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ARTICLE

Protecting (Trans and) Non-Binary People Against Discrimination in and Through EU Law: Time to Overcome Blind Spots

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Abstract

This Article examines the persistent gaps in the protection of trans and non–binary people against discrimination in European Union law, situating its analysis within a broader socio–legal context marked by rising anti–gender rhetoric and uneven national safeguards. Drawing on recent empirical data, including the 2023 FRA LGBTIQ Survey, it highlights the disproportionate levels of discrimination, violence, and harassment experienced by trans and non–binary individuals across the EU, as well as the growing political hostility that shapes their lived realities. Against this backdrop, the Article assesses the current EU legal framework—primary law, the Charter of Fundamental Rights, and secondary legislation—and demonstrates that explicit protection on the grounds of gender identity and gender expression remains absent. It then analyzes the evolving case law of the Court of Justice of the European Union, which has gradually interpreted the prohibition of sex discrimination as extending to certain forms of discrimination against trans persons, while still leaving significant blind spots, particularly for non–binary individuals. Building on recent jurisprudential developments, the Article explores the potential for a more inclusive and expansive reading of "sex" within EU equality law, arguing that such an approach could provide robust protection for all individuals facing discrimination based on gender identity or expression. Finally, it addresses the complex normative and doctrinal challenges that arise when balancing the interests of cisgender women with those of trans and non–binary people under the umbrella of sex–based equality. Positioned within a human–rights–oriented and social–justice–driven framework, the Article ultimately calls for renewed legal and political commitment to ensuring that EU equality law effectively safeguards the rights of trans and non–binary individuals.

Keywords: Trans and non-binary persons; gender identity; discrimination; EU law

A. Introduction

It is widely accepted that trans and non-binary people are among the most vulnerable groups in society, including in the European Union (EU).[1] For instance, the third edition of the EU's LGBTIQ Survey, undertaken by the Fundamental Rights Agency (FRA) in 2023, showed that across the EU, 54% of trans people, including non-binary people, reported being discriminated against on grounds of their gender identity in at least one area of life in the year leading up to the

[1]Alina Tryfonidou, *The Cross-Border Recognition of Changes in the Legal Sex of Transgender Persons: The Landmark Court of Justice Ruling in the Mirin Case*, 21 EUR. CONST. L. REV. 333, 333 (2025); Ana Cardoso, *Trans Rights in the European Union—"Sex" v. "Gender" on the Path Towards Equality and Non-Discrimination*, 8 EU L.J. 51, 52 (2023).

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survey.[2] At the same time, over the course of the last months, trans and non-binary rights have been at the center of five landmark rulings of the Court of Justice of the EU (hereafter CJEU or the Court). Against this background, this Article discusses the importance and possibilities of continuing efforts to expand protection of (trans and) non-binary people against discrimination in and through EU law. First, it will elaborate on the current state of equality for trans and non-binary people across the EU to offer the necessary societal context for the legal analysis it develops (Section B). Second, it will examine the extent to which (trans and) non-binary people *currently* find protection against discrimination in EU law, based on a reading of primary and secondary law and relevant CJEU case law (Section C). Third, it will analyze what level of protection (trans and) non-binary people *could* theoretically find in present EU law, taking into account recent developments in CJEU case law (Section D). Finally, it will address a particularly challenging issue for the future: balancing the interests of cisgender women and trans and non-binary individuals under the umbrella of the prohibition of "sex"–based discrimination in EU law (Section E). Positioned within a human rights framework and informed by a commitment to social justice, this Article seeks to contribute to the legal empowerment of trans and non-binary individuals, at a time when their rights are increasingly under attack in various jurisdictions across the globe.

In light of the objectives of the special issue in which this Article is included, it will pay particular attention to the unique perspectives of non-binary individuals in the context of discrimination based on gender identity or expression. Indeed, even more than trans women or trans men, non-binary people are directly confronted with the various ways in which many societies are gendered in a strictly binary manner. Taking the experiences of non–binary individuals into account is particularly challenging under the prohibition of discrimination in EU law, which "sacramentally" makes use of comparison most often in a binary and intercategorical setting when deciding whether unfavorable treatment took place—for instance, women versus men or trans persons versus cisgender persons.[3] Remedying (indirect) discrimination of non-binary people in a binary society might also warrant structural reforms that could potentially appear disproportionate to what can be expected of the normative majority.[4] Moreover, the right not to be discriminated against on grounds of gender identity may clash with state practices to attribute and register legal sex/gender in binary ways, which therefore do not recognize non-binary individuals.[5] At the same time, many of the legal interests of non-binary people are aligned with those of trans people, including in the context of the prohibition of discrimination on grounds of gender identity and expression. For this reason, this Article will often group trans and non-binary individuals together in its analysis.

B. Setting the Scene: The State of Equality for Trans and Non-Binary People in the EU

The most recent FRA LGBTIQ Survey showed that 54% of trans respondents—including non-binary people—reported being discriminated against on grounds of their gender identity across the EU. Discrimination on grounds of gender identity was reported by 64% of trans women, 63% of trans men, and 51% of non-binary respondents.[6] These figures are often much higher than the level of discrimination that official reports at the national level generally indicate, as only 16%

[2]European Union Agency for Fundamental Rights, *LGBTIQ Equality at a Crossroads—Progress and Challenges*, at 29 (2024), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2024-lgbtiq-equality_en.pdf.

[3]Nozizwe Dube, *A Typology of Comparators and Comparisons in EU Equality Law,* 62 Common Mkt. L. Rev. 49, 50 (2025).

[4]*See infra* Part E.

[5]C.L. Quinan, Verena Molitor, Marjolein van den Brink & Tatiana Zimenkova, *Framing Gender Identity Registration Amidst National and International Developments: Introduction to 'Bodies, Identities, and Gender Regimes: Human Rights and Legal Aspects of Gender Identity Registration',* 1 Int'l J. Gender, Sexuality & L. 1, 2 (2020).

[6]European Union Agency for Fundamental Rights, *supra* note 2, at 29, 36.

of trans women, 13% of trans men, and 10% of non–binary people across the EU report incidents to authorities such as police or equality bodies.[7] Furthermore, at the EU level, 20% of trans—including non-binary—people reported being the victim of physical and/or sexual violence on grounds of gender identity in the five years before the 2023 survey was carried out.[8] The violence seemed to be particularly directed at trans women, with 29% reporting an incident of hate-motivated violence, compared to 23% of trans men and 18% of non-binary and gender-diverse people.[9] Finally, an alarming 77% of trans women, 72% of trans men, and 66% of non-binary people indicated being confronted with an incident of harassment on the grounds of their gender identity in the year before the 2023 survey.[10]

Particularly worrying is that 59% of LGBTIQ respondents indicated that violence had increased in their country of residence over the five years leading up to the 2023 survey. Similarly, 53% of respondents reported an increase in prejudice and intolerance.[11] Only 19% of trans, including non–binary, people believed that their national government definitely or probably effectively combats prejudice and intolerance against LGBTIQ people.[12] Almost two-thirds of LGBTIQ respondents (63%) indicated that they always or often encountered online hatred, including calls for violence against LGBTIQ people and references to so-called LGBTIQ "propaganda" or "gender ideology," with LGBTIQ people being presented as a threat to "traditional" values in society.[13] Indeed, the Council of Europe Steering Committee for Human Rights noted recently that a climate of opposition to LGBTIQ rights has gained ground in several parts of Europe, linked to rising populist, homophobic, and transphobic rhetoric and the emerging so-called "anti-gender movement," which generally presents LGBTIQ rights as a threat to "traditional" hetero-normativity in Europe.[14]

In a resolution of January 2022, the Parliamentary Assembly of the Council of Europe explicitly condemned "with particular force the extensive and often virulent attacks on the rights of LGBTI[Q] people that have been occurring for several years in, among other countries, Hungary, Poland, the Russian Federation, Turkey, and the United Kingdom."[15] This statement was mirrored in a 2024 resolution by the European Parliament, in which it condemned

> [T]he fact that the rise of far-right political forces has motivated an increase in the stigmatization, harassment, violence and persecution of [LGBTIQ] persons and [LGBTIQ] civil society organizations and activists; [and] the increasing scapegoating of the [LGBTIQ] community and the harmful designation of the promotion of [LGBTIQ] rights as an "ideology."[16]

The annually updated Rainbow Map created by the European division of the International Lesbian, Gay, Bisexual Trans, and Intersex Association (ILGA–Europe) also confirmed a worrying trend in 2025 of European States dismantling LGBTIQ human rights under the guise of preserving

[7] *Id.* at 49.
[8] *Id.* at 56.
[9] *Id.* at 67.
[10] *Id.* at 71.
[11] *Id.* at 64.
[12] *Id.* at 82.
[13] *Id.* at 21.
[14] Council of Europe Steering Committee for Human Rights, *Combating discrimination on grounds of sexual orientation and gender identity in Council of Europe Member States*, at 11 (2019), https://rm.coe.int/combating-discrimination-on-grounds-of-sexual-orientation-and-gender-i/16809fb2b8.
[15] Eur. Parliamentary Association, *Combating rising hate against LGBTI people in Europe*, at para. 1 (2022), https://pace.coe.int/en/files/29712/html.
[16] Eur. Parliament, *Resolution of 8 February 2024 on the Implementation of the EU LGBTIQ Equality Strategy 2020-2025* (2023/2082(INI)) 6 (2024), https://www.europarl.europa.eu/doceo/document/TA-9-2024-0076_EN.html.

public order, with some EU Member States being more strongly in the grip of anti-LGBTIQ or anti-gender rhetoric than others.[17] For instance, when looking at the field of equality and non-discrimination legislation, ILGA-Europe scored the performance of EU Member States in the range of 8.74% (Italy) to 87.13% (Denmark), clearly demonstrating big legal differences across the EU.[18] Focusing specifically on the legal position of trans and non-binary people, Transgender Europe (TGEU) similarly reported significant differences among EU Member States in their protection and recognition of trans rights, including in the context of equality and non-discrimination.[19]

As Sarah Ganty and Juan Carlos Benito Sanchez have shown, while the grounds of gender identity and gender expression are strongly enshrined in anti-discrimination law in some EU Member States, they are conspicuously absent in others.[20] According to TGEU's trans rights index, as of 2025, a majority of Member States provide legal protection against discrimination on the grounds of gender identity/expression in national law, predominantly in the field of employment, and to a lesser extent also in the fields of goods and services, healthcare, education, and housing.[21] Protection is generally not offered in Member States such as Hungary, Italy, Latvia, Lithuania, and Romania, which are notably known for their opposition to LGBTIQ rights and support of anti-gender rhetoric. In the absence of uniform legislation across Member States, the potential for further advancing protection against discrimination on grounds of gender identity/expression in EU law merits attention.

While it is easy to point out strengths and weaknesses at the national level across the EU, it is important to point out that the rights of LGBTIQ people are not fully protected in EU law either.[22] Given the fact that the core of EU Member State anti-discrimination legislation is a transposition of various EU directives,[23] the significance of existing lacunae at the EU level cannot be overlooked. In this light, the first von der Leyen Commission—from 2019 to 2024—announced the first-ever EU LGBTIQ Equality Strategy (2020–2025), in which the Commission put forward several action points to advance LGBTIQ equality in the EU.[24] Importantly, the Commission acknowledged the need to adopt an intersectional approach in order to pay attention to the diversity among LGBTIQ people and the needs of the most vulnerable groups, including trans and non-binary people.[25] Noting the divergent approaches among Member States, the Commission announced it would support Member States in exchanging best practices on legal protection against discrimination on the grounds of gender identity and expression, and would examine

[17]ILGA-Europe, *Rainbow Map 2025* (May 14, 2025), https://www.ilga-europe.org/report/rainbow-map-2025/.

[18]ILGA-Europe, *Rainbow Map* (2025), https://rainbowmap.ilga-europe.org/categories/equality-non-discrimination/.

