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Joint contribution by ILGA-Europe and Transgender Europe towards the European Commission's monitoring of the implementation of the Gender Goods and Services Directive (Dir 2004/113/EC) and the Gender 'Recast' Directive (Dir 2006/54/EC) in the EU Member States

The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) is a European NGO with 294 national and local lesbian, gay, bisexual, transgender and intersex (LGBTI) member organisations in 40 European countries, and works for human rights and equality for lesbian, gay, bisexual, transgender and intersex people at European level.

ILGA-Europe enjoys consultative status at the Economic and Social Council of the United Nations (ECOSOC), participative status at the Council of Europe and receives financial support from the European Commission and other funders. It is also a member of the Platform of European Social NGOs. ILGA-Europe was established as a separate region of the ILGA in 1996. www.ilga-europe.org.

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Transgender Europe (TGEU) is a European third sector, umbrella organization, which works towards the full equality and inclusion of all trans people in Europe. TGEU was founded in 2005, during the 1st European Transgender Council in Vienna and is today registered as an NGO under Austrian Law. Currently TGEU has 31 member groups from 18 countries mainly from Europe. www.tgeu.org

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ILGA-Europe and TGEU recommend to the European Commission to:

1. proceed to the review of the implementation of both directives with a particular focus on discrimination based on gender identity and gender expression;
2. call on **Bulgaria, Italy, Liechtenstein, Malta, Poland, Portugal and Romania** to amend the restrictive understanding of their national law implementing both directives so as to ensure a minimal protection against discrimination on the ground of gender identity and gender expression;
3. ask for clarifications to **Cyprus, Iceland, Latvia and Luxembourg** where the coverage of gender identity and gender expression by national legislation remains unclear;
4. launch an infringement procedure against those Member States that do not undertake the necessary changes;
5. undertake a **legal analysis of requirements for gender recognition legislation** (i.e. change of name and legal gender) and their requirements in Member States towards their compatibility with both directives;
6. liaise with the Member States to ensure that **national equality bodies** investigate cases of discrimination on the ground of gender identity and gender expression;
7. ensure that national authorities and equality bodies **give publicity** to the coverage of gender identity and gender expression in their anti-discrimination policy;
8. promote **good practices** put in place in some of the Member States in the field of gender-based discrimination;
9. organise **'train the trainers' programmes** on legal issues designed for Member States;
10. encourage Member States to organize **trainings on discrimination** issues for the judges and all the legal officers and national equality bodies' officers (with a particular focus on the situation of transgender and intersex people);
11. liaise with DG SANCO to develop measures targeted at improving the access of trans-people towards general health-care provision such as **educational programs combating prejudice among medical practitioners** and offering guidance on development and implementation of trans-friendly treatment guidelines to all Member States;
12. commission **research on discrimination against intersex people** and how to best cover them under the existing EU legal framework.

1. INTRODUCTION

This joint contribution is being submitted to the European Commission in view of the review of the implementation of Dir 2004/113/EC “in line with the jurisprudence of the European Court of Justice on gender identity and gender discrimination” during 2011; and the review of Dir 2006/54/EC during 2012 as indicated in the *Actions to implement the Strategy for Equality between Women and Men 2010-2015*.

In preparation towards this paper, ILGA-Europe and TGEU launched a call to their EU-based member organisations to collect **fresh evidence of discrimination** on the grounds of sex, gender, gender identity and gender expression in the areas of employment, occupation, vocational training and access and supply of goods and services. Additionally, some evidence of discrimination found in published reports was also gathered and included.

For the purpose of this paper, we have not included any reference to discrimination based on sexual orientation *per se* as it is covered under the anti-discrimination set of legal instruments rather than the gender equality legislation. However, sexual orientation was brought into this submission with regard to experiences of multiple-discrimination, particularly when discrimination on the grounds of sexual orientation compounded with the ground of sex and other grounds leads to an aggravated experience of discrimination.

Trans people are covered by EU gender equality legislation following the 1996 *P. v S. and Cornwall County Council* judgement by the European Court of Justice which affirmed that the principle of equal treatment between women and men enshrined in “the directive [76/207/EEC] precludes dismissal of a transsexual for a reason related to a gender reassignment.”

In this paper, however, we move away from the arbitrary ground of **gender reassignment**. Instead we favour the grounds of gender identity and gender expression as they account for the reasons of discrimination more precisely. Gender reassignment is understood as a process of social adaptation to a gender, different to the one assigned at birth. It may or may not include legal aspects (changing name and or gender marker) and or medical aspects, which are referred to as gender reassignment treatment; in case of invasive genital surgeries as gender reassignment surgery. However, for the purpose of detecting discrimination experienced by those intending to, undergoing or having undergone gender reassignment it is more precise to use gender identity and gender expression as grounds as they account for the reasons of discrimination more precisely.

Gender identity and gender expression are instead understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of body (which may involve, if freely chosen, modifications of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms¹.

This approach is shared with the *European Union Agency for Fundamental Rights*:

¹ As defined in the Yogyakarta Principles.

“Whereas transgender people (in this narrow understanding) do find themselves in a specific situation due to the operation of 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”².

Moreover, we have intentionally included examples of **discrimination against intersex people**³ in this paper in spite of the absence of case-law that states that intersex people fall within the scope of sex equality legislation. We did this as we believe that it is not necessary to wait for a judgement by the Court of Justice of the European Union to cover intersex people under sex equality legislation precisely because the primarily form of discrimination that they suffer from is ‘sex’ discrimination as a result of their incongruence with European society’s strictly binary female/male sexes.

² European Union Agency for Fundamental Rights, *Homophobia and Discrimination on grounds of Sexual Orientation and Gender Identity in the EU Member States : Part I – the legal analysis* (2008) p 125.

³ Intersex (or inter*) refers to those people who have genetic, hormonal and physical features that are neither exclusively male nor exclusively female, but are typical of both at once or not clearly defined as either. These features can manifest themselves within secondary sexual characteristics such as muscle mass, hair distribution, breasts and stature; primary sexual characteristics such as reproductive organs and genitalia; and/or in chromosomal structures and hormones. This term has replaced the term ‘hermaphrodite’ which was used extensively by medical practitioners during the 18th and 19th centuries.

2. OVERVIEW OF THE SITUATION IN THE EUROPEAN UNION

In its publication entitled *Transgender People Europe and the Gender Recast Directive: Implementation Guidelines*⁴, ILGA-Europe clearly indicated that the implementation of EU gender equality legislation with regard to the grounds of gender identity and gender expression is insufficient in a significant number of EU Member States. The primary reason for such a gap is that **EU law does not require Member States to expressly refer to these grounds in their domestic legislation** but simply apply the law in a way that covers gender reassignment.

Furthermore, as indicated by the European Network of Legal Experts in the Field of Gender Equality in their publication entitled *The Transposition of Recast Directive 2006/54/EC*⁵, many Member States have not undertaken an implementation procedure of the Gender Recast Directive as they argued that the provisions of the Directive were already implemented in national law.

The European map below shows the patchy impact of the Goods and Services Directive and the Gender 'Recast' Directive on the coverage of gender identity in national law (2011): While the use of those directives to cover discrimination on the grounds of gender reassignment (or better, gender identity and gender expression) seems to be wider compared to 2009, the situation is still unsatisfactory.

In addition, Member States do not refer to intersex people in their national (gender) equality legislation and with the exception in Germany⁶ and in Finland⁷ do not extend their gender equality legislation's protection through interpretation to intersex people either. Their anti-discrimination legislation on the ground of sex is always restricted to a strict binary sex conception under which intersex people cannot be protected. It is therefore highly likely that the map below would not have any shades of blue in it if it had to portray the levels of protection afforded to intersex people at national level.

In preparation of this report a questionnaire was circulated among all National Equality Bodies in May 2011 asking them whether there is express or implicit protection against gender identity and gender expression discrimination in national legislation. This map has been designed on the basis of their replies⁸. These replies are fully published in the Annex1, that accompanies this report.

