativity”, *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 2001, Vol. 10, p. 163.

<sup>17</sup> M. Travis and F. Garland, “Legislating Intersex Equality: Building the Resilience of Intersex People through Law”, *Legal Studies* 2018, <https://doi.org/10.1017/lst.2018.17>.

<sup>18</sup> For a thorough discussion of all relevant international materials, we refer to our submission as third party intervener in the case of M. v. France. See [https://hrc.ugent.be/wp-content/uploads/2021/02/Tierce-intervention-M-c.-France-24-fe%CC%81vriier\\_FINAL.pdf5\\_.pdf](https://hrc.ugent.be/wp-content/uploads/2021/02/Tierce-intervention-M-c.-France-24-fe%CC%81vriier_FINAL.pdf5_.pdf). We also refer to the submission by ILGA Europe, OII Europe and C.I.A. in the same case for testimonials by persons affected by non-consensual ‘normalising’ treatment, available at [https://oii.europa.org/wp-content/uploads/2021/03/M.-v-France-Submission-\\_-final.pdf](https://oii.europa.org/wp-content/uploads/2021/03/M.-v-France-Submission-_-final.pdf). Switzerland has received such recommendation by several UN Treaty Bodies, i.e. CAT, CRC, CEDAW and HRC.

<sup>19</sup> Parliamentary Assembly of the Council of Europe, Resolution 2191 (2017) ‘promoting the human rights of and eliminating discrimination against intersex people’, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232>.

<sup>20</sup> S. Patel, “Gaps in the protection of athletes gender rights in sport – a regulatory riddle”, *The International Sports Law Journal* 2021.

<sup>21</sup> Available at: <https://www.worldathletics.org/news/press-release/questions-answers-iaaf-female-eligibility-reg>.

situated. On the basis of these rules, athletes with a certain variation in sex characteristics,<sup>22</sup> who want to compete in the female category of a certain event,<sup>23</sup> must not only be legally recognised as female or 'intersex' (or equivalent), but must also reduce blood testosterone levels to below 5 nmol/L for a continuous period of at least six months, and as long as they wish to remain eligible to compete.<sup>24</sup> The standard way of reducing natural testosterone levels is the use of hormonal contraceptives.<sup>25</sup> While the policy does not foresee the possibility of forced hormonal treatment, it does have for effect the exclusion of the athletes concerned as long as they do not comply with the requirements. The policy is justified on the basis that the affected athletes allegedly have a significant performance advantage over other women whose hormonal levels come within the 'normal' female range.<sup>26</sup> However, ever since the eligibility criteria were adopted, the underlying scientific evidence has been strongly contested.<sup>27</sup> For instance, in September 2021, the authors of a 2017 study that was cited by World Athletics as "peer-reviewed data and evidence from the field",<sup>28</sup> published a statement correcting their earlier conclusions. According to the authors, "*there is no confirmatory evidence for causality in the observed relationships [between levels of testosterone and performance advantage] reported. We acknowledge that our 2017 study was exploratory, and our intent was not to prove a causal inference*".<sup>29</sup> Other experts have stated that, while one's level of testosterone is connected to sporting advantages and women with variations of sex characteristics might have natural testosterone levels exceeding the 'typical' female range, the extent of any performance advantage remains unclear. Indeed, due to genetic factors the ability to process these higher levels of testosterone may be compromised.<sup>30</sup> The absence of a demonstrated relationship of causality between high levels of natural testosterone in women and their sports performance was also pointed out in a letter addressed to the president of World Athletics by the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the UN Working Group on the issue of discrimination against women in law and in practice (hereafter: the UN Special Rapporteurs and Working Group).<sup>31</sup>

### 3. Human rights accountability in sports under the ECHR

#### 3.1 *Lex sportiva* – a private legal sporting order

The world of sports is very dense in rules, and a large portion of those rules are not issued by public authorities, but rather by private sports governing bodies (SGB). This private regulation is enforced by private adjudicating bodies. Private sports regulation as well as private sports adjudication exist at the national as well as the transnational level, with the Court of Arbitration for Sport (CAS) embodying transnational private sports adjudication. The term *lex sportiva*<sup>32</sup> – in analogy with *lex mercatoria* – was coined to suggest the existence of a transnational system beyond State control. That the avoidance of State control is the central purpose, is quite accurately captured in the statement of the International Olympic Committee (IOC) president in 1909: "*The goodwill of all the members of any autonomous sport grouping begins to disintegrate as soon as the huge, blurred face of that dangerous creature known as the state makes an appearance*".<sup>33</sup> Indeed, *lex sportiva* is viewed "as a positive self-regulating law rather than an 'ensemble of social norms which can be transformed into law only by the juridical decisions of nation-states'".<sup>34</sup> FIFA has also been cited as an example of a supranational SGB that has been successful at blocking

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<sup>22</sup> See para. 2.2 (a) (i) of the regulations.

<sup>23</sup> See para. 2.2 (b) of the regulations. Note that experts have criticised the arbitrariness of the selection of the events for which the eligibility criteria apply. They point out that there is no scientific basis for such selection. See for instance S. Stebbings, A. Herbert, S. Heffernan, R. Pielke Jr. and A. Williams, "The BASES Expert Statement on Eligibility for Sex Categories in Sport: DSD Athletes", available at [https://www.bases.org.uk/imgs/8931\\_bas\\_bases\\_tses\\_summer\\_2021\\_online\\_pg\\_12\\_130.pdf](https://www.bases.org.uk/imgs/8931_bas_bases_tses_summer_2021_online_pg_12_130.pdf).

