

# Protecting trans, non-binary and intersex persons against discrimination in EU law

Pieter Cannoot & Sarah Ganty\*

## 1 Introduction

In November 2020, the European Commission announced its first-ever LGBTIQ Equality Strategy.<sup>1</sup> Recognising that discrimination, violence and social exclusion of lesbian, gay, bisexual, trans, non-binary, intersex and queer (LGBTIQ) people persists throughout the European Union (EU), the Commission put forward several action points to advance LGBTIQ equality in the EU, in close cooperation with the Member States. Importantly, the Commission explicitly pointed out the importance of adopting an intersectional approach and paying attention to ‘the diversity of LGBTIQ people’s needs and to the most vulnerable, including [...] trans, non-binary and intersex people, who are among the least accepted groups in society and generally experience more discrimination and violence than others in the LGBTIQ communities’.<sup>2</sup> Moreover, whereas discrimination against LGBTIQ people occurs across the entire EU, the Commission acknowledged the worrying trend of increased hostility towards LGBTIQ people in certain Member States,<sup>3</sup> which coincides with the rise of the so-called anti-‘gender ideology’ movement and threats to democracy and the rule of law.<sup>4</sup>

Based on a large-scale survey among LGBTIQ people, the EU Fundamental Rights Agency (FRA) reported in 2020 that a significant proportion of LGBTIQ people continue to experience discrimination, harassment and violence, simply because of their sexual orientation, gender identity, gender expression and/or sex characteristics.<sup>5</sup> Compared with the results of the previous survey from 2012, the FRA noticed ‘little, if any progress in the way LGBTIQ people experience their human and fundamental rights in daily life’.<sup>6</sup> Overall, 43 % of respondents felt discriminated against in the year before the survey was conducted.

\* Dr Pieter Cannoot is assistant professor of law and diversity, affiliated with the Human Rights Centre of Ghent University (Belgium). Dr Sarah Ganty is a postdoctoral research fellow at the Human Rights Centre of Ghent University (Belgium), supported by Research Foundation – Flanders (FWO) and a J.S.D. candidate at Yale Law School.

1 European Commission (2020), 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, available at [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025_en).

2 European Commission (2020), 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, available at [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025_en), p. 3.

3 European Commission (2020), 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, available at [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025_en), p. 2.

4 On the anti-‘gender ideology’ movement and its links to other threats to democracy and the rule of law, see Kováts, E. (2018), ‘Questioning consensus: Right-wing populism, anti-populism, and the threat of “gender ideology”’, *Sociological Research Online*, <https://doi.org/10.1177/1360780418764735>.

5 European Union Agency for Fundamental Rights (2020), *EU-LGBTI II: A long way to go for LGBTI equality*, available at <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>.

6 European Union Agency for Fundamental Rights (2020), *EU-LGBTI II: A long way to go for LGBTI equality*, available at <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>, p. 10.

Discrimination occurs in all spheres of life, including in employment, access to goods and services, in healthcare settings and in education. Moreover, the survey results showed that trans and intersex people are most affected by discrimination: 60 % of trans respondents and 62 % of intersex respondents felt discriminated against.

However, despite their significant vulnerability to discrimination, harassment and violence, LGBTIQ people are not fully protected in EU Law, as will be explained below. In this article, we examine whether and how trans, non-binary and intersex people are currently protected against discrimination in EU law, and how that protection could be improved.

In order to gain a clear understanding of the scope of such legal protection, we first elaborate on how basic terms such as gender identity, gender expression and sex characteristics have to be conceptualised and how they relate to each other (2.). Secondly, we will briefly examine the extent to which trans, non-binary and intersex people are currently protected against discrimination in EU and national law (3.). Before concluding, we will identify several lacunae and/or challenges in the legal protection of trans, non-binary and intersex people against discrimination and how these could be addressed or remedied (4.).

## 2 Relevant terminology

The terminology with which the law and society in general address issues regarding sex, gender identity/ expression and sexual orientation is varied, inconsistent and constantly evolving. A clear definition and demarcation are therefore of paramount importance. However, the question arises as to whether such definition and demarcation are actually possible, considering that many LGBTIQ people find the habitual terminology unsatisfactory to reflect the versatility that they feel or aspire to.<sup>7</sup> Indeed, the precise wording and terms used in debates surrounding (variations of) sex characteristics, gender identity and sexual orientation often reflect the personal views and feelings of the individual concerned and are often an area of very intense disagreement.<sup>8</sup> Trans, non-binary and intersex people, as illustrated by the Commission's LGBTIQ Equality Strategy, are often included under the acronym 'LGBTIQ'. Although LGBTIQ people face different issues, they are all considered to be 'sexual minorities'.<sup>9</sup>

The concepts of 'sex (characteristics)', 'sexual orientation', 'gender identity' and 'gender expression' are often discussed together. Indeed, sex, gender identity, gender expression and sexual orientation together form a person's sexual identity. Although society and the law tend to conflate these concepts, they are independent constructs. In order to fully grasp the discrimination faced by LGBTIQ people, and the underlying causes thereof, it is therefore still essential to conceptualise a few key concepts. Given our focus in this article on trans, non-binary and intersex people, we will not deal with notions related to 'sexual orientation'.

### 2.1 Sex – variations of sex characteristics – intersex people

'Sex' is traditionally seen as a biological concept of a factual nature, determined by the presence of a certain configuration of chromosomes, hormones, gonads, internal morphology, external genitalia and

7 Motmans, J. (2009) *Leven als transgender in België. De sociale en juridische situatie van transgender personen in kaart gebracht*, (Living as a transgender person in Belgium. Mapping the social and legal situation of transgender people), Brussels, Instituut voor de gelijkheid van vrouwen en mannen, p. 28.

8 Scherpe, J. M. (2016) 'The legal status of transsexual and transgender persons – An introduction' in Scherpe J. M. (ed.), *The legal status of transsexual and transgender persons*, Cambridge, Intersentia, 2016, p. 2.

9 Although the acronym 'LGBTIQ' has increased the visibility of sexual minorities and their claims regarding law and policy, it has also been criticised for not working inclusively, since the designation of separate categories serves to highlight the differences between and among individuals based on their sexual identities and/or experiences. See Fineman, M. A. (2014) 'Vulnerability, resilience, and LGBT youth', *Temple Political & Civil Rights Law Review* 2013-14, Vol. 23, p. 314 and Ammaturo, F. R. (2017) *European sexual citizenship. Human rights, bodies and identities*, London, Palgrave, 2017, pp. 34-35.

secondary characteristics in an individual.<sup>10</sup> In other words, a person's sex is composed of multiple sex characteristics. According to the Preamble to the Yogyakarta Principles +10, 'sex characteristics' refer to 'each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty'.<sup>11</sup> Although external genitalia are only one of the constituting elements of a person's sex, they are usually decisive for determining a person's sex at birth, including in terms of official sex registration.<sup>12</sup>

The concept of 'sex' is usually seen as a person's 'biological status as male or female',<sup>13</sup> hence referring to 'sex' as a binary notion. Indeed, European societies are premised on the assumption that human beings are discretely 'sexed' into two categories.<sup>14</sup> However, advances in science, as well as the experiences of individuals with variations of sex characteristics reveal that sex is much more nuanced than the binary categories would have us believe.<sup>15</sup> Indeed, although in most individuals the aforementioned sex markers are congruent, and therefore 'typically' male or 'typically' female, this is not the case for all human beings.<sup>16</sup> Sex is fraught with indeterminacy, since there is no simple or singular test to decide on a person's 'correct' sex marker.<sup>17</sup> The conceptualisation of 'sex' as a binary construct is therefore a social construct,<sup>18</sup> informed and defined by ideas of gender identity and gender roles,<sup>19</sup> and thus is not a pre-discursive notion that is fixed on individuals.<sup>20</sup>

People whose sex characteristics do not match the socially constructed normality of the male/female sex are referred to with a variety of terms, such as intersex people, people with variations of sex characteristics or people with differences in sex development (DSD). Some will identify as *being* 'intersex', while others indicate *having* an atypical development of sex characteristics, referring to the medical term of 'DSD' or the more neutral 'variations of sex characteristics'.<sup>21</sup> While intersex people will have sex characteristics that fall outside of the male/female binary, the majority of people with variations of sex characteristics still identify their gender within the binary, i.e. as a man or a woman.<sup>22</sup>

