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# **TRANSGENDER PEOPLE AND THE GENDER RECAST DIRECTIVE - *IMPLEMENTATION* *GUIDELINES***

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## 1. Introduction

In 2006, the European Union (EU) adopted a Directive aimed at consolidating the existing provisions on the implementation of the principle of equal treatment between men and women and providing a simplified legal framework on the area of sex discrimination<sup>1</sup>.

This Directive, referred to as the “Gender Recast Directive”, required all 25 Member States, plus Bulgaria and Romania which joined the Union in 2007, to implement its provisions by 15 August 2008. Additionally, it was incorporated into the European Economic Area Agreement and is thus also applicable to Iceland, Liechtenstein and Norway.<sup>2</sup>

The introduction of the Gender Recast Directive in effect replaced a series of EU Directives introduced and implemented by Member States over the previous three decades, and that constituted the foundation of the framework for equal treatment of men and women of the European Union.

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<sup>1</sup> 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), published in the Official Journal of the European Union L 204, 26 July 2006, pp. 23–36. N.B. The full text is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:EN:PDF>

<sup>2</sup> See Decision no. 33/2008 of the EEA Committee of 14 March 2008

Significantly, Recital 3 of the Preamble of this Directive introduced an explicit reference in relation to discrimination based on 'gender reassignment' for the first time in EU law.

The aim of these Guidelines is to provide an introduction to the content of the Gender Recast Directive and an overview of the jurisprudence of the European Court of Justice (ECJ), and their relevance for trans people living in the European Union. These Guidelines are also designed to give guidance on how to improve the implementation of the Gender Recast Directive vis-à-vis gender identity, and to ensure equality for all trans people in the countries where the Directive is applicable.

## **2. Legal background to the Directive and jurisprudence on gender identity**

Gender identity was not explicitly included in EU law until the Gender Recast Directive. One of the reasons for this was that gender identity is not included in the list of grounds of discrimination in EU Treaties. Instead, as we will see in subsection 2.2 below, the source for the inclusion was a 1996 decision by the European Court of Justice whereby the Court interpreted the ground of sex to include 'gender reassignment'.

In this section we will look at the development of EU law on equality between men and women and its various extensions and renovations, until the Gender Recast Directive finally codified the decision of the ECJ and introduced a reference to trans people for the first time in EU law.

## ***2.1 European Union legislation on equal treatment between men and women***

The legal framework on equal treatment between men and women has developed since the 1970s when, as Mark Bell puts it, “Article 119 [of the EEC Treaty] was finally transformed from a dormant Treaty provision into an active equal opportunities law”<sup>3</sup>. In fact, following an important case of the European Court of Justice in which the judges ruled that Article 119 was to be given “direct effect”<sup>4</sup>, equal opportunities between men and women became a core element of the 1974 Social Action Programme and, in the same year, became a focus of the European legislator.

In the space of four years the following Directives were introduced:

- Directive 75/117/EEC<sup>5</sup> which established a framework for the implementation of the principle of equal pay between men and women;
- Directive 76/207/EEC<sup>6</sup>, which prohibited direct and indirect discrimination based on sex in employment,

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<sup>3</sup> M. Bell, *Antidiscrimination Law and the European Union*, (2002) p.43

<sup>4</sup> *Defrenne v. Belgium*, Case 80/70 (1971)

<sup>5</sup> 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

vocational training and promotion, and working conditions;  
and

- Directive 79/7/EEC<sup>7</sup>, which extended equal treatment to social security, including pensions, other benefits related to sickness, invalidity, unemployment, and social assistance.

This general framework was further refined in the 1980s and the 1990s through the adoption of other Directives, among which:

- Directive 86/378/EEC<sup>8</sup>, which defined the occupational social security schemes that fall under the scope of European legislation (further elaborating what was established in Directive 79/7/EEC); and

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<sup>6</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

<sup>7</sup> 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

<sup>8</sup> Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, later amended by Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes

- Directive 86/613/EEC<sup>9</sup>, which extended the equal treatment framework to activities in a self-employed capacity.

This legal framework, together with political measures undertaken by European institutions to implement social policies in the field of gender equality, radically transformed the scope of the principle of equal treatment between men and women and the anti-discrimination framework.

In 1997, the Treaty of Amsterdam brought significant change in anti-discrimination legislation as five additional grounds of anti-discrimination were introduced in EU law, namely, race or ethnic origin, religion or belief, age, disability and sexual orientation. Three years later, the EU adopted the so-called Race Equality Directive<sup>10</sup>, and the Employment Framework Directive<sup>11</sup> providing legal protection against discrimination on these new grounds.

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<sup>9</sup> Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood

<sup>10</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

<sup>11</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

With the introduction of the two above-mentioned Directives, the legal framework on equal treatment between men and women became obsolete and required a number of adjustments. As a result, in 2002 the EU approved Directive 2002/73/EC<sup>12</sup> (amending Directive 76/207/EC) to bring it up to the substantive standards of the Race Equality Directive, with the exception of its scope of application (that was still limited to employment, vocational training and promotion, and working conditions).