<sup>24</sup> See para. 2.3 of the regulations.

<sup>25</sup> However, more invasive and irreversible procedures such as a surgical gonadectomy also occur.

<sup>26</sup> See para. 1.1 (d) of the regulations.

<sup>27</sup> Indeed, the 2011 version of the regulations was suspended for two years by the Court of Arbitration for Sports in the case of *Dutee Chand v. Athletics Federation of India and the IAAF*, 2014/A/3759. See also S. Bermon, P-Y Garnier, "Correction: Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes", *Br. J. Sports Med.* 2021, Vol. 55, No. 17.

<sup>28</sup> See para. 1.1 (d) of the regulations.

<sup>29</sup> S. Bermon, P-Y Garnier, "Correction: Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes", *Br. J. Sports Med.* 2021, Vol. 55, No. 17.

<sup>30</sup> S. Stebbings, A. Herbert, S. Heffernan, R. Pielke Jr. and A. Williams, "The BASES Expert Statement on Eligibility for Sex Categories in Sport: DSD Athletes", available at [https://www.bases.org.uk/imgs/8931\\_bas\\_bases\\_tses\\_summer\\_2021\\_online\\_pg\\_12\\_130.pdf](https://www.bases.org.uk/imgs/8931_bas_bases_tses_summer_2021_online_pg_12_130.pdf).

<sup>31</sup> Letter by the Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Working Group on the issue of discrimination against women in law and in practice, OL OTH 62/2018, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24087>, p. 2.

<sup>32</sup> A. Duvan, "The FIFA Regulations on the Status and Transfer of Players: trans-national law making in the shadow of Bosman", Asser Institute, Asser research paper 2016-06, 2016, p. 24.

<sup>33</sup> P. De Coubertin, *Une campagne de vingt-et-un ans (1887-1908)*, Paris: education physique, 1909, p. 152.

<sup>34</sup> T. Serby, "Sports corruption: Sporting autonomy, lex sportiva and the rule of law.", *ESLJ* 2017, Vol. 15(1), p. 2.

government interference, whether it be judicial action against (the officials of) football associations or legislation adopted by national parliaments.<sup>35</sup>

Private sport rules have an immense impact on the lives and careers of athletes. Yet these are not the result of a democratic process or subjected to democratic control as is the case for State-issued rules. What happens is that a collection of non-State actors establishes rules and standards that are accepted as legitimate by actors who have no say in the definition of these rules.<sup>36</sup> In this autonomous legal sporting order, the SGBs combine the roles of both legislative and executive powers.<sup>37</sup> It is, for instance, included in the Olympic Charter that sports organisations have the right to freely establish and control the rules of sports as well as to determine their own structure and governance.<sup>38</sup> The SGBs' own dispute resolution mechanisms in combination with the CAS act as the judicial power within this system. A common trait of arbitration is that tribunals can adjudicate claims arising between parties that have signed an arbitration agreement. With such an agreement, they consent to assigning disputes that would arise between them to said body. Yet commentators have noted that in the context of sports, such consent is not always given freely. Oftentimes, athletes are forced to sign agreements with 'forced' arbitration clauses as a prerequisite to participate in their respective sport.<sup>39</sup>

### 3.2 A private legal order risks becoming a human-rights-lawless zone

Mitten and Opie have correctly identified the body of *lex sportiva* as an "example of global legal pluralism without States".<sup>40</sup> Scholars have flagged the problematic consequences of this exceptionalism for the protection of human rights. Indeed, while States are legally obliged to guarantee human rights compliance at all levels of rule-making and adjudication, SGBs are not. The lack of democratic accountability moreover increases their room for non-compliance with human rights standards. Foster called out *lex sportiva* as a mere "cloak for continued self-regulation...[which] opposes a rule of law in regulating international sport".<sup>41</sup> Through forced arbitration, sports governing bodies have been able to unilaterally regulate the global labour markets for players. When Schwab states that "Players are people first, and athletes second"<sup>42</sup>, he signals this untenability of sports as an 'autonomous human rights-less' bubble. Much rather, he argues, respect for human rights ought to be "an indispensable element of any effective governance system"<sup>43</sup> Similarly, other commentators have argued that the rights of athletes should be considered in every phase of the regulation of sports,<sup>44</sup> just like human rights of all individuals have to be considered in every instance of norm making. Having access to "coherent and credible mechanism for the adjudication of human rights disputes arising within sport" is considered an essential pillar of such consideration of human rights in sports.<sup>45</sup>

The inherent threat to human rights has also been affirmed by several special procedures of the UN Human Rights Council. For instance, in their aforementioned joint letter to the president of World Athletics, the UN Special Rapporteurs and Working Group signalled that both the IAAF eligibility criteria as well as procedures for their implementation appear to contravene international human rights standards.<sup>46</sup> The CAS has been applying standards resembling human rights, such as a prohibition of discrimination, but a general lack of expertise on human rights among CAS arbiters has been cited as one of the main obstacles to settling human rights claims through the tribunal.<sup>47</sup> It is submitted that the present case offers a welcome opportunity for the Court to indirectly offer human rights guidance to the CAS. It is furthermore submitted that bringing areas that attempt to circumvent human rights protection within the reach of the Convention, merits to be a priority concern of the ECtHR.

