

The EU's evolving legal and policy approaches to Gender Equality



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European Institute for Gender Equality

The European Institute for Gender Equality (EIGE) is an autonomous body of the European Union established to strengthen gender equality across the EU. Equality between women and men is a fundamental value of the EU and EIGE's task is to make this a reality in Europe and beyond. This includes becoming a European knowledge centre on gender equality issues, supporting gender mainstreaming in all EU and Member State policies and fighting discrimination based on sex.

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Contents

Introduction	4
1. The evolution of the EU's policy and legal approach to gender equality	5
1.1. From equal pay to a fully fledged equal treatment principle	5
1.2. Going beyond equal treatment in the area of employment: gender mainstreaming and non-discrimination as a fundamental right	7
1.3. A shift of language and concepts, in the EU and beyond	10
1.4. Towards an innovative and comprehensive gender equality policy	11
2. Gaps and challenges and considerations for a way forward	14
2.1. Lack of coherent approach to gender equality in the EU	14
2.2. Concerns about persisting protection gaps	14
2.3. The call for a stronger integration of intersectionality	15
2.4. The anti-gender movement: a powerful drive against gender equality	17
References	19

Introduction

The EU and its Member States have made considerable progress towards the development and implementation of gender equality policies. The adoption of the European Pact for Gender Equality (1) and the 2020–2025 EU Gender Equality Strategy (2) are tangible signs of the EU's commitment and efforts in this area.

However, many challenges still hinder the concrete realisation of gender equality in the EU. These include, among other challenges, persisting power relations and structural inequalities between women and men (3) and widespread gender-based violence (4).

Over the past years, a rise of highly coordinated, well-funded organised 'anti-gender movements' has equally threatened the achievement of gender equality goals and stood in the way of tackling these challenges. These movements not only fuel an overall rise in intolerance and hate (against women and their attained rights and against les-

bian, gay, bisexual, trans, queer and intersex (LGBTQI+) people), but they also fuel support for regressive laws and policies running against international and EU human rights standards and commitments on gender equality and non-discrimination, on the fight against gender-based violence and on the promotion and protection of sexual and reproductive health and rights (5). The backlash in some Member States against the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) is a timely example. All this points to the need to continue to strengthen the EU's approach to gender equality.

Against this background, this paper provides a synthetic overview of the evolving EU's policy and legal approach to gender equality to date, with a view to inform a fact-based discussion on how to support the concrete realisation of gender equality in all of its dimensions across the EU.

(1) Council conclusions of 7 March 2011 on European Pact for Gender Equality (2011-2020).

(2) Commission communication – A Union of equality: Gender equality strategy 2020–2025, COM(2020) 152.

(3) See, in particular, the data and statistics included in the Commission's 2020–2025 gender equality strategy (cited above). See also: the Directorate-General (DG) for Justice and Consumers' *2022 Report on Gender Equality in the EU*; and the EIGE's *Gender Equality Index 2021 – Health*.

(4) See EIGE statistics at <https://eige.europa.eu/gender-based-violence>.

(5) See the analysis conducted in the study commissioned by the European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, *Backlash in Gender Equality and Women's and Girls' Rights*. See also Kuhar, R. and Paternotte, D., *Anti-Gender Campaigns in Europe – Mobilizing against equality*; and Datta, N., *Restoring the Natural Order – The religious extremists' vision to mobilize European societies against human rights on sexuality and reproduction*.

1. The evolution of the EU's policy and legal approach to gender equality

1.1. From equal pay to a fully fledged equal treatment principle

Similarly to other EU interventions in the social domain, the very first step towards what had then laid the basis for a gradual construction of an EU approach to gender equality was essentially connected to economic arguments⁽⁶⁾. At the time the European Economic Community (EEC) was shaped, equal pay between men and women was seen as a core component of efforts to avoid distortions in competition, among the founding Member States, that would frustrate the creation of a single, integrated European market⁽⁷⁾. The introduction of the principle of equal pay for male and female workers in the Treaty of Rome⁽⁸⁾, which constituted the foundations of the EEC, was therefore mainly a means to avoid social dumping in market sectors that heavily relied on cheaper female labour at the time.

Despite its economic motives, the provision had great significance, insofar as it drew attention to the unequal status of women within society⁽⁹⁾. Its potential was quickly realised by the labour and women's rights movement, which relied on it to

draw attention to the unequal position of women in society and to anchor their demands for rights. This paved the way for the development of a broad EU approach to combating inequality and promoting equal treatment between women and men in the field of employment, occupation and social security.

The first signs of such evolution came from the jurisprudence of the Court of Justice of the European Union (CJEU). Faced with the inability or unwillingness of Member States to transpose the EEC Treaty equal-pay provision into their national laws, a series of strategic cases were brought by trade unions before the CJEU⁽¹⁰⁾. These led the CJEU to establish, that the principle may be directly invoked by individuals, both against the state and against private individuals and entities (direct effect), and to progressively expand the notion and scope of the principle of equal pay⁽¹¹⁾. This jurisprudence evolved against the background of a renewed commitment on social policies by Member States⁽¹²⁾ and the rise and consolidation of the women's rights movement across Europe and globally, which succeeded to put the situation of women high on the political agenda at the national, regional and international level⁽¹³⁾.

⁽⁶⁾ See Debusscher, P., 'Gender equality policies in the European Union: Economic integration and feminist transnational advocacy'.

⁽⁷⁾ See Hoskyns, C., *Integrating Gender – Women, law and politics in the European Union*.

⁽⁸⁾ Article 119 of the EEC Treaty, which later became Article 141 of the Treaty establishing the European Community (TEC); and presently Article 157 of the Treaty on the Functioning of the European Union (TFEU).

⁽⁹⁾ In this respect, it is worth noting that equal pay had also been included in the UN's 1948 Universal Declaration of Human Rights and the 1951 International Labour Organization convention and recommendation on equal remuneration between male and female workers for work of equal value – thus underlining the importance of such principle within the realm of non-discrimination and social justice.