⁴ Fabeni, S. & Agius, S., *Transgender Europe and the Gender Recast Directive: Implementation Guidelines*, ILGA-Europe (2009) Available at:

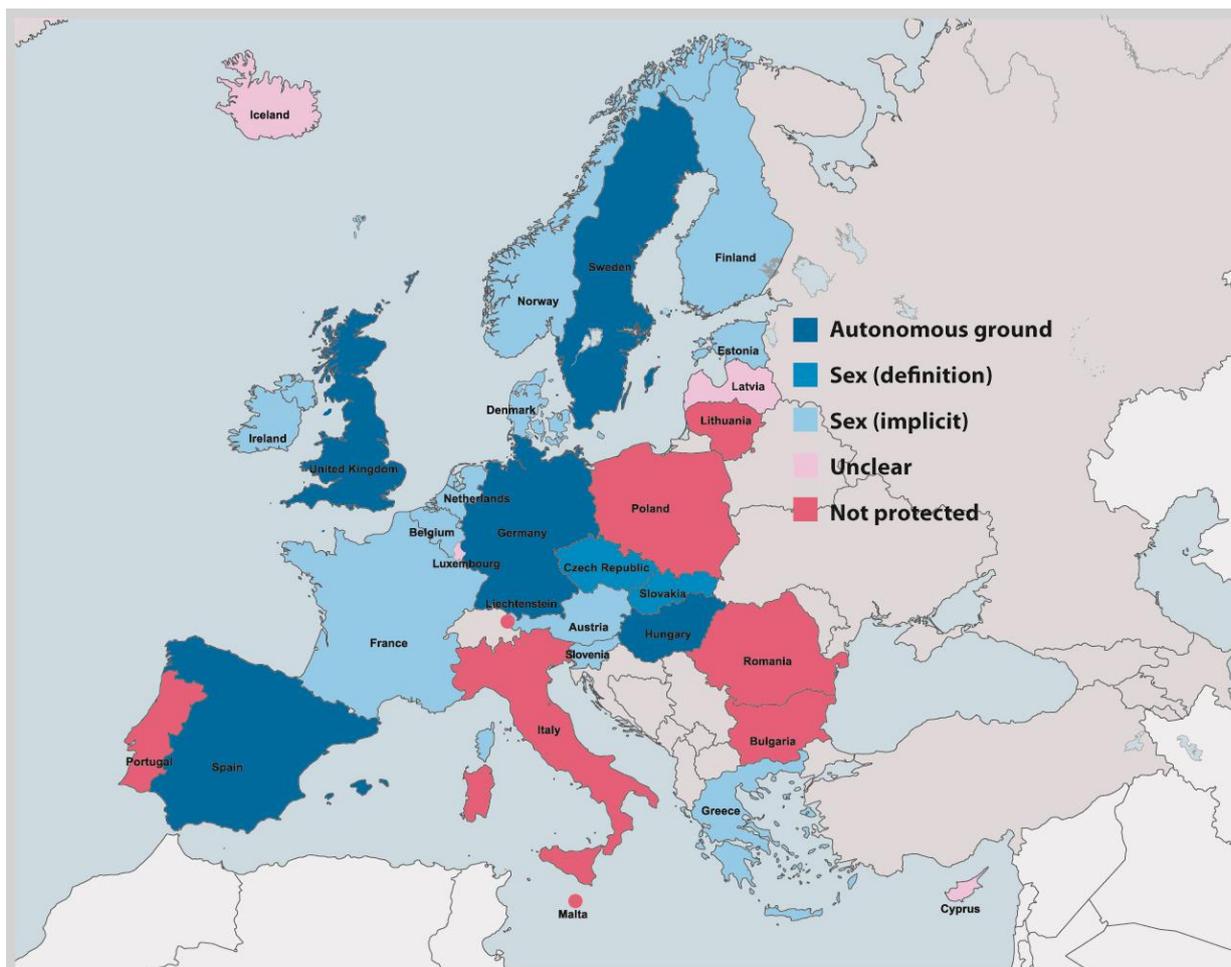
http://www.ilga-europe.org/home/publications/reports_and_other_materials/transgender_people_and_the_gender_recast_directive_implementation_guidelines_december_2009

⁵ Burri, S. & Prechal, S., *The Transposition of Recast Directive 2006/54/EC* European Commission (2009) Available at <http://ec.europa.eu/social/BlobServlet?docId=1843&langId=en>

⁶ Wide scope of protection against discrimination based on sexual identity

⁷ See Annex 1, reply to the questionnaire from the Finnish equality body: "The Ombudsman for Equality has considered that the Equality Act applies wide to the trans people and has there for also investigated cases of discrimination on the ground of gender identity and/or gender expression.

⁸ Except the Maltese National Commission for the Promotion of Equality which did not send its replies. To assess the current situation in Malta, other sources of information have been used. The Maltese equality body has been informed of the way the country information was going to be reported in this report.



Map 1: Protection against discrimination on the grounds of gender identity and gender expression in EU Member States and in EEA countries.

2.1. Structure of the report:

The first two parts of this document are highlighting **cases of discrimination** in the field of access to goods and services on the one hand (Directive 2004/113/EC) and employment and occupation on the other hand (Directive 2006/54/EC). Difficulties for trans people to have their name and gender marker changed, stereotypes regarding the health condition of trans and intersex people, lack of respect of confidentiality, teasing, bullying and harassment have a strong impact on the access of trans and intersex people to vocational training, employment, goods and services.

ILGA-Europe and TGEU consider that it is the role of the European Commission to ensure that both directives are fully implemented in order to protect trans and intersex people from such hard condition. The third section of this report therefore **underlines the need for a review** of the implementation of the directives with a specific attention to the way they apply to discrimination based on the ground of gender identity and gender expression.

3. DIRECTIVE IMPLEMENTING THE PRINCIPLE OF EQUAL TREATMENT BETWEEN MEN AND WOMEN IN THE ACCESS TO AND SUPPLY OF GOODS AND SERVICES (Directive 2004/113/EC)

3.1. Legal Recognition of Sex and Gender

- *Various pre-conditions prior to the qualification for legal protection against discrimination: When legal sex and gender requirements violate human rights in themselves.*

For many trans and intersex people, having the right name and sex/gender marker is of paramount importance both in accessing goods and services as well as for employability purposes. The majority of Member States provide for gender recognition⁹. However, requirements in accessing this legislation vary greatly¹⁰ and legislation actually intended to prevent discrimination against those people, who decide to permanently live in a gender other than the one assigned at birth, often become an obstacle in accessing goods and services or the labour market in itself.

Case Study 1: Denmark

To illustrate the consequences of the legal and medical requirements we will use Denmark as an example. Denmark does provide trans people with hormone treatment, surgery and psychological support reimbursed by public health insurance schemes,¹¹ however, individuals intending to undergo this treatment (required for a change of the legal gender marker) are required to provide:

- Intention to live in the opposite gender;
- Meet the real-life test requirements;
- A medical opinion indicating that they have Gender Identity Disorder;¹² and
- Genital surgery leading to sterilisation.¹³

All of those requirements are either administered or provided by one specialist institution – the Sexologisk Klinik.¹⁴

“Only a small percentage of the trans people who seek help at the only institution dealing with gender reassignment treatment. [...] A statistical comparison shows that from 1996 to

⁹ The principle has been established by the decision of the European Court of Human Rights (ECtHR) in *KB v France* (1996) and confirmed in later decisions

¹⁰ The ECtHR has left it to national legislation to define criteria for legal gender recognition

¹¹ Raun, T., *Denmark - A Transgender Paradise?* <http://trikster.net/4/raun/1.html>

¹² Medical opinion is usually the mental diagnosis of ‘Gender Dysphoria’ or ‘Gender Identity Disorder’ as defined in (national versions) of the WHO’s International Classification of Diseases (Mental and Behavioral Disorder Section) as well as the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association (APA)

¹³ EU Fundamental Rights Agency, *Homophobia, Transphobia and Discrimination on grounds of Sexual Orientation and Gender Identity* - 2010 Update, p. 16-17

¹⁴ The clinic holds not only a monopoly on treatment but also on research on trans issues. However, since its founding, the clinic has not published any research as pointed out by various Danish trans human rights activists.

2005 permission for a sex change was granted to 91% of the applicants in Sweden while it was only granted to 37% in Denmark.”¹⁵

Those who have been accepted often have to attend the clinic’s program for many years before a medical opinion is offered. Also, trans people have reported that surgeries are available in a one-size-fits-all manner and individual wishes/needs not to undergo certain invasive treatments are not respected. A decision by the Sexologisk Klinik cannot be appealed. Thus, only a minority of those intending to undergo gender reassignment is able to access the health care they need, and qualify for an official change in gender marker.

Reports from **France**, **Sweden** and other Scandinavian countries show that medical procedures, required for legal gender recognition are very lengthy and complicated, thus placing a great burden on the individuals undergoing treatment. In the case of France it may take up to five years for trans people to complete the medical and legal process. During these five years, individuals often find themselves in a legal limbo find it virtually impossible to stay or enter in the labour market.

On the other hand, the Portuguese that legislation on gender recognition that was adopted this year, limits at the decision-making process by public authorities on legal gender recognition to a maximum of 8 working days. However, due to a lack of availability of medical experts that are able to provide for the required Gender Identity Disorder diagnosis, the process is longer than stipulated in the law.

Given that requirements for legal gender recognition fall within the competences of Member States, further in-depth research is needed to establish whether certain provisions in national legislation on gender/sex recognition contradict the TFEU and EU gender equality legislation.

3.2 Access to financial services

A. Discrimination against Intersex people

Intersex people are still considered to suffer from a medical disorder, the ‘disorder of sex development’ (DSD). Intersex people are therefore considered to have a “disorder of body development” and are as such treated unfavourably by insurance companies with regard to life insurance, health insurance and other policies.

B. Discrimination against Trans people

Trans people who do not intend to undergo gender reassignment, or are in the process of undergoing gender reassignment experience several difficulties in access to financial services, irrespective of the service that they require. As a result, they will always need to come out to the people/companies from whom they are accessing the service as their accounts or bank cards will state a different gendered name that does not match their own gender.