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<sup>35</sup> H.E. Meier and B. Garcia, "Protecting private transnational authority against public intervention: FIFA's power over national governments.", *Public Administration* 2015, Vol. 93.4, p. 895.

<sup>36</sup> *Ibid.*, p. 891.

<sup>37</sup> A. Duval, "What *Lex Sportiva* Tells You About Transnational Law." *The many lives of transnational law. Critical engagements with Jessup's bold proposal*, 2019, p. 9.

<sup>38</sup> Rule 5, Fundamental Principles of Olympism, Olympic Charter (in force as from 17 July 2020). Available at [https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf?\\_ga=2.49727023.868074147.1632408403-620011724.1632408402](https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf?_ga=2.49727023.868074147.1632408403-620011724.1632408402).

<sup>39</sup> International Olympic Committee (2017) Olympic Charter, Rule 61(2); FIFA (2018) FIFA Statutes, Article 57(1); UEFA (2018) UEFA Statutes, Article 60; 18 IAAF (2017) 2017 Constitution, Article 20(1); Casini (2012), p. 1322.

<sup>40</sup> M. J. Mitten, and H. Opie, "Sports law": implications for the development of international, comparative, and national law and global dispute resolution." In *Lex Sportiva: What is Sports Law?*, TMC Asser Press, 2012, p. 173-222.

<sup>41</sup> K. Foster, "Is there a global sports law? Entertain Sports Law", 2003, J 2(1):1-18. <https://doi.org/10.16997/eslj.146>.

<sup>42</sup> B. Schwab, "Embedding the human rights of players in world sport", *Int Sports Law J* 2018, Vol. 17, p. 214, available at <https://doi.org/10.1007/s40318-018-0128-9>.

<sup>43</sup> *Ibid.*, p. 215.

<sup>44</sup> S. Patel, "Gaps in the protection of athletes gender rights in sport – a regulatory riddle", *The International Sports Law Journal* 2021.

<sup>45</sup> D. West, "Revitalising a phantom regime: the adjudication of human rights complaints in sport.", *The International Sports Law Journal* 2019, Vol. 19(1), p. 3.

<sup>46</sup> CAS 2018/O/5794 Mokgadi Caster Semenya v. The International Association of Athletics Federation (IAAF) and CAS 2018/O/5798 Athletics South Africa v. The International Association of Athletics Federation (IAAF), para. 553.

<sup>47</sup> J. Ruggie, "For the Game. For the World. FIFA and Human Rights" 2016, p. 26, available at <https://www.hks.harvard.edu/centers/mrcbg/programs/crj/research/reports/report68>.

### 3.3 ECtHR monitoring of human rights compliance in sports

The ECtHR has been praised – in line with a few national courts – for its track record in adjudicating cases that would “otherwise fall exclusively within the sports domain”.<sup>48</sup> The Court has earlier taken a critical stance toward *lex sportiva*, when it confirmed in *Mutu and Pechstein v. Switzerland* (paras. 114-115) that the acceptance of a CAS arbitration clause could not be considered to be freely consented to, given the restrictive implication of non-acceptance on the applicant athlete’s professional life. In the same case, the Court applied Article 6 ECHR to the CAS. In *Ali Riza and others v. Turkey* (para. 180), the Court has confirmed that the specificities of sports arbitration do not justify depriving athletes of fair trial guarantees. Beyond fair trial guarantees, the Court has moreover found violations of Article 10 ECHR on account of sanctions imposed by the Turkish Football Federation (*Sedat Doğan v. Turkey*, *Naki and Amed Sportif Faaliyetler Kulübü Derneği v. Turkey* and *Ibrahim Tokmak v. Turkey*).

The Court is respectfully invited to now apply similar critical ECHR scrutiny to substantive sports rules, as applied by the CAS. While the involvement of the Swiss civil courts is the formal anchor point for jurisdiction, substantively the case at hand is about rules that are part of the private *lex sportiva*. It is submitted that it would be of great value for human rights protection in sports in Europe and beyond, if the Court in its ruling in the present case could give strong incentives to SGBs and sports adjudicating bodies toward robust human rights protection. While the Court will be ruling on the facts of the case, the impact of the ruling will be much broader. For private sports bodies, as well as for state courts monitoring them, the judgment in this case is likely to become a central reference point concerning the role of human rights standards in sports. As such it has the potential to strengthen - or alternatively to disable – dynamics calling for increased human rights protection for athletes.

#### 4. Mandatory (hormonal) treatment as a violation of Article 3

Taking into account this need to review substantive sports rules, we respectfully submit that hormonal eligibility criteria for participation in female sports competitions, that effectively lead to mandatory medical treatment, amount to inhuman and degrading treatment, which is prohibited by Article 3 ECHR. When deciding on whether a certain practice or treatment falls within the scope of Article 3, the Court has held that the “ill-treatment must attain a minimum level of severity”.<sup>49</sup> In assessing whether such treatment meets this minimum, the Court has looked to “the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim”.<sup>50</sup> Furthermore, the Court has held that “the infliction of psychological suffering...can be qualified as degrading when it arouses in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them”.<sup>51</sup>

Whilst our submission focuses on the lives of female athletes with a variation of sex characteristics, it is important first to contextualise this group of individuals in the broader discriminatory context they face. As outlined above (2.2), it remains common practice for persons with a variation of sex characteristics to be targeted from birth as requiring medical procedures to ‘normalise’ them. A rapidly growing number of UN Member States, including Switzerland, have been notified that they must adopt a legal framework which addresses the multiple human rights violations experienced by those who have been forced to undergo sex ‘normalising’ treatment. We submit that the mandatory medical treatment female athletes with a variation of sex characteristics must undergo to prevent being banned from their competition is an extension of this ‘normalisation’. Indeed, such forced intervention into an athlete’s bodily integrity results in stigmatisation and psychological suffering.