In 2004, Directive 2004/113/EC<sup>13</sup> expanded the scope of application of the principle of equal treatment between men and women to access to and supply of goods and services. Even though Directive 2004/113/EC does not mention trans people in its text, the Council of the European Union and the Commission referred to the ECJ case-law for the first time and indicated that trans people are to be protected under the scope this Directive 2004/113/EC, even though this Directive does not mention them in its text. Indeed, in the minutes of the 2606<sup>th</sup> meeting of the Council of the European Union, the Joint Council and Commission state that:

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<sup>12</sup> Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

<sup>13</sup> 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

"Concerning Article 3 and its application to transsexuals, the Council and Commission recall the jurisprudence of the Court of Justice in case C-13/94 *P v S and Cornwall County Council*, where the Court held that the right not to be discriminated against on grounds of sex cannot be confined simply to discrimination based on the fact that a person is of one or other sex, and may include discrimination arising from the gender reassignment of a person.<sup>14</sup>

### **Summary:**

- EU gender equality legislation covers the areas of employment and occupation, social security, social advantages, and access to and supply of goods and services.
- The Goods and Services Directive (2004/113/EC) and the Gender Recast Directive (2006/54/EC) cover trans people in line with the jurisprudence of the European Court of Justice.

## ***2.2 The European Court of Justice's jurisprudence on gender identity***

The landmark case of *P. v. S. and Cornwall County Council*<sup>15</sup> opened the door for the inclusion of trans people

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<sup>14</sup> 2606<sup>th</sup> meeting of the Council of the European Union (Employment, Social Policy, Health and Consumers Affairs) held in Luxembourg on 4 October 2004, Draft minutes, Doc. No. 13369/04 of 27 October 2004, p.7

under in EU gender equality legislation. In this case, *P* (the applicant) was a British transsexual woman who had been dismissed while on sick leave recovering from her gender reassignment surgery. She claimed that she had been discriminated against on the ground of sex. The domestic judge referred the case to the European Court of Justice for a preliminary ruling in order to find out whether Article 2(1) prohibiting discrimination on grounds of sex, and Article 5(1) applying equal treatment in employment conditions (including dismissal) of Directive 76/207/EEC, were to be interpreted so as to include the dismissal of a transsexual person with reference to her gender reassignment.

The Court established that the scope of the Directive, as far as the concept of discrimination on grounds of sex was concerned, was not limited to discrimination based on the fact that the individual is of one sex or the other. In fact, the Court ruled that the Directive also extended to discrimination based on the sex of the person, thus including the case of dismissal of a transsexual person related to her/his gender reassignment.

*P. v. S.* was a landmark case, not only because it represents a precedent on which the European Court of Justice has constructed solid jurisprudence, but also because it constitutes the foundation on which gender reassignment was included in the scope of subsequent gender equality Directives.

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<sup>15</sup> Case C-13-94 (1994)

It Was then followed by other important decisions of the Court that reinforced its rationale, expanding it to other pieces of European legislation.

In *K.B. v. National Health Service Pensions Agency*<sup>16</sup>, the applicant was a woman living in a long-term relationship with a transsexual man. She claimed that the United Kingdom's denial of widower's pension scheme to her partner in case of her death constituted a breach of Article 141 of the EC Treaty that established the principle of equal pay between men and women, as well as Directive 75/117/EEC on the implementation of such a principle in the national law of Member States. She supported her argument by the fact that in the United Kingdom transsexuals were not allowed to marry even following gender reassignment.

The European Court of Justice ruled that, although pension schemes constitute a payment under the scope of the above-mentioned principle, Article 141 had been breached because the domestic legislation precluded transsexual individuals from the right to marry<sup>17</sup>, in violation of a judgment of the European Court of Human Rights (ECtHR). *K.B.* also established that individuals are protected on their gender role, and not only the sex given to them at birth.

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<sup>16</sup> Case C-117/01 (2004)

<sup>17</sup> Article 12 of the European Convention on Human Rights states that: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.'

The inclusive interpretation of the Court of Justice went further in *Sarah Margaret Richards v. Secretary of State for Work and Pensions*<sup>18</sup>. The applicant, a post-operative transsexual woman, had argued that the provision of the United Kingdom *Gender Recognition Act 2004* establishing in certain cases a pensionable age based on the gender of birth (in her case 65 years like men instead of 60 years for women) constituted a violation of Directive 79/7/EC implementing the principle of equal treatment between men and women in social security.

In this case the Court also ruled that domestic legislation establishing unfavourable retirement conditions for individuals on the basis of their gender reassignment, breached the principle of equal treatment in the field of social security.

**Summary:**

- *P. v. S. and Cornwall County Council* affirmed that sex equal treatment legislation in matters of employment and occupation is applicable to trans people.
- *K.B. v. National Health Service Pensions Agency and Sarah Margaret Richards v. Secretary of State for Work and Pensions* confirmed that equal pay and social security benefits are applicable to trans people.