Variations of sex characteristics cannot be explained satisfactorily under the essentialist binary theory of sex. The predominant modern social response approach towards intersex people has consisted of medically modifying the 'abnormality' shortly after birth, or sometimes during adolescence, to bring the individual concerned in accordance with the binary categories of 'male' or 'female'.<sup>23</sup> Intersex people

- 
- 10 Silver, A. E. (2013) 'An offer you can't refuse: Coercing consent to surgery through the medicalisation of gender identity', *Columbia Journal of Gender and Law* 2013-14, Vol. 26, p. 490.
  - 11 The Yogyakarta Principles+10 are a universal guide to human rights that applies generally binding international legal standards to the situation of LGBTIQ+ people. Although the Yogyakarta Principles+10 are not legally binding, they are considered to be very influential for policy-makers, courts and other human rights actors.
  - 12 Picarra, E. and Visser, C. (2012) 'Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism', *South African Journal on Human Rights*, Vol. 28, p. 508.
  - 13 Reeves, A. R. (2009) 'Sexual identity as a fundamental human right', *Buffalo Human Rights Law Review* 2009, Vol. 15, p. 218.
  - 14 Callens, N. (2014) *The past, the present, the future: genital treatment practices in disorders of sex development under scrutiny*, Ghent, University Press, p. 239.
  - 15 Clark Hofman, D. L. (2012) 'Male, female, and other: How science, medicine and law treat the intersexed, and the implications for sex-dependent law', *Tulane Journal of Law & Sexuality*, Vol. 21, p. 2.
  - 16 Greenberg, J. A. (1999) 'Defining male and female: Intersexuality and the collision between law and biology', *Arizona Law Review*, Vol. 41, p. 269.
  - 17 Currah, P. (1997) 'Defending genders: Sex and gender non-conformity in the civil rights strategies of sexual minorities', *Hastings Law Journal* 1996-97, Vol. 48, p. 1373.
  - 18 Greenberg, J. A. (1999) 'Defining male and female: Intersexuality and the collision between law and biology', *Arizona Law Review*, Vol. 41, p. 272. See also Lembke, U. (2016) 'Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies', *European Equality Law Review*, No. 2, p. 47.
  - 19 Clark Hofman, D. L. (2012) 'Male, female, and other: How science, medicine and law treat the intersexed, and the implications for sex-dependent law', *Tulane Journal of Law & Sexuality*, Vol. 21, p. 3.
  - 20 Butler, J. (1999) *Gender trouble: Feminism and the subversion of identity*, New York, Routledge, (10th ed.), p. 11.
  - 21 See Carpenter, M. (2018) 'The "normalisation" of intersex bodies and "othering" of intersex identities' in Scherpe, J. M., Dutta, A. and Helms, T. (eds.), *The legal status of intersex persons*, Cambridge, Intersentia, p. 486.
  - 22 Richards, C. et al. (2016), 'Non-binary or genderqueer genders', *International Review of Psychiatry*, Vol. 28(1), p. 95. See also Dunne, P. (2018) 'Towards trans and intersex equality: Conflict or complementarity?' in Scherpe, J. M., Dutta, A. and Helms, T. (eds.), *The legal status of intersex persons*, Cambridge, Intersentia, p. 236.
  - 23 Garland, F. and Travis, M. (2018) 'Legislating intersex equality: Building the resilience of intersex people through law', *Legal Studies*, available at <https://doi.org/10.1017/lst.2018.17>, p. 3.

have thus routinely been subjected to surgical treatments – while still very young – to align their physical appearance with either of the binary sexes without their prior and fully informed consent, even though they do not usually face actual health problems due to their status.<sup>24</sup> The aforementioned 2019 LGBTI survey by the FRA showed that 62 % of intersex respondents did not provide – and were not asked for – their or their parents’ consent before undergoing surgical intervention to modify their sex characteristics.<sup>25</sup> Although it goes beyond the scope of this article to discuss so-called sex ‘normalising’ treatment, it has been widely accepted that such non-consensual deferrable treatment is a violation of human rights.<sup>26</sup>

## 2.2 Gender identity – gender expression – trans and non-binary people

The Preamble to the Yogyakarta Principles +10 defines ‘gender identity’ as ‘each person’s deeply felt internal and individual experience of gender, which may or may not correspond to the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms’. Although ‘gender expression’ is already covered by the definition of ‘gender identity’ (bodily appearance, dress, speech and mannerisms), the Preamble also provides a separate definition. ‘Gender expression’ is described as ‘each person’s presentation of the person’s gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references’. With most people, gender expression is in conformity with the social expectations associated with their gender identity, but this is not necessarily the case with all individuals. Since gender is understood as an amorphous social construct, there are as many ways to experience and express gender as there are human beings on the planet.<sup>27</sup>

While arguably all (or at least most)<sup>28</sup> human beings have a gender identity and gender expression, most attention is focused on those people whose gender is considered to be not in conformity with societal normative expectations and stereotypes, i.e. trans and non-binary people. By contrast, the term ‘cisgender person’ is used for those (binary) persons whose gender identity is in conformity with the sex assigned to them at birth.

Although ‘sex’ and ‘gender identity’ are different concepts, it is clear that they interrelate in current society. Indeed, in part, gender identity is constructed from the consequences attached by society to the physical differences between the (binary) sexes. There are particular dress codes, speech patterns, gaits etc. assigned to the sexes, resulting in gender stereotypes based on the naturalness and sanctity of the binary system.<sup>29</sup> People who disrupt these gender norms are often faced with stigma, discrimination, harassment and violence, in order to restore the ‘natural’ gender order.

The term ‘trans people’ is increasingly used as an umbrella term for anyone whose gender identity and/or gender expression does not match the sex assigned to them at birth and the expectations society usually attaches to that sex. The notion of ‘trans’ represents a spectrum of gender variance, including people

24 Council of Europe Commissioner for Human Rights (2015), *Human rights and intersex people*, available at <https://book.coe.int/en/commissioner-for-human-rights/6683-pdf-human-rights-and-intersex-people.html#>, p. 14.

25 European Union Agency for Fundamental Rights (2020), *EU-LGBTI II: A long way to go for LGBTI equality*, available at <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>, p. 51.

26 See, for instance, Council of Europe, Resolution 2191 (2017) Promoting the human rights of and eliminating discrimination against intersex people, adopted by the Parliamentary Assembly of the Council of Europe, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&lang=en>; European Parliament (2019), Resolution on the rights of intersex people (2018/2878(RSP)), adopted by the European Parliament on 14 February 2019, available at [https://www.europarl.europa.eu/doceo/document/TA-8-2019-0128\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2019-0128_EN.html).

27 Reineck, K. (2017) ‘Running from the gender police: reconceptualizing gender to ensure protection for non-binary people’, *Michigan Journal of Gender & Law*, Vol. 24, p. 289.

28 Dianne Otto argues that, although ‘the definition sets out to be inclusive by acknowledging that everyone has a gender identity, those who do not experience gender as an “identity” or feel they have no gender or are gender neutral are excluded’. See Otto, D. (2017) ‘Queering gender [identity] in international law’ in Hellum, A. (ed.), *Human rights, sexual orientation, and gender identity*, London, Routledge, p. 36.

29 Picarra, E. and Visser, C. (2012) ‘Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism’, *South African Journal on Human Rights*, Vol. 28, p. 508.

who identify as a man or woman and people whose gender cannot be described in a binary way ('non-binary people'). The term 'non-binary people' is often used as an umbrella term for anyone who identifies as neither male nor female, as both male and female at the same time, as different genders at different times, or as no gender at all. While many trans and non-binary people seek access to gender-affirming treatment in order to establish (greater) congruence between their bodies and gender identity, trans identities should not be reduced to a medicalised lens. Beside the fact that many trans and non-binary people do not desire to undergo medical treatment, personal, familial, religious, socioeconomic and/or institutional reasons may hinder effective access to trans-specific healthcare.<sup>30</sup>

Over the last decade, the right to gender self-determination has been increasingly recognised among international human rights actors, such as the Council of Europe,<sup>31</sup> at EU level,<sup>32</sup> and at the national level, predominantly in the sphere of legal gender recognition.<sup>33</sup> For instance, in the EU/EFTA, nine countries – Belgium, Denmark, Iceland, Ireland, Luxembourg, Malta, Norway, Portugal and Switzerland – have abolished all pathologising requirements for legal gender recognition (for adults). Two more – France and Greece – have abolished the requirement of a mandatory diagnosis, but they still respectively impose a judicial procedure and mandatory divorce. With these exceptions, however, all other Member States still require one or more medical conditions such as mandatory diagnosis/psychological assessment, sterility or gender-affirming treatment for legal gender recognition.