It is not disputed that non-compliance with hormonal eligibility criteria leads to the effective exclusion from participation in a number of female sports competitions. The affected female athletes with variations of sex characteristics still maintain the possibility to exercise their profession as long as they undergo (hormonal) medical treatment, predominantly by taking contraceptives.<sup>52</sup> In its judgment in *V.C. v. Slovakia*, which concerned the forced sterilisation of Roma women, the Court attached significant importance to the protection of meaningful informed consent (‘free will’) under Article 3 and Article 8 of the Convention (para. 112), especially taking into account the impact of the treatment concerned on the applicant’s reproductive health status. In its assessment of the applicant’s claim under Article 3, the Court noted that “sterilisation constitutes a major interference with a person’s reproductive health status. As it concerns one of the essential bodily functions of human beings, it bears on manifold aspects of the individual’s personal integrity including his or her physical and mental well-being and emotional, spiritual and family life. It may be legitimately performed at the request of the person concerned, for example as a method of contraception, or for therapeutic purposes where the medical necessity has been convincingly

<sup>48</sup> D. West, “Revitalising a phantom regime: the adjudication of human rights complaints in sport.”, *The International Sports Law Journal* 2019, Vol. 19(1), p. 6.

<sup>49</sup> ECtHR 12 May 2015, App. No. 73235/12, *Identoba and Others v. Georgia*, para. 65.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> Sometimes irreversible surgeries, such as gonadectomies or even clitoridectomies, are performed. In the case of athlete Annet Negesa, a gonadectomy was performed without her full and prior informed consent. See the report by Human Rights Watch, available at [https://www.hrw.org/sites/default/files/media\\_2020/12/lgbt\\_athletes1120\\_web.pdf](https://www.hrw.org/sites/default/files/media_2020/12/lgbt_athletes1120_web.pdf); as well as the report by ILGA Europe, OII Europe, EL\*C and EGLSF, “LBTI women in sport: violence, discrimination and lived experiences”, p. 8-10, available at: <https://oii.europe.org/wp-content/uploads/2021/08/20210810-violence-and-discrimination-against-LBTI-women-in-sport-2.pdf>.

*established.*” (paras. 106-107). In the same case, the Court refuted the paternalistic actions on behalf of the hospital staff concerned, which meant that *“in practice, the applicant was not offered any option but to agree to the procedure”* (para. 114).

While the mandatory treatment in order to participate in a professional sports competition does not necessarily amount to the same severity as an irreversible sterilising surgery, we respectfully invite the Court to draw the necessary parallels between its judgment in *V.C. v. Slovakia* and the case at hand. Indeed, female intersex athletes who have a natural high level of androgens – a group that has suffered historical vulnerability<sup>53</sup> have no other choice but to consent to long lasting hormonal treatment during their careers, which negatively affects their reproductive health status and may also lead to unforeseen bodily or psychological side-effects.

Moreover, with respect to forced consent to take contraceptives, we respectfully submit that the temporal nature of contraceptive medication and its effect on persons with a variation in sex characteristics has not been medically proven and, as such, there is no clear understanding of the effect that hormonal contraceptives could have on their reproductive system and bodies. The Court has consistently observed that *“the very essence of the Convention is respect for human dignity and human freedom”*,<sup>54</sup> and medical treatment *“without the consent of a mentally competent adult patient would interfere with his or her right to physical integrity”*.<sup>55</sup> Furthermore, the Commission already held in *X v. Denmark* that there can be a violation of Article 3 if the *“medical treatment [is] of an experimental character and [has been given] without the consent of the person involved”*.<sup>56</sup> Accordingly, we invite the Court to find that forced consent to contraceptives for female athletes with a variation of sex characteristics, in the absence of any reliable research on the effects of such mandatory treatment, is a clear violation of a person’s bodily integrity, and therefore a violation of Article 3. The aforementioned UN Special Rapporteurs and Working Group also came to this conclusion in their joint letter to the president of World Athletics.<sup>57</sup> The UN Commissioner for Human Rights also noted that hormonal eligibility criteria for professional sports may violate the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment.<sup>58</sup>

## **5. The State’s positive obligations under Article 8 ECHR**

With this submission, we also respectfully invite the Court to clarify the nature and scope of the State’s obligation to ensure effective protection of the right to private life under Article 8 ECHR. More specifically, we invite the Court to find that States have the positive obligation under Article 8 ECHR to ensure the effective protection of the bodily integrity of female professional athletes with a variation of sex characteristics. In this section we will first elaborate on the scope of the State’s positive obligation and the State’s margin of appreciation (5.1), before addressing the elements that affect the balance between the general interests and the private interests in cases that concern hormonal eligibility criteria for participation in sports competitions (5.2).

