

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

# European Gender Equality Law Review

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2011 - 2

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# Members of the European Network of Legal Experts in the Field of Gender Equality

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## Editorial

### *Test-Achats* or: the limits of lobbying

Christa Tobler\*

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Whilst there has been a prohibition of discrimination on grounds of nationality in relation to services from the very beginning of the then European Economic Community, and whilst a prohibition on grounds of racial or ethnic origin has been in existence since 2000 on the basis of Directive 2000/43, a prohibition of discrimination on grounds of sex was introduced in this field by Directive 2004/113. This Directive concerns the implementation of the principle of equal treatment between men and women in the access to and supply of goods and services. In relation to insurance, it provides for a special regime in the form of Art. 5. This provision is characterised by three layers. First, paragraph 1 states the principle that equal treatment for men and women also applies in the field of insurance, though only with respect to contracts concluded after 21 December 2007. In other words, for contracts concluded before 21 December 2007 (which date marked the end of the implementation period for the Directive), there is a permanent derogation from the principle of equal treatment. Second, paragraph 2 contains a further derogation in that it provides for the possibility that, under the national law of the Member States, differential treatment is permitted based on relevant and accurate actuarial and statistical data. Finally, paragraph 3 contains what could be termed a ‘derogation from the derogation’ under paragraph 2, by stating that no differential treatment is permitted in relation to costs related to pregnancy and maternity, though with a transitional period of an extra two years.

On 1 March 2011, a Grand Chamber of the Court of Justice ruled that Art. 5(2) of Directive 2004/113, which allows for different treatment of men and women based on actuarial and statistical factors in the field of insurance, is invalid with effect from 21 December 2012 (Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministres*, judgment of 1 March 2011, nyr). The judgment attracted much attention, not least in the EU Member States which had made use of Art. 5(2). Specific information on the national laws on this issue can be found in the thematic report on sex-segregated services written by Susanne Burri and Aileen McColgan for the Gender Network in 2009.<sup>1</sup> The judgment also caused an uproar in the insurance industry, which is not surprising given that the provision in question was the result of successful lobbying efforts by the private insurance industry at the time of the adoption of the Directive. In fact, the proposal presented by the Commission in 2003 for the Goods and Services Directive did not contain what would later become paragraph 2 of Art. 5. Rather, the Commission in its proposal started from the assumption that, contrary to the views of the insurance industry, the situations of men and women in relation to insurance are comparable and must, therefore, be treated equally. Accordingly, the Commission’s proposal provided for equal treatment in relation to new contracts, though only after a transitional period of six years. However, the Council in adopting the Directive followed the view of the industry as expressed during the legislative process and took the opposite view on the issue of comparability. Curiously, when the *Test-Achats* case was before the Court of Justice, the Commission sided with the Council. As Advocate-General Kokott noted somewhat drily in her opinion on the case, the Commission was unable to explain its change of position. And to give the matter an additional, curious twist, when the Court’s judgment was made public,

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<sup>1</sup> Publications of the European Network of Legal Experts in the Field of Gender Equality are available at: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-9](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9).



Commission Vice-president Viviane Reding hailed the day of the judgment as ‘an important moment for gender equality in the European Union’.

At the heart of the case lies the implementation of Art. 5(2) of the Directive in Belgium in relation to life insurance, which led to an action for annulment in Belgium, brought by a consumer organisation and two individuals. The applicants claimed that the Belgian law is null and void because it infringes Belgian constitutional law, EU law and international human rights law. In relation to EU law, this implied that Art. 5(2) of Directive 2004/113, on which the Belgian law was based, is in turn illegal. This led to a request for a preliminary ruling of the Court of Justice on the validity of Art. 5(2). The national court’s main question was whether Art. 5(2) ‘is compatible with Art. 6(2) [EU] and, more specifically, with the principle of equal treatment’.

In its judgment, the Court carried out a test of the constitutionality of Art. 5(2) of the Directive. In doing so, it looked at the constitutional implications of Art. 13(1) EC (post-Lisbon: Art. 19(1) TFEU), which is the Directive’s legal basis, and at the constitutional requirements under Arts. 21 and 23 of the Charter of Fundamental Rights on equality and discrimination. In the latter context, the Court recalled its well-known equality formula, including in particular the element that what is comparable must be treated in the same way. In relation to the issue of comparability, the Court found that the Directive is based on the assumption of comparability, which, however, is subsequently not carried through in a coherent manner. In relation to the Directive’s legal basis, the Court found that whilst under this provision equality of treatment may be achieved gradually and the EU legislature is free to determine when it will take action, having regard to the development of the economic and social conditions within the EU, once the legislature has decided to act, it must act in a coherent manner. This, however, does not exclude the possibility of providing for transitional periods or derogations of limited scope. In the case of Directive 2004/113, Art. 5(1) provides for a permanent, limited derogation for all contracts concluded before 21 December 2007 (which was the date for implementation of the Directive). As for Art. 5(2), the Court found that this goes too far, as here at the most an appropriate transitional period would have been acceptable.

Relying on what the Court sees as the legislature’s assumption of comparability, the Court concluded that the permanent derogation under Art. 5(2) is in breach of the constitutional requirements under EU law, with the consequence that Art. 5(2) must be declared invalid with effect from 21 December 2012. In my analysis of the judgment, the Court’s finding means that all contracts concluded after 21 December 2007 must provide for unisex premiums and benefits. This outcome is similar to the original proposal of the Commission in 2003 (where, however, the transitional period had been longer), and it goes squarely against the decision made by the legislature in 2004.

As noted before, the version of Art. 5 eventually adopted was the result of successful lobbying by the private insurance industry. When, after the adoption, nobody challenged the legality of this provision through the annulment procedure under Art. 263 TFEU, Art. 5 seemed here to stay. However, seven years later the Court’s judgment has now reversed the situation. From a procedural perspective, this was possible because under the Treaty on the Functioning of the European Union (i.e. the revised and renamed former EC Treaty) the annulment procedure is not the only avenue through which the legality of the acts of EU institutions can be challenged. Rather, where it is not possible to directly challenge a measure through the annulment procedure, it may be possible for individuals to indirectly challenge in two ways, neither of which is hampered by the two-month time limit which the Treaty sets for the bringing of an action for annulment. One of these alternatives is the plea of illegality, which can be used in other direct procedures before the Court of Justice (Art. 277 TFEU). The other possibility is the plea of illegality before a national court, which then can (or, if it is a last instance court, must) turn to the Court of Justice with a question on validity in the preliminary ruling procedure (Art. 267 TFEU). That is what happened in *Test-Achats*. Whilst a preliminary ruling finding an act of an EU institution to be invalid does not formally abolish the measure, it nevertheless means that that measure can no longer be applied. In this manner, a national consumer organisation and two individuals have succeeded in effect in changing

EU sex equality legislation, which now has effect in all Member States and for all types of insurance (rather than only for the life insurance at issue in the Belgian legislation).

Given the legislative history, the success of the applicants in the *Test-Achats* case not only means that the action of the Council which adopted the Directive was challenged, but it also indirectly means a challenge to the practice of lobbying by stakeholders. *Test-Achats* shows that whatever their economic or other interests may be, these stakeholders, too, must take account of the EU's constitutional requirements. Should they propose something against these requirements, they must be aware of the fact that the EU institutions cannot follow it, or if they nevertheless do, that this is in breach of the EU's constitutional order and can be challenged directly or indirectly before the Court of Justice. In that sense, the judgment day of *Test-Achats* was a great moment for the EU's constitutional framework and its enforcement. Personally, I would also agree with Commission Vice-president Reding that it was a great moment for gender equality – though it remains to be seen whether, on the level of the actual insurance premiums, the judgment will lead to a levelling down in that no premiums go down but many premiums go up, as has been predicted in academic writing.<sup>2</sup>

Finally, to return once again to the issue of lobbying and its place in the process of the adoption of secondary law in the EU, in particular in the context of equality law. It may be interesting to note that practically the same lobbying as in 2003 in relation to sex is at present going on in relation to age, in the context of the Commission's proposal for a new Directive on equal treatment on grounds of religion or belief, disability, age or sexual orientation. Indeed, in the practice of insurance contracts, differentiations made on the basis of age appear to be even more common than differentiations on grounds of sex. Following *Test-Achats*, there has been much speculation in the insurance industry as to what the Court's judgment, in particular its statements about comparability, might mean in the context of age discrimination. What would happen if the Court were asked about the legality of a provision in the new Directive (i.e. if it should ever be adopted; it appears to be rather stuck at the moment) allowing for permanent different treatment on grounds of age based on statistical and actuarial factors? What, in particular, if the new Directive were not to express a presumption of comparability as found by the Court in relation to Directive 2004/113? In my opinion, it is not inconceivable that the Court could nevertheless come to a finding of comparability, based on its own assessment. Indeed, experience shows that the Court's case law on comparability in various contexts of EU law can be rather surprising. That being so, lobbyists in Brussels had better keep *Test-Achats* in mind.

#### Note

For further information on the *Test-Achats* case by the present writer, see in particular:

- 1) Christa Tobler, *Test-Achats: A Systematic Approach* (2011), which offers a number of charts on the factual and legal aspects of the case; available online at [http://www.eur-charts.eu/wp-content/uploads/2011/08/EUR-Charts\\_Test-Achats\\_V13\\_2011.pdf](http://www.eur-charts.eu/wp-content/uploads/2011/08/EUR-Charts_Test-Achats_V13_2011.pdf)
- 2) The case note to be published in the *Common Market Law Review* (2011), forthcoming.

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<sup>2</sup> Yves Thiery, 'The opinion of A.G. Kokott on gender discrimination in insurance: effects for the insurance market', *Zeitschrift für Gemeinschaftsprivatrecht* (2011) pp. 28-31 at p. 30.

# Sexual Harassment and Harassment on the Ground of Sex in EU Law: a Conceptual Clarification

Rikki Holtmaat\*

## Introduction

Sex discrimination can take various forms. It may be the consequence of legal rules, regulations or agreements (e.g. collective labour agreements), or regular or incidental practices which directly or indirectly grant *different rights and duties* to male and female (legal) subjects. In other words, sex discrimination often takes the form of *unequal treatment between men and women*. The prohibition of unequal treatment therefore is the central norm in all sex equality directives of the European Union. But sex discrimination may also be actual behaviour through which some persons receive ‘*bad treatment*’ on the ground of their sex. Harassment, hate speech, mobbing, (sexual) violence, stalking, all of these forms of ‘bad treatment’ may relate to sex discrimination. It is therefore a positive development that two new provisions were included in the Amended Equal Treatment Directive 2002/73/EC and were later incorporated in other directives as well: the prohibition of ‘harassment on the ground of sex’ and ‘sexual harassment’. It is my aim to clarify these two provisions and to investigate whether their placement in the context of EU sex equality directives is logical and sufficient to combat these forms of discrimination on the ground of sex.<sup>3</sup>

To begin with, I will describe how sex discrimination is defined in the EU sex equality directives and why and how this definition was extended to both ‘harassment on the ground of sex’ and ‘sexual harassment’. Although sounding very similar, these two concepts are in fact very differently constructed in EU law. I will therefore compare their content and scope in a detailed way.

In order to understand that a regulation of sexual harassment outside the scope of sex equality law is (also) necessary, a further clarification of the phenomenon of sexual harassment is necessary. What kind of conduct are we talking about? In which context does this take place? And which ‘actors’ are involved in it? What does all of this mean for the construction of legal norms to combat sexual harassment?

To conclude, I will discuss whether the inclusion of the concept of sexual harassment in the EU sex equality directives is sufficient to combat this particular form of ‘bad behaviour’.

## Sex discrimination, harassment on ground of sex and sexual harassment as defined by EU law

Since 1976, Directive 76/207/EEC has prohibited unequal treatment on the ground of sex in the area of employment relations. This was followed by a great number of other directives.<sup>4</sup>

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<sup>3</sup> An earlier, more extended publication on this topic, from which I derived some text for this contribution, is: R. Holtmaat ‘Sexual Harassment as Sex Discrimination: A Logical Step in the Evolution of EU Sex Discrimination Law or a Step Too Far?’ in: M. Bulterman et al. (eds.) *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* pp. 27-40 Alphen aan den Rijn, Kluwer Law International 2009. Other recent publications (in Dutch) are, inter alia, R. Holtmaat *Seksuele intimidatie: De Juridische Gids* Nijmegen, Ars Aequi Libri 2009; R. Holtmaat ‘25 jaar bestrijding van seksuele intimidatie. Naar een adequate juridische benadering van een hardnekkig probleem?’ *Nederlands Juristenblad* 20 (2010) pp. 1280-1286.

<sup>4</sup> A brief description of these directives may be found in S. Burri & S. Prechal ‘EU Gender Equality Law. Update 2010’, European Commission 2010, available at: [http://ec.europa.eu/justice/gender-equality/files/dgjustice\\_eugenderequalitylaw\\_update\\_2010\\_final24february2011\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/dgjustice_eugenderequalitylaw_update_2010_final24february2011_en.pdf), accessed 8 November 2011.

The definition of direct sex discrimination, as defined in the Recast Directive 2006/54/EC, reads as follows:

Article 2 (1) For the purpose of this Directive, the following definitions shall apply:

- direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.
- ...

Three elements are crucial in this definition:<sup>5</sup> there needs to be (1) a *treatment based on or related to the ground of sex*, which is (2) *unfavourable* (3) in *comparison* with the other sex. As was said in the introduction, women often are not only being *treated differently* as compared with men, but are also being *treated badly*. This was gradually recognised by EU legislators, who in 2002 also prohibited harassment on the ground of sex and sexual harassment as a form of sex discrimination. The element of comparison is not important in both these prohibitions: the (sexual) harassment is deemed '*bad*' in itself and should be prohibited per se.