### 3 State of play in EU law and at Member State level

Trans, non-binary and intersex people are stigmatised and discriminated against because their gender identity, gender expression and/or sex characteristics do not correspond to socially constructed and pervasive stereotypes. As the European Commission noted, they are among the most vulnerable communities in society.<sup>34</sup> It is therefore important to analyse to what extent they are currently included within the protective scope of anti-discrimination law, both at the level of the EU (3.1.) and the Member States (3.2.).

#### 3.1 The gap in the protection of the EU anti-discrimination law framework

##### *The EU anti-discrimination law framework*

The EU anti-discrimination law framework offers very limited protection when it comes to LGBTIQ people. Despite the EU's general competence to adopt secondary legislation to combat discrimination based on sexual orientation within the scope of EU law, legal protection against such discrimination is limited

30 Cannoote, P. (2019) "'#WontBeErased': The effects of (de)pathologisation and (de)medicalisation on the legal capacity of trans\* persons', *International Journal of Law and Psychiatry*, Vol. 66, <https://doi.org/10.1016/j.ijlp.2019.101478>, p. 4.

31 See, for instance, Council of Europe Resolution 2048 (2015) Discrimination against transgender people in Europe, adopted by the Parliamentary Assembly of the Council of Europe, available at <http://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=21736>, and the case law of the European Court of Human Rights: ECtHR 11 July 2002, 28957/95, *Christine Goodwin v the United Kingdom*; 6 April 2017, 79885/12, 52471/13, 52596/13, *A.P., Garçon and Nicot v France*; 11 October 2018, 55216/08, *S.V. v Italy*; 17 January 2019, 29683/16, *X v the Former Yugoslav Republic of Macedonia*; 9 July 2020, 41701/16, *Y.T. v Bulgaria*; 19 January 2021, 2145/16 and 20607/2016, *X. and Y. v Romania*; 17 February 2022, 74131/14, *Y. v Poland*.

32 See, for instance, EU Commission, (2020) 'Legal gender recognition in the EU: the journeys of trans people towards full equality', available at: [https://ec.europa.eu/info/sites/default/files/legal\\_gender\\_recognition\\_in\\_the\\_eu\\_the\\_journeys\\_of\\_trans\\_people\\_towards\\_full\\_equality\\_sept\\_en.pdf](https://ec.europa.eu/info/sites/default/files/legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_sept_en.pdf).

33 See Cannoote, P. (2019) "'#WontBeErased': The effects of (de)pathologisation and (de)medicalisation on the legal capacity of trans\* persons', *International Journal of Law and Psychiatry* 2019, Vol. 66, <https://doi.org/10.1016/j.ijlp.2019.101478>, pp. 5-8.

34 European Commission (2020), 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, available at [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/lgbtiq-equality-strategy-2020-2025_en), p. 3.

to employment, occupation and vocational training by means of the Employment Equality Directive.<sup>35</sup> Moreover, gender identity, gender expression and sex characteristics are not explicitly included as prohibited grounds for discrimination in EU Treaties, the Charter of Fundamental Rights (EUCFR) and the directives that together form the EU anti-discrimination law framework.

Indeed, Article 19 of the Treaty on the Functioning of the EU (TFEU) explicitly prohibits discrimination (inter alia) on the ground of sex, while Article 157 TFEU enshrines the principle of equal pay for male and female workers for equal work or work of equal value. Article 10 TFEU recalls that, in defining and implementing its policies and activities, the EU aims to combat discrimination based on sex and sexual orientation. The Treaty on European Union (TEU) further mentions that equality of treatment between men and women is a fundamental value of the EU (Articles 2 and 3(3)). Several directives have been adopted on the basis of the two aforementioned articles of the TFEU, including the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (Directive 2004/113/EC),<sup>36</sup> as well as the recast Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast Directive 2006/54/EC).<sup>37</sup> They all concern equal treatment between men and women. Finally, Article 21(1) of the EUCFR prohibits discrimination on any ground, including on grounds of sex and sexual orientation, while Article 23 of the Charter concerns equality between women and men in all areas, including employment, work and pay, and allows for the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.<sup>38</sup>

It is striking that today EU anti-discrimination law still mainly uses the expression of ‘equal treatment between men and women’ as well as ‘sex discrimination’, which appears to exclusively refer to a binary approach to sex and does not explicitly protect trans, non-binary and intersex people. Only Recital 3 of the Recast Directive 2006/54/EC, relying on case law of the CJEU, specifies that the directive also applies to discrimination arising from the ‘gender reassignment’ of a person. Indeed, without abandoning a binary conception of sex, the CJEU has interpreted the prohibition of discrimination based on sex in primary and secondary law as also prohibiting discrimination based on ‘gender reassignment’.

### *The CJEU's extensive interpretation of the prohibition of discrimination on the ground of sex*

According to the CJEU's case law, gender identity is protected to a limited extent under the ground of sex/gender, insofar as it covers individuals who intend to undergo, are undergoing or have undergone gender-affirming surgery. The Court successfully dealt with discrepancies of biological sex, gender identity and legal recognition for the first time in *P v S and Cornwall County Council*.<sup>39</sup> The CJEU found sex discrimination when a trans woman who underwent a process of medical transition was removed from

35 Council Directive 2000/78/EC of 27 November establishing a general framework for equal treatment in employment and occupation, *OJ L* 303, 2 December 2000, pp. 16-22. On the limitation of the protection against discrimination on grounds of sexual orientation, see Kochenov, D. (2009) ‘On options of citizens and moral choices of states: Gays and European federalism’, *Fordham International Law Journal*, Vol. 33, p. 156.

36 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJ L* 373, 21 December 2004, pp. 37-43.

37 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ L* 204, 26 July 2006, pp. 23-36 (hereafter the Recast Directive 2006/54/EC).

38 Mention should also be made of the Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Directive 79/7/EEC) adopted on grounds of Article 352 TFEU (ex-Article 308 TEC, 235 EEC Treaty) (Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, *OJ L* 6, 10 January 1979, p. 24).

39 Lembke, U. (2016) ‘Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies’, *European Equality Law Review*, No. 2, p. 52. See also: CJEU, C-13/94, *P v S and Cornwall County*, 30 April 1996, EU:C:1996:170, para. 41.

her employment. Interestingly, this was also the point when the Court started using the term 'gender'. Since then, it has used this term as an indiscriminate substitute for the term 'sex'.<sup>40</sup>

In the same vein, the Court judged in *K.B.* that national legislation, which precludes a trans person, in the absence of recognition of his gender identity, from fulfilling a requirement which must be met in order to be entitled to a right protected by Community law, must be regarded as being, *in principle*, incompatible with the requirements of Community law.<sup>41</sup> The *K.B.* case was about a trans partner, R., who was not entitled to a survivor's pension payable solely to a surviving spouse. R., who was assigned the female sex at birth and was registered as such in the Register of Births, had not been able to amend his birth certificate to reflect his gender transition. As a result, and contrary to their wishes, K.B. and R. were not able to marry and hence K.B. was not able to nominate her partner as the beneficiary of a survivor's pension. This situation – the national framework excluding trans people from the scope of survivors' pension rights according to their gender identity – was deemed by the Court not to be compatible with the principle of sex equality enshrined in Article 157 TFEU.<sup>42</sup>

In the field of social security, the Court found in *Richards* that Article 4(1) of Directive 79/7/EEC precludes legislation which denies a trans woman, who had undergone gender-affirming surgery (and therefore a medical and social transition), entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.<sup>43</sup> In other words, although states have a margin of appreciation in matters of gender recognition, the UK could not refuse to recognise, in such absolute terms, that the applicant was a woman and, on that basis, deny her the pension rights she was entitled to as a woman.

More recently, in *MB v Secretary of State for Work and Pensions*, the Court interpreted the Directive as 'precluding national legislation which requires a person who has changed gender not only to fulfil physical, social and psychological criteria but also to satisfy the condition of not being married to a person of the gender that he or she has acquired as a result of that change, in order to be able to claim a State retirement pension as from the statutory pensionable age applicable to persons of his or her acquired gender'.<sup>44</sup> In other words, the applicant was treated unfavourably in comparison to cisgender married people who did not need to annul their marriage in order to benefit from retirement pensions, since the retirement pension was not conditional on marital status.