[19]Transgender Europe, *Trans Rights Map* (2025), https://transrightsmap.tgeu.org/home/non-discrimination.

[20]Sarah Ganty & Juan Carlos Benito Sanchez, *Expanding the List of Protected Grounds Within Anti-Discrimination Law in the EU,* Equinet 60 (2021), https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/.

[21]Transgender Europe, *Trans Rights Map* (2025), https://transrightsmap.tgeu.org/home/non-discrimination (noting that among these fields, protection against discrimination is best guaranteed in employment. Indeed, certain Member States that provide protection against discrimination on grounds of gender identity/expression in the context of employment have not extended this protection across other fields. This could be related to the fact that only the Recast Equal Treatment Directive, which applies to employment and occupation, mentions in its preamble that "sex" needs to be interpreted as including "gender reassignment"). Directive 2006/54 of the European Parliament and 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), 2006 O.J. (L 204) 23 (EC) [hereinafter Recast Equal Treatment Directive].

[22]Pieter Cannoot & Cathérine Van de Graaf, *Charting Progress: A Comparative Analysis of National LGBTIQ Equality Action Plans in the EU,* European Commission Directorate-General for Justice and Consumers 11 (2024), https://www.migpolgroup.com/wp-content/uploads/2024/04/Charting-Progress_A-Comparative-LGBTIQ_2023_final-for-web.pdf.

[23]*See infra* Part C.

[24]*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Union of Equality: LGBTIQ Equality Strategy 2020–2025*, COM (2020) 698 final (November 12, 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0698.

[25]*Id.* at 3.

how "non-binary … and queer people" could be better protected against discrimination.[26] However, even though the Commission stated that EU law ensuring legal protection against discrimination is "key to advancing LGBTIQ equality, as is the CJEU case law," the Equality Strategy notably did not foresee amending the legal framework at the EU level to improve protection for trans and non-binary people.[27] The follow-up LGBTIQ+ Equality Strategy for 2026–2030 further lowered the Commission's level of ambition to close the protection gap for trans and non-binary people, as no specific actions to update the EU legal framework or stimulate dialogue to extend protection among Member States were foreseen.[28]

C. Current Protection of (Trans and) Non-Binary People Against Discrimination in EU Law

I. Protection Against Discrimination in Primary and Secondary EU Law

Over time, scholars have noted a shift in the EU's approach to equality and non-discrimination, from a limited focus on eliminating barriers to economic integration and mobility within the internal market towards a broader embrace of fundamental rights.[29] This development is particularly reflected in Article 2 of the Treaty on European Union (TEU), which anchors the Union in values such as equality and respect for human rights. In her long-awaited opinion in the infringement proceedings of the European Commission against Hungary following the adoption of the Hungarian "anti-LGBTIQ propaganda" legislation, Advocate General Ćapeta argued that the values in Article 2 of the TEU include LGBTIQ equality.[30] In its judgment of April 21, 2026, the CJEU confirmed this view, by holding that the Hungarian law resulted in the stigmatization and marginalization of "non-cisgender" and "non-heterosexual" persons solely on the ground of their gender identity or sexual orientation.[31] According to the Court, such stigmatization and marginalization, which is tantamount to establishing, maintaining, or reinforcing the social "invisibility" of some members of society, runs counter to the values of respect for human dignity, equality, and respect for human rights, including the rights of persons belonging to minorities, as

[26] *Id.* at 6.

[27] *Id.* Note that in the implementation report of 2024, the Commission recalled that the adoption into law of the proposed Equal Treatment Directive of 2008 remained a priority. This directive would have, *inter alia*, extended the scope of legal protection against discrimination on the grounds of sexual orientation beyond employment and occupation. *See* EUROPEAN COMMISSION, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Implementation of the 2020–2025 LGBTIQ Equality Strategy*, at 5 (2024), https://commission.europa.eu/document/download/d9e23ccc-4032-41d0-b208-68650103ef8a_en?filename=Report%20LGBTIQ.pdf. While the Commission announced its intention to withdraw the proposal in February 2025, it has since then again reversed course.

[28] EUROPEAN COMMISSION, *Union of Equality: LGBTIQ+ Equality Strategy 2026-2030*, COM (2025) 725 final, https://commission.europa.eu/publications/lgbtiq-equality-strategy-2026-2030-0_en. *See* Pieter Cannoot, *The LGBTIQ+ Equality Strategy 2026-2030*, POL'Y DEP'T FOR JUST., C.L. & INSTITUTIONAL AFFS. (2025), https://www.europarl.europa.eu/RegData/etudes/IDAN/2025/778856/IUST_IDA(2025)778856_EN.pdf (analyzing the LGBTIQ+ Equality Strategy 2026–2030); Alessandro Marcia, *Rainbow Europe or Rainbow Washing? A Comment on the EU's updated LGBTIQ+ Equality Strategy*, VERFASSUNGSBLOG (Oct. 21, 2025), https://verfassungsblog.de/rainbow-europe-or-rainbow-washing/.

[29] Cardoso, *supra* note 1, at 54; Nicholas Bamforth, *Discrimination on the Grounds of Sexual Orientation and Gender Identity*, *in* RESEARCH HANDBOOK ON EU LABOUR LAW 495, 524 (Alan Bogg, Cathryn Costello & A.C.L. Davies eds., 2016); Andreas Ziegler, *The European Union as a Protector and Promoter of Equality: Discrimination on Grounds of Sexual Orientation and Gender Identity*, *in* THE EUROPEAN UNION AS PROTECTOR AND PROMOTER OF EQUALITY 283, 285 (Thomas Giegerich ed., 2020); Christa Tobler, *Equality and Non-Discrimination under the ECHR and EU Law. A Comparison Focusing on Discrimination against LGBTI Persons*, 74 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 521, 521–61 (2014).

[30] Opinion of Advocate General Ćapeta at para. 262, Case C-769/22, Commission v. Hungary (Valeurs de l'Union) (June 5, 2025).

[31] Case C-769/22, European Commission v. Hungary, ECLI:EU:C:2026:326, para. 554 (Apr. 21, 2026), https://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX:62022CJ0769.

referred to in Article 2 of the TEU.[32] It concluded that the Hungarian law breached, in a both manifest and particularly serious way, the rights of "non-cisgender" or "non-heterosexual" persons as well as the values covered by Article 2 of the TEU.[33]

Though a comprehensive examination of the EU's rather complex legal framework on equality and anti-discrimination exceeds the scope of this Article, it is necessary to sketch out the main legal instruments and jurisprudence relevant to protecting (trans and) non-binary people against discrimination on grounds of gender identity and expression.[34]

At present, EU equality and anti-discrimination law affords only partial protection to LGBTIQ people, and especially to those who are trans or non–binary. The legal texts underpinning EU equality and anti-discrimination law—the Treaties, the Charter of Fundamental Rights (CFR or the Charter), and the applicable directives—do not explicitly recognize gender identity or gender expression as protected grounds.[35] This should not be surprising, considering the fact that the relevant Treaty provisions—especially Article 19 of the Treaty on the Functioning of the European Union (TFEU) and Article 21 of the CFR—predate the growth in general attention among legal and human rights actors for trans-specific forms of discrimination, notably also in the case law of the European Court of Human Rights (ECtHR).[36] However, as will be explained in Section D, an expansive interpretation of the existing prohibition of discrimination on grounds of sex in EU law arguably extends protection to all trans and non-binary individuals suffering discrimination on grounds of gender identity and gender expression, potentially even offering them stronger safeguards than those who are confronted with discrimination on grounds of sexual orientation.

Further specifying the aforementioned values of the EU, Articles 2 and 3(3) of the TEU attach particular importance to equality between women and men in the EU and EU law. In this light, Article 10 of the TFEU holds that, in defining and implementing its policies and activities, the EU aims to combat discrimination based on sex, leaving out gender identity or gender expression. Article 19 of the TFEU then grants the EU competence to adopt secondary legislation to combat discrimination, including discrimination on grounds of sex, but leaving out the grounds of gender identity and gender expression. Similarly, Article 157 of the TFEU affirms the principle of equal pay for male and female workers, seemingly leaving out anyone who does not fit neatly within these terms.

The Charter's Article 21(1) includes a wide-ranging anti-discrimination clause that names sex and sexual orientation among its protected grounds, and also contains an open ground. Its open-ended language suggests that gender identity and expression may fall within its ambit, particularly given its alignment with Article 14 of the ECHR, as mandated by Article 52(3) of the CFR. Indeed, the ECtHR has repeatedly held that Article 14 of the ECHR provides protection against discrimination on the grounds of gender identity.[37] However, Article 51(1) of the CFR restricts the Charter's applicability to EU institutions and Member States when they act within the scope of EU law. Even though Article 21(1) of the CFR has been confirmed by the CJEU to have horizontal direct effect,[38] allowing it to be invoked in disputes between private parties, EU law does not oblige

[32] *Id.* at para. 555.

[33] *Id.* at para. 556.

[34] *See also* Pieter Cannoot & Sarah Ganty, *Protecting Trans, Non-Binary and Intersex Persons Against Discrimination in EU Law,* EUR. EQUAL. L. REV. 37, 37–55 (2022), on which this Section builds.

[35] Serhii Lashyn, *Transgender EU Citizens and the Limited Form of Union Citizenship Available to Them,* 30 FEMINIST LEGAL STUD. 201, 202 (2022).

[36] *See infra* note 45.

[37] P.V. v. Spain, App. No. 35159/09, para. 30 (Nov. 30, 2010), https://hudoc.echr.coe.int/tkp197/view.asp?i=001-101943; Identoba and Others v. Georgia, App. No. 73235/12, para. 96 (May 12, 2015), https://hudoc.echr.coe.int/eng?i=001-154400; A.M. and Others v. Russia, App. No. 47220/19, para. 73 (July 6, 2021), https://hudoc.echr.coe.int/eng?i=001-210878.

[38] Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-09981 paras. 76–78; Case C-555/07, Seda Kücükdeveci v. Swedex GmbH & Co. KG, 2010 E.C.R. I-00365 para. 54; Case C-414/16, Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V., ECLI:EU:C:2018:257, para. 81 (Apr. 17, 2018) (developing this principle by the CJEU).

Member States to empower equality bodies to act on claims falling under Article 21(1) but outside the scope of the anti-discrimination directives. This has remained the case following the recent adoption of the Directives on the Standards for Equality Bodies.[39] Finally, Article 23 of the CFR provides that equality between men and women must be ensured in all areas, including employment, work, and pay, and permits positive action measures.

Several directives have been enacted under Articles 19, which requires unanimity among Member States in the Council, and 157 of the TFEU, which only requires a qualified majority in the Council. For the purposes of this Article, the most important ones are Council Directive 2004/113/EC of December 13, 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services (hereafter the Goods and Services Directive),[40] and the Recast Directive 2006/54/EC of the European Parliament and of the Council of July 5, 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (hereafter the Recast Equal Treatment Directive).[41] Besides these, Council Directive 79/7/EEC of December 19, 1978, on the progressive implementation of the principle of equal treatment for men and women in matters of social security (hereafter the Social Security Directive)[42] was adopted on the basis of current Articles 115 and 352 of the TFEU. These directives together seek to eliminate direct and indirect discrimination on grounds of sex, as well as harassment and sexual harassment in the areas of employment, goods and services, and social security. In comparison with other protected grounds in EU law—except for race and ethnic origin, but notably including sexual orientation—the framework of sex discrimination is well-developed and could be considered as one of the most elaborate aspects of EU social policy.[43]

A mere textual review of the substantive provisions of the Treaties, Charter, and secondary legislation shows that EU anti-discrimination law continues to speak predominantly in terms of "sex discrimination" and "equality between men and women," terminology that seems to suggest a strictly binary and sex-based protective scope. Explicit references to (trans and) non-binary persons are absent. However, Recital 3 of the preamble to the Recast Equal Treatment Directive mentions that

> The scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.[44]

[39]The mandate of equality bodies needs to cover the protected grounds of religion or belief, disability, age, sexual orientation (in the area of employment), and sex/gender (in the areas of employment, goods and services, and social security). *See* Council Directive 2024/1499 of May 7, 2024, On Standards for Equality Bodies in the Field of Equal Treatment Between Persons Irrespective of Their Racial or Ethnic Origin, Equal Treatment in Matters of Employment and Occupation Between Persons Irrespective of Their Religion or Belief, Disability, Age or Sexual orientation, Equal Treatment Between Women and Men in Matters of Social Security and in the Access to and Supply of Goods and Services, and Amending Directives 2000/43/EC and 2004/113/EC, 2024 O.J. (L 2024) 1499 (EU); Directive 2024/1500 of the European Parliament and of the Council of May 14, 2024, On Standards for Equality Bodies in the Field of Equal Treatment and Equal Opportunities Between Women and Men in Matters of Employment and Occupation, and Amending Directives 2006/54/EC and 2010/41/EU, 2024 O.J. (L 2024) 1500 (EU) [hereinafter the Standards for Equality Bodies Directives].