Harassment on the ground of inter alia race, religion, disability and sexual orientation was first included in Racial Equality Directive 2000/43/EC and in the Framework Equality Directive 2000/78/EC. After that, a similar provision concerning harassment on the ground of sex was included in the Amended Equal Treatment Directive 2002/73/EC, where it is stated that harassment is discrimination within the meaning of the Directive, and where this is defined as unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.”

Since then, a prohibition of harassment on the ground of sex was also included in the Goods and Services Directive 2004/113/EC and in the Recast Directive 2006/54/EC, which repealed some older directives. It is important to note that both in the original definition of sex discrimination as unequal treatment and in the added definition of the specific form of sex discrimination which is called *harassment on the ground of sex*, it is expressly required that there is a *causal relationship* between the ‘less favourable treatment’ or ‘conduct’ and the sex of the person who is affected by it. This close connection between a discrimination ground (in this case sex) and the unequal treatment or harassment is crucial for our general understanding of what discrimination is. A causal relationship (*causation*) is always needed between the action taken by the perpetrator, the effects that this action has (a particular *harm* or *disadvantage*) for the victim, and a particular *non-discrimination ground*. Causation does not mean that proof of intent is required, but it does mean that somehow (objectively) there is a connection between a certain discrimination ground and getting a certain *unfavourable* or *bad* treatment.

Conceptually speaking, it was correct to bring unequal treatment and harassment together in the EU non-discrimination legal framework. It makes clear that discrimination against women is not only a matter of *unequal* treatment (as compared with men) but that it also may occur in the form of simply *bad* or even *unworthy* treatment of women *because they are women*.

Sexual harassment, as a specific form of ‘bad treatment’ that negatively affects the daily life of many women in many situations, was also brought under the equal treatment legislation by the EU legislature at the same time. Sexual harassment, however, was only prohibited in the context of EU sex discrimination law, not in any of the EU equal treatment directives that concern the other non-discrimination grounds that are mentioned in Article 19 TEU. Not only does it exist exclusively in the sex equality directives, the norm that sexual harassment is prohibited was also constructed in a different way.

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<sup>5</sup> I only discuss the concept of direct discrimination here. Much of what is said below is also applicable to indirect discrimination.

In the Amended Equal Treatment Directive 2002/73/EC sexual harassment was defined as:

where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Whilst paragraph 3 of Article 2 of the Directive adds:

Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the ground of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting this person.

### **The difference between harassment on the ground of sex and sexual harassment**

A comparison of the two legal definitions reveals the following differences:

	Relationship with non-discrimination ground required	It concerns conduct of a sexualised nature
Harassment on the ground of sex	Yes	No
Sexual harassment	No	Yes

On the one hand, the definition of harassment does not require that the 'bad conduct' is of a sexualised nature; on the other hand the definition of sexual harassment does not require that there exists a causal relationship between the sexual harassment and the sex of the person who is thus being harassed.

It is correct that the Directive's definition of harassment on the ground of sex does not require that the conduct is of a sexualised nature. There are many forms of harassment that are non-sexual in nature, but that are clearly related to the ground of sex. Like, for instance, in the case where the only woman in a team of workers is always assigned to the most dirty or difficult tasks or is denied any serious tasks and instead is asked to make coffee for all of them, while she is never invited to come along to the pub after work, is not greeted when she comes to work in the morning, and so on.<sup>6</sup> This kind of 'mobbing' becomes extra humiliating and threatening when the conduct of the perpetrators is somehow linked to sexuality. Like, for instance, when the female worker in our example also receives pornographic emails from her male colleagues, or when they openly start betting which of them will be the first to succeed to sleep with her. Sexual harassment, therefore, is a serious offence that should be prohibited.

The directive's definition of sexual harassment, I would say, in itself correctly reflects social reality in which often no causal relationship between the sexual harassment and the prohibited ground of sex can be established in a clear and unambiguous way. The following examples may illustrate this. Sexual harassment (i.e. harassment of a sexualised nature) may or may not be clearly related to a particular non-discrimination ground.

*Related* A senior male doctor sexually harasses all of his young female colleagues *because* (consciously or subconsciously) he wants to undermine their position in the health institute in order to stay 'the boss'. Or a group of football players sexually harasses a co-player *because* they know or presume that he is gay. Or a Jewish pupil is being sexually harassed by his fellow pupils *because* of the fact that his penis has been circumcised. The three non-discrimination grounds involved in these examples are sex, sexual orientation and religion.

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<sup>6</sup> This kind of harassment on the ground of sex is what 'old style feminists' would simply call 'sexism'.

*Not related* Female inmates in a prison are sexually harassing a fellow female inmate just because they pick on her like hens in a chicken run, or because of whatever power play may be going on in the prison. Or male soldiers pick on a fellow male soldier because they think he is a coward. Or a male teacher is stalking a female colleague with whom, for a period of time, he has had a relationship, but he refuses to accept the fact that she wants to end that relationship. Or female pupils put nude pictures of a female class mate on You Tube ‘just for fun’.

The examples show that sexual harassment is not always related to the ground of sex. It may instead relate to another non-discrimination ground or may not relate to any discrimination ground at all. This means that the EU definition of sexual harassment, in which the element of the necessary causal relationship with the non-discrimination ground of sex has not been included, is in itself correct. But this does not mean that I think that the inclusion of sexual harassment in the sex equality directives was the correct thing to do.

The first reason for my position is that this inclusion was not necessary since any kind of sexual harassment that indeed is clearly related to the sex of the victim can also be held unlawful under the prohibition of (‘simple’) discriminatory harassment on the ground of sex. For that, we do not need a separate definition that, apart from naming the sexualised nature of the harassing conduct, does not really add much to the definition of harassment as such. Both definitions stress the fact that the behaviour may lead to an undignified and unsafe environment. The second reason for my objection is more serious and concerns the conceptual confusions that result from this EU legislation. Judges are now facing a difficult question: do they or do they not need to take the fact that the prohibition of sexual harassment is placed in the context of sex equality law into account in their dealings with such cases? If they answer this question in the affirmative, the victims face the very difficult problem of how to prove that there indeed is a causal connection between the sexual harassment and their sex. If, however, judges state that it is not important to prove such a causal connection, because the definition does not require it, they may bring any case of sexual harassment (also between males or between females, and no matter which discrimination ground may be involved) under the scope of sex equality law. This approach, in my view, would overstretch the concept of sex discrimination.

In fact, I think that there are many more objections against including sexual harassment in the EU equal treatment legislation.<sup>7</sup> One of them is that the EU legislature chose to prohibit sexual harassment as an offence, however leaving it quite unclear who is the actual norm-addressee of this prohibition: the perpetrator(s) or e.g. the employer or person/institution that provides goods and services? It appears at first sight that it is indeed the employer/provider who must refrain from sexual harassment. Can an employer/provider under EU law (also) be held accountable for the sexual harassing behaviour of any other persons who are present in his/her organisation? The latter, in my view, is a necessary legal tool in order to combat sexual harassment effectively.

To clarify my criticism of the inclusion of sexual harassment under the sex discrimination law, it is necessary to have a closer look at this phenomenon. I will do so initially from a non-legal perspective, after which I will return to the question why and how the legislature should address this problem.

### **Sexual harassment: what is it and why and how should the legislature react to it?**

#### ***A provisional sociological definition of sexual harassment***

Sexual harassment came ‘out of the shadow of shame’ in most European countries during the second feminist wave in the 1970s and 1980s. It was revealed that especially women at the workplace endured a lot of ‘trouble’ of this kind of behaviour, mostly by their male superiors or colleagues. There is a long history of fierce debate about the causes and nature of sexual

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<sup>7</sup> The same objections, to some extent, may also be raised against the way in which the European legislature chooses to regulate the issue of harassment on the ground of sex.

harassment and its relationship to the issue of sex equality.<sup>8</sup> I will not repeat this discussion here, but instead I will describe (in a non-legal, i.e. sociological way) what I consider as sexual harassment. Very briefly phrased, I would say that sexual harassment is *exposure to sexualised conduct or expressions in an institutional context*.

### (1) *Sexualised conduct or expressions*

The component 'sexualised conduct' in this provisional definition means that the behaviour that someone (the perpetrator) displays is, in some way, connected to sexuality or is somehow perceived as erotic or sexualised. It may entail physical contact, showing nudity, using sexual language, making proposals of a sexual nature, etc. In other words, it may be everything that in a given society or culture is associated with sexuality. In addition to this, I need to mention 'sexualised expressions', meaning that it is not necessary that this sexual conduct is directed at a specific person/victim. Constantly making 'dirty' jokes in the company canteen, putting up pin-up posters in a shared office space, or playing adult (pornographic) videos while being on night watch in the fire station, all of that could also amount to a sexualised or eroticised atmosphere that is experienced as offensive or intimidating by some people (and may not be experienced as such by others).

Sexualised conduct or expressions touch upon an aspect of people's lives that is deemed to be very 'private' and is intensely connected to people's self-esteem and dignity. Therefore, it is commonly held that exposure to any such behaviour should always be experienced on a voluntary basis, persons having complete freedom to reject any such activities when they are unwanted. The fundamental human right of (bodily) integrity lies at the basis of this normative evaluation of *unwanted or compulsory exposure to sexualised conduct or expressions*. Sexual offences, for the same reason, are not only seen as an intrusion on bodily and mental personal integrity, but also as violating human dignity.

### (2) *The institutional context*

In today's Western world, people are exposed to sexualised conduct or expressions almost every minute of the day, in any possible private or public environment. Think of TV commercials, advertisements in newspapers and magazines, hoardings along the roadside, erotic videos being displayed on the wall of a discotheque, being pinched on the bottom in an overcrowded bus, erotic spam in the email box, etc. I do not include all these 'activities' in the notion of sexual harassment. For that, it is necessary that the sexualised conduct or expression takes place/is situated *in an institutional context*. By this I mean that the victim or 'receiver' of the sexualised conduct or expression is somehow 'trapped' in a certain situation and cannot freely choose not to be exposed to the sexualised conduct or expression (or run away from it). When you are at work, in school, in a hospital, or in prison (just to name the most important amongst such institutional contexts) there is no escape from the sexual harassment, unless you want to give up your job, quit school, abstain from medical or psychiatric treatment, or escape from prison. All of these actions could (and most probably will) have severe consequences for your economic, social, mental or physical, or legal position. This may drive you to endure the sexual harassment without protesting against it too loudly, because protesting in itself might further damage your position within the institution (victimisation).

The institutional context has the effect that persons (workers, pupils or students, patients, inmates) are in a situation of 'dependence', meaning that they are dependent on the 'supervisors' (owner/director or board/management) in that institution to make/keep this environment safe for them and to prevent their position being badly affected by the

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<sup>8</sup> The legal discussions around this issue are summarised in A. McColgan, 'Harassment' in: D. Schiek et al. (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* pp. 477-560 Oxford and Portland, Oregon, Hart Publishing 2007. See also A. Saguy 'Employment discrimination or sexual violence? Defining sexual harassment in American and French law', *Law and Society Review* 34 No. 4 (2000) pp. 1091-1128 and G. Friedman & J. Whitman 'The European Transformation of Harassment Law: Discrimination versus Dignity', *Colombia Journal of European Law* (Spring 2003) pp. 241-274. Of particular interest is K.S. Zippel *The Politics of Sexual Harassment. A Comparative Study of the United States, the European Union, and Germany* Cambridge University Press, 2006.

occurrence of sexual harassment. A second characteristic of the institutional contexts is that in most of these institutions people are facing relationships of inequality. Persons within these institutions who are in the position of power (e.g. a director or a higher ranked colleague, a teacher, a doctor, a prison officer) can require the subordinate person to endure sexual harassment, or these higher ranked persons can ask for 'sexual favours' in return for e.g. better working conditions, good grades, a medical treatment (like an abortion), or earlier release from prison.

In many existing legal definitions of sexual harassment, these two aspects of the institutional context have been translated into the requirements that the sexualised conduct or expression:

- leads to a negative impact on the conditions under which one has to function in an institution; and/or
- is presented as a condition to get 'favours' from the person who is exercising some kind of power in the particular institution.

In the context of sexual harassment in the workplace, these factors are known as 'hostile work environment' and 'quid pro quo' harassment.

### **The legal ground to take measures against sexual harassment and the form of the legal norms and actions**

What follows from this is that there are three compelling reasons (*Rechtsgründe*) for any legislature to combat sexual harassment. First, it concerns a kind of conduct that may endanger or violate people's self-esteem or dignity and integrity. Second, this conduct takes place in an institutional context where people are not in a position to reject this kind of treatment or to protest against it or just run away. Third, being able to function properly and freely within this institution is of crucial importance in relation to the enjoyment of important social human rights (most importantly the right to work, education, mental and physical health care, and to dignified and safe prison conditions).

#### ***Different types of norms and different norm-addressees***

Legal action against sexual harassment may take two main forms. First, it may provide victims with effective legal remedies, mainly by means of a (well-defined) prohibition of sexual harassment, including rules about the burden of proof and effective and dissuasive sanctions against the perpetrator. On the basis of such legislation, individual victims may seek redress in court, e.g. by demanding an injunction to stop the sexual harassment or to get damages. This type of norm is 'reactive' and 'negative': only when damage has already been done may the victim call upon the negative duty of the perpetrator to refrain from any such conduct. Second, the legislator may issue norms to oblige people who are in charge of important institutions to take protective and preventive measures against sexual harassment. These types of norms are 'proactive' and 'positive': they may have an effect before harm will be done and create positive obligations. I call the first type of norms 'prohibition norms', the second type 'instruction norms'.

