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Trans and intersex equality rights in Europe – a comparative analysis

Including summaries in
English, French and German

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Trans and intersex equality rights in Europe – a comparative analysis

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Abbreviations

APA	American Psychiatric Association
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CoM	Committee of Ministers of the Council of Europe
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
EHRR	European Human Rights Report
EU	European Union
FRA	European Union Agency for Fundamental Rights
GCT	Gender confirmation treatment
GE	Gender expression
GI	Gender identity
ICCPR	International Covenant on Civil and Political Rights
ICD	International Classification of Diseases
LGBTI	Lesbian, gay, bisexual, trans and intersex
m/f	Male/female
MtF	Male-to-female
NB	Non-binary
NEB	National equality body
PACE	Parliamentary Assembly of the Council of Europe
RLE	Real life experience
SC	Sex characteristics
SOGI	Sexual orientation and gender identity
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
WHO	World Health Organization

Executive summary

Introduction

In 2012, the European Commission's Network of Legal Experts in the Non-discrimination Field authored a landmark report on discrimination motivated by sex, gender identity and gender expression. The report – drawing upon expert knowledge in 30 European jurisdictions – highlighted the significant levels of inequality which, despite promising developments in individual countries, trans and intersex people confronted across the European Union (EU) and the European Free Trade Association (EFTA).

In the years since 2012, the attention paid to the human rights of trans and intersex people and to discrimination on the grounds of gender identity and sex characteristics has increased significantly. Across the various Member States, and at the regional, especially the European and inter-American, level, there is growing awareness of the lived experience of trans and intersex individuals and greater understanding of the social, legal and economic challenges that they face.

Yet despite this welcome increase in public knowledge and appreciation of trans and intersex lives, discrimination based on gender identity and sex characteristics remains a disproportionate reality across the EU and EFTA. In its 2014 report, 'Being trans in the EU', which explores the trans-focused data obtained during an EU-wide survey of lesbian, gay, bisexual and trans communities, the European Union Agency for Fundamental Rights (FRA) observed 'serious and repetitive victimisation [throughout] the EU'. Discrimination and violence are also disproportionately experienced by intersex people in Europe who, as observed recently by the Commissioner for Human Rights of the Council of Europe, have historically been coerced – through cultures of shame and secrecy – into positions of marginalisation and invisibility.

In 2015, the European Commission published the 'List of actions to advance LGBTI equality'. Two of the Commission's priorities, as set out in its *List of actions* are: (a) improving rights and ensuring legal protection; and (b) monitoring and enforcement of the existing rights of lesbian, gay, bisexual, trans and intersex (LGBTI) people and their families. In 2016, the Council of Ministers asked the European Commission to report annually on the implementation of the list of actions. Against this background, the European Commission requested the European Equality Law Network to carry out an overview of trans and intersex equality frameworks across the 28 EU Member States and three additional EFTA states (Iceland, Liechtenstein and Norway). This report is the end product of that request. Proceeding through nine substantive chapters, the report analyses whether and how trans and intersex communities enjoy equality guarantees across the EU and EFTA.

International and regional protections

Chapter 2 of the report addresses international and regional protections for trans and intersex populations. It illustrates that such protections are currently in a state of flux. While no international human rights treaty document specifically acknowledges trans and intersex individuals, a growing number of human rights actors do refer to gender identity, gender expression and sex characteristics. It is clear that, at the very minimum, states are required to respect trans populations and take measures to protect against trans-motivated discrimination.

The European Court of Human Rights has made clear that 'gender identity' falls within the non-exhaustive list of protected characteristics set out in Article 14 ECHR (*Identoba and others v Georgia*). The ECtHR has also affirmed, in judgments such as *Goodwin v United Kingdom* and *AP, Garçon and Nicot v France*,

that State Parties to the European Convention on Human Rights have an obligation to legally recognise preferred gender. However, with the notable exception of sterilisation, the conditions for obtaining gender recognition largely fall within the margin of appreciation which European jurisdictions enjoy.

EU legal framework and case law

Chapter 2 also addresses EU legal frameworks, particularly EU case law, as they apply to trans and intersex non-discrimination.

EU legal framework

EU primary legislation contains no explicit references to gender identity, gender expression or sex characteristics, although the Charter does list sexual orientation in the list of non-discrimination grounds (Art. 21(1)). However, the CJEU may interpret the provision in an inclusive manner, either by an extensive interpretation of ‘sex’ or by expanding on the list which has been drafted in a non-exhaustive manner.

EU secondary law does contain reference to trans identities. The EU equality directives have one pertinent provision: Recital 3 of the Recast Directive (2006/54/EC) provides that the Directive also applies to discrimination arising from ‘gender reassignment’. This is a codification of the CJEU’s jurisprudence in the case of *P v S and Cornwall County Council* (1996).

Outside the equality directives, the Recast Qualification Directive (2011/95/EU), in Article 10(1)(d), and the Victims’ Rights Directive (2012/29/EU), in Recitals 9, 17 and 56, acknowledge gender identity and other gender-related aspects. It is of note that the General Data Protection Regulation of 2016 does not refer to ‘gender identity’ in any way, although it lists information on sex life and sexual orientation as a ‘special category of personal data’ (Art. 9(1); see also Recitals 71 and 75). It is possible that information on gender identity, gender expression or sex characteristics might be included by a broad interpretation of genetic or biometric data or information on health. However, a broad interpretation of ‘sex’ or ‘gender’ is impossible, since it is not mentioned as a sensitive ground.

EU case law

In general, the CJEU has been willing to employ a progressive interpretation of sex equality standards, thus creating a baseline obligation for Member States in relation to trans non-discrimination. However, the Court has looked at most cases through the lens of ‘gender reassignment’, resulting in a highly medicalised picture of trans populations. Consistent references to the fact that claimants have undertaken a process of surgical transition frames trans equality as contingent upon medical interventions. It calls into question the utility and applicability of EU non-discrimination guarantees for the large population of trans people in Europe who cannot or will not access gender confirmation healthcare. A relevant question in this regard is whether such individuals would be without an EU remedy if they suffer discrimination comparable to those who have physically altered their bodies.

No judgments have been issued regarding intersex or non-binary individuals. With regard to the latter it remains to be seen whether EU sex equality law – in its current formulation – has the capacity to accommodate and safeguard gender beyond the binary.

Legal gender recognition

Chapter 3 of the report explores access to legal gender recognition. At present, all 31 states have allowed certain individuals to amend their legal gender. However, the conditions for doing this vary greatly. In five countries, there are still no legislative, administrative or judicial guidelines for acknowledging

preferred gender. On the other hand, seven jurisdictions affirm preferred gender through a model of self-determination. In many other EU and EFTA states, applicants for gender recognition must surmount medical and marriage-related pre-conditions.

In terms of trans minors, comparatively few of the 31 countries surveyed for this report allow people under 16 or 18 years to obtain gender recognition. This is despite the growing visibility of this population, and the increasing number of trans young people who expressly desire an amended gender status. Trans children and adolescents have a number of specific interests, such as school diplomas, which increase their need for accurate gender markers. In addition, young people often appear to identify as non-binary at higher rates than their adult peers. For such individuals, innovative legal solutions, as have been adopted in **Malta** (the possibility to opt for a non-binary gender without a minimum age and the possibility to postpone the attribution of a legal gender) may serve as a blueprint for broader, more inclusive gender recognition laws and policies.

Trans- and intersex-specific non-discrimination grounds?

Chapter 4 investigates national equality and non-discrimination frameworks. An important question to be considered is how the protection of trans and intersex individuals should be conceptualised. There are three apparent options: (i) protection through a broad interpretation of sex; (ii) adding the grounds of gender identity, gender expression and sex characteristics to the non-discrimination grounds; or (iii) a middle road, not adding any grounds, but ensuring a broad interpretation of sex by adding a clarification that ‘sex’ should be understood broadly to encompass all forms of discrimination related to gender identity, gender expression and sex characteristics. In terms of visibility of the populations concerned, as well as the symbolic role of the law, the latter two are without doubt more favourable. That leaves the complex issue as to the effects and impact of one broad ‘gender/sex ground’ versus various independently formulated grounds.

Advantages of the first include the fact that the causes of many forms of discrimination of both cisgender people, women in particular, and trans and intersex people, may have similar roots (i.e. gender bias, stereotypical thinking on gender roles, etc.). It also offers better opportunities to deal with intersectional forms of discrimination on these particular grounds. Arguments in favour of separate grounds include the fact that trans and intersex populations may experience discrimination which does not neatly map onto accepted understandings of sex discrimination. This is particularly true in relation to non-binary populations. Thus, a broad conception of ‘sex’ to ensure protection of trans and intersex populations should probably be expanded to ensure the possibility of dealing with gender identities outside the gender binary. Clearly, this is an issue that requires further consideration.

In only 13 of the 31 countries are gender identity and/or sex characteristics explicitly protected by the national equality and non-discrimination framework, at least to some extent. In a number of countries it is unclear whether people can invoke protection against discrimination because of their gender identity or sex characteristics.

Healthcare

Chapter 5 looks at the important issue of access to healthcare. Gender-related equal treatment in the context of healthcare is protected by Directive 2004/113/EC on access to and supply of goods and services. However, this directive is firmly grounded in a binary perception of sex. Many applicable provisions contain explicit references to men and women. The notion of equality that the directive pursues appears less rigid than in other spheres (e.g. employment) given that Recital 12 of the preamble specifies that ‘healthcare services that result from physical differences between women and men, do not relate to comparable situations and therefore, do not constitute discrimination’.

Healthcare facilities and regulations for trans and intersex individuals vary greatly from country to country. Problems encountered by these groups include limited access to treatment, resulting in long waiting lists. In several countries (e.g. **Belgium**) specialised gender clinics have been established that have exclusive competence to treat trans individuals. This might, in some cases, result in an interference with the right to freely choose one's healthcare provider.

Waiting lists and costs (or lack of reimbursement thereof) may lead to people seeking treatment abroad, both in other EU countries as well as outside the EU. This, in turn, may cause problems regarding, for example, reimbursement of healthcare costs. Obtaining gender confirmation treatment abroad can also result in national authorities refusing to recognise legally required medical interventions (e.g. for accessing legal gender recognition). This creates a possible breach of the freedom to provide and receive services across the European Union.

As noted, the issue of health and well-being is implicated through the imposition of surgery, sterilisation, hormone treatment and diagnoses as pre-conditions for legal gender recognition. Surgery and sterilisation are still required in seven countries (albeit not in exactly the same countries); in a small number of countries the situation as to what surgical or sterilisation requirements are imposed remains unclear. The legal situation regarding hormone treatment is diffuse. A medical diagnosis is still required in the majority of the countries surveyed (in at least 21 countries).

While the general question of acknowledging preferred gender falls outside the scope of EU law, access to specific treatments, such as breast augmentation or voice alteration, may cross over with EU sex equality protections. In several countries, such treatment is not reimbursed because it is regarded as 'not core' to gender confirmation treatment, but 'only cosmetic'. Here the question of the proper comparator sometimes presents problems for national courts.

Following the recent decision in *MB v Secretary of State for Work and Pensions*, it is also clear that Member States cannot impose – at least where individuals are seeking to access rights, such as social security, which fall within the ambit of EU law – requirements for acknowledging preferred gender which contradict EU fundamental rights. Thus, for example, it is doubtful that a Member State would be able to withhold an earlier retirement pension from a trans woman because she refuses to submit to sterilisation. The European Court of Human Rights has recently held that sterilisation requirements are not compatible with Article 8 ECHR.

There is very little case law regarding the way trans and intersex individuals are treated in national hospitals by members of staff or other patients. The introduction of guidelines for respectful treatment, as has happened in **Croatia**, would be welcome in other Member States. Such guidelines should include a reference to the desirability of using individuals' preferred names and gender pronouns.

Single-sex facilities

In Chapter 6, the report considers the topic of single-sex spaces. Single-sex facilities are very common throughout all 31 states surveyed for this report, although their presence is more obvious in some jurisdictions than in others. Single-sex toilets, for example, are often regarded as a matter of course, causing daily dilemmas and struggles for many trans and non-binary individuals.

These issues seem to be regulated as much by social morality as they are by identifiable laws. This is reinforced by the fact that, in many of the 28 EU and three EFTA states surveyed, the actual law regulating entry into women-only or men-only toilets remains unclear.

A legal bottleneck has arisen in terms of how feelings of discomfort should influence policies surrounding access to segregated space. In concrete terms, policy-makers around the Union must consider whether

cisgender women's discomfort with the presence of trans women justifies policies of exclusion. In the **United Kingdom**, for example, the Equality Act 2010 permits service providers to refuse entry to single-sex services and communal accommodation for people who have a 'gender reassignment' characteristic. However, that refusal must be proportionate to achieving a legitimate aim. The topic of single-sex spaces raises wider questions, such as who the law is intended to protect, and requires that policy-makers (in consultation with relevant stakeholders) implement appropriate and proportionate solutions.

Education

The subject matter of Chapter 7 – education – falls largely outside the realm of EU equality law, with the exception of vocational training. It must be assumed that in the sphere of vocational training, students will be protected against sexual and other forms of harassment or discriminatory treatment on the basis of the Recast Directive. Arguably, General Framework Directive 2000/78/EC might offer protection for trans or intersex pupils and students who experience problems in the area of vocational training due to absences because of medical treatment. It is possible that the need to provide for reasonable accommodation might be invoked here.

A problem outside the scope of EU equality law, but experienced by many trans youth, is the impossibility of obtaining legal gender recognition prior to the age of majority (or the age of 16 years in a small number of EU and EFTA countries). This often results in students receiving a diploma in their old name, without the possibility of obtaining a new one.

Retirement pensions

Chapter 8 discusses access to retirement pensions. In 12 countries (November 2018), the retirement age for women is still lower than for men. This may cause problems for trans women who, if denied an earlier pension, will have their trans history involuntarily revealed. For trans men, it may mean that they pay too much, especially if they transition later in life. However, this problem will disappear as all countries move towards removing sex-based distinctions in the acquisition of retirement pensions.

Other problems, such as the use of actuarial data and sex-related information to determine benefits and premiums, may remain. These issues do require consideration, as they may result in people being confronted with demands to repay benefits (e.g. if it transpires that an individual received a surplus in their pension, because information on their change of legal gender was not processed correctly, as has happened in the **United Kingdom**). The situation may become more complicated if more EU and EFTA states decide to introduce non-binary sex options (or decide to stop attributing legal sex at all).

Employment

Chapter 9 deals with equality and non-discrimination protections in the sphere of employment. Compared to other areas covered by the EU equality directives, there is a relatively high number of employment-related cases across the 31 jurisdictions surveyed. However, the number of published cases is still comparatively low and certainly does not reach the levels one might expect, given the extent to which transphobic employment inequalities have been documented across Europe.

Absences for gender confirmation treatment and treatment relating to intersex variance are generally protected, just like sick leave for other reasons. However, in some cases, trans individuals are unable or unwilling to make use of their right and use their holidays for their medical treatments. This phenomenon requires further attention since holidays are granted for rest. It is for good reasons that employees continue to acquire holidays over periods of illness. In addition, given the high rates of harassment that

trans and intersex populations experience in the EU and the three EFTA states, there is also a need for codes of conduct and conflict management within the workplace.

The possibility of male employees being pregnant is relatively new, and in most countries no cases have been presented to courts or employment tribunals. However, it seems worthwhile to anticipate problems in this area and to clarify that the applicable regulations do apply to pregnant (trans) men too. This applies both to legislation aimed at protection of the pregnant person and their baby, as well as to protection against pregnancy-discrimination.

Remedies

Chapter 10 considers the remedies and sanctions which national courts impose where there is discrimination on the basis of gender identity, gender expression or sex characteristics. The absence of case law implies that there is a dearth of decisions providing judicial guidance on sanctions and remedies. There is some case law, providing for monetary compensation. In some of these cases, the compensation awarded was significant, which implies that it may have a deterrent effect on continuing transphobic conduct. It may also have an immediate rehabilitative impact for the victims of such conduct.

Yet in terms of reducing instances of discriminatory conduct against trans populations, sanctions which result in more inclusive policies, better education on trans identities and moves towards an environment of greater openness are, ultimately, more likely to enhance trans lived experiences. However, as in the other areas discussed, one must be conscious that, while these examples of policy change are positive, they are only being enforced in a minority of domestic jurisdictions across the 31 states surveyed.

Conclusions

The analysis of the ‘state of play’ of equality guarantees and non-discrimination protection for trans and intersex individuals shows a varied landscape. In only 13 of the 31 countries surveyed are gender identity and/or sex characteristics protected, at least to some extent, by national legislation.

EU secondary legislation (indirectly) protects at least certain individuals who experience a trans identity (*P v S and Cornwall County Council*). However, an important question is through what characteristic the EU and Member States should conceptualise trans discrimination. There are three options in this regard: (i) protection through a broad interpretation of sex; (ii) adding the grounds of gender identity, gender expression and sex characteristics; or (iii) a middle road, not adding any grounds, but ensuring a broad interpretation of sex by adding a clarification that ‘sex’ should be understood broadly to encompass all forms of discrimination related to gender identity, gender expression and sex characteristics. This is a question that requires further consideration – both at academic and policy levels.

A particularly contentious issue is access to single-sex spaces. In many jurisdictions throughout the 31 EU and EFTA states surveyed, segregated space has become a point of notable tension. A legal bottleneck has arisen in terms of how feelings of discomfort should influence policies surrounding access to segregated space. In concrete terms, policy-makers around the EU must consider whether cisgender women’s discomfort with the presence of trans women justifies policies of exclusion. The issue requires that policy-makers (in consultation with relevant stakeholders) should implement appropriate and proportionate compromises.

A striking and consistent feature of the analysis throughout this report is the extent to which EU and EFTA jurisdictions have failed to adopt provisions or policies to accommodate or protect intersex individuals. Intersex variance and those who experience it are particularly invisible within the sphere of domestic non-discrimination law. Although many national equality laws tend to, or at least are expected to,

protect intersex individuals against discrimination on an equal footing with all other people (generally by employing a broad interpretation of 'sex'), only **Malta** has made this inclusion explicit.

Legal protection for people identifying as non-binary is also weak across the 28 EU and three EFTA states surveyed. A major legal obstacle lies in the fact that all 31 jurisdictions, as well as the legal framework of the EU itself, are firmly grounded in a binary conception of sex. This is also true for the few countries that have recently introduced (or recognised an obligation to introduce) a 'third gender' option (**Austria, Germany and Malta**). Therefore, endeavours to recognise gender(s) outside the traditional male/female dichotomy may encounter many (unexpected) difficulties.

Overall, the results of this report reveal a changing legal landscape for trans and intersex people throughout the European Union and the three EFTA states. In many ways, the report contains a great deal of welcome information. Yet the position of trans and intersex people in Europe cannot be described as one of full (or even partial) equality. While public awareness is improving, trans and intersex people continue to suffer disproportionate social and legal burdens. Moving forward, policy-makers – both domestic and regional – must be willing to adopt much-needed steps to ensure that equality and non-discrimination are practically realised on the basis of gender identity, gender expression and sex characteristics.

RÉSUMÉ

Introduction

Le Réseau européen des experts juridiques en matière de non-discrimination de la Commission européenne a publié en 2012 un rapport de référence concernant la discrimination fondée sur le sexe et l'identité et l'expression de genre. S'appuyant sur une expertise couvrant 30 pays européens, il mettait en évidence les niveaux élevés d'inégalité que rencontrent, en dépit d'avancées prometteuses dans certains d'entre eux, les personnes trans et intersexuées sur l'ensemble du territoire de l'Union européenne (UE) et de l'Association européenne de libre-échange (AELE).

L'attention accordée aux droits fondamentaux des personnes trans et intersexuées ainsi qu'à la discrimination fondée sur l'identité de genre et les caractéristiques sexuelles s'est fortement accrue depuis lors. On observe en effet dans les différents États membres, de même qu'au niveau régional (européen et interaméricain surtout), une prise de conscience quant au vécu des personnes trans et intersexuées, et une plus grande compréhension des difficultés sociales, juridiques et économiques auxquels elles se trouvent confrontées.

Or, malgré cette sensibilisation croissante et bienvenue de la part du grand public à l'égard de la vie des personnes trans et intersexuées, la discrimination fondée sur l'identité de genre et les caractéristiques sexuelles demeure une réalité disproportionnée au sein de l'UE et de l'AELE. Dans son rapport de 2014 intitulé «Être «trans» dans l'UE», qui analyse les données récoltées sur cette thématique dans le cadre d'une enquête menée dans toute l'UE auprès de communautés lesbiennes, gays, bisexuelles et trans, l'Agence de l'Union européenne pour les droits fondamentaux (FRA) constate une victimisation grave et répétitive dans l'ensemble de l'Union. Des faits de discrimination et de violence visent également de façon disproportionnée les personnes intersexuées vivant en Europe, que des cultures de la honte et du secret ont forcées de tous temps à rester marginalisées et invisibles, comme le faisait récemment remarquer la Commissaire aux droits de l'homme du Conseil de l'Europe.

La Commission européenne a publié en 2015 la «liste d'actions pour promouvoir l'égalité des personnes LGBTI». Parmi les priorités énoncées dans cette liste figurent (a) l'amélioration des droits et la garantie d'une protection juridique; et (b) le contrôle et l'application des droits existants des personnes lesbiennes, gays, bisexuelles, trans et intersexuées (LGBTI) et de leurs familles. En 2016, le Conseil des ministres a demandé à la Commission européenne de faire rapport chaque année sur la mise en œuvre de la liste d'actions. C'est dans ce contexte que la Commission européenne a invité le Réseau européen en matière de droit de l'égalité à étudier les cadres de l'égalité pour les personnes trans et intersexuées dans les 28 États membres et trois pays supplémentaires membres de l'AELE (Islande, Liechtenstein et Norvège). Le présent rapport est l'aboutissement de cette mission. S'articulant en neuf chapitres de fond, il examine dans quelle mesure et de quelle manière les communautés trans et intersexuées bénéficient de garanties en matière d'égalité sur l'ensemble du territoire de l'UE et de l'AELE.

Les protections internationales et régionales

Le deuxième chapitre du rapport est consacré aux protections internationales et régionales en faveur des populations trans et intersexuées. Il montre que ces protections sont en mutation à l'heure où aucun document relevant de traités internationaux en matière de droits de l'homme ne reconnaît spécifiquement les personnes trans et intersexuées, mais où un nombre croissant d'intervenants en matière de droits de l'homme font référence à l'identité de genre, à l'expression de genre et aux caractéristiques sexuelles.

Il est donc manifeste que les États sont tenus, à tout le moins, de respecter les populations trans et de prendre des mesures destinées à les protéger contre une discrimination fondée sur cette caractéristique. La Cour européenne des droits de l'homme a clairement établi que «l'identité de genre» relève de la liste non exhaustive des caractéristiques énoncées à l'article 14 de la CEDH (*Identoba et autres c. Géorgie*). La CouEDH a également affirmé, dans des arrêts tels que *Goodwin c. Royaume-Uni* et *AP, Garçon et Nicot c. France*, que les États parties à la Convention européenne des droits de l'homme ont une obligation de reconnaître juridiquement le genre souhaité. Or, à l'exception notable de la stérilisation, les conditions de l'obtention d'une reconnaissance du genre relèvent largement de la marge d'appréciation laissée aux ordres juridiques européens.

Le cadre juridique et la jurisprudence de l'UE

Le chapitre 2 s'intéresse également aux cadres juridiques de l'UE, et plus particulièrement à la jurisprudence de la CJUE, dans la mesure où ils s'appliquent à l'interdiction de discrimination envers les personnes trans et intersexuées.

Le cadre juridique de l'UE

La législation primaire de l'UE ne contient aucune référence explicite à l'identité de genre, à l'expression de genre ou aux caractéristiques sexuelles, alors que la Charte cite effectivement l'orientation sexuelle dans la liste des motifs interdits de discrimination (article 21, paragraphe 1). La CJUE peut cependant interpréter la disposition de manière inclusive en donnant une large interprétation au «sexe» ou en allongeant la liste, laquelle a été établie de façon non exhaustive.

La législation secondaire de l'UE fait référence aux identités trans. Les directives européennes en matière d'égalité contiennent une disposition pertinente, à savoir le considérant 3 de la directive de refonte (2006/54/CE), qui dispose que la directive s'applique également aux discriminations qui trouvent leur origine dans le «changement de sexe» d'une personne. Il s'agit d'une codification de la jurisprudence de la CJUE dans l'affaire *P contre S et Cornwall County Council* (1996).

Outre les directives en matière d'égalité, la directive de refonte «qualification» (2011/95/UE) en son article 10, paragraphe 1 sous d), et la directive relative aux droits des victimes (2012/29/UE) dans ses considérants 9, 17 et 56, reconnaissent l'identité de genre et d'autres aspects liés au genre. Il convient de noter que le règlement général sur la protection des données de 2016 ne fait en aucune façon référence à «l'identité de genre» bien qu'il cite les informations concernant la vie sexuelle et l'orientation sexuelle en tant que «catégories particulières de données à caractère personnel» (article 9, paragraphe 1; voir également les considérants 71 et 75). Il se peut que l'information relative à l'identité de genre, à l'expression de genre ou aux caractéristiques sexuelles puisse être incluse dans une large interprétation des données génétiques ou biométriques, ou des informations sur la santé. Une large interprétation du terme «sexe» ou «genre» ne serait en revanche pas possible puisqu'il n'est pas mentionné en tant que motif sensible.

La jurisprudence de l'UE

La CJUE a montré, de façon générale, une volonté d'opter pour une interprétation progressiste des normes en matière d'égalité des sexes, et d'instaurer ainsi une obligation de référence pour les États membres en rapport avec l'interdiction de discrimination fondée sur la transsexualité. La Cour a cependant envisagé la plupart des affaires au travers du prisme du «changement de sexe» et a contribué ainsi à donner une image très médicalisée des populations trans. La référence systématique au fait que les requérants ont entrepris un processus de transition médicale tend à représenter l'égalité des personnes trans comme subordonnée à une intervention chirurgicale. Ce constat met en question l'utilité et l'applicabilité des

garanties européennes de non-discrimination pour les très nombreuses personnes trans vivant en Europe qui ne peuvent ou ne veulent recourir à des traitements de confirmation de genre. Une question pertinente se pose à cet égard: ces personnes ne disposeraient-elles d'aucune voie de recours au titre du droit de l'UE lorsqu'elles subissent une discrimination comparable à celle vécue par des personnes ayant physiquement modifié leur corps?

Aucun arrêt n'a été prononcé concernant des personnes intersexuées ou non binaires. Et il reste à voir, dans le second cas, si le droit de l'UE en matière d'égalité des sexes peut – dans sa formulation actuelle – intégrer et protéger le genre au-delà de son modèle binaire.

La reconnaissance juridique du genre

Le troisième chapitre du rapport se penche sur l'accès à la reconnaissance juridique du genre. À l'heure actuelle, les 31 pays ont permis à certaines personnes de modifier leur genre officiel. Les conditions de cette modification varient néanmoins fortement. Cinq pays ne se sont pas encore dotés de lignes directrices législatives, administratives ou judiciaires concernant la reconnaissance du genre souhaité. Par ailleurs, sept juridictions ont choisi un modèle d'autodétermination pour affirmer le genre souhaité. Dans beaucoup d'autres pays de l'UE et de l'AELE, les personnes qui demandent une reconnaissance de genre doivent préalablement satisfaire à une série de conditions médicales et liées au mariage.

En ce qui concerne les mineurs trans, les pays qui autorisent des personnes de moins de 16 ou 18 ans à obtenir une reconnaissance de genre sont relativement peu nombreux parmi les 31 qui font l'objet du présent rapport – alors que cette population acquiert une visibilité grandissante et que le nombre de jeunes trans souhaitant expressément modifier leur statut est en augmentation. Les enfants et adolescents trans ont un certain nombre d'intérêts spécifiques (diplômes scolaires notamment) qui rendent la mention précise du genre particulièrement nécessaire. La proportion de jeunes s'identifiant comme non binaires semble, en outre, souvent plus élevée que parmi leurs homologues adultes. Des solutions juridiques novatrices telles que celles adoptées à leur intention à **Malte** (possibilité d'opter pour un genre non binaire sans exigence d'âge minimum et possibilité de retarder l'attribution d'un genre juridique) pourraient servir de modèles à des lois et politiques plus larges et davantage inclusives en matière de reconnaissance de genre.

La transsexualité et l'intersexualité: des motifs spécifiques de non-discrimination?

Le quatrième chapitre du rapport se penche sur les cadres nationaux d'égalité et de non-discrimination. La manière de conceptualiser la protection des personnes trans et intersexuées y figure comme une question majeure. Il existe apparemment trois options: (i) une protection assurée au moyen d'une large interprétation du sexe; (ii) l'ajout des motifs de l'identité de genre, de l'expression de genre et des caractéristiques sexuelles aux motifs interdits de discrimination; ou (iii) une solution intermédiaire n'ajoutant aucun motif supplémentaire mais assurant une large interprétation en précisant que le «sexe» doit s'entendre au sens large pour englober toutes les formes de discrimination liée à l'identité de genre, à l'expression de genre et aux caractéristiques sexuelles. Les deux dernières options sont incontestablement préférables en termes de visibilité des populations concernées ainsi qu'en termes de rôle symbolique de la loi. Mais cela ne résout pas la problématique complexe que peuvent engendrer les effets et l'incidence d'un vaste motif unique «genre/sexe» par opposition à des motifs formulés indépendamment.

L'un des avantages du motif unique est le fait que de nombreuses formes de discrimination tant à l'égard des personnes cisgenres, et des femmes en particulier, que des personnes trans et intersexuées, peuvent avoir des causes analogues (préjugés sexistes, idées stéréotypées quant aux rôles sexospécifiques, etc.). Le motif unique offre également davantage de possibilités de traiter de formes croisées de discrimination

fondée sur les motifs qu'il regroupe. Pour leur part, les arguments en faveur de motifs distincts sont notamment le fait que les populations trans et intersexuées peuvent connaître une discrimination qui ne correspond pas exactement au concept généralement accepté de discrimination fondée sur le sexe. Tel peut être le cas des populations non binaires. Il en découle qu'une large vision du «sexe» visant à garantir la protection des populations trans et intersexuées devrait sans doute être étendue davantage encore afin de pouvoir y inclure des identités de genre se situant hors du modèle binaire. La question demande assurément un examen plus poussé.

L'identité de genre et/ou les caractéristiques sexuelles sont explicitement protégées, dans une certaine mesure du moins, par le cadre national d'égalité et de non-discrimination de 13 pays seulement parmi les 31 pays examinés ici. Dans un certain nombre d'autres, il est difficile d'établir si des personnes peuvent invoquer une protection contre une discrimination fondée sur leur identité de genre ou leurs caractéristiques sexuelles.

Les soins de santé

Le cinquième chapitre examine l'importante question de l'accès aux soins de santé. L'égalité de traitement en rapport avec le genre est protégée, dans le contexte des soins de santé, par la directive 2004/113/CE relative à l'accès à des biens et services et la fourniture de biens et services. Ceci étant dit, cette directive est fermement ancrée dans une perception binaire du sexe. De nombreuses dispositions applicables contiennent des références explicites aux hommes et aux femmes. La notion d'égalité voulue par la directive semble moins rigide que dans d'autres domaines (l'emploi, par exemple) dans la mesure où son considérant 12 précise que «des différences entre les hommes et les femmes en matière de fourniture de services de santé, qui résultent des différences physiques entre hommes et femmes, ne se rapportent pas à des situations comparables et ne constituent donc pas une discrimination».

Les structures de soins et les réglementations destinées aux personnes trans et intersexuées varient considérablement d'un pays à l'autre. L'accès limité au traitement, qui se traduit par de longues listes d'attente, est l'un des problèmes rencontrés par ces groupes. Plusieurs pays (**Belgique** notamment) ont mis en place des cliniques spécialisées dotées d'une compétence exclusive pour le traitement des personnes trans. Cette approche risque, dans certains cas, d'interférer avec le droit de choisir librement son prestataire de soins de santé.

Les listes d'attente et les coûts (ou leur non-remboursement) peuvent inciter certaines personnes à rechercher un traitement à l'étranger, que ce soit dans d'autres pays de l'Union ou en dehors de celle-ci, et cette démarche peut, à son tour, poser problème (en termes de remboursement des frais de santé, par exemple). L'obtention d'un traitement de confirmation de genre à l'étranger peut également inciter les autorités nationales à refuser de reconnaître les interventions médicales juridiquement exigées (pour accéder notamment à la reconnaissance juridique du genre) – ce qui peut créer une violation de la liberté de fournir et de recevoir des services dans toute l'Union européenne.

Comme déjà indiqué, la question de la santé et du bien-être se pose en raison des conditions préalables (chirurgie, stérilisation, traitement hormonal et diagnostic) imposées pour la reconnaissance juridique du genre. La chirurgie et la stérilisation continuent d'être exigées dans sept pays (mais pas forcément dans les mêmes) et, dans un petit nombre de pays, la situation quant aux exigences imposées en termes de chirurgie et de stérilisation demeure peu claire. La situation juridique est confuse en ce qui concerne le traitement hormonal. Un diagnostic médical reste exigé dans la majorité des pays couverts par le rapport (à savoir dans 21 d'entre eux au moins).

Si la question générale de la reconnaissance du genre souhaité ne relève pas du champ d'application du droit de l'UE, un recoupement peut exister entre l'accès à des traitements spécifiques, tels qu'une augmentation mammaire ou une modification de la voix, et les protections prévues par l'UE en matière

d'égalité des sexes. Dans plusieurs pays, ce type de traitement n'est pas remboursé car il est considéré comme n'étant pas «essentiel» au traitement de confirmation de genre mais uniquement comme «esthétique». La question d'un comparateur adéquat peut parfois poser problème ici aux juridictions nationales.

Il ressort également du récent arrêt de la CJUE dans l'affaire *MB c. Secretary of State for Work and Pensions* que les États membres ne peuvent imposer – du moins lorsque des personnes sont en quête d'un accès à des droits qui relèvent du champ d'application du droit de l'UE, telle la sécurité sociale – d'exigences pour la reconnaissance du genre souhaité qui iraient à l'encontre des droits fondamentaux de l'Union. Ainsi par exemple, il est peu probable qu'un État membre puisse refuser l'octroi anticipé d'une pension de retraite à une femme trans qui refuse de se soumettre à une stérilisation. La Cour européenne des droits de l'homme a récemment dit pour droit que les exigences de stérilisation ne sont pas compatibles avec l'article 8 de la CEDH.

Il existe très peu de jurisprudence sur la manière dont les personnes trans et intersexuées sont traitées par les membres du personnel ou d'autres patients dans les hôpitaux nationaux. L'introduction de lignes directrices en matière de traitement respectueux, comme en **Croatie**, serait une démarche bienvenue dans d'autres États membres. Ces orientations devraient notamment indiquer qu'il est désirable de respecter le souhait des patients concernés pour ce qui concerne les noms et le genre des pronoms utilisés.

Les installations unisexes

Le sixième chapitre du rapport aborde la thématique des espaces unisexes. Des installations unisexes sont très courantes dans les 31 pays couverts par l'étude – même si leur présence est davantage visible dans certains ordres juridiques que dans d'autres. Ainsi des toilettes réservées à un seul sexe sont-elles souvent considérées comme allant de soi, bien qu'elles causent dilemmes et difficultés au quotidien à de nombreuses personnes trans et non binaires.

Ces questions sont apparemment régies par la moralité sociale au moins autant que par des lois identifiables en la matière – une situation renforcée par le fait que dans bon nombre des 28 États membres de l'UE et trois pays de l'AELE inclus dans le rapport, la législation régissant effectivement l'accès à des toilettes réservées aux femmes ou aux hommes demeure peu claire.

Un goulet d'étranglement juridique s'est produit au moment de déterminer dans quelle mesure des sensations de gêne doivent influencer les politiques entourant l'accès à des espaces séparés. Concrètement, les décideurs de l'ensemble de l'Union doivent se demander si le malaise causé à des femmes cisgenres par la présence de femmes trans justifie une politique d'exclusion. Au **Royaume-Uni**, par exemple, la loi de 2010 sur l'égalité permet aux prestataires de services de refuser à des personnes présentant une caractéristique de «changement de genre» l'accès à des services et aménagements collectifs unisexes. Ce refus doit cependant être proportionné au but légitime recherché. Le thème des espaces unisexes soulève des questions plus larges (qui la loi est censée protéger, par exemple) et exige que les décideurs mettent en œuvre, en concertation avec les parties prenantes concernées, des solutions appropriées et proportionnées.

L'éducation

Le septième chapitre est consacré à un sujet – l'éducation – qui se situe largement hors du cadre du droit de l'UE en matière d'égalité, exception faite de la formation professionnelle. Il convient de supposer en effet que, dans le cas de cette dernière, les étudiants sont protégés à l'encontre d'un harcèlement sexuel ou d'autres formes de harcèlement ou de traitement discriminatoire par les dispositions de la directive de refonte. Sans doute la directive cadre 2000/78/CE pourrait-elle offrir une protection aux

élèves et étudiants trans ou intersexués qui rencontrent des difficultés dans le domaine de la formation professionnelle parce qu'ils s'absentent pour traitement médical. Il est possible aussi que la nécessité de fournir des aménagements raisonnables soit invoquée dans ce contexte.

Un problème ne relevant pas du champ d'application du droit de l'UE en matière d'égalité mais qui est vécu par de nombreux jeunes trans est l'impossibilité d'obtenir une reconnaissance juridique de leur genre avant l'âge de la majorité (ou l'âge de 16 ans dans quelques pays de l'UE et de l'AELE) – une situation qui a souvent pour conséquence que les étudiants reçoivent un diplôme libellé à leur ancien nom sans possibilité d'en obtenir un nouveau.

Les pensions de retraite

Le huitième chapitre examine l'accès aux pensions de retraite. Dans 12 pays (novembre 2018), l'âge de la retraite des femmes est encore inférieur à celui des hommes – ce qui peut poser problème aux femmes trans qui, au cas où l'octroi d'une retraite plus précoce leur est refusée, verront leur parcours trans involontairement révélé. Du côté des hommes, cette situation peut signifier qu'ils paient trop, à plus forte raison si leur transition intervient tardivement dans leur vie. Ce problème est néanmoins appelé à disparaître du fait que tous les pays s'orientent vers la suppression des distinctions fondées sur le sexe en matière d'acquisition des droits à pension de retraite.

D'autres difficultés, telle l'utilisation de données actuarielles et d'autres informations sexospécifiques pour calculer les prestations et primes, pourraient subsister. Ces questions méritent une étude approfondie car des personnes pourraient se voir réclamer le remboursement de prestations (s'il apparaît par exemple qu'elles ont reçu un excédent de pension parce que les informations relatives à leur changement de genre légal n'ont pas été traitées correctement, comme ce fut le cas au **Royaume-Uni**). La situation pourrait devenir plus complexe encore si d'autres pays de l'UE et de l'AELE décidaient à leur tour d'introduire des options sexuelles non binaires (ou décidaient de cesser purement et simplement d'attribuer un sexe légal).