- *Problems linked to the name’s change:
“I swear to you that I am the owner of this bank account!”*

¹⁵ Supra note 14

Dutch law¹⁶ requires that persons undergo ‘**complete gender reassignment**’ prior to their change of gender on their birth certificate. As a result, many trans people do not have access to identification documents in accordance with their gender role. This is particularly true for those trans people who are still undergoing gender reassignment, or who do not need or cannot access gender reassignment for health, religious, age or other reasons.

As a result of the above, complaints were received from the Dutch trans community claiming that they cannot convince their bank or their insurance company to address them in their **preferred gender role**. To put things in perspective, while banks and insurance companies have to screen their clients’ information at least once a year, and compare their files with the birth registry of the Netherlands, these companies claim that it is an extra burden for them to change the gender data of their clients so as to align it with the sex recorded on the birth registry. Banks and insurance companies hence state that they need to maintain the old gender marker on their records.

In Belgium, a bank customer reported the following case:

“As a customer of a credit card company claiming an unjustified booking on her credit card she faced great difficulty in proving her identity to the credit card company’s call-centre worker. Her interlocutor would not believe that she was the lawful owner of the credit card as her voice was that of a man”.

- *Refusal of coverage of gender reassignment costs and its potential impact on trans people’s health*

In Hungary (and possibly elsewhere), several insurance companies openly declare in the terms and conditions that apply to private health insurance that **they do not cover any medical costs** related to gender reassignment¹⁷. For example, Aviva¹⁸ and Generali¹⁹ have such provisions. Some other companies, such as QBE, used to have such an explicit exemption in their terms and conditions, but they removed them. Nevertheless, based on information provided over the phone they still maintain the policy that such costs are not covered.

Moreover, nearly all insurance companies declare in the terms and conditions that apply to private health insurance that they do not cover any medical costs related to psychiatric or mental illnesses, which might be used to refuse coverage for treatments related to gender reassignment.

The Dutch Equal Treatment Commission dealt with two cases of refusal of reimbursement of costs by insurance companies to transsexual women covering the costs of the operation for the placement of artificial breast implants. One of the insurance companies proposed to the trans woman to pay for the costs of the implants herself on the basis that:

“Secondary sex characteristics in transsexualism must comply with the rules for treatments of a plastic-surgical nature. These rules provide that the costs of placing artificial breast implants may only be reimbursed if the breast was removed. All other reasons for placing artificial breast implants are excluded. Please refer to [...] the policy conditions.”

¹⁶ Information provided by Transgender Netwerk Netherlands (TNN)

¹⁷ Information provided by Háttér Társaság a Melegekért (Hungary)

¹⁸ See http://www.biztositasifeltetelek.hu/Aviva/aviva_0017.pdf (Document is in Hungarian. Search for ‘nemi jelleg’)

¹⁹ See

https://www.general.hu/Szolgalatasok/Elet_es_nyugdij/~media/szolgalatasok/elet_es_nyugdij/klasszikus/altalanos_szerzodeses_feltetelek_easzf10%20pdf.ashx (Document is in Hungarian. Search for ‘nemi jelleg’)

The European Court of Human Rights requires that “insurance plans (should) cover “medically necessary” treatment in general, which gender reassignment surgery is part of”²⁰. However, this is not always the case. If in addition, private insurance companies refuse to contribute to cover those costs which may amount to a significant financial burden for the individual, many transgender persons do not have other choice than opting for treatments at a lower cost and in unsafe condition.

- *Transgender people = higher risks? Stereotypes of insurance companies.*

In the provision of financial services many problems are caused by a **lack of awareness** on gender identity and gender expression on the part of insurance companies. For example, trans identities are often seen as risk factors (on similar lines as an HIV+ status) in the provision of life insurance schemes etc. Cases of refusal of insurance policies have also been recorded.

- *Confidentiality, a core issue for trans people*

Respect of confidentiality is a key issue for trans persons. They are forced to come out on their change of gender at anytime in their daily life (including as employees, as consumers, and as citizens) often against their wish. Many have experienced and/or anticipate that as soon as they are coming out, they face strange reactions, intimate questions, and often harassment or discrimination which can hinder their access to some goods or services. As a result, many avoid to access certain services. Also, some take measures to conceal their gender identity, while insurance companies refuse to pay in the event of damage if information about previous gender reassignment treatment has not been provided, even if unrelated to the case.

A trans-man applied for a life-insurance that should be paid out at his niece’s 18 birthday. He was requested information about his health status. As he did not want to reveal his transgender identity to the bank consultant, who was also his interlocutor in all other financial matter with his bank, he concealed his transgender related health status (hormonal treatment, mastectomy, gender identity disorder diagnosis in order to have the mastectomy’s costs covered and official change of name). After having signed the application he learnt that this stated “false” information and that the insurance company had the right to decline to pay in case of incident, even if unrelated to his trans identity. Finally, he cancelled the insurance and did not pursue another financial product as he was ashamed on how to explain his motive to the bank clerk²¹.

3.3 Healthcare – more than gender reassignment treatment

Access to general healthcare is often impaired by prejudices of healthcare professionals. A quarter of the respondents in the *Transgender EuroStudy*²² reported adverse treatment by healthcare professionals because they were trans. A fifth reported that being trans

²⁰ Commissioner for Human Rights, Council of Europe ,*Issue paper: Human rights and gender identity*, (2009), p.26

²¹ Information provided by TransInterQueer (Germany)

²² Whittle, S., Turner, L., Combs, R., and Rhodes, S., *Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Case* (2008), Brussels: Ilga Europe

affected the way they access non trans-related healthcare: As a result many trans people report avoiding doctors' visits as much as possible for fear of inappropriate behavior.²³

In the 'Engendered Penalties' study in the UK, 22% of the survey respondents felt that being trans affected the way that they could access routine treatment that is not related to being trans. 29% of the respondents felt that being trans adversely affected the way they were treated by healthcare professionals²⁴.

The results can be seen in the health statistics: 12% of the trans respondents in the Swedish study reported bad health (as opposed to 6% of the general population). Trans people also reported worse mental health than gay (7%) or lesbian (20%) respondents. 29.9% of respondents to The Transgender EuroStudy survey had attempted suicide as an adult.²⁵ This reflects similar findings in other surveys. Half of the transgender respondents in a large-scale study into the health situation for LGBT people in Sweden had at one point or another in their lives considered taking their own life and 21% had actually tried to do this.²⁶ 34.4% of the respondents in a UK survey responded that they had attempted suicide at least once as an adult.²⁷ The situation of trans people with relation to HIV is completely unclear in Europe. Research from the United States, however, indicates that trans people, and especially MTF trans women sex workers, often are disproportionately affected.

Transgender people are prone to abuse by medical staff and public officials especially during the sensitive period of their transition. This is particularly grave as medical practitioners are often the first ones transgender people come-out to as they seek for help. These situations are practically inviting abuse – be it intended or not.

- *Gender Reassignment Treatment*

A key issue for many trans people's healthcare is access to appropriate gender reassignment services, including psychological, endocrinological and surgical expertise in the field of transgender healthcare. Not all trans people will need all aspects of these services, and some may not require any of them.

All EU Member States are held by the judgement of the ECtHR in the case *L v Lithuania* (2007) to provide for a possibility to access gender reassignment treatment. However, not all countries (in particular **Lithuania**) provide for the treatment that is needed by many trans people.

The *Transgender EuroStudy* showed that even those States that provide for sex reassignment treatment fail to provide the treatment to all transgender people in an accessible way. 79% of all respondents reported that they were denied state funding for their hormonal therapy. 82% reported, that they were denied funding for the minimal surgeries needed in order to live in the preferred gender, 51% decided to pay for the

²³ Ibid, p.59

²⁴ Ibid, p.46

²⁵ Ibid, p.45

²⁶ Statens Folkhälsoinstitut, *Homosexuellas, bisexuellas och transpersoners hälsosituation, Återrapportering av regeringsuppdrag att undersöka och analysera hälsosituationen bland hbt-personer, Östersund, (2005), FHI, p. 21*

²⁷ Supra note 25, p. 78

surgeries themselves, although half of these earned less than €25,000 annually. Coverage of costs is, however, not the only problem. One out of four transgender people reported refusal of treatment because their medical practitioner did not approve of gender reassignment at all.

The consequences for many transgender people are severe as the lack of access to gender reassignment treatment results in social stigmatization, low self esteem and in a higher suicide risk.

3.4 Sport clubs and competitions, inclusive environments?

Trans and intersex people may face problems in a number of areas in the field of sport, in particular when they want to access single-sex services and facilities. Some trans women still have to change at the men's locker room even when they have had their name changed.

In Germany, a trans woman received the written reply from the fitness company that she could not become a member as she had not undergone gender reassignment surgery and therefore could not possibly be allowed to use the female changing rooms. This would create discomfort for and pose a threat to other female customers.

More generally, discrimination on the ground of sex, gender identity and gender expression in the world of sport remains a serious problem. It has been brought to public attention when Caster Semenya had to undergo gender verification tests after winning the 800 m gold at the world championships in August 2009. It's worth wondering if gender should be the only criteria when building categories for sports competitions.