The norm-addressee of a prohibition norm should clearly be the perpetrator, the norm-addressee of an instruction norm should be the person/organisation that is in charge of the institution and has some kind of power or authority over all persons who function within that institution. An employer has authority over his/her employees and can take measures which prevent sexual harassment; i.e. he/she can explicitly prohibit sexual harassment and announce sanctions against anyone who violates this norm; he/she can also protect victims by means of a properly equipped complaints procedure, etc. The same goes for the board of a school, a hospital or a prison. The legal relationship with 'third persons' (e.g. the client of the firm, the parents of the pupils, the visitors of the patients) is more complicated, but nevertheless in most cases the institutional authority may also take some action against them when they violate the norm that sexual harassment is 'not done'.

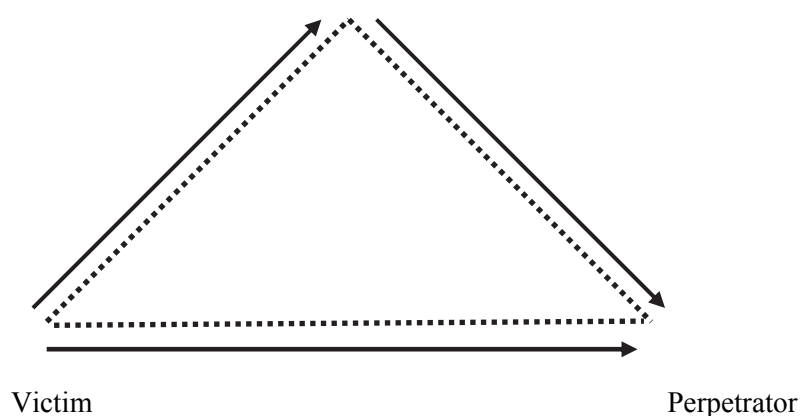


Given the institutional context in which sexual harassment takes place, in my view the legal construction of the positive duty for the employer/board of the institution to prevent and protect is of crucial importance. Instruction norms are an effective and proactive instrument in the fight against sexual harassment because an employer/board is in a position of power to really change the ‘culture’ of an organisation. Prohibition norms (although necessary) are less effective, because it is much more difficult for a victim to take action directly against a perpetrator (who has already intimidated and abused her/him) than against an employer/board, which did not prevent the harassment or protect her/him from it.<sup>9</sup> In order for the employer/board to implement their duties to prevent and protect, they need to have the legal possibility of taking appropriate action against an offender. This could be in the form of punishment of the offender (e.g. dismissal of an employee, expulsion of a pupil), or in the form of civil legal action (tort action against a ‘third party’). At the basis of any such ‘punishment’ needs to lie a prohibition of sexual harassment, which therefore also needs to be in place within the legal system.

### ***A further analysis of the liabilities involved in sexual harassment***

In order to better understand the different kinds of legal actions that may be occasioned in a case of sexual harassment, the following triangle may be illuminating.

Employer/ Board of Institution



Between each of these ‘parties’ different responsibilities and liabilities, and thus also different legal actions, may be possible on the basis of the two types of norms that were described above. The victim may take action against the perpetrator (e.g. in a tort case) on the basis of the prohibition of sexual harassment. On the basis of the same prohibition, the employer/board may take measures against the perpetrator (e.g. dismiss him/her from the job); these sanctions may also be taken in order to implement the norm that an employer/board should effectively protect victims. The victim may also take action against the employer or the board, since they are obliged to provide a safe environment. Often, the employer himself is the perpetrator, especially in small companies; in that case he is doubly responsible: as a perpetrator and as a person who should have effectively protected the victim against sexual harassment. The employer/board could also be sanctioned by an inspectorate when there is a failure to implement the instruction norms correctly and effectively. Of course, all this leaves aside the possibility that the perpetrator will be brought to court by the public prosecutor in a case where the sexual harassment amounts to a criminal offence (indecent (sexual) assault or rape).

<sup>9</sup> Although the burden of proof is also partly shifted in the case of sexual harassment, proof is often extremely difficult to provide since such conduct often takes place behind closed doors. It is much easier to show that the employer did not have a preventive programme in place or did not take any measures against the perpetrator.

## The scope of legislation against sexual harassment

Legislation against sexual harassment may be *underinclusive* (not protecting all persons who need protection) or *overinclusive* (stretching the legal norms beyond what is reasonable, given the nature of sexual harassment and other rights that may be involved).

### *Underinclusiveness*

The three compelling reasons outlined above to take effective legal measures against sexual harassment exist regardless of whether in some way or another sex discrimination against the victim (also) plays a role in a particular sexual harassment case, i.e. irrespective of whether the sexual harassment is related to sex discrimination. Of course, in some cases sexual harassment may be a specific way of showing disrespect or oppressing someone of the other sex (mostly a woman). However, there is no reason to restrict the prohibition of sexual harassment to the context of sex discrimination and forget about sexual harassment against persons of the same sex. Why should sexual harassment of homosexuals not be prohibited? However, this is exactly what the European Union legislature failed to do, when it regulated sexual harassment only in the sphere of the sex discrimination directives.<sup>10</sup> There is also no reason to restrict the prohibition of sexual harassment to the institutionalised context of employment relations and only protect workers (and forget about pupils, patients or inmates). When a group of boys in the changing room of the school gym sexually harasses<sup>11</sup> one of their (male) classmates, for example because he is circumcised, this victim should be protected in exactly the same way as a female gym teacher being sexually harassed in the changing room by her male head of department would be protected. We will see that European (sex equality) law has little to offer to our maltreated schoolboy.<sup>12</sup>

### *Overinclusiveness*

The inclusion of the institutional context in my sociological (non-legal) 'definition' of sexual harassment, means that sexualised conduct or expressions in contexts other than institutional ones (like on the bus, on the street, in the pub, or on the Internet) fall outside the scope of this concept. As we have seen, the institutional context means that 'dependent' persons in such a context cannot freely choose to 'get out' and thus avoid the sexualised conduct or expressions. When the same conduct or expressions occur in other contexts (e.g. a bus or a pub), this freedom does (at least in theory) exist. People can go elsewhere, although it may indeed be very inconvenient to be forced to take another form of transport or to have to go to another pub. Of course, when the sexualised conduct takes the form of sexual assault or even rape, in every European country there are criminal law provisions in place that prohibit any such conduct, no matter in which context this takes place. Leaving aside these severe forms of sexual harassment, I think that there are not enough pressing legal grounds to prohibit sexualised conduct or expressions outside the most important institutional contexts in which people have to function in our modern society in order to lead a full human life.

Another difference between the workplace and the pub (to take just two examples) is that in the first context there is a 'boss' who can control the behaviour of people who are working for him/her, while the pub owner has no formal authority over his/her clients. In other words, in the institutional context there is 'dependence' and there is someone in control who has the duty and the power to protect dependent persons against sexual harassment by taking protective and preventive measures (including punishment of the perpetrator). In such a context, effective proactive instruction norms, issued by the legislature and controlled by government agencies like the labour inspectorate or the medical or school inspectorate, are possible. It is hardly conceivable that the legislature will obligate all pub owners to effectively

<sup>10</sup> Homosexuals who are sexually harassed may still claim that they are the victim of harassment on the ground of sexual orientation. They then need to show that there is a causal relationship between the harassment and their sexual orientation.

<sup>11</sup> E.g. by forcing him to masturbate or by taking pictures of his penis and posting them on the Internet.

<sup>12</sup> He may claim that the school did not sufficiently protect him against harassment on the ground of his religion; the perpetrators themselves are not norm-addressees under the EC equality directives.

ban any kind of sexualised conduct or expressions by/towards their clients from the pubs.<sup>13</sup> (Of course, pub employees should be protected by their employers against sexual harassment by clients as far as possible.)

Including the whole area of goods and services under the scope of the prohibition of sexual harassment, is of questionable legitimacy. To a large degree, education or medical and psychiatric care may be seen as a (market) good or service. A victim of sexual harassment by a teacher or doctor cannot walk out of a school or hospital, so that kind of educational or medical service is indeed 'institutionalised'. In that respect, a prohibition of sexual harassment in this area is helpful. The problem with applying this norm very generally in the sphere of providing goods and services (as is done in Directive 2004/113/EC), is that there, in many instances, we do not have an institutional context in the sense described in this article. People can choose not to go to the pub where there are nude posters on the wall, and people can walk away from the shop where they are approached in a sexualised way. If many people object to such things, the 'free market mechanism' will prompt perpetrators to start to behave themselves.<sup>14</sup> Of course, if this amounts to activities that are penalised in criminal law (like sexual assault or rape), they should be punishable, but that has already been taken care of in all of the legal systems in the EU.

There is one particular danger of overinclusiveness of the legal prohibition of sexual harassment. Applying the sexual harassment prohibition, as defined in the Goods and Services Directive, to all areas of 'marketing' of goods and services can easily lead to 'morality policing' against expressions that by some (e.g. religious fundamentalists) are seen as sexualised and/or undignified. It will lead to all kinds of difficult issues concerning what prevails in a particular situation: the constitutional right to freedom of expression (e.g. to hang a nude poster on the wall in a pub, or to show pictures of a particularly 'revealing' dress in a women's fashion shop) or the right not to be exposed to presumably sexualised expressions. Outside the institutional contexts and outside the context of criminal behaviour, there is no compelling legal reason for intervention by the Government and for restricting the freedom of people to express themselves, even if they express themselves in a sexualised way.

### **To conclude: a different approach to sexual harassment in EU law?**

The outcome of this analysis of the construction of sexual harassment as sex discrimination in EU law is either that too much can be characterised as sexual harassment (i.e. as sex discrimination), or that too little can be characterised as such. *Too much*, in the sense that situations that have nothing to do with sex discrimination are placed under this law which might lead to a serious 'conflation' (i.e. inflation + confusion) of the discrimination concept. Including the prohibition of sexual harassment in the Goods and Services Directive means that in many non-institutional situations (i.e. where there is no compulsory stay and no hierarchical relationship) this conduct is also prohibited. *Too little*, in the sense that various kinds of sexual harassment cannot be combated through this law, since there is no clear relationship with the (opposite) sex of the victim. These situations are therefore left unregulated because, until now, the prohibition of sexual harassment in EU law has only been included in the sex equality directives. However sympathetic and progressive the initiative of the European legislature may seem at first sight, on a second look it must be concluded that most probably it has thereby created a confusing situation. It has not really solved the problem of sexual harassment and the lack of legal remedies against this very objectionable kind of treatment. As I have argued in this article, sexual harassment deserves a strong legal

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<sup>13</sup> Most countries do have some criminal provisions that prohibit 'indecent exposure' or 'public indecency'. Such criminal legislation always balances the right to freedom of expression with the rights of others not to be confronted with e.g. nudity or pornographic material.

<sup>14</sup> It becomes problematic when certain services, like public transport, are in fact a monopoly and people do not have a real choice as to whether or not to use the services. Still, in the example of public transport the problem remains that a bus or train driver does not have any official authority over the behaviour of the passengers towards other passengers. The company can only take general safety measures.

framework that offers victims optimal protection both by means of a prohibition and by means of instruction norms. The latter types of norms have until now been lacking in EU law. A further (political) problem is that it will be very hard to repair this situation.

A general EU law, that offers protection to all victims of any kind of *sexualised conduct or expressions in an institutional context* that is based on any possible or conceivable motive or ground, is further away than ever before. The argument will be that in Europe we have already regulated sexual harassment. A more encompassing (but not complete, because restricted to employment) approach could have been situated in the area of EU legislation concerning health and safety at work. Building on the 1989 Framework Directive (89/391/EC) in this area, a specific directive concerning sexual harassment at work could have been adopted,<sup>15</sup> not only prohibiting sexual harassment as such – as was done in the equal treatment directives – but also giving clear instructions to employers as to what their responsibilities are in this respect and expressly stating that they are liable for any damages that follow from not complying with these rules. Such (positive) instruction norms could have been drafted in accordance with the excellent recommendations made by the European Council as early as 1990.<sup>16</sup> Such instruction norms would include the obligation to take preventive measures and the obligation to protect victims of sexual harassment effectively, i.e. by installing independent (expert) complaint committees and offering counselling to victims. Although a sympathetic gesture was made by including sexual harassment in the sex equality directives, the EU legislature could and should move forward and provide for proactive and effective legal remedies in this area for every citizen of the EU.

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<sup>15</sup> A plea for such legislation had already been made in the 1980s; see the report by M. Rubenstein *The dignity of women at work. A report on the problem of sexual harassment in the member states of the European Communities* European Commission, V/412/1/87-EN déf. 1987.

<sup>16</sup> European Council, OJ 1990 C 157/3.

# Shouldn't Fathers Raise Their Children?

## Two ECHR and ECJ Cases on Gender Equality in Pension Rights

*Kristina Koldinská\**

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### Introduction

There is no doubt that the whole body of antidiscrimination provisions in several international treaties, as well as in the EU treaties and directives, significantly marked the route of Europe and the whole world towards equality and justice. One important aspect of this journey is the struggle to eradicate gender stereotypes,<sup>2</sup> which are rooted in the course of history in European countries.

The discussion on gender stereotypes is very much alive. The ECHR recently discussed this phenomenon in a case where it was claimed that one of the Member States of the Council of Europe still maintains a lower pensionable age for women depending on the number of children they have brought up, while this right is not available to men.