L'emploi

Le neuvième chapitre traite des garanties en matière d'égalité et de non-discrimination dans le monde de l'emploi. Ce dernier a connu, par rapport à d'autres domaines visés par les directives européennes en matière d'égalité, un nombre relativement élevé d'affaires dans les 31 ordres juridiques analysés. Le nombre d'affaires publiées n'en reste pas moins comparativement faible et n'atteint assurément pas les niveaux auxquels on pourrait s'attendre au vu de l'ampleur des inégalités d'origine transphobes documentées dans toute l'Europe.

Les absences pour traitement de confirmation de genre et traitement lié à une variance de genre relevant de l'intersexuation bénéficient généralement d'une protection, de la même manière qu'un congé de maladie pour d'autres raisons. Dans certains cas néanmoins, les personnes trans n'ont pas la possibilité, ou ne manifestent pas le souhait, d'exercer ce droit et utilisent leurs congés pour leurs traitements médicaux. Ce phénomène mérite l'attention car les congés sont octroyés pour prendre du repos – et c'est à juste titre que les salariés continuent d'acquérir des droits à congé pendant une période de maladie. Il conviendrait en outre, étant donné les taux élevés de harcèlement que connaissent les populations trans et intersexuées dans l'UE et les trois pays de l'AELE, d'instaurer des codes de conduite et de gestion des conflits sur le lieu de travail.

La grossesse d'un salarié masculin étant une possibilité relativement neuve, les cours et tribunaux du travail ou autres de la plupart des pays n'ont encore été saisis d'aucune affaire qui y serait liée. Il ne serait cependant pas inutile d'anticiper des problèmes dans ce domaine et d'établir clairement que la réglementation applicable vaut également pour les hommes (trans) «enceints». Ceci s'applique à la

fois à la législation visant à protéger la personne enceinte et son enfant, et à la protection contre la discrimination fondée sur la grossesse.

Les recours

Le dixième chapitre concerne les voies de recours ainsi que les sanctions que les juridictions nationales peuvent imposer en cas de discrimination fondée sur l'identité de genre, l'expression de genre ou les caractéristiques sexuelles. Le faible contentieux se traduit par un manque de décisions donnant des orientations judiciaires en matière de sanctions et de recours. Il existe une certaine jurisprudence donnant lieu à une indemnisation financière et il arrive que celle-ci soit importante, ce qui signifie qu'elle pourrait avoir un effet dissuasif sur la persistance d'attitudes transphobes ainsi qu'une répercussion immédiate sur la réhabilitation des personnes qui en sont victimes.

En ce qui concerne pourtant la réduction du nombre de cas de comportement discriminatoire envers les populations trans, les sanctions conduisant à des politiques davantage inclusives, à une meilleure éducation concernant les identités trans, et à une évolution vers davantage d'ouverture, pourraient en définitive avoir surtout pour effet d'améliorer le vécu des personnes concernées. Il faut néanmoins garder à l'esprit que, tout comme dans les autres domaines examinés, ces exemples illustrant une réorientation positive des politiques ne sont implémentés que dans une minorité d'ordres juridiques nationaux parmi les 31 pays analysés.

Conclusions

L'analyse des garanties en matière d'égalité et de la protection contre la discrimination des personnes trans et intersexuées conduit à un état des lieux assez diversifié. Ainsi l'identité de genre et/ou les caractéristiques sexuelles ne sont-elles protégées par la législation nationale, dans une certaine mesure du moins, que dans 13 des 31 pays couverts par le présent rapport.

La législation secondaire de l'UE protège (indirectement) à tout le moins certaines personnes qui connaissent une identité trans (*P c. S et Cornwall County Council*) – mais il est important de s'interroger sur la caractéristique qui permettrait à l'UE et à ses États membres de conceptualiser la discrimination fondée sur la transsexualité. Il existe trois options à cet égard: (i) une protection assurée au moyen d'une large interprétation du sexe; (ii) l'ajout des motifs de l'identité de genre, de l'expression de genre et des caractéristiques sexuelles; ou (iii) une solution intermédiaire n'ajoutant aucun motif supplémentaire mais assurant une large interprétation du «sexe» en précisant que celui-ci doit s'entendre au sens large pour englober toutes les formes de discrimination liée à l'identité de genre, à l'expression de genre et aux caractéristiques sexuelles. Cette question mérite une réflexion plus approfondie – à la fois sur le plan académique et sur le plan des politiques.

L'accès à des espaces unisexes est un sujet particulièrement controversé. Parmi les 31 États de l'UE et de l'AELE examinés, nombreux sont en effet les ordres juridiques au sein desquels cette problématique suscite de vives tensions. Un goulet d'étranglement juridique s'est produit au moment de déterminer dans quelle mesure des sensations de gêne doivent influencer les politiques entourant l'accès à des espaces séparés. Concrètement, les décideurs de l'ensemble de l'Union doivent se demander si le malaise causé à des femmes cisgenres par la présence de femmes trans justifie une politique d'exclusion. La question exige des décideurs qu'ils mettent en œuvre, en concertation avec les parties prenantes concernées, des solutions de compromis qui soient appropriées et proportionnées.

Un élément frappant et constant est mis en lumière tout au long du rapport dans la mesure où l'analyse montre à quel point les ordres juridiques de l'UE et de l'AELE se sont abstenus d'adopter des dispositions ou des mesures destinées à tenir compte des personnes intersexuées ou à les protéger. La variance de

genre relevant de l'intersexuation, de même que les personnes qui la vivent, sont particulièrement peu visibles dans les législations nationales de lutte contre la discrimination. Alors que de nombreuses lois nationales en matière d'égalité tendent à – ou, du moins, sont censées – protéger de toute discrimination les personnes intersexuées au même titre que n'importe quelles autres (en appliquant généralement une large interprétation du «sexe»), seule **Malte** a rendu cette inclusion explicite.

La protection juridique des personnes s'identifiant comme non binaires est également peu développée dans les 28 États membres de l'UE et les trois pays de l'AELE examinés – l'un des principaux obstacles juridiques étant que ces 31 ordres juridiques, ainsi que le cadre juridique de l'UE elle-même, sont fermement ancrés dans une conception binaire du sexe. Tel est également le cas de quelques pays qui ont récemment introduit (ou admis une obligation d'introduire) l'option d'un «troisième genre» (**Allemagne, Autriche** et **Malte**). Il se pourrait donc que les efforts déployés en vue de la reconnaissance d'un ou de plusieurs genres en dehors de la traditionnelle dichotomie homme/femme se heurtent à des difficultés multiples (et inattendues).

Le présent rapport révèle, de façon générale, une évolution du paysage juridique pour les personnes trans et intersexuées dans l'ensemble de l'Union européenne et dans les trois pays de l'AELE. Il contient énormément d'informations positives à bien des égards, même si la situation des personnes trans et intersexuées ne peut encore être décrite comme bénéficiant d'une égalité complète (ou même partielle). Si la sensibilisation du public à leur égard s'accroît, les personnes trans et intersexuées n'en continuent pas moins de porter des fardeaux sociaux et juridiques disproportionnés. Les décideurs, tant nationaux que régionaux, doivent aller de l'avant avec la ferme résolution d'adopter les mesures indispensables pour que l'égalité et la non-discrimination deviennent une réalité fondée sur l'identité de genre, l'expression de genre et les caractéristiques sexuelles.

Zusammenfassung

Einleitung

2012 erstellte das Europäische Netzwerk von Rechtsexpertinnen und Rechtsexperten auf dem Gebiet der Nichtdiskriminierung einen wegweisenden Bericht über Diskriminierung aufgrund des Geschlechts, der Geschlechtsidentität und des Geschlechtsausdrucks. Der Bericht – basierend auf Expertenwissen aus 30 europäischen Ländern – wies auf die erheblichen Ungleichheiten hin, mit denen Transpersonen und Intersexuelle, trotz vielversprechender Entwicklungen in einzelnen Ländern, überall in der Europäischen Union (EU) und Europäischen Freihandelszone (EFTA) konfrontiert sind.

In den Jahren seit 2012 hat die Aufmerksamkeit für die Menschenrechte von Transpersonen und Intersexuellen sowie für Diskriminierung aufgrund der Geschlechtsidentität und der Geschlechtsmerkmale deutlich zugenommen. In den verschiedenen Mitgliedstaaten, wie auch auf regionaler (vor allem europäischer und interamerikanischer) Ebene, existiert ein wachsendes Bewusstsein für die gelebte Realität von Transpersonen und Intersexuellen sowie ein besseres Verständnis für die sozialen, rechtlichen und wirtschaftlichen Herausforderungen, denen diese Menschen gegenüberstehen.

Trotz dieses wachsenden und begrüßenswerten öffentlichen Bewusstseins und Verständnisses für das Leben von Transpersonen und Intersexuellen ist Diskriminierung aufgrund der Geschlechtsidentität und der Geschlechtsmerkmale in den Ländern der EU und der EFTA nach wie vor eine unverhältnismäßig häufige Realität. In ihrem 2014 vorgelegten Bericht „Leben als Trans* in the EU“, der die auf Transpersonen fokussierten Daten aus einer EU-weiten Umfrage unter Lesben, Schwulen, Bisexuellen und Transpersonen auswertete, hat die Agentur der Europäischen Union für Grundrechte (FRA) überall in der EU schwere und wiederholte Fälle von Viktimisierung festgestellt. Diskriminierung und Gewalt richten sich in Europa auch unverhältnismäßig häufig gegen intersexuelle Menschen, die, wie der Menschenrechtskommissar des Europarats kürzlich feststellte, in der Vergangenheit durch Kulturen der Scham und Heimlichkeit marginalisiert und zur Unsichtbarkeit gezwungen wurden.

2015 veröffentlichte die Europäische Kommission eine Liste von Maßnahmen zur Förderung der Gleichstellung von LGBTI-Personen. Zu den in dieser Liste aufgeführten Prioritäten der Kommission gehören a) die Verbesserung der Rechte und die Gewährleistung des Rechtsschutzes und b) die Überwachung und Durchsetzung der bestehenden Rechte von Lesben, Schwulen, Bisexuellen, Transpersonen und Intersexuellen (LGBTI) und ihren Familien. 2016 forderte der Ministerrat die Europäische Kommission auf, jährlich über die Umsetzung der Maßnahmenliste zu berichten. Vor diesem Hintergrund beauftragte die Europäische Kommission das Europäische Netzwerk für Gleichstellungsrecht damit, einen Überblick über die Rahmenbedingungen der Gleichstellung von Transpersonen und Intersexuellen in den 28 EU-Mitgliedstaaten und in drei EFTA-Staaten (Island, Liechtenstein und Norwegen) zu erstellen. Der vorliegende Bericht ist das Ergebnis dieser Mission. In neun Sachkapiteln untersucht er, ob und wie die Gleichstellung von Transpersonen und Intersexuellen in der EU und der EFTA gewährleistet ist.

Internationaler und regionaler Schutz

Kapitel 2 des Berichts befasst sich mit dem internationalen und regionalen Schutz von Transpersonen und Intersexuellen. Es wird aufgezeigt, dass sich dieser Schutz derzeit im Wandel befinden. Während einerseits kein Dokument internationaler Menschenrechtsabkommen Transpersonen und Intersexuelle ausdrücklich berücksichtigt, nimmt andererseits die Zahl der Menschenrechtsakteure, die sich auf Geschlechtsidentität, Geschlechtsausdruck und Geschlechtsmerkmale beziehen, ständig zu. Klar ist, dass die Staaten zumindest

verpflichtet sind, Transpersonen zu respektieren und Maßnahmen zum Schutz vor transphob motivierter Diskriminierung zu ergreifen.

Der Europäische Gerichtshof für Menschenrechte (EGMR) hat klargestellt, dass „Geschlechtsidentität“ unter die nicht abschließende Liste geschützter Merkmale nach Artikel 14 EMRK fällt (*Identoba u.a. gg. Georgien*). In Urteilen wie *Goodwin gg. das Vereinigte Königreich* und *AP, Garçon und Nicot gg. Frankreich* hat er außerdem betont, dass die Vertragsstaaten der Europäischen Menschenrechtskonvention verpflichtet sind, das bevorzugte Geschlecht rechtlich anzuerkennen. Mit Ausnahme von Sterilisation fallen die Bedingungen für eine Anerkennung der Geschlechtszugehörigkeit jedoch weitgehend in den Ermessensspielraum, über den die europäischen Rechtsordnungen verfügen.

Rechtsrahmen und Rechtsprechung der EU

Kapitel 2 befasst sich auch mit den rechtlichen Rahmenbedingungen der EU, insbesondere mit der EU-Rechtsprechung, soweit diese für die Nichtdiskriminierung von Transmenschen und Intersexuellen relevant sind.

Der Rechtsrahmen der EU

Das Primärrecht der EU enthält keine ausdrücklichen Bezüge auf Geschlechtsidentität, Geschlechtsausdruck oder Geschlechtsmerkmale, wohingegen die Charta sexuelle Orientierung in der Liste der verbotenen Diskriminierungsgründe aufführt (Art. 21 Abs. 1). Der Gerichtshof der Europäischen Union (EuGH) kann die Bestimmung jedoch inklusiv auslegen, entweder durch eine weite Auslegung des Begriffs „sexuell“ oder durch Erweiterung der Liste, die nicht abschließend formuliert ist.

Das Sekundärrecht der EU enthält eine Bezugnahme auf Transidentitäten. In den EU-Gleichstellungsrichtlinien ist eine einschlägige Bestimmung zu finden: In Erwägungsgrund 3 der Richtlinie 2006/54/EG ist festgelegt, dass die Richtlinie auch für Diskriminierungen aufgrund einer „Geschlechtsumwandlung“ gilt. Dies ist eine Kodifizierung der Rechtsprechung des EuGH in der Rechtssache *P gegen S und Cornwall County Council* (1996).

Abgesehen von den Gleichstellungsrichtlinien berücksichtigen die Richtlinie 2011/95/EU über die Anerkennung von Drittstaatsangehörigen in Artikel 10 Absatz 1 Buchstabe d) und die Richtlinie 2012/29/EU über die Rechte von Opfern in ihren Erwägungsgründen 9, 17 und 56 Geschlechtsidentität und andere geschlechtsbezogene Aspekte. Bemerkenswert ist, dass die Datenschutz-Grundverordnung von 2016 keinerlei Bezugnahme auf Geschlechtsidentität enthält, obwohl sie Informationen über Sexualleben und sexuelle Orientierung als eine „besondere Kategorie personenbezogener Daten“ aufführt (Art. 9 Abs. 1; siehe auch Erwägungsgründe 71 und 75). Informationen über Geschlechtsidentität, Geschlechtsausdruck oder Geschlechtsmerkmale könnten durch eine weite Auslegung von genetischen oder biometrischen Daten bzw. von Gesundheitsdaten einbezogen werden. Eine weite Auslegung des Begriffs „Geschlecht“ ist hingegen unmöglich, da dieser nicht als sensible Kategorie genannt wird.

Die Rechtsprechung der EU

Der EuGH hat in der Regel Willen gezeigt, eine fortschrittliche Auslegung der Standards für geschlechtliche Gleichbehandlung anzuwenden, und damit eine Grundverpflichtung der Mitgliedstaaten zur Nichtdiskriminierung von Transpersonen geschaffen. Der Gerichtshof hat die meisten Fälle jedoch durch die Brille der „Geschlechtsangleichung“ betrachtet, was zu einem hochgradig medizinisierten Bild von Transpersonen geführt hat. Ständige Verweise darauf, dass beschwerdeführende Personen sich einer geschlechtsangleichenden Operation unterzogen haben, vermitteln den Eindruck, die Gleichstellung von Transpersonen sei von medizinischen Eingriffen abhängig. Für die große Zahl der Transpersonen in

Europa, die eine geschlechtsangleichende medizinische Behandlung nicht in Anspruch nehmen können oder wollen, wird dadurch die Nützlichkeit und Gültigkeit der EU-Nichtdiskriminierungsgarantien infrage gestellt. Eine wichtige Frage in diesem Zusammenhang ist, ob solche Personen nach dem EU-Recht keine Ansprüche hätten, wenn sie eine ähnliche Benachteiligung erfahren wie Personen, die ihren Körper physisch verändert haben.

Urteile, in denen es um intersexuelle oder nicht-binäre Personen geht, sind bislang nicht ergangen. Was letztere betrifft, so bleibt abzuwarten, ob das EU-Gleichstellungsrecht – in seiner jetzigen Fassung – in der Lage ist, Geschlecht jenseits der binären Ordnung zu integrieren und zu schützen.

Rechtliche Anerkennung der Geschlechtszugehörigkeit

Kapitel 3 des Berichts untersucht den Zugang zur rechtlichen Anerkennung der Geschlechtszugehörigkeit. Derzeit ist es in allen 31 Ländern bestimmten Personen erlaubt, ihr rechtliches Geschlecht zu ändern. Die Bedingungen dafür sind jedoch sehr unterschiedlich. In fünf Ländern gibt es noch keine gesetzlichen, behördlichen oder gerichtlichen Leitlinien für die Anerkennung des bevorzugten Geschlechts. Andererseits haben sich sieben Länder bei der Festlegung des bevorzugten Geschlechts für ein Selbstbestimmungsmodell entschieden. In vielen anderen EU- und EFTA-Staaten müssen Personen, die eine Anerkennung ihrer Geschlechtszugehörigkeit beantragen, eine Reihe von medizinischen und ehebezogenen Voraussetzungen erfüllen.

Was minderjährige Transpersonen betrifft, so sind unter den 31 Ländern, die für diesen Bericht untersucht wurden, vergleichsweise wenige, die es Personen unter 16 bzw. 18 Jahren erlauben, eine Anerkennung der Geschlechtszugehörigkeit zu erwirken – trotz der zunehmenden Sichtbarkeit dieser Bevölkerungsgruppe und der wachsenden Zahl junger Transmenschen, die ausdrücklich eine Anpassung ihres Geschlechtsstatus wünschen. Transkinder und jugendliche Transpersonen haben eine Reihe spezifischer Interessen (z.B. Schulabschlüsse), die präzise Geschlechtsmarker für sie umso notwendiger machen. Außerdem ist unter jungen Menschen der Anteil derjenigen, die sich als nicht-binär bezeichnen, oft höher als unter Erwachsenen. Für diese Menschen können innovative Rechtslösungen, wie sie in **Malta** geschaffen wurden (Möglichkeit, sich ohne Mindestalter für ein nicht-binäres Geschlecht zu entscheiden, und Möglichkeit, die Zuordnung eines gesetzlichen Geschlechts hinauszuzögern), als Blaupause für weitreichendere, inklusivere Gesetze und Politiken zur Anerkennung der Geschlechtszugehörigkeit dienen.

Spezielle Nichtdiskriminierungsgründe für Transpersonen und Intersexuelle?

Kapitel 4 des Berichts widmet sich den nationalen Rahmenbedingungen für Gleichstellung und Nichtdiskriminierung. Eine wichtige Frage in diesem Zusammenhang ist, wie der Schutz von Transpersonen und Intersexuellen konzipiert werden sollte. Es gibt drei erkennbare Optionen: (i) Schutz durch weite Auslegung des Begriffs „Geschlecht“, (ii) Aufnahme von „Geschlechtsidentität“, „Geschlechtsausdruck“ und „Geschlechtsmerkmalen“ in die Liste der verbotenen Diskriminierungsgründe oder (iii) einen Mittelweg, bei dem keine Gründe hinzugefügt, sondern eine weite Auslegung des Begriffs Geschlecht gewährleistet wird, indem präzisiert wird, dass „Geschlecht“ weit auszulegen und so zu verstehen ist, dass es alle Formen von Diskriminierung im Zusammenhang mit Geschlechtsidentität, Geschlechtsausdruck und Geschlechtsmerkmalen mit einschließt. Die beiden zuletzt genannten Optionen sind, was die Sichtbarkeit der betroffenen Personen und die symbolische Rolle des Rechts betrifft, zweifellos vorzuziehen. Es bleibt jedoch die komplexe Frage nach den Auswirkungen und Folgen eines einzigen, weit gefassten Grundes „Geschlecht“ im Vergleich zu mehreren, unabhängig formulierten Gründen.

Zu den Vorteilen der ersten Option gehört die Tatsache, dass viele Formen der Diskriminierung sowohl von Cisgender-Personen, insbesondere Frauen, als auch von Transpersonen und Intersexuellen

ähnliche Ursachen haben können (geschlechtsspezifische Vorurteile, stereotype Vorstellungen von Geschlechterrollen usw.). Sie bietet auch bessere Möglichkeiten, um mit intersektionellen Formen von Diskriminierung aus diesen speziellen Gründen umzugehen. Eines der Argumente, die für gesonderte Gründe sprechen, ist die Tatsache, dass Transpersonen und Intersexuelle Arten von Diskriminierung erfahren können, die nicht genau dem akzeptierten Verständnis von Geschlechterdiskriminierung entsprechen. Dies gilt insbesondere für nicht-binäre Personen. Somit sollte wohl ein weit gefasster Begriff von „Geschlecht“, der den Schutz von Transpersonen und Intersexuellen gewährleistet, erweitert werden, um sicherzustellen, dass Geschlechtsidentitäten jenseits der binären Geschlechterordnung berücksichtigt werden können. Dies ist ein Thema, das zweifellos einer weiteren Prüfung bedarf.

Nur in 13 der 31 Länder sind Geschlechtsidentität und/oder Geschlechtsmerkmale im Rahmen der nationalen Gleichstellungs- und Nichtdiskriminierungsvorschriften, zumindest teilweise, ausdrücklich geschützt. In einer Reihe von Ländern ist es unklar, ob sich Menschen auf den Schutz vor Diskriminierung wegen ihrer Geschlechtsidentität oder ihrer Geschlechtsmerkmale berufen können.

Gesundheitsversorgung

Kapitel 5 befasst sich mit der wichtigen Frage des Zugangs zur Gesundheitsversorgung. Die geschlechtsbezogene Gleichbehandlung in der Gesundheitsversorgung wird durch die Richtlinie 2004/113/EG über den Zugang zu und die Versorgung mit Gütern und Dienstleistungen geschützt. Diese Richtlinie gründet jedoch fest auf einer binären Vorstellung von Geschlecht. In zahlreichen einschlägigen Bestimmungen wird ausdrücklich auf Männer und Frauen Bezug genommen. Der mit der Richtlinie verfolgte Gleichstellungsbegriff scheint insofern weniger starr zu sein als in anderen Bereichen (z.B. Beschäftigung), als nach Erwägungsgrund 12 der Präambel „bei auf körperliche Unterschiede bei Mann und Frau zurückzuführenden unterschiedlichen Gesundheitsdienstleistungen für Männer und Frauen keine Diskriminierung vor[liegt], weil es sich nicht um vergleichbare Situationen handelt“.

Gesundheitseinrichtungen und Vorschriften für Transpersonen und Intersexuelle sind von Land zu Land sehr unterschiedlich. Zu den Problemen, mit denen diese Gruppen konfrontiert sind, gehört der eingeschränkte Zugang zu Behandlungen, der zu langen Wartelisten führt. Mehrere Länder (z.B. **Belgien**) haben spezialisierte Gender-Kliniken eingerichtet, die ausschließlich für die Behandlung von Transpersonen zuständig sind. Dieser Ansatz kann in manchen Fällen dazu führen, dass das Recht auf freie Wahl des Leistungserbringers eingeschränkt wird.

Wartelisten und Kosten (bzw. die fehlende Erstattung derselben) können zur Folge haben, dass Menschen sich im Ausland – in anderen EU-Ländern oder auch außerhalb der EU – behandeln lassen. Dies wiederum kann Probleme, beispielsweise bei der Erstattung von Krankheitskosten, nach sich ziehen. Die Durchführung einer geschlechtsangleichenden Behandlung im Ausland kann außerdem dazu führen, dass nationale Behörden die Anerkennung gesetzlich vorgeschriebener medizinischer Maßnahmen (z.B. für die rechtliche Anerkennung der Geschlechtszugehörigkeit) verweigern – was einen Verstoß gegen die Dienstleistungsfreiheit in der Europäischen Union darstellen könnte.

Wie bereits erwähnt, wird das Thema Gesundheit und Wohlbefinden dadurch berührt, dass Operation, Sterilisierung, Hormonbehandlung und Diagnosen zur Voraussetzung für eine rechtliche Anerkennung der Geschlechtszugehörigkeit gemacht werden. Chirurgische Eingriffe und Sterilisation werden immer noch in sieben Ländern (wenn auch nicht in genau denselben Ländern) verlangt; in einigen wenigen Ländern ist die Situation, was die Anforderungen hinsichtlich operativer Maßnahmen oder Sterilisation betrifft, nach wie vor unklar. Die Rechtslage in Bezug auf Hormonbehandlung ist diffus. Eine medizinische Diagnose ist immer noch in der Mehrzahl (genauer gesagt in mindestens 21) der untersuchten Länder erforderlich.

Während die allgemeine Frage der Anerkennung des bevorzugten Geschlechts nicht in den Geltungsbereich des EU-Rechts fällt, kann sich der Zugang zu bestimmten Behandlungen (Brustvergrößerung,

Stimmanpassung usw.) mit den EU-Maßnahmen zum Schutz der Geschlechtergleichstellung überschneiden. In mehreren Ländern werden solche Behandlungen nicht erstattet, da sie als „nicht von zentraler Bedeutung“ für das Verfahren zur Bestätigung der Geschlechtszugehörigkeit, sondern als „rein kosmetisch“ angesehen werden. Die Frage nach der richtigen Vergleichsperson stellt die nationalen Gerichte hier manchmal vor Probleme.

Nach der kürzlich ergangenen Entscheidung in *MB gegen Secretary of State for Work and Pensions* ist auch klar, dass Mitgliedstaaten – zumindest wenn Personen Rechte, z.B. soziale Sicherheit, in Anspruch nehmen möchten, die in den Geltungsbereich des EU-Rechts fallen – keine Bedingungen für die Anerkennung des bevorzugten Geschlechts stellen dürfen, die den Grundrechten der EU widersprechen. So ist es zum Beispiel unwahrscheinlich, dass ein Mitgliedstaat einer Transfrau eine frühere Altersrente verweigern könnte, weil sie sich weigert, sich einer Sterilisation zu unterziehen. Der Europäische Gerichtshof für Menschenrechte hat kürzlich festgestellt, dass es nicht mit Artikel 8 EMRK vereinbar ist, eine Sterilisation zur Bedingung zu machen.

Es gibt nur sehr wenig Rechtsprechung dazu, wie Transpersonen und Intersexuelle in nationalen Krankenhäusern von den dort Beschäftigten bzw. von anderen Patientinnen und Patienten behandelt werden. Die Einführung von Leitlinien für einen respektvollen Umgang, wie in **Kroatien** geschehen, wäre auch in anderen Mitgliedstaaten zu begrüßen. Diese Leitlinien sollten einen Hinweis darauf enthalten, dass es wünschenswert ist, die von den jeweiligen Personen bevorzugten Namen und geschlechtsspezifischen Pronomen zu verwenden.

Nach Geschlechtern getrennte Einrichtungen

In Kapitel 6 des Berichts wird das Thema geschlechtsgetrennte Einrichtungen behandelt. Nach Geschlechtern getrennte Einrichtungen sind in allen 31 Ländern, die für diesen Bericht untersucht wurden, sehr verbreitet, auch wenn ihre Präsenz in manchen Ländern offensichtlicher ist als in anderen. Getrennte Toiletten für Frauen und Männer gelten zum Beispiel häufig als Selbstverständlichkeit, bedeuten für viele Transpersonen und nicht-binäre Personen jedoch tägliche Dilemmata und Kämpfe.

Diese Themen werden anscheinend ebenso sehr von der Sozialmoral wie von den entsprechenden Gesetzen bestimmt. Verschärfend kommt hinzu, dass in vielen der 28 EU- und drei EFTA-Staaten, die Gegenstand der Untersuchung waren, die reale Gesetzgebung, die den Zugang zu Frauen- bzw. Männertoiletten regelt, unklar ist.

Ein juristisches Nadelöhr hat sich im Zusammenhang mit der Frage ergeben, wie Gefühle des Unbehagens die Regeln für den Zugang zu getrennten Einrichtungen beeinflussen sollten. Konkret müssen die politischen Entscheidungsträger in der gesamten Union prüfen, ob das Unbehagen von Cis-Frauen gegenüber der Anwesenheit von Transfrauen Ausgrenzungsmaßnahmen rechtfertigt. Im **Vereinigten Königreich** erlaubt der Equality Act 2010 Dienstleistern zum Beispiel, Personen, die Merkmale einer „Geschlechtsangleichung“ aufweisen, den Zutritt zu Einrichtungen oder Gemeinschaftsunterkünften, die einem bestimmten Geschlecht vorbehalten sind, zu verweigern. Diese Zutrittsverweigerung muss jedoch in einem angemessenen Verhältnis zur Erreichung eines rechtmäßigen Ziels stehen. Das Thema geschlechtsgetrennte Einrichtungen wirft weitreichendere Fragen auf, z.B. wen das Gesetz schützen soll, und erfordert, dass die politischen Entscheidungsträger (in Absprache mit relevanten Interessengruppen) angemessene und verhältnismäßige Lösungen umsetzen.

Bildung

Der Gegenstand von Kapitel 7 – Bildung – liegt, mit Ausnahme der beruflichen Bildung, weitgehend außerhalb des Geltungsbereichs des EU-Gleichstellungsrechts. Es ist davon auszugehen, dass in der

beruflichen Ausbildung stehende Personen auf der Grundlage der Richtlinie 2006/54/EG vor sexueller und anderen Formen von Belästigung sowie vor diskriminierender Behandlung geschützt sind. Transpersonen und intersexuellen Personen, die wegen Fehlzeiten aufgrund medizinischer Behandlungen Probleme in der Berufsausbildung haben, kann die Gleichbehandlungsrahmenrichtlinie 2000/78/EG wahrscheinlich Schutz bieten. Möglicherweise würde in diesem Zusammenhang die Notwendigkeit geltend gemacht, angemessene Vorkehrungen zu treffen.

Ein Problem, das außerhalb des Geltungsbereichs des EU-Gleichstellungsrechts liegt, jedoch viele junge Transmenschen betrifft, ist die Unmöglichkeit, vor Erreichen der Volljährigkeit (bzw. vor Vollendung des 16. Lebensjahres in einigen wenigen EU- und EFTA-Staaten) eine rechtliche Anerkennung der Geschlechtszugehörigkeit zu erwirken. Dies führt häufig dazu, dass junge Menschen ein auf ihren alten Namen ausgestelltes Abschlusszeugnis erhalten und keine Möglichkeit haben, ein neues zu bekommen.

Altersrenten

Kapitel 8 behandelt den Zugang zu Altersrenten. In zwölf Ländern (Stand November 2018) ist das Rentenalter von Frauen nach wie vor niedriger als das der Männer. Für Transfrauen kann dies zu Problemen führen, wenn ihnen ein früherer Renteneintritt verweigert wird und sie ihre Transvergangenheit unfreiwillig aufdecken müssen. Für Transmänner kann es bedeuten, dass sie zu viel bezahlen, vor allem wenn die Transition erst später in ihrem Leben stattfindet. Dieses Problem wird jedoch verschwinden, da in allen Ländern die Entwicklung dahin geht, geschlechtsbezogene Unterschiede beim Erwerb von Altersrentenansprüchen zu beseitigen.

Andere Probleme, etwa die Verwendung versicherungsmathematischer Daten und geschlechtsbezogener Informationen zur Berechnung von Leistungen und Prämien, könnten fortbestehen. Diese Themen bedürfen einer genauen Prüfung, da sie dazu führen können, dass Menschen mit Forderungen nach Rückzahlung von Rentenleistungen konfrontiert werden (etwa wenn sich herausstellt, dass eine Person zu viel Rente bezogen hat, weil Informationen über die Änderung ihres gesetzlichen Geschlechts nicht korrekt verarbeitet wurden, wie im **Vereinigten Königreich** geschehen). Die Situation könnte sich verkomplizieren, wenn mehr EU- und EFTA-Staaten beschließen, nicht-binäre Geschlechtsoptionen einzuführen (oder ganz auf die Zuweisung eines gesetzlichen Geschlechts zu verzichten).

Beschäftigung

Kapitel 9 befasst sich mit dem Schutz der Gleichstellung und Nichtdiskriminierung im Bereich der Beschäftigung. Im Vergleich zu anderen Bereichen, die unter die EU-Gleichstellungsrichtlinien fallen, ist die Zahl der arbeitsrechtlichen Fälle in den 31 untersuchten Ländern relativ hoch. Die Zahl der veröffentlichten Fälle ist jedoch immer noch verhältnismäßig gering und erreicht keinesfalls das Niveau, das angesichts des Ausmaßes transphob motivierter Ungleichheiten im Beschäftigungsbereich, die in ganz Europa dokumentiert wurden, zu erwarten wäre.

Fehlzeiten aufgrund einer Behandlung zur Bestätigung der Geschlechtszugehörigkeit oder einer Behandlung im Zusammenhang mit einer intersexuellen Varianz sind, ebenso wie Krankheitsurlaube aus anderen Gründen, in der Regel geschützt. In manchen Fällen sind Transpersonen jedoch nicht in der Lage oder nicht bereit, von ihrem Recht Gebrauch zu machen, und benutzen ihren Urlaub für medizinische Behandlungen. Dieses Phänomen muss weiter beobachtet werden, da Urlaub zum Zweck der Erholung gewährt wird. Es hat gute Gründe, dass Arbeitnehmerinnen und Arbeitnehmer in Krankheitszeiten weiterhin Urlaubsansprüche erwerben. Angesichts der zahlreichen Belästigungen, denen Transpersonen und Intersexuelle in der EU und den drei EFTA-Staaten ausgesetzt sind, ist es außerdem auch erforderlich, Regeln für Verhalten und Konfliktmanagement am Arbeitsplatz aufzustellen.

Die Möglichkeit, dass männliche Arbeitnehmer schwanger werden, ist relativ neu, und in den meisten Ländern wurden den Gerichten bzw. Arbeitsgerichten noch keine entsprechenden Fälle vorgelegt. Es erscheint jedoch sinnvoll, Probleme in diesem Bereich zu antizipieren und klarzustellen, dass die einschlägigen Vorschriften auch für schwangere (Trans-)Männer gelten. Dies bezieht sich sowohl auf die Vorschriften zum Schutz der schwangeren Person und ihres Babys als auch auf den Schutz vor Schwangerschaftsdiskriminierung.

Abhilfemaßnahmen und Sanktionen

In Kapitel 10 geht es um die Abhilfemaßnahmen und Sanktionen, die nationale Gerichte vorschreiben bzw. verhängen, wenn sie eine Diskriminierung aufgrund der Geschlechtsidentität, des Geschlechtsausdrucks oder der Geschlechtsmerkmale feststellen. Das Fehlen von Rechtsprechung bedeutet, dass es an Entscheidungen mangelt, die juristische Orientierungshilfe zu Sanktionen und Abhilfemaßnahmen liefern. Es gibt ein paar gerichtliche Entscheidungen, in denen finanzielle Entschädigungen zugesprochen wurden. In einigen dieser Fälle war die Entschädigung hoch, was bedeutet, dass sie eine abschreckende Wirkung im Hinblick auf weiteres transphobes Verhalten haben kann. Für die von einem solchen Verhalten Betroffenen kann sie darüber hinaus einen unmittelbaren wiederherstellenden Effekt haben.

Im Hinblick darauf, die Zahl der Fälle diskriminierenden Verhaltens gegenüber Transmenschen zu reduzieren, sind Sanktionen, die inklusivere Strategien, bessere Aufklärung über Transidentitäten und ein aufgeschlosseneres Umfeld bewirken, letztlich jedoch eher geeignet, die Lebensrealität von Transpersonen zu verbessern. Es ist allerdings, wie in den anderen erörterten Bereichen auch, zu bedenken, dass diese Beispiele eines Politikwandels zwar positiv sind, jedoch nur in den wenigsten innerstaatlichen Rechtsordnungen der 31 untersuchten Länder durchgesetzt werden.

Schlussfolgerungen

Die Analyse des aktuellen Stands der Gleichheitsgarantien und des Antidiskriminierungsschutzes für Transpersonen und Intersexuelle liefert ein vielfältiges Bild. Nur in 13 der 31 untersuchten Länder sind Geschlechtsidentität und/oder Geschlechtsmerkmale durch nationale Rechtsvorschriften, zumindest teilweise, geschützt.

Das Sekundärrecht der EU schützt (indirekt) zumindest bestimmte Personen, die eine Transidentität haben (*P gegen S und Cornwall County Council*). Eine wichtige Frage ist jedoch, anhand welchen Merkmals die EU und die Mitgliedstaaten die Diskriminierung von Transpersonen konzeptualisieren sollen. Es stehen drei Optionen zur Verfügung: (i) Schutz durch weite Auslegung des Begriffs „Geschlecht“, (ii) Hinzufügung der Diskriminierungsgründe „Geschlechtsidentität“, „Geschlechtsausdruck“ und „Geschlechtsmerkmale“ oder (iii) ein Mittelweg, bei dem keine Gründe hinzugefügt, sondern eine weite Auslegung des Begriffs Geschlecht gewährleistet wird, indem präzisiert wird, dass „Geschlecht“ weit auszulegen und so zu verstehen ist, dass es alle Formen von Diskriminierung im Zusammenhang mit Geschlechtsidentität, Geschlechtsausdruck und Geschlechtsmerkmalen mit einschließt. Diese Frage bedarf weiterer Diskussion – sowohl auf akademischer als auch auf politischer Ebene.

Ein besonders umstrittenes Thema ist der Zugang zu geschlechtsgetrennten Einrichtungen. In vielen der 31 untersuchten EU- und EFTA-Staaten führt das Thema getrennte Räumlichkeiten zu erheblichen Spannungen. Ein juristisches Nadelöhr hat sich im Zusammenhang mit der Frage ergeben, wie Gefühle des Unbehagens die Regeln für den Zugang zu getrennten Einrichtungen beeinflussen sollten. Konkret müssen die politischen Entscheidungsträger in den EU-Ländern prüfen, ob das Unbehagen von Cis-Frauen gegenüber der Anwesenheit von Transfrauen Ausgrenzungsmaßnahmen rechtfertigt. Diese Frage verlangt von den politischen Entscheidungsträgern, dass sie (in Absprache mit relevanten Interessengruppen) Kompromisslösungen umsetzen, die angemessen und verhältnismäßig sind.