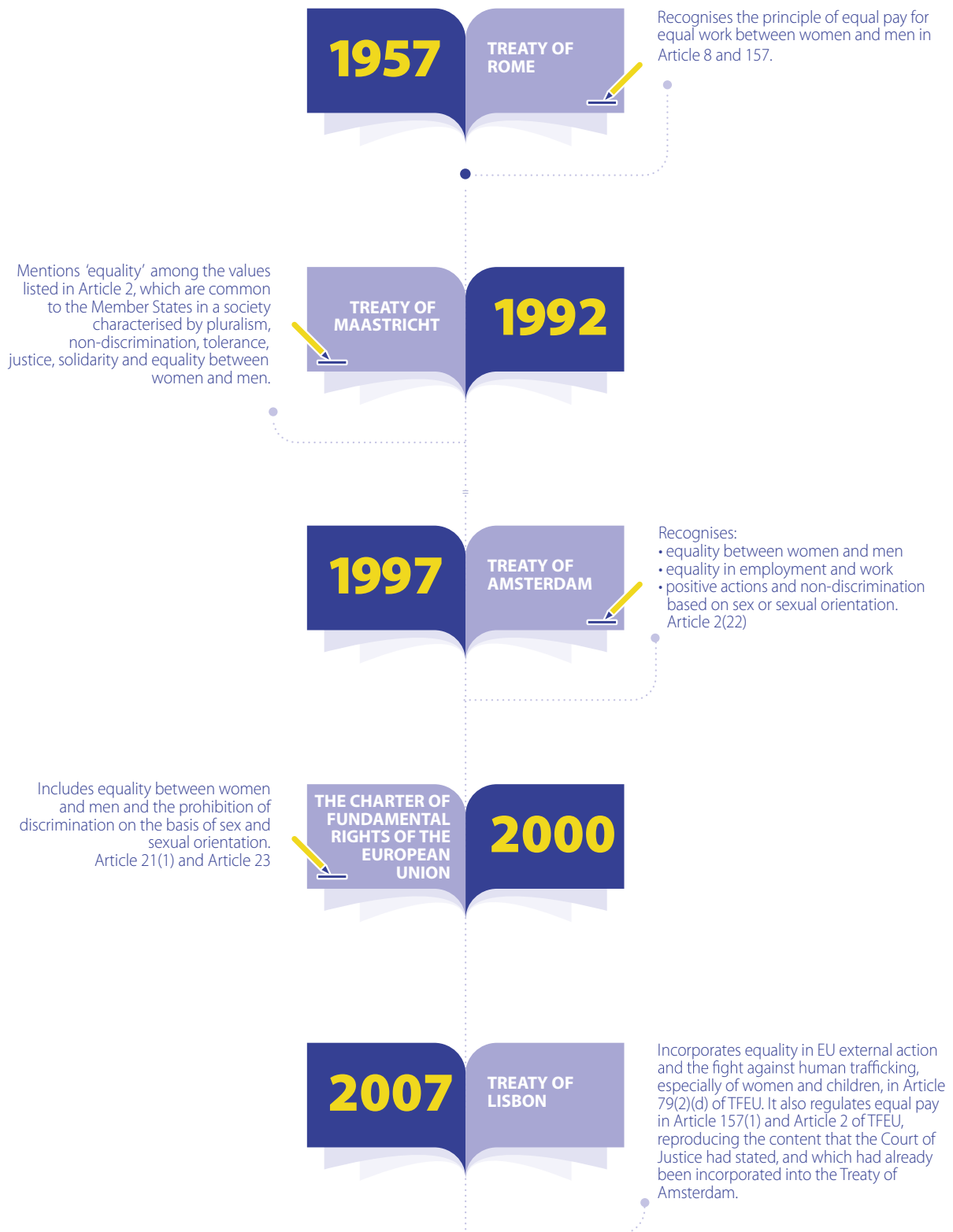
⁽¹⁰⁾ Judgment of the Court of Justice of 25 May 1971, *Defrenne v Belgian State*, Case 80/70, ECLI:EU:C:1971:55 (on unequal pensions); Judgment of the Court of Justice of 8 April 1976, *Defrenne v Sabena*, Case 43/75, ECLI:EU:C:1976:56 (on lower wages for women as a result of discriminatory pay scales); and Judgment of the Court of Justice of 15 June 1978, *Defrenne v Sabena*, Case 149/77, ECLI:EU:C:1978:130 (on discriminating working conditions and pension age).

⁽¹¹⁾ See in particular the landmark *Defrenne II* judgment of 8 April 1976 (in Case 43/75, cited); Judgment of the Court of Justice of 13 May 1986, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, Case 170/84, ECLI:EU:C:1986:204, on 'indirect discrimination' within occupational pension schemes; and Judgment of the Court of Justice of 17 May 1990, *Barber v Guardian Royal Exchange Assurance Group*, C-262/88, ECLI:EU:C:1990:209, where the CJEU clarified that all forms of occupational pension constituted pay for the purposes of former Article 119.

⁽¹²⁾ Council Resolution of 21 January 1974 concerning a social action programme, OJ C 13, 12.2.1974, pp. 1–4.

⁽¹³⁾ As reflected in the calls by the UN on its members to take concrete action to improve the position of women, which culminated in the declaration of 1975 as International Women's Year.

EQUALITY BETWEEN WOMEN AND MEN IN EU TREATIES



All of this prompted EU policymakers and governments to adopt a growing arsenal of legal instruments to articulate and detail the scope and implications of the equal pay principle. These soon included provisions introducing specific and positive action addressing the disadvantages experienced by women, building on the understanding that equal treatment does not necessarily lead to equal outcome – as recognised by the Member States themselves ⁽¹⁴⁾. These EU instruments therefore integrated within the equal pay principle a wide range of rules on equal treatment in the workplace and the labour market, along with the prohibition of discrimination in social security systems ⁽¹⁵⁾. The protocol on social policy and the related agreement attached to the Maastricht Treaty on the European Community of 1992, which mentioned the Community's role in supporting and complementing national action in several fields, including the promotion of equal opportunities between women and men in the labour market, furthered the advancement of more ambitious EU legislative action in this area ⁽¹⁶⁾. These legislative achievements, also facilitated by the recognition of the European Parliament as a fully fledged decision-maker next to the Council of Ministers (now the Council of the European Union), were accompanied by progress at the level of the institutions, with dedicated units and committees being created within the European Commission and the Parliament, and the first 'Equal opportu-

nities action programme' being adopted in 1982 ⁽¹⁷⁾.