The purpose of this article is to have a closer look at the recent ECHR case and to compare it with ECJ case law. This might be of importance especially now that the Lisbon Treaty has been adopted and the EU as a whole will adopt the Convention on Protection of Human Rights and Fundamental Freedoms and so the ECHR will therefore have somewhat of a 'final word' on human rights in Europe. Possible discrepancies between both Courts and the consequences of these will be shortly discussed, bearing in mind that the Lisbon Treaty established a new relationship between both judicial systems.

### **Should it still be only women who brought up children who enjoy specific advantages linked to pension rights?**

It has been a tradition of (not only) communist countries to provide women who bring up children with specific social advantages and, at the same time, to establish quite a comprehensive net of child care facilities in order to make women return to work.

For a long period, some post-communist countries retained provisions on a pensionable age, such that the pensionable age could be lowered for women who raised children. This condition could be in no way fulfilled by a man, even if he took a significant part in the education and care of his children, or even exclusively provided care for his children, if e.g. the mother died or left the family. The only country to keep such a provision today seems to be the Czech Republic.<sup>3</sup> There are some other European countries<sup>4</sup> which retain provisions that place women at an advantage as regards credited periods. Some of them are credited only to women who cared for children, but not equally credited to men, or in some cases women have easier access to such periods because their maternity leave is automatically regarded as such a period.<sup>5</sup>

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<sup>2</sup> This aim was expressed e.g. in CEDAW, Article 5.

<sup>3</sup> There are, however, some countries which provide special rules for pension credits, which can be assigned only to women, like Cyprus; see Missoc tables available at [http://ec.europa.eu/employment\\_social/missoc/db/public/compareTables.do](http://ec.europa.eu/employment_social/missoc/db/public/compareTables.do) accessed 11 October 2011.

<sup>4</sup> S. Renga et al. 'Old-age pension rights for women in three European countries. Which equality?', *European Gender Equality Law Review* No. 1 (2010).

<sup>5</sup> See report of the European Network of Legal Experts in the Field of Gender Equality: S. Renga et al. 'Direct and Indirect Gender Discrimination in Old-Age Pensions in 33 European Countries'. Available at [http://ec.europa.eu/justice/gender-equality/files/dgjustice\\_oldagepensionspublication3march2011\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/dgjustice_oldagepensionspublication3march2011_en.pdf) accessed 20 October 2011.

Even if one bears in mind that pension rights are relevant not only to the present but also to the past and, it can be argued, that stereotypes were openly in operation in the past, nevertheless keeping similar provisions in national legislation today seems to be somewhat outdated and not entirely in accordance with current trends towards equally shared parenting and caring responsibilities. In fact, a provision, according to which only women can acquire credits or reduce their pensionable age on the grounds of caring for their children, in a way further supports the deeply enrooted gender stereotypes, according to which it should be only a woman who should take care of her own children and not a man. In the present day when there are many men who are exclusive carers (and even more men who share the caring responsibilities with their partners), and when both EU policy and many European NGOs put so much emphasis on the reconciliation of family and working life and more participation by fathers in raising their children, such provisions seem at the very least to be outdated and not corresponding to modern trends in European society. It should be up to many agencies, including the courts, to promote the principle of equality as such and to prevent possible discriminatory and stereotyping behaviour and legislation, with their own decisions, taking also into account the long-term consequences of pension schemes. This role is fundamental to both European Courts – the Court of Justice of the EU<sup>6</sup> and the European Court of Human Rights.<sup>7</sup>

In fact, some EU citizens have been before these courts to argue that provisions which automatically anticipate that the exclusive carer is a woman, are not in accordance with the principle of equality between women and men. Let us take some recent case law of the ECHR and ECJ as examples of how both Courts deal with the above issue.

### **Griesmar and Andrie – very similar cases, very different responses**

These examples, the ECJ case of *Griesmar* and the ECHR case of *Andrie* will be used as there are many similarities in both cases. Even if the *Griesmar* case is already somewhat old and it was discussed as an equal pay case (while the *Andrie* case is a pension insurance case), it was a very important judgment (followed by e.g. *Commission v Luxembourg*,<sup>8</sup> *Kiiski*,<sup>9</sup> and *Maruko*<sup>10</sup>) and it might be very useful in order to compare the ECJ's and ECHR's jurisdictions in similar cases. In fact there is also a case which is still pending, on the scheme that was in question in *Griesmar*, so the *Griesmar* reasoning will probably be used again.<sup>11</sup>

### ***Similar facts, similar arguments of the parties, different legal framework***

Mr Griesmar was a civil servant and a father of three children. He was granted a retirement pension, but for the calculation of that pension no account was taken of the service credit, to which female civil servants were entitled in respect of each of their children. Mr Griesmar argued that national legislation, according to which his pension was calculated, was contrary to Article 119 of the Treaty on equal pay between men and women and at variance with the objectives of Directives 86/378/EEC and 79/7/EEC (now Directive 2006/54/EC).

In this case there were more legal questions raised – among others was the question about the character of the scheme for civil servants and whether the pension from such a scheme should be defined as pay according to Article 119 of the Treaty (now Article 157 of the TFEU). It was held that it was indeed the case that such a pension should be defined as pay.

What is more important for the purposes of this article, however, is the fact that Mr. Griesmar felt that he had been deprived of his rights as a father of three children only because he was a man. The responding French government argued that the purpose of the provision at

<sup>6</sup> In this article, the abbreviation ECJ will still be used, because the judgment in Case C-366/99 *Griesmar* (see below) was decided by the European Court of Justice.

<sup>7</sup> Hereinafter ECHR.

<sup>8</sup> Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxembourg* [2005] ECR I-03067.

<sup>9</sup> Case C-116/06 *Sari Kiiski v Tampereen kaupunki* [2007] ECR I-07643.

<sup>10</sup> Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-01757.

<sup>11</sup> Case C-572/10 *Clément Amedée v Garde des sceaux, Ministre de la justice et des libertés, Ministre du budget, des comptes publics, de la fonction publique et de la réforme de l'État* (nir).

stake was to 'address a social reality, namely the disadvantages which [female civil servants] incur in the course of their professional career by virtue of the predominant role assigned to them in bringing up children'.<sup>12</sup>

The case of Mr. Andrlé was similar to the *Griesmar* case in many respects. Mr. Andrlé, a Czech national, cared for his two minor children himself after he was divorced. His application for the statutory old pension was dismissed by the Czech Social Security Administration, as he had not attained the pensionable age required by the national legislation on statutory pensions. Mr. Andrlé challenged the administrative decision, arguing that given the fact that he had cared for two children, he was entitled to retire at the age of 57 (the pensionable age set for women if they cared for two children) and thus had reached the pensionable age. In the meantime, the constitutionality of the provision on pensionable age had been questioned. The Czech Constitutional Court, in judgment no. Pl. ÚS 53/2004,<sup>13</sup> dismissed the Supreme Administrative Court's petition to repeal the provision at stake, finding that it was not discriminatory. The Constitutional Court, similar to the French government in *Griesmar*, acknowledged that, in the former Czechoslovakia, the more favourable treatment of women who raised children was originally designed to compensate for the factual inequality and hardship arising out of the combination of the traditional mothering role of women and the social expectation of their involvement in work on a full-time basis.

In both cases, there was the legal question on comparability and on the legitimate aim of similar provisions, which provide certain advantages in relation to pensions for women.

At this juncture it should be pointed out that the legal bases on which similar cases could be decided are different. Whereas the ECHR is quite terse and just prohibits the discrimination on the grounds (among others) of sex in Article 14 of the ECHR and in Article 1 of Protocol 12,<sup>14</sup> EU law provides a large body of gender equality law. EU law permits exceptions from the principle of equal treatment for men and women only in very exceptional situations, and the situations are even more limited in equal pay cases. In fact, the *Griesmar* case was discussed as an equal pay case, as it was found to be a case on occupational pensions which fall under the concept of pay in (now) Article 157 TFEU.

An exception was accepted in equal treatment cases in order to protect women in relation to pregnancy and maternity. In settled case law, the Court for many years has always supported the view that EU law on antidiscrimination 'is intended to protect a woman's biological condition and the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment'.<sup>15</sup> This principle has been always applied in a narrow sense<sup>16</sup> and cannot be extended to the parenting responsibilities of women. The ECJ in its settled case law makes a distinction between pregnancy and breastfeeding (as a condition which only women can meet) and parenting responsibilities. In fact, in *Griesmar*, the Court argued: '[w]hile the Court has ruled that maternity leave granted to a woman on expiry of the statutory protective period falls within the scope of Article 2(3) of Directive 76/207, it has also held that measures designed to protect women in their capacity as parents, which is a capacity which both male and female workers may have, cannot find justification in that provision of Directive 76/207'.<sup>17</sup>

As regards the special protection in statutory social security systems (which was not the case in *Griesmar*, as explained above, but could have been relevant in *Andrlé* had it been

<sup>12</sup> Case C-366/99 *Griesmar* [2001] ECR I-0983, paragraph 51.

<sup>13</sup> Published in Collection of Laws under No. 341/2007 Coll.

<sup>14</sup> This is further developed by S. Besson 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?', *Human Rights Law Review* 8 No. 4 (2008) p. 665.

<sup>15</sup> Case C-366/99 *Griesmar* [2001] ECR I-0983, paragraphs 43 and 44, citing also Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25; Case 222/84 *Johnston* [1986] ECR 1651, paragraph 44; Case 312/86 *Commission v France* [1988] ECR 6315, paragraph 13; and Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 30.

<sup>16</sup> See e.g. Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-1017.

<sup>17</sup> Case C-366/99 *Griesmar* [2001] ECR I-0983, paragraph 44.

presented before the ECJ), Directive 79/7, Article 7 paragraph 1 allows the Member States to exclude from the scope of the directive 'the determination of pensionable age for the purposes of granting old-age and retirement pensions [... and...] advantages in respect of old-age pension schemes granted to persons who have brought up children.' The definition of advantages granted to persons who have brought up children is gender-neutral and therefore should not be applied only to women, if a statutory pension is at stake, as it was in case of Mr. Andriele.

### ***Comparability test***

In both cases, it was fundamental to ascertain whether the situations of men and women as described above are comparable or not.

The ECJ in *Griesmar* sought to establish whether that credit is designed to offset the occupational disadvantages which arise for female workers as a result of being absent from work during the period following childbirth, in which case the situation of a male worker is not comparable to that of a female worker, or whether it is designed essentially to offset the occupational disadvantages which arise for female workers as a result of having brought up children, in which case it will be necessary to examine the question whether the situations of a male civil servant and a female civil servant are comparable.<sup>18</sup> The Court held that the situations of a male civil servant and a female civil servant may be comparable as regards the bringing-up of children (even if not necessarily always). In particular, the fact that female civil servants are more affected by the occupational disadvantages entailed in bringing up children, because this is a task generally carried out by women, does not prevent their situation from being comparable to that of a male civil servant who has assumed the task of bringing up his children and has thereby been exposed to the same career-related disadvantages.<sup>19</sup> The Court further explained that 'the measure at issue in the main proceedings does not appear to be of a nature such as to offset the disadvantages to which the careers of female civil servants are exposed by helping those women in their professional life'. The Court also recalled that the situation of employed men and women may be comparable, and parenting responsibilities may be borne by men as well as women.<sup>20</sup>

In *Andriele*, the ECHR did not apply the comparability test. It repeated only the argument of the Constitutional Court, which held that a particular legal framework which gave an advantage to one group or category of persons compared to another could not in itself be said to violate the principle of equality, and that the legislature had discretion to implement preferential treatment.<sup>21</sup> In fact, as Besson notes, the ECHR almost automatically postpones the assessment of comparability of the situations at hand to the justification phase. And when the ECHR compares the situations, its test is often reduced to a minimum.<sup>22</sup>

### ***Legitimate aim***

It seems to be quite striking that the ECHR in *Andriele* found a justification for unequal treatment in the tradition of the pension scheme in one of the Council of Europe's Member States. The ECHR had to examine whether or not the underlying difference in treatment between men and women in the State pension scheme is acceptable under Article 14, that is, whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The ECHR thus used in this case a different test from the direct sex discrimination approach in EU law. In fact, the ECHR looked much more for justifications for the unequal treatment based on the legislation in force.

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<sup>18</sup> Ibid., paragraph 46.

<sup>19</sup> Ibid., paragraph 56.

<sup>20</sup> Further comments on these cases have already been published in this Review. See S. Renga et al. 'Old-age pension rights for women in three European countries. Which equality?', *European Gender Equality Law Review* No. 1 (2010).

<sup>21</sup> *Andriele v The Czech Republic*, Application no. 6268/08, 17 February 2011, paragraph 25.

<sup>22</sup> S. Besson 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?' *Human Rights Law Review* 8 No. 4 (2008) p. 664, citing some ECHR cases as examples: *Rasmussen v Denmark* A87 (1994); *Stubbings and others v United Kingdom* 1996-IV (1997).