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<sup>18</sup> Case C-423/04 (2006)

- Equal treatment for trans people has to be applied on the basis of the acquired gender and not the sex given at birth.

### **3. The main contents of the Gender Recast Directive**

Following the overview of the European Union gender equality legislation and the European Court of Justice's case-law in the previous section, we will now look at the Gender Recast Directive and its significance to trans people. This section introduces the reader to the main content of the Directive, while sections 4 to 7 focus on areas that require particular attention from the point of view of trans people's rights, namely, pension and social security schemes, the horizontal provisions of the Directive and positive action.

The material scope of application of the Gender Recast Directive includes:

- access to employment, self employment and occupation, including promotion; vocational training and retraining; employment, including promotion and dismissal; membership of, and involvement in an organisation of workers or employers, or other professional organisations;
- working conditions, including pay;
- occupational social security schemes, including pensions, sickness, invalidity, industrial accidents and professional diseases, and unemployment benefits.

The provisions of the Directive apply to all workers in both the public and private sectors.

The Directive includes a broad definition of discrimination, which includes direct and indirect discrimination; as well as harassment, including sexual harassment, and instruction to discriminate, while establishing the possibility for Member States to maintain or adopt positive action measures.

Several procedural measures are established to make the principle of equal treatment effective by offering efficient remedies against discrimination, including:

- availability of conciliation procedures as well as of judicial and administrative procedures that also ensure dissuasive and proportionate compensation and reparation against the damage caused by discrimination (Articles 17(1) and 18);
- establishment of effective, proportionate and dissuasive penalties in case of infringement of the prohibition of discrimination (Article 25);
- legal standing in any judicial or administrative procedure on behalf of or in support of the complainant for any organisation or association bearing a legitimate interest in making sure that the provisions of the Directive are implemented (Article 17(2));
- shift of the burden of proof onto the respondent when the complainant has established facts from which the occurrence of discrimination may be presumed (Article 19);

- availability of domestic provisions to protect employees against retaliation (Article 25).

The Gender Recast Directive requires Member States to establish equality bodies at domestic level "for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex" (Article 20), and indicates that such bodies should have a degree of independence such as to provide independent assistance to the victims of discrimination, conduct independent surveys, publish independent reports and recommendations, and exchange information with other similar European bodies.

Finally, the Directive encourages social dialogue, dialogue with non-governmental organisations and dissemination of information at the domestic level to ensure the effective implementation of the principle of equal treatment.

#### **4. Partner's pension under the occupational pension scheme**

One of the problems that may arise from the Gender Recast Directive has to do with the various complications that national marriage legislation often poses to trans persons both during and after gender reassignment.<sup>19</sup> Most European

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<sup>19</sup> In this section, due to the complexity of the subject, we have omitted aspects related to different impacts that the applicable national legislation may have on trans people who are in marriages or registered partnerships of the same-sex or different-sex.

countries, in fact, do not allow a trans person to remain within an existing marriage in order for him/her to change legal gender.

Additionally, an even greater number of European countries do not allow transgender people to marry according to their preferred gender.

In *Barber v Guardian Royal Exchange Assurance Group*<sup>20</sup> the European Court of Justice asserted that benefits granted under occupational pension schemes constitute a form of payment under the scope of European legislation.<sup>21</sup> This argumentation was reiterated by the ECJ in several other decisions regarding statutory social security schemes, and particularly in *K.B.*, where the judges pointed out that the key question for the petitioner who underwent gender reassignment was his legal capacity to get married and, in particular, whether or not the right to marry had been violated by the Member State.

While the provision for equal pay is established by Article 4 of the Directive, and through the jurisprudence of the European Court of Justice, the marriage requirement may still present a barrier in this scenario. In addition to the problems referred to at the outset of this section, only a few EU Member States have specifically legislated for the rectification of legal sex. In most cases one of the requirements is the completion of gender reassignment

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<sup>20</sup> Case C-262/88 (1990)

<sup>21</sup> As established by Recital 13 of the Gender Recast Directive

under medical and psychological scrutiny.<sup>22</sup> Only the United Kingdom and Spain have enacted legislation aimed at recognising the legal change regardless of genital surgery, thus also recognising the right to marry of transgender individuals who decided not to undergo surgery. The adoption of gender-neutral marriage laws (such as in Belgium, the Netherlands, Norway, Spain and Sweden) has offered a possible 'solution' to the problem of marriage for trans individuals who do not undergo surgery, and in this way may bypass the limitation.

Several EU Member States regulate the rectification of legal sex (following genital surgery) by means of administrative norms (such as Austria) or through judicial procedures (such as Belgium, France, Portugal, Hungary, and the Czech Republic).