A trans woman from France indicated that she is effectively precluded from participating in competitive sports as a result of the fact that she cannot change her gender marker on her passport. The reason for this is that in France she can only change her gender marker on her passport following a divorce from her partner – something she does not intend to do.

3.5 Daily discrimination

To conclude this section on the difficult access of trans and intersex people to goods and services, here are a few examples on how the daily life of trans and intersex people can be reduced to a series of discriminatory practices.

- Access to goods:
 - *A drugstore has denied a trans woman estrogen despite a prescription as they "don't support this"*
- Access to services:
 - *Access to the cinema: A cinema has denied access to two trans women the free entrance even though it has proclaimed "women's day".*
 - *Sales on the Internet: It has been reported that eBay had denied name-change of account despite official court-decision of name-change.*
 - *A Danish trans man residing in Germany was holding a Danish passport still indicating "F" for female (according to Danish legislation, his change of gender is only possible in Denmark). When he booked a trans-continental flight to Canada*

the flight company insisted that due to increased security measures they had to indicate his title as 'Mrs'. This not only causes confusion but forces him to constantly have to explain the contradictory information on the ticket, exposing him to further discrimination.

In Member States where the Goods and Services Directive is fully applied and provide a protection against discrimination on the grounds of gender identity and gender expression, trans and intersex people can fill a request to equality bodies or even go to court. However, in such cases of daily discrimination, they can reasonably not launch a complaint for each and every obstacle they face in their access to goods and services. Equality bodies and the national authorities should also therefore ensure a strong visibility to the anti-discrimination laws that protect trans and intersex people from discrimination on the grounds of gender identity and gender expression.

The European Commission should firmly urge Member States where the directive is not applied properly and where there is no such protection, to review their national law and to encourage national equality bodies to take cases of discrimination on grounds of gender identity and gender expression and to make this work visible.

4. DIRECTIVE IMPLEMENTING THE PRINCIPLE OF EQUAL OPPORTUNITIES AND EQUAL TREATMENT OF MEN AND WOMEN IN MATTERS OF EMPLOYMENT AND OCCUPATION (Directive 2006/54/EC)

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.

In the sections below, some cases of discrimination in the field of vocational training and employment are highlighted, illustrating the need for a more thorough implementation of the gender Recast Directive.

A. Discrimination against Intersex people

There is no statistical evidence or studies about intersex people and the discrimination that they suffer in accessing employment and occupation. Sadly, this is not exclusively the case with regard to the field of employment, but rather a general trend for intersex people's realities in all spheres of life.

B. Discrimination against Trans People

4.1 Vocational training

Vocational training includes higher education. Trans students may face harassment and discrimination in a number of areas during their studies. As a result, a high proportion of trans students is disheartened or frustrated and lose their self-confidence. This might also lead to under-achievement and absenteeism. In addition, given the importance recognised to higher education in the *Europe 2020 strategy*, it is critical to ensure that every student benefits of an inclusive learning environment. Below are some cases highlighting the daily problems faced by trans students.

When using **single-sex services and facilities** (for instance, single-sex student halls of residence or toilets), trans students sometimes face unpleasant remarks from other students or even are denied the access to the facilities corresponding to their appropriate gender.

In Germany, a male identified trans student in a vocational school experienced great distress upon the necessity to use the same changing facilities with his female co-students. He had been attending that vocational school for half a year exclusively with a male appearance but with female name and without being out as trans.

Newly introduced sports classes put him under great stress. Thus, he is afraid to have to exercise without the breast binding device, as with the binder he would not get enough air. The idea to share shower facilities with his female co-students and to visibly having to put on/off the breast binding device upsets him a lot, as he feels that he is forced to come out to his (female) co-students and to explain himself. He is very critical of the possible reactions of

his peers of such an outing. Impatiently awaiting the possibility to start hormone treatment, which has been delayed to due to an unsolved situation with his work and school in regard to his gender identity, the present challenge disturbs him a lot. Skipping sports classes is not an option since he wants to participate in sports classes as his peers know him as active sportsman in his leisure time.

Trans students can also be harassed by their fellows or by their professors, especially if they want to be addressed with a pronoun matching their real gender identity.

Experience of a Trans male student in an 'intercultural philosophy' seminar at the Humboldt-University (Summer semester 2010):

"Upon outing myself as a transgender person at the seminar and asking for being addressed with a male pronoun, I experienced tremendous problems in getting heard by the professor. My wish for being addressed with a male pronoun was completely ignored by the professor. All I had to say about gender (I have finished my 2nd major in "gender studies") was invalidated. Obviously, the idea that I might be a guy was out of the thinkable. In later sessions, after multiple explanations and with support of other students from the seminar, the professor continued with his expressions and comments. The professor did not even apologize even after I expressed my strong discomfort with the situation. Other students joined in and expressed their discontent with the situation. The professor continued, pointed at me and stated, "This woman wants to be a man!" and laughed.

Then, I kept on being reduced to being trans and was asked to speak as a representative (for trans people) and was pressed to change the subject of my paper to something related to trans, even though the topic of the seminar was intercultural philosophy and transgender was not planned to be covered – however, this did not change the expressions or usage of the wrong pronoun by the professor."

As a result, the student felt being ignored, not understood, both as a person and a professional. He was very sad and angry, but he felt that it was going to negatively reflect on his marks if he insisted further on clarifying the issue. It provoked insecurity about whether he should complete his studies at all, and significantly reduced his motivation to commit to his studies. Additionally, other students in the seminar expressed that they felt uncomfortable and that the working atmosphere got negatively affected by the professor's behavior.

In another course, this student was discriminated once more when the professor provided a lower mark on the coursework and justified his position by stating:

"You take the gender-question out of the biology and make it a purely cultural custom, something I do not agree with, by the way. Especially I cannot follow the degree to which you claim the character of gender and body is constructed and performative."

The testimony above clearly illustrates that students victim of harassment are likely to get discouraged and to feel unable to achieve a complete course. In this case, harassment even led to discrimination (lower marks) and it had a very negative impact on the general learning environment.

In addition, when having their name changed, trans people who are still studying, have to cope with a strong reluctance from various stakeholders (staff, students, administrative authorities) who do not immediately accept the name change and its implications. They might face difficulties in having the name changed in all the records (students associations, matriculation or qualification certificates for instance) or in getting a new uniform (when it is specific for male or female students). Additionally, since gender recognition legislation is only accessible at the earliest at the age of 18, those students

below this age often have no legal power to authorise a change of name and gender with regard to their school documentation.

The possibility of change of the name on the diploma is particularly important as trans people already strongly suffer from discrimination in accessing employment and their situation should not be worsened by the non-recognition of their diploma. The case presented below combines problems linked to the name's change and cross-border issues. This situation is not a single case: more and more students are studying abroad, including trans people.

A Romanian trans man residing in Germany holds a Romanian University entry exam certificate (Abitur), and has changed his name into a male name in Germany. He also plans to change his legal gender according to the German transsexual law (Transsexuellengesetz – TSG), which is available to residents, if their home country has no equivalent gender recognition legislation. It is expected that Romanian authorities will recognise the decision according to German law and issue a new Romanian birth certificate to him, however, there is no regulation that would ensure that his academic certificates are changed as well. Contradictory names on certificates and identification documents may pose a serious threat to his future educational career and employability especially in view of possible scepticism towards foreign academic certificates. He presented his situation to the Office for the Recognition of Foreign Qualifications at the Regional Commission in Stuttgart and was told that despite the prohibition of disclosure (Offenbarungsverbot) in the German transsexual law there was no possibility to change his school leaving certificate or issue an equivalent with his male name, that would be recognized in Germany.

Fortunately, there are also some **examples of good practices**. For instance, in December 2010, the Dutch Minister for Education announced a change of policy for all educational institutions in the country. In a letter to the educational institutions, she explained that the relevant law needs to be interpreted in a way that trans people should be allowed a new diploma with their corrected name and gender. But before achieving this positive result, a trans person had to experience a discrimination and to launch a complaint so as to make the law eventually respected. In 2004, Mr Eisfeld had changed his legal name and subsequently gender and had tried to get a new diploma since. When the University refused, he started a case through the Equal Opportunities Commission. The Dutch Equal Opportunities Commission ruled that the refusal by the university amounted to indirect sex discrimination. However, this type of initiative is quite seldom and such positive move should not be expected from the Member State if they are not encouraged to do so.

4.2 Access to employment, including promotion and dismissal, and working conditions, including pay

Most trans people have to face many stereotypes when they try to find a job or when they transition while they are employed. Those stereotypes can have a direct impact on their access to employment, or on the tasks they are proposed to deal with.

Unemployment is a key issue for transgender persons: “The Engendered Penalties study shows that only 31% of the respondents are in full-time employment. The exact figure for transgender women is 40% and for transgender men 36%, while among the non-

transgender population these figures are 57% for women and 72% for men²⁸. In addition, it is important to note that employment, and thus financial means, is crucial for those transgender people wishing to access transgender-related healthcare. Having a job implies having a health insurance, which (though not in all cases) facilitate reimbursement of expenses related to transgender healthcare. it constitutes a problem when “a work contract might state “male”, while the legal requirements for accessing gender reassignment surgery state that a transgender woman present herself in female attire at work. This means that the person concerned cannot decide herself when she deems it appropriate to inform her colleagues and employer about her gender identity”²⁹.