Ein auffälliges Merkmal der Analyse, das sich durch den gesamten Bericht zieht, ist die Tatsache, dass die EU- und EFTA-Länder in viel zu geringem Maße Bestimmungen erlassen bzw. Maßnahmen ergriffen haben, um intersexuellen Menschen Rechnung zu tragen oder sie zu schützen. Intersexuelle Varianz und diejenigen, die mit ihr leben, sind im innerstaatlichen Antidiskriminierungsrecht besonders unsichtbar. Obwohl viele nationale Gleichstellungsgesetze Intersexuelle beim Diskriminierungsschutz tendenziell allen anderen Menschen gleichstellen oder zumindest gleichstellen sollten (üblicherweise durch eine weite Auslegung des Begriffs „Geschlecht“), hat lediglich **Malta** diese Einbeziehung ausdrücklich geregelt.

Der rechtliche Schutz für Menschen, die sich als nicht-binär begreifen, ist in den 28 EU- und drei EFTA-Staaten, die untersucht wurden, ebenfalls schwach. Ein großes rechtliches Hindernis besteht darin, dass alle 31 Rechtsordnungen wie auch der Rechtsrahmen der EU selbst fest auf einem binären Geschlechterbegriff fußen. Dies gilt auch für die wenigen Länder, die in jüngster Zeit eine dritte Geschlechtsoption eingeführt (oder sich zu deren Einführung verpflichtet) haben (**Deutschland, Malta** und Österreich). Bemühungen, Geschlecht(er) außerhalb der traditionellen Mann-Frau-Dichotomie anzuerkennen, können daher auf viele (unerwartete) Schwierigkeiten stoßen.

Insgesamt lassen die Ergebnisse des Berichts eine sich verändernde Rechtslandschaft für Transpersonen und Intersexuelle in der gesamten Europäischen Union und den drei EFTA-Staaten erkennen. Der Bericht enthält in vielerlei Hinsicht viele begrüßenswerte Informationen. Dennoch kann die Stellung von Transpersonen und Intersexuellen in Europa nicht als vollständige (oder auch nur teilweise) Gleichstellung bezeichnet werden. Während sich das öffentliche Bewusstsein verbessert, sind Transpersonen und Intersexuelle nach wie vor unverhältnismäßigen sozialen und rechtlichen Belastungen ausgesetzt. Um voranzukommen, müssen die politischen Entscheidungsträger – sowohl auf nationaler als auch auf regionaler Ebene – bereit sein, dringend erforderliche Maßnahmen zu ergreifen, um sicherzustellen, dass Gleichheit und Nichtdiskriminierung aufgrund der Geschlechtsidentität, des Geschlechtsausdrucks und der Geschlechtsmerkmale praktisch verwirklicht werden.

1. Introduction

1.1 Trans and intersex rights in the EU and EFTA

In 2012, the European Commission's Network of Legal Experts in the Non-discrimination Field authored a landmark report on discrimination motivated by sex, gender identity and gender expression.¹

The report – drawing upon expert knowledge in 30 European jurisdictions – highlighted the significant levels of inequality which, despite promising developments in individual countries, trans ('trans') and intersex people confronted across the European Union (EU) and the European Free Trade Association (EFTA). The report also critically analysed existing EU protections for trans people – in particular, the case law of the Court of Justice of the European Union – and revealed the comparative absence, both *de jure* and *de facto*, of domestic protections against transphobic and intersex-motivated discrimination.

In the years since 2012, the attention paid to the human rights of trans and intersex people and to discrimination on the grounds of gender identity and sex characteristics has increased significantly throughout the EU and EFTA. Across the various Member States, and at the regional level, there is growing awareness of the lived experience of trans and intersex individuals and greater understanding of the social, legal and economic challenges that such people face.

Increasing knowledge of trans and intersex experiences is not simply a European phenomenon. Rather, it can be observed in numerous regions around the globe. In Chapter 2, this report explores the manifold ways in which international actors – particularly those within the United Nations (UN) human rights system – have recently embraced trans and intersex equality. This movement is also evident within regional organisations, particularly the Council of Europe,² the Organization of American States³ and the African Commission on Human and People's Rights.⁴ Growing awareness of gender diversity can also be seen through projects – enacted by both the World Health Organization (WHO) and the American Psychiatric Association (APA) – which seek to recalibrate the relationship between trans identities and healthcare.⁵

In some cases, greater awareness has been precipitated by high-profile individuals – young and old – revealing and speaking about gender identity and the body.⁶ Although these comparatively privileged narratives are often criticised as being unreflective of real-life trans and intersex struggles, they have encouraged important public conversations about marginalisation. In other situations, public knowledge has resulted from increased familiarity with the individual and collective hardships which trans and intersex people endure. As advocates and their allies expose systemic cultures of inequality, movements are emerging to tackle transphobia and intersex-motivated bias.

1 Agius, S. and Tobler, C. (2012), *Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression*, European Commission. For definitions of these terms, see the 'Terminology' section below.

2 See Chapter 2.

3 See e.g. Inter-American Commission on Human Rights, *Violence against LGBTI persons* (12 November 2015) OAS/Ser.L/V/II.rev.1; Inter-American Court of Human Rights, Advisory Opinion OC-24/17 (24 November 2017).

4 African Commission on Human and People's Rights (2014), 'Resolution on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity', Resolution 275.

5 See: American Psychiatric Association (2013), *Diagnostic and statistical manual of mental disorders*, Version 5; WHO (2018), *International classification of diseases*, Version 11.

6 See the high-profile cases of Caitlin Jenner and Jazz Jennings; Somaiya, R. (2015), 'Caitlyn Jenner, formerly Bruce, introduces herself in *Vanity fair*', *New York Times*, 1 June 2015, available at: <https://www.nytimes.com/2015/06/02/business/media/jenner-reveals-new-name-in-vanity-fair-article.html?mcubz=3&mtrref=www.google.co.uk&gwh=2E4529FCCD8BFE649505359D90132993&gwt=pay> (accessed 23 August 2017); Jennings, J. (2016), *Being Jazz: My life as a trans teen*, TLC/Peggy Sirota. In Europe, see Hanne Gaby Odiele, who has spoken publicly about experiencing intersex variance: Hicklin, A. (2017), 'Intersex and proud: Model Hanne Gaby Odiele on finally celebrating her body', *Guardian*, 23 April 2017, available at: <https://www.theguardian.com/fashion/2017/apr/23/intersex-and-proud-hanne-gaby-odiele-the-model-finally-celebrating-her-body> (accessed 24 September 2018).

Yet despite the welcome increase in public knowledge and appreciation of trans and intersex lives, discrimination based on gender identity and sex characteristics remains a disproportionate reality across the EU and EFTA. In its 2014 report, 'Being trans in the EU',⁷ which explores the trans-focused data obtained during an EU-wide survey of lesbian, gay, bisexual and trans communities, the European Union Agency for Fundamental Rights (FRA) observed 'serious and repetitive victimisation [throughout] the EU'.⁸ Trans respondents reported high levels of discrimination in various sectors, including employment, education and healthcare. They were also more likely to face violence, with the 'annual incidence rate of violence or harassment [being] around one incident per two trans respondents, which is twice as high as the incidence rates for lesbian, gay and bisexual respondents'.⁹

In 2015, Eurobarometer 437 highlighted that, despite greater public awareness and understanding of trans lives, there remains significant social prejudice against diverse experiences of gender and the body. For example, according to the 2015 survey, only in six EU Member States are more than 50 % of respondents comfortable with or indifferent to their child having a relationship with a trans person.¹⁰

Discrimination and violence are also disproportionately experienced by intersex people in Europe who, as observed recently by the Commissioner for Human Rights of the Council of Europe, have historically been coerced – through cultures of shame and secrecy – into positions of marginalisation and invisibility.¹¹ Indeed, a striking feature of the emerging research and data on trans communities in Europe is the absence of similarly detailed information on the lives of people who experience intersex variance. Such legal, political and social invisibility is evident throughout this report and must be understood as part of those structures of inequality which intersex people are required to navigate.

1.2 Report: Trans and intersex equality rights in Europe – A comparative analysis

In 2015, the European Commission published the 'List of actions to advance LGBTI equality'. Two of the Commission's priorities, as set out in its *List of actions* are: (a) improving rights and ensuring legal protection; and (b) monitoring and enforcement of the existing rights of lesbian, gay, bisexual, trans and intersex (LGBTI) people and their families. In 2016, the Council of Ministers asked the European Commission to report annually on the implementation of its List.¹²

Against this background, the European Commission requested the European Equality Law Network to carry out an overview of trans and intersex equality frameworks across the 28 EU Member States and three additional EFTA states (Iceland, Liechtenstein and Norway). This report is the end product of that request.

The report is not intended to provide an exhaustive exploration of the intersections of equality law, trans identities and intersex variance within the 31 jurisdictions under review. Such an investigation would require significantly more space than this document can accommodate. It might also be impossible to achieve, given the uncertainty which – even in 2018 – continues to surround national law protection for gender identity and sex characteristics. This latter concern is, as already noted, particularly relevant in the context of intersex variance, where the notion of 'sex characteristics' as a protected ground in discrimination law remains underdeveloped throughout Europe.

7 European Union Agency for Fundamental Rights (2014), *Being trans in the EU: Comparative analysis of EU LGBT survey data*, Publication Office of the European Union.

8 Ibid, p. 9.

9 Ibid, p. 10.

10 European Commission, DG Justice (2015), *Discrimination in the EU in 2015*; Special Eurobarometer 437 p. 65.

11 See generally: Commissioner for Human Rights of the Council of Europe (2015), *Human rights and intersex people: Issue paper*, CoE.

12 So far two annual reports have been published, the latest of which is *Annual report 2017 on the list of actions to advance LGBTI equality; Leading by example*, #EU4LGBTI, 2017. Another relevant report published in 2017 is: Bell, M. (2017), *Data collection in relation to LGBTI people; Analysis and comparative review of equality data collection practices in the European Union*, DG Justice.

Instead, identifying key themes – legal gender recognition, protection within employment and education, and access to healthcare, social security and goods/services – the report adopts a broader analysis of how (and whether) trans and intersex communities enjoy equality guarantees across the EU and EFTA. This baseline inquiry, while perhaps less detailed than a country-by-country investigation, is an important first step if policy-makers, both within the EU and national systems, wish to encourage greater non-discrimination protections and to consolidate the advances which have already been made.

The report begins with an overview of international and regional developments in the field of trans and intersex equality. Observing increasing judicial and soft-law engagement, the report identifies a growing international consensus on the non-discrimination entitlements of trans and intersex people. The report then proceeds to explore legal gender recognition frameworks across the 28 EU and three EFTA Member States. While the formal acknowledgement of preferred gender has historically been understood as an extension of private life, legal gender recognition is closely linked to experiences of inequality. Where trans and intersex communities cannot be affirmed in their lived gender, this denial becomes a gateway for future social and legal discrimination.

The substantive proportion of this report is dedicated to national laws (or the absence thereof) which protect trans and intersex people in areas which fall within the scope of EU law. This includes equality guarantees when people enter and engage in employment, experiences within the education and healthcare sectors, and non-discriminatory access to social security benefits, as well as goods and services. The report investigates to what extent domestic law currently protects trans and intersex individuals within these spheres, identifying the sanctions and remedies which have been imposed. The report also asks whether such statutory provisions or administrative policies can (and do) practically shield people from unequal treatment.

Overall, the report offers an insight into the current equality protections enjoyed by trans and intersex people across the European Union and EFTA. It identifies the progress which Member States have achieved in providing non-discrimination safeguards, but also exposes the vulnerabilities and inequalities which many trans and intersex individuals continue to experience within their national legal order.

A key limitation of the analysis contained in this report, which it is important to highlight at the outset, is the absence of detailed information on legal protections for intersex people. While the focus of this document is placed equally upon trans and intersex experiences of discrimination, there is noticeably more data and analysis relating to domestic rules which apply to gender identity. In many jurisdictions, researchers encountered definite difficulties in locating any case law or legislation which specifically considers unequal treatment based on sex characteristics.

While the absence of information and, consequently, the limited analysis in this report reflects a broader problem of domestic (and EU) law failing to engage with intersex experiences, the authors note that this absence represents a shortcoming. It is hoped that such a shortcoming can highlight the comparative dearth of available information and encourage European and national policy-makers to further engage with the legal and social concerns confronting intersex people.

1.2.1 Methodology

The report was researched and authored between December 2017 and October 2018. In order to obtain information on domestic protections against transphobic and intersex-motivated discrimination, the European Equality Law Network circulated a detailed questionnaire among 31 national law experts on gender equality and non-discrimination. The experts represented each of the jurisdictions surveyed for the report and have specialist knowledge of the equality frameworks applicable in those Member States. The expert questionnaires were completed between April and May 2018.

Although the authors chose not to provide specific, country-focused case studies, the report does refer to individual domestic laws or policies in detail, particularly to highlight examples of good practice. In supplementing the information provided by the national experts, the authors made use of various civil society and policy publications, as well as referring to academic scholarship. These materials helped to fill gaps in existing knowledge, and assisted the authors in understanding EU-level and domestic legal frameworks. The authors owe a particular debt of gratitude to the many professional colleagues, both academic and from civil society, who generously offered their expertise and knowledge throughout the drafting process.

1.2.2 Terminology

Before proceeding to the substantive content of the report, this introduction offers an explanatory note on the terminology used throughout this document. The authors acknowledge the deeply personal ways in which many individuals experience their sexuality, gender and bodies. While specific terminology – and definitions – have been used as part of this report, the reader should appreciate that these terms may not align with the multiplicity of ways that certain individuals – cisgender or trans – may understand and live their identity. The report's language may also not correspond with individual, or community, experiences of intersex variance. Although the authors have, where possible, chosen terminology which is commonly used within human rights discourse, the report should not be understood as claiming to use definitive or authoritative language.

Intersex

This report adopts the definition of *intersex* set out by the Commissioner for Human Rights of the Council of Europe in his landmark 2015 report, 'Human rights and intersex people': intersex individuals are people who cannot be classified according to the medical norms of so-called male and female bodies with regard to their chromosomal, gonadal or anatomical sex. The latter becomes evident, for example, in secondary sex characteristics such as muscle mass, hair distribution and stature, or primary sex characteristics such as the inner and outer genitalia and/or the chromosomal and hormonal structure.¹³

Trans

The term *trans* includes those people who have a gender identity and/or a gender expression that is different from the sex they were assigned at birth. 'Trans' is an umbrella term that includes, but is not limited to, men and women with trans pasts and people who identify as transsexual,¹⁴ trans,¹⁵ transvestite/cross-dressing, androgyne, polygender, genderqueer, agender, non-binary, gender variant or with any other gender identity and gender expression which is not standard male or female, and who express their gender through presentation (e.g. self-referring language, clothing, etc.) or body modifications, including (but not necessitating) the undergoing of multiple surgical procedures.

Gender identity

This report adopts the definition of *gender identity* set out in the Introduction to the Yogyakarta Principles:¹⁶ gender identity refers 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

13 Commissioner for Human Rights of the Council of Europe (2015), *Human rights and intersex people: Issue paper*, CoE, p. 13.

14 The term 'transsexual' is often used to refer to individuals who undertake a process of full medical transition, seeking to align their bodily characteristics with their internal sense of gender.

15 'Transgender' is, like the word 'trans', an umbrella notion which refers to all individuals who do not identify with their birth-assigned legal gender. However, some trans-identified people prefer the term 'trans' rather than 'transgender' as an acknowledgment that not all people have an experience of gender.

16 The Yogyakarta Principles are a 2007 soft-law document, written by 29 distinguished human rights experts, which apply international human rights to sexual orientation and gender identity, see: 'About the Yogyakarta Principles' (*Yogyakarta Principles website, no date available*) www.yogyakartaprinciples.org/principles-en/about-the-yogyakarta-principles/ (accessed 24 August 2017).

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.

Sex characteristics This report adopts the definition of *sex characteristics* set out in the Preamble to the Yogyakarta Principles Plus 10: sex characteristics are each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones and secondary physical features emerging from puberty.¹⁷

Gender expression This report adopts the definition of *gender expression* set out in the Preamble to the Yogyakarta Principles Plus 10:¹⁸ gender expression is each person's presentation of the person's gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references, and noting further that gender expression may or may not conform to a person's gender identity.

Transition Where individuals undertake a process to live – publicly or privately – within their preferred gender, this may be referred to as a *transition*. There is no standard transition narrative. Instead, a person's individual process of transition may (but need not) be social, legal, professional, medical or familial.

Where an individual decides to engage in a medical transition, this report refers to the healthcare treatments that the individual accesses as *gender confirmation treatments*, including (but not requiring) *gender confirmation surgery* (historically known as 'sex reassignment surgery'). In the legislation and case law of the European Union, undergoing gender confirmation or affirmative treatment is referred to as completing a process of '*gender reassignment*'.¹⁹

Cisgender *Cisgender* refers to individuals who self-identify with the gender that was assigned to them at birth. Cisgender is derived from the Latin word 'cis' ('on this side of') and should not be conflated with the pejorative, English-language term, 'sissy'.

Non-binary An umbrella term for gender identities that fall outside the gender binary of male or female. This includes individuals whose gender identity is neither exclusively male nor female, a combination of male and female or between or beyond genders. Similar to the usage of trans, people under the non-binary umbrella may describe themselves using one or more of a wide variety of terms.²⁰

17 Preamble to Yogyakarta Principles Plus 10' (*Yogyakarta Principles website*) <http://yogyakartaprinciples.org/preamble-yp10/> (accessed 29 August 2018).

18 Ibid.

19 *P v S and Cornwall County Council* [1996] 2 CMLR 247, [20].

20 This is the definition of 'non-binary' offered by the Trans Equality Network Ireland. See: 'Trans Terms' (*Trans Equality Network Ireland website*) <http://teni.ie/page.aspx?contentid=139> (accessed 29 August 2018).

2. International and regional non-discrimination protections for trans and intersex people

Chapter 2 explores existing non-discrimination protections for trans and intersex people. It focuses on three international and regional frameworks: (1) the United Nations human rights system, particularly the treaty monitoring bodies; (2) the Council of Europe human rights system, particularly the case law of the European Court of Human Rights; and (3) the European Union rights system, including trans-inclusive secondary legislation and the jurisprudence of the Court of Justice of the European Union.

Chapter 2 is not an exhaustive summary of all rights instruments and judicial opinions which guarantee the equality of trans and intersex people. Instead, before embarking upon an overview of domestic protections throughout the EU Member States and three EFTA states, Chapter 2 explains the international and regional context in which those national laws (or the absence thereof) must be understood.

2.1 United Nations human rights system

The right to equality and non-discrimination is firmly enshrined within international human rights law.²¹ Article 1 of the Universal Declaration of Human Rights (UDHR) provides that '[a]ll human beings are born free and equal in dignity and rights'. The principle of equality and non-discrimination is the only human right mentioned in the Charter of the United Nations (Article 1(3)).²² It is protected under all major international human rights instruments, including the International Covenant on Civil and Political Rights (Articles 2, 3 and 26), the International Covenant on Economic, Social and Cultural Rights (Articles 2 and 3) and the UN Convention on the Rights of the Child (Article 2).

While gender identity, gender expression and sex characteristics are not expressly protected by any international treaty, numerous UN actors, drawing upon the 'universality, interdependence, indivisibility and interrelatedness of human rights',²³ have confirmed that trans and intersex people enjoy human rights protections.

2.1.1 Human Rights Council, Independent Expert on SOGI and the High Commissioner for Human Rights

Since 2011, the UN Human Rights Council has, through various resolutions,²⁴ 'strongly deplor[ed] acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation or gender identity'.²⁵

In 2016, the Council appointed an Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity (SOGI).²⁶ The Independent Expert, who has an initial mandate for three years, has a number of goals, including assessing the implementation of existing

21 Farrior, S. (2015), *Equality and non-discrimination under international law*, Ashgate; Schiek, D., Waddington, L. and Bell, M. (eds) (2007), *Cases, materials and text on national, supranational and international non-discrimination law*, Hart; Oppenheimer, D., Foster, S. and Han, S. (2015), *Comparative equality and anti-discrimination law: Cases, codes, constitutions and commentary*, Foundation Press.

22 Article 1(3) of the Charter of the United Nations provides that the purposes of the United Nations include '[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'

23 United Nations Human Rights Council, 'Resolution 17/19 Human rights, sexual orientation and gender identity' (14 July 2011) UN Doc No. A/HRC/RES/17/19, Recital No. 1 to the Preamble.

24 Ibid; see also: UN Human Rights Council, 'Resolution 27/32 Human rights, sexual orientation and gender identity' (2 October 2014) UN Doc No. A/HRC/RES/27/32.

25 UN Human Rights Council, 'Resolution 32/2. Protection against violence and discrimination based on sexual orientation and gender identity' (15 July 2016) A/HRC/RES/32/2, [2].

26 Ibid, [3].

international human rights instruments in relation to SOGI, raising awareness of violence and discrimination on the basis of SOGI and identifying the ‘root causes’ of such violence and discrimination.²⁷

In his initial reports, the Independent Expert has observed the particular vulnerability of trans and intersex people in the field of healthcare²⁸ and in situations where they are denied access to ‘quick, transparent and accessible’ gender recognition procedures.²⁹ The Independent Expert has called upon states to ‘adopt anti-discrimination legislation that includes gender identity’ and to establish policies which tackle the ‘spiral of discrimination, marginalization and exclusion that have a negative impact’ on trans and gender non-conforming lives.³⁰ The Independent Expert has specifically observed that addressing SOGI-related inequalities requires an ‘intersectional approach’³¹ and has acknowledged that intersex people have ‘special features not necessarily related to sexual orientation and gender identity’.³²

In her landmark report to the UN Human Rights Council in 2011, the UN High Commissioner for Human Rights stated unequivocally that ‘[a]ll persons, including trans persons, are entitled to enjoy the protections provided for by international human rights law’.³³ The High Commissioner has called upon states to ensure that ‘anti-discrimination legislation includes gender identity among prohibited grounds, and also protects intersex persons from discrimination’.³⁴ In particular, the High Commissioner has emphasised that states must ‘address discrimination against children and young persons who identify or are perceived as LGBT or intersex’.³⁵ The Commissioner has also called for greater protections for trans and intersex people within the healthcare and housing spheres.³⁶

27 Ibid, [3(a)-(f)].

28 See e.g. *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity* (19 April 2017) UN Doc No. A/HRC/35/36, [14]-[15] and [57]-[58].

29 *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity* (11 May 2018) UN Doc No. A/HRC/38/43, [98].

30 Ibid, [96].

31 Ibid, [23].

32 *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity* (19 April 2017) UN Doc No. A/HRC/35/36, [6]. It is important to acknowledge that, for many intersex individuals, their primary concern is the practice of non-therapeutic genital ‘normalising’ surgeries performed on infants. These surgeries are not (directly) related to sexual orientation and gender identity, but are rather a public and medical manifestation of discomfort with bodily difference. This ‘feature’ of experiencing intersex variance differs from gay, lesbian, bisexual and trans experiences.

33 United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* (17 November 2011) UN Doc No. A/HRC/19/41, [5].

34 United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity* (4 May 2015) UN Doc No. A/HRC/29/23, [79(c)].

35 Ibid, [17].

36 Ibid, [78]-[79].

2.1.2 UN human rights treaty bodies³⁷

The UN human rights treaty bodies, as well as various other UN human rights actors,³⁸ have played an especially prominent role in mainstreaming trans and intersex experiences into international human rights law.

2.1.2.1 UN Human Rights Committee

In *G v Australia*,³⁹ the UN Human Rights Committee – which oversees compliance with the International Covenant on Civil and Political Rights (ICCPR) – affirmed that ‘the prohibition against discrimination under article 26 [of the Covenant] encompasses discrimination on the basis of [...] gender identity, including transgender status.’⁴⁰ In *G v Australia*, where it was also acknowledged that the notion of ‘privacy’ within Article 17 ICCPR protects personal identity, including ‘gender identity’,⁴¹ the Human Rights Committee held that requiring individuals to divorce prior to obtaining legal gender recognition is incompatible with Covenant guarantees.

In its recent Concluding Observations to state parties, the Human Rights Committee has consistently affirmed the equality and non-discrimination rights of trans and intersex people.⁴² It has recommended that countries ‘explicitly prohibit discrimination on the basis of gender identity and ensure that trans and intersex individuals are afforded, both in law and in practice, adequate and effective protection against all forms of discrimination’.⁴³ In addition, the Committee has expressed concern about various practices which involuntarily medicalise trans and intersex bodies.⁴⁴

37 In addition to the UN human rights treaty bodies addressed in the text below, the Committee on the Rights of Persons with Disabilities and the Committee on Economic, Social and Cultural Rights have also affirmed the rights of trans and intersex people: see Committee on the Rights of Persons with Disabilities, ‘General comment No. 6 (2018) on equality and non-discrimination’ (26 April 2018), UN Doc No. CRPD/C/GC/6, [21]; Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of the Islamic Republic of Iran’ (10 May 2017), UN Doc No. CRPD/C/IRN/CO/1, [12(b)]; Committee on Economic, Social and Cultural Rights, ‘GENERAL COMMENT No. 20 Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)’ (2 July 2009), UN Doc No. E/C.12/GC/20, [32]; Committee on Economic, Social and Cultural Rights, ‘Concluding observations on the fourth periodic report of the Dominican Republic’ (21 October 2016), UN Doc No. E/C.12/DOM/CO/4, [26]; Committee on Economic, Social and Cultural Rights, ‘General comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)’ (2 May 2016), UN Doc No. E/C.12/GC/22, [58]; Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of Canada’ (8 May 2017), UN Doc No. CRPD/C/CAN/CO/1, [46(d)]; Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of Morocco’ (25 September 2017), UN Doc No. CRPD/C/MAR/CO/1, [37].

38 In addition to the human rights treaty bodies, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has observed that ‘[d]iscrimination against women, girls, and persons on the basis of ...gender identity and sex characteristics often underpins their torture and ill-treatment in health-care settings’ (*Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (5 January 2016), UN Doc No. A/HRC/31/57, [42]). He has recommended the adoption of ‘transparent and accessible legal gender recognition procedures’ (ibid, [72(h)]), the abolition of ‘requirements for sterilization and other harmful procedures as preconditions’ (ibid) and the repeal of ‘laws that allow...genital-normalizing surgeries’ without free and informed consent (ibid, [72(i)]). In 2014, seven UN agencies published a joint issue paper, condemning the involuntary imposition of sterilisation procedures upon trans and intersex communities. The seven agencies located such procedures within ‘a long history of discrimination and abuse’ (World Health Organization and others, *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement* (World Health Organization 2014), p. 2, available at: www.unaids.org/sites/default/files/media_asset/201405_sterilization_en.pdf (accessed 15 August 2018)) and argued that unwanted sterilisation reflects multiple forms of discrimination (ibid, p. 12).

39 Communication No. 2172/2012 (CCPR/C/119/D/2172/2012) (UN HRC, 15 June 2017).

40 Ibid, [7.12].

41 Ibid, [7.2].

42 See e.g. Human Rights Committee, ‘Concluding Observations on the Fifth Periodic Report of Cameroon’ (30 November 2017) UN Doc No. CCPR/C/CMR/CO/5, [14]-[15].

43 Human Rights Committee, ‘Concluding Observations on the Third Periodic Report of Lebanon’ (9 May 2018) UN Doc No. CCPR/C/LBN/CO/3, [14].

44 Human Rights Committee, ‘Concluding Observations on the Sixth Periodic Report of Australia’ (1 December 2017) UN Doc No. CCPR/C/AUS/CO/6, [25]-[28].

2.1.2.2 UN Committee against Torture

The UN Committee against Torture, which monitors compliance with the UN Convention against Torture, has been a prominent defender of intersex rights. On numerous occasions, the Committee has expressed concern about ‘unnecessary and in some cases irreversible surgical procedures that have been carried out on intersex persons’ without informed consent.⁴⁵ The Committee has called upon state parties to adopt ‘legislative, administrative and other measures to guarantee respect for the physical integrity of intersex individuals’ and to ensure that ‘no one is subjected during childhood to non-urgent medical or surgical procedures intended to establish one’s sex’.⁴⁶ In addition, the Committee against Torture has also addressed the position of trans communities, noting the vulnerability of trans women who are inappropriately housed in male prisons⁴⁷ and calling upon countries to ‘[remove] abusive preconditions for the legal recognition of the gender identity of trans persons, such as sterilisation’.⁴⁸

2.1.2.3 UN Committee on the Rights of the Child

In its General Comment No. 20, the Committee on the Rights of the Child, which oversees compliance with the Convention on the Rights of the Child, asserted the entitlement of ‘all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy’.⁴⁹ The Committee has recommended that state parties ‘repeal all laws criminalizing or otherwise discriminating against individuals on the basis of their... gender identity or intersex status’⁵⁰ and that they ‘adopt laws prohibiting discrimination on those grounds’.⁵¹ Similarly, in its Concluding Observations, the Committee has criticised the practice of non-consensual intersex normalising surgeries⁵² and has recommended that state parties ‘[r]ecognize the identity of... trans and intersex children and protect them against discrimination in law and in practice’.⁵³

2.1.2.4 UN Committee on the Elimination of Discrimination against Women

In its Concluding Observations, the Committee on the Elimination of Discrimination against Women (CEDAW Committee), which monitors compliance with the Convention on the Elimination of All Forms of Discrimination against Women, has acknowledged that discrimination against women is ‘inextricably linked to other factors that affected their lives’, including being ‘trans or intersex’.⁵⁴ The CEDAW Committee has called upon state parties to ‘[e]stablish processes to eliminate discriminatory rulings and practices against... trans women and intersex persons in the justice system’.⁵⁵ It has recommended that countries address the discrimination that trans women and intersex people experience in accessing education⁵⁶ and

45 Committee against Torture, ‘Concluding observations on the seventh periodic report of Switzerland’ (7 September 2017), CAT/C/CHE/CO/7, [20].

46 Committee against Torture, ‘Concluding observations on the seventh periodic report of France’ (10 June 2016), UN Doc No. CAT/C/FRA/CO/7, [35(a)].

47 Committee against Torture, ‘Concluding observations on the fifth periodic report of Belarus’ (7 June 2018), UN Doc No. CAT/C/BLR/CO/5, [29]–[30].

48 Committee against Torture, ‘Concluding observations on the fifth periodic report of China with respect to Hong Kong, China’ (3 February 2016), UN Doc No. CAT/C/CHN-HKG/CO/5, [29(a)].

49 Committee on the Rights of the Child, ‘General comment No. 20 (2016) on the implementation of the rights of the child during adolescence’ (6 December 2016), UN Doc No. CRC/C/GC/20, [34].

50 Ibid.

51 Ibid.

52 Committee on the Rights of the Child, ‘Concluding observations on the combined fifth and sixth periodic reports of Spain’ (5 March 2018), UN Doc No. CRC/C/ESP/CO/5-6, [24].

53 Committee on the Rights of the Child, ‘Concluding observations on the combined third to fifth periodic reports of Cameroon’ (6 July 2017), UN Doc No. CRC/C/CMR/CO/3-5, [15(b)].

54 Committee on the Elimination of Discrimination against Women, ‘General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19’ (14 July 2017), UN Doc No. CEDAW/C/GC/35, [12].

55 Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the seventh periodic report of Chile’ (14 March 2018), UN Doc No. CEDAW/C/CHL/CO/7, [15(d)].

56 Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the combined sixth and seventh periodic reports of Luxembourg’ (9 March 2018), UN Doc No. CEDAW/C/LUX/CO/6-7, [39]–[40].

has advocated the explicit prohibition of ‘unnecessary surgical or other medical treatment on intersex children until they reach an age when they are able to give their free, prior and informed consent’.⁵⁷

2.2 Council of Europe human rights system

For the past two decades, the Council of Europe (CoE) has been one of the most prominent global actors in advancing trans rights. While the CoE’s early advocacy on gender and sexuality rights largely overlooked discrimination on the basis of sex characteristics, various CoE institutions have in recent years engaged more actively with intersex lives and experiences. The Council of Europe Convention on preventing and combating violence against women and domestic violence, often referred to as the Istanbul Convention, is one of the few global or regional agreements which expressly ensures protection without discrimination on the basis of ‘gender identity’.⁵⁸

This section explores the contribution of four institutions across the Council of Europe in promoting trans and intersex equality. They are the: (1) European Court of Human Rights; (2) Committee of Ministers of the Council of Europe; (3) Parliamentary Assembly of the Council of Europe;⁵⁹ and (4) Commissioner for Human Rights of the Council of Europe.

2.2.1 European Court of Human Rights

Perhaps the most high-profile CoE actor in the sphere of trans equality is the European Court of Human Rights (ECtHR). The ECtHR oversees compliance with the European Convention on Human Rights (ECHR), a regional rights agreement, drafted in 1950, to which all 47 Member States of the Council of Europe are party. Through its landmark case law, the European Court of Human Rights has advanced international human rights approaches to gender identity. The Court has served as the catalyst for legal reforms throughout the 47 Member States and in jurisdictions beyond the CoE borders.⁶⁰ It has not yet, however, decided a case focusing on discrimination arising from sex characteristics.

2.2.1.1 Equality and non-discrimination

Since 2010, the ECtHR has affirmed that trans people fall within the scope of equality and non-discrimination protection under Article 14 ECHR. This means that, in their enjoyment of the rights and freedoms set out in the Convention, trans individuals cannot be subject to unjustified discrimination.

In *PV v Spain* (2010), the ECtHR held that, ‘transsexuality is a notion which is, without doubt, covered by Article 14 of the Convention’.⁶¹ The Court concluded that there had not been unlawful discrimination against the applicant. Her contact with her child was restricted for medical reasons, and considerations relating to the welfare of the child, rather than because the applicant experienced a trans identity.

In its subsequent judgment, *Identoba and Others v Georgia* (2015), the ECtHR expanded the scope of its terminology, so as to acknowledge that Article 14 ECHR ‘duly covers questions related to... [the perhaps

57 Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the seventh periodic report of Chile’ (14 March 2018), UN Doc No. CEDAW/C/CHL/CO/7, [23].

58 Council of Europe Convention on preventing and combating violence against women and domestic violence, Art. 4(3) www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e (accessed 15 August 2018).

59 See also the intervention of the Committee of Ministers of the Council of Europe (COM). In its ‘Recommendation CM/Rec(2010)5’ (https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a (accessed 15 August 2018)), COM proposed that ‘legislative and other measures [should be] adopted and effectively implemented to combat discrimination on grounds of... gender identity, to ensure respect for the human rights of... trans persons and to promote tolerance towards them’ (Recommendation 2). COM particularly emphasised the need for appropriate policies to protect trans individuals in the spheres of employment, education and in achieving the highest attainable standard of health. It called upon Member States to facilitate access to both ‘appropriate gender confirmation services’ and ‘quick, transparent and accessible’ gender recognition pathways.

60 See e.g. *W v Registrar of Marriages* [2013] HKCFA 39 (Court of Final Appeal of the Hong Kong Special Administrative Region).

61 *PV v Spain* App No. 35159/09 (ECtHR, 30 November 2010), [30].

more inclusive concept of] gender identity'.⁶² The *Identoba* litigation arose from police failing to prevent and properly investigate attacks on a civil society demonstration to mark the International Day against Homophobia and Transphobia.

2.2.1.2 Legal gender recognition – movements towards recognition

Since the mid-1980s, much of the ECtHR's jurisprudence⁶³ in the sphere of trans rights has focused on legal gender recognition. The central question has been: does the European Convention on Human Rights guarantee an entitlement to be formally acknowledged in one's preferred gender?

In *B v France* (1992), the ECtHR held that **France's** specific (and absolute) refusal to acknowledge preferred gender was incompatible with Article 8 ECHR.⁶⁴ The judgment did not, however, affirm a more general entitlement to legal gender recognition. That affirmation came in *Goodwin v United Kingdom* (2000).⁶⁵ Ms Goodwin, who had undergone gender confirmation surgery, was denied an amended birth certificate showing her preferred female gender. As a result, she was unable to access core legal and social benefits in the **United Kingdom**, including retirement guarantees and marriage.

The European Court of Human Rights, citing 'clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of postoperative transsexuals',⁶⁶ held that the fair balance, which was inherent in the Convention, tilted in favour of recognising Ms Goodwin's preferred gender.⁶⁷ The **UK's** refusal to issue an amended birth certificate violated both Article 8 ECHR and Article 12 ECHR (the right to marry).

In the subsequent case of *Grant v United Kingdom* (2006), the ECtHR held that, following *Goodwin*, the **UK** could no longer withhold an earlier pension from a trans woman, who had undergone gender confirmation surgery and who had reached the required age.⁶⁸

2.2.1.3 Legal gender recognition – requirements

The scope of the ECtHR's opinion in *Goodwin* was limited in two important respects. Firstly, the ECtHR referred only to an obligation to legally recognise 'post-operative transsexuals', individuals who have undergone a surgery-based medical transition. Secondly, while *Goodwin* created a general obligation to legally affirm preferred gender, the ECtHR deferred to Member States in terms of the 'appropriate means of achieving recognition'.⁶⁹

This latter concession has, as is evident from Chapter 3 of this report, afforded Member States broad discretion to impose various preconditions (e.g. minimum age limits) as a requirement for obtaining formal acknowledgment of identity. In two recent judgments, the European Court has considered to what extent three preconditions – divorce requirements, sterilisation and mandatory diagnosis – are compatible with Convention guarantees.

Divorce requirement

In *Hämäläinen v Finland* (2015), the ECtHR held that a **Finnish** rule, whereby married applicants were required to convert their relationship to a registered partnership prior to obtaining recognition,

62 *Identoba and Others v Georgia* [2015] 39 BHRC 510, [96].

63 *Rees v United Kingdom* [1987] 9 EHRR 56, *Cossey v United Kingdom* [1991] 13 EHRR 62, *X, Y and Z v United Kingdom* [1997] 24 EHRR 143, *Sheffield and Horsham v United Kingdom* [1999] 27 EHRR 163.

64 [1993] 16 EHRR 1.

65 *Goodwin v United Kingdom* [2002] 35 EHRR 18.

66 *Ibid*, [85].

67 *Ibid*, [93].

68 [2006] ECHR 548, [44].

69 *Goodwin v United Kingdom* [2002] 35 EHRR 18, [93].

was compatible with the right to private and family life under Article 8 ECHR.⁷⁰ The ECtHR observed that condemning the conversion requirement would indirectly require countries to permit same-gender marriages, a matter over which the Convention grants a wide margin of appreciation to Member States.⁷¹

In balancing the proportionality of the conversion requirement (against the interference with private and family life), the ECtHR observed that converting to a registered partnership would not change the status of Ms Hämäläinen's daughter as having been born within wedlock, annul Ms Hämäläinen's paternity of her daughter or affect Ms Hämäläinen's 'responsibility for the care, custody or maintenance' of her daughter.⁷²

Although Ms Hämäläinen and her wife were being treated differently from cisgender couples, whose preferred gender was acknowledged without a requirement to dissolve their marriage, a majority of the Grand Chamber concluded that there were insufficient similarities to make such a comparison for the purposes of Article 14 ECHR, read in conjunction with Article 8 ECHR.⁷³ This creates a division with the jurisprudence of the UN Human Rights Committee which, as noted above, has found that divorce requirements do violate the rights to privacy and equality under Articles 17 and 26 ICCPR (*G v Australia*). There is, as yet, no evidence that Member States have addressed this division in their domestic law.