In this context, we need to examine several scenarios taking into account the (rather strict) position of the Court and the (diverse) positions of Member States:

- a. in the case of those states that legally recognise rectification of sex, the partners of post-operative transsexuals are entitled to pension rights under Article 4 of the Gender Recast Directive;
- b. in the case of those states that deny recognition of change of legal sex, violation of the fundamental right to marry of Article 12 of the European Convention on Human Rights can be invoked for post-operative

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<sup>22</sup> In several countries this implies genital surgery and sterilisation

transsexuals in accordance with the jurisprudence of the Court, and the consequent denial of pension rights would violate Article 4;

c. in the case of trans individuals who have not undergone surgery, therefore for whom the European jurisprudence currently seems to deny (or has no elaborated decision on) a fundamental right to marry, Article 4 does not seem to apply as far as pension rights are concerned, unless:

- domestic legislation recognises such rights to *de facto* couples;
- trans individuals enter gender-neutral marriage where established by domestic law;
- trans individuals enter into a registered partnership established by domestic law that, as stated by the European Court of Justice in *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, “places persons of the same-sex in a situation comparable to that of spouses so far as concerns that survivor’s benefit”<sup>23</sup>: in such a case denial of pension benefits would constitute direct discrimination under Articles 1 and 2 of Directive 2000/78/EC.

**Good practice:**

- In order to avoid the limitation of the enjoyment of pension benefits derived from the Gender Recast Directive,

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<sup>23</sup> Case C-267/06 (2008) para. 73

Member States are encouraged to adopt legislation with the aim of allowing transgender individuals to rectify their legal sex regardless of surgery or sterilisation, which is often an unnecessary and degrading procedure.

## 5. Social security schemes

Article 7 of the Gender Recast Directive establishes that social security benefits include occupational social security schemes that provide protection in the case of sickness, invalidity, retirement pensions, industrial accidents and occupational diseases benefits, and unemployment, as well as other social security schemes such as survivors' benefits and family allowances. While in the case of *Richards* the Court clearly established that discrimination against transsexuals in the fields of social security is prohibited, a number of issues need to be considered in relation to the provisions of the Directive:

- **Partner's benefits:** All social security benefits that are granted to the spouse or the registered partner of the worker need to apply to trans individuals.
- **Age of retirement:** Article 9(1)(f) of the Directive establishes that fixing different retirement ages for men and women constitutes discrimination under the scope of the Directive. Following *K.B.* and *Richards*, the maintenance of a different retirement age based on the birth sex (instead of the acquired gender) of the transsexual individual would breach the principle of equal treatment as established by the Gender Recast Directive,

and the jurisprudence of the European Court of Justice. The same standard should be applied to any other trans individual in those Member States that allow rectification of the legal sex regardless of gender reassignment surgery. It is unclear, however, whether the Directive addresses the position of transgender individuals that do not meet the requirements of their domestic legislation regarding change of legal gender.

- **Sickness and invalidity:** Sickness benefits must be made available to trans individuals for the purpose of gender reassignment, covering individuals who are indisposed due to hormone therapy or to their undergoing surgery in their transition process. Additionally, invalidity schemes must cover the case of incapacitation as a consequence of the transition process.

## **6. Implementation with regard to the horizontal provisions**

To ensure the full implementation of the Gender Recast Directive with reference to discrimination vis-à-vis gender reassignment, it is quintessential to focus on specific norms that will require particular attention at domestic level, from both legislators and policy-makers as well as from civil society organisations.

### ***6.1 Legal standing for organisations defending the rights of trans people***

Article 17(2) of the Directive states that organisations that have a legitimate interest in the implementation of its provisions may engage in any judicial or administrative procedure on behalf or in support of the complainant, provided that s/he grants her/his approval. However, it is up to the Member States to establish the criteria to define the requirements for legal standing.

Based on the scope of the Gender Recast Directive, trans organisations do have a legitimate interest in ensuring compliance of the Directive itself, and may therefore claim legal standing in a judicial or administrative procedure on behalf or in support of the victim of discrimination, with her/his consent. Legal standing of organisations is key to ensuring access to legal remedies and fair representation for victims of discrimination, because it allows organisations working on the protection of the rights of trans people to represent them in a legal procedure or take their side, offering legal counsel and advice.

This task can be undertaken not only by trans organisations, but also by other entities, such as lesbian, gay, bisexual, trans and intersex (LGBTI) organisations, and trade unions.

## **6.2 *Equality bodies***

Article 20 of the Gender Recast Directive establishes that Member States are to create equality bodies having the following competence to:

- provide legal assistance to the victims of discrimination;
- conduct surveys on discrimination;

- publish reports and issue recommendations;
- exchange information with corresponding bodies and EU authorities.

In the past, in countries where equality bodies existed, the attention paid to discrimination on grounds of gender identity has been minimal if not absent. Despite the decision in *P. v. S.* in 1996, and its impact, European and Member State institutions have not done enough to make sure that discrimination against trans individuals is fully integrated into policies and practices regarding sex discrimination.

Such omissions would not be admissible today in light of the clear scope of the Gender Recast Directive on the issue. Indeed, equality bodies addressing sex-based discrimination should:

- be equipped with the necessary expertise to deal with discrimination on grounds of gender identity;
- regularly conduct monitoring activities and studies to properly address discrimination against trans people;
- issue recommendations to state authorities on the introduction of legislation that specifically outlaws discrimination on grounds of gender identity and (where applicable) addresses the issue of the change of legal sex and name regardless of surgery and sterilization, as well as the implementation of best practices to fight discrimination.