### **5.1 The scope of the State’s positive obligation and the margin of appreciation**

As the Court has held before, *“while the essential object of Article 8 of the Convention is to protect individuals against arbitrary interference by public authorities, it may also impose on the State certain positive obligations to ensure effective respect for the rights protected by Article 8”*,<sup>59</sup> even in the horizontal relation between two private parties.<sup>60</sup> As the Court held in *Hämäläinen v. Finland*, *in deciding on the scope of positive obligations, it is – among other things – important to assess whether “fundamental values” or “essential aspects” of private life are in issue*” (para. 66). We respectfully submit that the case at hand concerns such essential aspects of private life. Indeed, in the case of *A.P., Garçon, Nicot v. France*, which concerned the issue of compulsory sterilising treatment as a precondition for legal gender recognition, the Court held that cases that directly go to individuals’ physical integrity have an essential aspect of an individual’s intimate identity at their centre (para. 123).

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<sup>53</sup> The need to show special consideration regarding the protection of the informed consent of intersex persons to medical treatment due to vulnerabilities stemming from economic, social and cultural circumstances was also pointed out by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Working Group on the issue of discrimination against women in law and in practice, in their joint letter to the president of World Athletics (available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24087>, p. 8).

<sup>54</sup> ECtHR 8 November 2011, App. No. 18968/07, *V.C. v. Slovakia*, para. 105.

<sup>55</sup> *Ibid.*

<sup>56</sup> ECmHR 2 March 1983, App. No. 9974/82, *X. v. Denmark*, 32 DR 282, at 293.

<sup>57</sup> Letter by the Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Working Group on the issue of discrimination against women in law and in practice, OL OTH 62/2018, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24087>, p. 1.

<sup>58</sup> UN High Commissioner for Human Rights, ‘Intersection of race and gender discrimination in sport’, A/HRC/44/26, p. 8.

<sup>59</sup> ECtHR (Grand Chamber) 5 September 2017, App. No. 61496/08, *Bărbulescu v. Romania*, para. 108.

<sup>60</sup> ECtHR (Grand Chamber) 10 April 2007, App. No. 6339/05, *Evans v. United Kingdom*, para. 75.

The Court has previously found that Article 8 imposes on States a positive obligation to ensure the right to effective respect for a person's physical and psychological integrity.<sup>61</sup> In cases involving violence by private individuals, the Court has held that this positive obligation may include a duty to maintain and apply in practice an adequate legal framework affording effective protection of an individual's physical integrity.<sup>62</sup> It is without question that cases concerning hormonal eligibility criteria for women's sports competitions, that may lead to effectively mandatory hormonal or surgical treatment, directly go to an athlete's physical and psychological<sup>63</sup> integrity. We therefore respectfully submit that such cases fall within the scope of the State's positive obligations under Article 8 as earlier defined by the Court.

We also submit that in cases concerning the rights of intersex persons under Article 8 ECHR, the Court should only allow a narrow margin of appreciation, especially when their right to bodily integrity is at stake. According to the Court's case law, "if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, [...], then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question".<sup>64</sup> We invite the Court to find that intersex persons form such a particularly vulnerable group in society, since they have been suffering considerable discrimination and violations of fundamental rights on the basis of the perceived abnormality of their variation of sex characteristics. The vulnerability of intersex persons for stigmatisation and discrimination in society has also been raised by the Parliamentary Assembly of the Council of Europe in the aforementioned resolution 2191(2017).

## **5.2 The balance between general interests and private interests in cases concerning hormonal eligibility criteria for sports competitions**

In determining whether the State has abided by its positive obligation under Article 8 ECHR, the Court will determine whether a fair balance was struck between the competing interests of the individual and the community as a whole, taking into account the margin of appreciation enjoyed by the State.<sup>65</sup> In this section we argue that, while protecting fairness in sports is a legitimate general interest, considerations of bodily and psychological integrity outweigh the need to create a level playing field in female sports competitions.

### **5.2.1 The general interest of ensuring fairness in sports**

The essence of professional sports is to test human difference. Indeed, if all athletes would perform in exactly the same way, no true competition would exist. In other words, differences in bodily characteristics, training opportunities, nutrition, socioeconomic background etc., are common and almost intrinsically related to the world of professional sports. Can – or should – we realistically prevent that athletes who differ in height, weight, eye sight, lung capacity etc. compete against each other? At the same time, it also cannot be questioned that fairness and the assurance of a level playing field are as central to professional sports as human difference. The question then becomes what forms of difference can be considered as undermining the need for fairness. In this light, we do not submit that the organisation of sports along binary lines (women – men), is necessarily untenable from the perspective of the ECHR. Nevertheless, as the case at hand demonstrates, it needs to be questioned whether the – scientifically highly contested - use of a single bodily characteristic, i.e. the (natural) level of testosterone, in a number of female sports competitions meets the requirements of the ECHR taking into account its impact on the bodily integrity, mental and physical health, professional life and reproductive status of the athlete concerned, and its connection to outdated understandings of 'normality' of female bodies.

Therefore, while the legitimacy and importance of measures to ensure fairness in professional sports should not be questioned,<sup>66</sup> we respectfully submit that the effective protection of athletes' physical and psychological integrity outweighs the need to ensure a level playing field in professional sports, taking into account the clear impact of hormonal requirements on female athletes with a variation in sex characteristics, and their unconvincing scientific basis. In the following section, we will particularly elaborate on two important issues, i.e. the lack of any meaningful informed consent to (hormonal) treatment aimed at reducing testosterone levels and the impact of hormonal eligibility criteria on the athletes' professional life.

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<sup>61</sup> ECtHR 9 March 2004, App. No. 61827/00, *Glass v. United Kingdom*, para. 74.

<sup>62</sup> ECtHR (Grand Chamber) 12 November 2013, *Söderman v. Sweden*, App. No. 5786/08, para. 80.