[40]Council Directive 2004/113 of Dec. 14, 2004, Implementing the Principle of Equal Treatment Between Men and Women in the Access to and Supply of Goods and Services, 2004 O.J. (L 373) 37 (EC) [hereinafter Goods and Services Directive].

[41]Directive 2006/54 of the European Parliament and the Council of Jul. 5, 2006 (recast), On the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation, 2006 O.J. (L 204) 23 (EC) [hereinafter Recast Equal Treatment Directive].

[42]Council Directive 79/7 of Dec. 19, 1978, On the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security, 1979 O.J. (L 6) 24 (EEC) [hereinafter Social Security Directive].

[43]European Union Agency for Fundamental Rights, *Handbook on European Non-Discrimination Law* 162 (2018), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-handbook-non-discrimination-law-2018_en.pdf.

[44]Recital 3 of the Recast Equal Treatment Directive, *supra* note 41.

The same clarification was recently also included in Recital 5 of the preamble to the Pay Transparency Directive of May 10, 2023,[45] and Recitals 5 and 7 of the preambles to the Standards for Equality Bodies Directives of May 7 and 14, 2024.[46] As mentioned in the recitals, the preambles serve to codify the case law of the CJEU on this point.

The next subsection will therefore explore to what extent (trans and) non–binary people currently find protection against discrimination in CJEU case law dealing with the prohibition of discrimination on grounds of sex.

II. Protection Against Discrimination in CJEU Case Law

According to the current CJEU case law that specifically deals with trans, and non-binary, equality, the prohibition of sex-based discrimination offers limited protection to individuals whose gender identity differs from the sex assigned to them at birth, specifically those who are planning, undergoing, or have completed trans-specific gender-affirming medical procedures.[47] In this regard, and as mentioned above, the Court has clarified that the prohibition of sex-based discrimination cannot be narrowly understood as discrimination solely between men and women.

The first significant engagement of the Court with discrimination against trans people occurred in the 1996 case of *P. v. S. and Cornwall County Council*.[48] There, the dismissal of a trans woman (P.) following her gender transition was found to contravene the then-applicable Directive 76/207/EEC 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 (repealed by the Recast Equal Treatment Directive).[49] The CJEU held that where an individual is removed from their position because they intend to undergo or have undergone "gender reassignment," they are subjected to unfavorable treatment compared to other individuals of the sex they were previously assigned.[50] Notably, this judgment also marked a discursive shift in existing case law, as the Court began employing the term "gender" alongside "sex,"[51] and has since used the two terms interchangeably in the context of EU equality and non-discrimination law.[52]

In a similar ruling, the CJEU decided in *K.B. v. National Health Service Pensions Agency and Secretary of State for Health* that national legislation which effectively prevents a trans person from fulfilling a condition necessary to access rights under EU law due to lack of legal gender recognition at the national level is, in principle, incompatible with EU equality guarantees.[53]

[45]Directive of the European Parliament and of the Council of May 10, 2023, To Strengthen the Application of the Principle of Equal Pay for Equal Work or Work of Equal Value Between Men and Women Through Pay Transparency and Enforcement Mechanisms, 2023 O.J. (L 132) 21 (EU).

[46]Standards for Equality Bodies Directives, *supra* note 39.

[47]Case C-13/94, P. v. S. and Cornwall County Council, 1996 E.C.R. I-02143, para. 21.

[48]*Id.*

[49]Council Directive 76/207 of Feb. 9, 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, 1976 O.J. (L 39) 40 (EEC).

[50]Note that, despite the positive outcome, the judgment was heavily criticized for comparing P.'s position to that of cisgender men, rather than other (cisgender) women. In this way, the Court undermined P.'s female identity. *See* Cardoso, *supra* note 1, at 58; Lashyn, *supra* note 35, at 211. The Court later refrained from such comparison, instead preferring to compare the situation of a trans person with that of a cisgender person who shares the same gender identity. *See, e.g.*, Case C-117/01, K.B. v National Health Service Pensions Agency and Secretary of State for Health, 2004 E.C.R. I-00541, para. 31; Case C-423/04, Richards v Secretary of State for Work and Pensions, 2006 E.C.R. I-03585, para. 29.

[51]*See* Tryfonidou, *supra* note 1, at 10.

[52]Ulrike Lembke, *Tackling Sex Discrimination to Achieve Gender Equality? Conceptions of Sex and Gender in EU Non-Discrimination Law and Policies,* EUR. EQUAL. L. REV. 46, 50 (2016).

[53]*K.B.*, Case C-117/01 at para. 36.

The case involved R., a trans man, who was denied the ability to be nominated for a survivor's pension due to the inability to amend his birth certificate. As a result, his partner, K.B., could not legally marry him and thus could not designate him as the beneficiary of a survivor's pension. The Court found, taking into account the decision of the ECtHR in *Christine Goodwin v. the United Kingdom,* that the impossibility for a trans person to marry in the absence of gender recognition violates Article 12 of the ECHR,[54] and such indirect exclusion of trans individuals from pension entitlements contravened the principle of equality enshrined in Article 157 of the TFEU.

The Court applied a comparable logic in the *Richards* case,[55] which dealt with access to retirement pensions under the Social Security Directive. The CJEU ruled that denying a trans woman, who had undergone gender-affirming surgery but had had no access to legal gender recognition, a retirement pension on the basis that she had not yet reached the statutory pension age for men (65) was unlawful. Had she been legally recognized as a woman under national law, she would have qualified for the pension at 60. The ruling made clear that, although EU Member States enjoy a certain discretion in regulating legal gender recognition, they may not rely on a refusal of such recognition to withhold social security rights falling within the scope of EU law, that would otherwise be accessible for trans people.

The most recent development came in *MB v. Secretary of State for Work and Pensions*,[56] where the Court once again interpreted the Social Security Directive as precluding national laws that impose additional conditions on trans people seeking to access gender-specific retirement entitlements. In MB's case, she was required not only to meet physical, psychological, and social criteria for gender recognition but also to annul her marriage to a woman because same-sex marriage was not legally recognized in England and Wales at the time. This prerequisite effectively penalized MB in comparison to cisgender married individuals, who did not have to annul their marriage to access retirement benefits.

As scholars have already pointed out, the CJEU has thus given a progressive, capacious interpretation to the prohibition of sex-based discrimination in EU non-discrimination law, by including the ground of "gender reassignment" in its protective scope.[57] However, given the fact that the Court has only dealt with four cases that directly concern discrimination of trans individuals—all stemming from the United Kingdom, which is no longer an EU Member State—uncertainties about the case law's reach remain.

For a number of years, commentators have argued that the CJEU case law on trans discrimination deploys a "classical," medicalized, and binary trans narrative.[58] All trans individuals in the aforementioned cases indeed identified as either a man or a woman and had undergone both a social and medical transition. As Stefano Osella points out, even though the CJEU has not specified a list of criteria with which individuals need to comply in order to claim protection against discrimination on grounds of "gender reassignment" in EU law, the Court has to date only addressed and provided protection to "behaviorally normative" trans people.[59] Even in the most recent case of *MB,* the Court explicitly referred to MB's situation as a person "who [has] lived for a significant period as [a person] of a gender other than their birth gender and who

[54]Goodwin v. The United Kingdom, App. No. 28957/95 (July 11, 2002), https://hudoc.echr.coe.int/fre?i=001-60596.

[55]*Richards*, Case C-423/04 at para. 38.

[56]Case C-451/16, MB v. Sec'y of State for Work and Pensions, ECLI:EU:C:2018:492, para. 53 (Jun. 26, 2018).

[57]Tryfonidou, *supra* note 1, at 9.

[58]*See, e.g.*, Mark Bell, *Gender Identity and Sexual Orientation: Alternate Pathways in EU Equality Law,* 60 AM. J. COMPAR. L. 127, 137 (2012); Peter Dunne & Marjolein van den Brink, *Trans and Intersex Equality Rights in Europe – a Comparative Analysis*, EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR JUSTICE AND CONSUMERS 53, 54 (2018), https://www.equalitylaw.eu/downloads/4739-trans-and-intersex-equality-rights-in-europe-a-comparative-analysis-pdf-732-kb; Stefano Osella, *The Court of Justice and Gender Recognition: A Possibility for an Expansive Interpretation*, 87 WOMEN'S STUD. INT'L F. 1, 1 (2021); Tryfonidou, *supra* note 1, at 11.

[59]Osella, *supra* note 58, at 5.

[has] undergone a gender reassignment operation" to find that MB must be considered to have "changed gender" for the purposes of the application of the Social Security Directive.[60] This use of a medicalized, binary lens brought Peter Dunne and Marjolein van den Brink to question whether all trans individuals, and certainly non-binary individuals, would actually be covered by the prohibition of sex-based discrimination.[61]

Moreover, to date, the CJEU has not addressed the application of the Goods and Services Directive to trans—including non-binary—individuals, or at least not in a case directly dealing with EU non-discrimination law.[62] Although the directive upholds the principle of equal treatment between women and men in the provision of goods and services comparable to the Recast Equal Treatment Directive, the preamble remains silent on whether this extends to discrimination based on "gender reassignment." In other words, next to uncertainties about the case law's personal scope, it remains to be seen whether the CJEU will extend its current reasoning from the areas of employment and social security to the area of goods and services in a case directly dealing with issues of equality and discrimination.

D. Potential Protection of (Trans and) Non-Binary People Against Discrimination in EU Law

The previous section demonstrated that a textual review of the EU's primary and secondary equality and non-discrimination framework, as well as an analysis of the existing CJEU case law on trans—including non-binary—discrimination, reveals only a partial protection against discrimination on grounds of gender identity and gender expression in EU law. However, the question is then whether trans and non-binary people *could* theoretically still be better protected against discrimination on the grounds of gender identity and expression in EU law.

Given the aforementioned observed spread of anti-LGBTIQ sentiments, the increasing influence of the "anti-gender ideology movement," and rule of law backsliding in certain EU Member States,[63] focusing on protection against discrimination at the EU level seems to be of ever-growing importance. Greater legal protection against discrimination at the EU level would first of all lead to increased harmonization among EU Member States. Given the primacy of EU law, strengthening the rights of trans and non-binary people at the EU level would also counter anti-trans legislation or case law at the national level. Moreover, trans-friendly developments in EU law—for instance through case law of the CJEU—could be instrumental in pushing the European Commission to start or continue infringement proceedings against Member States that openly demonstrate hostility towards LGBTIQ people and have caused a rollback in the protection of trans rights.

The following section will argue that *all* (trans and) non-binary persons are theoretically already protected against discrimination in EU law, even without needing to amend the Treaties, Charter, or the non-discrimination directives (Section I). This capacious understanding of sex-based discrimination is not only conceptually coherent, but is also logically grounded in ongoing developments in CJEU case law (Section II). However, while current EU law does not make such legislative reform strictly necessary for the protection of trans and non-binary people against discrimination to be effective, this section will also address the benefits of and obstacles to the formal recognition of gender identity and gender expression as self-standing protected grounds in EU law.