The ECHR said, in its judgment, that it 'cannot overlook the fact that the measure at stake is rooted in specific historical circumstances. The means employed in 1964 reflected the realities of the then socialist Czechoslovakia, where women were responsible for childcare and the related care of the household while being under pressure to work full time.'<sup>23</sup> This argument of tradition rooted deep in socialism does not seem to be very adequate and up to date, when more than 20 years have passed since the end of communism. The Court in fact stated that in today's society the child-bearing and child-rearing roles may no longer overlap to such a great extent. It went on, however, to say that 'the demographic shifts and changes in perceptions of the roles of the sexes are by their nature gradual and, after forty-five years of the existence of the measure at stake, it is necessary to time the amendment accordingly. Therefore, the State cannot be criticised for progressively modifying its pension system to reflect these gradual changes and for not having pushed for complete equalisation at a faster pace.'<sup>24</sup>

The Court concluded that 'the original aim of the differentiated pensionable ages based on the number of children women raised was to compensate for the factual inequality between men and women. In the light of the specific circumstances of the case, this approach continues to be reasonably and objectively justified on this ground until social and economic changes remove the need for special treatment for women. In view of the time-demanding pension reform which is still ongoing in the Czech Republic, the Court is not convinced that the timing and the extent of the measures undertaken by the Czech authorities to rectify the inequality in question have been so manifestly unreasonable as to exceed the wide margin of appreciation allowed in such a field.'

The ECHR preferred a special treatment for women until the social and economic changes would remove the need for it and found a justification for this conclusion. The ECJ in its settled case law, on the other hand, in searching for possible justifications applied only a restricted system of exceptions, which the EU law provides, especially in equal pay cases.

### ***Conclusions in both cases***

As has already been said, there are two different approaches taken by the two courts. In *Griesmar*, the ECJ concluded that the provision at stake infringes the principle of equal pay inasmuch as it excludes male civil servants, who are able to prove that they assumed the task of bringing up their children, from entitlement to the credit which it introduces for the calculation of retirement pensions.<sup>25</sup> The *Griesmar* case, together with some other cases which followed, points out clearly that there should be a strong distinction made between the (occupational) disadvantages suffered exclusively by women because of their pregnancy and/or breastfeeding on the one hand, and possible advantages or disadvantages deriving from parenting (or general caring) responsibilities, which should be shared equally by men and women, on the other hand.

In *Andrle*, however, the ECHR did not take very much account of its former judgment in *Konstantin Markin*<sup>26</sup> on parental leave. This case was about the unequal treatment of men and women connected with bringing up children. Russian law granted military personnel a parental leave, which was granted as a leave of three years only to female military personnel, whereas a man would be entitled only to three months of parental leave, even if he brought up the child alone after divorce. The ECHR held that 'the reference to the traditional perception of women as primary child-carers cannot provide sufficient justification for the exclusion of the father from the entitlement to take parental leave if he so wishes'.<sup>27</sup> In *Andrle*, however, the circumstances in *Markin* were held to be too different, especially because parental leave is a short-term measure which does not affect a person's entire life. It is related to the life today

<sup>23</sup> *Andrle v The Czech Republic*, Application no. 6268/08, 17 February 2011, paragraphs 51-54.

<sup>24</sup> *Andrle v The Czech Republic*, Application no. 6268/08, 17 February 2011, paragraphs 51-54.

<sup>25</sup> Case C-366/99 *Griesmar* [2001] ECR I-0983, paragraph 67.

<sup>26</sup> *Konstantin Markin v Russia*, no. 30078/06, 7 October 2010.

<sup>27</sup> *Ibid.*, paragraph 49.

of those concerned, whereas the pension age reflects and compensates for inequalities of past times.<sup>28</sup>

In *Andrle*, the Court based its conclusions more on the *Stec* case,<sup>29</sup> as regards the timing of the necessary social and political changes and also in respect of the improved knowledge of the national institutions on the subject of the factual situation within social legislation.<sup>30</sup> In the *Stec* case (which was very different from *Andrle*) applicants complained about sex-based differences in eligibility for reduced earnings allowance (REA) and retirement allowance (RA), which are earnings-related benefits payable to employed or formerly employed people who have suffered an impairment of earning capacity from a work-related injury or disease. Before 1986 there was a continued right to REA after retirement, which was payable concurrently with the State pension. From 1986 a succession of legislative measures attempted to remove or reduce the REA being received by claimants no longer of working age, by imposing cut-off or limiting conditions at 65 for men and 60 for women (the ages used by the statutory old-age pension scheme). The ECHR held that 'Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article.'<sup>31</sup> The argument of long tradition in a social security system was accepted in the *Andrle* case.

The ECHR judgment was somewhat of a disillusionment for those who had expected that the ECHR could be a progressive watchdog in the field of human rights, including the right to equal treatment and that it could in a way follow the jurisprudence of the ECJ.<sup>32</sup> The Strasbourg Court, however, only followed the rather weak arguments of the Czech Government and reasoned, somewhat problematically, from the case law of the Czech Constitutional Court.

The *Andrle* case is therefore a little sad, as the ECHR's jurisprudence on the principle of equality and ban on discrimination has always played a very important role, not only in the decision-making of the national courts and institutions but also in the ECJ case law. It seems, however, that the ECHR goes into reverse gear with its recent judgment and is less progressive than in the older judgment of *Griesmar*, even if it could be argued that the later judgment did not take sufficiently into account the fact that pension rights are attached not only to the present but also to the past when stereotypes were applied.<sup>33</sup> The reaction of the French legislature could also be considered to be problematic, as some rights were equalised and so reduced for women, so that it is now difficult to get some pension credits.

It would be for the Czech courts to submit a preliminary question to the ECJ regarding the current presence in the Czech Pension Insurance Act of the rule on pensionable age, which might be lowered for women if they brought up children. There is in fact already a preliminary question, which has recently been referred to the ECJ. The *Soukupová* case<sup>34</sup> is based on certain consequences of the provisions on pensionable age on financial support under the Farmers' Early Retirement from the EU Farming Scheme. Ms. Soukupová applied for this support and was denied it, as the Czech legislation results in women who have brought up two or more children having an objectively shorter period in which to submit an application for support from the farmers' retirement scheme than women with one or no children or than men. Ms. Soukupová attacked the administrative decision before the Czech courts.

<sup>28</sup> *Andrle v The Czech Republic*, Application no. 6268/08, 17 February 2011, paragraphs 58-59.

<sup>29</sup> *Stec and Others v The United Kingdom*, no. 65731/01, ECHR 2006-VI.

<sup>30</sup> *Andrle v The Czech Republic*, Application no. 6268/08, 17 February 2011, paragraphs 50 and 60.

<sup>31</sup> *Stec and Others v The United Kingdom*, no. 65731/01, ECHR 2006-VI, paragraph 51 and *Andrle v The Czech Republic*, Application no. 6268/08, 17 February 2011, paragraph 48.

<sup>32</sup> See e.g. an early reaction in the Czech Republic to the judgment: I Prouza 'Rána pod pás aktivním otcům?', *Bulletin Centra pro lidská práva a demokratizaci* 3 No. 2 (2011). Available at <http://www.iips.cz/data/files/Centrum%20LP/bulletin%20LP/Vol.%20III/bulletin-LP-III-2.pdf>, accessed 20 October 2011.

<sup>33</sup> S. Renga et al. 'Old-age pension rights for women in three European countries. Which equality?', *European Gender Equality Law Review* No. 1 (2010).

<sup>34</sup> Case C-401/11 *Blanka Soukupová v Ministerstvo zemědělství*, nyr

The *Nejvyšší správní soud* (Czech Supreme Administrative Court) has asked the Court of Justice if the specifically relevant EU law<sup>35</sup> and the general principles of EU law permit a distinction to be made between male farmers and female farmers when entitlement to registration under the scheme in question is being assessed, and a further distinction to be made between female farmers according to the number of children they have brought up.

The answer of the CJEU could be of great importance in the whole discussion on equality between men and women in the Czech statutory pension scheme, as regards the pensionable age.

### **ECHR case law and its consequences for ECJ case law after Lisbon**

To conclude, let me comment briefly on the jurisdiction of both courts after the adoption of the Lisbon Treaty. After Lisbon, the ECHR in no way replaces the activities of the ECJ.<sup>36</sup> However, the ECHR will henceforth decide whether institutions of the European Union have harmed an individual's rights through violation of any of the rights guaranteed by the Convention. Similarly, the ECHR is likely to have the authority to evaluate EU legal documents in light of the provisions of the Convention. If a discrepancy is found between any of the provisions of EU law and the Convention, it would mean that the Union's institutions responsible for the implementation of any such document would have to take appropriate measures to ensure that EU law is in accordance with the specific provisions of the Convention and the Convention as a whole. In this way a coherent system of protection of fundamental rights throughout Europe should be created, which will enable Europe to appear from the outside to be acting as a single entity, effectively united by law and declared values.<sup>37</sup>

This seems, however, not to be that easy in the area of gender equality. Whereas gender equality has always been one of the cornerstones of EU legislation, in the European Convention on Protection of Human Rights and Fundamental Freedoms it has always been only one amongst other discriminatory grounds. While ECJ case law contains a huge number of decisions finding a breach of the non-discrimination principle, Article 14 of the ECHR has only been regarded as violated in some 20 judgments since 1968.<sup>38</sup>

From the recent judgments of both Courts, it would seem that there is still a long way to go towards the desired appearance of Europe as a single entity in these matters.

The ECHR judgment in *Andrle* is very different from the recently developed ECJ case law, although the ECHR presented much stronger and, in my opinion, also much better arguments that contribute to the further promotion of gender equality and eradication of gender stereotypes.

It remains to be seen whether both Courts will find a more common language for these issues in the future.

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<sup>35</sup> The actual norm in question was Article 11 of Council Regulation (EC) No. 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations.

<sup>36</sup> See e.g. Joint communication from Presidents Costa and Skouris, available at [http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh\\_cjue\\_english.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf) accessed 10 October 2011.

<sup>37</sup> On this, cf. further e.g. S. Besson 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?' *Human Rights Law Review* 8 No. 4 (2008) pp. 647-682; K. Koldinská *Gender a sociální právo* Prague, C.H. Beck 2010, pp. 78-81.

<sup>38</sup> S. Besson 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?' *Human Rights Law Review* 8 No. 4 (2008) p. 656.

# Positive Measures in Employment Law: Different Approaches under CEDAW and EU Gender Equality Legislation

Simone van der Post\*

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## Introduction

When talking about equality between men and women, an interesting and polemical issue is that of positive measures as a means to achieve equality between men and women. In international law there are two legal systems dealing with this issue: the Convention of the Elimination of all forms of Discrimination Against Women (CEDAW) and EU gender equality legislation. These two systems deal with the topic differently, leaving a gap between the different approaches. First of all, there is a difference in the terms used. In CEDAW the term ‘temporary special measures’ is used. However, in CEDAW’s *travaux préparatoires*, and in other international human rights documents, different terms are used to refer to these measures. The term used in EU law is ‘positive action’. This term, however, is ambiguous, since it has another meaning in international law. As well as being a synonym for ‘temporary special measures’, it is used, in international law, to describe the obligation for States to act as opposed to States refraining from action. Scholars do not agree on a clear definition, in gender equality law, but Barnard comes up with a concise version: ‘Positive action is a management approach intended to identify and remedy situations that lead to or perpetuate inequalities in the workplace. It is intended to put women in the position to be able to compete equally with men but does not interfere with the selection process.’<sup>1</sup> Within the context of this article, therefore, positive measures are seen as measures used to attain substantive equality between men and women. Even though positive measures can be applied in a variety of situations in social life, this article will focus on their implementation in the area of employment.

In this article both systems will be examined to pinpoint the areas where differences arise. First I will look at the scope of both legal systems, then continue with their respective definitions of discrimination and their application in the field of employment. Then I will highlight the differences in the approaches used and point to some questions that need further consideration.

## 1. Scope

CEDAW is a Convention drafted and adopted within the framework of the United Nations then Human Rights Committee (this was replaced by the Human Rights Council in 2006). It entered into force on 3 September 1981 and has been signed and ratified by all 27 EU Members. It is part of the system of human rights documents of the United Nations, which can be seen in its scope and wording. The Convention deals with eliminating discrimination against women in the exercise or enjoyment of their human rights in the political, economic, social, cultural, civil or any other field.<sup>2</sup> The explicit link to the enjoyment of human rights and fundamental freedoms gives the Convention a very broad scope extending its application to the public and private domain.<sup>3</sup> The discrimination against women should be eradicated in both vertical and horizontal relations,<sup>4</sup> and should include the elimination of stereotypes.<sup>5</sup> The

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<sup>1</sup> C. Barnard *EC Employment Law* Oxford, New York, Oxford University Press 2006 p. 297.

<sup>2</sup> Article 1 CEDAW read in conjunction with Article 2.

<sup>3</sup> See R.C. Oostland *Non-discrimination and the Equality of Women*, Proefschrift Universiteit Utrecht 2006, available at <http://igitur-archive.library.uu.nl/dissertations/2006-0622-200934/full.pdf> accessed 9 November 2011.

<sup>4</sup> See Article 2 CEDAW.

<sup>5</sup> See Article 5 CEDAW.

Convention provides detailed provisions on a variety of specific issues in its subsequent articles.<sup>6</sup>

Holtmaat and Tobler argue that CEDAW has a threefold purpose:<sup>7</sup>

1. to achieve a complete equality in law and public administration as in private relations;
2. to improve the *de facto* position of women; and
3. to combat the dominant gender stereotypes and gender ideology.

Regarding the broad scope and purpose of CEDAW, States Parties are obliged to actively engage in the advancement of women in their societies. It is not enough simply to change legislation for the States Parties to be in accordance with the Convention; they must also implement an active policy, especially to achieve the second and third purpose of the Convention as mentioned above.

EU gender equality legislation has a very different origin and therefore a different scope from CEDAW. As the EU has developed from an economic cooperation between European States, it is not surprising that the gender equality legislation stems from a provision with economic intentions, namely on equal pay. Thus Article 157 TFEU<sup>8</sup> provides a basis for the adoption of ‘measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value’.