<sup>63</sup> Next to the potential side-effects of hormonal treatment for a person's mental condition, qualitative research with intersex athletes has also indicated that the affected persons often suffer from intense public scrutiny, stress and psychological challenges stemming from the public suspicion and doubts concerning their gender identity and sex characteristics. See in particular the recent report by Human Rights Watch on DSD eligibility criteria, available at [https://www.hrw.org/sites/default/files/media\\_2020/12/lgbt\\_athletes1120\\_web.pdf](https://www.hrw.org/sites/default/files/media_2020/12/lgbt_athletes1120_web.pdf).

<sup>64</sup> ECtHR 20 May 2010, App. No. 38832/06, *Alajos Kiss v. Hungary*, para. 42.

<sup>65</sup> ECtHR (Grand Chamber) 5 September 2017, App. No. 61496/08, *Bărbulescu v. Romania*, para. 112.

<sup>66</sup> Nevertheless, importantly, in September 2021 three major global women's sports organisations (WomenSport International, International Association of Physical Education and Sport for Girls and Women, and International Working Group on Women and Sport) called for action to immediately withdraw controversial DSD eligibility criteria by World Athletics and other Olympic movement sports bodies. See <https://iwgwomenandsport.org/womens-sport-calls-for-global-action-on-flawed-female-eligibility-regulations/?fbclid=IwAR1jsZNx218Tp1k85mWBGPEaANuOKCEBeKCrw0XfWPJeHh6cbXcFkUjp-Ss#eng>.

### 5.2.2 The lack of meaningful informed consent to medical (hormonal) treatment

As we already demonstrated in section 4 of this submission, non-compliance with hormonal eligibility criteria leads to the effective exclusion from participation in a number of female sports competitions. The affected female athletes with variations of sex characteristics still maintain the possibility to compete as long as they forcibly undergo (hormonal) medical treatment, predominantly by taking contraceptives, a situation amounting to a violation of Article 3 ECHR.<sup>67</sup> For the same reasons as we mentioned above (4.), we invite the Court to draw the necessary parallels under Article 8 ECHR between its existing case law, and the case at hand. Moreover, in the aforementioned case of *V.C. v. Slovakia*, the Court found that the State breached its positive obligations under Article 8 ECHR, on the basis of its failure to give special consideration to the reproductive health of the applicant as a Roma woman, taking into account the historical vulnerability and targeting of the Roma minority (paras. 138-155).

Female intersex athletes who have a natural high level of androgens have no other choice but to consent to medical (hormonal) treatment during their careers, which negatively affects their bodily and mental integrity, and their reproductive health status. It must therefore be strongly questioned whether any exercise of free will is possible in this context. As the Court similarly held in *A.P., Garçon, Nicot v. France* (para. 132) and *X. and Y. v. Romania* (para. 165), the athletes concerned are therefore presented with an impossible dilemma: either they undergo the required (hormonal) treatment against their wishes, thereby relinquishing the full exercise of their right to respect for their physical and psychological integrity (as protected under Articles 3 and 8 ECHR), or they waive the right to exercise their profession (which is also protected under Article 8 ECHR, see *infra*). In their aforementioned joint letter to the president of World Athletics, the UN Special Rapporteurs and Working Group also came to the conclusion that female athletes with a variation of sex characteristics who are confronted with hormonal eligibility criteria for sports competitions are left with no real choice but to undergo medically unnecessary treatment in order to maintain their livelihoods.<sup>68</sup> This view was later shared by the UN Human Rights Council,<sup>69</sup> and the UN High Commissioner for Human Rights.<sup>70</sup>

### 5.2.3 The impact on an athlete's access to her chosen profession

While the Court has not recognised a general right to employment, or the right to freely choose a particular profession, Article 8 ECHR does not exclude activities of a professional nature from the notion of 'private life'.<sup>71</sup> A summary of the general principles of the case law in employment-related disputes can be found in the Court's judgment in *Denisov v. Ukraine*.<sup>72</sup> The Court has developed two different tests to assess the State's compliance with Article 8: a reasons-based approach and a consequence-based approach. On the basis of the latter, it is for the applicant to present evidence substantiating consequences of the impugned measure, as well as their level of severity. The Court will only accept that Article 8 is applicable where these consequences are very serious and affect the applicant's private life to a very significant degree.

In its admissibility decision in *Platini v. Switzerland*,<sup>73</sup> the Court – in applying the criteria set out in *Denisov* – held that the level of severity under the consequences-based approach was reached in the case where the applicant had worked all his life in the world of football and was banned from any football-related professional activity during four years by FIFA. The Court accepted, first, that the negative consequences of the measure were likely to occur within the framework of the "inner circle" of the applicant, who was provisionally prohibited from earning a living in the world of football, the only source of income throughout his life, a situation aggravated by the dominant position, even monopoly of FIFA in the global organization of football and by his age. Secondly, it considered that the sanction could have a negative impact on the possibility of forming and developing social relations with others given the very broad nature of the sanction imposed, which extended to "any" football-related activity. In this regard, the Court considered that it should be borne in mind that the applicant was commonly, in the public and in the media, identified in relation to football. Finally, the Court considered it probable that the sanction pronounced

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<sup>67</sup> Sometimes irreversible surgeries, such as gonadectomies or even clitoridectomies, are performed. In the case of athlete Annet Negesa, a gonadectomy was performed without her full and prior informed consent. See the report by Human Rights Watch, available at [https://www.hrw.org/sites/default/files/media\\_2020/12/lgbt\\_athletes1120\\_web.pdf](https://www.hrw.org/sites/default/files/media_2020/12/lgbt_athletes1120_web.pdf); as well as the report by ILGA Europe, OII Europe, EL\*C and EGLSF, "LBTI women in sport: violence, discrimination and lived experiences", p. 8-10, available at: <https://oiiueurope.org/wp-content/uploads/2021/08/20210810-violence-and-discrimination-against-LBTI-women-in-sport-2.pdf>.