Finally, Directive 2004/113/EC enshrines the principle of equal treatment between men and women in access to goods and services and, as is the case for most of the EU anti-discrimination law instruments, it is deeply grounded in a binary perception of sex.<sup>45</sup> No case concerning discrimination against trans, intersex or non-binary people has yet been brought before the CJEU. The directive is silent on whether it also provides protection from discrimination on grounds of 'gender reassignment', as opposed to Recast

40 Lembke, U. (2016) 'Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies', *European Equality Law Review*, No. 2, p. 50. On p. 52 Lembke rightly explains that, 'In some cases, the discrimination against LGBTI\* persons is discrimination based upon (biological) sex; in some cases, it is discrimination because of sex-based assumptions, expectations, stereotypes, or norms (gender); and, in many cases, the boundaries are blurring. The CJEU should consequently apply its approach of sex discrimination developed in *P. v S.* and *K.B.* to disadvantageous non-conformist sexes as well as to gender performances'.

41 Article 157 TFEU (previously Article 141 EC) as well as the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ L* 204, 26 July 2006, pp. 23-36 (previously Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women). See CJEU, C117/01, *K.B. v National Health Service Pensions Agency and Secretary of State for Health*, 7 January 2004, EU:C:2004:7, paras. 30 to 34.

42 Van den Brink, M. and Dunne, P. (2018) 'Trans and intersex equality rights in Europe – a comparative analysis', available at <https://ec.europa.eu/newsroom/just/items/638586/en>.

43 See CJEU, C-423/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions*, 27 April 2006, EU:C:2006:25, para. 33.

44 CJEU (GC), C-451/16, *MB v Secretary of State for Work and Pensions*, 26 June 2018, EU:C:2018:492.

45 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 84.

Directive 2006/54/EC. However, the Commission has made clear that the protection in Directive 2004/113/EC should be in line with the CJEU's case law.<sup>46</sup>

As a consequence, the protected ground of sex is not limited to discrimination between (cisgender) men and (cisgender) women, but also serves as a proxy to include 'gender reassignment'. To date, the Court has not ruled on further cases regarding gender identity, gender expression and sex characteristics, especially concerning non-binary and intersex people. The only other mentions of gender identity which can be found in the case law of the Court are related to asylum cases when it comes to the determination of refugee status and the use of expert reports and the respect for private life<sup>47</sup> or to the procedure attached to it.<sup>48</sup>

### *International protection and the Victims' Rights Directive*

More generally, the Recast Qualification Directive<sup>49</sup> and the Recast Procedure Directive<sup>50</sup> in the matter of international protection formally acknowledge gender identity and the necessity for asylum seekers to be protected when they are victims of maltreatment on that basis. The inclusive language of these directives should be taken as a model of trans and intersex-inclusive provisions.<sup>51</sup>

The Recast Qualification Directive, defining membership of a particular social group (one of the reasons for persecution, a condition in order to be granted refugee protection)<sup>52</sup> specifies that 'gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group'.<sup>53</sup> The ground of gender identity is included as one 'gender related aspect' among others. On this basis, it could be argued that other 'gender related aspects' such as sex characteristics or gender expression could be taken into consideration to assess the reasons for persecution based on belonging to a particular social group.

46 European Commission (2015), *Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services*, COM(2015) 190 final, 5 May 2015, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0190>. See also: Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 48.

47 See CJEU, C-473/16, *F. v Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, EU:C:2018:36: 'It is also necessary to take account, in order to assess the seriousness of the interference arising from the preparation and use of a psychologist's expert report, such as that at issue in the main proceedings, of Principle 18 of the Yogyakarta principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, to which the French and Netherlands Governments have referred, which states, inter alia, that no person may be forced to undergo any form of psychological test on account of his sexual orientation or gender identity' (para. 62). See also CJEU 17 December 2020, *European Commission v Hungary*, C-808/18, EU:C:2020:1029, para. 188.

48 See CJEU, C517/17, *Milkias Addis v Bundesrepublik Deutschland*, 16 July 2020, EU:C:2020:579, para. 65.

49 Recital 30 and Article 10(d) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L 337, p. 9.

50 Recital 29 and Articles 11(3) and 15(3) of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013 L 180, p. 60.

51 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 49.

52 Article 10 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L 337, p. 9.

53 Article 10(1)(d) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011 L 337, p. 9. See also Recital 30 of Directive 2011/95/EU.

The Recast Procedure Directive provides that special procedural guarantees may be recognised because of the applicant's gender identity,<sup>54</sup> especially regarding the interview and the person who conducts it.<sup>55</sup> However, as opposed to the Recast Qualification Directive, this Directive does not adopt the broad wording of 'gender related aspects'.

It should also be recalled that EU law has strengthened the rights of victims of crime, in respect of people who are particularly vulnerable and, in this context, understands gender-based violence as including violence on grounds of a person's gender identity or gender expression.<sup>56</sup> As opposed to the two aforementioned Directives, the Victims' Rights Directive explicitly covers the ground of gender expression, yet does not mention the ground of sex characteristics.

### *The gaps and limits of EU anti-discrimination law*

Although the CJEU has given an extensive interpretation of discrimination based on sex which also covers 'gender reassignment' and despite the fact that a few secondary instruments use inclusive language, the protection of trans, non-binary and intersex people against discrimination in EU law remains limited. As van den Brink and Dunne point out, while the CJEU has been willing to employ a progressive interpretation of sex equality standards, it has consistently made use of a highly medicalised picture of trans people.<sup>57</sup> Moreover, the CJEU sticks to a binary understanding of sex and gender, while the binary view of sex/gender has been increasingly challenged at many levels and should also be questioned in anti-discrimination law. In this context, given the binary understanding of sex/gender, as well as the importance of gender-affirming surgery in the CJEU's relevant case law, several authors have raised doubts over whether all trans, non-binary and intersex people fall within the protective scope of EU anti-discrimination law.<sup>58</sup>

Furthermore, beyond the limits of CJEU case law, the fact that the grounds of gender identity, gender expression and sex characteristics are not explicitly recognised in the EU's anti-discrimination framework means there are many gaps and uncertainties in the protection of trans, non-binary and intersex people against discrimination. For instance, Recital 12 of Directive 2004/113/EC explains that, 'healthcare services, which result from physical differences between women and men, do not relate to comparable situations and, therefore, do not constitute discrimination', without mentioning gender-affirming treatment which is generally trans-specific. In other words, when comparisons are drawn between men and women, they might not take into account the specificity of trans people undergoing gender-affirming treatment; for instance, breast augmentation is often considered as cosmetic and is therefore often not reimbursed by health insurance.<sup>59</sup>

54 Recital 29 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), *OJ* 2011 L 337, p. 9.

55 Article 15(3)(a) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), *OJ* 2011 L 337, p. 9. See also Article 11(3) of Directive 2011/95/EU regarding applications made on behalf of dependants or minors.

56 See Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, *OJ* 2012 L 315, p. 57 and more specifically Recital 17.

57 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 9.

58 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, pp. 108-109. Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, pp. 58-64.

59 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, pp. 80-81.

Beyond the matter of gender-affirming treatment, the directive also does not consider the more general medical needs of trans people. A cis woman and a trans man may, for instance, need similar medical treatment, e.g. gynaecological interventions, and trans people may need other specific treatments too. In other words, the simple idea that ‘men’ and ‘women’ need different healthcare services based on their physical differences, does not take into account the complexity of variations in sex and gender among human beings.

Another example detailed below is the provision of single-sex facilities: Recital 17 of Directive 2004/113/EC states that access to goods and services does not require that facilities should always be provided to men and women on a shared basis, with the consequence that this binary understanding of sex/gender may not be accommodating for people identifying as non-binary.<sup>60</sup> Another gap identified in the field of employment or education is the absence from work or education due to trans or intersex-related treatment, which is, once again, trans/intersex-specific.<sup>61</sup> As explained in the last section, the issue of pregnancy, which EU law links to women only,<sup>62</sup> is likely to raise issues for pregnant trans and non-binary individuals who might fall through the cracks of protection.<sup>63</sup>

Finally, although the list enumerated in Article 21(1) of the EUCFR is an open-ended one and therefore likely to protect discrimination on grounds of gender identity, gender expression and sex characteristics, the scope of protection is narrower due to the limited scope of the Charter defined by its Article 51(1).<sup>64</sup> Moreover, Article 21(1) is not part of the EU anti-discrimination legal framework *per se* (i.e. the anti-discrimination law directives which are mainly adopted on the basis of Article 19 TFEU), which comprises definitions, remedies, enforcement mechanisms and bodies for the promotion of equal treatment. As a result, even when Article 21(1) is likely to apply according to Article 51(1) EUCFR, EU law does not require Member States to give a mandate to equality bodies to act on this basis. In other terms, under EU law, equality bodies have no competence to help victims of discrimination which would fall outside the scope of protection provided by anti-discrimination law as defined by Article 19 TFEU, but inside the scope of application of Article 21(1) EUCFR.<sup>65</sup>

### 3.2 Greater protection in some national legislation

National authorities also have an essential role to play when it comes to the protection of trans, non-binary and intersex people. The vast majority of trans and non-binary people around the world do not have access to legal gender recognition by the state. This generates stigma and prejudice ‘that tacitly permits, encourages and rewards with impunity the acts of violence and discrimination against them, and

60 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 84.