TransFuzia, Slovakian LGBT rights association reports that people going through a legal change of gender tend to lose their jobs, and have very low chance of finding a new one. They have a big chance to get trapped in a vicious circle of being trans-visible that makes it almost impossible to find a job and earn money to pay for gender confirmation treatment, which would lower the visibility. In addition, there is no possibility to change gender markers on the documents proving achieved education, which makes it harder even for transgender people, whose trans status is invisible, not to “come out” at almost every job interview.

Below is an example of discrimination in the access to employment based on gender identity. Similar cases are found in the Annexes to this report.

One of the best police cadets in Germany who had undergone gender reassignment 15 years earlier was refused a job by the Hesse Federal State as the police medical service did not found him fit for service. Police regulation 300 (Polizeidienstverordnung), applicable at national and federal state-level, defines that “at least one testicle needs to be functional. Loss or atrophy of both testicles defines a failure that contradicts an employment.” Since the police cadet has never had testicles nor lost them, the regulation is not applicable in this case. However, the medical service of the police feared an increase of aggression because of the hormone treatment or lack thereof; also the doctor associated potential mood-changes with the treatment. In December 2007, the judges acknowledged that the refusal of this applicant constituted discrimination on the grounds of sex. However, this would be justifiable as it serves the higher-ranking aim of: “securing a functioning police service by excluding such applicants, who, due to artificial hormone treatment, are subject to mood-changes and are thus running the risk of not being able to master the special challenges of this service.” An appeal against this decision is not possible. The cadet is pressing charges against Hesse now at the Federal Constitutional Court. The decision is pending.

Many cases were reported of very skilled people who had a high profile position with many clients contacts and who were moved to another department (with less contacts with the external world) right after they transitioned. This even occurred when the individuals had first informed their managers of their wishes and had made sure that they would be supportive. It has also happened that trans people who **would have been promoted** if they had not transitioned, were eventually not proposed any higher positions. Some trans people have even lost their job when they came out as being trans:

An employer in the field of health care in Germany first agreed on the coming-out of an employee as transgender. However later-on it was allegedly not any longer tolerable for patients and the employer told he feared of loss of patients. The employer was willing to keep the employee under the old name as the work records were good. However, the employer was

²⁸ Commissioner for Human Rights, Council of Europe ,*Issue paper: Human rights and gender identity*, (2009)

²⁹ Ibid

not willing to support the Coming-out. Since the contractual basis was a de-facto freelance contract, as very common in the German health care system, the Trans person had no legal possibility to challenge the discrimination. Finally, the Trans person could not get other contracts afterwards.

It is essential that Member States **raise awareness on the prohibition of discrimination** based on gender identity and gender expression in the field of employment. When they are acquainted of such cases, they should take a firm and visible position. This has been the case in Austria recently when media reported the concerns of parents regarding a trans woman teacher who had just transitioned:

“The federal ministry reacted promptly to the media report about the transsexual teacher at the HTL-Spengengasse in Vienna and announced that it is qualification and not the appearance which is important by teachers” said Angelika Frasl, the Deputy Federal Chairwoman and transgender delegate of the SoHo. Frasl explained that the statement of the federal ministry is an important step for acceptance and recognition of transgender people at the employment market and should be a guide for every employer. “Lots of transsexual people still loose their employment after coming out and fall into long-term unemployment.” It is essential to cause changes through awareness raising and training. “Transsexuality is not a contagious illness of which someone would have to be protected”, said Sarah-Michelle Fuchs, psychotherapist and SoHo-federal board member, in an interview on ATV. From there the reaction of the representative of the parents’ association is inapprehensible. “I wish the concerned HTL-teacher all the best on her way to her true “me” and thank the minister of education Claudia Schmied and her team for their exemplary reaction” sais Frasl closingly

In addition to this, almost all trans people, who are known to be trans, have to face **intrusive questions** of colleagues (about their sex life, their medical condition etc), the refusal of use of the correct pronoun and workplace bullying. As a result, they might get discouraged, lose their motivation and they are likely eventually to be dismissed because of their seeming lack of enthusiasm at work. The cases below are illustrating that.

In Germany, S. was happy that his document change went smoothly. With a new ID showing his officially recognized new male name and a “male” social security ID number he was very motivated to start his new job. S. was shocked and sad when he learned from another colleague that participants in his training group had reacted bewildered when they had learned that S. had a girlfriend. They also run down S.’s “androgynous character”. S. immediately contacted his head of team and human resource manager. As a result, he was sent home, as he appeared to be negatively affected by the incidents. S. was in doubt whether it was reasonable of him or out of proportion informing his superiors right-away. His masculinity was invalidated by the supposition that he was androgynous.

Furthermore, **national courts are still not knowledgeable enough** or always in a position to interpret the ground of gender (or sex) in conformity with the meaning established by the ECJ in *P. v S.*

This is illustrated by the *Louise Hannon*³⁰ case ruled in March 2011 by the Equality Tribunal in Ireland. Ms Hannon was dismissed following her revelation of her female gender identity to her employer and the subsequent process that she undertook towards living in accordance with it fulltime (including presenting herself as a woman at work). While the employer had originally agreed to the transition, he eventually told her that she had to revert back to her former male identity and wear male clothes when seeing clients.

³⁰ The Equality Tribunal, *Louise Hannon v First Direct Logistics Limited*, Decision DEC-E2011-066, 29.03.2011

Moreover the Operations Manager continued to refer to her by her former male name, and *Hannon* was told that she could not use the female toilets (even though male staff occasionally used them as well). She was also asked to work from home for an interim period of time. Following further similar incidents, she was told that her productivity had reduced dramatically. The Equality Tribunal ruled that *Hannon* was a victim of a constructive dismissal and awarded her more than €35,000 in compensation for the discrimination that she suffered.

In this case *Hannon*, claimed that she was discriminated on the grounds of gender and disability since according to her lawyer this was the only way she could make a claim for discrimination on the grounds of her transsexuality. In its reasoning the **Tribunal went into detail about *Hannon's* Gender Identity Disorder (hence her disability) argued gender as a narrower ground than indicated in the *P. v S.* case.**

Roundup

All the cases highlighted in this report are examples of violation of the Gender Goods and Services Directive (Dir 2004/113/EC) and the Gender 'Recast' Directive (Dir 2006/54/EC). However, they were not all brought to the attention of the justice (equality bodies, national or European courts). Indeed, victims of discrimination on the ground of gender identity and gender expression rarely launch complaints. Only a fraction of them know their rights and have the financial means necessary to access justice. Also given the loads of discrimination experienced, often on a daily basis, only few find the courage to take legal steps. They often fear victimisation from their university or from their employer.

There is a clear role to play here for trans and LGBTI rights associations, but also for the equality bodies and the national authorities.

Both directives should be implemented at the national level in a way they protect trans and intersex people against discrimination based on the grounds of sex, gender identity and gender expression. In addition, legislation should be given visibility so as to avoid further cases of discrimination and the burden of going to court for the victims.

5. HOW TO ENFORCE THE DIRECTIVES AT NATIONAL LEVEL?

5.1 Lack of recognition of gender-based discrimination in the national legislation

According to the Commissioner for Human Rights of the Council of Europe;

*“the absence of explicit recognition of gender identity in non-discrimination legislation also has an impact on its inclusion in the work of equality bodies and National Human Rights Structures (NHRSS). [...] In addition, these organisations often lack the knowledge and competence to deal with gender identity discrimination, and would therefore require training before embarking on this work [...]. The need for national non-discrimination legislation in all Council of Europe member states, which includes gender identity as a ground for discrimination in the labour market is thus evident. It is particularly important that changes to non-discrimination laws are also accompanied by awareness-raising campaigns for employers and employees so that the size and the seriousness of the problem are understood. Employers should be better aware of the situation of transgender people to guarantee a safe work environment for all”.*³¹

Mapping the exact application of ECJ case-law and transposition of the two Directives with regard to gender reassignment is rather complicated. In 2009 an assessment study³² of the implementation of the Recast Directive among the EU-27 and EEA countries was conducted by the European Network of Legal Experts in the Field of Gender Equality. The study asked whether the novelties and/or clarifications that were introduced into the Directive as a result of the recasting process were implemented in national law, also asking a specific question about gender reassignment. It found out that since the main exercise of the Recast Directive was that of consolidating existing European Union gender equality law in the sphere of employment and occupation, many Member States did not undergo a thorough implementation process (if they undertook one at all), basing their lack of transposition on the premise that all of the provisions were already included in national law.

Further studies about the coverage and meaning of gender reassignment in domestic legislation were conducted by both the FRA (latest in 2010)³³ and EQUINET (2010)³⁴. Both of these studies shed some light on the differences of understanding of gender reassignment across the European Union, and the diversity between the extensive coverage provided in a handful of countries, the lack of clarity on the extent of coverage in some others or even no coverage whatsoever.