1.2. Going beyond equal treatment in the area of employment: gender mainstreaming and non-discrimination as a fundamental right

Despite these developments, in the early 1990s the EU's approach to gender equality remained anchored to the main goal of ensuring equal treatment between women and men in the area of employment, and essentially intended as a matter of social policy. This changed with the 1997 Treaty of Amsterdam, which – concluded in the wake of the 1995 UN Beijing Conference on Women ⁽¹⁸⁾ – paved the way for a breakthrough in the EU's approach to gender issues ⁽¹⁹⁾.

In addition to major changes introduced with regards to the EU's social policy, including the explicit reference to the opportunity to adopt positive measures to favour the under-represented sex in the area of employment and occupation ⁽²⁰⁾, the Treaty of Amsterdam expressly framed equality between women and men as one of the key objectives and activities of the European Community, and included the concept of gender mainstream-

⁽¹⁴⁾ Council recommendation of 13 December 1984 on the promotion of positive action for women, OJ L 331, 19.12.1984, pp. 34–35.

⁽¹⁵⁾ See, in particular, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes. See also Council Directive 86/613/EEC of 11 December 1986 on self-employment; and, as regards social security, Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

⁽¹⁶⁾ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC; Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC.

⁽¹⁷⁾ [European Commission. Equal opportunities action programme 1982-1985.](#)

⁽¹⁸⁾ [UN Women - World Conferences on Women.](#)

⁽¹⁹⁾ For a detailed analysis of changes brought about by the Treaty of Amsterdam, see Defeis, E. F., 'The Treaty of Amsterdam: The next step towards gender equality?.'

⁽²⁰⁾ Article 141(4) of TEC, now Article 157 of TFEU. The concept of positive discrimination was already embedded in certain EU legislative instruments, and had been, after an initial reluctance, legitimised by the CJEU in its landmark judgment of 11 November 1997, *Marschall v Nordrhein-Westfalen*, C-409/95, [ECLI:EU:C:1997:533](#).

ing, calling for the integration of a gender perspective by both EU institutions and the Member States in all areas of EU policy⁽²¹⁾. It also provided a legal basis for the EU legislator to adopt legislation to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, in areas beyond the labour market⁽²²⁾.

These treaty amendments were soon followed, in December 2000, by the proclamation of the EU's human rights catalogue – the Charter of Fundamental Rights of the European Union (EU charter). This charter, which acquired legally binding status with the entry into force of the Treaty of Lisbon in December 2009⁽²³⁾, contains a number of provisions relevant to gender equality⁽²⁴⁾. By reaffirming equality and non-discrimination as fundamental rights and serving as a privileged source of interpretation of EU secondary law in this area, the EU charter was perceived by many as a significant contribution to expanding and strengthening the EU's approach to gender equality⁽²⁵⁾.

These novelties favoured a gradual interpretation of the principle of equal treatment between women and men, reflected in a series of new interventions of the EU's legislature, which codified the jurisprudence of the CJEU and modernised and

complemented the existing legal framework on equality between women and men in the area of employment, occupation and social security. These new legislative instruments reaffirmed a broad definition of discrimination – including both direct and indirect discrimination, and contemplating gender and sexual harassment as a form of discrimination – and contemplated provisions aimed at fostering the enjoyment of the rights granted by EU law, including the setting up of equality bodies⁽²⁶⁾. Procedural safeguards were also introduced, such as the inversion of the burden of proof⁽²⁷⁾. The new legislation also promoted the adoption of affirmative action, including interventions to promote better work-life balance⁽²⁸⁾ and to boost gender balance in corporate boards⁽²⁹⁾. The impetus provided by the Treaty of Amsterdam equally prompted new EU legislation on the protection and promotion of equality between women and men in areas beyond employment, in particular concerning the access to and the supply of goods and services⁽³⁰⁾.

At the same time, the shift in the EU's approach gradually became more prominent, from being centred in the principle of equality between women and men and the prevention of and the fight against discrimination on the grounds of sex, to

(21) Articles 2 and 3 of TEC, respectively providing that: 'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities ..., to promote throughout the Community ... equality between men and women' and 'In all the activities referred to ..., the Community shall aim to eliminate inequalities, and to promote equality, between men and women.'

(22) Article 13 of TEC, now Article 19 of TFEU.

(23) Article 6 of the Treaty on European Union.

(24) See, in particular, Article 21 of the charter, which reaffirms the principle of non-discrimination on any grounds; Article 23, which reaffirms the principle of equality between men and women in every field, and also includes a reference to positive action in favour of the under-represented sex; and Article 33, which enshrines the right to reconciliation of professional and family life.

(25) See for example Costello, C., 'Gender equalities and the European Union Charter of Fundamental Rights'; and Schiek, D., 'Gender equality under the Charter of Fundamental Rights – A new lease for positive action?.'

(26) See Council Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Council Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.

(27) Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

(28) See Council Directive 2010/18/EU of 8 March 2010 implementing the revised framework agreement on parental leave; and the Commission proposal for a directive on the health and safety at work of workers who are pregnant, have recently given birth or are breastfeeding, COM(2008) 637 – withdrawn in 2015 when the Commission announced a proposal on work-life balance, eventually presented in 2017 and adopted in 2019 as Directive 2019/1158 of 20 June 2019 on work-life balance.

(29) See the Commission proposal for a directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM(2012) 614 final.

(30) Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

embracing the more comprehensive notion of gender equality.

Firstly, the potential expansion of the concept of discrimination on the grounds of sex to manifestations of discrimination on the grounds of gender identity, gender expression and sex characteristics started being explored⁽³¹⁾. In two landmark cases, the CJEU ruled⁽³²⁾, also building on jurisprudence from the European Court of Human Rights⁽³³⁾, that discrimination as regards entitlement to social security benefits on the grounds of lack of legal recognition of a new gender after gender reassignment surgery constituted direct discrimination on the grounds of sex.

Furthermore, efforts to ensure protection against discrimination based on grounds other than sex were pursued, building on the new legal basis offered by the Treaty of Amsterdam⁽³⁴⁾. The application of these new provisions benefitted from the interpretation given by the CJEU to corresponding provisions on equality between women and men⁽³⁵⁾ and laid the basis for a more careful appreciation of how experiences of discrimination can be exacerbated by multiple and intersectional forms of discrimination, including on the grounds of sexual orientation⁽³⁶⁾.

In the meantime, the Commission – which was also assisted by its European network of legal experts in gender equality and non-discrimination, and the European Union Agency for Fundamental Rights (FRA) – invested in researching, documenting and improving knowledge of discrimination, harassment and violence inflicted on the basis of sexual orientation, gender identity, gender expression and sex characteristics⁽³⁷⁾.