EU gender equality legislation necessarily stays within the scope of the EU Treaties, which do not encompass all aspects of social life. The main function of the EU is still economic cooperation. Even though the European Court of Justice (ECJ) has ruled that the social objective of (ex) Article 141 EC (now Article 157 TFEU) should prevail over its economic objective (*Schröder*),<sup>9</sup> the economic connotation remains in evidence, giving EU gender equality legislation a narrower scope than CEDAW.

## 2. Definitions of discrimination

The definition of discrimination used by CEDAW is formulated in Article 1:

For the purpose of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

This provision clearly prohibits discrimination against women instead of discrimination on the basis of sex in general, showing its asymmetrical approach to equality.<sup>10</sup> Loenen argues that there is a difference in the material and personal scope of the Convention. The material scope is that of discrimination against women but the personal scope is not defined. This means men can rely on the Convention if they are subjected to discrimination against women. An example of such discrimination is measures affecting part-time workers. Generally speaking, part-time workers are women and measures against part-time workers are seen as indirect discrimination

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<sup>6</sup> Article 6 on trafficking of women; Article 7 on participation in political and public life; Article 8 on international participation; Article 9 on the right to nationality; Article 10 on the right to education; Article 11 on employment; Article 12 on the right to health; Article 13 on economic and social rights; Article 14 on the problems of rural women; Article 15 on equality before the law; and Article 16 on personal and family rights.

<sup>7</sup> See R. Holtmaat & C. Tobler, ‘CEDAW and the European Union’s policy in the field of combating gender discrimination’ *Maastricht Journal on European and Comparative Law* 12 No. 4 (2005) pp. 399-425.

<sup>8</sup> Formerly 141 EC and 119 EEC.

<sup>9</sup> Case C-50/96 *Deutsche Telekom v Schröder* [2000] ECR I-743.

<sup>10</sup> See Holtmaat & Tobler 2005, op. cit. and Oostland 2006 op cit.

against women. Men with part-time jobs are also affected and can thus rely on the Convention.<sup>11</sup>

Unlike the definition of discrimination used in the Convention on the Elimination of all forms of Racial Discrimination (CERD), the CEDAW definition does not prohibit preference on the basis of sex. Some argue that the exclusion of preference means that, for example, an employer who chooses a male candidate over a female candidate when all other characteristics are the same would not be in breach of the Convention, as the wording does not explicitly prohibit this preference.<sup>12</sup> Others, however, argue that when preference is given to a man which leads to the impairment of the enjoyment of women of their human rights, this entails a distinction prohibited by the Convention.<sup>13</sup>

The phrase 'the effect or purpose' further emphasises that the Convention intended to prohibit both direct and indirect discrimination.<sup>14</sup> The phrase 'on a basis of equality of men and women' is open to two interpretations on the type of result sought with the prohibition of discrimination: the interpretation of the phrase as a formal definition of discrimination implies that all provisions should be gender neutral. However, read in conjunction with the rest of the Convention, the formal formulation of discrimination can also be seen to pursue substantive equality where men and women are equal in practice.<sup>15</sup>

CEDAW does not provide for grounds for justification of discrimination. The text of the provision does not provide for such grounds and there have been no general recommendations of the CEDAW Commission clarifying this point.<sup>16</sup> Loenen argues that there probably is some form of justification of discrimination, but that it should be subject to a very strict test in light of the purpose of the Convention.<sup>17</sup>

The principle of equality used in EU legislation is derived from the original Article 119 EEC, now rephrased and extended in Articles 141 EC and 157 TFEU respectively, stating that men and women should receive equal pay for equal work or work of equal value. In the third *Defrenne* case of 1978,<sup>18</sup> the ECJ ruled that the equality principle in Article 119 EEC was a general principle of law. The general principle of equality is elaborated upon through Directives.

The Recast Directive (2006/54/EC) gives an extensive definition of discrimination, making a distinction between direct and indirect discrimination. Article 2, paragraph 1 of the Recast Directive gives the following definition of direct discrimination:

(a) 'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

The definition calls for a comparison to establish if a person has suffered a disadvantage. In cases before the ECJ this comparison is not always made, as the ECJ does not find a comparison essential to determine if there is a case of direct discrimination but rather decides its cases based on the issue of whether the person is put at a disadvantage because of their sex, for example in the case of pregnancy.<sup>19</sup> It is also worthwhile to mention that direct

<sup>11</sup> T. Loenen 'Het discriminatiebegrip' in A.W. Heringa et al. (eds.) *Het Vrouwenverdrag: een beeld van een verdrag*...pp. 1-13 Antwerpen/Apeldoorn, MAKLU Uitgevers 1994.

<sup>12</sup> See N. Burrows 'The 1979 Convention on the Elimination of all Forms of Discrimination Against Women', *Netherlands International Law Review* 32 (1985) pp. 419-460.

<sup>13</sup> See Oostland 2006 op. cit.

<sup>14</sup> See Oostland 2006 op. cit. and the references mentioned therein. Also Article 18 of CEDAW obliges Signatory States to submit reports on their advancement of the implementation of CEDAW to the CEDAW Commission for revision by that Commission. See e.g. concluding observations on Peru, 08/07/98, paragraphs 319 and 320, concluding observations on the United Kingdom, 01/07/99, paragraphs 300 and 301 and concluding observations on Bhutan 30/01/2004, paragraphs 15 and 16, as mentioned by Oostland.

<sup>15</sup> See Oostland 2006 op. cit., Holtmaat & Tobler 2005 op. cit., and Loenen 1994 op. cit.

<sup>16</sup> See Oostland 2006 op. cit. and the references mentioned therein.

<sup>17</sup> Loenen 1994 op. cit.

<sup>18</sup> Case 149/77 *Defrenne v Sabena (Defrenne III)* [1978] ECR 1365.

<sup>19</sup> See S. Burri & P. Prechal *EU Gender Equality Law Update 2010* (Luxembourg, Office for Official Publications of the European Communities 2010) available at: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-9](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9) accessed 9 November 2011.

discrimination is prohibited completely unless there is an ‘express derogation’.<sup>20</sup> Article 157 TFEU does not contain such an express derogation (except in paragraph 4 providing for the adoption of special measures).

Article 2, paragraph 1 of the Recast Directive gives the following definition of indirect discrimination:

- (b) ‘indirect discrimination’: where an apparently neutral provision, criterion or practice would put a person of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

This definition has a broad scope, as the phrase ‘provision, criterion or practice’ is formulated as such in order for it to encompass both legal and non-legal requirements. The concept of indirect discrimination can however (partially) be described as a more substantive approach to equality in which a disadvantage of a group is considered. However, indirect discrimination does not require an equal outcome.<sup>21</sup>

Taking into consideration the definitions used in the CEDAW and EU systems, there are some similarities but also some differences. Both systems prohibit direct and indirect discrimination. However, EU legislation takes a more formal approach to the concept of equality, focusing on gender equality instead of the substantive equality for women as in CEDAW. Notably, EU law provides for objective justification of indirect discrimination, underlining its symmetrical approach. CEDAW is aimed at equality of result and the possibilities of justifying discrimination are not clear. Furthermore, CEDAW has a clear asymmetrical approach to equality, prohibiting the discrimination of women, whilst EU legislation is symmetrical, prohibiting discrimination on the basis of sex.

### **3. Non-discrimination in the field of employment**

In CEDAW, Article 11 deals with the issues of employment and reads as follows:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
  - a) The right to work as an inalienable right of all human beings;
  - b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
  - c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
  - d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
  - e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
  - f) The right to protection of health and safety in working conditions, including the safeguarding of the function of reproduction.

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<sup>20</sup> See Barnard 2006 op. cit.

<sup>21</sup> See Barnard 2006 op. cit.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

- a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- b) To introduce maternity leave with pay or with comparable social benefits without the loss of former employment, seniority or social allowance;
- c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
- d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

The first paragraph enumerates, non-exhaustively, the rights women have pertaining to the field of employment. Women are to enjoy these rights ‘on a basis of equality of men and women’. To reach this goal, the States Parties are to ‘take all appropriate measures to eliminate discrimination against women’ in this field. Again there are no justification grounds for discrimination against women. The second paragraph deals with the issues of discrimination against women on the basis of marriage and maternity within the field of employment. The third paragraph deals with protective legislation. As for the substantive issues, it should be noted that, for the purpose of this Convention, the right to work must be interpreted as the right to gainful employment.<sup>22</sup>

The sub-article on equal pay can also be considered to cover the right to equal benefits such as holiday leave and pension rights.<sup>23</sup> It can be noted that the provision on the prohibition of dismissal on grounds of pregnancy only protects women from being dismissed on the grounds of being pregnant and/or taking maternity leave, giving a slightly narrower protection than alluded to in the heading of the second paragraph of abovementioned Article 11, which talks about the protection of motherhood. The combining of work and family life provision is a slight contradiction to the spirit of the Convention as this provision stresses the need for both parents to engage in the upbringing of children, instead of focusing on women. This can be seen as a positive derogation from the generally asymmetrical approach of the Convention.<sup>24</sup>

The implementation of the principle of equal treatment stemming from Article 157 TFEU is covered by Directive 2006/54/EC.<sup>25</sup> Article 4 of that Directive reads:

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination based on sex.

More detailed provisions on the issues of social security schemes, access to employment, pregnancy, maternity and paternity leave and parental leave can be found in various Directives.<sup>26</sup> The EU system for parental leave in Directive 2010/18/EU is especially

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<sup>22</sup> See Burrows 1985 op. cit.

<sup>23</sup> See Burrows 1985 op. cit.

<sup>24</sup> See Burrows 1985 op. cit.

<sup>25</sup> Originally equal pay was covered by Directive 75/117/EEC, which was repealed and replaced by Directive 2006/54/EC.

<sup>26</sup> See Directives 2006/54/EC, 79/7/EEC and 92/85/EEC.



interesting, awarding leave to both parents so that they can take care of their children. The non-transferability of this leave promotes the use of the leave by women and men.

The two legal systems discussed above have many similarities in their provisions on the equal treatment of women and employment; however there are some differences. CEDAW puts more emphasis on the fundamental right of women to work. This becomes clear in, amongst others, the provision calling for the same employment opportunities for women as compared with the EU prohibition on direct and indirect discrimination on the grounds of sex in access to employment. The CEDAW provision puts more emphasis on creating opportunities for women, while EU legislation prohibits discrimination. CEDAW also puts more emphasis on the protection of women in the workplace in general. However, EU legislation provides for parental leave for both parents. CEDAW is less specific about the sharing of responsibilities between men and women in the care of children, as it only calls for 'the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities'.

#### 4. Positive measures

As mentioned above, CEDAW is aimed at creating *de facto* equality between men and women. As women historically have a disadvantage in comparison with men in many fields of society, including employment, CEDAW provides for 'temporary special measures'<sup>27</sup> to close the gap. Article 4 states:

1. Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discounted when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

The 'temporary special measures' called for in the first paragraph of the Article do not entail an exception to the principle of non-discrimination as defined in Article 1 of the Convention, as these measures do not impair the enjoyment of rights by women, even though the paragraph states the measures 'shall not be considered discrimination'. Temporary special measures are not an exception to the principle of non-discrimination, but rather are the expression of the means to achieve the substantive equality, which is also called for in Article 1.<sup>28</sup>

Furthermore, the provision contains three conditions: the special measures should be temporary; in no way entail a situation of separate but equal standards; and they should accelerate *de facto* equality between men and women. There is however a discrepancy between the temporary nature of the measures (to be discontinued when 'the objectives of equality of opportunity and treatment have been achieved') and the aim of *de facto* equality, as equality of opportunity and treatment do not necessarily mean *de facto* equality.<sup>29</sup>

Also, the provision does not contain an obligation for the implementation of special measures, only the possibility of taking them. In its general recommendation on this Article,<sup>30</sup> however, the Committee on the Elimination of Discrimination against Women (hereinafter 'Committee') reiterated the aim of the Convention to be substantive equality, pinpointing it as an equality of result, and that this provision should be interpreted in that light as a means to

<sup>27</sup> See the discussion of the different use of terms in CEDAW and EU gender legislation in the introduction to this article.

<sup>28</sup> See Oostland 2006 op. cit. and O. de Schutter 'Positive Action' in D. Schiek et al.(eds.) *Cases, materials and text on national, supranational and international non-discrimination law* pp. 782-786 Oxford, Hart Publishing 2007.

<sup>29</sup> See Oostland 2006 op. cit.