In addition to the above mentioned studies, in preparation of this report a questionnaire was circulated with the support of Equinet among all National Equality Bodies (NEBs) during May 2011 asking them whether: (i) there is express or implicit protection against gender identity and gender expression discrimination in national legislation, (ii) the NEB is provided with the remit to investigate cases of discrimination on the ground of gender

³¹ Issue paper, « Human rights and gender identity », Commissioner for Human Rights, Council of Europe

³² European Network of Legal Experts in the Field of Gender Equality. (2009). *The Transposition of Recast Directive 2006/54/EC*. Brussels: European Commission.

³³ European Union Agency for Fundamental Rights. (2010). *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity - 2010 Update: Comparative Legal Analysis*. Luxembourg: Publications Office of the European Union.

³⁴ European Network of Equality Bodies. (2010). *Dynamic Interpretation: European Anti-Discrimination Law in Practice V*. Brussels: EQUINET.

identity and gender expression, (iii) trans and/or intersex people have submitted cases of discrimination to the NEB, and (iv) the NEB has taken any measures to promote equality for trans and intersex people.

All the equality bodies (or equivalent structures) have sent their replies except Malta. The Maltese National Commission for the Promotion of Equality has been informed about how the situation in Malta would be reported. The completed questionnaires are annexed to this report.

The situation in the Member States and EEA countries vis-à-vis the coverage of gender identity and gender expression is as follows (until end May 2011)³⁵.

Country	Implicitly covered under the ground of sex	Autonomous ground	NEB mandated to tackle gender reassignment discrimination	Trans people that are covered by NEB ³⁶	Cases that have reached the NEB	NEB's specific measures promoting trans equality
Austria	Yes	No	Yes	All trans may be covered ³⁷	3 cases concluded.	Organised a conference on trans issues (2009)
Belgium³⁸	Yes	No	Yes	All trans: transsexuals expressly; other trans ad hoc	81 cases (since 2006); 1 legal action ongoing	Specific research; partnership with trans organisations
Bulgaria	No	No, open ended list	Not statutory	All trans may be covered	3 cases; 1 case ongoing	None
Cyprus	Unclear	No	No (only ad hoc)	All trans may be covered	3 cases; 2 cases ongoing	None
Czech Republic	Yes, sexual identification	No	Yes	All trans may be covered	None	None
Denmark	Yes	No	Yes ³⁹	All trans may be covered	n/a	Trans organisation in NEB committee
Estonia	Yes	No	Yes (NEB)	All trans may be covered	1 case (since 2005)	None

³⁵ Based on the ILGA-Europe research amongst NEBs

³⁶ In many cases, no non-transsexual trans cases have reached domestic courts or NEBs yet. The coverage of all trans people is therefore only a presumption, and future decisions may narrow the interpretation than is provided in this document.

³⁷ 'All trans may be covered' means that according to the information submitted by the NEBs non-transsexual trans people are assumed to be covered by existing legislation. However, this was practically tested as yet.

³⁸ A review of current equality legislation is underway and express inclusion of the ground of gender identity and expression is being considered.

³⁹ Danish Institute for Human Rights since March 2011. No information about previous structure.

			interpreta tion)	covered		
Finland ⁴⁰	Yes	No	Yes	All trans and intersex (NEB interpretation)	5-10 cases per annum	Advice to government; focus on trans issues during 2011; dialogue with trans & LGBTI organisations
France	Yes	No	Yes	Transsexuals only, other trans no	4 cases	Dialogue with trans organisations
Germany	Yes	Yes, Sexual Identity	Unclear	All trans and intersex (NEB interpretation)	114 enquiries: 98 trans, 16 intersex. No decisions yet	Research
Greece	Yes	No	Yes	All trans may be covered	2 cases (since 2010)	None
Hungary	No	Yes, Sexual identity	Yes, expressly	All trans may be covered	2 cases (since 2005)	None
Iceland	Unclear	No	Yes	All trans may be covered	1 case (since 2009)	None
Ireland	Yes	No	Yes	All trans may be covered	1 case (decided 2011) ⁴¹	Advice to government
Italy	No	No	No	None	n/a	Dialogue with trans organisations
Latvia	Unclear	No	Yes (NEB interpretation)	All trans may be covered	3 cases (since 2006)	None
Liechtenstein	No	No	No	None	n/a	None
Lithuania	No	No	No	None	n/a	None
Luxembourg	Unclear	No	Yes (Board decision)	All trans may be covered	6 cases (since 2008)	Dialogue with trans organisation
Malta	No	No	No	None	n/a	None
The Netherlands	Yes	No	Yes	All trans (NEB interpretation)	22 decisions (since 1998): 19 transsexual, 1 transgender, 1 transvestite.	Dialogue with trans organisation
Norway	Yes	No	Yes	Transsexuals only, other trans no	4 cases, 11 requests for information	Advice to government
Poland	No	No	Not expressly	Unclear	1 case (since 2010)	None
Portugal	No	No	No (only ad hoc)	Unclear	n/a	None
Romania	No	No, open ended list	Not statutory	All trans may be covered	n/a	None

⁴⁰ A new anti-discrimination act is in preparation and is expected to include clear reference to sexual and gender minorities.

⁴¹ Equality Tribunal, *Louise Hannon v First Direct Logistics Ltd.* Decision No. DEC-E2011-066, 18.04.2011

Slovakia		Yes, Sex or gender identification	No	Yes, expressly	All trans may be covered	1 case (received 2011), 2 requests for information	None
Slovenia		Yes	No, open ended list	Not expressly	All trans may be covered	2 cases (ground of sexual identity established)	Advice to government
Spain ⁴²		Yes	Yes, Sexual identity	Yes, expressly	All trans, expressly covered	n/a	n/a
Sweden		Yes	Yes, Transgender identity and expression	Yes, statutory	All trans, expressly covered	25 complaints received on specific ground. Few other cases under sex	Working group on trans issues, action plan (2009 -); advice to government
United Kingdom	GB	No	Yes, gender reassignment	Yes, statutory	Transsexuals expressly covered, other trans no	9 strategic cases; 200 queries (since 2009). 6 additional cases (Scotland).	Capacity building and funding for trans organisations; policy and law review; various specific publications
	NI	Yes	No	Yes	Transsexuals only, other trans no	1 out of court settlement; various enquiries	Advice to government

The table above shows that there are great variations across the European Union and EEA countries when it comes to coverage of trans people under domestic law. It also shows that even though some progress has been registered since 2009⁴³, several states do not meet the standards that were set by ECJ case-law. Indeed, based on the information that was collected, it appears that **Bulgaria, Italy, Liechtenstein, Lithuania, Malta, Poland, Portugal** and **Romania** fall short of meeting the established principle including gender reassignment within the meaning of sex. The situation in **Cyprus, Iceland, Latvia**, and **Luxembourg** is unclear and coverage is entirely dependent on the respective NEB's willingness. **Austria, Belgium, Denmark, Estonia, Finland, France, Greece, Ireland, the Netherlands, Northern Ireland, Norway** and **Slovenia** seem to meet the requirement even though they do not include an express reference in the law. In **the Czech Republic** and **Slovakia** the ground of sex is expressly extended to cover sexual identification (and gender identification in the latter) while **Germany, Great Britain, Hungary, Spain**, and **Sweden** have an autonomous ground that is equivalent to gender reassignment or gender identity and gender expression. **Belgium** and **Finland** are both undergoing a review of existing legislation and are expected to introduce an autonomous ground of gender identity and gender expression in domestic law, thus joining the growing number of countries that are opting for a separate ground of anti-discrimination.

⁴² Following the new Ley Integral para la Igualdad de Trato y la no Discriminación adopted at the end of May 2011. A new equality body structure will be created.

⁴³ See 2009 overview and map in Fabeni, S., & Agius, S. (2009). *Transgender People and the Gender Recast Directive: Implementation Guidelines*. Brussels: ILGA-Europe. p.21-23

While the above assessment may seem to indicate that there is a five tier distinction⁴⁴, a **more nuanced review** is necessary. EQUINET acknowledges this in its publication by stating that, “[T]here is some variation in the scope of protection afforded to transsexual people depending on which Member State they happen to live in: for example, in Austria, discrimination arising from gender reassignment covers discrimination on grounds of gender reassignment and gender identity; in Cyprus discrimination on grounds of ‘sexual identification’ is deemed to fall within sex discrimination.”⁴⁵

Indeed, **gender reassignment** is not in itself a ground of anti-discrimination but a process that many trans people undergo. In some countries, the term is restrictively reserved for transsexuals, while in others it is applied more broadly to cover all trans people irrespective of whether they intend to undergo any form of physiological gender reassignment or not. A precise assessment on the scope that the term is provided in domestic settings remains difficult. This is due to the fact that in several states few cases were considered by courts and equality bodies and hence to date a legal interpretation of the term is still academic. Additionally, beyond the phrasing of the law, it is important to review trans people’s (i) access to justice through the domestic NEB structure and the judicial system, as well as (ii) whether any initiatives promoting equality for trans people and existing remedies have been undertaken.

5.2 Access to justice on basis of gender-based discrimination

The effectiveness of the European legal framework, in this case, of both directives, very much depends on the capacity of victims to access justice. This can be done through Ombudsmen or national equality bodies and not necessarily through the court. However, alternative dispute settlement mechanisms are not necessarily more accessible and visible.