### **6.3 Social dialogue and dialogue with NGOs**

Articles 21 and 22 of the Directive respectively promote social dialogue between social parties and dialogue with non-governmental organisations that have a legitimate interest in the implementation of the Directive itself.

According to Article 21, this dialogue should, among other things, promote the implementation of best practices, the monitoring of practices as well as of agreements and codes of conduct. The scope of the Directive requires that such activities are extended to the issue of gender identity. It is thus necessary that state authorities, and the social partners include in their focus the issue of discrimination on grounds of gender identity to:

- identify and promote best practices;
- review agreements and codes of conduct;
- promote practices to facilitate access to employment and working condition of trans workers.

If organisations of employees and employers are to take a significant responsibility in mainstreaming the promotion of equal treatment for trans people, Article 22 gives an important role to trans and LGBTI rights organisations, that will have to engage with the state based on domestic practices established for dialogue with civil society.

#### **6.4 *Dissemination of information***

Article 30 of the Directive requires Member States to take any necessary action to ensure that those for whom the Directive was enacted have full knowledge of their rights and the content of the Directive and its remedies.

Education about rights and remedies is critical to empowering potential or actual victims of discrimination, as well as to preventing abuses. With a few exceptions, not much has been done to reach out to trans people and raise their awareness of the equal treatment protection they are entitled to enjoy. Article 30 offers a tool to trans and LGBTI organisations to ensure that Member States address the issue of discrimination on grounds of gender identity in their campaigns and awareness raising materials.

## **7. Positive action**

Article 3 of the Gender Recast Directive establishes that Member States may maintain or adopt measures to ensure full implementation of the principle of equality between men and women in practice. Although positive action has traditionally been employed to sustain a more robust presence of women in the workforce, under the scope of the Gender Recast Directive, Member States can expand the range of beneficiaries of positive actions and include trans individuals.

Access to work is certainly one of the major obstacles encountered by trans people. Social stigmatisation (which is particularly severe when the trans person's gender presentation does not match the gender on the identification documents), lack of family support, and community exclusion

often create a dire economic situation for trans individuals.<sup>24</sup> This context often pushes trans individuals to the margins of the labour market regardless of their skills and qualification.

### **Recommendations:**

Several measures could guarantee increased access to work for trans people including:

- measures that encourage employers to hire a trans candidate when “equally qualified” to another candidate to increase their inclusion in the workforce<sup>25</sup>;
- provision of training specifically for trans people to increase their competitiveness in the labour market;
- facilitating access for trans people to higher positions in the labour market;
- organisation of activities to educate employers, human resource managers and employees on gender identity issues to fight stigmatization against trans people in the workplace;

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<sup>24</sup>For example, Spanish research showed that 54% of trans respondents from the First Gender Identity Disorder Unit were unemployed, while only 31% held full-time jobs. See Esteva, I et al. *Social Inequalities: Demographic Characteristics of Patients Treated at the First Gender Identity Disorder Unit in Spain* (2001)

<sup>25</sup> These measures have been considered admissible by the European Court of Justice in its decision in *Marshall v. Land Nordrhein-Westfalen* Case C-409/95 (1997)

- removal of any barriers that create disadvantages for trans workers (both during the transition period, and importantly, through legal recognition of the preferred gender<sup>26</sup>).

## **8. How does the Directive apply trans people?**

In this sections we will now focus on the overall implementation of the Gender Recast Directive, as well as its current state of implementation. The document subsequently provides guidelines for action to ensure that the Directive is adequately implemented with regard to trans people's concerns in the all countries where it is applicable.

### ***8.1 Implementation with regards to gender identity***

The Gender Recast Directive is the first European Union piece of legislation that includes an express reference to trans people in its text.<sup>27</sup> While not going as far as to explicitly recognise 'gender identity' as a distinct ground of

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<sup>26</sup> The European Court of Human Rights has repeatedly ruled that failure of a State to alter the birth certificate of a person to his/her preferred gender constitutes a violation of Article 8 (Right to respect for private and family life) of the European Convention on Human Rights

<sup>27</sup> The 2004/113/EC Goods and Services Directive also covers trans people but no express reference is included in its text, see section 2 above for further detail

anti-discrimination,<sup>28</sup> the Directive codifies the *P. v S.* judgement in its Preamble by stating that:

"The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, *it also applies to discrimination arising from the gender reassignment of a person.*"<sup>29</sup>

In EU Directives, the Preamble (unlike the Articles) is not legally binding as it is meant to shed light on how the provisions of the Directive are to be interpreted. However, in this specific case, the Recital makes reference to the interpretation consistently delivered by the European Court of Justice which is legally binding for domestic judges. Therefore, the interpretation of the Gender Recast Directive on the matter of gender reassignment is unquestionable.