[60] *MB*, Case-451/16 at para. 35.

[61] Dunne & van den Brink, *supra* note 58, at 47, 54.

[62] *See infra* Part D.

[63] Laurent Puech, *The Rule of Law as a Well-Established and Well-Defined Principle of EU Law,* 14 HAGUE J. ON RULE L. 107, 107–38 (2022).

I. Furthering the Capacious Understanding of "Sex"-Based Discrimination in EU Law

1. Reading "Gender Identity" and "Gender Expression" into "Sex"-Based Discrimination Through Case Law

The prohibition of "sex"-based discrimination under both EU primary and secondary equality and non-discrimination law can be reasonably interpreted as encompassing discrimination based on gender identity and gender expression. This is because trans and non-binary individuals are subjected to discrimination precisely due to their deviation from prevailing gendered societal norms tied to the *sex* assigned to them at birth (also called cisnormativity).[64] For example, someone designated male at birth who identifies as a woman or as non-binary—or who adopts a gender expression not aligned with traditional masculinity—challenges the expectation that they should exhibit a masculine identity or appearance. Put differently, "sex" functions as a foundational factor in the discriminatory experiences faced by trans and non-binary people.[65] Discrimination on grounds of gender identity or expression thus shows the same interaction between sex and socially constructed gendered expectations and stereotypes, as discrimination affecting cisgender women, and to a lesser degree cisgender men.

As Ulrike Lembke points out, the scope of the legal framework addressing sex-based discrimination must account for both the harm caused by rigid, harmful gender norms imposed on those who conform to cisnormative expectations in society, and the disadvantages suffered by those whose sex or gender performance does not align with those expectations.[66] Both forms of discrimination are essentially rooted in a stereotypical, binary, and cisnormative conception of sex. As Ana Cardoso puts it, "in both cases, the specific individual is suffering, but the reasons are very different."[67] In other words, when tackling sex-based discrimination, both an external and an internal hierarchy of sex/gender (dis)advantage needs to be captured.[68]

Based on this capacious reading,[69] sex-based discrimination could therefore refer to a wide range of situations, from discrimination on the grounds of biological sex (characteristics) and socially constructed gendered stereotypes or expectations that interact with sex, to discrimination on grounds of gender identity or gender expression. Depending on the context at stake, any of these dimensions or an intersection thereof could come to the foreground, activating the protection offered by the legal framework mentioned above, and taking into account the circumstances of the situation.

This inclusive understanding of the ground of "sex" is aligned with long–standing practice in EU (case) law, which makes use of the terms "sex" and "gender" in an interchangeable way.[70] Indeed, it is widely accepted that EU law does not only provide protection against discrimination

[64]Lembke, *supra* note 52, at 48. *See also* Holning Lau, *Sexual Orientation and Gender Identity Discrimination*, 2 COMPAR. DISCRIMINATION L. 1, 10 (2018).

[65]Lembke, *supra* note 52, at 48.

[66]*Id.*

[67]Cardoso, *supra* note 1, at 61.

[68]Lembke, *supra* note 52, at 52.

[69]The possibility of a "capacious interpretation" of protected grounds in EU equality and non-discrimination law was first introduced by Sandra Fredman, who argued that such a view suggests that all aspects of a person's identity should be taken into account within one protected ground to include multiple intersecting relationships of disadvantage. In other words, a capacious understanding of grounds allows for protection against intersectional forms of discrimination. For the purposes of this Article, the term "capacious reading" or "capacious interpretation" is used to describe an expansive, inclusive, and contextual interpretation of the protected ground of "sex", to take into account the multidimensional layers of gender discrimination that interact with sex. *See* SANDRA FREDMAN, INTERSECTIONAL DISCRIMINATION IN EU GENDER EQUALITY AND NON-DISCRIMINATION LAW 66, 69 (2016), https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb. *See* Raphaële Xenidis, *Turning EU Equality Law to Algorithmic Discrimination: Three Pathways to Resilience*, 27 MAASTRICHT J. EUR. & COMPAR. L. 736, 750 (2020) (explaining the need for a purposive and contextual interpretation of grounds).

[70]Susanne Burri, *EU gender equality law—update 2018,* EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR JUSTICE AND CONSUMERS 6 (2018), https://www.equalitylaw.eu/downloads/4767-eu-gender-equality-law-update-2018-pdf-444-kb.

that may stem from differences in biological sex (characteristics), but also, and arguably predominantly, against discrimination resulting from the socially constructed hierarchies, power relations, expectations, and norms affecting women and men.[71] As discussed, the CJEU has already affirmed that the prohibition of sex-based discrimination under EU law extends to cases involving "gender reassignment." While the ground of gender reassignment is less inclusive than the grounds of gender identity and gender expression, at the very least, this case law confirms that the protection offered by EU law is not confined to only essentialized, innate, and stable categories of "men" and "women."

Moreover, as explained by Osella, it is not because certain trans and non–binary people are *not yet included* in the case law that they are also *excluded* from EU law's protection against discrimination.[72] Indeed, Osella argues not only that the CJEU has never decided on a list of criteria for understanding the scope of the ground of "gender reassignment"—such as, for instance, the need to undergo gender-affirming (surgical) treatment—but also that the Court's reference to the classical trans "trapped–in–the–wrong–body" narrative in its pivotal judgment in *P. v. S. and Cornwall County Council* could simply be considered as a product of its time. The Court could be seen as merely re-enacting a cultural understanding of trans identities that was dominant in legal and general language at that point in time.[73] Compared to the 1990s, the understanding that both sex and gender (identity) need to be conceptualized as a spectrum is now much more widespread. Nevertheless, it must be pointed out that already in 1996, Advocate-General Tesauro argued that

> It is necessary to go beyond the traditional classification and recognize that, in addition to the man/woman dichotomy, there is a range of characteristics, behaviour and roles shared by men and women, so that sex itself ought rather to be thought of as a continuum. From that point of view, it is clear that it would not be right to continue to treat as unlawful solely acts of discrimination on ground of sex which are referrable to men and women in the traditional sense of those terms, while refusing to protect those who are also treated unfavourably precisely because of their sex and/or gender identity.[74]

In other words, adding an inclusive, gender diverse lens to the prohibition of sex-based discrimination in EU law might be less revolutionary or controversial than it appears at first sight.

It may thus be argued that the CJEU may very well further interpret EU anti–discrimination law to prohibit adverse treatment of every trans or non–binary individual who does not behave, identify, or present in ways that conform to stereotypical expectations linked to the sex assigned to them at birth. However, this would of course also depend on the personal and material circumstances presented in the case(s) at hand, as well as the formulation of the preliminary question(s) presented to the Court. Given the fact that the aforementioned 2023 LGBTIQ Survey indicated that only very low numbers of trans and non-binary victims of discrimination are inclined to report incidents of discrimination to official authorities across the EU, it seems fair to assume that it would take a considerable amount of time for multiple cases of discrimination on grounds of gender identity or expression to arrive at the CJEU, especially to be as varied as necessary to answer all questions raised above. However, civil society organizations could still play an instrumental role in identifying suitable cases to bring before the CJEU through several national procedures by way of strategic litigation, which could speed up this process.

[71] *Id.* at 12, 13.
[72] Osella, *supra* note 59, at 5.
[73] *Id.*
[74] Opinion of Advocate General Tesauro at para. 55, Case C-13/94, P. v. S. and Cornwall County Council (Dec. 14, 1995).

In the same way it has interpreted "sex" as "gender,"[75] the European Commission has already supported the broader interpretative approach regarding trans and non-binary people, suggesting that the CJEU's inclusive reading of "gender reassignment" should not only equally apply to the prohibition of sex-based discrimination in the Goods and Services Directive, but also to other instances of discrimination based on gender identity.[76] Moreover, as evidenced by the LGBTIQ Equality Strategy for 2020–2025 and 2026–2030, the Commission now consistently makes use of the terms "gender identity" and "gender expression" when referring to the specific types of discrimination experienced by trans and non-binary people.[77] Finally, as mentioned by Ganty and Sanchez Benito, several EU Member States already protect against discrimination on grounds of gender identity and gender expression via an expansive interpretation of the ground of sex/gender in domestic law, rather than through the addition of separate self-standing grounds.[78]

2. Adding "Gender Identity" and "Gender Expression" to the List of Protected Grounds in EU Law

A capacious interpretation of the existing legal framework on sex-based discrimination would enable individuals disadvantaged due to their gender identity or expression to rely directly on the robust legal infrastructure already in place, without requiring a formal expansion of protected grounds in EU primary or secondary equality and non-discrimination law.

However, as Dunne and van den Brink,[79] Ganty and Benito Sanchez,[80] and Silvan Agius and Christa Tobler have already proposed,[81] an alternative route would involve the explicit inclusion of new protected grounds, gender identity and gender expression, within EU primary law, such as Article 21 of the CFR and Article 19 of the TFEU, as well as in the relevant anti–discrimination directives. While, as discussed previously, current EU law does not make such an amendment strictly necessary for protection of trans and non-binary people against discrimination to be effective, the formal recognition of these grounds would nonetheless bring several important advantages.

First and foremost, codifying gender identity and gender expression as independent grounds of protection would immediately remove any uncertainty or ambiguity that would result from reliance on incremental developments in CJEU case law under the ground of sex. Second, it would serve an important symbolic and political function by affirming the existence and particular vulnerability of trans and non-binary individuals to discrimination.[82] Third, incorporating these categories into secondary EU legislation would result in harmonization across the EU by creating binding obligations for all Member States to incorporate gender identity and gender expression in their national legal frameworks. Given the open hostility that some national governments have recently expressed towards trans and non–binary people,[83] reform of national anti-discrimination

[75] *See, e.g.*, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Union of Equality: Gender Equality Strategy 2020-2025*, COM (2020) 152 final, https://ec.europa.eu/newsroom/just/items/682425/en.

[76] *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee – 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*, at 4, COM (2015) 190 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0190.

[77] European Commission, *supra* note 24, at 4–6; European Commission, *supra* note 28, at 10–12.

[78] Ganty & Benito Sanchez, *supra* note 20, at 15.

[79] Dunne & van den Brink, *supra* note 58, at 13.

[80] Ganty & Benito Sanchez, *supra* note 20, at 20.

[81] Silvan Agius & Christa Tobler, *Trans and Intersex People—Discrimination on the Grounds of Sex, Gender Identity and Gender Expression,* European Commission Directorate-General for Justice 76, 77 (2012), https://op.europa.eu/en/publication-detail/-/publication/9b338479-c1b5-4d88-a1f8-a248a19466f1.

[82] Dunne & van den Brink, *supra* note 58, at 47.

[83] Cardoso, *supra* note 1, at 56.

law through EU obligations could be an important catalyst for improving the daily lives of thousands of trans and non-binary individuals across the EU.

However, that same hostility makes it very unlikely that the grounds of gender identity and gender expression would be added to EU equality and non-discrimination law anytime soon. Indeed, both Treaty revision as foreseen by Article 48 of the TEU and amendments to the directives adopted on the basis of Article 19 of the TFEU require unanimity among Member States. Given the current political context in the EU, it may be overly optimistic to believe that legislative reform in EU law is likely to provide trans and non-binary people explicit protection against discrimination anytime soon.

A related but potentially more feasible strategy would be to revise all relevant instruments of (secondary) EU equality and non-discrimination law, to clarify in the preamble that the prohibition of sex-based discrimination also encompasses "gender reassignment."[84] As mentioned above, this clarification is currently only included in Recital 3 of the preamble to the Recast Equal Treatment Directive, but not yet in the Goods and Services Directive or Social Security Directive. While, as explained *supra*, the ground of "gender reassignment" is under-inclusive and should be abandoned in favor of gender identity and gender expression, it could still support the CJEU in moving towards a capacious understanding of "sex" in all areas of EU equality and anti-discrimination law. Moreover, the recent inclusion of this clarification in the preambles to the Pay Transparency Directive and Standards for Equality Bodies Directives also shows there is precedent for at least transplanting the findings of existing CJEU case law on trans discrimination beyond the strict material scope of those cases.