Sterilisation and diagnosis requirements

In *A.P., Garçon and Nicot v France* (2017), the ECtHR reviewed the legitimacy of imposing both sterilisation and compulsory diagnosis as preconditions for legal gender recognition.⁷⁴

Each of the applicants argued that, by obliging individuals to irreversibly modify their bodies, **French** law imposed surgical and other medical treatments which had a high probability of sterilisation. The European Court of Human Rights held that mandatory infertility, in order to obtain gender recognition, violates the right to physical and moral integrity under Article 8 ECHR. Sterilisation requirements place trans individuals in an 'impossible *dilemma*':⁷⁵ either such people forgo their fundamental right to be formally acknowledged in their preferred gender or they involuntarily engage in medical treatments which compromise their physical integrity.⁷⁶ The ECtHR's reasoning builds upon its earlier judgment, *YY v Turkey* (2015).⁷⁷ In this case the Court held that Member States cannot impose sterilisation as a precondition for accessing gender confirmation surgery. However, in that earlier judgment, the ECtHR did not decide whether requiring sterilisation was proportionate in the context of legal gender recognition. In *AP*, the Court has now answered that question.

However, in *AP*, the European Court of Human Rights adopted a more deferential approach towards diagnosis requirements. The Court noted that, among the 41 state parties which acknowledged preferred gender, all but four required a diagnosis.⁷⁸ There existed a 'quasi-unanimity' on the desirability of this condition⁷⁹ and thus state actors enjoyed a wide margin of appreciation. While diagnosis was typically imposed to safeguard against ill-considered medical transitions, it also protected applicants who, for a multiplicity of reasons, may erroneously request legal recognition.⁸⁰ It is clear, therefore, that the ECtHR is not yet prepared to acknowledge a right to self-determined legal gender, as advocated in the Yogyakarta Principles.

70 *Hämäläinen v Finland* [2015] 1 FCR 379, [88]-[89].

71 *Ibid*, [69]-[75].

72 *Ibid*, [86].

73 *Ibid*, [110]-[113].

74 *AP, Garçon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017).

75 *Ibid*, [132].

76 *Ibid*.

77 *YY v Turkey* App No. 14793/08 (ECtHR, 10 March 2015).

78 *AP, Garçon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017), [139].

79 *Ibid*.

80 *Ibid*, [141].

Surgery requirement

The ECtHR has not yet ruled on the permissibility of mandatory surgical interventions, although a case presenting this issue is currently pending before the court (*RL and PO v Russia*).⁸¹ The Court has, however, indicated that it is not legitimate for a Member State to impose surgery as a precondition for legal gender recognition, if there is insufficient clarity as to how applicants access such surgeries in that country.⁸²

In *L v Lithuania*, domestic law required that individuals undergo certain surgical procedures before they could officially amend their legal gender. However, as national law had failed to formally regulate such procedures, L had been unable to satisfy the requirement. The ECtHR observed that this situation consigned L to an intermediate position.⁸³ He had undertaken both a social transition and a partial medical transition. L was not, however, able to achieve formal recognition from the State, which continued to treat him as having his birth-assigned, female legal gender. The European Court of Human Rights found that **Lithuanian** law was incompatible with the right to private life under Article 8 ECHR.⁸⁴

2.2.1.4 Reimbursement for gender confirmation treatments

In *Van Kück v Germany* (2003),⁸⁵ the European Court of Human Rights established that the burden that was placed on the applicant to prove the ‘medical necessity’ of her gender confirmation surgery and the genuineness of her trans identity was unreasonable. The ECtHR held that there was a violation of Article 6(1) ECHR (right to a fair hearing) and Article 8 ECHR.⁸⁶

The applicant had taken an action against a **German** health insurance company claiming that the company was liable to reimburse 50 % of the expenses related to gender confirmation surgery and hormone treatment. The **German** courts dismissed her reimbursement, arguing that the applicant had deliberately caused her condition. The ECtHR found that the domestic proceedings were unfair and in breach of the right to a fair trial, and that the requirement to prove the medical necessity of treatment was disproportionate and unreasonable because ‘gender identity is one of the most intimate areas of a person’s private life’.⁸⁷

In a subsequent case, *Schlumpf v Switzerland* (2009),⁸⁸ the Swiss courts had upheld an insurer’s decision not to reimburse the cost of the applicant’s gender confirmation surgery, because she had failed to observe a two-year waiting period. The ECtHR found a violation of Article 8 ECHR.⁸⁹ The Court concluded that the Swiss authorities had arbitrarily applied the two-year requirement, without considering whether – because of her advancing age (67) – the applicant would effectively be prevented from medically transitioning if she was forced to postpone treatment for two years.⁹⁰

2.2.2 Committee of Ministers of the Council of Europe

In its ‘Recommendation CM/Rec(2010)5’,⁹¹ the Committee of Ministers of the Council of Europe (CoM) proposed that ‘legislative and other measures [should be] adopted and effectively implemented to combat discrimination on grounds of... gender identity, to ensure respect for the human rights of... transgender

81 App Nos. 36253/13 and 52516/13 (ECtHR, lodged on 25 May 2013 and 30 May 2013).

82 *L v Lithuania* [2008] 46 EHRR 22.

83 *Ibid*, [57].

84 *Ibid*, [59]–[60].

85 [2003] 37 EHRR 51.

86 *Ibid*, [65] and [86].

87 *Ibid*, [56].

88 App No. 29002/06 (ECtHR, 5 June 2009).

89 *Ibid*, [116].

90 *Ibid*, [115].

91 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 https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a (accessed 15 August 2018).

persons and to promote tolerance towards them'.⁹² CoM particularly emphasised the need for appropriate policies to protect transgender individuals in the spheres of employment, education and in achieving the highest attainable standard of health.⁹³ It called upon Member States to facilitate access to both 'appropriate gender reassignment services'⁹⁴ and 'quick, transparent and accessible' gender recognition pathways.⁹⁵

2.2.3 *Parliamentary Assembly of the Council of Europe*

In addition to the European Court of Human Rights, the Parliamentary Assembly of the Council of Europe (PACE) has played a prominent role in advancing the rights of trans and intersex people. PACE is a constituent assembly of the Council of Europe with 324 representatives from the 47 Member States. It 'uncover[s] human rights violations, "monitors" whether states keep their promises, and demands answers from Presidents and Prime Ministers'.⁹⁶

In its 2017 resolution, 'Promoting the human rights of and eliminating discrimination against intersex people',⁹⁷ PACE called upon countries to 'prohibit medically unnecessary sex-"normalising" surgery, sterilisation and other treatments practised on intersex children without their informed consent'.⁹⁸ It recommended that, unless there is an immediate risk to the life of a child, medical professionals should not alter the sex characteristics of children 'until such time as the child is able to participate in the decision, based on the right to self-determination and on the principle of free and informed consent'.⁹⁹

The Assembly has argued that intersex people should have both 'effective access to health care throughout their lives'¹⁰⁰ and 'full access to their medical records'.¹⁰¹ It advocates 'flexibility' in birth registration practices,¹⁰² so that parents experience less pressure in assigning a gender to intersex infants, and encourages 'a range of options for all people, including those intersex people who do not identify as either male or female'.¹⁰³ In the sphere of equality guarantees, PACE has called for Member States to 'ensure that anti-discrimination legislation effectively applies to and protects intersex people',¹⁰⁴ with the possibility of 'inserting sex characteristics as a specific prohibited ground in all anti-discrimination legislation'.¹⁰⁵

The Assembly has also addressed the equality and non-discrimination rights of trans people. In its 2015 resolution,¹⁰⁶ 'Discrimination against trans people in Europe', PACE requested that Member States 'explicitly prohibit discrimination based on gender identity in national non-discrimination legislation'.¹⁰⁷ In particular, European countries should 'provide effective protection against discrimination on grounds of gender identity in access to employment in the public and private sectors and in access to housing, justice and health care'.¹⁰⁸

92 *ibid*, Recommendation 2.

93 *ibid*, sections V, VI and VII.

94 *ibid*, [35].

95 *ibid*, [21].

96 'PACE – In Brief' (*PACE website*) http://website-pace.net/en_GB/web/apce/in-brief (accessed 24 September 2018).

97 Resolution 2191 (2017).

98 *Ibid*, [7.1.1.].

99 *Ibid*, [7.1.2.].

100 *Ibid*, [7.1.4.].

101 *Ibid*, [7.1.5.].

102 *Ibid*, [7.3.1.].

103 *Ibid*, [7.3.1.].

104 *Ibid*, [7.4.].

105 *Ibid*.

106 Resolution 2048 (2015).

107 *Ibid*, [6.1.1.].

108 *Ibid*, [6.1.5.].

In the sphere of gender recognition, the Assembly called for ‘quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of trans people’.¹⁰⁹ It recommended that such amendments should be available ‘irrespective of age, medical status, financial situation or police record’¹¹⁰ and without a requirement to divorce.¹¹¹ PACE encouraged Member States to ‘consider including a third gender option in identity documents’¹¹² and to ‘ensure that the best interests of the child are a primary consideration in all decisions concerning children’.¹¹³

2.2.4 Commissioner for Human Rights of the Council of Europe

The final CoE actor to consider is the Commissioner for Human Rights of the Council of Europe. The Commissioner surveys and advises on the protection of core rights standards throughout the 47 Member States. The Commissioner provides advice and raises awareness of human rights issues through the publication of thematic documents and organisation of events and workshops. Since 2008, various Commissioners have taken an active role in promoting the equality and non-discrimination of trans and intersex people.

In a 2015 report, ‘Human rights and intersex people’, the Commissioner called upon Member States to ‘end medically unnecessary “normalising” treatment of intersex persons, including irreversible genital surgery and sterilisation, when it is enforced or administered without the free and fully informed consent of the person concerned’.¹¹⁴ The Commissioner recommended that countries ‘facilitate the recognition of intersex individuals before the law through the expeditious provision of birth certificates, civil registration documents, identity papers, passports and other official personal documentation’.¹¹⁵ Intersex people should, according to the Commissioner, enjoy the right to self-determination and have the possibility of ‘not choosing a specified male or female gender marker’ where doing so would conflict with personal gender.¹¹⁶ In the sphere of equality law, the Commissioner argued that either ‘[s]ex characteristics should be included as a specific ground in equal treatment [...] legislation’ or that ‘the ground of sex/gender should be authoritatively interpreted to include sex characteristics’.¹¹⁷

In 2008, the Commissioner was one of the first global or regional human rights actors to substantively explore trans equality.¹¹⁸ In the landmark issue paper, ‘Human rights and gender’, the Commissioner encouraged Member States to ‘[i]mplement international human rights standards without discrimination, and prohibit explicitly discrimination on the ground of gender identity’.¹¹⁹ In particular, the Commissioner called for ‘policies to combat discrimination and exclusion faced by trans persons on the labour market, in education and health care’.¹²⁰ On the question of legal gender recognition, the Commissioner advocated for ‘expeditious and transparent procedures for changing the name and sex of a trans person’¹²¹ and argued that Member States should eliminate abusive requirements, such as compulsory medicalisation or involuntary divorce.¹²²

109 Ibid, [6.2.1.].

110 Ibid.

111 Ibid, [6.2.3.].

112 Ibid, [6.2.4.].

113 Ibid, [6.2.5.].

114 Commissioner for Human Rights of the Council of Europe, *Human rights and intersex people: Issue paper* (CoE, 2015) p. 9.

115 Ibid.

116 Ibid.

117 Ibid.

118 Commissioner for Human Rights of the Council of Europe, *Human Rights and Gender Identity* (29 July 2009) CommDH/IssuePaper(2009) <https://rm.coe.int/16806da753> (accessed 15 August 2018).

119 Ibid, 18.

120 Ibid.

121 Ibid.

122 Ibid.

2.3 European Union rights system¹²³

This final section explores equality and non-discrimination protections for trans and intersex people within the European Union rights system. The section begins by acknowledging the relative paucity of trans and intersex-inclusive primary and secondary EU legislation (Chapter 2.3.1), before explaining how the Court of Justice of the European Union (CJEU) has attempted to enhance trans non-discrimination rights through a broad interpretation of ‘sex discrimination’ (Chapter 2.3.2).

2.3.1 Primary and secondary legislation

Neither of the European Union’s core treaty documents (the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)) make reference to gender identity, gender expression or sex characteristics.

Article 10 TFEU provides that ‘[in] defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex... or sexual orientation’. Article 19 TFEU empowers ‘the [Council of Ministers], acting... after obtaining the consent of the European Parliament, [to] take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or *sexual orientation*’ (emphasis added). Thus, while the Union’s primary legislation is increasingly sensitive to the inequalities faced by women and lesbian, gay and bisexual people, it does not explicitly recognise trans and intersex people.

A similar phenomenon is evident in the Charter of Fundamental Rights of the European Union. With the adoption of the Treaty of Lisbon and the coming into force of Article 6(1) TEU, the Charter now has ‘the same legal value as the Treaties’, although the Charter only applies to Member States when they are ‘implementing Union law’.¹²⁴ Article 21(1) of the Charter, which contains the only non-exhaustive list of discrimination grounds under EU law, prohibits ‘any discrimination based on any ground such as sex [...] or sexual orientation’. It does not, however, include specific reference to gender identity and sex characteristics. While it is possible that, like the European Court of Human Rights (*Identoba and Others v Georgia*),¹²⁵ the CJEU may interpret Article 21(1) as encompassing both of these grounds, there is symbolism in leaving trans and intersex people outside the field of explicit protection.

Tackling discrimination: Should EU law adopt trans and intersex-specific protected grounds?

The question of specific reference to gender identity, gender expression and sex characteristic in both primary and secondary EU legislation raises an interesting debate.

On the one hand, it is possible to argue that expanded categories of protection are not necessary for trans and intersex people in Europe. Rather, the existing legal framework – sex equality protections – should be expansively interpreted to embrace a wider category of individuals whose gender and bodies are different from expected societal norms. Recent case law from European jurisdictions, such as **Germany**,¹²⁶ illustrates that the notion of sex discrimination is sufficiently malleable to accommodate people who face unequal treatment, laws and policies because of their sex characteristics. Similarly, jurisprudence from the Court of Justice of the European Union¹²⁷ (and an expanding body of judgments from the United States)¹²⁸ are evidence that sex equality guarantees are capable of protecting a broad category of trans

123 It is important to acknowledge that, while all EU primary and secondary legislation is binding on the 28 Member States, it does not uniformly apply to the three EFTA jurisdictions surveyed for the purposes of this report. This is because, although EFTA Member States have adopted certain EU sex equality laws, they have also autonomously introduced additional sex equality guarantees, without an EFTA obligation to do so.

124 Charter of Fundamental Rights of the European Union, Article 51(1).

125 [2015] 39 BHRC 510.

126 Constitutional Court of Germany, 1 BvR 2019/16 (10 October 2017).

127 See Chapter 2, Section 2.3.2.

128 See e.g. *GG v Gloucester County School Board* Case No. 15-2056 (19 April 2016).

litigants. Furthermore, there may be substantive benefit in exploring the limits of sex stereotyping case law, prohibiting discriminatory treatment which holds trans and intersex people (and indeed cisgender people) to historic, and socially harmful, stereotypes about masculinity and femininity.¹²⁹

On the other hand, however, many individuals – particularly those who advocate for the rights of trans and intersex people in Europe – push back against the adequacy of purely ‘sex’-orientated guarantees. Firstly, there is significant symbolism where the law expressly acknowledges trans and intersex lives.¹³⁰ While (in a strict legal sense) sex equality structures may be capable of addressing certain manifestations of transphobic and anti-intersex conduct, there is important symbolism in European Union law adopting protected characteristics which speak directly to the lived reality of trans and intersex people. While certain individuals may cautiously argue that greater legal visibility may expose trans and intersex individuals to accusations of legal favouritism, the inclusion of gender identity, gender expression and sex characteristics in EU law should simply be understood as an extension of basic guarantees which other EU citizens already enjoy.

Secondly, from a practical perspective, it is important to understand that, in some circumstances, trans and intersex people do not experience discrimination which neatly maps onto accepted understandings of sex discrimination. While, in certain instances, a trans woman may confront inequality because of her female gender, in other scenarios, that individual will face discriminatory behaviour because of her self-identification, her self-expression and how both of these personal characteristics are perceived by public and private actors. To reduce the woman’s experience to notions of sex inequality not only mischaracterises the offending conduct, it also risks stifling the law’s capacity to appropriately and meaningfully respond to the injury imposed. Indeed, given the binary nature in which ‘sex’ has historically been interpreted as a matter of human rights and EU law, there remain significant doubts as to whether current EU sex equality laws do (or even could) embrace non-binary identities. The same reasoning also applies to instances of discrimination motivated by intersex variance. In that latter example, there may often be good reason to acknowledge (and expressly name) the link between unequal treatment and experiences of sex characteristics.

Appeals to the reasoning of sex-stereotyping are particularly complex in the context of trans identities. As noted below (Chapter 2.3.2), in *P v S and Cornwall County Council*,¹³¹ the European Court of Justice found sex discrimination where a trans woman, who undertook a process of medical transition, was removed from her employment. In its judgment, the Court observed that the individual was being treated unequally because she engaged in non-stereotypical conduct which differed from the standard expression of gender by those assigned male.¹³² While this reasoning was an effective means of providing P with an equality-based remedy, it required the court to anchor the claimant to her birth-assigned male gender. In effect, what the CJEU was saying was that P was a man who was treated discriminatorily because he failed to satisfy society’s expectations for men. However, such an approach fundamentally disregards the claimant’s self-identification as female. The benefit of a specific ‘gender identity’ or ‘gender expression’ characteristic is that it accurately captures the nature of the offending conduct, while still affirming the individual’s lived experience of gender.

Secondary legislation

In the field of secondary legislation on equality and non-discrimination, there is certain coverage for trans individuals, although their protection remains anchored in sex equality, and intersex people remain invisible. As will be observed from the case law of the Court of Justice of the European Union below, a majority

129 Timmer, A. S. H. (2016), ‘Gender stereotyping in the case law of the EU Court of Justice’ *European equality law review* (1) pp. 37–46.

130 See e.g. House of Commons Select Committee on Women and Equalities (2016), *Trans equality*, The Stationary Office Limited, [90].

131 [1996] 2 CMLR 247.

132 *Ibid*, [21].

of the existing trans-orientated jurisprudence has concentrated on incorporating trans experiences into Directive 79/7/EEC, which focuses on equal treatment between men and women in the field of social security. In cases such as *Richards v Secretary of State for Work and Pensions*,¹³³ the question arose as to what extent trans individuals could invoke the ‘sex discrimination’ provisions included in the legislation.

Directive 2006/54/EC¹³⁴ (‘Recast Directive’) implements the principle of equal opportunities and equal treatment of men and women in employment and occupation. It brings together, in one text, the pre-existing EU secondary legislation on sex equality in the field of employment. Drawing upon the case law of the CJEU (discussed below), Recital 3 to the Recast Directive provides that, ‘[i]n view of [the] purpose and the nature of the rights which [the principle of equal treatment for men and women] seeks to safeguard, it also applies to discrimination arising from the gender confirmation of a person’. Member States are not required to directly include gender confirmation as a protected characteristic in domestic legislation which transposes Directive 2006/54/EC. They must, however, interpret sex discrimination in a manner which covers people who intend to undergo, are undergoing or have undergone gender confirmation.

Directive 2004/113/EC¹³⁵ (‘Goods and Services Directive’) implements the principle of equal treatment between men and women in the access to, and supply of, goods and services. Unlike the Recast Directive, the Goods and Services Directive does not expressly refer to gender confirmation – either in the recitals or in the substantive provisions. There is evidence, however, that, at the point of enactment, both the Council of Ministers and the European Commission understood Directive 2004/113/EC as protecting ‘gender confirmation’.¹³⁶ Furthermore, in a 2015 report to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2004/113/EC, the European Commission observed that, although ‘[t]here is no case law concerning gender identity more generally speaking as covered by the protection against sex discrimination [...] the approach should be materially similar’.¹³⁷ This suggests that the Commission interprets the protections set out in the Goods and Services Directive in line with the CJEU’s case law.

In addition, gender identity is formally acknowledged in two additional pieces of EU secondary legislation: Directive 2011/95/EU¹³⁸ (‘Recast Qualification Directive’) and Directive 2012/29/EU¹³⁹ (‘Victims’ Rights Directive’). The Recast Qualification Directive regulates certain aspects of asylum and subsidiary protection law across the 28 EU Member States. The Victim’s Rights Directive creates ‘minimum standards on the rights, support and protection of victims of crime’.

Under Article 10(1)(d) of the Recast Qualification Directive, and in accordance with the Geneva Convention, being part of a ‘particular social group’ can be a ground for persecution. However the Directive interprets it further, by specifying that whether or not an applicant for asylum belongs to a particular social group, national authorities should have due consideration for ‘[g]ender related aspects, including gender

133 [2006] 2 CMLR 49.

134 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) *OJL* 204, 26.7.2006, p. 23-36.

135 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJL* 373, 21.12.2004, p. 37-43.

136 2606th meeting of the Council of the European Union (Employment, Social Policy, Health and Consumer Affairs) held in Luxembourg on 4 October 2004, Draft minutes, Doc. No. 13369/04 of 27 October 2004, p. 7.

137 European Commission (2015), ‘Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services’ (5 May 2015) COM (2015) 190 final, p. 4.

138 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, *OJL* 337, 20.12.2011, p. 9-26.

139 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, *OJL* 315, 14.11.2012, p. 57-73.

identity’.¹⁴⁰ The recitals to the Victim’s Rights Directive also clarify that ‘victims of crime should be recognised and treated in a respectful, sensitive and professional manner without discrimination of any kind based on any ground such as... gender expression, gender identity...’ (Recital 9). Recital 17 further states that, ‘[v]iolence that is directed against a person because of that person’s gender, gender identity or gender expression... is understood as gender-based violence’ and Recital 56 advocates individual assessments which ‘take into account the personal characteristics of the victim such as... gender identity or expression’.

While neither of these directives specifically focuses on issues of equality, they are striking for their adoption of the broader, more inclusive language of ‘gender identity’ and ‘gender expression’. Enacted subsequent to current EU equality protections, the directives illustrate how – even in a short number of years – understanding of trans lives has evolved and expanded. The directives should encourage EU law-makers to: (a) revisit the ways in which all trans individuals are (or, perhaps more importantly, are not) protected by EU equality frameworks, and (b) introduce practical reforms which will prohibit discrimination against those who experience intersex variance. It is important to acknowledge, however, that the trans-inclusive provisions in neither of these directives has yet been the subject of (or analysed in) the case law of the Court of Justice of the European Union.

The European Union has – through Directive 2000/78/EC¹⁴¹ – created non-discrimination protections for individuals on the basis of their sexual orientation in the sphere of employment and occupation. This is a powerful statement of equality guarantees for lesbian, gay and bisexual individuals across the Union. However, Directive 2000/78/EC is limited to the extent that – unlike sex discrimination prohibitions (which extend into areas such as the supply of goods and services) – it only covers inequality within the employment arena. In 2008, the European Commission proposed a new ‘Equal Treatment Directive’ which would expand protection for LGB populations into, among other areas, social protection, education and the supply of goods and services.¹⁴² However, as yet, the Union has not adopted this proposed reform.

2.3.2 Court of Justice of the European Union

Despite the relative absence of (explicit) legislation protecting trans individuals within the European Union, the Court of Justice of the European Union (CJEU) has, since 1996, been a prominent actor in promoting trans equality. In a series of cases, focusing on employment and social security rights, the Court has provided certain guarantees for people who undertake a process of ‘gender confirmation’. While the trans jurisprudence of the CJEU can be (and has been) subject to significant criticism, the interventions of the Court have had symbolic and practical impacts and have motivated legal reform both within the Union and across the 28 Member States. Like the European Court of Human Rights, the CJEU has not yet been presented with a case concerning the rights of intersex people.

2.3.2.1 Case law of the CJEU

P v S and Cornwall County Council

In *P v S and Cornwall County Council*,¹⁴³ the applicant was dismissed from her employment (an education establishment run by the Council) when she informed her manager that she intended to undertake a medical transition. The applicant issued proceedings before the **UK** Employment Tribunal (‘Industrial Tribunal’ as

140 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, s. 10(1)(d).

141 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ L 303*, 2.12.2000, p. 16-22.

142 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}.

143 [1996] 2 CMLR 247.

it then was) claiming that her dismissal constituted sex discrimination under the Sex Discrimination Act 1975. The Tribunal was doubtful that the 1975 Act prohibited transition-related discrimination. However, it asked the Court of Justice for a preliminary ruling upon whether ‘the dismissal of a transsexual for a reason related to a gender confirmation constitute[s] a breach of [Directive 76/207/EEC]’.¹⁴⁴

The Court of Justice responded that ‘the scope of [Directive 76/207/EEC]¹⁴⁵ cannot be confined simply to discrimination based on the fact that a person is of one or other sex’.¹⁴⁶ Rather, having regard to the ‘purpose and the nature of the rights which it seeks to safeguard’, the directive (and the principle of non-discrimination between men and women) must ‘apply to discrimination arising... from the gender confirmation of the person concerned’.¹⁴⁷

The Court observed that, where an employer discriminates against an individual who undertakes a medical transition, ‘[s]uch discrimination is based, essentially if not exclusively, on the sex of the person concerned’.¹⁴⁸ Therefore, where a person, such as the applicant, is dismissed from employment ‘on the ground that he or she intends to undergo, or has undergone, gender confirmation, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender confirmation’.¹⁴⁹ The Court of Justice concluded that, ‘[t]o tolerate such discrimination would be tantamount to a failure to respect the dignity and freedom to which he or she is entitled’.¹⁵⁰

KB v National Health Service Pensions Agency and Another

In *KB v National Health Service Pensions Agency and Another*,¹⁵¹ the applicant was in a long-term relationship with a trans man. Although the couple had undertaken a commitment ceremony, they were unable to marry because **English** law did not provide for either legal gender recognition or for same-sex marriage. The NHS Pensions Agency informed the applicant that, should she predecease her partner, he would not be entitled to a widower’s pension, which was reserved for surviving spouses. The **English** Court of Appeal asked the Court of Justice for a preliminary ruling on whether ‘the exclusion of the female-to-male transsexual partner of a female member of the National Health Service Pension Scheme, which limits the material dependant’s benefit to her widower, constitute[s] sex discrimination in contravention of Article 141 EC [now Article 157 TFEU] and Directive 75/117’.¹⁵²

The Court of Justice observed that access to a widower’s pension falls within the scope of Article 157 TFEU, which concerns the right to equal pay on the basis of sex. While it is ultimately paid to the spouse of an employee, it derives from the employment relationship.

In general, Member States enjoy discretion to restrict ‘certain benefits to married couples while excluding all persons who live together without being married’.¹⁵³ As such, it was *prima facie* legitimate for the NHS Pensions Agency to exclude unmarried co-habitants from the survivors’ pension. However, the situation was different where, as in *KB*, the **United Kingdom** was, contrary to Articles 8 and 12 ECHR (*Goodwin v United Kingdom*),¹⁵⁴ preventing an individual who has socially and medically transitioned from entering into a lawful, different-gender marriage merely because he was assigned female at birth and because

144 Ibid, [10]. Directive 76/206/EEC was repealed, and consolidated with other legislation regarding sex equality within the sphere of employment, by Directive 2006/54/EC (referred to above).

145 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *OJ L 39, 14.2.1976*, p. 40-42.

146 [1996] 2 CMLR 247, [20].

147 Ibid.

148 Ibid, [21].

149 Ibid.

150 Ibid, [22].

151 [2004] 1 CMLR 28.

152 Ibid, [16].

153 Ibid, [28].

154 [2002] 35 EHRR 18.

the **UK** refused to acknowledge his preferred gender. Such refusal appeared to create sex discrimination – on the basis of gender confirmation – between different-gender couples, where both parties have been assigned different legal genders at birth, and different-gender couples, where the parties had been assigned the same legal gender and one of them had subsequently transitioned.¹⁵⁵

It was for the national courts to determine whether, in *KB*, the applicant's partner had taken sufficient steps to be formally acknowledged in his preferred gender for the purposes of the survivors' pension. However, the current **UK** framework – which absolutely excluded trans people from falling within the scope of survivors' pension rights according to their preferred gender – was not compatible with the principle of sex equality established through Article 157 TFEU.¹⁵⁶

Richards v Secretary of State for Work and Pensions

In *Richards v Secretary of State for Work and Pensions*,¹⁵⁷ the applicant (a trans woman, who had socially and medically transitioned) unsuccessfully applied for a retirement pension at the age of 60 years. The Secretary of State for Work and Pensions refused the applicant's request because **UK** law, which did not permit legal gender recognition, classified the applicant as a legal male. The Social Security Commissioner requested a preliminary ruling from the Court of Justice on whether 'Directive 79/7 prohibited the refusal of a retirement pension to a male-to-female transsexual until she reaches the age of 65 and who would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law'.¹⁵⁸

In responding to the Commissioner, the Court of Justice acknowledged both: (a) that Member States enjoy a margin of appreciation to determine the requirements for obtaining gender recognition; and that (b) at the time that *Richards* was decided, Member States were still temporarily entitled to maintain advantageous pension benefits for women. In exercising their discretion to regulate access to retirement pensions, however, Member States were obliged to respect Community law – in particular, the principle of equality between men and women, including protection for individuals who undertake gender confirmation.

In *Richards*, the applicant was not challenging earlier pension benefits for women. Instead, her complaint – accepted by the Court of Justice – was that, in contravention of the ECHR, the **UK** was absolutely refusing to recognise the applicant as a woman and was, therefore, preventing the applicant from enjoying that earlier pension entitlement. The Secretary of State for Work and Pensions was entitled to establish criteria which the applicant would have to satisfy in order to be affirmed, for the purposes of her pension, as a legal female. However, withholding any such possibility of affirmation constituted unlawful sex discrimination under Directive 79/9/EEC.¹⁵⁹ As a woman, who had been assigned male at birth and who had undertaken a process of gender transition, the applicant was treated less favourably than cisgender women, who were assigned female at birth.

MB v Secretary of State for Work and Pensions

In *MB v Secretary of State for Work and Pensions*,¹⁶⁰ the applicant, a trans woman who had medically and socially transitioned, unsuccessfully applied for a retirement pension from the Department of Work and Pensions. At the time of her request, the applicant had not obtained a Gender Recognition Certificate (i.e. formal acknowledgement of her preferred gender in the **United Kingdom**) because, prior to the Marriage (Same-Sex Couples) Act 2013, which introduced same-gender marital unions, the law in England and

155 [2004] 1 CMLR 28, [33] – [34].

156 Ibid, [36].

157 [2006] 2 CMLR 49.

158 Ibid, [19].

159 Council Directive 79/9/EEC of 19 December 1978 amending Directive 77/391/EEC introducing Community measures for the eradication of brucellosis, tuberculosis and leucosis in cattle, *OJ L 6*, 10.1.1979, p. 27-27.

160 Case C-451/16 (European Court of Justice, 26 June 2018).

Wales required married trans individuals to gain an annulment before the State would legally affirm their gender. According to the Secretary of State for Work and Pensions, the purpose of this annulment rule was to prevent same-gender marriages. The applicant and her wife, however, refused to annul their union for religious reasons. The **English** Court of Appeal asked the Court of Justice for a preliminary ruling on whether ‘Directive 79/7 preclude[s] the imposition in national law of a requirement that... a person who has changed gender must also be unmarried in order to qualify for a State retirement pension’.¹⁶¹

In its response to the Court of Appeal, the CJEU reiterated that Member States retain competence to establish criteria for entering marriage and obtaining gender recognition in their national law. However, as noted in *KB*, the Court reminded the **UK** that it must exercise such competence in compliance with Union law – particularly the principle of non-discrimination. One such manifestation of that principle is Directive 79/7/EEC, which prohibits sex discrimination in access to pensions which protect against the risks of old age. Consistent with previous case law, the CJEU confirmed that sex discrimination, in the context of Directive 79/7/EEC, includes unequal treatment on the basis of ‘gender reassignment’, a concept that embraces individuals, such as the applicant, who, although she had not obtained a Gender Recognition Certificate, had socially and medically transitioned.

In *MB*, the applicant, who had been assigned male at birth and who had medically transitioned, was being treated unfavourably in comparison with cisgender married individuals, who had been assigned female at birth. While the latter were able to access retirement pensions without annulling their marriage, an annulment obligation was placed upon the applicant.

The CJEU held that, for the purposes of determining whether there was discrimination, the applicant was similarly situated to married cisgender individuals. The relevant consideration was whether there was comparability *for the specific purposes of claiming the retirement pension*. In this regard, the Court observed that access to the pension was generally available to all people who: (a) had reached the minimum age; and (b) who had paid the mandatory contributions. The Secretary of State had argued that the applicant’s position was materially different to cisgender married women because, if she obtained a Gender Recognition Certificate without annulment, the applicant would be in a same-gender marriage. However, the CJEU pointed out that enjoyment of the retirement pension was not conditional on marital status.

The CJEU also observed that it was not determining the applicant’s general civil status, but simply whether she should have access to a retirement pension without annulling her marriage. This was the reasoning which led the Court to reject the Secretary of State’s reliance on *Hämäläinen v Finland* (discussed in Chapter 2.2 above). In *Hämäläinen*, the Grand Chamber of the European Court of Human Rights accepted a **Finnish** rule whereby applicants for gender recognition were required to convert their marriage into a registered partnership.

The CJEU observed that, in *Hämäläinen*, the Strasbourg court had concluded that the applicant and her wife were not in a similar situation to different-gender couples (who were not required to convert their relationship) because legal gender recognition, without conversion, would have required **Finland** to acknowledge a marriage with two people of the same legal gender. This potential imposition of ‘gay marriage’ sufficiently differentiated Ms Hämäläinen and her wife for the purposes of any Article 14 ECHR analysis.

However, similar concerns did not arise in *MB* where the CJEU was satisfied that a situation of comparability did exist. There was no risk that *MB* would create a general obligation to recognise same-gender marriages. The applicant was not asking to be generally affirmed as a legal woman without annulling her marriage. Rather, she was merely requesting access, without unfavourable treatment because of her gender confirmation, to a retirement pension, enjoyment of which was not linked to marital status.

161 Ibid, [25].

By withholding access to the pension until *MB* annulled her marriage, the **UK** had engaged in direct discrimination on the basis of sex. The **UK** government had failed to produce arguments which would permit such discrimination.

2.4 Concluding remarks

International and regional protections for trans and intersex people are experiencing a period of important transition. While no international human rights treaty specifically acknowledges trans and intersex individuals, a growing number of human rights actors – supervisory bodies and mandate holders – are referring to gender identity, gender expression and sex characteristics. These actors, including the UN High Commissioner for Human Rights and the UN human rights treaty bodies, have offered a powerful affirmation that, irrespective of the express wording of core human rights documents, the principles and guarantees enshrined in those documents extend to trans and intersex people. In Europe, such global statements are now reinforced through the support of regional institutions, such as the Parliamentary Assembly and the Commissioner for Human Rights of the Council of Europe. Together with the transformative jurisprudence of the European Court of Human Rights, these regional actors have significantly enhanced (at least *de jure*) recognition and protection for trans and intersex people in Europe.

Across the EU, the Court of Justice of the European Union has also been (and remains) willing to protect trans litigants and to read trans equality guarantees into existing EU legislation.

Cases, such as *P v S* and *Cornwall County Council*, are landmark legal statements for the rights of trans populations – not just in Europe but within the wider field of human rights law. In circumstances where neither domestic actors, nor the European Union institutions, were willing to expressly acknowledge trans-focused unequal treatment, the Court stepped in to offer a progressive interpretation of sex equality standards. In doing so, it created – throughout the Member States – a baseline obligation to respect trans people, and to enforce preventative obligations against trans-motivated discrimination. Unfortunately, as this report reveals, that progressive interpretation of sex equality remains – throughout the European Union and EFTA – the sole aspect of equality which many trans communities enjoy. Indeed, it is an interpretation which the EU legislator decided to specifically acknowledge in the preamble to Directive 2006/54/EC.

Yet one should also be cautious of overstating either the importance or the reach of the CJEU's case law. Firstly, the Court is understandably limited by the scope of the legislation which it applies. While in cases such as *MB* the judges have pursued an expansive application of sex equality, the impact of CJEU jurisprudence reflects (what this chapter reveals to be) EU law's limited engagement with trans lives. If the CJEU is going to safeguard a wider category of trans equality rights, this can only come about through greater recognition of trans people – initially within the core treaty documents (e.g. incorporating 'gender identity' and 'gender expression' into Article 19 TFEU) and then in secondary legislation. This is also – or even more – true in the context of intersex variance. To the extent that EU legislation does not address intersex lives, it is unsurprising that the CJEU has not yet decided cases relating to anti-intersex discrimination. Recent national case law, however, possibly provides a blueprint for incorporating intersex concerns within the EU's 'sex' equality frameworks.

It is also important to be aware of the restricted vision of trans identities which the CJEU case law seems to emphasise. This is, without doubt, partly the product of the limited subject matters which trans litigants bring before the Court and the arguments in which those litigants engage. However, even with that caveat, the Court's jurisprudence paints a highly medicalised picture of trans people – conceptualising their equality protections through a lens of 'gender reassignment'. Consistent references to the fact that claimants have undertaken a process of surgical transition frames trans equality as contingent upon medical transition. It calls into question the utility and applicability of EU non-discrimination guarantees for the large number of trans EU citizens who cannot or will not access gender confirmation healthcare.

Are such individuals without an EU remedy even where they suffer comparable discrimination to those who have physically altered their bodies?

The CJEU's decisions also leave open the position of non-binary individuals. Anchoring trans equality within the concept of sex, and particularly gender confirmation, the Court appears to prefer a more rigid, dichotomous framework for protection. As increasing numbers of trans people – particularly young people – experience unequal treatment because they experience and express gender identities outside male and female categories, it remains to be seen whether EU sex equality law, in its current formulation, has the capacity to accommodate and safeguard gender beyond the binary.

3. Legal gender recognition

Chapter 3 explores the extent to which trans and intersex people in the 28 EU and three EFTA states surveyed for this report can obtain official acknowledgement of their preferred gender. Legal recognition is often *the* gateway to greater equality rights and protections across the European Union. Where individuals cannot be formally affirmed in their lived gender, they may experience higher rates of discrimination in employment, education, healthcare and access to goods and services.¹⁶² Lack of recognition increases the likelihood that a person's trans history, or their experience of intersex variance, will be involuntarily revealed to third parties, and it may expose that person to risks of physical violence and abuse. In this chapter, the report explores the existence of gender recognition procedures across various European jurisdictions, and considers their accessibility for trans and intersex people. Chapter 3 not only identifies the presence of rights to formal acknowledgement. It also explains what conditions people must satisfy in order to benefit from them.