The gender perspective and gender-related issues were also progressively integrated in EU legislative and policy action in a variety of areas: the integration of a ‘gender perspective’ in the implementation of EU rules on combating trafficking in human beings⁽³⁸⁾; and the recognition of a person’s gender, including gender identity and sexual orientation, for the purposes of defining membership of a particular social group and assess the existence of a well-founded fear of persecution under EU rules on qualification for international protection⁽³⁹⁾. What is also worth noting is the definition of ‘gender-based violence’ included in the victims’ rights directive, adopted in 2012, according to which gender-based violence is to be understood as ‘violence that is directed against a person because of that person’s gender, gender identity or gender expression or that affects persons of a particular gender disproportionately’⁽⁴⁰⁾. A gender perspective has also been given relevance within the EU’s legal and

⁽³¹⁾ On this topic, see, among others, Bell, M., ‘Gender identity and sexual orientation: Alternative pathways in EU equality law’.

⁽³²⁾ Judgment of the Court of Justice of 7 January 2004, *K.B. v National Health Service Pensions Agency and Secretary of State for Health*, C-117/01, ECLI:EU:C:2004:7; Judgment of the Court of Justice of 27 April 2006, *Richards v Secretary of State for Work and Pensions*, C-423/04, ECLI:EU:C:2006:256.

⁽³³⁾ For a recollection of relevant European Court of Human Rights case-law, see the court’s factsheets on [gender equality](#); [gender identity issues](#); and [sexual orientation issues](#).

⁽³⁴⁾ Council Directive 2000/78/EC of 27 November 2000 on equal treatment in employment and occupation; and Commission proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426.

⁽³⁵⁾ See, in particular, Judgment of the Court of Justice of 17 February 1998, *Grant v South-West Trains Ltd.*, C-249/96, ECLI:EU:C:1998:63; Judgment of the Court of Justice of 1 April 2008, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, C-267/06, ECLI:EU:C:2008:179; Judgment of the Court of Justice of 25 April 2013, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, C-81/12, ECLI:EU:C:2013:275.

⁽³⁶⁾ See, in particular, Judgment of the Court of Justice of 24 November 2016, *Parris v Trinity College Dublin and Others*, C-443/15, ECLI:EU:C:2016:897.

⁽³⁷⁾ FRA 2014, 2015, and 2020 surveys and reports: ‘EU LGBT survey–European Union lesbian, gay, bisexual and transgender survey. Main results’; ‘Protection Against Discrimination on Grounds of Sexual Orientation, Gender Identity and Sex Characteristics in the EU: Comparative Legal Analysis’; ‘Long Way to Go for LGBTI Equality’

⁽³⁸⁾ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

⁽³⁹⁾ See, in particular, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

⁽⁴⁰⁾ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

policy instruments in the fields of agriculture and rural development, environment and climate change ⁽⁴¹⁾ and development cooperation ⁽⁴²⁾.

These protection, promotion and mainstreaming efforts were accompanied by a number of flagship policy initiatives framing the EU's commitment to gender equality. From the Commission's first comprehensive framework strategy on gender equality (2000–2005) ⁽⁴³⁾, to the 2010 Women's Charter ⁽⁴⁴⁾ and the related strategy for gender equality for 2010 to 2015 ⁽⁴⁵⁾, followed by the 2016–2019 strategic engagement for gender equality ⁽⁴⁶⁾, corroborating the Council's European pact for gender equality ⁽⁴⁷⁾. Meanwhile, the European Institute for Gender Equality (EIGE) was created in 2007 and started its operations in 2010. Gender equality was added, after being in the mandate of DG Employment, Social Affairs and Inclusion, to the Commission's Justice portfolio, integrated as part of a broader policy on non-discrimination and fundamental rights ⁽⁴⁸⁾. Furthermore, a series of financial instruments and programmes were created to support the implementation of the EU's developing gender equality policy, including in fields not yet covered by the EU's sphere of intervention, such as gender-based violence ⁽⁴⁹⁾.

1.3. A shift of language and concepts, in the EU and beyond

The terms 'gender' and 'gender equality' are not mentioned, and thus not defined, in the EU treat-

ties, which exclusively refer to 'equality between women and men' and/or to discrimination based on, among other grounds, 'sex'. Nonetheless, the development of EU secondary law, political documents of the EU, case-law of the CJEU and EU policies has led to an increasing integration of the terms 'gender' and 'gender equality' in the EU's overall approach, such as in the 2020–2025 EU gender equality strategy.

The relevance of this shift in the language and concepts used goes beyond linguistic considerations. The integration of the terms 'gender' and 'gender equality' influenced the evolution of debates on, and the legal and policy approach to, gender issues at regional and international level.

As observed by Council of Europe experts ⁽⁵⁰⁾, the use of the terms 'gender' and 'gender equality' reveal a substantive change in approach: the initial goal of giving girls and boys and women and men de jure equal rights, opportunities and treatment gradually evolved into a more comprehensive vision of how to tackle gender-based inequalities and victimisation, based on the understanding that achieving equality de facto is conditional upon due consideration being given to the social construction of gender and the relationship between the sexes. Such understanding was later further articulated in an even more inclusive approach, according to which, as the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity observed ⁽⁵¹⁾, the use and integration of the 'gender' concept should not be restricted to women,

⁽⁴¹⁾ See EIGE, *Gender in Agriculture and Rural Development* and *Gender in Environment and Climate Change*.

⁽⁴²⁾ See Commission communication – *Gender equality and women empowerment in development cooperation*, COM(2007) 100.

⁽⁴³⁾ *Community framework strategy on gender equality (2001–2005)*.

⁽⁴⁴⁾ Commission communication – *A strengthened commitment to equality between women and men: A women's charter*, COM(2010) 78.

⁽⁴⁵⁾ Commission communication – *Strategy for equality between women and men 2010–2015*, COM(2010) 491.

⁽⁴⁶⁾ *Strategic engagement for gender equality 2016–2019*.

⁽⁴⁷⁾ *Council conclusions on the European pact for gender equality for the period 2011–2020*.

⁽⁴⁸⁾ Regarding institutional developments, see Arribas, G. V. and Carrasco, L., 'Gender equality and the EU – An assessment of the current issues'.