II. Promising Developments in Recent CJEU Case Law

The possibility of the CJEU reading the protected grounds of gender identity and gender expression into the existing EU equality and non-discrimination legal framework is not only theoretically feasible but has arguably also become likely in light of recent developments in case law. Indeed, in the space of only a few months, the CJEU has adopted five judgments that have significantly strengthened trans and non-binary rights in EU law, with four of the cases—at least—concerning trans people and one case addressing the situation of non-binary people. While it goes beyond the scope and aims of this Article to thoroughly analyze these judgments, they are nevertheless important to mention. When reading them together, it appears that the CJEU has not only moved away from the strictly binary and medicalized understanding of trans identities in favor of a more inclusive understanding of gender identity,[85] but also attaches greater importance to the fundamental rights dimension of the cases at hand. Even though most judgments discussed in this subsection do not directly deal with the EU's (secondary) equality and non-discrimination legal framework, there is no apparent reason to assume that the Court would not extend that new inclusive approach to cases of discrimination affecting trans and non-binary people.

In the following sections, the facts and reasoning of the five cases will first be discussed (Section 1). Afterwards, the relevance of the cases for the protection against discrimination on grounds of gender identity and gender expression in EU law will be addressed (Section 2).

1. Recent CJEU Case Law on Trans and Non-Binary People

1.1 C-4/23 – *Mirin* (2024)

As Alina Tryfonidou noted, the *Mirin* case can best be characterized as "a free movement case with a (trans)gender dimension."[86] The case essentially dealt with the question of whether EU

[84]Dunne & van den Brink, *supra* note 58, at 13.

[85]Fulvia Ristuccia & Alessandro Marcia, *Trans* EU citizens: Free Beyond Movement? The Grand Chamber in Case C-4/23* Mirin*, EU:C:2024:845,* 32 Maastricht J. Eur. & Compar. L. 505, 517 (2025).

[86]Tryfonidou, *supra* note 1, at 2.

Member States are obliged to recognize the legal gender recognition obtained by an EU citizen in another EU Member State. M.-A.A., a Romanian and British national, had been assigned female at birth in Romania. After moving to the UK, he changed his name and title via deed poll in 2017 and obtained a UK gender recognition certificate in 2020. On that basis, he asked the Romanian authorities in 2021 to issue a new birth certificate reflecting his male gender and new name. The authorities refused, relying on domestic law that requires a separate Romanian judicial procedure to approve any change of legal sex. The referring court asked whether such a requirement was compatible with the free movement rights of EU citizens under Articles 21 of the TFEU and 45 of the CFR, as interpreted in light of dignity, equality, non-discrimination, and respect for private life.[87]

In its Grand Chamber judgment of October 4, 2024,[88] the CJEU confirmed that while matters of name and legal gender fall within national competence, Member States must exercise that competence consistently with EU law. Drawing on its established case law on recognition of names, the Court held that refusing to recognize a name change or change of legal sex lawfully obtained in another Member State constitutes a restriction on free movement, because discrepancies in civil-status documents create serious practical obstacles in both public and private life. The Court found Romania had not advanced any legitimate justification for imposing a separate domestic recognition procedure. Moreover, in *X and Y v. Romania*, the ECtHR had already held that the Romanian procedure for gender recognition was incompatible with Article 8 of the ECHR,[89] which—through Article 52(3) of the CFR—sets the minimum level of protection for Article 7 of the CFR. A procedure that risks producing an outcome contrary to that reached in the Member State of origin cannot be considered an effective mechanism for enabling an EU citizen to exercise free movement rights.[90]

The Court therefore concluded that Articles 20 and 21 of the TFEU, read in light of Articles 7 and 45 of the CFR, preclude national legislation that prevents entry into a birth certificate of a change of name and legal gender lawfully acquired in another Member State.

1.2 C-247/23 – *Deldits* (2025)

A second case in which the CJEU recently dealt with a legal claim brought forward by a trans person was the case of *Deldits,* in which the judgment was delivered on March 13, 2025.[91] The proceedings concerned the refusal of Hungarian authorities to amend the gender marker of VP, an Iranian trans refugee, in the asylum register from female to male. The authorities justified the refusal solely on the ground that VP had not proved they had undergone gender-affirming surgery. With no domestic procedure for legal gender recognition available,[92] VP relied on the right to data rectification under Article 16 of the General Data Protection Regulation (GDPR), read with the accuracy principle contained in Article 5(1)(d) of the GDPR.

The Court first confirmed that data concerning a person's gender identity constitutes personal data, and that its inclusion in a public register amounts to processing under the GDPR. Importantly, where the purpose of processing is identification, the data must reflect the person's lived gender identity at the time of registration rather than the sex assigned at birth. The right to rectification may be restricted only by legislative measures meeting the conditions of Article 23 of

[87]The referring court also asked a question about the potential impact of the UK's departure from the EU on the answer to the first question, which will not be addressed further. *Mirin,* C-4/23, para. 35.

[88]Case C-4/23, M.-A. A. [Mirin] v. Direcția de Evidență a Persoanelor Cluj, ECLI:EU:C:2024:845 (Oct. 4, 2024), para. 53.

[89]X and Y v. Romania, App. Nos. 2145/16 and 20607/16 (Jan. 19, 2021), https://hudoc.echr.coe.int/eng?i=001-207364.

[90]*Mirin,* Case C-4/23 at para. 68.

[91]Case C-247/23, VP v. Országos Idegenrendészeti Főigazgatóság, ECLI:EU:C:2025:172 (Mar. 13, 2025) [hereinafter *Deldits*].

[92]Note that this amounts to a manifest violation of Article 8 of the ECHR, which holds a positive obligation to foresee a procedure of legal gender recognition. *See* Goodwin v. The United Kingdom, App. No. 28957/95 (July 11, 2002), https://hudoc.echr.coe.int/fre?i=001-60596.

the GDPR. However, the Hungarian refusal was based not on legislation but on an *ad hoc* administrative requirement to provide evidence of surgery. The Court further clarified that a Member State cannot rely on the absence of a domestic legal gender recognition procedure to limit the exercise of Article 16 of the GDPR. Echoing its earlier trans discrimination case law, it held that national rules preventing a trans person—due to the non-recognition of their gender identity—from fulfilling conditions necessary to access a right granted by EU law must be regarded as incompatible with EU law in principle.

Turning to the substance of the medical requirement, the Court held that conditioning rectification of gender identity data on proof of gender–affirming surgery undermines the essence of Charter rights, including bodily integrity and respect for private life. Again referring to *X and Y v. Romania*, it recalled that recognition of a trans person's gender identity cannot depend on unwanted surgical treatment. In line with the ECtHR's judgment in *A.P., Garçon and Nicot v. France*,[93] it found that such a requirement is neither necessary nor proportionate for ensuring the accuracy and reliability of a public register because less intrusive evidence—such as a medical certificate or psychiatric diagnosis—can suffice.

1.3 C-394/23 – *Mousse* (2025)

In the *Mousse* case, decided January 9, 2025,[94] the CJEU again interpreted the GDPR, this time focusing on the principles of data minimization and lawfulness under Articles 5(1)(c), 6(1)(b)–(f), and 21. The case arose from a complaint by the organization, Mousse, against SNCF Connect, the French public railway company, which required online customers to indicate a binary gendered title ("Monsieur" or "Madame") when purchasing tickets. Mousse argued before the referring *Conseil d'État* that this practice violated the GDPR and failed to account for non-binary persons.

The Court recalled that data minimization requires data collection to be adequate, relevant, and limited to what is necessary for the purposes of processing, and that the GDPR provides an exhaustive list of lawful bases for processing. First, it held that collecting gendered titles to personalize commercial communication is not indispensable for the performance of a rail transport contract: generic forms of address would constitute a less intrusive alternative. Second, the Court held that the processing of gendered titles of customers could not be seen as necessary in light of the data controller's aim to enable personalized customer communication where customers were not informed of the pursued legitimate interest at the time when the data were collected, or where processing is not limited to what is strictly necessary for the attainment of that interest. Crucially, the Court added that processing gendered titles fails the necessity test where the fundamental rights of data subjects outweigh the controller's interests—particularly where the practice risks discrimination on grounds of gender identity.[95]

1.4 C-43/23 – *Shipova* (2026)

Building on its judgment in *Mirin*, the CJEU again significantly expanded the scope of gender recognition rights in EU law in the case of *Shipova*, decided on March 12, 2026.[96] The case concerned a Bulgarian trans woman who lived in Italy. While she was assigned the male sex at birth, she had always identified and presented as a woman, and had started a medical transition in Italy. In light of the problems arising from the discrepancy between her lived gender identity and

[93]A.P., Garçon and Nicot v. France, App. Nos. 79885/12, 52471/13, and 52596/13 (Apr. 6, 2017), https://hudoc.echr.coe.int/eng?i=001-172913.

[94]Case C-394/23, Mousse v Commission nationale de l'informatique et des libertés (CNIL) and SNCF Connect, ECLI:EU:C:2025:2 (Jan. 9, 2025).

[95]Note that in other parts of the judgment in *Mousse*, the Court did not simply refer to discrimination on grounds of gender identity, but rather to "discrimination arising from a change in a person's gender identity." *Mousse*, Case C-394/23 at para. 62. In light of the fact that for many trans and non-binary people, lived gender identity does not change during their life—contrary to legal sex—it is more respectful to use the former term.

[96]Case C-43/24, K.M.H. v Obshtina Stara Zagora, ECLI:EU:C:2026:183 (Mar. 12, 2026) [hereinafter *Shipova*].

official documents, she had requested gender recognition before the Bulgarian authorities. Bulgarian courts repeatedly rejected her request, relying on national legislation and constitutional interpretation that recognize gender solely in biological terms.

As in *Mirin,* the CJEU held that although Member States retain competence over civil status matters such as legal gender, they must exercise that competence in compliance with EU law, particularly the free movement rights of Union citizens under Article 21 TFEU. Bulgaria's refusal to allow the applicant, a Bulgarian national residing in Italy, to amend her legal gender and related personal data created a discrepancy between her lived gender and the information on her identity documents. This mismatch forced her to repeatedly justify her identity in everyday situations, thereby hindering her ability to exercise free movement. The Court emphasized that identity documents must enable citizens to move freely, and that restrictions on this freedom must comply with the Charter, including Article 7 on respect for private life.

Drawing heavily on ECtHR case law under Article 8 of the ECHR, the CJEU reaffirmed that gender identity is a core aspect of private life and that States have positive obligations to provide clear and accessible procedures for legal gender recognition. Bulgarian law, which excludes transgender people based on biological or moral considerations, was found incompatible with these obligations. The Court concluded that EU law—specifically Article 21 TFEU and Article 4(3) of Directive 2004/38, read in light of Article 7 of the Charter—precludes national legislation that prevents a mobile Union citizen from amending their gender data recorded in civil status registers. Importantly, the Court also drew on its aforementioned case law in trans discrimination cases, holding that the absence of gender recognition may not hinder a transgender person's access to a right protected by EU law.

1.5 C-769/22 – *Commission v. Hungary* (2026)

The case of *Commission v. Hungary* concerned infringement proceedings brought by the European Commission against Hungary following the adoption of Law No LXXIX of 2021, which introduced a series of prohibitions of or restrictions on the portrayal and dissemination to minors of content depicting or promoting "deviation from the self-identity corresponding to the sex assigned at birth," "gender reassignment," or homosexuality. The legislation affected a wide range of activities, including audiovisual media, advertising, and educational activities, and was presented as a measure to protect children. The Commission argued that, in reality, the legislation targeted LGBTIQ persons, restricted access to information concerning their lives and identities, and was incompatible with several provisions of EU secondary law related to the internal market, the Charter and the values enshrined in Article 2 of the TEU.