61 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 97.

62 See Articles 2(2)(c), 3 and 14(2) Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ L 204*, 26 July 2006, pp. 23-36.

63 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 100.

64 For instance, CJEU, C-206/13, *Cruciano Siragusa c. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, 6 March 2014, EU:C:2014:126, paras. 19-22.

65 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, p. 21.

leads to a situation of de facto criminalization'.<sup>66</sup> Out of 39 European states,<sup>67</sup> a majority of states went beyond the protected ground of sex to enshrine the grounds of gender identity, gender expression and sex characteristics in different fields: 21 states explicitly prohibit discrimination on the basis of at least one of these three grounds (predominantly 'gender identity' and occasionally 'sex characteristics').<sup>68</sup> Besides this, the UK only recognises the ground of 'gender reassignment'. Thus, many states do not explicitly prohibit discrimination on the basis of at least one of these grounds.<sup>69</sup> However, in some countries, such as Germany, the ground of sex/gender has played the role of proxy to protect people who are victims of discrimination based on gender identity, gender expression and sex characteristics.<sup>70</sup> Furthermore, even though they do not explicitly recognise the grounds of gender identity, gender expression and sex characteristics, a few Member States also enshrine in their legal order an open-ended non-discrimination clause which could include these grounds.<sup>71</sup>

As a consequence, the grounds of gender identity, gender expression and sex characteristics show diverging degrees of protection in domestic anti-discrimination legislation across European countries. While these grounds have found recognition mainly through the interpretation of the ground of sex and/or the open-ended clause, they are not explicitly recognised, or only partially recognised, in many countries, some of which have deployed strategies to protect people discriminated against based on these grounds through sex/gender and through sexual orientation.<sup>72</sup> However, this may lead to contradictions and difficulties, depending on how courts choose to interpret the concepts. Moreover, it can also lead to important gaps such as in EU law or limited protection when courts adopt a medicalised view of trans people.

## 4 Improving the protection of trans, non-binary and intersex people against discrimination and challenges

The previous section showed that trans, non-binary and intersex people only enjoy (very) limited protection against discrimination in the EU, and especially at EU level. The question therefore arises of how their position in the EU equality law framework could be improved. As van den Brink and Dunne have already identified, there appear to be (at least) three ways forward: an extensive interpretation of the existing ground of 'sex', the explicit addition of three new grounds (gender identity, gender expression and sex characteristics) in the (primary and secondary) EU equality law framework, and the explicit clarification in the (primary and secondary) EU equality law framework that 'sex' also includes gender identity, gender expression and sex characteristics.<sup>73</sup> Moreover, the introduction of an open-ended clause in the TFEU

66 United Nations General Assembly (2018) *Protection against violence and discrimination based on sexual orientation and gender identity. Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity A/73/152*, 12 July 2018, para. 25.

67 Chopin, I. and Germaine, C. (2021) *A comparative analysis of non-discrimination law in Europe 2020. The 27 EU Member States, Albania, North Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia Turkey and the United Kingdom compared*, European network of legal experts in gender equality and non-discrimination, pp. 121-133, available at <https://op.europa.eu/en/publication-detail/-/publication/a88ed4a7-7879-11ea-a07e-01aa75ed71a1>. Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, pp. 15-16.

68 Albania (gender identity only), Belgium, France, Greece (gender identity or gender characteristics), Hungary (sexual identity), Iceland, Malta, Montenegro (gender identity, intersex characteristics), Serbia, Slovenia, Sweden, Georgia (gender identity and expression), Kosovo (gender identity only), Czechia (the term 'gender identification' is used, but according to Czechia's Public Defender of Rights, this means gender identity), Finland, Luxembourg, Netherlands, Norway, Portugal, Croatia and North Macedonia.

69 Austria, Cyprus, Denmark, Estonia, Germany, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Poland, Romania, Slovakia, Spain, Turkey, Bulgaria, Moldova and the UK.

70 In 2017, the Federal Constitutional Court of Germany clarified that the prohibition of sex discrimination covers gender identity: BVerfG, Beschluss des Ersten Senats vom 10. Oktober 2017 1 BvR 2019/16 – Rn. (1 – 69), DE:BVerfG:2017:rs20171010.1bvr201916.

71 Moldova, Slovakia, Estonia (to a limited extent), Latvia, Romania and Bulgaria.

72 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, pp. 61-64.

73 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 108.

would be an additional way to protect trans, non-binary and intersex people against discrimination. It is clear that all four options come with benefits and challenges. In this section, we will briefly explore how the EU could move forward.

#### 4.1 Extensive interpretation of ‘sex’ discrimination

In our opinion, the prohibition of discrimination on the basis of sex – contained in both EU primary law and EU secondary law – naturally includes a prohibition of discrimination on the basis of gender identity, gender expression and sex characteristics. Indeed, as has been explained in Section 2, trans, non-binary and intersex people face stigma and discrimination because of the fact that their gender identity, gender expression and/or sex characteristics does not correspond to socially constructed and persistent expectations that accompany the *sex* assigned to them. Indeed, a person assigned the male sex who identifies as a woman or as non-binary or who adopts a non-masculine gender expression transgresses the societal expectation that they would develop a masculine gender identity or appear masculine.<sup>74</sup> Similarly, a person who has a variation in sex characteristics defies the socially constructed stereotype that everyone is of either a ‘typically’ male or ‘typically’ female sex.<sup>75</sup> In both cases, an individual who abides by the socially constructed expectations connected to the binary sex assigned to them at birth (cisgender people and people without variations of sex characteristics) will escape the specific types of discrimination that trans, non-binary and intersex persons face.<sup>76</sup> In other words, ‘sex’ plays a decisive role in the discrimination with which trans, non-binary and intersex people are confronted.<sup>77</sup>

As Lembke holds, ‘when tackling sex discrimination, non-discrimination law has to cover both detrimental conformist gender roles and disadvantageous non-conformist sexes or gender performances. Both dimensions of sex discrimination are rooted in the binary sex model’.<sup>78</sup> In 2020, the US Supreme Court reached the same conclusion in the case of *Bostock v Clayton County*, in which it held that the prohibition of sex discrimination in Title VII of the Civil Rights Act includes the prohibition of discrimination on the basis of gender identity.<sup>79</sup>

As mentioned above, the CJEU already held that the prohibition of sex discrimination laid down in the EU gender equality directives includes discrimination based on ‘gender reassignment’, and therefore goes beyond discrimination on the ground of an individual being a man or a woman. By analogy, the CJEU could interpret the directives as also prohibiting discrimination based on the fact that a (trans, non-binary or intersex) person fails to act, identify or appear in conformity with the stereotypes connected to the sex assigned to them at birth. Interestingly, in his opinion in the case of *P v S and Cornwall County Council*, Advocate General Giuseppe Tesouro already pointed out that ‘sex’ should be interpreted as a continuum and that the prohibition of sex discrimination applies to those persons who fall outside of the male/female dichotomy and are treated unfavourably ‘precisely because of their sex and/or sexual

74 See Lembke, U. (2016) ‘Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies’, *European Equality Law Review*, No. 2, p. 48.

75 Lembke, U. (2016) ‘Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies’, *European Equality Law Review*, No. 2, p. 51. See also Tobler, C. (2014) ‘Equality and non-discrimination under the ECHR and EU Law. A comparison focusing on discrimination against LGBTI persons’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 74(3), 541.

76 Note that cisgender persons may also encounter gender discrimination because of challenging stereotypes and gender roles connected to their sex/gender, e.g. cisgender women and men challenging traditional notions of ‘femininity’ and ‘masculinity’.

77 Lembke, U. (2016) ‘Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies’, *European Equality Law Review*, No. 2, p. 48. See also Tobler, C. (2014) ‘Equality and non-discrimination under the ECHR and EU Law. A comparison focusing on discrimination against LGBTI persons’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 74(3), 536-537, 545.

