

Promotion of ‘gender identity’ v. protection from sex discrimination
by the European Union in 2022

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Generally speaking, treaties of the European Union prohibit sex discrimination in terms of advancing equality between men and women with the focus being on the functioning of the labour market and in equal access to goods and services. Discrimination based on sexual orientation is also prohibited to advance equality in the workplace and the EU-wide marketplace. Several directives¹ have been passed in the area of non-discrimination in the 2000s, which concern religion or belief, disability, age and equal treatment of men and women in the labour and other markets. Member States are supposed to incorporate them into their own legislation.

This is what has been laid down formally in key treaties and approved by all Member States. Cases coming from Member States can be adjudicated by the European Court of Justice (ECJ), which has given several important judgments protecting the rights of EU citizens. Case law of the European Court of Human Rights (not an EU institution, as it functions within a different organisation of European states) is also relevant in the EU context, and the interpretation of the specific content of European human rights norms adds up and evolves constantly.

In recent years, in EU policy documents and guidelines, there has been more and more emphasis to promote including ‘gender’ identity under the umbrella of non-discrimination. However, the extent of this varies and not all Member States have embraced it. For the most part, this happens through different sets of policies, guidelines and recommendations. Eszter Kováts and Elena Zacharenko (2021) have analysed the changing meanings attributed to ‘gender’ in EU policy documents. They conclude that there has indeed been a shift wherein the term is increasingly used in the context of individual identity, detached from using it as an alternative to, but very close to meaning the same as ‘sex’ (physical reality of humans being divided into female and male individuals) as well as ‘gender’ as a historical, social, and analytical category referring to norms, expectations, and power relations between women and men in different societies.

Kováts and Zacharenko argue that the shift in the meanings attributed to ‘gender’ in EU policy documents from social structures and expectations to individual(ised) identities does lend credence to some right-wing and conservative criticism stemming from ‘traditional’ and restrictive understandings of the roles and positions of women and men in social and political life. In short, when ‘gender’ is individualised and personalised, focus from power relations present in hierarchies of ‘gender’, affecting socio-economic realities in the labour market and informal care work, is directed to cultural and social categories. In these cultural categories ‘woman’ and ‘man’ become understood as immaterial identities, not realities grounded in the physical and material

¹ Directive 2000/78/EC against discrimination at work on grounds of religion or belief, disability, age, or sexual orientation; Directive 2004/113/EC equal treatment for men and women in the access to and supply of goods and services; Directive 2006/54/EC equal treatment for men and women in matters of employment and occupation.

difference between females and males. This opens the door to a variety of identity labels created and multiplied in LGBT subcultures during the past few decades, such as genderqueer, non-binary or agender.

Recent past, present, and future developments

Recent key documents summarise what is going in EU 'gender identity' policies now. "Final Report 2015-2019 on the List of actions to advance LGBTI equality" lays out actions and developments during the past few years. Most of the vocabulary is to the point: for example, talking about same-sex marriage as a social and legal phenomenon. However, there is an interesting discrepancy: in a celebratory preface from Helena Dalli, the commissioner for equality in 2019-2024, the term used for lesbian, gay and some bisexual relationships is 'same-gender couples', even though the main body of the text on the actions of the European Commission refers to same-sex relations. In this and other documents, there are signs of current vocabulary shying away of talking about sex as a coherent and meaningful category, communicating the awareness of EU institutions of current social and political trends by using 'inclusive' vocabulary.

Plans for the near future are laid out in another key documents, the (first ever) "LGBTIQ strategy 2020-2025". It talks about "lesbian, gay, bisexual, trans, non-binary, intersex and queer" people as well as of the legal recognition of same-gender couples', familiar from the preface of the Final Report 2015-2019. The list repeated when talking about non-discrimination takes the form of "sexual orientation, gender identity, gender expression and sex characteristics", echoing the Yogyakarta Principles. The need to be able to be open about all these characteristics is called for, at the same time placing having a life partner of the same sex to a similar position as what kind of sex characteristics one has.

The object of protection from discrimination becomes further muddled when the strategy mentions that the "Commission is examining how non-binary, intersex and queer people can be better protected against discrimination", as all of these are difficult to define, with 'intersex' being perhaps the most easily and empirically definable term. This is further highlighted by the obscured understanding of the term 'woman' regarding, for example, the gender pay gap: "The Commission will continue to support measures under the gender equality strategy intended to improve the socio-economic position of women, including those that are relevant for LBTIQ women".

Again, the muddled language and categories express ideas that are difficult to verify, such as "trans, non-binary and intersex people are often not recognised in law or in practice, resulting in legal difficulties for both their private and family life, including in cross border situations". In the case of transgender persons, a discrepancy between outer appearance and identification documents is very much possible. However, non-binary and intersex persons also have a legal sex, visible in identity documents. No further elaboration or examples are given in this context.

However, the fingerprint of various trans lobbyists can perhaps best be seen in the endorsement of self-identification of legal sex **with no age restrictions**: “The Commission will foster best practice exchanges between Member States on how to put in place accessible legal gender recognition legislation and procedures based on the principle of self-determination and without age restrictions.” This shows a lack of awareness on child and adolescent development on the advisability of self-determination in institutionally recognised gender identity services for minors. In the few Member States that have self-identification in place, it is very clearly subject to age restrictions.

The European Commission also shows little awareness of the sensitive nature of gathering data relating to sexual orientation, ‘gender identity’ and sex characteristics, and it vows to, for example, “improve the inclusion of trans, non-binary and intersex people in relevant documentation, applications, surveys and processes” – this could very well be in breach of data protection principles, as ‘gender identity’, in the same way as sexual orientation, is often regarded as private and sensitive information.

The acronym used has evolved into a minimum of “LGBTI” - the conglomeration of sexual orientation (LGB), ‘gender identity’ (T) and differences in sex development (I for ‘intersex’) – with additional terms such as non-binary and queer thrown in at times. All letters in the acronyms pose a set of questions of their own. From a human rights perspective, sexual orientation and ‘gender identity’ have been extensively addressed in the case law of the European Court of Human Rights (ECtHR), but not differences in sex development. (There is one application pending, *M. v. France*, application no. 2821/18). The main import of the current interpretation of the ECtHR regarding ‘gender identity’ questions is, actually, much in line with the Gender Recognition Act (2004) in the United Kingdom as it stands: bodily modification and (physical or hormonal) sterilisation are not required for changing one’s legal sex. The ECtHR does not require self-identification from Member States (of the Council of Europe, a larger number of States than EU Member States), and does not prohibit requirements for medical diagnosis.

Sources:

Final Report 2015-2019 on the List of actions to advance LGBTI equality

https://ec.europa.eu/info/sites/default/files/report_list_of_actions_2015-19.pdf

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Union of Equality: LGBTIQ Equality Strategy 2020-2025:

https://ec.europa.eu/info/sites/default/files/lgbtiq_strategy_2020-2025_en.pdf