In its judgment,[97] the Court gave central attention to the prohibition of discrimination on grounds of sex and sexual orientation included in Article 21(1) of the Charter. Indeed, while several of the invoked EU internal market instruments, such as the e-Commerce Directive, the Services Directive, and the Audiovisual Media Services Directive, allow for restrictions in light of the promotion of the best interests of the child, the margin of assessment that Member States enjoy in defining content that is likely to impair the physical, mental, or moral development of minors, must comply with Article 21(1) of the Charter. According to the Court, the Hungarian "anti-LGBTIQ propaganda" law was based on a preference for certain, i.e. "non-cisgender" and "non-heterosexual," identities and sexual orientations to the detriment of others, leading to their stigmatization, which was incompatible with the requirements of the prohibition of discrimination in a pluralist society. It noted that minors could have been protected against age-inappropriate content without any direct discrimination on grounds of sex or sexual orientation.

Equally important for this Article, the Court also found that the law violated several provisions of the Charter, as well as Article 2 of the TEU. The CJEU held that the law stigmatized and marginalized "non-cisgender"—which includes transgender persons—and "non-heterosexual"

[97]Case C-769/22, European Commission v. Hungary, ECLI:EU:C:2026:326 (Apr. 21, 2026).

persons, by finding them detrimental to the physical, mental, and moral integrity of children simply on the ground of their gender identity or sexual orientation, and by associating them with pedophilia. In these circumstances, the Court found that the essence of the right to respect for private and family life (Article 7 of the Charter), the freedom of expression and information (Article 11 of the Charter), and the prohibition of discrimination based on sex or sexual orientation (Article 21(1) of the Charter) was undermined, which could not be justified by the objective to promote the best interests of the child. By treating a group of persons as a threat to society solely on the basis of their gender identity or sexual orientation, "non-cisgender" and "non–heterosexual" persons were also stigmatized in a way that violated their right to human dignity (Article 1 of the Charter). Finally, as mentioned above, the Court also held that such stigmatization and marginalization, establishing, maintaining, or reinforcing the social invisibility of a group, were a manifest and particularly serious violation of the values of human dignity, equality, and respect for human rights included in Article 2 of the TEU.

2 . Relevance of the Case Law for the Protection Against Discrimination on Grounds of Gender Identity/Expression

As mentioned above, while mostly not directly dealing with questions of discrimination directed against trans or non-binary people, the five aforementioned judgments are relevant to the central argument in this Article. Indeed, taken together, the judgments demonstrate that the CJEU has recently adopted a significantly demedicalized approach to trans experiences, has embraced the more inclusive term of "gender identity," as opposed to "gender reassignment," and has more thoroughly engaged with fundamental rights (Section 2.1). For this reason, it would arguably be unlikely that the Court would exclude gender identity and/or gender expression if asked directly to interpret the scope of the prohibition of discrimination on the grounds of "sex" in EU (secondary) law. At the same time, the cases are perhaps also illustrative of the widening arsenal of legal pathways that EU law offers to strengthen trans and non-binary rights, beyond the prohibition of discrimination (Section 2.2).

2.1 A More Inclusive Reading of Trans and Non-Binary Experiences

Taken together, *Mirin*, *Deldits*, *Mousse*, *Shipova*, and *Commission v. Hungary* signal an important shift in the CJEU's understanding of how trans experiences fit within the architecture of EU equality and non-discrimination law. Most notably, the Court has significantly departed from its earlier medicalized framing of trans identities. Whereas the aforementioned CJEU's trans discrimination cases relied heavily on the concept of "gender reassignment" and invoked invasive medical gender-affirming procedures as a relevant factor, the recent judgments consistently use the more inclusive terminology of "gender identity." In *Deldits* and *Mousse*, the Court explicitly treated gender identity as a protected characteristic under EU law under the GDPR and the Goods and Services Directive respectively, thereby taking a step that had been anticipated in academic literature but never openly articulated by the Court. Similarly, in *Shipova,* the Court held that toleration of discrimination based on "the difference between biological sex and gender identity" would be tantamount to a failure to respect the dignity and freedom to which a trans person is entitled under EU law.[98]

Of these cases, *Mousse* represents the clearest doctrinal statement in this regard. Despite the fact that the case concerned interpreting the principle of personal data minimization included in the GDPR, the CJEU unambiguously, and for the first time, held that discrimination on grounds of a person's gender identity falls within the scope of the prohibition of discrimination on grounds of sex.[99] As importantly, the Court did so by referring to the Goods and Services Directive, an

[98]*Shipova*, *supra* note 96, para. 54.
[99]Tryfonidou, *supra* note 1, at 2.

instrument not previously invoked in trans discrimination litigation. Even if the formulation appears in the judgment almost as an obiter dictum, its legal and symbolic relevance cannot be overstated. The Court thus appears to have embraced a more inclusive understanding of the specific forms of discrimination that trans and non–binary persons face, and, crucially, has expanded the conceptual boundaries of "sex" as a protected ground.

Mirin and *Deldits* reinforce this trajectory from a different angle. Although these cases did not concern discrimination as such, the Court's reasoning further supports a demedicalized and rights-based understanding of gender identity under EU law. Indeed, in both cases, the Court did not attach any relevance to the precise "trans narrative" of the applicant, nor did it suggest that the enjoyment of rights under EU law depends on undergoing gender–affirming surgery.[100] This represents a significant departure from the Court's earlier approach to trans discrimination,[101] and its implications will likely carry over into the future interpretation of the scope of the prohibition of discrimination on grounds of sex.[102] While *Deldits*—and to a lesser extent also *Mirin* and *Shipova*—[103] does not fully exclude the possibility that Member States may request some form of medical attestation—reflecting the ECtHR's own incomplete departure from psycho-pathologizing language in its case law on procedures of legal gender recognition[104]—it nonetheless supports a more autonomous and less medicalized understanding of gender identity for the purposes of EU law.

Finally, while the judgment in *Commission v. Hungary* did not go as far as explicitly finding a protected ground of gender identity under the prohibition of discrimination included in Article 21(1) of the Charter, it arguably follows logically from its wording and its overall strong reliance on equality rhetoric, that all "non-cisgender" persons, which—according to the CJEU —includes "transgender persons,"[105] are covered by the prohibition of (sex–based) discrimination in EU primary law. Moreover, the Court consistently made use of the term "gender identity" when discussing the grounds on which transgender persons were directly and discriminatorily stigmatized and marginalized by the Hungarian "anti-LGBTIQ propaganda" legislation, leading to a violation of Article 1 of the Charter and Article 2 of the TEU.[106]

The recent jurisprudence thus lays important conceptual groundwork for a more robust and inclusive EU equality and non-discrimination framework.

2.2 Implications for the Development of Trans and Non-Binary Rights in EU Law Beyond Non-Discrimination

This conclusion is arguably also supported by the overall growing attention for and strengthening of trans and non-binary rights in EU (case) law. Indeed, *Mirin*, *Deldits*, *Mousse*, *Shipova*, and

[100]Ristuccia & Marcia, *supra* note 85, at 13.

[101]Alessandro Marcia, *Trans* Rights Beyond Medicalisation? The CJEU in Case Deldits (C-247/23),* European Law Blog (Apr. 3, 2025), https://www.europeanlawblog.eu/pub/gkdar607/release/2.

[102]Tryfonidou, *supra* note 1, at 12.

[103]Indeed, in *Mirin,* the CJEU ruled that the Romanian authorities could not provide any justification for the interference with the applicant's free movement rights by demanding the completion of a judicial procedure of gender recognition, notably because of the fact that the ECtHR had already decided that this procedure did not meet the standards of Article 8 of the ECHR. However, the language of the judgment does not completely rule out the possibility that a Member State could make the recognition of a change in legal gender obtained in another Member State dependent on the completion of a national procedure of gender recognition, as long as that procedure—and its requirements—constitute a justified restriction on free movement, taking into account the applicant's fundamental rights under the Charter and the corresponding ECHR rights. Similarly, in *Shipova,* the CJEU relies on ECtHR case law concerning gender recognition for its discussion on the justification of restrictions on free movement for trans Union citizens. As the ECtHR still allows Contracting States to require a medical diagnosis for gender recognition, this condition could also still be considered valid by the CJEU.

[104]Pieter Cannoot, *The Pathologisation of Trans* Persons in the ECtHR's Case Law on Legal Gender Recognition,* 37 Neth. Q. Hum. Rts. 23–27 (2019).

[105]*See, e.g., Commission v. Hungary*, Case C-769/22 at paras. 448, 470, 487, 491 and 556.

[106]*See id.*, paras. 487, 554.

Commission v. Hungary show that the CJEU has considerably advanced the rights that trans and non-binary people enjoy in the EU. Indeed, in the latter judgment, Hungary's state-sponsored manifest and particularly serious discriminatory stigmatization and marginalization of LGBTIQ people even brought the Court to find the first–ever autonomous violation of Article 2 of the TEU. From that perspective, it would appear strange to see the CJEU suddenly adopt more conservative reasoning and stereotypical constructions of trans experiences in cases directly addressing trans and non-binary discrimination. At the same time, while the earlier CJEU case law on trans issues strongly relied on equality and non-discrimination, *Mirin*, *Deldits*, *Mousse*, *Shipova*, and *Commission v. Hungary* also demonstrate the growing importance of *other* fields of primary and secondary EU law for the strengthening of trans and non-binary rights. Even though the figures included in Section B of this Article underscore the importance of continued efforts to develop legal protections against discrimination on the grounds of gender identity and/or expression, the legal focus should arguably not be reduced to equality and non-discrimination alone.

Indeed, although questions of equality and non-discrimination appear throughout the CJEU's trans-related case law, they have not consistently been the central issues driving these judgments. Except for *P v. S and Cornwall County Council*, which directly concerned employment-related discrimination of a trans woman, previous CJEU case law involving trans persons predominantly made use of an equality lens for matters involving gender recognition at the national level. Indeed, taken together, *KB*, *Richards*, and *MB* clarified that, while legal gender recognition falls within the scope of national law, Member States must nevertheless comply with EU law in exercising that competence. In doing so, EU equality and non–discrimination law required Member States to treat trans people according to their lived gender, rather than their official legal sex. However, except for the requirement to annul one's marriage addressed in *MB*, EU law did not specify which conditions Member States could set in their national gender recognition procedures. The more recent case law in *Mirin*, *Deldits*, *Mousse*, and *Shipova* continues this focus on gender registration, and significantly reduced national discretion for recognition procedures.

Mirin and *Shipova* are particularly significant in this respect. While not directly addressing discrimination, the Court nevertheless issued what must be seen as landmark rulings for trans rights in the EU.[107] In *Mirin*, it required full recognition of a change of legal sex lawfully obtained in another Member State, rather than limiting recognition to what is strictly necessary for the exercise of free movement rights.[108] In *Shipova*, the Court went even further, by holding that EU free movement rights and Article 7 of the Charter require Member States to enable gender recognition in civil status registers for nationals who exercised their right of free movement in the Union. In doing so, the CJEU substantially reinforced its prior, rather cautious and functionalist approach to civil status recognition shown in the so-called "rainbow cases" of *Coman* and *V.M.A.*[109] Moreover, in *Mirin, Shipova*, and *Deldits*, the Court clarified that, in the context of sex/gender registration, Member States cannot expect trans persons to show evidence of having undergone gender-affirming surgical treatment.

The political relevance of this development should not be underestimated. At a time when several Member States are actively restricting trans rights, the Court's insistence on mutual recognition in *Mirin*, the right to gender recognition and non-discrimination in *Shipova*, the right to rectification of registered gender in *Deldits*, and the right to human dignity and equality in *Commission v. Hungary* provides an important counterweight. The judgments in *Mirin, Shipova*, and *Deldits* also reveal the influence of the ECtHR's case law on legal gender recognition, which obliges all States Parties to the ECHR to provide clear, accessible, and transparent procedures that do not rely on mandatory sterility or gender-affirming surgical treatment. This broader

[107] Tryfonidou, *supra* note 1, at 14.