78 Lembke, U. (2016) ‘Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies’, *European Equality Law Review*, No. 2. Lembke refers to the external and internal gender hierarchy: cisgender men and women are favoured in comparison with gender non-conforming people (external hierarchy), while men are favoured in comparison with women (internal hierarchy).

79 US Supreme Court 15 June 2020, *Bostock v Clayton County*, 590 US (2020).

identity'.<sup>80</sup> The European Commission has also argued that the expansive protective approach used by the Court in the aforementioned cases concerning 'gender reassignment' should be materially similar in other cases of discrimination based on gender identity.<sup>81</sup>

There is thus no inherent reason why the CJEU could not extensively interpret the prohibition of sex discrimination to fully include trans, non-binary and intersex people in its protective scope. However, as noted by van den Brink and Dunne, an approach that only relies on the interpretation given in case law comes with legal uncertainty.<sup>82</sup> Given that there has only been a handful of cases concerning trans people, and no cases concerning non-binary and intersex people, that have reached the CJEU so far, legal progress through judicial interpretation could be very slow.

## 4.2 Addition of new discrimination grounds or legal clarification of 'sex'

As Ganty and Benito Sanchez recently argued, another approach could consist of the explicit addition of three new discrimination grounds, i.e. gender identity, gender expression and sex characteristics, both in EU primary law – such as Article 21 EUCFR and Article 19 TFEU – as well as in the EU gender equality directives.<sup>83</sup> Even though there is no absolute necessity to do so, the addition of new grounds still has a number of benefits.<sup>84</sup> Firstly, adding new grounds would increase the visibility of trans, non-binary and intersex people and symbolically recognise their vulnerability to discrimination. Secondly, it would end the legal uncertainty that accompanies the sole reliance on judicial interpretation by the CJEU. Thirdly, explicitly recognised grounds could catalyse data collection and research, which would facilitate the evidencing of indirect and structural discrimination. Fourthly, adding new grounds to the EU equality law framework (in particular in secondary law) would oblige all Member States to include them in national anti-discrimination legislation.

However, given the fact that unanimity among Member States is required both to amend Treaty provisions and to amend the equality directives adopted on the basis of Article 19 TFEU, it appears utopian to assume that gender identity, gender expression and sex characteristics may be added to the EU equality law framework in the near future. Indeed, state-sponsored hostility towards LGBTIQ people in Member States such as Poland and Hungary is well-documented. At this point, it seems impossible to assume that all EU Member States would support the explicit recognition that trans, non-binary and intersex people are in need of better protection against discrimination in EU law. In any case, even assuming that current provisions of primary EU equality law remain unamended, arguably, in our opinion, the Commission still has the competence to propose the addition of gender identity, gender expression and sex characteristics to the EU gender equality directives as proper non-discrimination grounds next to 'sex'. Indeed, as we explained in the previous section, the notion of 'sex' included in Article 19 TFEU needs to be extensively interpreted. However, the unanimity rule imposed by Article 19 TFEU to adopt and amend equality law directives makes this option unlikely.

Closely related to the addition of three new discrimination grounds is the approach that consists of providing a clarification in the gender equality directives that the prohibition of discrimination on the

80 CJEU, C-13/94, *P v S and Cornwall County Council*, Opinion of AG Tesouro, para. 17. See also Bell, M. (2012) 'Gender identity and sexual orientation: Alternative pathways in EU equality law', *The American Journal of Comparative Law*, Vol. 60(1), p. 136.

81 EU Commission (2015), *Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services*, COM(2015) 190 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0190>, p. 4.

82 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 71.

83 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, pp. 62 and seq.

84 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>.

basis of sex also includes discrimination on the basis of gender identity, gender expression and sex characteristics. This approach has already been taken before. Indeed, following the CJEU's case law, Recital 3 was added to Recast Directive 2006/54/EC, pointing out that its provisions also applied to discrimination arising from a person's 'gender reassignment'. In the absence of CJEU case law covering the entire spectrum of trans, non-binary and intersex people, a Treaty revision that explicitly grants the competence to adopt legislative provisions prohibiting discrimination on the basis of gender identity, gender expression and sex characteristics, or amendments to the equality directives that explicitly add the three grounds besides sex, this approach could potentially be a politically acceptable middle road. The approach of a legislative clarification would generate benefits similar to the explicit addition of new grounds: it would result in increased visibility and symbolic recognition of trans, non-binary and intersex people, reduce legal uncertainty and be a catalyst for anti-discrimination action plans and data gathering.

### 4.3 The utility of an open-ended clause in EU anti-discrimination law

An open-ended clause is a clause stating that grounds beyond those explicitly mentioned in it may also be invoked. For instance, the ECtHR has made it clear in many instances that the list set out in Article 14 ECHR 'is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "*notamment*") [...] and the inclusion in the list of the phrase "any other status" (in French "*toute autre situation*")'<sup>85</sup> and has held that Article 14 encompasses the ground of gender identity.<sup>86</sup>

Regarding EU law, the academic literature agrees that Article 21(1) EUCFR is an open-ended provision<sup>87</sup> and the CJEU has confirmed this in several discrimination cases on grounds which are not enshrined in Article 21(1).<sup>88</sup> Moreover, it is now clear that this article has a horizontal direct effect, meaning that individuals can invoke this provision before domestic courts.<sup>89</sup> However, it is important to recall that the scope of Article 21(1) is limited to Article 51(1) EUCFR, i.e. EU institutions and agencies, and Member States only insofar as they are implementing EU law. In short, because Article 21(1) EUCFR contains an open-ended list of grounds, it provides a tool to protect against discrimination which occurs on grounds which are not enshrined in Article 19 TFEU and the EU anti-discrimination law directives. There are therefore some limited opportunities for claims of discrimination based on grounds not enshrined in Article 19 TFEU.<sup>90</sup>

Ganty and Benito Sanchez have explored the potentiality of such a clause in EU law, including in Article 19 TFEU. Setting aside the unanimity issue necessary to change the Treaty, they acknowledge that such a clause could lead to legal uncertainty and unpredictability, especially for horizontal discrimination, for which legal certainty is essential.<sup>91</sup> Along the same lines, the question arises as to whether an open-ended list could be enshrined in Article 19 TFEU. Indeed, the legal bases related to EU competences have to be very precise and an open-ended clause might be too uncertain, legally speaking. The authors also state that this difficulty could be overcome by defining precisely what would qualify as a ground under an open-ended clause and propose such a definition.<sup>92</sup>

85 ECtHR (plenary) 23 November 1976, 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, *Engel and others v the Netherlands*, para. 72; ECtHR (GC) 16 March 2010, 42184/05, *Carson and Others v the United Kingdom*, para. 70.

86 ECtHR 12 May 2015, 73235/12, *Identoba and others v Georgia*, para. 96; 6 July 2021, 47220/19, *A.M. and others v Russia*, para. 73.

87 See, for instance, Craig, P. and de Búrca, G. (2015) *EU Law: Text, cases, and materials*, Oxford University Press, p. 895.

88 See, for instance, CJEU, C-177/18, *Almudena Baldonado Martín v Ayuntamiento de Madrid*, 22 January 2022, EU:C:2020:26.

89 CJEU (GC) C-414/16, *Egenberger*, 17 April 2018, EU:C:2018:257, paras. 87-79.

90 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, p. 5.

91 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, pp. 58-76.

92 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, p. 75.

Although the inclusion of an open-ended clause within Article 19 TFEU would not be a panacea for the protection of trans, non-binary and intersex people against discrimination, it does present one advantage that the other ways forward described above do not offer (at least not so easily): protection against intersectional and multiple discrimination. Intersectional discrimination refers to ‘the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone’.<sup>93</sup> It arises, ‘where the grounds cannot be separated because there is a *synergy* between them’.<sup>94</sup> Multiple discrimination is different in that it takes place on the basis of several grounds operating separately in one specific case.

It has been shown that discrimination on grounds of gender identity, gender expression and sex characteristics is often linked to other discrimination grounds. For instance, the FRA 2020 LGBTI survey found that 40 % of respondents mentioned their ethnic origin or immigrant background as an additional ground for discrimination, besides being LGBTI.<sup>95</sup> There is also a strong connection with socio-economic status: intersex (52 %) and trans (46 %) respondents’ households face more difficulties in making ends meet.<sup>96</sup> There is therefore a need to address these situations from an intersectional or multiple perspective.<sup>97</sup>

While invoking multiple discrimination under EU law would not be a problem, as long as the grounds which operate separately are protected, the case is different for intersectional discrimination. Indeed, in the *Parris* case, the CJEU found that Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, ‘must be interpreted as meaning that a national rule [...] is not capable of creating discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation’.<sup>98</sup> And it is highly likely that the same finding would be reached under the gender equality directives.