The first implication of the inclusion of Recital 3 in the Directive is that any individual who is allegedly a victim of discrimination on grounds of his/her gender reassignment may refer to any conciliation, administrative or judicial

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<sup>28</sup> EU equality legislation finds its legal base in the Treaty of the European Communities. The recognition of new grounds may require a change in the Treaty itself and would need to be approved by all EU Member States

<sup>29</sup> Recital 3, emphasis added

procedure established to redress discrimination on grounds of sex.

**Guideline:**

- Every piece of legislation prohibiting discrimination on grounds of sex and establishing the principle of equal treatment between men and women in the fields of employment, whether pre-existing the Gender Recast Directive or introduced as a measure to implement it, must be interpreted so as to include a prohibition of discrimination based on the gender reassignment of the individuals.

Since 15 August 2008, domestic legislation in EU Member States should incorporate the provisions of the Directive in their national law.<sup>30</sup> This means that, regardless of the status of implementation of the Directive in a country since that date, the domestic judge is obliged to interpret the existing law in accordance with the content of the Directive itself.

**Guideline:**

Domestic judges and administrative authorities called on by domestic law to decide on cases of discrimination against trans individuals in the workplace must interpret the law

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<sup>30</sup> Member States are obliged to make the necessary changes to their laws in order to achieve the result sought by the Directives

taking into account Recital 3 of the Preamble in light of the case-law of the European Court of Justice and rule that discrimination against trans individuals violates the principle of equal treatment between men and women.

## ***8.2 The current state of implementation***

The current state of implementation of the Gender Recast Directive with regards to the ground of gender identity is insufficient in a significant number of EU Member States and European Economic Area (EEA) countries for various reasons. Firstly, a number of countries have not yet specifically transposed any aspects of the Gender Recast Directive as their governments seem to be of the belief that the obligations of the Directive are already met in national law. Secondly, the Gender Recast Directive does not demand the express inclusion of a reference to the ground of gender identity in national gender equality legislation; merely that it is included in the scope of such legislation.

Consequently, many Member States took advantage of the absence of clear instructions and simply ignored their obligation to include gender identity in the implementation of the Directive.

The table below shows the patchy impact that the Gender Recast Directive has had on the coverage of gender identity in national law:

## Highest levels of protection afforded to trans people at national level

National legislation	Case-law	National equality body	Interpretation	Not protected
Belgium Hungary Norway Slovakia Sweden United Kingdom	Denmark Spain	Finland France Ireland The Netherlands	Austria Germany	Bulgaria Cyprus Czech Republic Estonia Greece Iceland Italy Latvia Liechtenstein Lithuania Luxembourg Malta Poland Portugal Romania Slovenia
<b>6</b>	<b>2</b>	<b>4</b>	<b>2</b>	<b>16</b>

Belgium, Hungary, Norway, Slovakia, Sweden, and the United Kingdom have express references in national law to a

ground that covers gender reassignment.<sup>31</sup> In Denmark and Spain, national law does not refer to gender reassignment, but the respective national courts interpreted existing legislation to cover it. Similarly, the respective national equality bodies of Finland, France, Ireland and the Netherlands cover gender reassignment as a ground of discrimination in their decisions. In Austria and Germany no transposition has yet taken place but legal experts presume that in the event that a case reaches a competent authority, gender reassignment will be covered in conformity with EU law.

In the 16 remaining countries, namely Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, and Slovenia, no reference to discrimination on the basis of gender reassignment is found in national law or practice, suggesting that trans people are in a situation of legal uncertainty.<sup>32</sup>

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<sup>31</sup> The wording of the applicable ground is not standard, and ranges from 'gender identification' to 'transgender identity' to 'sexual identity'

<sup>32</sup> Based on information collated in S. Burri & S. Prechal, *The Transposition of Recast Directive 2006/54/EC*, European Commission (2009) online at <http://ec.europa.eu/social/BlobServlet?docId=1843&langId=en>; and EU Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation* (2009), p.111, online at

While the situation may have changed in a few countries since the above data was compiled, many gaps still remain. In response to a question raised by members of the European Parliament in January 2009<sup>33</sup>, the European Commissioner Vladimir Špidla recognized that “Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) of the European Convention of Human Rights also need to be taken into account where transgender rights are considered” and stated that the “Commission takes breaches of EC law seriously and is closely monitoring the implementation in the Member States of EC law, including Directives 2006/54/EC and 2004/113/EC.” He also added that “The deadline for transposition of Directive 2006/54/EC in the Member States was 15 August 2008. However, in accordance with Article 33 of the latter, ‘Member States may, if necessary to take account of particular difficulties, have up to one additional year to comply with this directive’. The Commission will start

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[http://fra.europa.eu/fraWebsite/attachments/FRA\\_hdgso\\_report\\_Part%202\\_en.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA_hdgso_report_Part%202_en.pdf)

<sup>33</sup> See P-0076/09 - Implementation of the recast Gender Directive 2006/54/EC vis-à-vis transgender people

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+P-2009-0076+0+DOC+XML+V0//EN&language=EN>

monitoring the transposition of that directive in the near future.”<sup>34</sup>

By 15 February 2011, Member States will be expected to send all the necessary information about their transposition of the Directive to the European Commission. The latter will in turn draw up a report to the European Parliament and the Council on the application of the Directive. It is therefore highly important to keep the European Commission informed of any inconsistencies in the application of the Directive at the Member State level.