The authors acknowledge that, for many trans and intersex individuals, obtaining legal affirmation of their preferred gender is not a current priority. Instead of seeking formal recognition, these people may prioritise social and professional acknowledgement and may place greater emphasis upon access to medical transition pathways. Among intersex people, there are many individuals who have greater concern for the practice of involuntary non-therapeutic surgeries than for gender recognition. Indeed, some advocates have expressed unease with centring intersex as part of non-binary recognition debates, pointing out that many individuals who experience intersex variance self-identify as male or female.¹⁶³ Chapter 3 should not be understood as identifying gender recognition as a goal (or something towards which individuals should aim) for *all* trans and intersex people across Europe. Rather, the chapter seeks to highlight, for those people who do wish to be formally acknowledged, the progress which has been made and the challenges which still persist.

3.1 Existence of a right to legal gender recognition

In all 31 jurisdictions, individuals have been formally acknowledged in their preferred gender.

In a majority of EU countries (and the three EFTA states), there are explicit procedures – either administrative or judicial – by which people can access the right to legal gender recognition. Such procedures apply equally to trans and intersex people, although these groups may have different capacities to satisfy the preconditions which national laws impose (see below, Chapter 3.3). In some EU Member States, national law specifically acknowledges an entitlement to gender identity.¹⁶⁴ For example, Article 3 of the **Maltese** Gender Identity, Gender Expression and Sex Characteristics Act 2015 states that '[a]ll persons being citizens of **Malta** have the right to – (a) the recognition of their gender identity; (b) the free development of their person according to their gender identity...'

However, in five jurisdictions (**Cyprus, Bulgaria, Latvia**,¹⁶⁵ **Lithuania** and **Liechtenstein**),¹⁶⁶ although certain individuals have been formally acknowledged, there are no rules, or only incomplete rules, for

162 See e.g. European Union Agency for Fundamental Rights (2014), *Being trans in the EU: Comparative analysis of EU LGBT survey data*, Publication Office of the European Union. In an American context, see recent data from: James, S. E. et al. (2016), *The report of the 2015 U.S. Trans Survey*, NCTE.

163 See: Travis, M. and Garland, F. (2018), 'Legislating intersex equality: Building the resilience of intersex people through law', Legal Studies.

164 Act 4491/2017, Art. 1 (**Greece**).

165 In **Latvia**, Arts. 37(2) and 23(1) of the Civil Status Acts Registration Law envisage amendments to the birth register or marriage register where a person applies to amend their legal gender. However, there is no legal regulation on the procedure and requirements for such legal recognition (*Civilstāvokļa aktu reģistrācijas likums*, Official Gazette No. 197, 14 December 2012, <https://likumi.lv/doc.php?id=253442>) (accessed 21 August 2018).

166 In **Liechtenstein**, there is no framework for obtaining legal gender recognition. However, there is evidence that an individual was permitted to amend gender status using Art. 46 (1) and Art. 87 (2) PGR (Law on natural and legal persons), see: European Commission against Racism and Intolerance (2015), *ECRI report on Liechtenstein*, p. 28 (accessed 23 June 2018).

legal gender recognition. Where an individual applies to officially amend their gender status, they must rely upon a broad interpretation of other statutes or persuade domestic courts, on a case-by-case basis, to acquiesce in their request. In all five countries, the absence of a specific framework risks *de facto* impeding access to gender recognition.

In **Bulgaria**, an entitlement to gender recognition has been located in a number of legal texts, none of which explicitly create a right to alter legal gender. These texts include the Law on **Bulgarian** Personal Documents, the Regulation for Issuing **Bulgarian** Personal Documents and the Civil Registration Act 1999. Similarly, in **Cyprus**, where there is no dedicated gender recognition law, Article 40 of the Civil Registry Law of 2002 makes it possible to amend or correct birth details in the Population File. However, such corrections or amendments are inserted *in addition to* the original birth records, which remain part of the Population File.

In **Lithuania**, there is a nominal entitlement to gender recognition, which is contingent upon undergoing gender confirmation surgery.¹⁶⁷ However, as the domestic parliament has not regulated such surgery in **Lithuania**, for most individuals in the country there is no possibility of completing the surgical requirement. Although, in *L v Lithuania*,¹⁶⁸ the European Court of Human Rights condemned the ‘intermediate’ nature of **Lithuanian** law, ten years later lawmakers have still not adopted sufficient measures to remedy the legal lacuna.

Table 1. Existence of legal gender recognition procedures

Country	Existence of binary gender recognition procedures	Existence of non-binary gender recognition procedures ¹⁶⁹
Austria	Yes	Yes ¹⁷⁰
Belgium	Yes	No
Bulgaria*	No	No
Croatia	Yes	No
Cyprus*	No	No
Czech Republic	Yes	No
Denmark	Yes	No
Estonia	Yes	No
Finland	Yes	No
France	Yes	No
Germany	Yes	Yes ¹⁷¹
Greece	Yes	No
Hungary	Yes	No
Iceland	Yes	No
Ireland	Yes	No
Italy	Yes	No
Latvia*	No	No
Liechtenstein*	No	No

167 Article 2.27 of the Civil Code “The right to change the gender”.

168 [2008] 46 EHRR 22.

169 ‘Non-binary gender recognition procedures’ refer to the possibility of obtaining a legal gender that is neither male nor female.

170 In a landmark ruling (15 June 2018), the **Austrian** Constitutional Court called upon the State to acknowledge preferred gender outside male and female categorisation. It remains unclear to what extent the **Austrian** state has (at the present juncture) implemented the Constitutional Court ruling.

171 In **Germany**, it is currently possible for an infant, who experiences intersex variance, to be designated as having an unspecified legal gender (Civil Status Act, s. 23(3)). Following a landmark decision of the Federal Constitutional Court (2017), the **German** government has indicated its intention to legislate for a ‘third’ gender option for persons who experience intersex variance. (See below, paragraph 3.4).

Country	Existence of binary gender recognition procedures	Existence of non-binary gender recognition procedures ¹⁶⁹
Lithuania*	No	No
Luxembourg	Yes	No
Malta	Yes	Yes
Netherlands	Yes	No
Norway	Yes	No
Poland	Yes	No
Portugal	Yes	No
Romania	Yes	No
Slovakia	Yes	No
Slovenia	Yes	No
Spain	Yes	No
Sweden	Yes	No
United Kingdom	Yes	No

* In **Bulgaria, Cyprus, Latvia, Liechtenstein** and **Lithuania**, there are no formal procedures for obtaining legal recognition of preferred gender, although, in each jurisdiction, there is evidence that certain persons have been acknowledged by the State.

3.2 Procedures for obtaining legal gender recognition – judicial or administrative?

Across the 28 EU Member States and three EFTA states it is not possible to identify a uniform procedure through which individuals can be formally acknowledged in their preferred gender. A number of jurisdictions impose a judicial application process, while other countries have created administrative frameworks. In addition, as noted above, in five EU and EFTA states, there are currently no (or incomplete) legislative or administrative rules which explicitly permit legal gender recognition.

In a number of jurisdictions, individuals must apply to domestic courts in order to have their gender officially acknowledged. Examples of EU Member States with a court-based recognition system include **Italy** and **Greece**. In 2016, **France** reformed its gender recognition laws, removing sterilisation as a mandatory precondition. However, under the new legislative framework (Law of 19 November 2016),¹⁷² applicants are still required to engage with a judicial procedure. Similarly, in **Germany**, although the Federal Constitutional Court has condemned several prerequisites, including minimum age, enforced sterilisation and involuntary divorce, it has not set aside the judge-centred character of the Transsexual Law 1980.

In 2008, the **Romanian** Constitutional Court held that the requirement to obtain a court judgment before the State officially recognises preferred gender is consistent with the right to private life under Article 26 of the domestic constitution.¹⁷³ While the decision to apply for legal gender recognition is a personal choice, national judges have a public order duty to ensure the validity of civil status documents. However, despite this reasoning, a number of critiques have been directed towards judicial application procedures.

Requiring individuals to submit their request before national courts creates an additional layer of formality, which many people find both intimidating and difficult to navigate. Where obtaining recognition necessitates additional legal knowledge, this may dissuade individuals from making an application. It may also require legal assistance which many people – especially those in situations of economic vulnerability

¹⁷² Law of 19 November 2016, Civil Code, Articles 61-5 to 61-8, www.legifrance.gouv.fr/affichCode.do?sessionId=1E437169124383E1247A5B4D733B5A84.tplgfr30s_3?idSectionTA=LEGISCTA000033437635&cidTexte=LEGITEXT000006070721&dateTexte=20180502 (accessed 22 August 2018).

¹⁷³ Constitutional Court of **Romania**, Decision No. 530 (13 May 2008).

– may be unable to afford. In addition, in certain jurisdictions, judicial procedures place domestic judges in a ‘gate-keeper’ role. This allows judges to exercise high levels of personal discretion as to whether they should formally acknowledge preferred gender. In some countries, this has resulted in judges imposing additional preconditions beyond what is currently required in national law or policies.¹⁷⁴

Finally, maintaining judicial procedures can often import an adversarial element into the gender recognition process. In **Poland**, an individual who applies to the court for official acknowledgement must list specific individuals as ‘defendants’ to their request.¹⁷⁵ In practice, there is an obligation to name family members, including parents, spouses and children, as defendants. Not only does such a requirement have the potential to incite (or exacerbate) familial strife, it may also delay recognition procedures where family members object.

An alternative approach is to regulate gender recognition through administrative frameworks. In the **United Kingdom**, people who apply for a Gender Recognition Certificate submit their request to an administrative body, the Gender Recognition Panel.¹⁷⁶ Similarly, in **Hungary**, applications are processed by the Government Office of Budapest, Citizenship and Registration Department, which instructs the public registrar to amend legal gender. In **Luxembourg**, where requests for formal acknowledgement have historically been decided by the administrative tribunal, new legislative reforms (adopted in 2018) will now vest that power in the Ministry for Justice.¹⁷⁷

While administrative procedures avoid many of the criticisms directed towards court-based processes, they may still be unpopular with applicants who object to third-party scrutiny of their gender. In a number of countries, administrative procedures may be combined with judicial oversight, particularly on appeal. Under **Ireland’s** Gender Recognition Act 2015, although applicants make their initial request to the Minister for Social Protection, Article 17 of the 2015 Act creates a right to appeal to the Circuit Family Court if they are unsuccessful. Similarly, in **Finland**, although the recognition decision is taken by the **Finnish** magistrates, an appeal is lodged with the Administrative Court.¹⁷⁸

3.3 Conditions for obtaining legal gender recognition

In *Goodwin v United Kingdom*,¹⁷⁹ the European Court of Human Rights held that, while Contracting Parties to the Convention were required to formally acknowledge preferred gender, they enjoyed a margin of appreciation as to the conditions which applicants can be required to satisfy.¹⁸⁰

In this section, the report explores the various prerequisites which the 28 EU and three EFTA states have established as entry requirements for gender recognition. As will be seen, a broad spectrum of legal affirmation frameworks operate across Europe. While certain jurisdictions, including **Ireland** and **Belgium**, have embraced a model of self-determination, other countries, such as the **Czech Republic** and **Finland**, continue to impose strict medical conditions, including surgery, sterilisation and hormone conditions. Across Europe, trans minors continue to struggle to have their preferred gender formally acknowledged and may, in some states, such as **Denmark** and the **United Kingdom**, be expressly excluded from legal recognition. Finally, as will become apparent from the discussion below, EU and EFTA Member States continue to impose a rigid, binary-orientated notion of legal gender. While a number of

174 This has been observed, *inter alia*, in **Romania** and **Germany**, see e.g. ‘Diskriminierung von Transsexuellen am Amtsgericht Leipzig?’ (*Greens Website*, 6 October 2018) www.irishstatutebook.ie/eli/2015/act/25/section/2/enacted/en/html#sec2 (accessed 22 August 2018).

175 Supreme Court of **Poland**, Case no III CZP 118/95, *Orzecznictwo Sądów Polskich* 1996, no 4, pos. 78 (22 September 1995); I CSK 146/13 (6 December 2013).

176 Gender Recognition Act 2004, Section 1.

177 Law of 10 August 2018.

178 Act on Confirming the Sex of a Trans Person, Article 4.

179 [2002] 35 EHRR 18.

180 *Ibid*, [93].

domestic courts have begun to recognise the possibility of lives beyond ‘male’ and ‘female’, one country – **Malta** – legally affirms gender identity outside the ‘man’ and ‘woman’ classification.

3.3.1 Self-determination

There are seven countries (**Belgium, Denmark, Ireland, Luxembourg, Malta, Norway** and **Portugal**) that currently operate (or will very soon begin operating) a model of self-determination *for people over the age of majority*. In such jurisdictions, adult applicants can be formally acknowledged in their preferred gender without a requirement to satisfy medical, civil status or age preconditions. Self-determination merely requires that individuals submit a statutory declaration affirming that they have a stable connection with the gender in which they wish to be recognised.¹⁸¹

In 2014, inspired by the landmark Gender Identity Act 2012¹⁸² adopted in Argentina, **Denmark** became the first European country to introduce self-determination rules.¹⁸³ As noted below, **Danish** law absolutely excludes minors and applicants are required to observe a six-month waiting period before obtaining recognition. However, the key determinant under **Denmark**’s regime is the self-affirmed gender status of an applicant. In the intervening years, six other EU and EFTA states – **Malta** (2015),¹⁸⁴ **Ireland** (2015),¹⁸⁵ **Norway** (2016),¹⁸⁶ **Belgium** (2017),¹⁸⁷ **Portugal** (2018)¹⁸⁸ and **Luxembourg** (2018)¹⁸⁹ – have approved self-determination frameworks. There are also a number of jurisdictions which are currently debating similar reforms.¹⁹⁰

From the perspective of trans and intersex people, a model of self-determination presents key advantages. Firstly, it is an accessible, streamlined process which minimises the extent to which applicants must engage with procedural bureaucracy. Secondly, self-determination reduces (or eradicates) the need to fulfil the common preconditions discussed below which, for a multiplicity of reasons (e.g. health, age, social, economic, familial), some applicants are unable to satisfy. Finally, for many individuals self-determination has important symbolism. It stands as acknowledgement that trans and intersex people are the arbiters of their own gender and that gender status should not be subject to third-party scrutiny.

3.3.2 Conditions for recognition

While ‘self-determination’ has increasingly been endorsed by human rights actors, most recently the numerous experts who re-drafted the Yogyakarta Principles Plus 10,¹⁹¹ it remains a minority position across the European Union and EFTA. In **Italy**, the Constitutional Court has rejected the argument that gender recognition can arise solely from the will of an applicant.¹⁹² Similarly, in jurisdictions such as **Finland** and **France**, which recently liberalised their national laws for acknowledging preferred gender,

181 See: In **Denmark**, Article 3(5) of the Act on Civil Registration requires that applicants confirm their ‘feelings of belonging to the opposite gender’. In **Malta**, Article 5(b) of the Gender Identity, Gender Expression and Sex Characteristics Act 2015 prescribes ‘a clear, unequivocal and informed declaration by the applicant that one’s gender identity does not correspond to the assigned sex in the act of birth’. In **Belgium**, Article 3 of the Gender Recognition Act 2017 requires that an applicant state ‘[the applicant] has been convinced for a long time that the sex mentioned in [the applicant’s] birth certificate is not in congruence with [the applicant’s] inner experienced gender identity’. In **Luxembourg**, the Law of 25 June 2018 requires that an applicant attest to an ‘intimate and stable conviction’ that the current legal gender does not conform with internal experience of gender.

182 Act No. 26.743.

183 Amendment Act L182 (2014).

184 Gender Identity, Gender Expression and Sex Characteristics Act 2015.

185 Gender Recognition Act 2015.

186 Legal Gender Amendment 2016.

187 Gender Recognition Act 2017.

188 Decree (XIII 3 105) (2018).

189 Law of 10 August 2018.

190 See e.g. ongoing policy and legislative debates in the **United Kingdom**, the **Netherlands** and **Spain**.

191 ‘Yogyakarta Principles Plus 10’ (*Yogyakarta Principles website*) <http://yogyakartaprinciples.org/principles-en/yp10/> (accessed 24 September 2018).

192 **Italian** Constitutional Court, Decision No. 180 (13 July 2017).

the legislatures in both jurisdictions stopped short of allowing self-declared gender, despite such reforms in neighbouring countries. In the sections which follow below (3.3.2.1–3.3.2.3), this report concentrates on three preconditions – medicalisation (surgery, sterilisation, hormone treatments and diagnosis), divorce and age – which European countries continue to commonly impose.

3.3.2.1 Medicalisation

Surgery and sterilisation

Across the 28 EU and three EFTA states, there remains a requirement in a number of jurisdictions that, in order to be formally acknowledged in their preferred gender, trans and intersex people must: (a) undergo gender confirmation surgery; and (b) show evidence that they have undertaken a process of sterilisation or are otherwise incapable of reproducing (see Table 2 below).

Surgical requirements reflect an (incorrect) assumption that physical interventions are an inherent part of gender transition processes and that Europe's trans people inevitably desire to change their bodies, particularly their sex characteristics. Similarly, the imposition of sterilisation obligations arise out of historic fears that if individuals were to procreate after they had been legally affirmed, this would give rise to (supposedly) inappropriate reproductive practices (e.g. 'pregnant men'). Such fears have little regard for how trans and intersex people experience their bodies and they often conflict with strongly-held desires to found a family.

As Table 2 illustrates, the European Union and EFTA jurisdictions which currently require surgical intervention include the **Czech Republic** and **Estonia**. In **Romania**, certain courts have interpreted Article 4(2), Point L of Government Ordinance No.41 of 31 January 2003 to specifically require surgical procedures. Countries which currently impose sterilisation include **Finland** and **Slovakia**. In **Finland**, despite recent reforms to remove a divorce requirement from the Act on Confirming the Sex of a Trans Person 2002, national authorities chose to retain infertility as a mandatory precondition. In certain states, such as **Latvia**, **Cyprus** and **Liechtenstein**, where there are no formal procedures for accessing gender recognition, existing practice suggests that those people who have been acknowledged in their preferred gender, undertook a process of surgical transition or no longer retained their reproductive capacities.

An ancillary precondition which arises from surgical prerequisites is that applicants observe a period of 'real life experience' (RLE) during which they live in their preferred gender (but without formal acknowledgement). Although, historically, RLE was only imposed upon people who underwent gender confirmation surgery, it is now required in some EU jurisdictions, such as **Iceland**,¹⁹³ **Germany**¹⁹⁴ and the **United Kingdom**,¹⁹⁵ which do not mandate surgical interventions.

In the past decade, however, there has been a clear shift in European attitudes towards the acceptability of physical intervention requirements. As detailed in Chapter 2, various United Nations and Council of Europe human rights actors, including the ECtHR, have pushed back against the legitimacy of involuntary surgery and sterilisation. Their criticisms are reflected in the increasing number of EU and EFTA legislatures which have positively removed physical intervention requirements from their national laws. Examples of jurisdictions which have taken such steps in the last decade include: **Spain** (2007); **Portugal** (2011); **Netherlands** (2013); **Denmark** (2014); **Croatia** (2014); **Norway** (2016); **France** (2016); **Belgium** (2017) and **Luxembourg** (2018). In **Malta**, Article 3(4) of the Gender Identity, Gender Expression and Sex Characteristics Act 2015 explicitly guarantees gender recognition rights without 'proof of a surgical procedure for total or partial genital reassignment...'.¹⁹⁶

¹⁹³ Act 57/2012.

¹⁹⁴ Transsexual Law 1980.

¹⁹⁵ Gender Recognition Act 2004.

In addition to legislative action, domestic courts have also played an important role in protecting the physical and bodily integrity of applicants for gender recognition. In **Sweden**, the Stockholm Administrative Court of Appeals has stated that, where individuals consent to sterilisation purely as a means of obtaining official gender recognition, these people do not act voluntarily.¹⁹⁶ In response, the **Swedish** parliament repealed mandatory infertility in 2013. Case law from the Constitutional Court,¹⁹⁷ the Equality Ombudsman¹⁹⁸ and the Administrative Tribunal¹⁹⁹ has also been the catalyst for executive and legislative reforms in **Croatia**, **Norway** and **Luxembourg** respectively. In **Austria**, the High Administrative Court has condemned the obligatory removal of primary sex characteristics as discriminatory and contrary to human rights.²⁰⁰ Similarly, in **Italy**, both the Court of Cassation²⁰¹ and the Constitutional Court²⁰² have rejected surgery as a precondition for gender recognition.

It is interesting to note that, although national legislative and judicial actors have shown a growing willingness to respect the procreative rights of applicants for gender recognition, they are more reluctant to acknowledge preferred gender when trans or intersex people actually reproduce after gender recognition. While in **Germany** the Federal Constitutional Court struck down sterilisation requirements in 2011, the Court nonetheless implied that it would be permissible for the legislature to assign parental status according to birth gender.²⁰³ In two recent judgments, the Federal Court of Justice has declared that a trans woman who provides sperm for conception and a trans man who gives birth must be registered as 'father' and 'mother' respectively.²⁰⁴ Similar rules are enforced across EU and EFTA Member States, including in **Denmark** and **Norway**.²⁰⁵ In **Belgium** and the **Netherlands**, while a trans man who gives birth will always be his child's 'mother', recent reforms have made it possible for a trans woman, who provides sperm, to be registered as a co-mother.²⁰⁶ By contrast, in **Sweden**, domestic courts have been willing to acknowledge, as a father, a trans man who gave birth after he obtained gender recognition.²⁰⁷

196 Stockholm Court of Administrative Appeal, *Socialstyrelsen v NN* Mål nr 1968-12 (19 December 2012).

197 Constitutional Court of **Croatia**, U-IIIB/3173/2012 (18 March 2014).

198 Equality Ombudsman of **Norway**, Case 14/840 (9 September 2014).

199 Administrative Tribunal of **Luxembourg** (Civil Affairs), Judgment N°173/2016 (1 June 2016).

200 High Administrative Court of **Austria**, Verdict 2008/17/0054 (27 February 2009).

201 Court of Cassation of **Italy**, No. 15138 (20 July 2015).

202 Constitutional Court of **Italy**, Decision No. 221 (2015).

203 Federal Constitutional Court of **Germany**, 1 BvR 3295/07 (11 January 2011).

204 Federal Court of Justice, Case XII ZB 660/14 (September 2017); Federal Court of Justice, XII ZB 459/16 (29 November 2017).

205 See: Children Act (in both jurisdictions).

206 **Dutch** Civil Code, Art. 1:198(c) BW; Gender Recognition Act 2017, Article 6 (**Belgium**). This asymmetry may reflect the continuing influence of the historic maxim, *mater semper certa est* (meaning 'the mother of the child is always certain'). In a number of jurisdictions, there appears to be strong support for the idea that the mother of a child should always be fixed as the individual who gives birth (see e.g. Section 33(1) of the **UK's** Human Embryology and Fertilisation Act 2008).

207 Stockholm Administrative Court, Case No. 3201-14 (9 July 2015).

Table 2. Medical requirements for legal gender recognition

Country	Surgery	Sterilisation	Diagnosis
Austria	No	No	Yes
Belgium	No	No	No
Bulgaria ²⁰⁸	No	No	Yes
Croatia	No	No	Yes
Cyprus	Yes	Yes	Yes
Czech Republic	Yes	Yes	Yes
Denmark	No	No	No
Estonia	Yes	No	Yes
Finland	No	Yes	Yes
France	No	No	No
Germany	No	No	Yes
Greece	No	No	No
Hungary	No	No	Yes
Iceland	No	No	Yes
Ireland	No	No	No
Italy	No	No ²⁰⁹	Yes
Latvia ²¹⁰	Yes	Yes	Yes
Liechtenstein ²¹¹	Unknown	Unknown	Unknown
Lithuania ²¹²	Yes	No	Yes
Luxembourg	No	No	No
Malta	No	No	No
Netherlands	No	No	No ²¹³
Norway	No	No	No
Poland	No	No	Yes
Portugal	No	No	No
Romania ²¹⁴	Yes	Yes	Yes
Slovakia	Yes	Yes	Yes

208 The precise requirements of the law in **Bulgaria** remain uncertain as there is no formal framework for acknowledging preferred gender.

209 It remains uncertain what physical interventions are required to obtain legal gender recognition in **Italy**. Although the Court of Cassation and the Constitutional Court have struck down requirements for sterilisation, it remains unclear to what extent State authorities can require applicants to physically amend their bodies and whether there is a prohibition on surgical (as opposed to hormone-induced) amendments.

210 In **Latvia**, there are no formal procedures available. Therefore, it is difficult to conclusively state whether physical medical interventions are required. Yet, there is evidence that people who do obtain gender recognition must submit to surgery and sterilisations. See e.g. Transgender Europe 'TGEU Index' (TGEU Website) (https://tgeu.org/wp-content/uploads/2018/05/SideB_TGEU2018_Print.pdf).

211 The available evidence suggests that people who have been able to formally amend their legal gender in **Liechtenstein** have completed gender confirmation surgery.

212 In **Lithuania**, the current law requires that, in order to be recognised in one's preferred gender, there is a necessity to undergo gender confirmation surgery. However, access to (and the details of) that surgery have not been regulated by domestic law. The current legal framework does not specifically require sterilisation, although it is unclear whether this will change when/if the national parliament makes provision for gender confirmation surgery. Such a requirement would be inconsistent with the jurisprudence of the European Court of Human Rights.

213 Although, in the **Netherlands**, there is no requirement that individuals obtain a diagnosis, the legal gender recognition process is supervised by medical professionals at certain 'gender clinics' within the country.

214 In **Romania**, as noted, the process for obtaining legal gender recognition requires an application to the domestic courts. In reality, national judges acknowledged preferred gender inconsistently, with certain judges requiring more onerous supporting evidence, including sterilisation and gender confirmation surgery.

Country	Surgery	Sterilisation	Diagnosis
Slovenia ²¹⁵	No	No	Yes
Spain	No	No	Yes
Sweden	No	No	Yes
United Kingdom	No	No	Yes

Hormone therapy

While an increasing number of jurisdictions are removing requirements for surgical and sterilising procedures, either through legislative or judicial processes, another form of physical intervention, hormone therapy, remains more common. Due to medical requirements and protocols, all people who access surgical interventions (and perhaps sterilisation interventions) as a prerequisite for legal gender recognition are likely to have completed a course of hormone therapy. In addition, in certain states where applicants for recognition may no longer be required to prove surgery or infertility, they may still have to undergo hormone interventions.

In **Spain**, Article 4(2) of Law 3/2007 of 15 May expressly acknowledges preferred gender without a requirement for involuntary surgery. However, applicants are still obliged to prove that they have received ‘two years of medical treatment to alter physical characteristics to match gender identity’.²¹⁶ In practice, ‘treatment to alter physical characteristics’ has been interpreted as mandating hormonal therapy. Similarly, in **Slovenia**, the law does not definitively require specific medical treatments. However, a majority of individuals who request gender recognition are already undertaking hormone treatments.

The legitimacy of hormone requirements has been affirmed by national judiciaries. In **Bulgaria**, where there are currently no procedures which directly regulate gender recognition, the Supreme Court has rejected unwanted surgery as a prerequisite for gender recognition.²¹⁷ However, the Court does permit **Bulgarian** officials to mandate evidence that applicants have begun a course of hormonal treatment.²¹⁸ Similarly, in **Italy**, although both the Court of Cassation and the Constitutional Court have condemned surgical requirements,²¹⁹ the case law suggests that state authorities can legitimately require hormone interventions.

Diagnosis

The final medical-orientated precondition for legal gender recognition is the requirement that applicants obtain a diagnosis of gender dysphoria, gender identity disorder or transsexualism. Even as EU and EFTA jurisdictions move away from physical interventions, a significant majority of states continue to impose diagnosis requirements. Indeed, apart from the **Netherlands** (discussed below) and the seven countries that have adopted self-determination, all other jurisdictions surveyed for this report maintain diagnosis preconditions.

When, in 2004, the **United Kingdom** became the first European country to allow legal gender recognition without an obligation for physical medical intervention, **UK** parliamentarians still imposed a diagnosis requirement. Section 2(1)(a) of the Gender Recognition Act 2004 limits Gender Recognition Certificates to individuals who have or have had gender dysphoria. Similarly, in **Hungary**, the Office of Budapest,

215 In **Slovenia**, where individuals apply for legal gender recognition, they must include medical certification. It is unclear what information this certificate must contain and it is therefore possible that, in practice, state officials who process applications for gender recognition will require applicants to have undergone particular medical treatments, including surgery and sterilisation.

216 Law 3/2007 of 15 May, Article 4(1)(b).

217 Supreme Court of **Bulgaria** (4th Civil Division), No. 2316/2016 r (30 May 2017).

218 Ibid.

219 Court of Cassation of **Italy**, No. 15138 (20 July 2015); Constitutional Court of **Italy**, Decision No. 221 (2015).

Citizenship and Registration Department will not direct the public registrar to amend a person's legal gender without opinions from a psychiatrist (with an expertise on trans identities) and a clinical psychologist. Express diagnosis requirements are further evident in the legislation or administrative policies of **Germany, Croatia, Finland and Iceland**, and they arise from the case law of the **Polish and Bulgarian** courts.

One jurisdiction, which has neither adopted self-determination nor requires a diagnosis, is the **Netherlands**. In 2013, the **Dutch** parliament, when repealing sterilisation and surgery-focused prerequisites, instituted a novel, supervisory obligation.²²⁰ Medical professionals in three gender clinics throughout the **Netherlands** are called upon to oversee applications for legal gender recognition. Although these professionals need not certify that people have a diagnosable gender-related condition, they must confirm that applicants experience their preferred (requested) gender and that they understand the consequences of obtaining gender recognition.²²¹ While the 2013 reforms have been praised for decoupling trans identities from mental illness, they nonetheless reinforce historic beliefs that trans people are unable to independently articulate their gender and that they require external supervision.

3.3.2.2 Divorce

Across the jurisdictions surveyed for this report, numerous states continue to require divorce as a precondition for legal gender recognition, although the number of countries withholding acknowledgement from married applicants has declined in the past decade.²²² At present, 13 EU and EFTA countries²²³ impose divorce as a precondition for officially recognising preferred gender. A divorce requirement also persists in **Northern Ireland**.

The justification for mandating the dissolution of an existing marital union is that, if applicants were to obtain recognition while in a different-sex marriage, this would result in two people with the same legal gender inhabiting the union. For EU and EFTA Member States where marriage for same-sex couples is not available, such an outcome would be inconsistent with national law and public policy. In certain jurisdictions, such as **Italy**, where applicants are required to dissolve an existing different-sex marriage, there is the possibility to form a civil partnership once the applicant is affirmed in the preferred gender.

In those jurisdictions which require divorce, such a precondition may either be stated explicitly²²⁴ or arise from administrative or medical practice²²⁵ or from judicial interpretation.²²⁶ In **Northern Ireland**, for example, the Gender Recognition Act 2004 directly provides that, prior to obtaining a full Gender Recognition Certificate, applicants must annul any pre-existing marriage.²²⁷ Similarly, the new Legal Recognition of Gender Identity Law 2017 in **Greece** also expressly mandates that individuals be unmarried. By contrast, in **Croatia**, the relevant legal and administrative frameworks do not specify divorce as a prerequisite for acknowledging preferred gender. However, in light of a recent amendment to the national constitution, which expressly rejects same-sex marriage,²²⁸ it is unlikely that state authorities would accept any request which will create a marriage with two legal males or two legal females. In **Poland**, where the rules for gender recognition have been built up through case law, there is evidence that domestic courts do not affirm applicants who are married.

220 See: Pintens, W. (2015), 'The legal status of transsexual and trans persons in Belgium and the Netherlands' in Scherpe, J. M. (ed), *The legal status of transsexual and trans persons*, Intersentia, p. 119.

221 Ibid.

222 Dunne, P. (2016), '(Trans) marriage equality? Challenging Europe's marital "dissolution requirements"' *Child and family law quarterly*, Vol. 28(4), pp. 325-346.

223 Bulgaria, Croatia, Cyprus, Czech Republic, Greece, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Poland, Romania and Slovakia.

224 Family Law Act, Article 9(1)(7) (**Estonia**).

225 See e.g. **Slovakia, Hungary**.

226 See e.g. **Italy**.

227 Gender Recognition Act, Section 4(3)(b) and Sch. 2, Pt. 3.

228 Official Gazette *Narodne novine* No. 5/14.

In recent years, despite the judgment of the European Court of Human Rights in *Hämäläinen v Finland*,²²⁹ a growing number of EU and EFTA states have rejected divorce requirements. While these reforms typically follow on from broader decisions to allow same-sex marriage, there are also jurisdictions which repealed mandatory divorce even before same-sex marital unions were introduced.

Among the states which have repealed divorce requirements in recent years are **Ireland, Finland** and **Sweden**. In **Germany**, in 2008, the Federal Constitutional Court struck down divorce prerequisites as inconsistent with Basic Law guarantees.²³⁰ In **France**, prior to the introduction of same-sex marriage, domestic courts had rejected involuntary divorce. According to the Court of Appeals, Rennes, marriage is determined at the point of entry, so that subsequently obtaining gender recognition does not alter the status or validity of the union.²³¹ In 2006, the **Austrian** Constitutional Court rejected that country's divorce requirement on procedural grounds.²³²

It is important to observe that, even in those jurisdictions, such as England and Wales, which have repealed (at least partially) the requirement to dissolve an existing marriage, an applicant who is in a same-sex civil partnership will still be required to convert their relationship to a marriage if the state authorities do not permit different-sex registered partnerships.

3.3.2.3 Age

Across the 28 EU and three EFTA states surveyed, legal gender recognition is overwhelmingly an entitlement enjoyed by adult trans and intersex people. While in a number of jurisdictions surveyed for this report at least some minors can be formally acknowledged in their preferred gender, all countries place (varying) restrictions on young people's access to official recognition.

In numerous states throughout the EU and EFTA, minor applicants are explicitly excluded from gender recognition pathways. This is the case, inter alia, in **Spain, Poland**,²³³ **Finland, Denmark, France, Sweden** and **Lithuania**. In the **United Kingdom**, Section 1 of the Gender Recognition Act 2004 states that 'a person of either gender *who is aged at least 18* may make an application for a gender recognition certificate...' (emphasis added). Where access to recognition is dependent on gender confirmation surgery, in countries such as the **Czech Republic** and **Slovakia**, this indirectly obstructs affirmation for young people who are often excluded from medical transition pathways.

In recent years, a growing number of jurisdictions,²³⁴ applying a spectrum of models, have increased young people's access to official recognition. In **Italy** and **Malta**, current practice entitles parents and guardians to apply for acknowledgement. Article 7(1) of the Gender Identity, Gender Expression and Sex Characteristics Act 2015 in **Malta** provides that, 'persons exercising parental authority over the minor or the tutor of the minor may file an application in the registry of the Civil Court... requesting the Court to change the recorded gender and first name of the minor...'. The **Maltese** legislation is unusual in that, like only a handful of other EU and EFTA countries (e.g. **Germany**²³⁵ and **Croatia**),²³⁶ it imposes no lower limit for affirming children's preferred gender.

229 [2015] 1 FCR 379.

230 Federal Constitutional Court of **Germany**, 1 BvL 10/05 (23 July 2008).

231 Court of Appeal, Rennes, Chamber 6 A, N°11/08743, 1453, 12/00535 (16 October 2012).

232 Constitutional Court of **Austria**, V4/06 (8 June 2006).

233 In **Poland**, the exclusion of trans and intersex minors has been developed through case law.

234 In 2018, **Luxembourg** explicitly enshrined the gender recognition rights of young people in legal reforms (Law of 10 August 2018).

235 In **Germany**, the Federal Constitutional Court has struck down the original age restrictions in the Transsexual Law 1980 (Federal Constitutional Court of **Germany**, BVerfG, BVerfGE 60, 123 (16 March 1982)). However, it remains unclear to what extent trans minors are accessing gender recognition in **Germany** as a matter of practice.

236 In **Croatia**, the relevant legal framework makes no reference to age limitations, although there is a requirement to submit medical evidence in relation to the minor applicant.

In most jurisdictions which acknowledge minors there is a lower threshold for legal gender recognition. Thus, in **Ireland**,²³⁷ **Portugal**²³⁸ and **Belgium**,²³⁹ while parents can consent to legal affirmation of young people's preferred gender, minors must be aged at least 16 years. The application procedure which minors in these three countries navigate is also more onerous than the process applied to adult applicants. This is similarly the case for minor applicants in **Greece**. In that jurisdiction, the minimum age is 17 years with parental consent. Where the child has reached 15 years, there must be parental consent and a positive opinion from an interdisciplinary scientific committee. This committee is set up through a joint decision by the Minister of Justice, Transparency and Human Rights and the Minister of Health for a two-year term. It is composed of a child psychiatrist, a psychiatrist, an endocrinologist, a child surgeon and a paediatrician as Chair.

In the **Netherlands**, people over the age of 16 years can apply for recognition without the agreement of their parents, although, as noted, the process remains supervised by medical professionals at three authorised gender clinics. Under the current **Dutch** framework, minors under 16 years of age are absolutely excluded from acknowledgement.

In **Norway**, minors can request gender recognition through a process of self-determination once they reach the age of 16 years.²⁴⁰ For children aged between six and 15, parents can make a request, with specific processes available if parents disagree. Where children experience intersex variance, there is a procedure for their parents to obtain gender recognition under six years of age. This mirrors the position in **Sweden**, where parents can also apply to amend legal gender for intersex children. **Swedish** law requires that, as part of such a procedure, a child must also consent to gender recognition if they have reached the age of 12 years.²⁴¹

3.4 Non-binary recognition

Across the 28 EU and three EFTA states, legal gender (and procedures for obtaining gender recognition) remains anchored to a highly binary framework. As domestic laws currently stand, only one jurisdiction (**Malta**) permits individuals to obtain legal acknowledgement of a non-binary preferred gender. In all other countries, applicants must request either a 'male' or 'female' gender option.

In **France**, there is a possibility to withhold mentioning legal gender on a birth certificate where a child experiences intersex variance, and where it is not possible to assign gender according to the individual's sex characteristics. The child must be assigned a legal gender within two years by a judicial decision (simple proceeding).