<sup>30</sup> General Recommendation no. 25, 30th session, 2004.

realise *de facto* equality and not as an exception to non-discrimination.<sup>31</sup> The Committee also asserts that States Parties: ‘are obliged to adopt and implement temporary special measures in relation to any of these articles if such measures can be shown to be necessary and appropriate in order to accelerate the achievement of overall, or a specific goal of, women’s *de facto* or substantive equality’.<sup>32</sup>

EU gender equality legislation provides for the possibility of ‘positive action’.<sup>33</sup> It is a much debated term that has its origin in Directive 76/207/EEC, which deals with equal treatment with regards to employment. In Article 2(4) of this Directive, measures promoting equal opportunities by removing existing inequalities were allowed. The ECJ stated in *Hofmann v Barmer Ersatzkasse*<sup>34</sup> that Article 2(4) may provide the basis of special measures benefiting women; however this could not justify general positive discrimination.<sup>35</sup> In the *Kalanke* case,<sup>36</sup> the ECJ ruled that positive action is a derogation from an individual right and thus must be construed strictly, allowing provisions that do not include absolute and unconditional priority to women.<sup>37</sup> In the *Marschall v Land Nordrhein-Westfalen* case<sup>38</sup> the ECJ ruled that provisions that make a distinction on the basis of sex can be permitted under Article 2(4) if that provision guarantees an objective assessment of each individual’s situation, leaving room for derogation of the benefit to women when there are circumstances that ask for such a derogation. The ECJ was a bit more permissive in *Badeck*,<sup>39</sup> where it ruled that measures benefiting women were permitted if there was sufficient flexibility and non-rigidity in these measures and the benefit for women is not automatic or unconditional. The ECJ furthermore found in *Lommers*<sup>40</sup> a measure providing for childcare for female employees to be only admissible because it made an exception for urgent cases, provided that these ‘urgent cases’ would include men who were sole carers for their children. Even though the Court seems to have become a bit more permissive over the years, in all the abovementioned cases the ECJ continuously regarded positive action as a derogation of the principle of non-discrimination.<sup>41</sup> Also, the ECJ has made it clear that positive measures should be aimed at achieving equal opportunities and should not be aimed at achieving equal results.<sup>42</sup>

Positive action also has a basis in the TFEU, in paragraph 4 of Article 157 and in the Recast Directive, Article 3. These provisions give a slightly broader interpretation of the concept of positive action, providing for measures that give a specific advantage to compensate for a disadvantage of the under-represented sex. The measures are still regarded as a justifiable derogation from the principle of non-discrimination. The only exception is that of special protection of women on grounds of pregnancy and motherhood, as this is a special, incomparable situation.

## 5. Different approaches

As discussed above, the CEDAW and EU legislation systems have their differences in the prohibition of discrimination against women in employment. However, the biggest differences arise with the issue of positive measures. With EU gender equality legislation the emphasis lies on the prohibition of discrimination. There is a legal basis for positive measures, but these measures are always seen as a derogation from the non-discrimination principle. This leads to

<sup>31</sup> However, the Committee stresses that these measures are not to be discriminatory against men.

<sup>32</sup> General Recommendation no. 25, 30th session, 2004, paragraph 24.

<sup>33</sup> See the discussion of the different use of terms in CEDAW and EU gender legislation in the introduction to this article.

<sup>34</sup> Case 184/83 *Hoffman v Barmer Ersatzkasse* [1984] ECR 3047.

<sup>35</sup> See E. Ellis *EU Anti-Discrimination Law* Oxford/New York Oxford University Press 2005.

<sup>36</sup> Case C-450/93 *Kalanke v Freie und Hansestadt Bremen* [1995] ECR I-3051.

<sup>37</sup> Advocate General Tesauro argued in this case that positive action should entail an equality of starting point, not of result.

<sup>38</sup> Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-06363.

<sup>39</sup> Case C-158/97 *Badeck and others* [2000] ECR I-1875.

<sup>40</sup> Case C-476/99 *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891.

<sup>41</sup> See Ellis 2005 op. cit.

<sup>42</sup> See de Schutter 2007 op. cit. at p. 819..

a complicated system of criteria to be met by a measure to be acceptable as a derogation from the non-discrimination principle. As mentioned above, the ECJ has become more permissive in what measures can be allowed, but the fact remains that special measures are an exception to the non-discrimination rule. Giving preference to women to increase the number of women employed can therefore only be used under strict conditions of the possibility to still hire a man instead of a woman. Measures such as strict quotas to overcome the historical, social disadvantage of women seem improbable in this system. Even though the EU aims to attain substantive equality,<sup>43</sup> it seems the formal approach to equality prevails over reaching *de facto* equality.

In CEDAW another approach to positive measures is adopted. The general aim of the Convention is to attain substantive equality for women. Positive measures are used to reach this aim. States Parties are obliged to take positive measures by the CEDAW Committee's recommendation and are urged by that Committee to report on these measures in their reports to the Committee. They even have to explain why they did not take any positive measures.<sup>44</sup> Also, as mentioned several times, the principle of non-discrimination used in CEDAW contains a clear substantive component, alongside its formal definition. Positive measures are, thus, not regarded as an exception to the principle of non-discrimination. They are regarded as temporary measures to be used to reach a *de facto* equality, which forms the basis of the principle of equality between men and women used in the Convention.

The two approaches used by the EU and CEDAW respectively show some important differences. It seems that the CEDAW system actively encourages States to take positive measures while the EU system discourages the positive measures as far as they do not comply with the strict criteria to allow derogation from the non-discrimination principle. This raises the question if, and if this is the case on which points, the obligations which States have under CEDAW and EU legislation are conflicting.

## 6. Conclusion

In essence, the two different (international) legal systems differ in their approach to the question whether women need to get the same opportunities as men or whether women should be compensated for the historical and social disadvantages which they have suffered in the participation in working life. It is as though an anthropologist and a lawyer are discussing how to rearrange the world to do away with social injustices from the past. The anthropologist stresses the injustice done to the group and points out that the current social structures impair the equal enjoyment of a right and the slow change of social structures is way too slow to do justice to the disadvantaged group. The only way to get rid of the inequality is to temporarily give an advantage to the disadvantaged group and this way forces the social structures to catch up with 'reality'. The lawyer points out that the current situation is indeed unfair to the disadvantaged group; however, temporarily giving them an advantage would create an unfair situation for the individuals in the other group. In that way the other group would be at a disadvantage, creating a vicious circle of giving advantages to one or the other group. It is better to create equal opportunities for everyone and let the social structures catch up with reality without creating new inequalities.

At the moment it appears to be an endless debate as the collective and the individual seem hard to reconcile. In the meantime, States and women are caught up in the middle and nothing really changes. It almost seems appropriate to rename the glass ceiling the diamond ceiling as the squabbling anthropologist and lawyer cannot break through it. However, if the anthropologist and the lawyer have the courage to actually listen to each other and, more importantly, learn from each other, there may be a way out.

<sup>43</sup> See Case C-13/94 *P v S. and Cornwall County Council* [1996] ECR I-2143 and Case C-136/95 *Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (CNAVTS) v Evelyne Thibault* [1998] ECR I-2011.

<sup>44</sup> General Recommendation no. 25, 30th session, 2004, paragraph 29.

# EU Policy and Legislative Process Update

May 2011 – October 2011

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1. On 27 October 2011 the European Parliament adopted a resolution on the proposal for a directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted. In the resolution gender aspects are addressed. A refugee is defined as a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country (Article 2 d). In the assessment by Member States 'gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group'.

The text of the resolution can be found on:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0469+0+DOC+XML+V0//EN>

2. On 4 October 2011 a Legal Seminar on the implementation of EU law on equal opportunities and anti-discrimination, 'Approaches to Equality and Non-discrimination Legislation inside and outside of the EU', took place in Brussels, organised by the European Commission, the European Network of Legal Experts in the non-discrimination field, together with this Network, the European Network of Legal Experts in the field of Gender Equality.

Information and discussion papers can be found on:

[http://www.migpolgroup.com/events\\_detail.php?id=309](http://www.migpolgroup.com/events_detail.php?id=309)

3. On 3 October 2011 Mikael Gustafsson (GUE/NGL) was elected to the Chair of the Women's Rights and Gender Equality (FEMM) Committee of the European Parliament. He became the first man to chair Parliament's Women's Rights Committee, a clear signal that championing gender equality is not the sole responsibility of women. Mr Gustafsson is a strong believer in equality between men and women, and 'practises what he preaches', according to colleagues.

See the website of the EP:

<http://www.europarl.europa.eu/en/headlines/content/20111014STO29303/html/Women's-Rights-committee's-new-chair-feminist-to-his-fingertips>

4. In October the European Union Agency for Fundamental Rights (FRA) announced that it will conduct an EU-wide survey on violence against women in 2011-2012. This is the first survey of its kind to randomly sample and interview 40,000 women across the 27 EU Member States and Croatia.

See the factsheet on this survey:

[http://fra.europa.eu/fraWebsite/attachments/FRA-0811-Factsheet-VAW-survey\\_EN.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA-0811-Factsheet-VAW-survey_EN.pdf)

5. On 26 September 2011 EU Justice Commissioner Viviane Reding met leaders of Europe's business schools to discuss how to improve the gender balance in company boardrooms by encouraging more young women to follow a career in business. Women still represent only 12 % of board members in Europe's biggest listed

companies, despite the fact that 60 % of university graduates are female. In her speech to the leaders of the business schools Commissioner Reding stressed that ‘High-level commitment and effective action from governments, political parties, social partners and businesses are crucial to tackle the under-representation of women in decision-making positions and on the boards of listed companies.’

The speech of Commissioner Reding can be found on:

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/604&format=PDF&aged=0&language=EN&guiLanguage=en>

6. On 19 September 2011 the conference ‘Equality between women and men’ took place in Brussels. It marked the first year of the Strategy for equality between women and men (2010-2015) which was adopted on 21 September 2010. It was also an opportunity to have important debates on the key priorities of the Strategy.

Information on the conference:

[http://ec.europa.eu/justice/newsroom/gender-equality/events/110919\\_en.htm](http://ec.europa.eu/justice/newsroom/gender-equality/events/110919_en.htm)

Strategy for equality between women and men (2010-2015):

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0491:EN:NOT>

7. In the first week of September 2011 the European Women’s Lobby dispatched letters to the Heads of the Political Groups in the European Parliament urging them to ensure that an equal number of women and men are nominated for these positions, with the aim of reaching parity in decision-making positions. According to the EWL the situation has improved marginally since 2004, as the proportion of women in the European Parliament increased from about 30 % in 2004 to 35 % after the 2009 elections, but the mid-term elections in January 2012 for the Chairs and Vice-Chairs of the Parliamentary Committees may provide a good opportunity to improve the balance for Chairs and Vice-Chairs..

See for more information the Website of the EWL:

<http://www.womenlobby.org/spip.php?article2249>

8. On 6 July 2011 the European Parliament adopted a resolution on women and business leadership. The resolution welcomes the Commission's intention to propose European legislation in 2012 if companies do not manage to achieve, through voluntary measures, the targets of 30 % women on company boards by 2015 and 40 % by 2020. The resolution mentions Norway as an example of good progress, because of Norwegian legislation requiring a minimum of 40 % of both women and men on boards of listed companies with a workforce of more than 500, and making provision for effective sanctions for non-compliance. Developments in other Member States are also explicitly mentioned and will be followed by the European Parliament. The resolution calls for implementation of new policies to enable women to be involved in the management of companies.

The resolution can be found on:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0330+0+DOC+XML+V0//EN&language=EN>

9. On 4 May 2011 EU Justice Commissioner Viviane Reding announced that the first two companies which had signed up to the ‘Women on the Board Pledge for Europe’ had committed to improve the gender balance in their boardrooms from 30 % by 2015 and to 40 % by 2020. In March 2011 Commissioner Reding had challenged publicly listed companies in Europe to voluntarily sign the Pledge to increase women’s

presence on corporate boards to 30 % by 2015 and to 40 % by 2020. In the following weeks other companies also signed the Pledge.

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/533&format=PDF&aged=1&language=EN&guiLanguage=en>

The 'Women on the Board Pledge for Europe' can be found:

[http://ec.europa.eu/commission\\_2010-2014/eding/womenpledge/index\\_en.htm](http://ec.europa.eu/commission_2010-2014/eding/womenpledge/index_en.htm)

# European Court of Justice Case Law Update

May 2011 – October 2011

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## ▪ Case C-123/10 of 20 October 2011

*Waltraud Brachner v Pensionsversicherungsanstalt*

*Council Directive 79/7/EEC*

### **Facts**

Ms Brachner received an old-age pension under the ASVG (General Social Security Act) from the Austrian social insurance office for salaried employees (*Pensionsversicherungsanstalt*) which amounted, for the year 2007, to EUR 368.16 gross per month. She was not entitled to receive the compensatory supplement (which brings a pension up to the statutory minimum income amount) because her spouse received a monthly pension of EUR 1 340.33 net, which, when added to her own income, came to an amount which exceeded the standard rate for that supplement. Her pension was, however, increased by 1.7 % by the annual pension adjustment.

The national court asked whether a disadvantage for (overwhelmingly) female pensioners, arising from the annual increase in their pensions, could be justified by the earlier age at which they become entitled to a pension and/or the fact that the standard amount for a minimum income provided for by law was disproportionately increased, when it needed to be borne in mind that the provisions concerning the payment of that statutory minimum income require account to be taken of the pensioner's other income and that of a spouse, whereas in the case of other pensioners (namely those receiving larger pensions), no account was taken of other income or the income of a spouse when annual pension increases were made.

### **Judgment of the Court of Justice**

1. Article 3(1) of Directive 79/7/EEC must be interpreted as meaning that an annual pension adjustment scheme, such as that at issue in the main proceedings, comes within the scope of that directive and is therefore subject to the prohibition of discrimination laid down in Article 4(1) of that directive.
2. Article 4(1) of Directive 79/7 must be interpreted as meaning that, taking into account the statistical data produced before the referring court and in the absence of evidence to the contrary, the referring court would be justified in taking the view that Art. 4(1) forbids a national arrangement which leads to the exclusion, from an exceptional pension increase, of a significantly higher percentage of female pensioners than male pensioners.
3. Article 4(1) of Directive 79/7 must be interpreted as meaning that if, in the examination which the referring court must carry out, it should conclude that a significantly higher percentage of female pensioners than male pensioners may in fact have suffered a disadvantage because of the exclusion of minimum pensions from the exceptional increase provided for by the adjustment scheme at issue in the main proceedings, that disadvantage cannot be justified by the fact that women who have worked become entitled to a pension at an earlier age or that they receive their pension for a longer period, or because the compensatory supplement standard rate was also subject to an exceptional increase in 2008.