⁽⁴⁹⁾ *Daphne III Funding Programme*.

⁽⁵⁰⁾ Council of Europe, '*Gender mainstreaming – Conceptual framework, methodology and presentation of good practices*'. These findings have been later reaffirmed and integrated into a variety of legal instruments – including the Council of Europe Committee of Ministers Recommendation (CM/Rec (2007) 17) on gender equality standards and mechanisms and its Explanatory Memorandum (CM (2007)153 add); the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No 210 (2011)); the Council of Europe Recommendation (CM/Rec(2019) 1) on preventing and combating sexism (see updated list of Council of Europe key standards on gender equality [here](#)) – and policy instruments, such as the Council of Europe *Gender Equality Glossary* and its *gender equality strategies*.

⁽⁵¹⁾ See the reports of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, '*The law of inclusion*' and '*Practices of exclusion*'.

but intended as broadly relating to how gendered societies and related constructs and expectations can influence personal identities and social interactions. As such, the concept provides a framework for addressing multiple asymmetries of power, deriving from how sex is constructed and operates in societies, thus bearing relevance to understand and address structural causes and different manifestations of violence and discrimination against women and any other people particularly affected by gender constructs and expectations⁽⁵²⁾.

'Gender' has thus become a term increasingly used in international human rights law to describe socio-cultural constructs that ascribe certain roles, behaviours, forms of expression, activities and attributes associated with biological sex characteristics⁽⁵³⁾. This is reflected in the definition of 'gender' included in the Istanbul Convention – the only definition that can be found in international and regional instruments. This definition refers to 'gender' as 'the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men'⁽⁵⁴⁾.

Returning to the EU context, this shift has reverberated into the further development of a comprehensive EU approach to gender equality, which evolved in different stages of legal and policy interventions, as the following paragraphs briefly revisit⁽⁵⁵⁾.

1.4. Towards an innovative and comprehensive gender equality policy

The renewal of the EU institutions' mandates that followed the 2019 European elections –marked with the appointment of the first-ever female Commission President and, more recently, a female European Parliament President (stepping in the footsteps of Simone Veil in 1979 and later Nicole Fontaine as Parliament Presidents) – gave a new push for the development of a comprehensive EU gender equality policy.

In the political guidelines for the EU⁽⁵⁶⁾, the newly elected Commission President indicated that 'equality for all and equality in all its senses' was one of the major priorities of the Commission, to be pursued under the political leadership of a new commissioner for equality.

The EU gender equality strategy presented by the Commission in 2020⁽⁵⁷⁾, as one of a series of EU initiatives and strategies concerning equality, diversity and inclusion presented under the slogan 'Union of equality', integrates efforts to further progress in key policy areas already identified by previous strategies (including the prevention and fight against gender-based violence, fostering gender equality in the labour market, promoting

⁽⁵²⁾ These include lesbian, gay, bisexual, trans or intersex people, and any other people whose gender identity and/or expression is not, or is not perceived to be, in conformity with the sex assigned at birth or with a determined 'gender norm', which the UN Independent Expert has referred to as 'gender-diverse' persons.

⁽⁵³⁾ See the Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, *The law of inclusion*. The report highlights as particularly notable examples the practices and decisions of the following UN bodies: the Committee on Economic, Social and Cultural Rights, which established that 'the notion of the prohibited ground "sex" has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes'; the Working Group on Discrimination Against Women and Girls and the Committee on the Elimination of Discrimination against Women, which observed that women who do not conform to gender stereotypes, including lesbian, bisexual and trans women, are particularly vulnerable to discrimination, violence and criminalisation; and the Committee on the Rights of Persons with Disabilities, which uses the phrase 'all genders', suggesting an understanding of gender as not binary. The Office of the High Commissioner of Human Rights (OHCHR) has *embraced* a broad understanding of 'gender equality' as 'effectively ensuring full enjoyment of human rights by women, girls, men, boys and people of diverse gender identities (which) requires, first, a comprehensive understanding of the social structures, social norms and stereotyping, and power relations that frame not only laws and politics but also the economy, social dynamics, family life and community life'; and it refers to 'gender integration' as 'the process of assessing the implications for women, men and people with diverse gender identities of any planned action – including legislation, policies or programmes – in all areas and at all levels'.

⁽⁵⁴⁾ Article 3C of the Istanbul Convention.

⁽⁵⁵⁾ For a thorough reconstruction, see Arribas, G. V. and Carrasco, L., 'Gender equality and the EU – An assessment of the current issues'; van der Vleuten, A., *The Price of Gender Equality – Member States and governance in the European Union*; Verloo, M., *Multiple Meanings of Gender Equality – A critical frame analysis of gender policies in Europe*.

⁽⁵⁶⁾ Ursula von der Leyen, *Political Guidelines for the Next European Commission 2019-2024*.

⁽⁵⁷⁾ Commission communication – *A Union of equality: Gender equality strategy 2020-2025*, COM(2020) 152.

women leadership and women representation in decision-making positions) with a significant change in tone and narrative. Combining gender mainstreaming with specific targeted measures, the strategy aims at 'achieving a gender equal Europe where ... women and men, girls and boys, in all their diversity, are equal.' The strategy therefore embraces an integrated approach, devoting renewed attention to addressing both manifestations of discrimination and violence and structural inequalities and prejudices. Furthermore, the strategy integrates an intersectional perspective, paying attention to the increase in discrimination on the grounds of characteristics such as sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. It also reflects an enhanced awareness of women or men, as heterogeneous categories, including in relation to their sex, gender identity, gender expression or sex characteristics.

On this basis, the Commission has taken further steps in various fields not yet covered, or only partially covered, by EU interventions. It has adopted a strategy to work towards EU-level action to strengthen long-term care and early childhood education and care⁽⁵⁸⁾ and has taken important steps towards a stronger framework for combating gender-based violence. In particular, in March 2022, the Commission presented its proposal for EU-wide rules to combat violence against women and domestic violence⁽⁵⁹⁾, which sets minimum standards for Member States in areas of EU competence, complementary to those established by the Istanbul Convention, including on the criminalisation of cyber violence offences⁽⁶⁰⁾. The proposal reaffirms a rather broad understanding of gender-based violence, defining 'violence against

women' as 'gender-based violence, that is directed against a woman or a girl because she is a woman or a girl or that affects women or girls disproportionately', and which encompasses all acts of gender-based violence that result in or are likely to result in physical, sexual, psychological or economic harm or suffering, including threats of such acts⁽⁶¹⁾. The Commission also presented in December 2021 an initiative to extend the list of EU crimes to hate speech and hate crime⁽⁶²⁾. If implemented⁽⁶³⁾, this would enable the EU to work towards an effective and comprehensive criminal law approach to hate speech and crime 'targeting individuals and groups of people sharing or perceived as sharing "a common characteristic", such as race, ethnicity, language, religion, nationality, age, sex, sexual orientation, gender identity, gender expression, sex characteristics or any other fundamental characteristic, or a combination of such characteristics', along with a consistent protection of the victims of such acts.