[108] *Id.*

[109] *See* Konstantinos Lamprinoudis, *Somewhere Over the Rainbow,* VERFASSUNGSBLOG (June 11, 2025), https://verfassungsblog.de/commission-hungary-equality-lgbtq/ (providing a brief overview of CJEU rulings in "rainbow cases").

fundamental rights context appears to have given the CJEU the confidence needed to move forward in advancing the rights of trans and non–binary people at the EU level.[110]

Nevertheless, several uncertainties remain. For instance, while—in light of the spirit of its outcome—the CJEU arguably intended to deliver a highly inclusive judgment in *Commission v. Hungary,* it is somewhat puzzling why the Court decided to make use of the rather uncommon term "non–cisgender" persons rather than "transgender persons," *and* felt the need to specify that the latter were included in the former term.[111] Further, the wording of the judgment in *Mirin* is somewhat vague as to whether full recognition of a change in legal gender extends to all civil-status effects—such as, notably, marriage and parentage—or whether it should be read as limited to the factual circumstances and the movement-related elements of the case.[112] As mentioned above, in *Coman* and *V.M.A.*, the Court confined recognition to the functional purposes of enabling free movement, making a broader reading of *Mirin* difficult to sustain. However, when finalizing this Article, the CJEU ruled in *Cupriak-Trojan and Trojan* that a same-sex marriage lawfully contracted in one Member State must be recognized *for all legal purposes* when EU citizens exercise their free movement rights, clearly leaving the functionalism and caution of *Coman* and *V.M.A.* behind.[113] Similarly, in *Shipova,* while the Court repeatedly mentioned the importance of gender data on identity documents when exercising free movement, the judgment's operative part referred to the amendment of gender data recorded *in civil status registers.* As in *Mirin,* the Court could rely on the case law of the ECtHR, which already clarified that Article 8 of the ECHR imposes on Member States positive obligations to establish a legal framework providing for the legal recognition and protection of same-sex couples and to provide gender recognition, to underpin its interpretation of EU law standards in these cases. In other words, there are now clearer precedents that recognition of an EU citizen's civil status in the context of free movement should be interpreted broadly, despite a Member State's national rules on civil status.

Moreover, the CJEU has yet to clarify whether a "genuine link" is required between the EU citizen and the Member State in which gender recognition is obtained—an important question in light of divergent national procedures, including differences in medical requirements and the availability of non–binary options.[114] Further, if the Court were to accept that gender recognition and mutual recognition thereof may be conditioned on some form of medical attestation so long as it complies with ECHR standards, the scope of *Mirin* and *Shipova* could be significantly curtailed.

Mousse also contributes to this broader landscape. Its practical impact for trans and non-binary people—particularly those obliged to navigate mandatory, binary gendered titles when accessing goods and services online—is likely to be considerable.[115] The judgment not only confirms that EU law can address a wide range of discriminatory practices beyond the traditional contexts of employment or social security, but also that instruments such as the GDPR can practically protect against discrimination by reducing the risk of exposure to unfavorable treatment based on the mandatory registration of gendered personal information. This ruling therefore opened up new

[110]Tryfonidou, *supra* note 1, at 15.

[111]A textual analysis of the judgment reveals that the term was likely taken from the Commission's submissions in the case.

[112]Tryfonidou, *supra* note 1, at 18.

[113]Case C-713/23, Cupriak-Trojan v. Mazowiecki, ECLI:EU:C:2025:917 (Nov. 25, 2025), para. 77. Note that the Court specified that the obligation to recognize a same-sex marriage within the context of free movement does not oblige Member States to open up the institution of marriage for same-sex couples in national law (at para. 61). However, when reading *Mirin* together with *Cupriak-Trojan and Trojan,* the recognition of an EU citizen's lawfully obtained gender marker for all legal purposes would arguably mean that this person should be treated according to their lived gender for all matters of civil law.

[114]*See* Ristuccia & Marcia, *supra* note 85, at 7; Tryfonidou, *supra* note 1, at 20.

[115]Note that cisgender people might also object to having their gender identity indirectly registered by the mandatory processing of a gendered title and will therefore also benefit from the *Mousse* ruling. However, at the same time, it must also be mentioned that for some (binary) trans people, having their lived gender registered or processed is an important element of recognition and self-esteem, which may also provide protection against misgendering.

avenues for the protection of gender-diverse individuals in their everyday interactions with both public and private actors, despite not directly addressing the EU equality and non-discrimination legal framework.

Together, *Mirin*, *Deldits*, *Mousse*, *Shipova*, *and Commission v. Hungary* therefore demonstrate that EU law is evolving toward a more comprehensive, demedicalized, and fundamental-rights-oriented approach to trans and non-binary experiences. This evolution will likely not only reshape the interpretation of "sex" within EU equality and non–discrimination law, but also expand the broader legal toolkit available to secure trans and non-binary people's rights within the Union beyond equality and non-discrimination.

E. Future Challenges: More than Simply Adding Grounds

While the previous section focused on the question of whether all forms of discrimination on the grounds of gender identity and gender expression could fall within the scope of the current EU equality and non-discrimination law framework, it should be pointed out that there's more at stake than simply adding protected grounds. Indeed, adopting a gender-diverse lens to the prohibition of sex-based discrimination in EU law arguably also influences the overall structure and interpretation of the legal framework that is currently in place. This leads to new and highly relevant questions about the meaning of "sex" in EU equality and non-discrimination law, which go beyond the issue of personal scope—that is, the definition of the protected ground—and directly address the level of protection offered by EU law and the justification of disparate treatment or effects. This section will first elaborate on how the evolution towards more inclusive understandings of "sex" lead to new theoretical and practical questions (Section I). It will then address how, taking into account these developments, the notion of "single-sex" goods and services needs to be interpreted in the context of EU equality and non-discrimination law (Section II). Third, it will discuss the additional complexities raised by the situation of non-binary people (Section III).

I. Challenges Caused by Inclusive Understandings of "Sex"

The EU's sex/gender equality framework was designed in a time when the dominant legal and cultural understanding of sex/gender was grounded in binary and cisnormative constructs.[116] Persons falling within the scope of the legal framework were implicitly expected to identify and be legally registered as either male or female, and have bodies and especially sex characteristics that matched that identification and/or registration. As mentioned above, the CJEU's reliance on a binary and medicalized classical "trapped–in–the–wrong–body" trans narrative in its existing case law on the protected ground of "gender reassignment" is also indicative that EU anti–discrimination law is historically grounded in binary cisnormativity.

A more explicitly inclusive approach towards gender identity or gender expression as protected grounds, either through a capacious understanding of sex in CJEU case law or through legislative reform, would arguably disrupt that normative understanding of sex/gender. Indeed, if the ground of sex refers to the conceptually related but different dimensions of sex characteristics, gender, and gender identity/expression within the ambit of the same legal instrument, one cannot expect—nor require—them to consistently overlap for all of the instrument's purposes. This is further influenced by developments at the Member State level regarding procedures of legal gender recognition. In recent years, several EU Member States have reformed national frameworks for gender registration, predominantly under the umbrella

[116] *C.f.* Osella, *supra* note 58, at 3.

of the emerging right to gender self-determination.[117] On the basis thereof, conditions involving compulsory medical interventions have been abolished in almost half of the EU Member States. On top of that, countries such as Austria, Germany, and the Netherlands allow for official non-binary sex/gender markers to be recorded in civil registers. These national developments have profoundly reshaped legal understandings of sex and gender identity, openly accepting that a person's sex characteristics and gender identity do not always overlap and are not required to overlap for legal purposes.

These evolutions in legal understandings of the concept of sex, both in relation to official registration of sex and in the context of protection against sex-based discrimination, raise compelling questions of a theoretical and practical nature. This is especially the case for issues where these two strands intersect, namely the position of so-called single-sex goods, services, and spaces in EU anti-discrimination law.[118] Even beyond their conceptual relevance, these single-sex goods and services are also currently at the heart of an intensely polarized public debate in countries like the United Kingdom, even resulting in litigation before the Supreme Court,[119] in which the protection of the interests of trans and non-binary people, especially trans women, is often presented as diametrically opposed to the interests of cisgender women.[120] However, anti-trans and especially anti-gender self–determination rhetoric can also be observed in several—but not all—EU Member States, such as, notably, Bulgaria,[121] Germany,[122] Hungary,[123] Italy,[124] the Netherlands,[125] Slovakia,[126] and Spain.[127] One argument to oppose gender self-determination raises issues regarding the potential impact on questions of gender equality, and predominantly

[117] *See* European Commission, Legal gender recognition in the EU. The journeys of trans people towards full equality (2020), https://commission.europa.eu/system/files/2020-09/legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_sept_en.pdf (providing a recent comparative analysis on legal gender recognition in the EU).

[118] Peter Dunne, *(Trans)Forming Single-Gender Services and Communal Accommodations,* 26 Soc. & Legal Stud. 537, 538 (2017).

[119] For Women Scotland Ltd v. The Scottish Ministers [2025] UKSC 16 (Apr. 16, 2025).

[120] Dunne, *supra* note 118, at 539; Cardoso, *supra* note 1, at 60.

[121] In 2024, the Bulgarian parliament adopted so-called "anti LGBTIQ propaganda" legislation, to prohibit the discussion of issues of sexual orientation and gender identity in schools.

[122] Anti-gender rhetoric is especially spread by the far-right political party *Alternative für Deutschland. See* Sabine Volk, *Rallying 'round the Drag: Anti-Gender Mobilization and the Mainstreaming of the Far Right,* 27 Eur. Societies 59, 59–82 (2025). Also note that a particularly notorious German far-right extremist, known for transphobic opinions, recently changed legal gender from male to female as part of an attempt to hide from justice. While there were strong doubts that this person actually identified as a woman, based on the registered gender they were initially sent to a woman's prison. While some said that this case illustrated the dangers of a system based on gender self-determination, others said that the recognition could still be annulled in court on the basis of abuse of rights, and that there is no absolute right to be detained in accordance with one's legal gender. *See* Charlotte Greipl, *Wie geht es weiter mit der Rechtsextremistin Liebich?* [*What's Next for Right-Wing Extremist Liebich?*], ZDF Heute (April 10, 2026), https://www.zdfheute.de/politik/deutschland/liebich-festnahme-tschechien-rechtsextremistin-100.html.

[123] As is well-known, during his time in office (2010–2026), Viktor Orbán introduced various anti-LGBTIQ legal reforms, such as the abolition of legal gender recognition, "anti-LGBTIQ propaganda" legislation, and a ban on pride marches. *See, e.g.*, Beáta Huszka & Agnieszka Kubal, *Resisting Illiberal Politics: Mobilizing European Courts in Defence of the Rights of Sexual Minorities in Hungary and Romania,* Democratization 1, 1–23 (2025). As mentioned above, in its judgment of April 21, 2026, the CJEU held that the "anti-LGBTIQ propaganda" legislation violated several provisions of primary and secondary EU law, including Article 21 of the Charter and Article 2 of the TEU.

[124] Italian Prime Minister Meloni has been very outspoken in her opposition to the "LGBTQ lobby" and so-called "gender ideology." *See* Nausica Palazzo, *Meloni's Mark: The Revival of the Traditional Family in Italian Law and Politics,* 5 J. Illiberalism Stud. 21, 21–36 (2025).

[125] In the Netherlands, a proposal to amend the Gender Recognition Act to introduce a procedure based on gender self-determination was eventually withdrawn by the Government due to highly polarized controversies about the proposal's impact on children's rights and safety in single-sex spaces. *See* https://www.eerstekamer.nl/wetsvoorstel/35825_veranderen_voorwaarden.