Similar possibilities exist in the **Netherlands** and **Germany**. Article 1:19 of the **Dutch** Civil Code permits the registration of an 'uncertain' gender. Such uncertainty should be resolved within three months, although the initial gender marker can be maintained if the uncertainty persists. In practice, the overwhelming majority of infants, who are initially assigned an 'uncertain' gender, subsequently obtain a 'male' or 'female' legal status. This is largely because, save in exceptional circumstances, it is not possible to apply for non-binary identity documents in the **Netherlands**.²⁴² However, in a judgment by a district court on 28 May 2018 it was ruled that the claimant, who had an intersex condition, had the right to change the

237 Gender Recognition Act 2015, s. 12.

238 Decree (XIII 3 105) (2018), Art. 7.2.

239 Gender Recognition Act 2017, Article 11. Under Article 11 of the 2017 Act, if the parents or guardians refuse consent, the minor can apply to the Family Court to be assisted by an ad hoc guardian.

240 Legal Gender Amendment Act, Article 4.

241 Act 1972:119, Article 2.

242 Van den Brink, M. and Tigchelaar, J. (2014), *M/V en verder, Seksregistratie door de overheid en de juridische positie van transs*, UCERF, pp. 19-20 and 24 www.wodc.nl/onderzoeksdatabase/2393-de-mogelijkheid-en-consequenties-van-het-onbepaald-laten-van-het-geslacht.aspx (accessed 4 October 2018).

description ‘female’ in her birth certificate into ‘sex could not be established’.²⁴³ In **Germany**, Article 22(3) of the Civil Status Act, introduced in 2013, directs that children who cannot be designated male or female at birth should initially be assigned an unspecified gender. Since 2013, very few infants have been given an ‘unspecified’ gender status and the provision has been criticised by intersex advocates as encouraging surgical interventions.²⁴⁴

In 2017, while refusing an individual’s application to be acknowledged as ‘other gender’ or ‘gender neutral’, the **French** Court of Cassation reiterated that, ‘[F]rench law does not allow the mention of a legal sex other than male or female’.²⁴⁵ The Court stated that withholding non-binary recognition categories does not violate the European Convention on Human Rights. In England and Wales, the High Court has also concluded that withholding an ‘X’ passport (note: the litigation did not concern gender recognition) does not violate the Convention rights of non-gendered individuals.²⁴⁶ In *R (On the Application of Christie Elan-Cane) v Secretary of State for the Home Department*, the Court held that the decision whether to provide a non-binary passport did engage the applicant’s Convention rights but that it remained, at present, within the **UK** Government’s margin of appreciation.

However, in recent years, there have been two constitutional court judgments – in **Germany** and **Austria** – which have affirmed a right to legal recognition outside male and female categorisation.

In 2017, in a case concerning an intersex litigant, the Federal Constitutional Court of **Germany** held that limiting gender options to the binary violates rights to personal development and equality.²⁴⁷ The German parliament was required to: (a) abolish the requirement to register gender at birth; or (b) create additional gender options. In August 2018, the German government announced that it would introduce a ‘third’ gender option, which would be available only to people with intersex variance.

In June 2018, the Constitutional Court of **Austria** similarly held that state authorities must make available gender options beyond male and female.²⁴⁸ While the **Austrian** state has no constitutional obligation to register sex, where it chooses to do so officials must provide options which respect individual gender identity, including non-binary identities, although the State is only required to acknowledge preferred genders which have a real relation to social life.

3.5 Concluding remarks

As the foregoing analysis suggests, legal recognition of preferred gender is (like international trans and intersex protections in Chapter 2) currently in a state of flux across the EU and EFTA. In all jurisdictions, there is evidence that at least certain individuals have been legally acknowledged, although as noted, some countries continue to provide no official pathway (legislative, judicial or administrative) towards gender recognition.

Seven EU and EFTA states now permit trans and intersex people to access legal affirmation through a process of self-determination. Under a self-declaration model, applicants are formally acknowledged in their preferred gender without satisfying specific medical or temporal requirements. What matters is internal experiences of gender, as evidenced through a statutory declaration (although, in most jurisdictions, the statutory declaration must emphasise the permanence of transition).

243 Rechtbank Limburg, C/03/232248/FA RK 17-687 (28 May 2018) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBLIM:2018:4931> (accessed 21 October 2018).

244 Advocates argue that, by requiring intersex infants to be assigned an ‘unspecified’ gender if they cannot be identified as ‘male’ or ‘female’, Article 23(3) of the Civil Status Act will encourage parents to consent to gender ‘normalising’ surgeries so as to avoid othering their child.

245 Court of Cassation of **France**, N° 16-17189 (4 May 2017).

246 *R (On the Application of Christie Elan-Cane) v Secretary of State for the Home Department* [2018] EWHC 1530 (Admin).

247 Constitutional Court of **Germany**, 1 BvR 2019/16 (10 October 2017).

248 Constitutional Court of **Austria** (15 June 2018).

For many EU citizens, self-determination is the optimal model for recognising trans and intersex identities. It prioritises gendered self-autonomy and makes trans and intersex people the arbiters of their legal identity. Yet in certain jurisdictions, including the **United Kingdom**, movements towards self-determination are also a source of critique. To the extent that self-determination could possibly be used as a tool for abuse or fraud (e.g. cisgender men gaining access to women-only spaces), some groups and individuals, including certain women's rights advocates, have advocated greater caution. Within European institutions, there is evidence of an incremental shift towards the principle of self-declared gender. This is best illustrated by PACE's adoption of self-determination in 2015.

The many other EU and EFTA states which have not yet embraced self-determined gender continue to apply differing access requirements for legal affirmation. At their most restrictive, preconditions for gender recognition require trans and intersex people to physically alter their bodies, including through surgery, sterilisation or hormone therapies. As noted in Chapter 2, the European Court of Human Rights has condemned mandatory infertility as a requirement for legal affirmation²⁴⁹ and the Court is currently reviewing the legitimacy of involuntary surgery.²⁵⁰ Although EU institutions, particularly CJEU case law, have framed trans identities through a lens of inevitable medical transition, there remain significant question marks over the extent to which physical requirements for gender recognition are compatible with European human rights standards. On the other hand, the ECtHR has taken a more deferential stance towards diagnosis prerequisites. At present, diagnosis is enforced by a majority of EU and EFTA states, a fact which led the ECtHR to affirm the proportionality of **France's** diagnosis prerequisite in *AP, Garçon and Nicot*.²⁵¹

Moving forward, perhaps the two most complicated questions for domestic policy-makers across the EU and EFTA will be how to affirm the preferred gender of trans young people, and what protections can be enacted for legal genders beyond male and female. As two rapidly expanding constituencies among trans people, the needs and entitlements of trans minors and non-binary communities are increasingly pressing.

This chapter reveals that, at present, there is an absence of formal acknowledgement (and protection) for young trans identities and for people who do not fit neatly within the categories of 'man' and 'woman'. In some ways, this comparative dearth of recognition illustrates either explicit (or more underlying) social fears: can the law be sure about the durability of young trans identities? What will the consequences be if trans children change their minds? How will European legal systems adapt to more than two gender categories? These are important questions and they require proper consideration. Yet they are also questions for which, even at the present time, nuanced and workable resolution is possible. This is already being seen in EU and EFTA jurisdictions, such as **Malta** and **Norway**, which are adopting innovative legal solutions. These Member States, and others like them, can serve as a blueprint for broader, more inclusive gender recognition laws and policies across Europe.

249 *AP, Garçon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017).

250 *RL and PO v Russia* App Nos. 36253/13 and 52516/13 (ECtHR, Lodged on 25 May 2013 and 30 May 2013).

251 *AP, Garçon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017).

4. National equality and non-discrimination law frameworks

As discussed in Chapter 2, EU equality and non-discrimination law does not explicitly protect against discrimination on the basis of gender identity, gender expression or sex characteristics. This does not exclude the possibility that the CJEU may interpret other provisions as encompassing these grounds. However, it is unclear whether the CJEU will do so and, if it does, how far such protection would extend.

The one exception to this general void (in the area of gender equality) is Directive 2006/54/EC, on the basis of which Member States are expected to protect individuals who intend to undergo, are undergoing or have undergone gender confirmation treatment against discrimination because of it. Member States are not required to include a specific reference in their national equality laws but must interpret the prohibition of discrimination on the basis of sex as encompassing the prohibition of discrimination in relation to gender confirmation.

Countries have implemented their obligation under Directive 2006/54/EC to protect against discrimination because of 'gender reassignment' in various ways.²⁵² Beyond this minimal protection, the picture is even more diverse, varying from comprehensive and explicit inclusion (**Malta**) to a complete lack of references (**Estonia**).

Firstly, the general legal landscape will be discussed, with attention to implicit and explicit inclusion of the various aspects related to trans and intersex discrimination. The role of national equality bodies (NEBs) and public interest litigation is then mapped out. The subsequent subsections will look into the conditions for invoking protection against discrimination. The chapter will conclude with a brief discussion of the state of play.

4.1 Legal provisions on trans and intersex discrimination

The trans and intersex inclusiveness of the national equality and non-discrimination frameworks can be characterised as a sliding scale, leading from 'explicitly inclusive' of gender identity and expression and sex characteristics, via 'partly explicitly inclusive', to 'implicit but presumably inclusive'. The latter category is divided between national equality laws that are implicitly expected to cover all people and national equality laws that are expected to cover at least some of the aspects of gender identity and expression and sex characteristics. The one exception is **Estonia** where these elements are neither included explicitly nor expected to be covered by a generous interpretation. It must be presumed, nonetheless, that Estonian equality law – in conformity with the demands of EU law – does protect against discrimination on the basis of gender confirmation, especially in light of the fact that legal gender recognition is possible in the country (see Chapter 3).

As is clear from Table 3 (coverage of national non-discrimination frameworks), so far there is only one country (**Malta**) that has included specific references to all three elements in its equality legislation.²⁵³ In the **Netherlands**, the Second Chamber of parliament approved a proposal to insert an explanatory sentence in the General Act on Equal Treatment, stating that 'sex' covers all three.²⁵⁴ This bill is awaiting approval by the Senate. The Dutch national equality body has applied this broad understanding of 'sex' from the start.

252 See also Senden, L. and Timmer, A. (2018) *Gender equality law in Europe. How are EU rules transposed into national law in 2017?* European Commission.

253 The Equality for Men and Women Act Chapter 456 of the Laws of **Malta**; various references in Article 2.

254 Tweede Kamer Handelingen 2017-2018 (*Proceedings Second Chamber Dutch Parliament*), nr. 101, item 27, proposal of the Members of Parliament Bergkamp, Van den Hul en Özütok, (34650), 3 July 2018, to amend the Algemene Wet Gelijke Behandeling (*General Equal Treatment Act*).

Both the **Maltese** and the **Dutch** national equality frameworks must be understood as encompassing non-binary gender, but no other country so far seems to have explicitly included non-binary gender in its protective scope. The same is true for sex characteristics.

Table 3. Coverage of national non-discrimination frameworks

Country	Covered by non-discr. law(s)	Protected by nat. eq. body (NEB)	Explicit coverage?	Specific conditions?	Material scope protection?	Public interest litigation possible?
Austria	Presumably yes	Yes	No	No	EU law ²⁵⁵	No
Belgium	Presumably yes	Yes	Yes GI, GE & GCT, no SC or NB	No	EU law	Yes
Bulgaria	Partly	Partly	Yes trans M/F, GCT	Yes	EU law	Yes
Croatia	Yes	Yes	GI & GE	No	Very broad: EU areas + any other	Yes
Cyprus	Partly	Yes	No	Yes	Criminal code & employment	No
Czech Republic	Yes	Yes	Yes, GI	Presumably not	EU law	Yes
Denmark	Yes GI, rest presumably	Yes	No	No	EU law + public administration	Yes
Estonia	Partly	No	No	No	No	No
Finland	Yes	Yes	GI & GE yes, SC & NB no	No	EU law	Yes
France	Yes	Yes (but not SC)	No	No	EU law	Yes
Germany	Yes	Yes	Yes GI, rest ± implicit	No	EU law	No
Greece	Yes	Yes	GCT + GE, rest implicit	No	Employment & vocational training explicitly; all fields under general anti-discriminatory constitutional norm	Yes
Hungary	Yes	Yes	Yes: GI	No	EU law, incl housing	Yes
Iceland	Yes	No (pending)	No	No	Non-discr law	Yes
Ireland	Partly	Yes	No	No	EU law	No
Italy	Presumably yes	Yes	No	No	EU law	No
Latvia	Maybe	Yes	No	No	No	No
Liechtenstein	Presumably	Yes	No	No	Probably gender equality law applies	No
Lithuania	No	Yes	No	No	No info	Probably
Luxembourg	Yes	Yes	Only GCT	No	EU law	Yes
Malta	Yes	Yes	Yes GI, GE, SC	No	EU law	NEB may refer or join

255 'EU law' indicates that national law covers the areas protected by the sex-equality directives.

Country	Covered by non-discr. law(s)	Protected by nat. eq. body (NEB)	Explicit coverage?	Specific conditions?	Material scope protection?	Public interest litigation possible?
Netherlands	Yes	Yes	No, (explanation will be added to law)	No	EU law	Yes
Norway	Yes	Yes	Yes: GI & GE	No	Very broad: all sectors of society	Yes
Poland	Yes	Yes	No	No	EU law	Yes
Portugal	Yes	Yes	Yes	No	EU law	No
Romania	Yes	Yes	No	Unclear	No	Yes
Slovakia	Yes	Yes	Yes clause explaining sex includes GI	Yes: GCT	EU law	Yes
Slovenia	Yes	Yes	Yes: GI & GE	No	Unclear	Yes, on behalf or intervene
Spain	Not specifically	Yes	No	No	Only regional, esp. education & healthcare	No
Sweden	Yes	Yes	Yes GI & GE	No	EU law and more (incl. e.g. military service)	Yes
United Kingdom	Yes	Yes	No	Yes linked to GCT, or SC	EU law	NEB assist

GI: gender identity, GE: gender expression, SC: sex characteristics / intersex, GCT: gender confirmation treatment, NB: non-binary and trans M/F: trans men/women

A significant number of states (14), however, have included specific references to gender identity and/or expression or related aspects. **Bulgaria**, for example, has added gender confirmation to the list of protected grounds.²⁵⁶ Several other countries have included references to gender identity (e.g. **Czech Republic**, **Germany** and **Slovakia**). Still others have included references to both gender identity and expression (**Belgium**, **Croatia** and **Slovenia**). Sometimes these grounds have been added as additional grounds, sometimes the law specifies an inclusive interpretation.

Sixteen countries, not counting the **Netherlands** in light of the development described above, have so far not included any reference to gender confirmation or gender identity. Many of these countries are expected to offer protection nonetheless, partly (**Bulgaria**, **Ireland**) or fully (**Austria**, **Belgium**, **Italy** and **Liechtenstein**) or an inclusive reading is regarded as at least a possibility (**Latvia**).

In countries that do not explicitly mention gender identity and expression and / or sex characteristics, the current uncertainty whether trans, intersex and / or non-binary individuals will be protected against discrimination, is due in large part to a lack of case law on the issue. More clarity can only surface once more cases are brought to courts and equality bodies. That begs the question whether it is to be expected that individuals who are already marginalised, excluded and disadvantaged, are willing – and even able – to bring their cases to contribute to the clarification of the scope of legal protection (in the **United Kingdom**, this was a point raised by the House of Commons Select Committee on Women and

²⁵⁶ The ground of sex/ gender under Article 4 para. 1 of the Law on Protection from Discrimination encompasses change of gender/ gender confirmation; see p. 17 of the Additional provisions of the Law on Protection from Discrimination.

Equalities). The absence of legal certainty may, in this way, be reinforcing itself, by discouraging the victims of discrimination from seeking attention for such discrimination in the first place.

4.1.1 *Material scope of protection*

In most countries the explicit protection offered regards the areas covered by EU law, especially employment law. However, many countries do offer more, including provisions in the criminal code, protecting trans individuals against violence and discrimination, as is the case in, for example, **Cyprus**. Likewise, in **Estonia**, both the Constitution and the Criminal Code protect everyone from discrimination. However, the scope of such general protections is usually unclear, as are the remedies available in such situations, if there are any.

In **Norway**, all forms of gender-related discrimination in any sector of society are covered by law. In **Spain** the situation is somewhat different, due to the fact that tackling these forms of discrimination is a matter for the regional rather than the national level. Thus, regional differences may occur. In **Sweden** legal protection includes the military.

It is unclear how far intersex individuals would benefit if the scope of non-discrimination protection offered by EU legislation were to be expanded. Arguably, as noted earlier, the most urgent issue facing intersex individuals is the irreversible treatment that many babies with intersex conditions are subjected to. Such situations would fall outside the current scope of EU sex equality legislation. This is different for intersex individuals identifying as non-binary. These people are likely to face discriminatory treatment that is comparable to other people transgressing the established gender boundaries, such as women applying for jobs that are considered 'male'.

4.2 National equality bodies and public interest litigation

The lack of explicit protection, as discussed in Chapter 4.1, is partly compensated for by the practice of national equality bodies. In 25 countries these bodies are known or expected to employ inclusive interpretations and to offer inclusive protection. A few national equality bodies (**Bulgaria** and **France**) offer limited protection to specific groups. In **Iceland**, a bill is pending which will expand the national equality body's competence to encompass the fields covered by Directives 2000/43/EC and 2000/78/EC. In **Lithuania** the competence of the equality body is limited to awareness raising. In **Spain**, the legal practices of the equality bodies vary significantly between the regions. However, national equality bodies need a complaint to start a case, even if the threshold to submit complaints is often lower than for courts, and thus, once again, the development of legal protection for trans and intersex people depends on the willingness of affected individuals to initiate proceedings.

Some equality bodies might try to bridge at least part of this gap by initiating a general inquiry and publishing their findings. Some of these bodies may also address the government to recommend strategies to improve the situation, based on such research. Numerous equality bodies are competent to intervene in cases before the court or to actively support victims of discrimination.

A final option to ensure more certainty about the scope of protection of trans, intersex and non-binary people would be public interest litigation, for example by NGOs. However, this is possible in very few countries and often only in limited circumstances. For example, in **Denmark**, the possibility is restricted to the Danish Institute for Human Rights addressing the Danish equality body.

4.3 Forms of unequal treatment and conditions for invoking protection

Trans individuals may require protection against at least three forms of unequal treatment as compared with others (see also Chapter 2.3.1).

Transitioning individuals comparing themselves to non-transitioning (cis) individuals

A first form of different treatment relates to difference in treatment on the basis of *transition as such*. A classic example is the CJEU case of *P v S and Cornwall County Council* (discussed in Chapter 2.3.2.1) where a trans woman was dismissed after informing her employer of her intention to undergo gender confirmation treatment. The core issue in such cases is not whether this person is male or female, but the change, the transition as such. Arguably, such situations concern one aspect of the more general problems experienced by people identifying as and, probably more importantly, presenting and being perceived as non-binary. Although the CJEU did decide in favour of *P*, the Court nevertheless was not asked to move beyond the binary, since the applicant identified clearly as female. Given the strictly binary construction of EU sex equality law, it is doubtful whether the Court would move beyond the binary if asked to. When AG Tesouro, regarding *P v S and Cornwall County*, suggested that sex might be better thought of as a continuum than a dichotomy, the CJEU did not take up that challenge.

Trans individuals comparing themselves to cis individuals of the opposite legal gender (legal men comparing to legal women and vice versa)

A second form is treatment of a trans person that is different from that of other people with the *opposite legal gender*. This may take (at least) two forms, the first of which is the ‘classic’ form of sex discrimination, while the second has only recently been accepted by the CJEU in *MB*.

Legal trans men and women demanding equal treatment as compared to individuals of the opposite legal gender: Firstly, a trans man, for example, may be treated differently from women (trans or cis) with regard to the entitlement to retire earlier. Or a trans woman may experience discrimination (e.g. sexual harassment) on the basis of her being a woman similar to cis women. A complaint about such forms of discrimination basically represents a ‘classic’ challenge to sex discrimination. The complainant compares themselves to the opposite sex and demands equal treatment for both sexes.

Trans individuals who have not (yet) obtained their preferred legal gender, demanding treatment on an equal footing with cis individuals of their preferred gender: A quite different situation arises in cases where a trans person lives in their preferred gender and has *not* changed their legal gender, but still wishes to be treated as if they had. An example is the CJEU case of *MB v Secretary of State for Work and Pension* (discussed in Chapter 2.3.2.1). *MB* presented as a woman and wished to be treated like any other woman and retire at 60 (instead of continuing to work till the age of 65 as legal males would have to). In cases such as these, the comparison is not made with the ‘opposite gender’, but with the same, preferred (but not legal, as in the classic form of sex discrimination discussed above) gender: trans women compared to cis women, rather than women (trans or cis) compared to men (trans or cis).

The effect of such a claim seems to be a confirmation of the legitimacy of the distinctive treatment on the basis of sex, rather than that it questions and challenges such distinctive treatment. To clarify: *MB* could have chosen to tackle the differences in retirement ages as a matter of discrimination on the basis of her being legally male. She could have presented the case as a classic (cis) gender discrimination case, challenging the difference. Instead, *MB* chose to accept the existing difference in treatment, and claim the more beneficial treatment, thus subscribing to the legitimacy of the difference.

Trans individuals compared with cis individuals of the same legal gender (legal (trans) women comparing to legal (cis) women; legal (trans) men comparing to legal (cis) men)

The final possible comparison discussed here, is very similar to the previous form, but for the *legal* gender status of the individual asking for equal treatment. This form regards treatment of legally male (or female) trans individuals that is different from the treatment of other individuals of the same *legal* gender. An example might be a refusal to grant preferential treatment to a trans woman whereas cisgender women are given such priority status.

It is not entirely clear whether and, if so, to what extent trans women can successfully compare themselves with other women to claim equal treatment to obtain certain benefits that are granted to women only, because to claim sex discrimination, generally a comparison to someone with the *opposite* (legal) gender is required. In the CJEU case of *MB* (discussed above), the CJEU circumvented this problem by focusing on the fact that MB had socially and medically transitioned (although not legally, which caused her exclusion from early retirement in the first place). However, it seems likely that the CJEU will accept the validity of such comparisons, relying on ‘gender reassignment’ as the element to be protected.

National legal practice

At the national level, the general picture is that people – cis and trans – are able to invoke protection against sex discrimination, taking their legal sex as the starting point. Given the scarcity of published case law it seems unlikely that such cases have already reached the courts or equality bodies. Of course, another explanation might be that applicants in such cases would not be recognised or identified as trans in the first place. States also tend to offer protection against discrimination related to transition in conformity with CJEU case law.

The issue of whether and, if so, to what extent trans and non-binary individuals fit the EU exceptions to the principle of sex equality (protection of pregnancy, positive action and genuine occupational requirements) is still largely unclear (see Chapters 5 and 9). **Belgium** and **Finland**, for example, employ binary gender quota systems, thus excluding non-binary people and raising the question of the extent to which such quota would be or should be applicable to trans women and/or men too. Belgian law prescribes a gender quota system for top and middle management positions, strictly based on the M/F divide.²⁵⁷ In Finland quota are required for both women and men in administrative and other bodies that wield public power, as well as on the boards of public companies.²⁵⁸

4.4 Concluding remarks

As mentioned above and in Chapter 2, EU sex equality law is very much constructed within the gender binary. To invoke protection against sex discrimination, applicants must make a comparison with the opposite sex. However, the CJEU tends to circumvent this problem by focusing on the transition, rather than the actual sex.

In particular, specifically regarding the comparison between trans individuals and people of a different sex, it would arguably be appropriate for courts and equality bodies to explicitly question the reasons for allowing this type of direct discrimination, given the ‘sex-difference-confirming effect’ of such claims. A claim to entitlement to a right that is only granted to one of the sexes (in a binary construction of sex) by someone of the *opposite* sex, may be understood as a critique of that directly discriminating rule. It is an argument that the right should not be restricted to just one sex, but be granted regardless of sex. On the other hand, a claim to a sex-specific right based on the argument that one does belong to the ‘privileged’ group and therefore should be granted the right, relates not to the discriminatory rule as such, but the criteria defining the privileged group (i.e. who counts as a ‘woman’).²⁵⁹

To what extent the trans and intersex struggles against discrimination and for equal rights and emancipation need to go hand in hand with (cis and/or trans) women’s emancipation, and even whether the two are related in any significant way, is subject to debate. Controversies exist, both regarding the direction such efforts should take (e.g. whether the various genders should be treated better and valued in their own right or whether gender should not matter at all and should no longer function as an organisational

257 Royal Decree of 2 October 1937, as amended in 2012.

258 Section 4 a of the Act on Equality Ombudsman (1328/2014).

259 See, for example, Rosenblum, D. (2011), ‘Unsex CEDAW, or What’s wrong with women’s rights’, *Columbia journal of gender and law*.

principle for society) and the best strategies to achieve those aims. In this debate feminist and trans and intersex groups may completely disagree or may just ignore each other's issues and problems. On the other hand, feminist, trans and intersex groups are certainly not monolithic and, therefore, it is often more likely that *some* feminist groups and *some* trans and/or intersex groups find themselves in opposite camps, while other feminist and trans and/or intersex groups are working closely together.

Reasons for adopting rules that discriminate directly on the basis of sex (earlier retirement for women, conscription only for men) may have to do with compensation for a double burden, or to ensure access to certain professions (e.g. the police force). The important question would then be to what extent such reasons apply similarly to cis and trans women.²⁶⁰ In so far as they do not, the equal treatment demanded should not be based on the trans/cis comparison, but could still be based on the fact that denial of such equal treatment would harm the (trans) person concerned disproportionately, for example by the unavoidable 'outing' of their trans status.

It is not entirely clear how far the various comparisons sketched above would fall within the 'closed system' that is part of EU equality law, especially regarding employment. EU law does not specify whether or to what extent the legal gender label is important for a comparison of the 'men' and 'women' who are entitled to equal treatment. In practice, in some situations appearance will be decisive (e.g. hiring practices, salary negotiations) whereas in others (e.g. pension entitlements) legal gender will be decisive.

Another question regards the best way to improve the protection against discrimination on the basis of gender identity and expression and sex characteristics. Both **Malta** and the **Netherlands** have opted for an inclusive definition of 'sex'. Such an approach certainly has advantages, because cases where the exact ground is not clear or grounds may be overlapping can just be dealt with under the same protective heading. This is all the more important in countries that have different institutions dealing with sex equality and other grounds, as is the case in **Belgium**, even if the 'new' grounds (gender identity, expression, sex characteristics) would be brought within the mandate of the institution monitoring sex equality. After all, gender identity is not only closely related to sex (m/f) discrimination but to discrimination on the basis of sexual orientation as well.

Exceptionally, in **Ireland**, situations involving trans individuals, e.g. at work, are often dealt with on a par with discrimination on the ground of disability. Such an approach might become questionable once trans status is no longer associated with illness, a development that has arguably started with the decision of the WHO to move gender incongruence from the category of mental disorders in the ICD to sexual health conditions (June 2018) (see also Chapter 5.1).²⁶¹ It would be interesting to consider whether, faced with the same facts as the *Hannon* case²⁶² today, an **Irish** court (or tribunal) would still involve disability discrimination.

On the other hand, the argument could be made that the legal protection of discrimination on the ground of disability offers useful possibilities to address situations that are not so easily comparable by application of its concept of reasonable accommodation. Reasonable accommodation, for example, might form the basis for an argument to allow a trans person to dress differently while in transition from the manner prescribed by the – usually gender-specific – company dress codes or to allow an employee who is uncomfortable with going through airport safety checks, because of a mismatch between lived gender and passport marker, to fly for work as little as possible.²⁶³

260 Generally speaking, it may, of course, be assumed that such reasons will also not be applicable to some cis women. However, that is not the point here.

261 www.who.int/health-topics/international-classification-of-diseases (accessed 2 October 2018).

262 Equality Tribunal of **Ireland**, DEC – S 2011-066; EE/2008/043 (29 March 2011).

263 See, for example, Waddington, L. (2011), 'Reasonable accommodation: Time to extend the duty to accommodate beyond disability?', *NTM/NJCM-Bulletin*, vol. 36, p. 186, for a discussion of extending the concept to religion and old age.

Employing one broad ground might also be more accommodating of aspects of gender that are yet to emerge. For example, the tendency in Member States to add gender identity to the list of prohibited grounds, might make it more difficult to broaden the definition so as to include sex characteristics, because the extension to a specific group may simultaneously be read as a restriction to that group.

On the other hand, especially the closed system in combination with the tendency to apply a broad possibility to compare trans and cis gender people (as e.g. in *MB*) might give rise to cases where cisgender people demand equal treatment with trans people in ways that states might not be willing to accommodate, as might be the case with regard to dress codes, for example.

Currently, those EU and EFTA states which already offer some protection to trans and intersex people in their non-discrimination law employ different approaches to provide that protection. Sometimes sex or gender is interpreted to cover trans, non-binary and/or intersex individuals. Another possibility is to make that broad meaning of sex / gender explicit by explaining the understanding of sex / gender *in* the law itself. Finally, some countries have opted to add one or more of these grounds to the list of prohibited grounds. It is clear (see Chapter 2.3.1) that there are benefits and difficulties attached to each of these options. Moving forward, this is an issue that requires further consideration – at the academic level, the level of EU policy-making and at the level of national protections for trans, non-binary and intersex people.

5. Access to healthcare

Gender-related equal treatment in the context of healthcare is protected by Directive 2004/113/EC on access to and supply of goods and services.²⁶⁴ This sex equality directive is founded on and firmly grounded in a binary perception of sex. Many applicable provisions have explicit references to men and women, raising the question of how far the directive is capable of protecting people who are not recognised as such or who identify as non-binary.²⁶⁵ The preamble (Recital 12) specifies that ‘healthcare services that result from physical differences between women and men, do not relate to comparable situations and therefore, do not constitute discrimination’. The issue of comparators is discussed in more detail below (Chapter 5.3).

5.1 Access to and funding of healthcare services

Access to and funding of healthcare is a complex area. National healthcare systems generally have a public health part that is complemented by private insurances. The private healthcare market is difficult to fathom. The government and the market periodically negotiate the basic ‘packages’ that will be offered and consequently regular changes are made in the minimum care offered. The situation may change quite quickly over time. Individual insurance companies make different choices and those insured select different insurance packages. Thus, considerable differences may exist regarding access to the various treatments that together make up gender confirmation treatment (hormone therapy, surgery, silicone injections etc.).²⁶⁶

Both access to gender confirmation treatment as such and the funding thereof may differ, depending on the form of the particular treatment (pills, surgery) or on what is regarded as ‘core’ to gender confirmation treatment and what is not. Breast augmentation, for example, is considered in many states to fall outside the core treatment and is therefore often not eligible for funding. The same is true for many surgical interventions, especially those that do not concern genitals but, for example, facial traits (e.g. a pointed rather than an angular chin for (trans) women) or change of voice, which may be regarded as purely ‘cosmetic’. Hormone therapy, on the other hand, is usually accessible relatively easily.

Moreover, medical perspectives on ‘gender incongruence’ are currently evolving quickly, as shown by the decision of the WHO to move gender incongruence from the category of mental disorders in the ICD to sexual health conditions (June 2018).²⁶⁷

264 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. On access to health care for – among others – trans individuals, see also 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, 31 March 2010 and the Explanatory Memorandum CM(2010)4-add3final, 31 March 2010.

265 The directive refers to ‘men and women’ 17 times (including in the title) and three times to women only, in relation to pregnancy.

266 On various elements of gender confirmation treatment see e.g. Hembree, W. C., Cohen-Kettenis, P. T., Gooren, L., Hannema, S. E., Meyer, W. J., Murad, M. H., Rosenthal, S. M., Safer, J. D., Tangpricha, V. and T’Sjoen, G. G. (2017), ‘Endocrine treatment of gender-dysphoric/gender-incongruent persons: An Endocrine Society* clinical practice guideline’, *The journal of clinical endocrinology & metabolism*, 3869; Colebunders, B., Brondeel, S., D’Arpa, S., Hoebeke, P. and Monstrey, S. (2017), ‘An update on the surgical treatment for trans patients’, *Sex.Med.Rev.*, 103.

267 www.who.int/health-topics/international-classification-of-diseases. This version of ICD-11 will be presented for adoption by states at the World Health Assembly in 2019.

Table 4. Goods and services: healthcare

Country	Access to GCT as such	Access to GCT funding	Do conditions apply?	Equal access compared to cis?	Non-discrimination provisions?	Case law?
Austria	Yes	Yes	Yes	Yes	Not explicit	No
Belgium	Yes	Partly	Specific hospitals	At least to some extent	Yes	Yes
Bulgaria	Yes	Yes	Yes	No	Yes	Yes
Croatia	Partly	No	No	Yes	Yes	Yes
Cyprus	Only hormones, no surgery	No	Yes	No	No	Yes
Czech Republic	Yes	Yes	Yes	Yes	Not explicit	No
Denmark	Yes	Yes	No	Yes	Yes	No
Estonia	Yes	No	No rules	Unclear	Pending	Yes
Finland	Yes	Yes	Yes	Yes	Yes	Yes
France	Yes	Yes	Yes	Yes	Yes	Yes
Germany	Yes	Yes	Yes	Yes	Not explicit	Yes
Greece	Presumably	No info	Unclear	Unclear	Not explicit	Complaints to ombuds
Hungary	Yes	10 %	No	Yes	Not explicit	Yes
Iceland	Yes	Partly	Yes	Yes	Yes	No
Ireland	Only hormones, no surgery	Yes	Yes	Probably yes	Not explicit	No
Italy	Yes	Unclear	Yes	Yes	Not explicit	No
Latvia	Not specifically	Transition explicitly <u>not</u> funded	Irrelevant	Irrelevant	No	No
Liechtenstein	No (no rules)	No	No rules	Irrelevant	No rules	No
Lithuania	No rules	No	No rules	No rules	No	No
Luxembourg	Yes	Yes	Yes	Yes	Not explicit	No
Malta	Yes	Pending	Unclear / developing	Yes, preferred sex	Yes	Yes
Netherlands	Yes	Yes (partly depending on insurance contract)	No	Yes	Yes	Yes
Norway	Yes	Yes	Yes	Yes	Yes	Yes
Poland	Yes	Partly	Yes	Probably	Not explicitly	No
Portugal	No info	No info	No info	No info	Yes	No
Romania	No	No	Doctors decide; not regulated	Not regulated	Not explicit	No
Slovakia	Yes	No	No	Yes	Yes	No
Slovenia	Yes	Funded if trans diagnosis	No (but diagnosis)	Yes	Yes	No
Spain	Yes	Yes	No	Probably	Yes for trans; non-b & intersex not specifically	Yes

Country	Access to GCT as such	Access to GCT funding	Do conditions apply?	Equal access compared to cis?	Non-discrimination provisions?	Case law?
Sweden	Yes	Yes	Yes	Yes	Yes	No
United Kingdom	Yes	Yes	Yes	Yes	Yes for transsexuals, no info on non-b or intersex	Yes

GCT = gender confirmation treatment

In most countries gender confirmation treatment is available, but not in all. The countries that do not offer such treatment, generally also seem not to cover the costs for such treatment abroad. **Ireland** and **Cyprus** only provide for hormone treatment. **Ireland**, however, does provide funding for treatment abroad.

Some countries have no or insufficient medical specialists (**Croatia**, **Cyprus** and the **Netherlands**), causing long waiting lists. This may be a reason for some trans individuals to seek treatment abroad, in other EU countries as well as outside the EU. This, in turn, may cause problems regarding, for example, reimbursement of healthcare costs. Obtaining gender confirmation treatment abroad can also result in national authorities refusing to recognise legally required medical interventions (e.g. for accessing legal gender recognition). For example, some transgender individuals from the **Netherlands** seek treatment in **Belgium**, to evade the long waiting lists at home. However, to change their legal gender, people need an expert declaration from a *Dutch* authorised medical expert. This might be in breach of the freedom to provide and receive services across the European Union, and should be further researched.²⁶⁸

The high costs of gender confirmation treatment may be another reason. Limited funding by national healthcare systems may also result in waiting lists (e.g. **Ireland**). A **Dutch** trans woman who had opted for treatment abroad (in Thailand) was, upon her return, confronted with the refusal of her insurance company to pay the full costs of her treatment. The insurer argued that it could only be held to compensate part of the costs in accordance with market prices. However, the court rejected the argument because the limit set by the insurer was significantly lower than the costs for gender confirmation treatment in the Netherlands. The insurer had to compensate the full costs, as the treatment had been a lot cheaper than the claimant could have obtained in the Netherlands.²⁶⁹

A **Spanish** citizen was repeatedly denied access to gender confirmation surgery in all the hospitals in Navarra, despite the fact that she had an entitlement under Royal Decree 1207/2006. She decided to seek treatment in Thailand and, upon her return, asked for reimbursements of the costs incurred. The Superior Court of Navarra decided in her favour.²⁷⁰

Some countries only finance part of the treatment. **Poland**, for example, only pays for hormone treatment, not for surgery. In **Hungary** only 10 % of the costs of treatment is reimbursed.

Access to specialised trans healthcare is also affected by the clustering of expertise and/or the authorisation to carry out gender confirmation treatment to a limited number of hospitals (e.g. **Belgium**, **Finland** and

268 Van den Brink, M. (2017), 'Recht doen aan genderidentiteit. Evaluatie drie jaar transwet in Nederland 2014-2017' ['Doing justice to gender identity: evaluation of three years of the trans law in the Netherlands] (UCERF, 5 December 2017), p. 58 and 66; p. 96 of the English summary, www.wodc.nl/binaries/2897_Volledige_Tekst_tcm28-294981.pdf (accessed 3 October 2018).

269 Rechtbank Midden Nederland, *Claimant v ASR Basis Ziektekostenverzekeringen N.V.*, 28 February 2018, case no. 6303883 UC EXPL 17-12055, ECLI:NL:RBMNE:2018:1049.

270 Superior Court of Navarra, 26 March 2015.

the **Netherlands**). This may be experienced as a restriction of people's freedom to choose a healthcare provider, especially if the number of specialist hospitals is very low.

As already mentioned above, many countries only fund gender confirmation treatment that they regard as *core*. Breast augmentation is a major example of a treatment that is not considered to be fundamental and equated to cosmetic surgery. Therefore, such treatment will not be funded (e.g. **Iceland**).

A remarkable situation is presented by **Latvia**, where gender confirming treatment is specifically *excluded* from public healthcare funding. No specific regulation exists in this area at all, despite the fact that a change of legal sex is possible and is subject to the requirement of physical adjustment.