## **9. Is ‘gender reassignment’ equivalent to ‘gender identity’?**

The Directive’s use of the term ‘gender reassignment’ raises concerns as to whether all trans people are included within its definition or whether the term limits itself to transsexuals. Should it be accepted that the term’s definition be understood in the wider sense? Would it be appropriate for the domestic legislator to consider it as equivalent to ‘gender identity’ for the purpose of the prohibition of discrimination?

Unfortunately, there is no clear guidance from the European Courts on how to answer these questions. Gender

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<sup>34</sup> See P-0076/09 - Answer given by Mr Špidla on behalf of the Commission

<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2009-0076&language=EN>

reassignment as a legal term originated from the wording of the 1996 European Court of Justice's decision in *P. v. S.* and had to do with the circumstances of that case in which the applicant was dismissed while undergoing gender reassignment. The language was employed again in *K.B.* and *Richards* and seems to specifically suggest a reference to the gender reassignment surgeries that are undertaken by transsexuals. The jurisprudence of the European Court of Human Rights has only dealt with cases that were brought by transsexual individuals who were subjected to hormone therapy and underwent complete or, in the only case of *L. v. Lithuania*<sup>35</sup> partial, surgery, and therefore does not help to clarify this question.

A recent legal analysis carried out for the EU Fundamental Rights Agency may however provide useful insights for the domestic legislator. In response to whether 'gender reassignment' is indeed equivalent to 'gender identity', the study concluded that:

“[T]ransgenderism may not have to be reduced to [a] narrow understanding, linking it to 'gender reassignment' defined as 'a process which is undertaken under medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex, and includes any part of such a process'. Whereas transgender people in this narrow understanding do find themselves in a specific situation due to the operation of

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<sup>35</sup> *L. v. Lithuania*, Appl. no.27527/03, judgment of 11 September 2007

gender reassignment [...] there is no reason not to extend the protection from discrimination beyond these persons, to cover 'cross dressers, and transvestites, people who live permanently in the gender 'opposite' to that on their birth certificate without any medical intervention and all those people who simply wish to present their gender differently. It has been recommended that protection from discrimination on grounds of 'gender identity', more generally, should encompass not only transsexuals (undergoing, intending to undergo, or having undergone a medical operation resulting in gender reassignment), but also those other categories."<sup>36</sup>

**Good Practice:**

Six European countries have so far construed the definition of 'gender reassignment' to be equivalent to that of 'gender identity' and included an express ban on discrimination in national law. In doing so, they provided protection from discrimination to all trans people without distinction and left no room for legal uncertainty.

## **10. Strategic litigation and further progress through legislation**

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<sup>36</sup> EU Agency for Fundamental Rights, Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I - Legal Analysis, 2008, p.131, online at [http://fra.europa.eu/fraWebsite/attachments/FRA\\_hdgso\\_report\\_Part%201\\_en.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA_hdgso_report_Part%201_en.pdf)

Whereas the Gender Recast Directive constitutes an important tool for combating discrimination on grounds of gender identity, there is a concrete risk that the gaps in the law may leave room for lack of clarity. Such gaps are likely to continue to undermine equality for transgender people. Due to this, civil society should work towards progress on both the European and domestic levels to ensure full implementation of the framework of the Directive.

### ***10.1 Progress at European level***

**Main goal:** ensuring that the language of the Gender Recast Directive regarding its reference to gender reassignment can be expanded so as to coincide with the ground of gender identity.

- The precedent of *P. v. S.* and its lasting linguistic formulation, as well as the language of the Directive, should be challenged with reference to the meaning of gender identity before the European Court of Justice. The starting point could be a case of discrimination at the workplace or within social security in which the petitioner would be a transgender individual who has not undergone any kind of surgery, but whose gender role and gender identity do not correspond to the sex assigned at birth. In other words, the meaning of gender reassignment should either be explicitly expanded or amended.
- Similarly to what happened after *P. v. S.*, a future favourable decision should then be used as a precedent to ensure that the same interpretation is applied to other

areas of life, such as the provision of goods and services, healthcare, housing, and others.

- Such litigation efforts should be carefully prepared to maximize their impact. The language that is developing in recent decisions of the European Court of Human Rights seems to increasingly recognise the existence of a factor (gender identity) that determines people's well-being. Precisely because of the cross-fertilization between the two European Courts, it is very important to set the advancement of the language used by the ECtHR as a key goal. It is not unthinkable to believe that the ECJ would then decide to aligning its language to that of the ECtHR.