[126] In September 2025, Slovakia changed its constitution, enshrining into law recognition of only two sexes, male and female.

[127] In Spain, anti-trans feminist movements publicly expressed their opposition to the legal reform of the procedure of gender recognition based on gender self-determination. *See* Lucas R. Platero, *Strange bedfellows: Anti-Trans Feminists, VOX Supporters and Biologicist Academics,* 10 Dig. J. Diversity and Gender Stud. 124, 125–30 (2023).

the legal instruments that guarantee protection against discrimination for women.[128] After all, sex/gender equality frameworks, including the EU's, were historically designed to tackle one specific form of sex/gender inequality: the discrimination suffered by cisgender women because they are women. From that perspective, "single-sex" goods and services were considered to be "cisgender women-only" goods and services.

II. How to Interpret "Single-Sex" Goods and Services in EU Law

The evolutions in both the binary cisnormative and cisgender women–focused underpinnings of EU sex/gender equality law towards more inclusive understandings now meet in the specific context of "single-sex" goods and services. Indeed, on the one hand, according to so-called "gender critical" feminists, cisgender women enjoy certain "sex-based rights," which presupposes the presence of female sex characteristics at birth.[129] On the basis thereof, persons born with male sex characteristics must be excluded from women-only goods and services that are exclusively reserved for "natal women." In other words, "sex" is interpreted as strictly binary, innate, and assigned at birth. On the other hand, trans-inclusive feminists argue that "sex" should be interpreted as including gender identity, meaning that women-only goods and services are by principle reserved for both cisgender and trans women. While both viewpoints strongly disagree on the proper meaning of "sex" in this context, it needs to be acknowledged that both cisgender women and trans and non-binary people are highly vulnerable to discrimination and violence, and therefore share legitimate expectations of safety and protection against discrimination in accessing goods and services.

It is clear that the provision of single-sex goods and services, whatever interpretation of "sex" is used, amounts to differential treatment. Under Article 5(5) of the Goods and Services Directive, such differential treatment on grounds of sex shall not amount to discrimination, if the provision of goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Recital 16 of the preamble to the Directive further clarifies that legitimate aims may, for instance, be the protection of victims of sex-related violence in cases such as the establishment of single-sex shelters, for reasons of privacy and decency in cases such as the provision of accommodation by a person in a part of that person's home, the promotion of gender equality or the interests of men or women in cases involving, for example, single-sex voluntary bodies, the freedom of association in cases of membership at single-sex private clubs, and the organization of sporting activities such as single-sex sports events. However, neither the Directive's substantive provisions nor the preamble defines what "sex" means in this context, leaving it open for interpretation to what extent and in what forms EU law allows the provision of single-sex goods and services.

Given that the Goods and Services Directive subjects the provision of single–sex goods and services to a proportionality test—the measures need to be "appropriate and necessary" in light of

[128]Note that, to the author's knowledge, only a few cases addressing the meaning of "sex" in the context of "single-sex" goods and services have arisen in EU Member States that have already adopted a framework of legal gender recognition based on gender self-determination. One relevant example concerns the refusal to grant a trans woman, who had obtained gender recognition but had not undergone gender-affirming treatment, access to a women-only gym in Germany. The case is currently still pending in court. *See Nach Abweisung: Trans Frau verklagt Frauen-Ftnessstudio* [*After Being Turned Away: Trans Woman Sues Women's Gym*], QUEER (May 3, 2025), https://www.queer.de/detail.php?article_id=53447.

[129]*See inter alia* Sally Hines, *Hands Towards the Right: UK Gender-Critical Feminism and Right-Wing Coalition*, 34 J. GENDER STUD. 699, 704–06 (2025); Cardoso, *supra* note 1, at 52. A telling illustration can be found in Germany, where the "Deutscher Sauna Bund" adopted new guidelines on access to women-only saunas, in light of the introduction of self-determination for gender recognition in 2024. According to the guidelines, only women with female primary sex characteristics are allowed to women-only gyms, which may be enforced on the basis of either legal gender or corporal inspection. *See Selbstbestimmungsgesetz/Eintritt in Geschlechtsspezifische Bereiche* [*Self-Determination Act/Access to Gender-Specific Areas*], DEUTSCHER SAUNA-BUND (January 21, 2025). https://sauna-bund.de/selbstbestimmungsgesetz-eintritt-in-geschlechtsspezifische-bereiche/.

the pursued legitimate aim—the answer to that question will depend on the precise circumstances of the context at hand. Moreover, in light of the fact that trans and non-binary people arguably find protection against discrimination on the grounds of gender identity in the provision of goods and services based on the same legal instrument as cisgender women (see Section D), any interpretation of "sex" that leads to an unfavorable treatment of trans and non-binary people in comparison to cisgender individuals needs to be met with obvious suspicion. Indeed, while it cannot be ruled out that "sex" should sometimes be interpreted as "the presence of female sex characteristics" or, perhaps even more pertinently, "the absence of male sex characteristics" as an appropriate and necessary means to achieve a certain legitimate aim, a blanket trans-exclusionary reading of "sex" would be hard to reconcile with the principle of proportionality and the overall coherence of EU sex/gender equality and non-discrimination law. In other words, despite the historical importance of the single-sex exception to the prohibition of discrimination in the provision of goods and services for the equality of cisgender women, recent inclusive and complex understandings of "sex" in law demand a more contextualized and nuanced interpretation. In any case, as was explained *supra*, the CJEU already ruled against an essentialized and static understanding of "sex" in the case of *P. v. S. and Cornwall County Council* in 1996. The challenge now lies in appropriately and contextually balancing cisgender women's legitimate expectations of equality and safety with very similar expectations held by trans and non-binary people, taking into account the specific circumstances of each case.[130]

III. "Single-Sex" Goods and Services and Non-Binary People

While most of the public debate concerns the inclusion or exclusion of trans women—be they legally recognized as women or not[131]—in the context of women-only goods and services, the specific challenges for non-binary people should not be overlooked. On top of the question of whether and to what extent non-binary individuals can be lawfully *excluded* from certain single-sex goods and services, there is the separate question of whether those individuals can resist being *included* in goods and services that are segregated along binary gender lines. Indeed, under the prohibition of discrimination on grounds of gender identity, a non-binary person, whether they are legally recognized as such or not,[132] could arguably legally challenge the absence of goods or services that match their gender identity when such goods or services are only provided in a binary setting, for instance by claiming indirect discrimination.[133] In fact, in its case law on binary trans people, the CJEU never demanded successful legal recognition of a person's lived gender identity to be able to rely on the prohibition of discrimination. Indeed, already in *P v. S and Cornwall County Council,* the Court accepted that P.—a woman legally registered as male—could claim protection against discrimination on the grounds of "gender reassignment" in EU law. However, it could be argued that non-binary people perhaps more fundamentally challenge societal gender constructs than binary trans people, leading to higher costs for providers of services and/or goods to properly take into account their needs and interests. In that light, it is important to point out that, so far, the ECtHR has not recognized a positive obligation under Article 8 of the ECHR to provide for a non-binary gender category in national law.[134] From that perspective, it cannot be ruled out that the CJEU would consider disparate treatment or effects towards non-binary people

[130] *C.f.* Dunne, *supra* note 118, at 546.

[131] As Dunne points out, this is an unavoidable consequence of a media and political discourse that has overwhelmingly concentrated on trans women, and persistent cultural anxiety with trans women. *See* Dunne, *supra* note 118, at 539.

[132] This is important for non-binary people, as only a few EU Member States provide official recognition through a non-binary sex/gender marker.

[133] However, note that the provision of goods and services along binary gender lines could also be considered direct differential treatment on grounds of (non-binary) gender identity.

[134] Y v. France, App. No. 76888/17 (Jan. 31, 2023), https://hudoc.echr.coe.int/eng?i=002-13994. *See also* Pieter Cannoot, *Y v France: Intersex Rights in the Age of Subsidiarity,* 5 Eur. Convention on Hum. Rts. L. Rev. 487, 487–508 (2024).

justifiable under EU equality and non-discrimination law, by arguing that Article 7 of the CFR—which corresponds with Article 8 of the ECHR and therefore has to provide the same minimum standards as the Convention—does not require the recognition of non-binary gender identity in law. Nevertheless, the lens of equality/non-discrimination should at least encourage the CJEU to show sufficient attention to context and nuance in tackling these issues.[135]

Under the principle of proportionality, resolving the questions that non–binary people present in the context of sex/gender segregation would need to take into account the circumstances at stake. As Jessica Clarke argued,[136] solutions could come in different forms, from integration of non–binary individuals within binary structures, to recognition through the addition of a separate non-binary offer, to inclusive design that removes the need for sex/gender segregation in the provision of goods and services. Needless to say, remedying discrimination through the integration of non–binary individuals within existing binary structures—for instance, on the basis of their personal preference—would be less demanding of the normative majority than providing a separate non-binary offer or realizing inclusion in which the need for gender segregation has disappeared. Even more than trans women or trans men, the interests of non-binary individuals could clash with those of people, such as employers or providers of goods and services, who do not question the sex/gender binary. Depending on the context, the proportionality assessment could therefore arguably still show particular assimilationist dynamics negatively affecting non-binary individuals.

The answers to the questions raised above will eventually be provided by the CJEU. However, as the provision of single-sex goods and services can occur in very different material contexts, it appears unlikely that the Court will be able to settle each specific situation anytime soon. It therefore seems important for the Court to show awareness of the current tense societal context across the EU and to offer sufficient principled guidance for national courts and equality bodies to deal with a wide range of circumstances at the national level, in which a contextual definition of "sex"—that is, sex as "sex characteristics," "gender," or "gender identity"[137]—will be relevant. In the absence of such supranational case law, there's a risk that national LGBTIQ–phobic political contexts might spill over to domestic courts, potentially even across national borders. Given the increasing popularity and influence of the anti-gender ideology movement, often coinciding with nationalist and populist agendas,[138] across European countries in recent years, the protection of fundamental rights at the EU level is of crucial value.

F. Conclusion

Despite the persistence and, in some Member States, the intensification of transphobic and anti-gender rhetoric across the EU, this Article has shown that EU law holds significant untapped potential to protect trans and non–binary people against discrimination. While explicit legislative reform to include gender identity and gender expression as protected grounds in EU equality and non-discrimination law currently appears politically unattainable, a capacious and principled interpretation of the prohibition of sex-based discrimination can offer meaningful protection. Recent developments in CJEU case law signal a welcome shift toward a more inclusive and less

[135] *See id.* It could also be argued that the ECtHR's ruling in *Y v. France* is mainly relevant for the question of including non-binary people in procedures of sex/gender registration, with knock-on effects for other branches of law, such as family law, and public administration—for instance, issues involving identity documents or changes to governmental software systems. However, the absence of an *official* non-binary gender marker does not necessarily have to mean that non-binary persons cannot or should not be recognized in matters of policy and public or private services.

[136] Jessica A. Clarke, *They, Them, and Theirs,* 132 HARV. L. REV. 895, 936–45 (2019).

[137] Moreover, different interpretations for gender identity could still be thought of, such as *legal* gender identity or *lived* gender identity. The choice for either possibility could further be influenced by the conditions set in procedures for legal gender recognition, potentially based on self-determination or a medicalized understanding of transness.

[138] Osella, *supra* note 58, at 2.

medicalized understanding of trans and non-binary realities, suggesting that the Court is increasingly attuned to the lived experiences and rights claims of gender-diverse individuals. At the same time, persistent binary and cisnormative framings continue to shape the structure and interpretation of both national and EU law. The path forward, therefore, requires a combination of judicial courage, political will, and societal awareness to ensure that EU equality and non-discrimination law evolves into a framework that is genuinely inclusive of all gender identities and expressions, while effectively combatting hegemonic masculinity and patriarchy.[139] In the face of current threats, protecting trans and non-binary individuals against discrimination in and through EU law is not only possible, it is necessary.

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[139]Cardoso, *supra* note 1, at 62.

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