<sup>68</sup> Letter by the Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Working Group on the issue of discrimination against women in law and in practice, OL OTH 62/2018, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24087>, p. 5.

<sup>69</sup> UN Human Rights Council, Resolution 40/5 'Elimination of discrimination against women and girls in sport', A/HRC/RES/40/5.

<sup>70</sup> UN High Commissioner for Human Rights, 'Intersection of race and gender discrimination in sport', A/HRC/44/26, p. 8-9.

<sup>71</sup> ECtHR (Grand Chamber) 5 September 2017, App. No. 61496/08, *Bărbulescu v. Romania*, para. 71.

<sup>72</sup> ECtHR 25 September 2018, App. No. 76639/11, *Denisov v. Ukraine*, para. 115-117.

<sup>73</sup> ECtHR (Decision) 5 March 2020, App. No. 526/18, *Platini v. Switzerland*.



against the applicant, like moreover any sanction of socially reprehensible behaviour, had negative effects on his reputation in the sense of a certain stigmatisation (paras. 57-58).

In spite of the clear contextual differences between the sanction imposed in *Platini v. Switzerland* and hormonal eligibility criteria for participation in a female sports competition, we respectfully invite the Court to again draw the necessary parallels between its existing case law and the case at hand. Indeed, professional intersex athletes who choose to preserve their bodily integrity and reproductive status are effectively banned from their profession, which in many cases is their main or only source of income. Given the monopoly position of most international sports federations, these athletes have no other possibility but to agree to the required treatment or to engage in other professional activities. Given the inherent connection between their exclusion and the natural composition of their bodies, these athletes are exposed to stigma and potential negative effects on their reputation, bearing in mind the historical vulnerability and discrimination intersex persons have suffered in society. Indeed, in its 2020 report on the topic, Human Rights Watch presented several stories of how the affected intersex athletes suffer from intense public scrutiny and stigma, while being publicly challenged in their femininity on the basis of persisting stereotypes.<sup>74</sup> Similar stories can be found in the recent report by ILGA Europe, OII Europe, EL\*C and EGLSF.<sup>75</sup> In their aforementioned joint letter to the president of World Athletics, the UN Special Rapporteurs and Working Group also raised attention for the “*real stigmatizing and discriminatory impact of the [...] regulations on the dignity and privacy of the targeted group of women*”.<sup>76</sup> The UN Commissioner for Human Rights also found that hormonal eligibility criteria for professional sports may violate the right to work and to the enjoyment of just and favourable conditions of work, since “*they may constitute a barrier limiting disproportionately equal access to work for athletes with variations in sex characteristics*”.<sup>77</sup>

## **6. The State’s obligations under Article 14 ECHR jo. Articles 3 and 8 ECHR**

We finally respectfully submit that eligibility regulations to compete in women’s sports competitions adopted by sports bodies, which impose medical treatment for female athletes with variations in sex characteristics, constitute a violation of Article 14 jo. Articles 3 and 8 ECHR. They are the expression of a larger trend in society that denies people with variations in sex characteristics, and in particular women with variations in sex characteristics, the equal enjoyment of rights guaranteed by the Convention.<sup>78</sup> As such, they can be characterized as discrimination on the basis of sex characteristics.

### **6.1 Difference in treatment on the basis of sex characteristics**

Under the current World Athletics regulations, people who identify as women and whose bodies meet the normative medical and social expectations of female bodies are allowed to participate in sports competitions without undergoing mandatory medical treatment. In contrast, people who identify as women and whose bodies have a variation in sex characteristics (such as congenital high levels of androgens) are forced to undergo such treatment in order to participate in these sport competitions. As a result, women without a variation in sex characteristics and women with a variation in sex characteristics are treated differently on the basis of their sex characteristics, resulting in an unequal enjoyment of their rights under Articles 3 and 8 ECHR. However, as mentioned above, there is currently no scientific evidence that supports the claim that natural high levels of testosterone cause decisive advantages in sports, and in female sports competitions more specifically.

While Article 14 does not literally mention “sex characteristics”, it explicitly mentions “sex”. Even though sex has traditionally been understood as a binary, recent scientific insights have made clear that an individual’s sex refers to their unique composition of several sex characteristics (X- and Y-chromosomes, hormones, gonads, internal and external genitalia and secondary characteristics). It seems logical, therefore, to read into the prohibition of differential treatment *on the basis of sex* a prohibition to discriminate *on the basis of “sex characteristics”*. However, even if the Court is of the opinion that the notion of “sex” should be differentiated from “sex characteristics”, it should be noted that the list of prohibited grounds of discrimination is not exhaustive.<sup>79</sup> The present case offers the Court an opportunity to extend the prohibition of discrimination

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<sup>74</sup> Available at [https://www.hrw.org/sites/default/files/media\\_2020/12/lgbt\\_athletes1120\\_web.pdf](https://www.hrw.org/sites/default/files/media_2020/12/lgbt_athletes1120_web.pdf).