### ***10.2 Progress at domestic level***

**Main goal:** ensuring broad interpretation of the ground of gender identity by domestic courts to ensure a more effective impact of the Gender Recast Directive; and ensuring legislative reform that replicates the legal advances achieved through the decisions of the European Court of

Human Rights in cases such as *Goodwin*<sup>37</sup>, *van Kück*<sup>38</sup>, *L.*<sup>39</sup>, and *Grant*<sup>40</sup>;

- Existing national legislation providing protection to trans people on the grounds of gender identity, such as that of Sweden and the United Kingdom, may be used in other European countries both as a ground for advocacy and as a model for change.
- Legislative advocacy may not give short-term results in every country. In this event, litigation at domestic level (with reference to the European Court of Human Rights' numerous decisions since *Goodwin*), may constitute another tool to ensure recognition of gender identity, thus allowing for legal change of sex and name on identification documents regardless of surgery.
- Positive court decisions should then be used to ensure the introduction of new legislation or legislative reform of existing norms in line with the jurisprudence. Progressive legislation would amplify the benefits of the Gender Recast Directive ensuring protection from discrimination of all trans individuals, regardless of surgery.

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<sup>37</sup> *Christine Goodwin v. UK*, Appl. no. 28975/95, judgment of 11 July 2002

<sup>38</sup> *van Kück v. Germany*, Appl. no. 35968/07, judgment of 12 June 2003

<sup>39</sup> See note 36 above

<sup>40</sup> *Grant v. UK*, Appl. no. 32570/03, judgement of 23 May 2006

## **IMPLEMENTATION PROCESS – THE NEXT STEPS**

By 15 August 2008, Member States had to ensure that their domestic legislation complied with the Gender Recast Directive. To assist organisations in monitoring implementation and full compliance of national legislation with the Directive, you will find below a compliance checklist and a list of steps that may be taken if national legislation does not meet the minimum requirements of the Directive.

### **1/ Do national legislation, policies and practices comply with the Directive?**

- Legislation, policies and practices put in force by Member States should be checked for compliance using these guidelines. Administrative practices should also be reviewed to ensure that they do not contravene the provisions of the Directive.

#### **COMPLIANCE CHECKLIST –**

##### **Member States should by now:**

- NOT exclude trans people from the interpretation of the ground of sex, either by explicitly including gender reassignment in the text of equal treatment laws, or through interpretation by domestic judges/other administrative institutions
- Include trans people within the remit of the national gender equality body

- Encourage dialogue with trans organisations, and other entities, such as LGBTI organisations, trade unions, and any other organisations focusing on combating discrimination on the basis of gender reassignment
- Include the ground of gender reassignment in any education/awareness campaign about the content of the Directive
- Extend positive action measures to trans people (*In those Member States where positive action is used as a tool to ensure full gender equality in practice*)
- Recognise sick and invalidity schemes for trans individuals and ensure that such schemes are made available by employers
- Recognise the age of retirement for trans individuals based on the preferred gender and not on the birth sex
- Make available social security schemes and pensions schemes to trans individuals and their spouses/partners
- Abolish any laws, regulations and administrative provisions that are contrary to the principle of equal treatment of trans people as stipulated in the Directive

## **2/ What if national legislation does not meet this checklist?**

- Identify strategies to initiate a change in national legislation where it is necessary (e.g. lobby parliamentarians, rally support from other NGOs and other

civil society organisations, launch a public awareness campaign, etc.)

- Publicise any individual cases where trans people are negatively affected by the non-compliance and seek legal advice on possible remedies with reference to the Directive
- Bring non-compliance to the attention of the Ministry responsible for gender equality
- In cases of discrimination, make use of administrative and judicial remedies, referring both to the Directive and to the case-law of the ECJ and ECtHR that judges must apply in their judgments
- Make specific reference to the Directive and/or the ECJ case-law in any document, public statement and letters to government and elected officials you send regarding the issue of trans equality in employment and occupation
- Raise the issue with your national equality body responsible for gender equality
- Raise the issue with trans organisations, LGBTI organisations, and trade unions
- Bring your concerns to the attention of the European Commission (The relevant office is Unit G/1 'Equality between Men/Women', Directorate G 'Equality between Men/Women, Action against discrimination, Civil Society', DG Employment, Social Affairs, and Equal Opportunities, European Commission  
<http://ec.europa.eu/social/main.jsp?langId=en&catId=418>)

- Inform ILGA-Europe about the state of implementation of the Directive in your country and let us know how we can support your actions.

***Further information is available from:***

S. Burri & S. Prechal, *The Transposition of Recast Directive 2006/54/EC*, European Commission (2009)

<http://ec.europa.eu/social/BlobServlet?docId=1843&langId=en>

S. Burri & S. Prechal, *EU Rules on Gender Equality: How are they transposed into national law?* European Commission (2009)

<http://ec.europa.eu/social/BlobServlet?docId=4018&langId=en> (available in EN FR DE)

S. Burri & S. Prechal, *EU Gender Equality Law*, European Commission (2008)

<http://www.ec.europa.eu/social/BlobServlet?docId=1771&langId=en> (available in EN FR DE)

Commissioner for Human Rights, *Human Rights and Gender Identity Issue Paper*, Council of Europe (2009)

<https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=1382167&SecMode=1&DocId=1433126&Usage=2> (available in EN FR RU)