There are also some positive developments to report. **Malta**, at the forefront of the legal developments regarding the status of trans and intersex individuals, is now working on significant improvements in its healthcare services beyond cisgender.²⁷¹ Improvements include an increase of capacity, building a gender sensitive system and increasing funding for necessary healthcare. However, treatment is not yet funded by the public healthcare system. A trans woman challenged the rejection of her request for funding with the national equality commission, which decided in her favour. The commission asked the health department to implement a concrete plan to enable free access to gender confirmation services.²⁷²

In **Ireland**, the Trans Equality Network Ireland and the **Irish** health service together developed a 'treatment pathway' for trans people, including children and adolescents.²⁷³

Croatia also shows some promising developments, despite the current lack of access to specific treatment and the absence of any funding, including for treatment abroad. The Ministry of Health has adopted professional guidelines for medical staff and psychologists treating trans, intersex and non-binary people in 2016.²⁷⁴ The guidelines include clinical instructions that specifically address the reproductive health of trans, intersex and non-binary people, requiring medical professionals to offer their patients the possibility to store their sperm, egg cells or embryos before resorting to hormonal therapies or surgical treatment, in accordance with the conditions prescribed under the **Croatian** Act on medically assisted fertilisation.²⁷⁵ The instructions also recommend that trans men and women should receive regular gynaecological care, depending on the scope and type of treatment they were subjected to, regardless of the legal gender in their official documents. By analogy, access to any other medical treatment, such as breast cancer screening, should be guaranteed in accordance with the medical need, regardless of the legal gender of the person.

5.2 Conditions for access

In a substantial group of countries access is subject to medical approval, that is to a medical diagnosis of gender dysphoria. Such approval will entitle the person concerned to a generally limited number of treatments, such as hormone treatment (e.g. **Cyprus**). Accessibility is strongly affected by insurance coverage. In several countries any treatment is possible, but much of it will not be reimbursed, making such treatments *de facto* inaccessible to the majority of trans individuals.

271 Office of the Deputy Prime Minister – Ministry for Health, 'Consultation document' (April 2018) <https://deputyprime.minister.gov.mt/en/Documents/National-Health-Strategies/Trans%20Healthcare.pdf> (accessed 2 October 2018).

272 Carabott, S, (2017), 'Plan for free gender confirmation for trans people is "needed": Victory for all needing such treatment', *Times of Malta* (15 August 2017). www.timesofmalta.com/articles/view/20170815/local/plan-for-free-gender-reassignment-for-trans-people-is-needed.655622 accessed 2 October 2018.

273 www.teni.ie/hse_begins_work_on_treatment_pathway. Accessed 14 October 2018.

274 *Stručne smjernice za izradu mišljenja zdravstvenih radnika i psihologa o utvrđivanju uvjeta i pretpostavki zapromjenu spola i životu u drugom rodnom identitetu*, Official Gazette Narodne novine No. 7/16. Available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2016_01_7_93.html (accessed 3 October 2018).

275 *Zakon o medicinski pomognutoj oplodnji*, Official Gazette Narodne novine No. 86/12. Available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2012_07_86_1962.html (accessed 3 October 2018).

Some countries also still require a ‘real life test’ period as a condition to access gender confirmation treatment (e.g. **UK**, which requires such a test for legal gender recognition). The test requires people who would like to undergo gender confirmation treatment and / or change their legal gender to live in their preferred gender for a period of one or more years. The aim of the controversial test seems to be to ensure that the person concerned really wants and is ready to transition.²⁷⁶ A few countries have not set any specific conditions to be fulfilled, although a medical opinion of the necessity of the treatment is required, especially if the treatment is fully or partly funded.

In **Sweden**, a distinction is made between upper and lower body treatment. For the upper body a diagnosis of gender dysphoria is required. For the lower body the diagnosis must be ‘transsexualism’. The **Norwegian** Ombud found that the requirement of a diagnosis of transsexualism in order to access breast surgery is not contrary to the Anti-Discrimination Act.²⁷⁷ A somewhat similar case was decided in the same vein in the **UK**.²⁷⁸ Likewise, in **Croatia** genital surgery is regarded as ‘aesthetic’ treatment, which does not qualify for funding.

Some countries specifically regulate the registration of patients in accordance with their preferences. In most countries, however, general practice seems to be that people are registered and addressed according to their legal gender. Specific problems may occur in cases where the doctor is unaware of their patient’s gender status, if the medical problem does have a gendered aspect without the patient being aware of that fact (such as bladder infections).

A final area of healthcare services to be discussed is screening policies. In several countries, women of a certain age receive periodic invitations for preventive screening on, for example, breast cancer or cervical cancer. Men may receive similar invitations for prostate cancer. In various countries, including **Denmark**, **Hungary** and the **Netherlands**, such invitations are based on legal gender. This implies that trans men who changed their legal gender will not receive such invitations, while trans women may. In **Denmark**, trans men will have to register to receive such invitations, implying that their treatment is not entirely equal. However, they will receive free screening, just like cisgender women. This is not a problem in countries like **Norway** where such screening is available, but only for those who are willing to pay for it and automatic invitations are thus not distributed.

In **Belgium** an insurance company was only prepared to accept a trans person as a client under certain conditions, including the payment of a significantly higher premium. The company assumed that the person concerned presented a higher risk because of their trans history. This argument was rejected by the **Belgian** courts as unfounded.

5.3 Comparators

People claiming funding for healthcare services may base their claim on an equality argument which in turn requires a comparator. Likewise, governments need to ensure a fair balance in the financial support granted to various aspects of healthcare. Because bodies do differ, achieving equal, or equitable, treatment is challenging.

Gender confirmation treatment is generally trans specific. In such cases comparisons are not regularly made. Specific forms of treatment for specific groups are acceptable from an equal rights perspective, as explained in Recital 12 of the Goods and Services Directive, cited in the introduction to this chapter. However, in other situations comparisons are drawn. As explained above, breast augmentation, for example, is often regarded as ‘not core’ or ‘merely cosmetic’ in nature and therefore will not be reimbursed. However, in

²⁷⁶ See Chiam, Z., Duffy, S. and González Gil, M. (2016), *Trans legal mapping report. Recognition before the law*, 1st ed. https://ilga.org/downloads/TLMR_ENG.pdf (accessed 3 October 2018).

²⁷⁷ Case 14/1677 of 25 February 2016.

²⁷⁸ *AC v West Berkshire Primary Care Trust* [2010] Med LR 28 and [2011] EWCA Civ 247.

many countries cis women do receive breast reconstruction surgery after mastectomy because of cancer. This raises questions such as, are trans women comparable to women who had cancer or is their situation comparable to that of other cisgender women who may have small breasts? Or should all women be entitled to breast augmentation?

In the **UK** a trans woman, who was suffering from a psychological disorder because of inadequate breast tissue and was seeking funding for breast surgery, argued that the court should not compare her with a cisgender woman. However, the court held that in this case the comparison between trans and cis women was fair and rational.²⁷⁹

A **Dutch** woman with an intersex condition, interestingly, compared herself with trans people and argued that her health insurance company discriminated against her by refusing to pay for electronic removal of facial hair, whereas they did pay for similar treatment in the case of trans individuals. However, the insurer managed to convince the equality body that the criterion regarding all facial hair was whether such hair growth was so excessive that it qualified as a deformity.

5.4 Lack of case law

Overall, there is little case law on health issues, especially given the negative attitudes that are still frequently experienced by trans people. One of the few examples of cases of discriminatory treatment was dealt with by the **Hungarian** Equal Treatment Authority. A urologist refused to issue a medical certificate that a trans woman needed in order to change her name and gender in the registry. After the examination, the professional made various humiliating remarks about the woman's trans status, which were heard by another person. Following the woman's complaint, the medical office where the urologist worked agreed to post information on its website containing guidelines for healthcare professionals on the proper, respectful and dignified treatment of trans people. The information was drafted in collaboration with the applicant. The office also paid for publication of the same information in a prestigious urological journal.

A possible explanation for the lack of case law might be found in the fact that many countries lack specific legislation protecting gender non-conforming people against such discriminatory treatment in the area of healthcare. In countries that do have specific regulations, this is often confined to the transition period. Only **Maltese** non-discrimination legislation explicitly includes intersex and non-binary individuals in its scope. The **Netherlands** is working on an explanatory line in the equality act that will clarify that 'sex' includes gender identity and expression and sex characteristics (see above Chapter 4.1).

5.5 Concluding remarks

The landscape regarding healthcare for trans and intersex individuals is very varied in nearly all relevant respects. Some countries do not offer any surgical treatment, but in most the full range of treatments is available. However, accessibility is often hampered by lack of funding by public healthcare. If treatment is paid for by the State, the available funds may be limited, causing long waiting lists. Waiting lists may also be caused by the lack of sufficient professional staff, which in turn may or may not be caused by limited funding.

Another problem, experienced by many trans individuals, is that funding – if offered – is mostly restricted to (what are considered to be) 'core treatments'. Various elements of gender confirmation treatment tend to be regarded as 'cosmetic' in nature. On the other hand, in countries where physical adjustment and sterilisation are still required, if offered, funding may only be provided to people who commit to a complete

279 On this case see e.g. Flynn, M. (2011), 'Transsexual denied NHS breast surgery loses appeal' (17 March 2011) **UK** Human Rights Blog <https://ukhumanrightsblog.com/2011/03/17/transsexual-denied-nhs-breast-surgery-loses-appeal/> (accessed 3 October 2018).

medical transition, resulting in dilemmas for people who wish to access individualised treatments (e.g. low hormone dosage, etc.). In practice, individuals who can afford treatment often seek it outside their home EU or EFTA jurisdiction.

The limited case law that has been published mostly relates to efforts to obtain funding. The lack of case law on discriminatory treatment stands in sharp contrast with the findings of a FRA 2014 study on discrimination experienced by trans people, including in healthcare. Over one in five trans people reported that they felt personally discriminated against by healthcare personnel because of being trans.²⁸⁰ The introduction of guidelines, as happened in **Croatia**, is worth consideration. Such instructions should include a reference to the desirability of using patients' preferred gender.

280 European Union Agency for Fundamental Rights (2014), *Being trans in the EU: Comparative analysis of EU LGBT survey data*, Publication Office of the European Union, p. 41-42.

6. Single-sex facilities

As mentioned above in Chapter 5, equal treatment regarding access to and the supply of goods and services is protected by Directive 2004/113/EC.²⁸¹ The directive allows differences in treatment based directly on sex, if the difference is justified by a legitimate aim, including for reasons of privacy and decency (Article 4(5) and preamble Recital 16). Other examples of (possible) justifications mentioned are the protection of victims of sex-related violence, freedom of association and sports. Recital 17 states that ‘the principle of equal treatment in the access to goods and services does not require that facilities should always be provided to men and women on a shared basis, as long as they are not provided more favourably to members of one sex.’ This binary understanding of sex / gender may not be accommodating, especially to people identifying as non-binary. However, single-sex facilities are *allowed*, as an exception to the principle of equal treatment. The directive does not *demand* the establishment of separate facilities.

There is no European country that does not allow at least some single-sex facilities. A number of countries explicitly require separate facilities in specific contexts. The most common of such facilities are toilets. Work is one area where in most countries separate toilets are legally required, at least for firms of a certain size (e.g. ten employees). However, legally required separate toilets are also quite common in hotels and restaurants, swimming pools and saunas. At the other end of the spectrum, there are countries which do not require separate facilities at all, but allow them through an exception in national equality laws.

Table 5. Goods and services: single-sex spaces

Country	General provisions requiring or allowing single-gender facilities?	Provisions allowing or requiring all-gender facilities?	Special rules re: access to single-gender facilities for trans / intersex / NB individuals?	If special rules: distinction between people who have been recognised in preferred gender and those who have not?	Case law?
Austria	Yes (toilets in public buildings)	For disabled	No	Unclear	No
Belgium	Yes (labour law)	No	No	No	Yes
Bulgaria	Yes, e.g. hotels, swimming pools	No	No	No	No
Croatia	Yes: exception to non-discrimination e.g. sports facilities	No	No	No	No
Cyprus	Yes: required	No	No	No	No
Czech Republic	Yes, esp. toilets & at work	No	No	No	No
Denmark	No	No	No	No	Yes
Estonia	No	No	No	No	No
Finland	Yes, exception to equality	No	No	No	No
France	Yes, at work, recommended for schools & sports	No	No	No	No
Germany	No, but allowed for objective reasons, e.g. protection against sexual harassment	No	No	Probably not	Yes

281 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

Country	General provisions requiring or allowing single-gender facilities?	Provisions allowing or requiring all-gender facilities?	Special rules re: access to single-gender facilities for trans / intersex / NB individuals?	If special rules: distinction between people who have been recognised in preferred gender and those who have not?	Case law?
Greece	Yes (e.g. restaurants)	No	No	No	No
Hungary	No	No	No	No	No
Iceland	Yes, exception to equality	No	No	No	No
Ireland	Yes, exception to equality	No	No	No	No
Italy	Yes, many public places	All-gender toilets at work only allowed if separate impossible	No	No	No
Latvia	No	No	No	No	No
Liechtenstein	Yes, e.g. at work	Yes, allowed, if separate units	No	No	No
Lithuania	No	No	No	No	No
Luxembourg	Yes	Unknown	Unknown	No	No
Malta	Yes, restaurants, hotels etc.	No	No	No	No
Netherlands	Yes at work + as an exception to equality	No	No	No	Yes
Norway	Single-sex only as exception to equality	No	No	No	No
Poland	Yes, at work, swimming pool etc	No	No	No	No
Portugal	Yes	No, exceptions to m/f rule unknown	No	No	No
Romania	Yes, e.g. swimming pools	No	No	No	No
Slovakia	Yes, e.g. bigger hotels	Smaller establishments allowed to offer All-Gender	No	No	No
Slovenia	Yes, as exception to equality	No	No	No	No
Spain	No	No	No	No	No
Sweden	No	No	No	No	No
United Kingdom	Yes, as exception to equality	No	No	No	No

Only **Austria**, **Italy** and **Liechtenstein** have adopted specific rules on shared facilities, although these were not aimed at people who find it hard to choose one particular gender. **Austria** requires gender-neutral toilets for people with disabilities. In **Italy** and **Liechtenstein**, the provisions provide an exception to the rule that single-sex facilities must be available, for example at work. Both countries allow all-gender facilities if they are constructed as separate units. As already mentioned above, a number of countries do not require small businesses to provide more than one toilet. Interestingly, the **Dutch** law regarding restaurants demands two toilets, without reference to gender. In **Norway**, all-gender facilities are the norm, rather than the exception.

The applicable laws on the provision and use of public toilets is often unknown and not easy to identify. The tradition of sex-segregated facilities is apparently so deeply internalised that people respect the moral binary code. The law is not needed to ensure that people follow the rule. The sanctions of breaking single-sex codes are mostly unclear. It is assumed that indecency provisions from criminal law might be applicable.

The self-evident nature of sex-segregated bathrooms and other similar facilities, such as dressing rooms in sports facilities and swimming pools, possibly also explains why so few countries have taken measures to accommodate people in transition or identifying as non-binary. In the **Czech Republic**, access to public toilets for trans individuals is not solved by legislation, resulting in a situation that lacks clarity.

A country with very generous exceptions to the principle of equal treatment, and thus ample opportunities to offer single-sex facilities is **Ireland**. The equality legislation allows for exceptions for nursing homes, refuges (e.g. women's refuges), hostels, houses for religious purposes (for nuns and priests for example), hostels for homeless people, retirement homes or homes for people with disabilities. Denying accommodation to individuals who are perceived to fall outside the target group is not considered to be discrimination. This may arguably affect trans, intersex or non-binary individuals, just as it may affect people on the basis of ethnicity or age. According to the **Irish** expert, there are so many exclusions, one would suggest that a defence could be raised in respect of trans people.²⁸²

Another, more constricted example of an exception is provided by the **UK**, where the explanatory note to the equality act contains specific exceptions to the principle of equal treatment. One of these reads: 'A group counselling session is provided for female victims of sexual assault. The organisers do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. This would be lawful.'²⁸³

6.1 Case law

Case law has been published on the issue of single-sex facilities, but again, as in other areas, the number seems modest, especially given the widespread practice of sex segregation that sometimes actually makes it difficult for gender incongruent individuals not to break the rules.

Both in **Denmark** and in the **Netherlands**, two trans women complained that they were denied access to women's dressing rooms. Neither woman had had gender affirming surgery and other women complained about the unsolicited confrontation with their genitals.

Interestingly, the two national equality bodies decided the cases differently. The **Dutch** body regarded the negative attitude of the other women as discriminatory and concluded that the gym was guilty of direct discrimination on the basis of sex and should have tried to explain, mediate and change the attitude of

282 Quoted from the report of the **Irish** expert, Frances Meenan.

283 Such exceptions are reminiscent of the Canadian case *Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601, 7 Dec. 2005, in which the Court of Appeal for British Columbia upheld the decision that a rape crisis centre could legitimately refuse to employ a trans woman, because she was not 'woman enough' (para. 118).

the other women.²⁸⁴ The **Danish** Equality Board, on the other hand, found that the referral of a trans woman to an individual dressing room was not discriminatory, but rather ‘a practical way of balancing the interests of everyone involved, including the female guests who felt offended by the women’s physical appearances’.²⁸⁵

The question of whether to accept and accommodate negative, exclusionary attitudes or to force people into more tolerant attitudes – which may of course be harmful for businesses who fear losing their clients – is certainly not new, and has already given rise to case law from the CJEU in the area of employment discrimination. More than ten years ago the CJEU found in *Feryn* that the prejudices of clients cannot justify discrimination.²⁸⁶ In 2017 the CJEU held in *Bouagnaoui*,²⁸⁷ one of the two so-called ‘headscarf cases’, that the wishes of clients regarding the religious dress of employees cannot be considered to be a genuine and determining occupational requirement in the sense of Article 4(1) of Directive 2000/78/EC.²⁸⁸ However, in the second of these two cases, *Achbita*, the Court observed that ‘the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate’.²⁸⁹ Even though the Court continued that a company policy prescribing ‘neutral’ dress might be indirectly discriminatory, the CJEU arguably seems to allow employers at least some room to meet discriminatory demands from their clients. Similarly, the **Irish** exceptions to accommodate discriminatory attitudes relying on age or ethnicity, discussed above, appears to represent the same dilemma.

The **German** Federal Labour Court found that some groups of Muslim women in need of women-only times in swimming pools might require the services of female equality officers. However, this form of discriminatory accommodation was rejected by other courts. A **Belgian** Civil Court found that a tour operator, who only wished to accept a trans man on a tour to Jordan if he agreed to pay the extra fee for a single room, had discriminated on the basis of sex conversion (see also Chapter 10).²⁹⁰

6.2 Concluding remarks

In conclusion, it is clear that single-sex facilities are absolutely common in all countries, albeit in some jurisdictions more so than others. Single-sex toilets, for example, are very much regarded as a matter of course, causing daily dilemmas and struggles for many trans and non-binary individuals. Suggestions to make toilets accessible to all, or to add all-gender facilities, may lead to heated debate. When the district of Friedrichshain-Kreuzberg in Berlin, **Germany**, decided to provide for (additional) all-gender toilets in public buildings, a politician observed that all-gender toilets were not effective means against international terrorism.²⁹¹

A legal bottleneck is generated by the question of whether, and if so to what extent, the well-being of others should be taken into account in this area. This is not an issue that is limited to single-sex facilities or trans rights, but affects many different areas, as is clear from the CJEU case law discussed above. Accepting feelings of discomfort among the dominant majority as justifications to restrict access to important areas of daily life, such as work, public toilets, sports, etc. for groups of people who are already

284 College voor de Rechten van de Mens, oordeelnr. 2014-64, 22 May 2014, <https://mensenrechten.nl/nl/oordeel/2014-64> (accessed 29 September 2018).

285 **Danish** equality board, case 9383/2016, www.retsinformation.dk/Forms/R0710.aspx?id=179999 (accessed 29 September 2018).

286 Case C-54/07 (European Court of Justice, 10 July 2008).

287 Case C-188/15 (European Court of Justice, 14 March 2017), para. 41.

288 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, L 303/16, OJ 2.12.2000.

289 Case C-157/15 (European Court of Justice, 14 March 2017), para. 37.

290 Civil Court in Antwerp (31 May 2017), *Nieuw Juridisch Weekblad*, 2018, p. 450, with P. Borghs’s case note.

291 Thomsen, J. (12 January 2017), Regierungserklärung Michael Müller erhält heftigen Gegenwind aus den eigenen Reihen, *Berliner Zeitung*.

more vulnerable and marginalised. It begs the question of who the law aims to protect (and why?) and requires policy-makers, in consultation with civil society, to look for creative, appropriate measures.

7. Education

Education may affect trans, non-binary and intersex individuals in various ways. This is especially true for young people since they represent the overwhelming majority of pupils and students.

Harassment and abuse are problems for many young people who are regarded as deviating from the established gender norms. Linked to this issue are the cisgender and heteronormative stereotypes used in books and by teachers and students alike. The availability of non-discrimination policies plays an important role in this regard. Ideally, such policies should include instructions to use students' preferred name and pronoun, but as will be discussed below, this is still very far from being established general practice.

A different kind of problem is presented by diplomas. Diplomas usually mention first names and sometimes the gender of the student too. Therefore, students who transition after obtaining a diploma generally hope to obtain a new diploma to avoid an involuntary coming out, every time they are asked for their diploma, for example by a prospective new employer. However, many countries are reluctant or even unwilling to provide new diplomas, in an attempt to preclude the possibility of fraud as much as possible. This may also present a problem for older students who engage, for example, in vocational training.

For an increasing number of children and young students, the age requirement for a change of legal gender of 16 or 18 years, applicable in many countries, may be experienced as a race against the clock (on youth see also the discussion in Chapter 3.3.2.3). In the **Netherlands**, for example, trans young people are known to worry whether they will be able to change their legal gender *before* they graduate, so as to obtain a diploma that reflects their preferred gender.²⁹² This is partly due to the fact that medical treatment and coaching are often regarded as inextricably intertwined with the change of legal gender, whereas, according to the law, the two are entirely separate processes. Thus, students think they cannot change their legal gender (possible as of 16 years of age) before the trans clinic gives them the green light. However, according to the law it would suffice to obtain an expert document stating that the expert believes that the person is convinced they belong to another sex. This is very different from obtaining a diagnosis of gender dysphoria.

Most of the problems described above fall outside the scope of EU law. Vocational training, however, is covered by Article 14(1)(b) of the so-called Recast Directive.²⁹³

7.1 National state of play

Generally speaking, the national organisation of education may be very complex. In **Belgium**, for example, the three 'Communities' (Dutch, French and German-speaking areas) are responsible for their respective school systems, which include both state-run and private schools – the latter generally faith-based. The national authorities may issue recommendations, but usually local problems and priorities dictate the agenda. Thus, for example, in the Flemish Community, diplomas may be re-issued after a change of legal gender. A similar regulation is pending in the French-speaking Community.

292 Van den Brink, M. (2017) 'Recht doen aan genderidentiteit. Evaluatie drie jaar transwet in Nederland 2014-2017' ['Doing justice to gender identity: evaluation of three years of the trans law in the Netherlands] (UCERF, 5 December 2017), pp. 28-29, www.wodc.nl/binaries/2897_Volledige_Tekst_tcm28-294981.pdf (accessed 3 October 2018).

293 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204/23, 26 July 2006.

Table 6. Education

Country	Obligation for schools to have a non-discrimination policy?	If so: (some) explicit references to GI, GE, SC?	Are schools required to respect preferred gender pronoun / name etc?	Can diplomas be obtained with preferred gender? (legal or not)	Case law?	Particularities & best practices
Austria	Yes	Implicitly covered	No	Not obligatory	No	
Belgium	Yes	Implicitly	No	In part of the country	No	
Bulgaria	Yes	No	No	No	No	
Croatia	Yes	No	No	No	No	
Cyprus	Yes	Yes	No	No	No	
Czech Rep.	Yes	No	No	No	No	
Denmark	Yes (1 st & 2 nd level)	No	No	Yes	No	
Estonia	Yes	No	No	Yes	No	
Finland	Yes	Yes, GI	Probably	Yes	No	Finnish language is gender neutral
France	Yes	No	No	No	No	
Germany	Yes	No	No	Yes	No	No actionable rights
Greece	Only vocational training	No	Yes (case law)	Yes	Yes	
Hungary	Yes	No	No	No	No	
Iceland	Yes	No	No	Yes	No	
Ireland	Yes	No	No	Yes	Yes	Single-sex schools allowed
Italy	Yes	No	No	No	No	
Latvia	Yes	No	No	No	No	
Liechtenstein	No	No	No	No	No	
Lithuania	Yes	No	No	No	No	
Luxembourg	No	No	No	No	No	
Malta	Policy based	Yes (policy)	Yes	Yes	No	
Netherlands	No	No	No	Yes	Yes	
Norway	Yes	No	Yes	Yes	Yes	
Poland	No	No	No	No	No	7 Aug. is Int. Day of Education & Trans Persons
Portugal	Policy-based	No	No	No	No	
Romania	No	No	No	No	No	
Slovakia	Yes	No	No	No	No	
Slovenia	No	No	No	No	No	
Spain	No (only regional)	No	Some regions	No	No	

Country	Obligation for schools to have a non-discrimination policy?	If so: (some) explicit references to GI, GE, SC?	Are schools required to respect preferred gender pronoun / name etc?	Can diplomas be obtained with preferred gender? (legal or not)	Case law?	Particularities & best practices
Sweden	Yes	Yes (GI & GE)	No	Yes	No	Diplomas do not mention sex but soc. sec. number which has gender digit
United Kingdom	Yes	Yes	No	No	No	

Many countries do offer protection against discrimination by obliging schools to adopt non-discrimination policies. Only **Liechtenstein, Luxembourg, Malta**, the **Netherlands, Portugal, Romania, Slovenia** and **Spain** have no such law at all. **Malta** and **Portugal** did adopt national policies. In **Greece**, the obligation only covers vocational training. A closer look, however, reveals a patchwork: some laws relate only to primary and secondary education, whereas others cover all levels. Sometimes, such obligations only relate to state-run schools. Moreover, in many countries initiatives have been taken either by regional governments (e.g. **Spain**) or by schools themselves.

Most national laws do not explicitly mention gender or intersex individuals. Only **Cyprus, Finland** and **Sweden** (and **Malta** in a recommendation) have specified that non-discrimination policies need to include gender status. However, also in this regard, more initiatives have been taken at the regional and local level.

Specific policies regarding the use of students' preferred pronoun exist in only four countries. However, as the **Hungarian** expert explains, the absence of explicit policies does not mean that it does not happen.

Finally, in all countries diplomas mention the legal name and sex, including if these have been changed. Exceptionally, in **Ireland** one college (University College Dublin) will also issue a diploma in the preferred gender – including non-binary – if this has not been changed legally. Such a policy might be problematic in countries that closely monitor the issuing of diplomas as well as the identity of those receiving them, such as in the **Netherlands**, where all personal details must match the data in the population registration.

A number of countries have made explicit exceptions to the common rule that diplomas will only be issued once, to the extent that people who changed their legal gender – and often their name too – are entitled to a new certificate.

Most trans-specific policies seem to have been adopted at the secondary and tertiary levels. This can possibly be explained by the minimum age for changing one's legal gender that applies in most countries.

In **Croatia** all degrees, certificates, licences and diplomas which include professional qualifications, professions and occupations must indicate these as feminine or masculine, because of the rules of Croatian grammar. This implies that there is no room for flexibility towards people who identify as non-binary.

In **Germany** it has been recommended that new certificates are automatically issued after someone changes their legal name. However, this proposal was criticised because it might result in a non-consensual outing of the person concerned.

7.2 Concluding remarks

Most issues facing trans, non-binary and intersex young people in education and schooling fall outside the scope of EU sex equality law. As far as vocational training is concerned, it must be assumed that students will be protected against sexual and other forms of harassment or discriminatory treatment on the basis of gender identity, expression or sex characteristics. EU sex equality law does not offer protection regarding any of the other issues faced by students.

Arguably, the General Framework Directive 2000/78/EC²⁹⁴ might offer protection for trans or intersex pupils and students who experience problems in the area of vocational training due to absences because of medical treatment. Hospital admissions may cause students to fall behind with their work, which in turn could jeopardise their chances of passing exams successfully. Reasonable accommodation may arguably be expected in such circumstances. However, this goes beyond the scope of the current report.

294 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

8. Retirement pensions

Article 157 TFEU establishes the principle of equal pay. Equal pay encompasses occupational retirement benefits. The principle has been further elaborated in Directive 2006/54/EC (see Article 7(1)(iii)). Statutory retirement benefits are covered by Directive 79/7/EEC.²⁹⁵

Retirement pensions, and especially national provisions establishing lower retirement ages for women and different premiums and benefits according to sex, have in the past already caused controversy. Possibly the most prominent of the preliminary cases the CJEU was asked to decide was the *Barber* case.²⁹⁶ Had Mr Barber been a woman, he would have been entitled to a retirement benefit after being laid off. European pension funds warned the court that enforcing equal treatment in this realm would cost billions and threaten the stability of the funds. The Court did find that the policy violated the equality principle but, given the consequences, restricted the retroactive effect of its decision.

Following *Barber*, the EU has worked towards the elimination of different pensionable ages for men and women. Today 12 of the 31 EU and EFTA countries still have a differentiated system, but all countries except **Poland** have now set an end-date, mostly implying a rise of the retirement age for women.²⁹⁷ Clearly, different retirement ages may present problems for trans individuals: if they, and especially trans women, are not allowed to retire at the earlier age for (cisgender) women, they are involuntarily outed. If they transitioned long before their retirement, they may also reasonably expect to retire early. The CJEU has decided several cases on this issue (see Chapter 2.3.2 and the *MB* case discussed there as well as below). It is not very clear to what extent trans men suffer from direct sex discrimination too, except that they will have to work longer than they would have if they had legally remained female. No cases regarding trans men and retirement ages or benefits have reached the European Court of Justice or the European Court of Human Rights to date. However, in **Austria** a trans man did pursue his case to the Supreme Court (see Chapter 8.1 below).

From the perspective of the position of trans and non-binary individuals, a number of issues regarding retirement are relevant. This is not so clear for intersex individuals (other than those who identify as non-binary) because, as a rule, they do fit their attributed gender.

The problems experienced in this area are arguably caused because of the remnants of rules that directly discriminate on the basis of sex, especially different retirement ages for men and women as in the case of *Barber* referred to above.

Another problem may occur due to the actuarial data used by pension funds (as well as other insurers), that rely on sex-segregated data (e.g. regarding life expectancy). This could result in calculations of premiums or benefits that are actually lower or higher than they should be according to individuals' legal gender and different premiums.

The Goods and Services Directive (2004/113/EC) contained an exception to the principle of equal treatment. Article 5(2) of the Directive provided that the Directive did not prevent the use of such sex-related actuarial data, resulting in proportionate differences in individuals' premiums and benefits, 'where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data'. The CJEU declared this provision invalid in the *Test Achats* case. Similarly, the calculation of statutory social security benefits cannot be made 'on the basis of a generalisation as regards the average life expectancy of men and women', as the CJEU decided in 2014, in *X*. However, according to the

295 Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (79/7/EEC).

296 Case C-262/88 (European Court of Justice, 17 May 1990).

297 In 2016, the Polish government reversed a reform, adopted in 2012, to raise retirement ages to 67 and equalise the retirement ages for men and women. See e.g. European Trade Union Institute (8 January 2018), *Poland: the restoration of a lower statutory pension age*.

European Commission, the *Test Achats* case has no consequences for the setting of different benefits for men and women in occupational pensions, as allowed by Article 9(1)(h) of Directive 2006/54/EC.

Different pension rights for men and women may also present tensions for trans men and women.²⁹⁸ In 2017, the CJEU was presented with a complaint from a trans woman (*MB*) who was not allowed to retire early because, legally, her gender was still male (see also Chapter 2.3.2.1).²⁹⁹ The petitioner had not changed her legal gender because she had not wanted to divorce from her wife for religious reasons. Despite the fact that same-sex marriage falls outside the scope of EU law,³⁰⁰ the Court considered that pensions do fall within the scope of EU sex equality law and ruled that EU law does not allow discriminatory rules that place additional requirements on trans women as compared to cis women who do not need to marry or divorce in order to retire at 60.

In light of the fact that in almost all countries retirement ages will be equalised sooner (e.g. the **UK** by the end of 2018) or later (e.g. **Croatia** by 2029) the questions raised by trans and non-binary individuals are of a temporary nature. However, in the meantime some tensions and unclarities still exist. For **Poland**, which, as mentioned above, has reversed the scheduled equalisation of retirement ages, these problems will persist.

8.1 National state of play

Table 7. Retirement pensions

Country	Different ages m/f?	If yes: access benefit according to legal gender?	If yes: access benefit non-binary persons?	Case law?
Austria	No ³⁰⁴	Yes	NA	Yes
Belgium	No	NA	NA	No
Bulgaria	Yes	Yes	NA	No
Croatia	Yes	Yes	NA	No
Cyprus	No	NA	NA	No
Czech Republic	Yes	Probably	NA	No
Denmark	No	NA	NA	No
Estonia	Yes	Yes	NA	No
Finland	No	NA	NA	No
France	No	NA	NA	No
Germany	No	NA	NA	No
Greece	No	Unclear (transitional rules)	NA	No
Hungary	Yes	Yes	NA	No
Iceland	No	NA	NA	No
Ireland	No	NA	NA	No
Italy	No	NA	NA	No
Latvia	No	NA	NA	No
Liechtenstein	No	NA	NA	No
Lithuania	Yes	Yes	NA	No
Luxembourg	No	NA	NA	No

298 ECtHR, *Goodwin v United Kingdom* [2002] 35 EHRR 18.

299 C-451/16 (EU Court of Justice, 5 December 2017).

300 Generally speaking, in cases of free movement, EU Member States may be required to grant residence rights to married same-sex couples as if they were married under the national law of the state concerned, as was the case in *Coman*, C-673/16 (Court of Justice, 5 June 2018).

301 Different pensionable ages only still apply in the statutory pension schemes and only for women born before 1968.

Country	Different ages m/f?	If yes: access benefit according to legal gender?	If yes: access benefit non-binary persons?	Case law?
Malta	No	NA	NA	No
Netherlands	No	NA	NA	No
Norway	No	NA	NA	No
Poland	Yes	Yes	NA	No
Portugal	No	NA	NA	No
Romania	Yes	Unclear	NA	Yes
Slovakia	Yes	Yes	NA	No
Slovenia	Yes	Probably	NA	No
Spain	No	NA	NA	No
Sweden	No	NA	NA	No
United Kingdom	Yes	Yes	NA	Yes

In three countries (**Czech Republic**, **Romania** and **Slovenia**) that still have different schemes for men and women, rules with respect to retirement benefits for trans men and women are either lacking or unclear. This is despite the fact that in these countries change of legal sex has also been made possible.

In the nine other countries with differentiated schemes, retirement entitlements are granted on the basis of legal sex. However, following the 2017 *MB* judgment mentioned above, seven of these countries might be confronted with similar problems, since **Bulgaria**, **Croatia**, **Czech Republic**, **Hungary**, **Poland**, **Romania** and **Slovenia** all still require trans individuals who wish to change their legal gender to be unmarried or divorced.

Only **Estonia** will escape this problem, because being unmarried is not a precondition for a change of legal sex. In **England**, **Wales** and **Scotland**, applicant for gender recognition no longer have to annul their marriage (although there remains a 'spousal consent' requirement). In **Northern Ireland**, annulment remains a precondition for gender recognition.

Interestingly, whereas all **UK** cases³⁰² were initiated by trans *women* who wished to retire early like any other woman, in **Austria**³⁰³ a trans *man* turned to the court. In Austria, women who defer their pension benefits after their legal retirement age are entitled to a bonus. The applicant argued that he, having lived and worked as a woman in the past, should be entitled to this bonus, since as a man he would have to continue working for several more years. This claim was rejected by the court.

A very specific problem that has arisen in the **UK** is that the benefits for individuals and surviving partners may be different depending on gender as well as age. If mistakes are made because change of legal sex is not properly registered with the pension fund, people may receive too much, which they will have to pay back later, or they may receive too little. It is not difficult to imagine that this might happen elsewhere too.³⁰⁴

Another example of problems presented by complex administrative (pension) systems, is from **Romania**, where a trans man was able to transfer past contributions to his new account. This suggests that this apparently does not happen automatically. A situation in which people lose part of their pension rights

302 Case C-451/16 (European Court of Justice, 26 June 2018) (*MB*); C-423/04 (European Court of Justice, 27 April 2006) (*Richards*); see also C-117/01 (European Court of Justice, 7 January 2004) (*KB* on survivor's pensions). See also the *Goodwin* case from the ECtHR, *Goodwin v United Kingdom* [2002] 35 EHRR 18.

303 Supreme Court (*Oberster Gerichtshof*, OGH), 21 April 2009, 10 ObS 29/09a, www.ris.bka.gv.at/Dokumente/Justiz/JJT_20090421_OGH0002_010OBS00029_09A0000_000/JJT_20090421_OGH0002_010OBS00029_09A0000_000.pdf (accessed 23 April 2018).

304 See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/677567/gender-recognition-pensions-and-benefits.pdf (accessed 10/5/18).

due to amending their legal gender seems to come squarely within the protection against discrimination on the basis of 'gender reassignment', as protected by the EU directives and the CJEU.

In **Belgium** maternity leave is an element that is included in the calculations of retirement benefits. It is applied equally to trans men who, prior to transitioning, gave birth to a child. It is unclear whether this would also apply if that same person gave birth while legally male.

8.2 Concluding remarks

It can be concluded that the issue of pensionable ages will disappear when the still existing laws that grant women an earlier retirement age expire. However, the problems caused by the use of sex-segregated actuarial data in combination with a change of legal sex are not likely to disappear when increasing numbers of people decide to change their legal sex. The situation may actually become more complicated if more states decide to introduce a third, non-binary sex (or decide to stop attributing legal sex at all) as will be the case in **Germany**.

9. Employment

Equal treatment on the basis of sex in employment is covered by the Recast Directive. It presents probably the best known area of EU non-discrimination law. Trans, non-binary and intersex people may face gender discrimination comparable to cisgender men and women. However, on top of that they may experience problems related to their trans status or experience of intersex variance.

One issue (also briefly discussed in Chapter 7 on Education) is absence, due to trans or intersex-related treatment. This will be discussed in Chapter 9.1. Discriminatory practices and harassment are discussed in Chapter 9.2. Harassment is the focus of Chapter 9.3, while Chapter 9.4 focuses on pregnancy-related issues. The chapter ends with a short conclusion.