When intersectional discrimination is not recognised as such in the law, it could be argued that the open-ended clause prohibits such discrimination. In other words, the open-ended clause is likely to cover a unique form of discrimination which derives from several grounds operating in synergy. The case law of the ECtHR pleads for such an interpretation. Indeed, although the Court has never used the term ‘intersectional’ as such, it has found instances of intersectional discrimination under Article 14 ECHR.<sup>99</sup>

Finally, even in the instance of multiple discrimination, if one ground at stake is not enshrined – e.g. socioeconomic status – it will be impossible for the applicant to claim such discrimination, whereas the open-ended clause could remedy this gap.

- 
- 93 Hannett, S. (2003) ‘Equality at the intersections: The legislative and judicial failure to tackle multiple discrimination’, *Oxford Journal of Legal Studies*, Vol. 23, p. 68. Kimberlé Crenshaw coined the term ‘intersectionality’: Crenshaw, K. (1989) ‘Demarginalizing the intersection of race and sex: A Black feminist critique of anti-discrimination doctrine, feminist theory and antiracist politics’, *University of Chicago Legal Forum*, p. 1.
- 94 Solanke, I. (2018) ‘The anti-stigma principle-centralising intersectionality in the theory of anti-discrimination law’ in *Multiplication des critères de discrimination, Enjeux, effets et perspectives, Actes du colloque, 18-19 Janvier 2018*, Défenseur des droits, p. 146. See also Crenshaw, K. (1989) ‘Demarginalizing the intersection of race and sex: A Black feminist critique of anti-discrimination doctrine, feminist theory and antiracist politics’, *University of Chicago Legal Forum*: 1; and Hannett, S. (2003) ‘Equality at the intersections: The legislative and judicial failure to tackle multiple discrimination’, *Oxford Journal of Legal Studies*, Vol. 23, p. 65.
- 95 European Union Agency for Fundamental Rights (2020), *EU-LGBTI II: A long way to go for LGBTI equality*, p. 21, available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-lgbti-equality-1\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf).
- 96 European Union Agency for Fundamental Rights (2020), *EU-LGBTI II: A long way to go for LGBTI equality*, p. 21, available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-lgbti-equality-1\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf), p. 63.
- 97 Ganty, S. and Benito Sanchez, J. C. (2021) *Expanding the list of protected grounds within anti-discrimination law in the EU – An Equinet report*, Equinet, available at <https://equineteurope.org/publications/expanding-the-list-of-protected-grounds-within-anti-discrimination-law-in-the-eu-an-equinet-report/>, p. 59.
- 98 CJEU, C-443/15, *David L. Parris v Trinity College Dublin and Others*, 24 November 2016, EU:C:2016:897.
- 99 See, for instance, ECtHR 24 July 2012, 47159/08, *B.S. v Spain*.

As a consequence, although there are some objections to be raised concerning the open-ended clause, the advantages that it is likely to bring regarding protection against multiple and intersectional discrimination should be considered to better protect trans, non-binary and intersex people.

#### 4.4 Potential future challenges

The previous sections discussed how trans, non-binary and intersex people could be fully included in the EU equality law framework. As we pointed out, there does not seem to be an obvious reason why the prohibition of sex discrimination could not be interpreted as also applying to discrimination based on gender identity, gender expression and sex characteristics, given the centrality of (binary) sex to gender stereotypes in society. In view of the pervasiveness of gendered stereotypes concerning sex, gender identity and gender expression, the full inclusion of trans, non-binary and intersex people in the EU equality law framework could present some challenges. Given the scope of this article, we briefly address two which we mentioned previously: measures related to pregnancy and sex/gender-segregated goods and services.

##### *Pregnancy-related measures*

As van den Brink and Dunne have explained,<sup>100</sup> EU law is relevant to pregnancy in two ways: it offers protection to anyone going through pregnancy, before and after the birth, through positive measures (such as paid leave)<sup>101</sup> and it prohibits discrimination on the basis of pregnancy in the sphere of employment and occupation.<sup>102</sup> On the basis of consistent CJEU case law, pregnancy-related discrimination is considered to be a form of direct discrimination on the basis of sex and more specifically direct discrimination against *women* as ‘only women can be refused employment on grounds of pregnancy’.<sup>103</sup> Both the Pregnant Workers Directive and the Recast Directive 2006/54/EC seem to limit the scope of the protective measures to women, by using terminology such as ‘unfavourable treatment of a woman related to pregnancy or maternity’,<sup>104</sup> ‘a woman’s biological condition during pregnancy’,<sup>105</sup> ‘female workers’<sup>106</sup> or by using female pronouns such as ‘her’.<sup>107</sup>

The importance of protection against pregnancy-related unfavourable treatment cannot be disputed. Indeed, discrimination based on pregnancy is one of the most persistent forms of discrimination in

100 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 100.

101 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), *OJ L* 348, 28 November 1992, pp. 1-7 (hereafter the Pregnant Workers Directive). These measures are considered to be necessary to achieve substantive equality of women, see Recital 24 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ L* 204, 26 July 2006, pp. 23-36.

102 Recitals 23 and 24 and Article 2(2)(c) Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ L* 204, 26 July 2006, pp. 23-36.

103 CJEU, C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, 8 November 1990, para. 12.

104 Recital 23 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ L* 204, 26 July 2006, pp. 23-36.

105 Recital 24 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ L* 204, 26 July 2006, pp. 23-36.

106 Article 3(2) Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), *OJ L* 348, 28 November 1992, pp. 1-7.

107 Article 2 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), *OJ L* 348, 28 November 1992, pp. 1-7.

the EU.<sup>108</sup> While it also cannot be disputed that pregnancy-related discrimination predominantly affects (cisgender) women, the current regulatory framework is underinclusive and, arguably, is difficult to maintain. Indeed, trans men and non-binary people may also get pregnant and give birth. Given that a requirement of mandatory sterility in order to access gender-affirming treatment or legal gender recognition is considered to be a violation of fundamental rights<sup>109</sup> and an increasing number of EU Member States are considering or have already recognised non-binary official sex/gender markers,<sup>110</sup> it may be expected that the number of pregnant people who do not (legally) identify as women will only continue to grow.

In our opinion, there is no convincing reason to conclude that pregnant men and non-binary people are explicitly excluded from the scope of the Pregnant Workers Directive or the Recast Directive 2006/54/EC. Indeed, even though an individual may not identify or be legally recognised as a woman, the objective of the pregnancy-related measures is to protect the individual against unfavourable treatment due to the fact that they are pregnant. Given the reality that – currently – only people with certain ‘typically’ female sex characteristics can get pregnant and give birth, pregnancy-related discrimination or protections are therefore always *sex*-based. However, in order to avoid legal uncertainty, either a clarification could be added to the Pregnant Workers Directive and the Recast Directive 2006/54/EC, by adding a reference to trans and non-binary people to the existing references to women, or their provisions could be formulated in a gender-neutral way, next to keeping an explicit reference to women. Clarifying the personal scope of these directives would not have any effect on their scope *ratione materiae*.

Beside the question of whether pregnant men and non-binary people fall within the scope of pregnancy-related protective measures in EU law, another important issue needs to be addressed. Although trans men and non-binary people of reproductive age will probably not be as vulnerable to stereotypical expectations that they will soon ‘get pregnant and reduce their activities on the labour market’ as young (cisgender) women, they are likely to be confronted with additional prejudice, harassment and stereotypical attitudes when they (try to) get pregnant and give birth.<sup>111</sup> Indeed, a pregnant trans man or non-binary person would be likely to be regarded as transgressing socially accepted gender norms. For this reason, it is important that gender identity, gender expression (and to a lesser extent sex characteristics) are included, either explicitly or through judicial interpretation, in the EU gender equality law framework.