The gender perspective has also been highlighted in a number of other strategies adopted by the Commission as part of its broad 'Union of equality' objective, reaffirming the increasing attention paid to intersectionality. The 2021–2030 strategy for the rights of persons with disabilities, for example, aims to address, among other issues, specific barriers faced by people with disabilities who are at the intersection of identities, including gender. The EU Roma strategic framework, the LGBTIQ equality strategy and the EU anti-racism action plan⁽⁶⁴⁾ also variably stress the ways in which sex and gender intersect with other personal characteristics and identities, and how these intersections contribute to unique experiences of discrimination. Building on the integration of the

⁽⁵⁸⁾ See more information: [A European Care Strategy for caregivers and care receivers](#).

⁽⁵⁹⁾ Proposal for a directive of the European Parliament and of the Council on combating violence against women and domestic violence, COM(2022) 105.

⁽⁶⁰⁾ The adoption of the directive does not rule out the possibility for the EU to accede to the Istanbul Convention itself, which, as the CJEU recently clarified in its [Opinion 1/19](#) (Grand Chamber) of 6 October 2021, the EU can pursue even if not all Member States consent or have ratified the convention.

⁽⁶¹⁾ Article 4(a) of proposal for a directive of the European Parliament and of the Council on combating violence against women and domestic violence, COM(2022) 105.

⁽⁶²⁾ Commission communication – [A more inclusive and protective Europe: Extending the list of EU crimes to hate speech and hate crime](#), COM(2021) 777.

⁽⁶³⁾ For more information, [European Commission: 'How to extend the list of EU crimes: STEP BY STEP'](#).

⁽⁶⁴⁾ Commission Communication - [A Union of Equality: Strategy for the rights of persons with disabilities 2021 -2030](#), COM(2021) 101; [EU Roma strategic framework for equality, inclusion and participation](#), COM(2020) 620; [LGBTIQ equality strategy 2020 -2025](#), COM(2020) 698; [EU anti-racism action plan 2020 -2025](#), COM(2020) 565.

gender perspective in the victims' rights directive, the EU strategy on victims' rights also refers to victims of gender-based violence as among the most vulnerable victims and pays particular attention to addressing the specific needs of all victims of gender-based violence ⁽⁶⁵⁾.

⁽⁶⁵⁾ Commission communication – [EU strategy on victims' rights \(2020–2025\)](#), COM(2020) 258.

2. Gaps and challenges and considerations for a way forward

Four main areas can be identified as requiring further particular attention with a view to the full realisation of a comprehensive gender equality policy in the EU.

2.1. Lack of coherent approach to gender equality in the EU

The acknowledgment of the importance to go beyond equality *de jure* and address all the different and complex causes and manifestations of structural gender inequalities, such as gender-based violence and discrimination, is visible in policy instruments, including in the 2020–2025 EU strategy for gender equality.

However, inconsistencies persist in the terms and definitions employed in existing legal instruments. On the one hand, EU provisions on equality between women and men are still strongly anchored on the narrowly framed and interpreted ground of ‘sex’, which the recalled CJEU jurisprudence only partially managed to overcome⁽⁶⁶⁾. On the other hand, other instruments – mainly as the result of gender mainstreaming efforts – embrace a wider, more inclusive approach contemplating the experiences of, and accommodating the protection against, discrimination and victimisation of non-binary gender categories, and integrating concepts such as ‘sex characteristics’, ‘gender identity’, ‘gender expression’ and ‘gender-related aspects’.

According to academic experts, these inconsistencies lead to the existence of different models and practices, which impact a uniform and coherent interpretation and implementation of legal and policy instruments, also considering the wide margin of discretion left to Member States in regulating areas not covered by EU interventions (including, for example, legal recognition of a new gender)⁽⁶⁷⁾. In this respect, civil society stakeholders, and in particular those advocating for the protection and promotion of equality for LGBTIQ+ people, have argued for an inclusive approach to gender equality that takes into account non-binary and third gender people fully⁽⁶⁸⁾.

2.2. Concerns about persisting protection gaps

While the EU has moved away from the market perspective and progressively built a comprehensive legal and policy framework on gender equality, recognising that indeed gender inequality is not limited to the economic sphere, but manifests itself in different areas and therefore requires an integrated approach, experts regret that the existing legal framework is still strongly focused on the gender-equal economy.

According to critics⁽⁶⁹⁾, legislative interventions related to social policy remain subordinate to the main objective of fostering women’s integration into the labour market and market competitiveness, instead of being anchored in a fundamen-

⁽⁶⁶⁾ See the findings of the study commissioned by the Commission’s DG Justice and Consumers, *Legal Gender Recognition in the EU – The journeys of trans people towards full equality*. See also Sivonen, L., ‘Gender identity discrimination in European judicial discourse’; and Gomes, I. E., *Queering European Union Law: Sex and gender beyond the binary and cisnormativity*, <http://www.europa-kolleg-hamburg.de>.

⁽⁶⁷⁾ See, for example, as regards the impact of the existing framework on the rights of trans and intersex people, the findings of the study commissioned by the Commission’s DG Justice and Consumers, *Trans and Intersex Equality Rights in Europe – A comparative analysis*.

⁽⁶⁸⁾ See the European region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), ‘Briefing note: LGBTI-inclusive gender equality work’.