The length of proceedings and the costs of legal representation are major issues to explain the reluctance of many victims to seek redress when discrimination occurs.

From a general point of view, judges often lack awareness on discrimination cases, and for instance, the practical implementation of the requirement of the reversed burden of proof seems problematic in many cases⁴⁶.

The main obstacle to the effectiveness of anti-discrimination legislation at national level is probably the fact that sanctions are not considered to be dissuasive enough.

ILGA-Europe and TGEU encourage their members to take cases to equality bodies and to use litigation strategies at domestic level to ensure the recognition of gender identity as a ground of discrimination.

5.3 Next steps:

Within the Action plan accompanying the Strategy for Equality between Women and Men, the European Commission has committed itself to:

⁴⁴ (i) No coverage (ii) unclear (iii) according to ECJ case law (iv) according to ECJ case law with an express clarification of sex including trans people (v) autonomous ground

⁴⁵ European Network of Equality Bodies. (2010). *Dynamic Interpretation: European Anti-Discrimination Law in Practice V*. Brussels: EQUINET. p.30

⁴⁶ « Comparative study on access to justice in gender equality and anti-discrimination law », *Milieu*, February 2011

“Monitor the correct implementation of EU equal treatment laws with a particular focus on Directives 2004/113/EC and 2006/54/EC (and to) monitor the extent to which gender has been taken into account in applying the non-discrimination directives”⁴⁷.

ILGA-Europe and TGEU strongly encourage the European Commission to proceed to the review of the implementation of both directives with a particular focus on discrimination based on gender identity and gender expression.

Minimal requirements are not met (no coverage of gender identity and gender expression) in the meaning of national law in **Bulgaria, Italy, Liechtenstein, Malta, Poland, Portugal and Romania**. ILGA-Europe and TGEU call on the European Commission to address this problem (through infringement procedure when necessary).

Likewise, the European Commission should ask for clarifications to **Cyprus, Iceland, Latvia and Luxembourg** where the coverage of gender identity and gender expression by national legislation remains unclear.

To ensure the effectiveness of both directives, the European Commission should urge Member States to expressly refer to protection against gender identity and/or gender expression discrimination in their national anti-discrimination legislation. The seeming legal uncertainty on the grounds covered by the directives and thus, by the national anti-discrimination legislation, is exposing trans and intersex people to further discrimination.

In **Italy**, in *Liechtenstein*, in **Lithuania** and in **Malta**, national equality bodies do not cover cases of discrimination against trans people. The situation is unclear in **Poland** and in **Portugal**.

Member States should ensure that all the equality bodies investigate cases of discrimination on the ground of gender identity and gender expression

National authorities and equality bodies should then give publicity to this policy. Such a firm and visible position is likely to prevent many cases of discrimination due to a lack of knowledge of the law.

⁴⁷ *Actions to implement the Strategy for Equality between Women and Men 2010-2015*, SEC(2010) 1079 final, 21.9.2010

CONTRIBUTION ANNEX

A. Further cases of discrimination based on gender identity and gender expression in the field of employment

- **Poland:** Transsexualism is explicitly mentioned as a condition discouraging individuals from applying to the military (regulation from June 25th, 2004). Campaign Against Homophobia and Trans-Fuzja Foundation inquired the Polish Ministry of National Defence on explaining this discrimination.
- **Belgium:** Ms Demuylder- De Meyer is currently transitioning, following the Belgian “protocol”. For the time being, her legal identity is still masculine (M. Michel Demuylder – De Meyer). She was working in an outlet of the optician Grand Vision. In July 2010, Ms Demuylder – De Meyer started dressing as a woman, which was not accepted by her employer (Grand Vision). Grand Vision considers that the employee should act as agreed in the work contract (“at the time, at the place and according to the conditions agreed”), and argues that the contract having been signed by the employee as a man, “he” should keep on dressing accordingly. Exchanges of mails in July 2010 provided evidence of the nature and the reason of the conflict between Ms Demuylder – De Meyer and Grand Vision. From 12 July 2010 on, Ms Demuylder – De Meyer has been on leave for “work incapacity”, upon delivery of medical certificates. The last certificate ran from 17 December 2010 to 15 January 2011. On 11 January, Ms Demuylder – De Meyer informed Grand Vision that she was willing to come back to work as from 12 January, and was consequently asked to come to an interview at her employer’s headquarter, before going back to her work place. As she attended the interview dressed as a woman, the employer asked her to come back to work dressed as a man, saying that he would not allow her to come back if she didn’t. Ms Demuylder – De Meyer then asked for a written confirmation of this decision and of its reasons, but the employer refused and announced that she would be dismissed. Later the same day, Ms Demuylder – De Meyer was prevented from acceding to her work place, with the director of the outlet orally confirming that her dressing as a woman was the reason for such a refusal and for her being dismissed. On 12 January, Ms Demuylder – De Meyer received a mail confirming she was dismissed. On 13 January, she received a second mail explaining the reasons for Grand Vision’s decision. This document mentions the fact that she refused to obey the director of the company’s orders. However, it does not mention these orders had to do with the gender identity and expression of Ms Demuylder – De Meyer.
- **Luxembourg:** A specialist for Psychiatry and Psychotherapy is not granted creditation necessary to work under his male name without an official name change. As he is German he needs to fulfill the pre-conditions for a name change under the German Transsexual Law, requiring him to be diagnosed as mentally ill (F64.0). He refuses this as he fears negative effects on his professional reputation and privacy protection. This states a de-facto work prohibition.
- **Germany:** A transman, who lives ‘stealth’ (not being out about his gender identity) in his acquired gender, learned about rumors in his company about himself. These said that he intending to undergo male-to-female gender reassignment surgery. He felt a great insecurity on how to react as gossiping was widely spread among the work force, sometimes with quite a sharp tone. When co-workers had previously learned about his gender identity, it had been against his will. A colleague had recognized

the characteristic under-arm scar as the result of a transman's phalloplasty and he had to inform his team supervisor about the reasons for an up-coming sick-leave. Despite the confidentiality of the talk, the team supervisor harassed him verbally afterwards with 'funny' remarks in relation to the up-coming sick-leave. Confronted with the inappropriateness of his remarks, the supervisor refused to take responsibility and denied any bad intentions. As a result, the behavior by his co-workers and superior has created for the man a working atmosphere of distrust and fear. At his work place, he feels not understood and deprived of the possibility to address the situation effectively as he does not wish to further publicize the reasons for his discomfort with others at his job.

- **Germany:** Employer had reacted supportively when W, his employee had come out 2,5 years ago as female-to-male in the job. However, X advised W in professional meetings, with others present, that W. 'should not take on the habit of smoking in order to imitate men'. W. felt panic, offended in his masculinity and especially by the presence of others to this comment challenged in his professional capabilities.

B. Case of discrimination in the access to services

Equifax, a credit scoring company, is reportedly discriminatory in its treatment of trans people. An investigation by PinkNews.co.uk reporter Jane Fae reveals that one of the UK's largest credit scorers, Equifax, is discriminatory in its treatment of trans individuals. The consequences of this discovery are potentially huge – and costly – as discriminatory treatment means quite possibly that the trans community is being treated unlawfully, not just by Equifax, but by any third party company that uses Equifax' services when issuing credit cards. The discovery came about after a number of complaints from trans men and women who felt they had been treated badly when applying for credit in their new name. The UK has two credit scoring agencies – Experian, the largest, and Equifax – and complaints appeared mostly to cite Equifax. Both companies have put in place systems to deal with individuals who have "gone all the way" and obtained a gender recognition certificate. In fact, their approach in such circumstances is exemplary, and positively helpful to those trying to get their new name and status recognised across a range of financial service providers.

Difficulties arise when an individual simply changes their name. According to Equifax Director of Regulatory Affairs, Neil Munroe, the company runs two procedures. He told us: "The name change can be held as an "alias", in which case, both the old name and details associated to that record and the new name and details associated to that record will be linked and, on an organisation applying to us for details on the new name, we will provide information back to the organisation on both individuals from both records automatically." Or: "the new name can be associated to the old. In this case the organisation requesting the data will be made aware that there is a link and the organisation may then request further information . . . The organisation may also be alerted to the existence of a correction notice (which is added in these cases) which will state that the two are in fact one and the same." In other words, anyone whose records are amended using the association route will almost inevitably be "outed" as trans every time they apply for credit.

The difficulty arises because whilst Experian adopt the "alias" approach for all its customers, once it is satisfied that a name change has been made, it only offers the "alias" route for women where a name change is brought about by marriage or divorce: from Ms/Miss to Mrs or vice-versa. According to one legal expert, this certainly appears to be discriminatory. Under the Equality Act 2010, it is unlawful to provide goods or services in a

manner that discriminates according to one or more of the “protected characteristics” given – and this includes trans. If it does prove to be unlawful, then not only would Equifax be in the firing line, but also any other company that makes use of its services. We did ask other credit card providers, including BHS and Barclaycard, for a comment on this matter, but they have yet to get back to us. The response of the community has been mixed, with one activist stoically saying that such treatment is entirely expected and others rather more upset.