### *Sex/gender segregated goods and services*

Another future challenge that has recently received a lot of attention is related to the provision of publicly accessible goods and services reserved for people of one sex or gender (mostly women). Goods and services that are segregated along sex/gender lines are very common throughout the EU.<sup>112</sup> While in some cases sex/gender segregation is required by law, for instance sanitary facilities at work, segregated goods or services are usually based on considerations of privacy, safety and social morality. In recent years, much of public debate has concerned the access of trans women (and to a lesser extent non-binary people) to ‘women-only spaces’, especially in light of the increasing acceptance of gender self-determination in procedures of legal gender recognition across Europe. Several so-called ‘gender-critical’ feminist activists and scholars fear that the inclusion of trans women in women-only spaces would

108 See European Commission (2022), *A comparative analysis of gender equality law in Europe 2021*, available at <https://op.europa.eu/en/publication-detail/-/publication/e33e56da-8fa2-11ec-8c40-01aa75ed71a1/language-en/format-PDF/source-search>; Masselot, A., Caracciolo Di Torella, E. and Burri, S. (2013) *Fighting discrimination based on the grounds of pregnancy, maternity and parenthood. The application of EU and national law in practice in 33 European countries*, available at <https://op.europa.eu/en/publication-detail/-/publication/f115fb16-787b-41b5-b41a-b407790cf701/language-en/format-PDF/source-252567618>.

109 ECtHR 10 March 2015, 14793/08, *Y.Y. v Turkey*; 6 April 2017, 79885/12, 52471/13, 52596/13, *A.P., Garçon and Nicot v France*.

110 Including Austria, Belgium, Denmark, Germany and Malta.

111 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 101.

112 Van den Brink, M. and Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, available at <https://ec.europa.eu/newsroom/just/items/638586/en>, p. 109.

put (cisgender) women at higher risk of sexual harassment and violence.<sup>113</sup> Some therefore call for the recognition of ‘sex-based rights’ and the importance of female embodiment in order to protect (cisgender) women’s rights.<sup>114</sup>

The EU equality law framework explicitly allows the provision of sex/gender-segregated goods and services. Indeed, Directive 2004/113/EC states that it does not ‘preclude differences in treatment, if the provision of the 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’.<sup>115</sup> In this light, Recital 16 explains that a legitimate aim for introducing sex/gender segregation may be, for instance, the protection of victims of sex-related violence, reasons of privacy and decency, the promotion of gender equality, freedom of association and the organisation of sporting activities.

Since the means to achieve those aims must be appropriate and necessary, it is clear that a general blanket ban of all trans women (or non-binary people) from receiving women-only public goods or services, because they are not ‘sufficiently female’ in the eyes of a gatekeeper, is hard to reconcile with the principle of proportionality. Indeed, empirical research does not support the claim that trans-inclusionary women-only spaces would facilitate higher levels of sexual harassment or violence.<sup>116</sup> Besides, given the fact that sex/gender segregation is most often interpreted in a binary way (i.e. separate goods or services for men and/or women), a strict interpretation of what ‘single-sex/gender’ means could lead to a general exclusion of non-binary people. However, it cannot be fully ruled out that in some circumstances differential treatment of trans, non-binary and/or intersex people could be justified in light of a legitimate aim.<sup>117</sup> As any such exclusion would be likely to be challenged before the courts or equality bodies, the limits to proportionality will have to be crystallised over time in case law.<sup>118</sup> Moreover, as we explained above, the prohibition of sex-based discrimination naturally also includes a prohibition of discrimination based on gender identity, gender expression and sex characteristics. This finding supports a narrow interpretation of the possibility to exclude trans, non-binary and/or intersex persons from sex/gender segregated goods and services.<sup>119</sup> In the absence of any relevant case law of the CJEU, an explicit clarification in Directive 2004/113/EC could reduce legal uncertainty.

Given the rapidly increasing recognition of non-binary people in society and law, another issue, which will need to be settled soon, concerns inclusion of people who do not identify as men or women in a society that takes the binary for granted. Indeed, beside the issue of whether non-binary people could be legally excluded from accessing goods or services that are exclusively reserved for women or men, the question arises as to whether they should be forced to make a choice in the first place. Under the prohibition of discrimination on the basis of gender identity, a non-binary person could legally challenge the absence of services or goods that match their gender identity when such goods or services are offered separately to

113 Portuondo, L. (2018) ‘The overdue case against sex-segregated bathrooms’, *Yale Journal of Law and Feminism*, Vol. 29, pp. 465-526.

114 See Cooper, D. and Emerton, R. (2020) ‘Pulling the thread of decertification: What challenges are raised by the proposal to reform legal gender status?’, *Feminists@Law*, Vol. 10(2), p. 10.

115 Article 4(5), Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJ L 373*, 21 December 2004, pp. 37-43.

116 Hasenbush, A., Flores, A. R. and Herman, J. L. (2018) ‘Gender identity nondiscrimination laws in public accommodations: a review of evidence regarding safety and privacy in public restrooms, locker rooms, and changing rooms’, *Sexuality Research and Social Policy*, <https://doi.org/10.1007/s13178-018-0335-z>, pp. 1-14.

117 See Sharpe, A. (2020) ‘Will gender self-determination undermine women’s rights and lead to an increase in harms?’, *Modern Law Review*, Vol. 83(3), pp. 539-557; Cooper, D. (2019) ‘A very binary drama: The conceptual struggle for gender’s future’, *Feminists@Law*, <https://doi.org/10.22024/UniKent/03/fal.655>.

118 See a recent decision by the Netherlands Institute for Human Rights in which it held that a trans woman, who had not undergone genital surgery and was excluded from the women’s sanitary facilities in her local gym, was directly discriminated against on the basis of sex. The Institute held that there were less restrictive means available to address concerns of cisgender women than a blanket ban. See *College voor de Rechten van de Mens*, Case 2021-139, 25 November 2021.

119 Given the prohibition of discrimination based on gender identity, gender expression and sex characteristics, and the generally observed move in Europe and around the world towards the recognition of gender self-determination as a fundamental right, a blanket exclusion of individuals who are not legally registered as women but who identify as women from ‘women-only spaces’, solely because of their official sex/gender registration, would arguably be disproportionate.

men and women only. While this issue goes beyond the scope of this article, it is clear that policy-makers should soon start paying attention to the position of non-binary people in almost inherently binary societies. In this light, Clarke has already suggested three possible solutions:<sup>120</sup>

- Recognition: the explicit recognition of non-binary people would not only lead to the addition of categories for official sex/gender registration, but would also lead to the creation of separate spaces in society for people who do not identify as men or women. Taking the example of sex/gender-segregated public sanitary facilities, separate facilities would have to be available for non-binary people;
- Neutrality:<sup>121</sup> under a neutrality approach, sex/gender segregation in goods and services would become the exception. This approach would probably lead to a fundamental and inclusive redesign of society in order to guarantee gender neutrality, while still maintaining legitimate expectations of privacy and safety;
- Integration: integrating non-binary people in current society would strongly resemble the *status quo*. Indeed, currently, people who are non-binary but are confronted with goods or services segregated along sex/gender binary lines often have to choose one category over the other. If the integration model were to be followed, it would become hard to simply exclude non-binary people from single-sex spaces without a clear and convincing justification for doing so.

Each of these three options would generate benefits and new challenges. In any case, it does not seem necessary to adopt a 'one-size-fits-all' solution. Indeed, the prohibition of discrimination on the basis of gender identity, gender expression and sex characteristics requires a case-by-case analysis and should therefore be sufficiently flexible to allow a balance of interests, taking into account the specific circumstances at hand.<sup>122</sup>

## 5 Conclusion

Trans, non-binary and intersex people are among the most vulnerable communities in the EU. It is striking, however, that EU anti-discrimination law does not explicitly protect them against discrimination on grounds of gender identity, gender expression and sex characteristics. Some progress towards more protection has been made in the case law though: through an extensive interpretation of the ground of sex, the CJEU has protected people who are victims of discrimination on the ground of 'gender reassignment'. However, the protective scope of EU anti-discrimination law remains limited to a binary understanding of sex and the CJEU continues to place particular importance on gender-affirming surgery. Moreover, EU anti-discrimination law does not take into account some specificities of trans people's experiences in life.

Several ways forward to overcome the limitative scope of protection have been examined: an extensive interpretation of the existing ground of 'sex', the explicit addition of three new grounds to the EU equality law framework, the explicit clarification in the EU equality law framework that 'sex' also includes gender identity, gender expression and sex characteristics, and the use of the open-ended clause within the EU equality law framework. Although the explicit addition of three new grounds in primary law and secondary law may appear to be the most suitable solution, this nonetheless comes with some challenges, such as in the case of measures related to pregnancy and sex/gender-segregated goods and services.

---

120 Clarke, J. (2019) 'They, them and theirs', *Harvard Law Review*, pp. 901-902.

121 This could also be described as gender *inclusivity*.

122 Clarke, J. (2019) 'They, them and theirs', *Harvard Law Review*, pp. 901-902, 945.