⁽⁶⁹⁾ See for example, among other academic experts, Bisio, L. and Cataldi, A., *The Treaty of Lisbon from a Gender Perspective: Changes and challenges*; Kantola, J., *Gender and the European Union*; Jacquot, S., *L’égalité au nom du marché? Émergence et démantèlement de la politique européenne d’égalité entre les femmes et les hommes*.

tal-rights-based approach. As a result, the current legal framework is perceived to be inadequate in providing full protection to key economic, social and cultural rights. Reference goes to the lack of specific provisions aimed at guaranteeing the right to adequate food, housing, education and health, which is seen as frustrating the EU's commitment to prevent and fight against poverty, insecurity and social exclusion affecting women. But gaps are also identified in terms of the protection of the right to social security, insofar as it is seen as still grounded in a 'male breadwinner' model – lacking, despite some progress made, effective measures to achieve a real 'equal earner – equal carer' system, including in terms of work–life balance and to ensure the genuine recognition, reduction and redistribution of unpaid and low-paid care work⁽⁷⁰⁾.

Furthermore, academics and civil society stakeholders observe that EU legislation currently fails to tackle some fundamental women's rights issues, thus lagging behind international human rights standards. An obvious protection gap relates to sexual and reproductive health and rights, which have so far not been the object of any legislative intervention⁽⁷¹⁾.

Closing such protection gaps would require a thorough review of the impact of legal instruments in force. Investing in further building the capacity of legal professionals, equality bodies and civil society stakeholders to prompt a progressive evolution of case-law – including by enhancing knowledge and awareness of the fundamental rights standards enshrined in the EU charter and how to more effectively leverage the potential of this instrument through strategic litigation – could be considered. Cooperation between the EU and international and regional stakeholders, to favour the uptake and implementation of international and regional standards and instruments in the

absence of EU standards and competence, could also be envisaged.

Civil society stakeholders equally call for a better application of gender mainstreaming in law and policymaking, in particular in terms of gender budgeting⁽⁷²⁾, gender impact assessments and participation of concerned groups in the various stages of decision-making, from drafting to implementation and evaluation. Particular reference is made to the design and implementation of legal and policy measures in relation to key initiatives such as the European Green Deal, the digital single market strategy or the pact on asylum and migration⁽⁷³⁾. In this respect, investing in scaling up institutional expertise and coordination both at the EU level and in national administrations, together with improvements in impact assessment, monitoring and evaluation tools (such as through the introduction and systematic use of engendered indicators and the regular collection of gender disaggregated data and statistics) could help strengthen gender mainstreaming at all stages of the policymaking process.

2.3. The call for a stronger integration of intersectionality

As illustrated in the previous section, EU legal and policy instruments, along with CJEU case-law, have gradually reflected a more careful appreciation of issues of multiple and intersectional discrimination and inequalities. However, two main issues seem to stand in the way of a genuine integration of intersectionality in the EU's approach to equality, including gender equality.

The first problem is linked to the inherent limitations of the current EU legal framework on an-

⁽⁷⁰⁾ See, for example, 'European Women's Lobby recommendations on the European Commission strategy on equality between women and men 2020–2025'. On the latter point, it is however worth noting, the Commission adopted a strategy to work towards EU-level action to strengthen long-term care and early childhood education and care – see more information at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13298-European-care-strategy_en.

⁽⁷¹⁾ 'European Women's Lobby recommendations on the European Commission strategy on equality between women and men 2020–2025'.

⁽⁷²⁾ For more information on the state of play and recommendations in this area, see <https://eige.europa.eu/gender-mainstreaming/toolkits/gender-budgeting>; see also Simoes, C. and Calatuzzolo, R., *EU Gender Budgeting: Where do we stand?*. The issue has been given increasing attention by the European Commission in recent public interventions.

⁽⁷³⁾ 'European Women's Lobby recommendations on the European Commission strategy on equality between women and men 2020–2025'.

ti-discrimination. On the one hand, existing EU legislation, as it stands, fails to provide even and comprehensive protection against discrimination on all grounds mentioned by Article 19 of TFEU (sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation) in all areas of life. The European Network of Equality Bodies (Equinet) has referred in this respect to the existence of a 'hierarchy of grounds', with racial or ethnic origin at the top, closely followed by sex, with religion or belief, disability and sexual orientation below this and age at the bottom⁽⁷⁴⁾. On the other hand, intersectional discrimination is as such currently not protected under EU law⁽⁷⁵⁾. Against this background, experts have called on the EU's legislature, and in particular the European Parliament and the Council, to swiftly deblock negotiations on the proposed horizontal equality directive⁽⁷⁶⁾ and to introduce in existing legal instruments specific provisions aimed at providing protection against intersectional forms of discrimination⁽⁷⁷⁾. The role and capacity of equality bodies to prompt progress at the national level could also be better explored and supported, as suggested by Equinet⁽⁷⁸⁾, also with a view to the forthcoming proposal by the Commission establishing minimum binding standards on the mandate, powers, status, independence, resources and effectiveness of such bodies⁽⁷⁹⁾.

A second challenge concerns the limited use of intersectional analysis in the process of law and policymaking, including impact assessments, implementation monitoring and evaluation of existing legal and policy instruments. The EU gender

equality strategy helpfully recognises the need to adopt policies that take into account an intersectional perspective by acknowledging the diversity among women and men and girls and boys. The Commission study *New Visions for Gender Equality 2019* also notes the need to address complexities of inequalities in gender equality policies⁽⁸⁰⁾. According to civil society stakeholders⁽⁸¹⁾, however, more concrete measures should be put forward at the level of EU law and policymaking to ensure that the needs of specific groups are adequately identified and catered for.

This would require clear and coherent indications, in the different legal and policy instruments at the EU and the national level tackling discrimination and inequality on various grounds, of 'how an intersectional lens will be applied' and 'how ... the perspectives of all women are taken into account when designing equality measures to address intersectional discrimination and oppression'⁽⁸²⁾.

Cross-references to the identities and experiences of heightened discrimination and marginalisation facing women variously affected by multiple and intersecting inequalities could be included in impact assessments, monitoring and evaluation provisions and tools, at both the EU and the national level. This is considered necessary to allow the identification of measures to effectively address 'the full variety of intersectional experiences of women and girls', such as enhanced socioeconomic hurdles and the over-exposure to, and under-protection against, hate speech, hate crime and violence, and specifically sexualised hate crime

⁽⁷⁴⁾ See, for example, the findings of the Equinet report, *Expanding the list of protected grounds within anti-discrimination law in the EU*.

⁽⁷⁵⁾ See on this point the FRA report, *Equality in the EU 20 years on from the initial implementation of the equality directives*, which points out that 'only a few Member States have adopted legal provisions that pertain to either multiple or intersectional discrimination.'