Table 8. Employment

Country	Protection against (e.g.) transition-related absences?	Case law addressing discrimination because of actual or perceived GI, SC?	If legal sex change is possible without sterilisation: pregnant male entitled to equal protection?
Austria	Yes	Yes for GI, No for SC	Unclear
Belgium	Yes	Yes	Unclear
Bulgaria	Yes	No	NA
Croatia	Yes	No	NA
Cyprus	Yes	No	NA
Czech Republic	Yes	No	NA
Denmark	Yes	No	Yes
Estonia	Yes	No	Yes
Finland	Yes	No	Yes
France	Yes	Yes	Probably
Germany	Yes	Yes	Yes
Greece	Yes	No	Possibly
Hungary	Yes	Yes	Yes
Iceland	Yes	No	Yes
Ireland	No	Yes	Probably
Italy	Yes	No	Probably
Latvia	No	No	No
Liechtenstein	No legislation	No	No legislation
Lithuania	No legislation or case law	No	Probably
Luxembourg	Yes	No	Yes
Malta	Yes	No	Probably
Netherlands	Yes	Yes	Probably
Norway	Yes	Yes	Yes
Poland	Yes	Yes	Probably
Portugal	Yes	No	Yes
Romania	No special legislation	No	No
Slovakia	Yes	No	NA
Slovenia	Yes	No	No rules
Spain	Yes	No	Unclear
Sweden	Yes	No	Yes
United Kingdom	Yes	Yes	Unclear

9.1 Absence because of trans or intersex-related treatment

In a large majority of countries, absence due to gender confirmation treatment is covered by general sick leave protection. In most countries such absence is treated like any other medical condition, provided the employee can show a doctor's certificate. Only the **UK** has an explicit provision detailing the coverage of gender confirmation treatment.

Coverage by sick leave regulation implies that the treatment must be regarded as a medical necessity. In countries that still demand full physical surgery, including sterilisation, this might present problems for individuals who only want partial treatment. Possibly, medical necessity will only be accepted if the treatment complies with the requirements for a change of legal sex. In **Estonia**, gender confirmation surgeries are regarded as 'aesthetic' surgeries and thus are not covered by national health insurance.

In **Germany**, reportedly, many people try to have their surgery done during their holidays. Although this may well be explained as a strategy to avoid hassle at work, also in light of the general underreporting of discrimination against trans and intersex employees, it does imply that these individuals do not benefit from sick leave protection on an equal footing with other employees.

A **Dutch** employer refused to pay sick leave for his trans employee, because he regarded the treatment as 'cosmetic' rather than a medical necessity.³⁰⁵ This argument was not accepted by the court. The **Belgian** expert suggests that Belgian case law protecting women from dismissal because of frequent absences due to miscarriages³⁰⁶ might be applied by analogy to an employee undergoing gender confirmation treatment. However, such options will probably be accepted only if the desired treatment is considered a medical necessity, since national protection for sick leave will hardly be so generous as to cover treatment that is regarded as unnecessary and comparable to cosmetic surgery. In **Iceland**, trans individuals increasingly decide to stick to hormone therapy. Thus they do not need to be absent from work at all.

9.2 Discriminatory treatment at work

The labour market is the area that gives rise to most non-discrimination case law, as compared to the other areas discussed. Yet only in nine countries is there reported case law on discrimination with respect to trans people in the context of employment. None of the reported cases relate to intersex individuals.

Recent research on LGBTI equality in **Croatia** showed that 75.1 % of respondents had experienced some form of discrimination at work due to sexual orientation or gender identity.³⁰⁷ Given the widespread discrimination against trans individuals, not just in Croatia but Europe-wide, including at work, the threshold to initiate legal procedures is obviously high. Another cause may be a lack of awareness by the stakeholders of their rights. The published case law is generally regarded as representing only the tip of the iceberg.

Complaints may be divided broadly into three categories: hiring practices, discriminatory and disrespectful treatment and harassment in the workplace and dismissal.

Hiring practices

That trans individuals experience discrimination at the point of entry to the labour market indicates their significant under-representation.³⁰⁸ People identifying as non-binary probably experience discrimination

305 Rb Oost-Brabant, 13 March 2014, ECLI:NL:RBOBR:2014:2417.

306 E.g., Labour Court in Mons, Judgment of 22 May 2015, *Chroniques de droit social*, 2015, p.335 with J. Jacqmain's case note.

307 LGBTI Workplace Equality, Research Results (2017) http://ravnopravnost.lgbt/wp-content/uploads/2016/03/LGBTI-research-results_eng.pdf (accessed 13 May 2018). The research results are not segregated for trans persons.

308 See e.g. FRA (2014), *Being trans in the European Union. Comparative analysis of EU LGBT survey data*, esp. Chapter 1.4.

even more often. There is not yet much information on the occurrence of discrimination relating to sex characteristics in this realm.

However, proving discriminatory hiring decisions in a concrete case is quite difficult, since employers are rarely open about their discriminatory motives or prejudice. This is well-known for other discrimination grounds, such as sex and race, but no less true for gender identity and expression.

In **Norway** an employer was found to have discriminated against a trans woman ‘because of her appearance’. The **Dutch** equality body concluded that a taxi company had discriminated, after it refused to hire a trans woman as a taxi driver.³⁰⁹ The company had argued that its clients found a trans woman taxi driver ‘unsuitable’. In the **UK** a massage parlour servicing gay and bi-sexual men could not for that reason refuse to hire a trans woman.³¹⁰ In **Hungary** an employer was found to have discriminated against a trans woman who applied for a job as a sales person.³¹¹ She had not yet changed her name, but had already been living, dressing and behaving as a woman for six years. The employer stated they were looking for a sales ‘woman’. Apart from being disrespectful and discriminatory towards the applicant, the case raises the more general question of whether the hiring policies of this employer meet the general demands of sex equality law as such, since nothing in the case suggests that the argument was linked to an exception based on a genuine occupational requirement.

A court in **Germany** instructed an employer that having undergone gender confirmation treatment in the past is not an indicator of future inability to work.³¹² Therefore, the rejection of the application on the basis of this argument was found to be flawed.

Such explicit motivations for the rejection of a job application make it possible to establish (a presumption of) discrimination. However, in many cases employers state they have better qualified candidates or use other vague justifications. In another **Norwegian** case, the employer was able to refute the allegation of such discrimination, because they could actually prove that other candidates were better qualified than the trans applicant.³¹³

The exception to the prohibition of non-discrimination in cases of ‘genuine occupational requirements’ (see Article 14(2) Directive 2006/54/EC) may also be at stake. In a **German** case, the company justified its refusal to hire a trans candidate by explaining that for the job concerned an endogenous hormone supply was imperative.³¹⁴

On a more general level, access to the labour market and choosing a profession may be impaired by the fact that identity documents indicating a new name and another gender are only issued *after* the transition process has been completed. During the transition process, especially in countries that still require a lengthy ‘real life test’, documents will reveal someone’s trans status, for example when applying for a job.

9.3 Harassment

In general, harassment might be the area of employment law that receives most complaints. Even though it might be difficult to prove allegations of discrimination, it is easier than in the case of hiring practices. It may also be the most well-known of all non-discrimination areas. Yet in a significant majority of the 31 EU and EFTA countries surveyed for this report, no case law has been published at all.

309 College voor de Rechten van de Mens, opinion 2017-20, 22 February 2017.

310 *Lawrence v Wills t/a Zeus Sauna/Zeus@71* (2009) (Employment Tribunal Case No.2604029/09).

311 www.egyenlobanasmod.hu/en/node/1031 (accessed 24 October 2018).

312 Administrative Court of Berlin, judgment of 30 April 2014, 36 K 394.12.

313 Tribunal case 2008-08-20, <https://lovdata.no/pro/#document/LDN/avgjorelse/ldn-2008-19?searchResultContext=1130> (accessed on 18 May 2018).

314 Administrative Court of Frankfurt, judgment of 3 December 2007, 9 E 5697/06.

In **Hungary**, a mayor attracted (international) media attention when he told a trans woman in his village that, as long as he was mayor, she would no longer be able to work there.³¹⁵ However, the woman failed to prove detrimental treatment because a brief investigation by the equality body showed that she had not been hired as a worker for the municipality significantly less than before. **France, Germany, Ireland, the Netherlands, Poland** and the **UK** report cases of harassment and discriminatory treatment by employers or colleagues. In the **UK** the Employment Tribunal found that an employer had failed to investigate and respond to complaints from a trans employee about harassment by a colleague.³¹⁶

The **Polish** Commissioner for Human Rights has issued a report on discrimination of trans people at work. Among other things the Commissioner has recommended training for employers. The Commissioner has asked the Minister to monitor and report back.³¹⁷

9.4 Pregnancy protection

EU law is relevant in two ways to pregnancy: it offers protection to pregnant people, so as to ensure that protective, *positive* measures related to pregnancy and giving birth (such as pregnancy and maternity leave) are not regarded as contravening the principle of equality in the workplace. This area is primarily covered by Directive 92/85/EEC, which mandates a certain kind of treatment.³¹⁸ On the other hand, Directive 2006/54/EC protects pregnant workers against *negative*, discriminatory treatment, such as a refusal to hire or to continue a contract.³¹⁹

According to a consistent line of case law of the CJEU, pregnancy-related detrimental treatment must be regarded as a form of *direct* discrimination against *women*.³²⁰ In the areas of EU sex equality law that are subject to the ‘closed system’, direct discrimination is not allowed, unless one of the three exceptions of Directive 2006/54/EC (Article 2(2)(c), Article 3, Article 14(2)) applies. This is reflected in the wording of Article 2(2)(c) of Directive 2006/54/EC which prohibits ‘any less favourable treatment of a *woman* related to pregnancy and maternity’.³²¹ This conceptualisation of pregnancy as a ground of discrimination that can only affect women may leave pregnant (trans) men unprotected. At the same time, the reality of pregnant men raises the question of whether the current perception of pregnancy discrimination as sex discrimination is still tenable.

The so-called pregnancy Directive (92/85/EEC) is not an equality directive as such, but aims to improve the health and safety of pregnant workers and workers who have recently given birth. There are interesting differences in the various language versions of the directive: the title of the **English** version refers to pregnant *workers*. The **Finnish** version uses similar neutral language, because the Finnish language has no gendered conjugations (although some related provisions, e.g. on maternity leave, do refer to women). The **Dutch, French** and **German** versions, on the other hand, refer to female workers, by using the female form (*werkneemsters, travailleuses, Arbeitnehmerinnen*).

This gender-specific framework is reflected in different forms in the domestic laws in Europe, where most national laws have gender-specific provisions. This may cause problems for pregnant trans men. Very

315 Equal Treatment Body, EBH/88/2016 <http://www.egyenlobanasmod.hu/hu/jogeset/ebh362018>.

316 Souza v Primark Stores (2017) Employment Tribunal: Case No: 2206063/2017.

317 The **Polish** Commissioner of Human Rights asked the Minister of Labour and Social Policy (www.rpo.gov.pl/sites/default/files/Wystapienie_RPO_do_Ministra_Rodziny_Pracy_i_Polityki_Socjalnej.pdf) and the Government Plenipotentiary for Equal Treatment (www.rpo.gov.pl/sites/default/files/Wystapienie_RPO_do_Pelnomocnika_Rzadu_ds_Rownego_Traktowania.pdf) for their comment on the recommendations indicated in the report and about information on actions undertaken (and planned) with regard to ensuring full respect for the rights of trans people in employment. For the Minister’s response see: www.rpo.gov.pl/sites/default/files/Odpowiedz-MRPIPS-XI.411.2.2017.pdf, accessed 23 October 2018.

318 See also Article 4(2) of Directive 2004/113 on Goods and Services.

319 See also Recital 20 and art. 4(1)(a) of Directive 2004/113 on Goods and Services.

320 See Case C-177/88 (Court of Justice, 8 November 1990), ‘Dekker’. In para. 12 the Court observes ‘[...] that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex’.

321 See Recitals 23, 24, 25 and Art. 2(2)(c), 6, 9(1)(g) and 28(1).

few countries have so far had to deal with the situation of pregnant men. **Germany**³²² and **Finland**³²³ are among the exceptions, but not much is known about the details of these cases. Thus, most of the information on how the law may be expected to treat pregnant men, other than whether they will be registered as the child's father or mother,³²⁴ can be no more than an educated guess.

Only in six countries (**Denmark, Estonia, Germany, Iceland, Norway** and **Sweden**) is the question of whether pregnant men are entitled to legal protection answered affirmatively without any hesitation. In most other countries, it is assumed that the gendered focus of the law will nevertheless be interpreted inclusively. In **Poland** this expectation is based on the importance attached nationally to pregnancy protection. **Ireland**, it is suggested, on the other hand, might be inclined to treat trans men like cis men, implying that they would not be entitled to more than two weeks paternal leave, after the birth of their child. It is assumed that in **Latvia** the gendered provisions regarding pregnancy will be strictly interpreted as protecting only women, which would leave trans men unprotected. The **Swedish** expert replied that both combating pregnancy discrimination and facilitating caring responsibilities are priorities. Therefore, the question is not whether but how a court would construct the inclusive scope of protection.

In accordance with well-established CJEU case law, pregnancy *discrimination* is treated as (direct) discrimination against women as 'only women can become pregnant'. In light of the fact that now 23 (possibly 24) out of the 28 EU and three EFTA countries do not or no longer require sterilisation in order to change legal gender (see Chapter 3.3.2.1), it is only a matter of time before such cases will come for adjudication.³²⁵ Although it is quite unlikely that trans men of reproductive age will experience prejudicial expectations that they 'will get pregnant and quit' similar to young women, it is not difficult to imagine pregnant men suffering even more from prejudice, harassment and stereotypical attitudes. If legislators – at national or EU level – will not adopt additional rules, solving such issues will be left to the national courts and ultimately possibly the CJEU.

9.5 Concluding remarks

Compared to other areas covered by the EU sex equality directives discussed in this report, there is a relatively high volume of case law at both national and EU level. This can possibly be explained by the fact that discrimination in the labour market is comparatively well-regulated and employees are relatively well-informed about their rights. On the other hand, the number of complaints and published cases is still very low and only represents the tip of the iceberg.

Absences due to trans or intersex-related treatment are covered everywhere. However, given the very serious problems experienced by trans individuals, both when trying to access the labour market and at work, unfortunately the individuals concerned sometimes seem unable to exercise their rights and decide to use their holidays for their medical treatments instead. This might need more attention, since holidays are intended as a time to rest and recover. It is for good reason that employees continue to acquire holiday during periods of illness.

Given the harassment experienced by trans individuals more (or better) codes of conduct and conflict management in the workplace are clearly needed.

322 Spottiswoode, J. (2013), 'Trans man gives birth in Germany', *Telegraph*, 11 September 2013 www.telegraph.co.uk/news/worldnews/europe/germany/10301862/Trans-man-gives-birth-in-Germany.html (accessed 3 October 2018).

323 'Finland's first pregnant man reportedly faces battle for social benefits', 8 October 2017 <https://sputniknews.com/art-living/201710081058047036-finland-pregnant-man/> (accessed 3 October 2018).

324 In **Germany** the birth-giving father will be registered on his child's birth certificate as the mother, with reference to his previous female name(s). Confirmed by the Federal Court of Justice, judgment of 6 September 2017, XII ZB 660/14. And MtF trans people who procreate a child with their cryo-conserved sperm can only become fathers in the sense of the law, in the birth register and on the birth certificate, see Federal Court of Justice, judgment of 29 November 2017, XII ZB 459/16.

325 Especially since the ECtHR judgment in the case of *AP, Garçon and Nicot v France*, App. Nos. 79885/12, 52471/13 and 52596/13, 6 April 2017 (see Chapter 2.2.1.3).

The possibility of male employees being pregnant is very new and in most countries no problems have been presented yet. However, it might be worthwhile anticipating such problems and clarifying – and, as necessary, improving – the applicable regulations so as to avoid problems occurring in the first place. For both fathers and children it is imperative that the pregnancy is fully protected and that the male employees are protected against pregnancy discrimination on an equal footing with their pregnant (cisgender) female colleagues as well. The construction of pregnancy discrimination as *per se* a manifestation of direct discrimination against *women* may be in need of reconsideration.

On a positive note, the courts and equality bodies dealing with the complaints of trans individuals' cases seem well aware of the problems and are able to reach balanced conclusions. However, the question remains as to the extent to which the applicants in such cases are really helped with these judgments, other than obtaining satisfaction. It is, for example, unlikely that people will get their jobs back. The next chapter will briefly discuss the issue of remedies further.

10. Sanctions and remedies

10.1 Sanctions and remedies: an absence of national case law

As noted in the previous chapters, a striking feature of trans and intersex non-discrimination frameworks throughout the European Union and the three European Free Trade Association countries which were surveyed is the absence of case law before national courts, administrative tribunals and equality bodies. Across the 31 jurisdictions surveyed for this report, in a significant number of states there are no reported judgments or opinions relating to the unequal treatment which trans and intersex people face.

A knock-on effect of this dearth of case law is that, across the Member States of the EU and EFTA, there is little (or no) judicial guidance on the sanctions and remedies which should be awarded when transphobic or intersex-motivated discrimination occurs. Examples of countries in which the national researchers for this report were unable to identify case law imposing penalties for trans and intersex inequalities include **Austria, Bulgaria, Croatia, Czech Republic, Iceland, Latvia, Liechtenstein, Slovakia and Slovenia.**

In some jurisdictions, such as **Spain**, while there is no national jurisprudence which addresses discrimination, there have been cases where trans people have been the victims of hate crimes. In Spain, under Article 510 of the Criminal Code, an individual convicted of committing a hate crime can receive a prison sentence of up to four years. In other states, such as **France** and **Lithuania**, although general domestic equality guarantees have rarely been applied to trans and intersex people in specific cases, there is a belief that those guarantees (including the relevant penalties) also cover these people.

The absence of judicial or administrative rulings on transphobic and intersex-motivated discrimination is troubling. Firstly, it suggests that, while national and EU-level equality guarantees may exist, they are not substantively protecting trans and intersex people across Europe. The dearth of case law in the above jurisdictions is inconsistent with domestic and regional surveys which reveal that trans and intersex people in these countries experience disproportionate rates of unequal treatment.³²⁶ Secondly, the absence of such rulings means that judicial actors do not have the opportunity to establish clear sanctions which might deter individuals or groups who would otherwise engage in discriminatory conduct. Where equality law penalties are never enforced against offenders, this encourages a belief that transphobic and intersex-motivated discrimination can be perpetrated with impunity.

10.2 Sanctions and remedies: domestic case law penalising transphobic discrimination

Despite the general absence of case law, there are important examples across the EU and EFTA where national courts and tribunals have censured individuals and organisations for engaging in acts of transphobic discrimination. In many instances, the adjudicators have penalised such conduct through the imposition of monetary sanctions or by requiring the offender to reverse an unlawful action. Unfortunately, however, the judgments referred to below do not include decisions where domestic courts and tribunals have condemned unequal treatment motivated by sex characteristics.

In a recent case from **Belgium**, a trans woman was denied access to her employer's healthcare insurance scheme unless she waived her right to claim medical expenses arising from gender dysphoria, with which she had been diagnosed prior to concluding the work contract. The Belgian Labour Court of Appeal held

326 FRA (2014), *Being trans in the EU: Comparative analysis of EU LGBT survey data* (Publication Office of the European Union 2014); Commissioner for Human Rights of the Council of Europe (2009), *Human rights and gender identity* (29 July 2009) CommDH/IssuePaper(2009); Commissioner for Human Rights of the Council of Europe (2009), *Discrimination on grounds of sexual orientation and gender identity in Europe* (2nd edn, Council of Europe 2011); Commissioner for Human Rights of the Council of Europe, *Human rights and intersex people – Issue paper* (Council of Europe 2015) <https://rm.coe.int/16806da5d4>, accessed 20 June 2017.

that the exclusionary clause in the insurance scheme discriminated against the woman on the basis of sex conversion.³²⁷ As such, the clause was incompatible with Article 25 of the Gender Act. The Court ordered the insurance company to register the woman under a penalty of EUR 2 000.

In an earlier **Belgian** case, a trans man had been refused access to a tour of Jordan unless he agreed to pay an extra fee for a single room. The tour was run according to a room-sharing model. However, the operators were unable to find another man to share with the claimant, who was himself not willing to share with a female participant. A Belgian Civil Court concluded that, by requiring the claimant to pay for a single room, the tour operator engaged in discrimination based on sex conversion.³²⁸ The Court ordered the operator to enrol the claimant without the additional fee and awarded fixed damages as provided in the Gender Act.

In the **Netherlands**, a District Court ruled³²⁹ that an employer had discriminated against a trans woman where he: (a) questioned the woman about whether she was going to wear a dress; (b) told the woman that he had hired her as a man; and (c) made constant reference to the woman's trans identity. The Court awarded the claimant compensation of EUR 10 000.

In England and Wales, the claimant in *Souza v Primark Stores*³³⁰ was a trans woman. She claimed that she had been constructively dismissed by her employer following a series of transphobic incidents, including being constantly referred to as a man, being called a male name and being unable to have her harassment complaints properly investigated. The Employment Tribunal held that the claimant was the victim of discrimination on the basis of 'gender confirmation' and awarded compensation of GBP 47 000 (including GBP 25 000 for injury to feelings).

In an **Irish** case, *Hannon v First Direct Logistics Limited*,³³¹ the claimant alleged that her former employer had engaged in numerous acts of discrimination, including limiting her right to express her preferred gender, restricting interaction with clients, refusing access to gender appropriate facilities and requiring the claimant to work at home. The Equality Tribunal of Ireland accepted that the claimant had been subject to gender and disability discrimination. The Tribunal awarded Ms Hannon EUR 35 422.71 plus interest at the Courts Act rate from the date of the claim to the date of payment.

In **Sweden**, the Equality Ombudsman has previously settled a dispute where a pregnant trans man was refused access to pregnancy insurance. The insurer's digital system could not approve male social security numbers. The insurer ultimately acknowledged that it had discriminated against the man on the basis of his sex and agreed to pay compensation of approximately EUR 5 000. Outside of the judicial sphere, in March 2018, the Swedish Parliament enacted legislation³³² to compensate, on an *ex gratia* basis, persons who, prior to July 2013, had undergone sterilisation as a precondition for obtaining legal gender recognition. Individuals who make a successful claim under the scheme will receive SEK 225 000.

In **Germany**, the Administrative Court of Berlin has concluded that a trans civil servant, working for the German Federal Bureau of Investigation, cannot be denied appointment as a 'civil servant for life' simply because she undertakes a medical transition.³³³ The Court ordered the Bureau to make the life appointment. In a subsequent judgment, where an employer had refused to hire a trans woman because they did not accept the woman's gender identity, the Federal Labour Court concluded, on appeal, that the employer had committed discrimination on the grounds of gender or gender identity.³³⁴ The employer was liable to compensate the woman with an amount to be determined by the State Labour Court.

327 Labour Court of Appeal in Brussels (16 March 2018).

328 Civil Court in Antwerp (31 May 2017), *Nieuw Juridisch Weekblad*, 2018, p. 450, with P. Borghs's case note.

329 Ktr Harderwijk, *JAR* 2010/114 (16 December 2009).

330 Employment Tribunal, Case No: 2206063/2017 (22 December 2017).

331 Equality Tribunal of **Ireland**, DEC – S 2011-066; EE/2008/043 (29 March 2011).

332 *Lag (2018:162) om statlig ersättning till personer som har fått ändrad könstillhörighet fastställd i vissa fall*.

333 Administrative Court of Berlin, 36 K 394.12 (30 April 2014).

334 Federal Labour Court of **Germany**, 8 AZR 421/14 (17 December 2015).

In 2017, the **Danish** Equality Board identified discrimination on the basis of gender where a public body referred to a trans woman, who had obtained gender recognition, by her former name.³³⁵ In this instance, however, the Board did not impose a specific penalty against the body.

All of these cases are important examples where national courts have given substance to the inclusion of trans people within sex equality discrimination frameworks. Without the threat of proportionate sanction, it is unlikely that employers or service providers would be deterred from engaging in transphobic conduct. The sanction imposed in cases, such as *Souza* and *Hannon*, amounts to a significant monetary penalty. As such, the cases stand, in the context of **English** and **Irish** law, as symbolic and practical statements about the position and rights of trans individuals. Indeed, even where the amount awarded is comparatively low, as in the recent **Swedish** sterilisation compensation scheme, the very making of that payment (to redress the acknowledged wrong of sterilising trans people) had clear personal and social value. Similarly, in the **German** civil service employment dispute, although the court did not require monetary payment, appointment for life had a considerable financial benefit for the claimant. However, in the background of all these cases, one must be conscious, as noted, of the paucity of domestic jurisprudence and the low rates at which national courts are sanctioning transphobic discrimination.

10.3 Sanctions and remedies: policy change

In some cases, where a domestic court concludes that an individual or organisation has engaged in transphobic discrimination, the court may order or request the offender to amend (or put in place) non-discrimination policies.

In the aforementioned *Souza v Primark Stores* case,³³⁶ in addition to awarding compensation, the Employment Tribunal recommended that the employer consult a specialist organisation to formulate a written policy for trans staff. The Tribunal also encouraged the employer to amend the institutional training materials, existing equality and harassment policies and grievance procedures to reflect and incorporate the new policy. Similarly, in **Malta**, following a successful complaint to the National Commission for the Promotion of Equality, alleging discrimination in health services, the Commission recommended that the Health Department create a plan to enable free access to gender confirmation treatments.

In **Greece**, the Ombudsman has played a particularly important role in encouraging educational establishments to respect preferred gender. In one example from 2013,³³⁷ an adult trans individual, who was attending night school while undertaking a process of transition, complained that the educational institution was treating her in an offensive and humiliating manner. The Ombudsman intervened and the school accepted proposals to respect the student's preferred (female) name, to allow the student to wear female clothing and to permit the student access to female toilets. In addition, the institution organised educational programmes to raise awareness of both teachers and students. A similar outcome was reached for two minor students in 2017.³³⁸ As part of these subsequent interventions, the Ombudsman recommended that the Greek Ministry of Education should publish a circular addressing the issue of trans students in the field of education.

In **Finland**, the state social insurance institution, KELA, had, until 2014, advised that individuals would not be able to claim reimbursement for hormone treatment unless they had already obtained legal gender recognition. However, in 2014, the Insurance Court³³⁹ held that imposing such restrictions was *ultra vires* the power of KELA. The current guidelines now permit reimbursement where multi-professional working groups in the two university hospitals consider that all medical indications for undertaking hormone

335 Equality Board of **Denmark**, Case 10023/2017 (31 October 2017).

336 Employment Tribunal, Case No: 2206063/2017 (22 December 2017).

337 Intervention of the Ombudsman, www.synigoros.gr/?i=equality.el.imidedu.132282 (28 August 2018).

338 *Yearly report of the Ombudsman* (referring to 231564/2017, 233918/2017) 180, www.synigoros.gr/resources/ee2017-p00.pdf (accessed 14 May 2018).

339 Insurance Court of **Finland**, Decision VakO 3394:2012 (2014).

treatment are fulfilled. In 2008, the Equality Ombudsman had issued an opinion arguing that the former KELA policy constituted impermissible discrimination against trans individuals.³⁴⁰

In a 2018 dispute, before the Equal Treatment Authority of **Hungary**,³⁴¹ a trans woman claimed that she had been discriminated against by a urologist. In particular, the medical officer had refused to certify the woman for gender confirmation surgery, which is required for obtaining legal gender recognition, and had made a number of transphobic comments to the woman, which were overheard by a third person. As part of the settlement brokered by the Equal Treatment Authority, the medical office apologised for the conduct of its urologist. The office also agreed to publish information on its website for medical professionals who interact with trans individuals.

In the sole case regarding trans discrimination which has been decided by the **Romanian** National Council for Combating Discrimination,³⁴² the Council concluded that there was insufficient evidence to prove unequal treatment. However, although the Council did not impose sanctions, it did recommend continuing training for police officers and the adoption of procedures for relations with trans persons.

In many ways, requiring policy change is a more transformative and impactful remedy than monetary compensation. The award of money damages can have: (a) an immediate deterrent effect on continuing transphobic conduct; and (b) an immediate rehabilitative impact for trans victims, who may have suffered financial harm and detriment to their dignity because of their unfair treatment. Yet in terms of reducing instances of discriminatory conduct against trans people, sanctions which result in more inclusive policies, better education on trans identities and moves towards an environment of greater openness are, ultimately, more likely to enhance trans lived experiences. This can be seen in **Greece**, where the Ombudsman's interventions potentially had an impact on all trans students at the educational establishments. It is also evident in **Finland**, where requiring KELA to change its policies increased coverage for broad sections of the Finnish trans community. However, as before, one must be conscious that, while these examples of policy change are positive (and provide models of good practice for other national courts), they are only being enforced by a minority of EU and EFTA judges.

10.4 Concluding remarks

Chapter 10 has considered the remedies and sanction which national courts impose where there is discrimination on the basis of gender identity, gender expression or sex characteristics.

The absence of case law implies that there is a dearth of decisions providing judicial guidance on sanctions and remedies. As noted, this encourages an appearance that, although national and EU-level equality guarantees exist, they are not substantively protecting trans and intersex people. Similarly, the absence of such rulings means that judicial actors do not have the opportunity to establish clear sanctions which might deter individuals or groups who would otherwise engage in discriminatory conduct. Where equality law penalties are never enforced against offenders, this suggests that transphobic and intersex-motivated discrimination can be perpetrated with impunity.

Chapter 10 has identified limited examples of case law where domestic courts did provide monetary compensation following an incidence or pattern of discriminatory conduct. In some cases, the compensation awarded was significant, increasing the likelihood of the aforementioned deterrent effect. Meaningful monetary awards may also provide a rehabilitative effect for the victims of transphobic behaviour. Yet, as the chapter identifies, there are also domestic courts which, instead of providing compensation, are requiring domestic actors – public and private – to establish better frameworks to protect trans individuals.

340 Equality Ombudsman of **Finland**, Opinion TAS 229/07 (30 September 2008).

341 Equal Treatment Authority of **Hungary**, ETA: EBH/36/2018 (2018), www.egyenlobanasmod.hu/hu/jogeset/ebh362018 (accessed 24 October 2018).

342 National Council for Combating Discrimination of **Romania**, Decision No.3 (10 January 2018).

These frameworks include enhanced training and reporting mechanisms. In terms of the long-term goal of reducing trans-motivated discriminatory acts, sanctions, which result in more inclusive policies, better education on trans identities and moves towards an environment of greater openness may have the greatest impact.

11. Conclusion

The analysis of the ‘state of play’ of equality guarantees and non-discrimination protection for trans and intersex individuals shows a varied landscape – in terms of levels of protection, areas of protection and the groups which are protected. In only 13 of the 31 countries are gender identity and/or sex characteristics protected, at least to some extent, by national legislation. Overall, the equality and non-discrimination frameworks surveyed in this report require significant reform, with the position of non-binary and intersex people needing particular consideration. It is noteworthy, though, that a number of pressing issues seem largely to fall outside the scope of EU equality law, such as the position of young trans, intersex and non-binary people who would like diplomas that reflect their experienced name and identity, rather than the one attributed at birth. In this final chapter, the report identifies key issues for consideration and highlights important questions for future analysis.

Legal gender recognition

All of the 31 EU and EFTA states considered in this report have allowed certain individuals to amend their legal gender. However, the conditions for doing this vary greatly. In five countries there are still no legislative, administrative or judicial guidelines for acknowledging the preferred gender. On the other hand, seven jurisdictions affirm the preferred gender through a model of self-determination. In many other EU and EFTA states, applicants for gender recognition must surmount medical and marriage-related preconditions. Comparatively few of the 31 countries allow people under 16 or 18 years to obtain gender recognition. This is despite the growing visibility of trans minors, and the increasing number of trans young people who expressly desire an amended gender status. Trans children and adolescents have a number of specific interests, such as school diplomas, which increase their need for accurate gender markers. The processes through which trans and intersex persons can be formally acknowledged in their preferred gender is a question that needs further consideration. While, in general terms, legal gender recognition falls outside the scope of EU law, it is a matter which national law-makers and the European Court of Human Rights are increasingly addressing.

EU equality law frameworks

EU secondary legislation (indirectly) protects at least certain individuals who experience a trans identity. In the landmark *P v S and Cornwall County Council* judgment, the CJEU held that people who have a ‘gender reassignment’ characteristic fall within the ‘sex’ protections of EU employment non-discrimination guarantees. Recital 3 of the Recast Directive (2006/54/EC) now expressly provides that the Directive also applies to discrimination arising from ‘gender reassignment’. While this EU legislation should be acknowledged for its trailblazing role in mainstreaming trans protections both inside and outside the EU, it must equally be recognised that ‘gender reassignment’, and the medicalised connotations in which it is situated, may not be accessible for many people who seek to rely upon EU law guarantees.

A particularly important question is through what characteristic(s) should EU law (and the national law of Member States) protect trans and intersex people from transphobic discrimination? There are three apparent options: (i) protection through a broad interpretation of sex; (ii) adding the grounds of gender identity, gender expression and sex characteristics to the non-discrimination grounds; or (iii) a middle road, not adding any grounds, but ensuring a broad interpretation of sex by adding a clarification that ‘sex’ should be understood broadly to encompass all forms of discrimination related to gender identity, gender expression and sex characteristics.. In terms of the visibility of the groups concerned, as well as the symbolic role of the law, the latter two are preferable. That leaves open the complex issue of the effects and impact of one broad ‘gender/sex ground’ as opposed to various independently formulated grounds.

As noted, the advantages of the first option include the fact that the causes of many forms of discrimination of both cisgender people, women in particular, and trans and intersex people, may have similar roots (i.e.

gender bias, stereotypical thinking about gender roles, etc.). It also offers better opportunities to deal with intersectional forms of discrimination on these particular grounds. On the other hand, arguments in favour of separate grounds include the fact that trans and intersex people may experience discrimination which does not neatly fit into accepted ways of understanding sex discrimination. This is particularly true in relation to non-binary people. Thus, a broad conception of ‘sex’ to ensure the protection of trans and intersex people should probably be expanded to ensure the possibility of dealing with gender identities outside the gender binary. This is a question to which both EU-level and domestic policy-makers must turn their attention in the near future.

Following the judgment of the European Court of Human Rights in *AP, Garçon and Nicot* (2017), which outlaws sterilisation as a precondition for changing the legal sex, particular attention should be given to the current construction of pregnancy discrimination as a form of direct discrimination against *women*. If (trans) men can become pregnant, can pregnancy discrimination still be equated with *direct* discrimination against *women*? The equal treatment of pregnant trans men and men who have recently given birth has not been explored in this report beyond the area of employment discrimination. However, it is common knowledge that many policies and regulations regarding pregnancy and childbirth are drafted in sex-specific terms, focusing on women only. Ensuring equal treatment and protection of pregnant trans men and their babies, including for example in health insurance policies, has thus been put on the agenda. It is noteworthy, however, that at least seven of the 31 countries surveyed still require sterilisation as a precondition for changing the legal gender.

Single-sex facilities

A particularly contentious issue is access to single-sex spaces. In many jurisdictions throughout the 31 EU and EFTA states surveyed, segregated space has become a point of notable tension in movements for trans and intersex equality. Single-sex facilities are very common throughout the EU and the three EFTA jurisdictions, although their presence is more obvious in some countries than in others. Single-sex toilets, for example, are often regarded as a matter of course, causing daily dilemmas and struggles for many trans and non-binary individuals. These issues seem to be regulated as much by social morality as they are by identifiable laws. This is reinforced by the fact that, in many countries, the actual law regulating entry into women-only or men-only toilets remains unclear.

A legal bottleneck has arisen in terms of how feelings of discomfort should influence policies surrounding access to segregated spaces. In concrete terms, policy-makers around the EU must consider whether cisgender women's discomfort with the presence of trans women justifies policies of exclusion. In the **United Kingdom**, for example, the Equality Act 2010 permits service providers to refuse entry to single-sex services and communal accommodation for people who have a ‘gender reassignment’ characteristic. However, that refusal must be proportionate to achieving a legitimate aim. The issue of single-sex spaces raises wider questions, such as who the law is intended to protect, and requires that policy-makers (in consultation with relevant stakeholders) should implement appropriate and proportionate compromises.

Intersex

A striking and consistent feature of the analysis throughout this report is the extent to which EU and EFTA jurisdictions have failed to adopt provisions or policies to accommodate or protect intersex individuals. A small minority of jurisdictions create the possibility of postponing the attribution of legal gender to a new-born infant (**Germany, Malta, and the Netherlands**), although it must be acknowledged that intersex advocates do not recommend the routine withholding of legal gender from (or the imposition of a third gender on) babies who experience intersex variance. A policy which enjoys greater support is the criminalisation of non-therapeutic gender ‘normalising’ surgeries, and this has recently been introduced in **Malta**.

Intersex variance and those who experience it are particularly invisible within the sphere of domestic non-discrimination law. Although many national equality laws tend to, or at least are expected to, protect intersex individuals against discrimination on an equal footing with all other people (generally by employing a broad interpretation of ‘sex’), only **Malta** has made this inclusion explicit. This would also be achieved through a proposed law which is pending before parliament in the **Netherlands**. In seeking to identify future priorities for lesbian, gay, bisexual, trans and intersex populations – at both EU and domestic levels – there is a need to place greater emphasis on the rights and lived experiences of intersex populations.

Non-binary

The legal protection for people identifying as non-binary is also comparatively weak across the 28 EU and three EFTA states surveyed. A major legal obstacle lies in the fact that all 31 jurisdictions, as well as the legal framework of the EU itself, are firmly grounded in a binary conception of sex. This is also true for the few countries that have recently introduced (or recognised an obligation to introduce) a ‘third gender’ option (**Austria, Germany and Malta**). Therefore, endeavours to recognise gender(s) outside the traditional male / female dichotomy are likely to encounter (unexpected) difficulties in many different fields. How, for example, will gender quotas work for people with a non-binary gender, in a system where minimum levels have been set for both women and men? As more and more people living in the EU openly identify as non-binary, there is a growing need for law-makers (and national judiciaries) to engage with experiences beyond ‘male’ and ‘female’. The question of how non-binary gender ‘fits’ the ‘closed system’ of significant parts of EU sex discrimination law needs further consideration.

A changing legal landscape

Overall, the results of this report reveal a changing legal landscape for trans and intersex people throughout the European Union and three EFTA states. In many ways, the report contains much welcome information. A growing number of individuals have access to legal gender recognition, with many states adopting human rights-focused models of affirmation. In five countries legislative, administrative or judicial guidelines are still lacking. Trans individuals are more visible in non-discrimination protections and across the various issues considered in this report there are examples of best practice and of judicial actors intervening to challenge transphobic conduct.

Yet the position of trans and intersex people in Europe cannot be described as one of full (or even partial) equality. While public awareness is improving, trans and intersex people continue to suffer disproportionate social and legal burdens. For intersex people, this report reveals overwhelming experiences of legal ambiguity and invisibility, where individuals enjoy few explicit protections against unequal treatment. Member States also largely fail to counteract the practice of unnecessary medical interventions on the bodies of intersex people. Trans communities, on the other hand, are more likely to be formally embraced by domestic legal frameworks (often indirectly).

However, there remains a dearth of national case law condemning and censuring transphobic abuse. Overall, the report reveals an EU and EFTA-wide system of protections which, although improving, remain incapable of substantively achieving meaningful equality for trans and intersex people. Moving forward, policy-makers – both domestic and regional – must be willing to adopt much-needed steps to ensure that equality and non-discrimination are practically realised on the basis of gender identity, gender expression and sex characteristics.

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