For all that, we do not believe there is any malicious intent on Equifax’s part. They have gone out of their way to comply with the gender recognition act and it looks very much as though, in this instance, their systems have been overtaken by more recent legislation. Mr Munroe told us: “I have escalated this anomaly with the senior management team within Equifax with a view to them understanding the seriousness of the matter and to hopefully agreeing a plan to introduce the capability to create an “alias” process for changes in gender in the very near future”.

C. Lithuania: National Equality Body draws a line between “LGB” and “T”

Recently the Human Rights Committee of the Seimas (Lithuanian Parliament) discussed the annual report (for 2010) of the office of the Equal Opportunities Ombudsman and the appeal by the Lithuanian Gay League to the Equal Opportunities Ombudsman ‘On implementation of Gender Recast Directive (2006/54/EC) with respect to transgender people.’

Vladimir Simonko, Chairman of the Lithuanian Gay League (LGL), noted that the deteriorating situation of LGBT people has not changed in Lithuania. ‘This was also confirmed by the Agency for Fundamental Rights in its conclusions about the situation in the country,’ Vladimir Simonko said at the meeting.

In response to the opinions voiced by the Chairman of LGL, Aušrinė Burneikienė, the Equal Opportunities Ombudsman stated that ‘we may discuss the situation of homosexuals, but **please note that the directive regarding trans people is only a guidance for Member States.**’

According to Ms Burneikienė, the rights of homosexuals are worldwide treated separately from the problems of transsexuals: ‘If there are homosexual rights, there are problems in the case of trans people. **Transsexuality is a disease,**’ the main defender of equal opportunities in the country emphasised at the meeting.

Vladimir Simonko pointed out that in one of the landmark cases the European Court of Justice clearly allocated a violation of trans people rights under EU gender equality legislation.

‘In Europe this issue is still pending, there is on-going discussion as to whether the issue of trans people can be attributed to the issues of gender equality. But what is quite clear now and what has been categorically stated, is that the problems of trans people cannot be put together with the rights of homosexuals,’ Ms Burneikienė stated.

Source: report by Vytautas Valentinavičius published on gayline.lt

D. Article published in the *Irish Sun* on the 2nd of February 2011

THE IRISH Sun
 Wednesday, February 2, 2011 €1 IRELAND'S No.1 NEWSPAPER

DÁIL TO PLAY FOR
 GENERAL Election war was finally unleashed yesterday after Brian Cowen travelled to Aras na Uachtaráin to have the Dail dissolved. Within minutes, all the party leaders were battling to win the hearts and minds of the 3.1 million people eligible to vote on February 25. Meanwhile, an opinion poll out today shows Fine Gael's support has dropped four per cent since the weekend. Full Story - Pages 6&7

A ROOM FOR ONLY €5
 OVER 200 HOTELS & GUESTHOUSES - TOKEN 4 PAGE 18

SUPER STAYS



LOOK ROO'S BACK

ARSENAL.....2	S'LAND.....2	MAN UTD...3
EVERTON....1	CHELSEA...4	A.VILLA....1

SEE SUNSPORT



WORLD EXCLUSIVE



Cordoned off . . . scene

Gun nut shoots woman in back

By STEPHEN DUNNE

AN innocent woman was rushed to hospital last night after she was attacked by gun thugs in her own home.

The victim — named locally as Patricia Cunningham — was hit in the back when a number of shots were fired through the window of her home in Bray, Co Wicklow.

Cops believe she was mistakenly targeted by

Continued on Page Four



Jord done

SEE PAGE 13

TRINITY'S SEX SWAP PROF

Greek lecturer was man

EXCLUSIVE by GARY MENEELY

A BOFFIN at the country's top university is a TRANSSEXUAL.

Lecturer Dr Martine Cuypers — who teaches Greek at Trinity College — has switched course from male to female.

The brave PhD used to be Martijn but now wears earrings and carries a handbag.

Asked to comment on her personal story, Dr Cuypers said: "I'm actually in the middle of something. Have you made a call to Transgender Equality Network Ireland?"

Full Story — Page Five

Trinity . . . college lecturer won't comment




Gender change . . . Cuypers takes break

TRINITY PROF IS HELEN OF BOY



No comment... Trinity College

CHOP OFF THE CLASS

Switching course... Cuypers

A LECTURER at Ireland's most prestigious university is a TRANSEXUAL.

Dr Martine Cuypers, who teaches Greek at Trinity College Dublin, switched from male to female.

The brave academic used to be called Martijn but now goes by the name Martine, wears earrings and carries a handbag. Sources told the Irish Sun Dr Cuypers' gender swap has been a hot topic among students.

But a university insider said: "Dr Cuypers continues to teach. It hasn't affected her position at the college."

The Irish Sun called to Dr Cuypers's office in the Classics Department to ask the scholar about

EXCLUSIVE by GARY MENEELY

her experience as a transsexual. She said: "I'm actually in the middle of something. I don't have any time today. Have you made a call to Transgender Equality Network Ireland? That's what you should be doing."

The lecturer revealed she was the chairperson of the support group TENI.

Our reporter explained we wanted to do a case study on her personal story of being a sex swap Greek boffin.

Personal

But Dr Cuypers cut us off. She replied: "I don't do case studies."

Asked when she underwent her sex change op, she responded: "I don't do case studies."

Cuypers has spoken to the press as chair of the TENI in the past. But her academic title is not given on TENI's website and the link between her job at Trinity and her role in TENI has not been previously publicly revealed.

In an apparent bid to keep her transgender background and uni role separate, Dr Cuypers said: "You're looking for personal stories."

She added: "At this moment I don't have the time to

engage. I'm really sorry."

Cuypers holds a PhD from Holland's Leiden University and has previously worked as a research fellow in Germany and the US.

Her work focuses on Greek literature, which features characters such as Helen of Troy and the blind prophet of Thebes who was transformed into a woman for seven years.

There are an estimated 600 transgender people in Ireland.

And they are to have their chosen sex officially recognised. The move follows recent rulings of the High Court and the European Court of Human Rights.

Campaigner Lydia Foy - once dentist Donal - fought a 13-year battle for the right to change the gender on her birth certificate.

The dad of two from Athy, Co Kildare, successfully challenged Irish law that denied the rights of people who switched sex.

The Irish Sun informed Dr Cuypers we were running a story about her being a transsexual lecturer. She said: "I am not willing to co-operate with that."

And Trinity refused to comment on whether the college was aware Dr Cuypers is a transsexual or if students had complained. A spokeswoman said: "The college has no comment."

Support group TENI can be contacted on 01 633 4687. gary.meneely@the-sun.ie

Rebecca: Sex-snip op saved my life

IRELAND'S most famous sex swapper last night insisted transgender people shouldn't be afraid to come out.

Rebecca de Havalland was born Ross Tallon in the 1950s.

The former hairdresser went on to set up the country's first model agency as a man. But despite success with Tallon Models, she felt TRAPPED in the wrong body.

After struggling with life as Ross,

By GARY MENEELY

Rebecca decided to have a sex change. And last night she urged others in her situation not to hide their true selves.

Rebecca, 52, said: "Any person who is doing this is not committing murder. We may be causing a bit of heartache. But we cause ten times more heartache to ourselves by not

doing it. If we are not being true to ourselves, we are certainly not being true to any other human being."

De Havalland, from Granard, Co Longford, had her snip op back in 1989. And she turned to drink as she fought to be accepted.

But now a sober De Havalland has a new model agency and believes Ireland is more open to transgender people. She said: "It was pretty difficult

back in the day coming out. It was only when I had my gender operation that I felt complete."

De Havalland warned of the dangers of transsexuals hiding who they are. She said: "I wouldn't be talking to you today if I had continued as Ross, because I would have been dead. My day-to-day living is now great. Ireland is allowing me to be the way I want."



New model... de Havalland

This contribution complements a previous submission made in December 2010 that was entitled:

Joint contribution by ILGA-Europe, Transgender Europe and OII-Germany towards the European Commission's assessment of the state of affairs vis-à-vis gender discrimination in education and the provision of financial services: http://www.ilga-europe.org/home/publications/policy_papers/report_on_gender_discrimination_in_education_and_financial_services_december_2010

ANNEXES:

- Annex 1** Equality Bodies: Complete Responses (June 2011)
- Annex 2** Germany: Collection of cases of discrimination against trans people (February 2011)
- Annex 3** Poland: Implementation of Gender Recast Directive (February 2011)
- Annex 4** Slovakia: Implementation of Gender Recast Directive (February 2011)
- Annex 5** Romania: Collection of cases of discrimination against trans people (February 2011)

Input received from:

Çavaria www.cavaria.be

EQUINET www.equineteurope.org

Háttér Társaság a Melegekért www.hatter.hu

ILGA-Europe www.ilga-europe.org

IVIM/OII-Germany <http://www.intersexualite.de/index.php/what-is-ivim/>

Trans-fuzja www.transfuzja.org

TransFúzia

Transgender Europe www.tgeu.org

Transgender Network Netherlands transgendernetwerk.org

TransInterQueer www.transinterqueer.org

National Equality Bodies and numerous trans individuals