<sup>75</sup> ILGA Europe, OII Europe, EL\*C and EGLSF, “LBTI women in sport: violence, discrimination and lived experiences”, p. 8-10, available at: <https://oiiieurope.org/wp-content/uploads/2021/08/20210810-violence-and-discrimination-against-LBTI-women-in-sport-2.pdf>.

<sup>76</sup> Letter by the Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Working Group on the issue of discrimination against women in law and in practice, OL OTH 62/2018, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24087>, p. 4.

<sup>77</sup> UN High Commissioner for Human Rights, ‘Intersection of race and gender discrimination in sport’, A/HRC/44/26, p. 8.

<sup>78</sup> See the Human Rights Centre and ULB Equality Law Clinic’s third-party intervention in the case of *M v. France* in which an overview is given of the structural discrimination that people with variations in sex characteristics face. [https://hrc.ugent.be/wp-content/uploads/2021/02/Tierce-intervention-M-c.-France-24-fe%CC%81vriier\\_FINAL.pdf5\\_.pdf](https://hrc.ugent.be/wp-content/uploads/2021/02/Tierce-intervention-M-c.-France-24-fe%CC%81vriier_FINAL.pdf5_.pdf).

<sup>79</sup> ECtHR 23 November 1976, App. Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, *Engel and others v. the Netherlands*, para. 72.

enshrined in Article 14 to differences in treatment on the basis of sex characteristics in an attempt to offer a better human rights protection to people with variations in sex characteristics.<sup>80</sup>

## 6.2 Lack of objective and reasonable justification

Differential treatment on the basis of a prohibited ground only becomes discrimination whenever it lacks an objective and reasonable justification. In order to assess whether such justification exists, the Court resorts to an assessment of the legitimate aim and the proportionality between the measure and the aim pursued. In this regard, one cannot ignore that people with variations in sex characteristics face considerable and structural stigma, prejudice and discrimination both in the past and in the present.<sup>81</sup> As a result, it is appropriate to consider people with variations in sex characteristics a vulnerable group in society. We therefore respectfully invite the Court to apply the “very weighty reasons” principle and to narrow down the margin of appreciation whenever it is confronted with differences in treatment on the basis of a variation in sex characteristics.<sup>82</sup>

As noted above, ensuring fairness in professional sports is unquestionably a legitimate aim, even if sport competitions are by essence about testing bodily difference. In that regard, we submit that the problem is not sex/gender segregation in sports as such, but rather the disproportionate and arbitrary measure to determine admission to women’s sport competitions based on a single bodily characteristic, i.e. level of testosterone, which results in the exclusion of, or enforced (hormonal) treatment for women with a variation in sex characteristics in violation of Article 14 jo. Articles 3 and 8. Indeed, it should be noted that relying on testosterone levels is not suited to achieve the desired aim. Although the World Athletics eligibility criteria are adopted based on the assumption that the amount of testosterone is causally linked to performance, recent scientific studies contradict or at the minimum question this assumption as was described above.<sup>83</sup> On top of this shaky scientific basis comes the clear negative impact that hormonal eligibility criteria and the accompanying mandatory medical treatment have for the bodily integrity, mental health, reproductive status and professional opportunities of the affected female athletes with a variation in sex characteristics.

Moreover, the Commissioner for Human Rights and the EU Agency for Fundamental Rights have recently pointed out that people whose bodies present a variation in sex characteristics face structural forms of exclusion in all areas of life.<sup>84</sup> Hormonal eligibility criteria for female sports competitions amount to perpetuating this structural discrimination of people who present variations in sex characteristics. Indeed, forcing women with variations in sex characteristics to lower their amount of testosterone in order to participate in a *women’s* sports competition in fact reproduces the idea that a woman is a person whose levels of testosterone do not exceed a certain threshold. This is problematic since the very existence of women with variations in sex characteristics demonstrates that *all bodies*, and thus *all women*, actually differ; in other words, every woman has a unique composition of sex characteristics. As such, eligibility criteria to compete in women’s sports competition reflect but also participate in the social regulation of who is a woman and who cannot claim to be one.

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<sup>80</sup> See the Human Rights Centre and ULB Equality Law Clinic’s third-party intervention in the case of *M v. France* in which we further argue why it is necessary to include “sex characteristics” in the list of prohibited grounds of discrimination. [https://hrc.ugent.be/wp-content/uploads/2021/02/Tierce-intervention-M-c.-France-24-fe%CC%81vrierv\\_FINAL.pdf5\\_.pdf](https://hrc.ugent.be/wp-content/uploads/2021/02/Tierce-intervention-M-c.-France-24-fe%CC%81vrierv_FINAL.pdf5_.pdf).

<sup>81</sup> EU Fundamental Rights Agency, *A long way to go for LGBTI equality*, 2020; Council of Europe Commissioner for Human Rights, *Human Rights and Intersex People*, 2015, available at <https://rm.coe.int/16806da5d4>.

<sup>82</sup> ECtHR 20 May 2010, App. No. 38832/06, *Alajos Kiss v. Hungary*, para. 42.

<sup>83</sup> See footnote 29.

<sup>84</sup> EU Fundamental Rights Agency, *A long way to go for LGBTI equality*, 2020; Council of Europe Commissioner for Human Rights, *Human Rights and Intersex People*, 2015. <https://rm.coe.int/16806da5d4>.