⁽⁷⁶⁾ See the Equinet report, *Expanding the list of protected grounds within anti-discrimination law in the EU*.

⁽⁷⁷⁾ For example, FRA, in its report *Equality in the EU 20 years on from the initial implementation of the equality directives*, calls on the EU legislator to 'consider broadening the concept of discrimination to include intersectional discrimination in existing and new legislation in the area of equality and non-discrimination. This would enable the EU and Member States to reinforce legal protection against intersectional discrimination, in particular for women who face discrimination based on the combination of different grounds of discrimination.'

⁽⁷⁸⁾ See the Equinet report, *Expanding the list of protected grounds within anti-discrimination law in the EU*.

⁽⁷⁹⁾ See more information at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13098-Equality-bodies-binding-standards_en.

⁽⁸⁰⁾ Crowley, N. and Sansonetti, S. (eds), *New Visions for Gender Equality 2019*.

⁽⁸¹⁾ See 'European Women's Lobby recommendations on the European Commission strategy on equality between women and men 2020-2025'; and ILGA-Europe, 'Briefing note: LGBTI-inclusive gender equality work'.

⁽⁸²⁾ ILGA-Europe, 'Briefing note: LGBTI-inclusive gender equality work'.

and violence. This issue was raised by international human rights and civil society experts⁽⁸³⁾, in particular in relation to lesbian, bi, trans and intersex women and, more broadly, people whose identities, expressions and bodies do not conform to the heteronormative, man/woman binary system. Prominent civil society organisations voiced concern over the lack of inclusion from gender equality policies of people with sex characteristics that do not fit the binary male/female model⁽⁸⁴⁾.

Further investments in targeted EU and national-level research, together with a better involvement of concerned groups in law and policymaking processes, could also enhance the authorities' ability to understand and address the needs of all people affected by discrimination and victimisation as a result of the intersection between gender-based inequalities and other forms of discrimination.

2.4. The anti-gender movement: a powerful drive against gender equality

As research has shown⁽⁸⁵⁾, the present decade has witnessed a rise of so-called anti-gender movements, globally and within the EU. These movements have prompted a backlash in gender equality and women's rights in key areas and policy; along with attempts to reduce the working envi-

ronment and operating space for civil society organisations and activists advocating for the protection and promotion of the rights of women and LGBTIQ+ people. Some of these movements campaign against the so-called gender ideology – a concept created on the basis of a purposeful misinterpretation of the term 'gender', to gather support around restrictive traditional gender roles and criticism of various progressive causes seen as challenging them.

As observed in a 2018 study commissioned by the European Parliament⁽⁸⁶⁾, in some Member States the backlash has remained at the level of rhetoric and discourse; in others – especially those where the civil society movement offered weak resistance, and/or where retrogressive laws and policies in the area of gender equality formed part of a wider strategy to progressively weaken the human rights protection framework – it has concretised into retrogressive measures. At the EU level, some Member States preferred to replace in EU political texts the concept of 'gender equality' by the concept of 'equality between women and men'⁽⁸⁷⁾.

Opposition against the Istanbul Convention determined a regression, in particular with respect to measures to prevent and counter gender-based violence⁽⁸⁸⁾. In many cases, the anti-gender movement also contributed to fuel further sexism, gender-based hatred and violence in the public and private space; along with a spike in attacks targeting civil society organisations and activists, includ-

⁽⁸³⁾ See, for example, the report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Tlaleng Mofokeng, '*Violence and its impact on the right to health*', which highlights how violence originates in contexts of inequality and multiple forms of discrimination, noting in particular how the binary conceptualisation of gender as strictly heteronormative is at the origin of particularly brutal forms of gender-based violence, hate crimes and hate speech LGBTIQ+ people face; and calls for an integrated, non-binary approach to violence addressing common root causes of violence entrenched in patriarchy, systems of oppression, systemic racism, inequalities and binary approaches to gender. See also ILGA-Europe, '*Briefing note: LGBTI-inclusive gender equality work*', and Bolter, F., '*Violence against lesbians, bi women and trans people: Adapting the public response to the diversity of LGBTI+ life experiences*'.

⁽⁸⁴⁾ See, for example, ILGA-Europe, '*Briefing note: LGBTI-inclusive Gender Equality work*'.

⁽⁸⁵⁾ See European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, '*Backlash in Gender Equality and Women's and Girls' Rights*'; Kuhar, R. and Paternotte, D., '*Anti-Gender Campaigns in Europe – Mobilizing against equality*'; Datta, N., '*Restoring the Natural Order – The religious extremists' vision to mobilize European societies against human rights on sexuality and reproduction*'; Corredor, E. S., '*Unpacking "gender ideology" and the global right's antigender countermovement*'.

⁽⁸⁶⁾ European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, '*Backlash in Gender Equality and Women's and Girls' Rights*'.

⁽⁸⁷⁾ For example, see interpretative statements submitted in 'Council conclusions on tackling the gender pay gap: Valuation and distribution of paid work and unpaid care work'.

⁽⁸⁸⁾ An overview of the reasons opposed to the ratification of the Istanbul Convention in Bulgaria, Lithuania, Hungary, Romania, Slovenia and Slovakia can be found in the study commissioned by the European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, '*Tackling Violence against Women and Domestic Violence in Europe – The added value of the Istanbul Convention and remaining challenges*'.

ing through hate speech, in particular online, abusive lawsuits and even the vandalism of property, premises and violent physical attacks targeting individuals ⁽⁸⁹⁾. The resulting chilling effect is likely to not only negatively affect the civil society movement, but also to reverberate on the level of ambition of law and policymakers in tackling these issues, made increasingly contentious and divisive, at both the national and the EU level.

Several initiatives are exploring how to effectively counter these anti-gender movements and back-

lash. A multi-faceted approach is needed, including a careful adaptation of framing and narratives, which should, among other things, avoid solely legalistic interpretations and attempts to define gender in 'neutral' or 'non-contentious' terms. Value-based framing could instead be put at the core of these efforts, to alert about anti-gender activism as a worrying component of democratic and human rights backsliding. Investing in bottom-up public education and awareness raising initiatives to build support for an inclusive gender equality policy and counter stereotypes is imperative.

⁽⁸⁹⁾ See the findings of the FRA 2021 report, *Protecting Civic Space in the EU*. The new FRA report with the same title, 2022, the same negative trends.

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