▪ **Case C-104/10 of 21 July 2011**

***Patrick Kelly v National University of Ireland (University College, Dublin)***

*Directives 76/207/EEC, 97/80/EC and 2002/73/EC*

***Facts***

Mr Kelly was a qualified teacher resident in Dublin. He applied for a 'Master's degree in Social Science' course for which he was not selected. Mr Kelly claimed before the Equality Tribunal that this refusal constituted discrimination, since he was better qualified than the least-qualified female candidate to be offered a place. For the Circuit Court he requested, unsuccessfully, copies of the retained applications, copies of the documents appended to or included with those applications, and copies of the 'score sheets' of the candidates whose application forms had been retained. Mr Kelly appealed against that order to the High Court, which asked the Court of Justice five preliminary questions on information concerning the selection procedure for vocational training in relation to the alleged sex discrimination.

***Judgment of the Court of Justice***

1. Article 4(1) of Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, must be interpreted as meaning that it does not entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course, so that he may establish 'facts from which it may be presumed that there has been direct or indirect discrimination' in accordance with that provision.  
Nevertheless, it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus deprive Art. 4(1) in particular of its effectiveness. It is for the national court to ascertain whether that is so in the main proceedings.
2. Article 4 of Council Directive 76/207/EEC must be interpreted as meaning that it does not entitle an applicant for vocational training to information held by the course provider on the qualifications of the other applicants for the course, either because he believes that he has been denied access to vocational training on the basis of the same criteria as the other candidates and discriminated against on grounds of sex, referred to in Article 4 of Directive 76/207, or because that applicant complains that he was discriminated against on the grounds of sex, referred to in Article 1(3) of Directive 2002/73, in terms of accessing that vocational training.
3. Where an applicant for vocational training can rely on Directive 97/80 in order to obtain access to information held by the course provider on the qualifications of the other applicants for the course, that entitlement to access can be affected by rules of European Union law relating to confidentiality.
4. The obligation contained in the third paragraph of Article 267 TFEU does not differ according to whether a Member State has an adversarial or an inquisitorial legal system.

**OPINIONS OF ADVOCATES-GENERAL**

▪ **Case C-123/10, Opinion of Advocate-General Trstenjak delivered on 16 June 2011**

***Waltraud Brachner v Pensionsversicherungsanstalt***

***The Advocate-General advises the Court of Justice:***

1. Article 4 of Directive 79/7/EEC must be interpreted as meaning that an annual pension adjustment scheme such as that at issue in the main proceedings comes within the scope of that directive and of the prohibition on discrimination in Article 4(1).



2. Article 4 of Directive 79/7/EEC precludes a national arrangement which leads to the exclusion, from an exceptional pension increase, of a significantly higher percentage of female pensioners than male pensioners.
3. Such disadvantages of female pensioners in the annual pension adjustment cannot be justified by the fact that women who have worked become entitled to a pension at an earlier age or that they receive their pension over a longer period, or because the compensatory supplement standard rate was also subject to an exceptional increase, when the income of the spouse is taken into account, whereas for other pensioners the income of the spouse was not taken into account.

#### **PENDING CASES BEFORE THE COURT OF JUSTICE**

- **Case C-512/11: Reference for a preliminary ruling from the Työtuomioistuin (Finland) lodged on 3 October 2011**  
*Terveys- ja sosiaalialan neuvottelujärjestö TSN ry v Terveyspalvelualan Liitto ry, Mehiläinen Oy*

##### ***Question referred by the Työtuomioistuin***

Do Directive 2006/54/EC and Directive 92/85/EEC preclude national provisions of a collective agreement, or the interpretation of those provisions, under which an employee moving from unpaid child-care leave to maternity leave is not paid remuneration during maternity leave in accordance with the collective agreement?

- **Case C-513/11: Reference for a preliminary ruling from the Työtuomioistuin (Finland) lodged on 3 October 2011**  
*Ylemmät Toimihenkilöt YTN ry v Teknoliikenne Oy, Nokia Siemens Networks Oy*

##### ***Question referred by the Työtuomioistuin***

Do Directive 2006/54/EC and Directive 92/85/EEC preclude a national collective agreement from being interpreted as meaning that an employee moving from unpaid child-care leave to maternity leave is not paid remuneration during maternity leave in accordance with the collective agreement?

- **Case C-476/11: Reference for a preliminary ruling from the Vestre Landsret (Denmark) lodged on 19 September 2011**  
*HK Danmark acting on behalf of Glennie Kristensen v Experian A/S*

##### ***Referred questions by the Vestre Landsret***

1. Must the exception in Article 6(2) of Council Directive 2000/78/EC concerning the determination of age limits for admission to occupational social security schemes be interpreted as authorisation for the Member States to be able generally to except occupational social security schemes from the prohibition in Article 2 of the directive of direct or indirect discrimination on grounds of age in so far as that does not bring about discrimination on grounds of sex?
2. Must the exception in Article 6(2) of Council Directive 2000/78/EC be interpreted as not precluding a Member State from maintaining a legal situation in which an employer can pay, as part of pay, age-graded pension contributions, implying for example that the employer pays a pension contribution of 6% for employees under 35, 8% for employees from 35 to 44 and 10% for employees over 45, in so far as that does not bring about discrimination on grounds of sex?

▪ **Case C-427/11: Reference for a preliminary ruling from High Court of Ireland (Ireland) lodged on 16 August 2011**

*Margaret Kenny and others v Minister for Justice, Equality and Law Reform, Minister for Finance, Commissioner of An Garda Síochána*

***Referred questions by the High Court***

1. In circumstances where there is prima facie indirect gender discrimination in pay, in breach of Article 141 (now Article 157 TFEU) and Council Directive 75/117/EEC in order to establish objective justification, does the employer have to provide:
  - (a) justification in respect of the deployment of the comparators in the posts occupied by them;
  - (b) justification of the payment of a higher rate of pay to the comparators; or
  - (c) justification of the payment of a lower rate of pay to the complainants?
2. In circumstances where there is prima facie indirect gender discrimination in pay, in order to establish objective justification, does the employer have to provide justification in respect of:
  - (a) the specific comparators cited by the complainants; and/or
  - (b) the generality of comparator posts?
3. If the answer to Question 2(b) is in the affirmative, is objective justification established notwithstanding that such justification does not apply to the chosen comparators?
4. Did the Labour Court, as a matter of Community law, err in accepting that the ‘interests of good industrial relations’ could be taken into account in the determination of whether the employer could objectively justify the difference in pay?
5. In circumstances where there is prima facie indirect gender discrimination in pay, can objective justification be established by reliance on the industrial relations concerns of the respondent? Should such concerns have any relevance to an analysis of objective justification?

▪ **Case C-401/11: Reference for a preliminary ruling from the Nejvyšší správní soud (Czech Republic) lodged on 28 July 2011**

*Blanka Soukupová v Ministerstvo zemědělství*

***Referred questions by the Nejvyšší správní soud***

1. May the concept of ‘normal retirement age’ at the time of transfer of a farm under Article 11 of Council Regulation (EC) No 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF), be interpreted as ‘the age required for entitlement to a retirement pension’ by a particular applicant under national legislation?
2. If the answer to Question 1 is in the affirmative, is it in accordance with European Union law and the general principles of European Union law for ‘normal retirement age’ at the time of transfer of a farm to be determined differently for individual applicants depending on their sex and the number of children they have brought up?
3. If the answer to Question 1 is in the negative, what criteria should the national court take into account when interpreting the concept of ‘normal retirement age’ at the time of transfer of a farm under Article 11 of Council Regulation (EC) No 1257/1999?

- **Case C-394/11: Reference for a preliminary ruling from the Komisia za zashtita ot diskriminatsia (Bulgaria) lodged on 25 July 2011**  
*Valeri Hariev Belov v ChEZ Elektro Bulgaria AD and ChEZ Raspredelenie Bulgaria AD*

***Referred questions by the Komisia za zashtita ot diskriminatsia***

1. Does the case to be considered fall within the scope of Council Directive 2000/43/EC (here with respect to Article 3(1)(h))?
2. What is meant by ‘treated less favourably’ within the meaning of Article 2(2)(a) of Directive 2000/43 and by ‘put persons of a racial or ethnic origin at a particular disadvantage’ within the meaning of Article 2(2)(b) of Directive 2000/43?
  - 2.1. For less favourable treatment to qualify as direct discrimination, is it absolutely essential for the treatment to be more unfavourable and for it to infringe, directly or indirectly, rights or interests explicitly defined in law, or is it to be understood as any form of behaviour (relationship) in the wider sense of the word which is less advantageous than behaviour in a similar situation?
  - 2.2. For the fact of being put in a particular unfavourable situation to qualify as indirect discrimination, is it also necessary for it to infringe, directly or indirectly, rights or interests explicitly defined in law, or is it to be understood in the wider sense as any form of being placed in a particular unfavourable/disadvantageous situation?
3. Depending on the answer to the second question: If, for direct or indirect discrimination within the meaning of Article 2(2)(a) and (b) of Directive 2000/43 to be deemed to have occurred, it is necessary for the less favourable treatment or the fact of being put in a particular unfavourable situation to infringe, directly or indirectly, a right or interest defined in law,
  - 3.1. do the provisions of Article 38 of the Charter of Fundamental Rights, Directive 2006/32/EC (Recital 29, Article 1 and Article 13(1)), Directive 2003/54/EC (Article 3(5)) and Directive 2009/72/EC (Article 3(7)) define, to the benefit of the final consumer of electricity, a right or interest entitling him to check meter readings regularly and capable of being relied on before the national courts in proceedings such as the main proceedings, and
  - 3.2. is national legislation and/or administrative practice approved by the State energy regulatory authority granting a distribution undertaking the freedom to install electricity meters in places to which it is difficult or impossible to gain access, preventing consumers from checking and monitoring meter readings, compatible with those provisions?
4. Depending on the answer to the second question: If, for direct or indirect discrimination to be deemed to have occurred, it is not absolutely necessary for a right or interest defined in law to have been directly or indirectly infringed,
  - is, pursuant to Article 2(2)(a) and (b) of Directive 2000/43, national legislation or case-law, as at issue in the main proceedings, admissible if it requires, for discrimination to be deemed to have occurred, that the more unfavourable treatment and the fact of being put in a more unfavourable position infringe, directly or indirectly, rights or interests defined in law;
  - if they are not admissible, is the national court then obliged not to apply them and to refer to the definitions given in the directive?
5. Is Article 8(1) of Directive 2000/43 to be interpreted
  - 5.1. as meaning that it requires the victim to establish facts which impose an unambiguous, incontestable and certain conclusion or inference that direct or indirect discrimination has occurred, or is it sufficient for the facts to justify only an assumption/presumption of such discrimination?
  - 5.2. Do the facts that
    - (a) only in the two parts of the city known as Roma districts are electricity meters attached to electricity poles in the streets at a height at which consumers cannot read them, with known exceptions in some parts of those two urban districts, and

- (b) in all other districts of the city the electricity meters are placed at a different height (up to 1.7 m) at which they can be read, usually in the consumer's home, on the outside of the building or on surrounding fences,  
lead to a shift in the burden of proof to the defendant?
- 5.3. Do the facts that
- (a) not only Roma but also people of a different ethnic origin live in the two parts of the city known as Roma districts and/or
  - (b) accordingly, not all the inhabitants of those two districts actually regard themselves as Roma, and/or
  - (c) the reasons for placing the electricity meters in those two urban districts at a height of 7 m are described by the distribution undertaking as being generally known,  
preclude a shift in the burden of proof to the defendant?
6. Depending on the answer to Question 5:
- 6.1. If Article 8(1) of Directive 2000/43 is to be interpreted as meaning that an assumption/presumption of the occurrence of discrimination is necessary and if the aforementioned facts lead to a shift in the burden of proof to the defendant, what form of discrimination can be presumed from those facts — direct or indirect discrimination and/or harassment?
- 6.2. Do the provisions of Directive 2000/43 enable direct discrimination and/or harassment to be justified by the pursuit of a legal objective by necessary and suitable means?
- 6.3. In view of the legal objectives which the distribution undertaking emphasises it is pursuing, can the measure taken in the two urban districts be justified in a situation in which
- (a) the measure is taken because of the increasing incidence of unpaid bills in the two urban districts and the frequent offences committed by consumers which impair or threaten the safety, quality and continuous and secure operation of the electrical installations  
and  
the measure is taken across the board, irrespective of whether the individual consumer pays his bills for the distribution and supply of electricity and whether the individual consumer has been found to have committed any offence (manipulation of meter readings, illegal connection and/or extraction and/or consumption of electricity without payment, or any other interference with the network which impairs or threatens its safe, high-quality, continuous and secure operation);
  - (b) provision is made in legislation and the General Conditions of the Contract on Distribution ("Distribution Contract") for liability for any similar offence in civil, administrative and criminal law;
  - (c) the clause contained in Article 27(2) of the General Conditions of the Distribution Contract — whereby the distribution undertaking gives an assurance that, if explicitly requested by a consumer in writing, it will enable him to make a visual check of the meter readings — does not in fact enable the consumer to check the readings personally and regularly;
  - (d) it is possible for an inspection meter to be installed in the consumer's home at his explicit written request, although a fee is payable;
  - (e) the measure is a distinctive and visible reference to the dishonesty of the consumer in one or other form in view of what the distribution undertaking refers to as the generally known reasons for the measure being taken;
  - (f) other technical methods and means can be used to protect electricity meters against interference;
  - (g) the legal representative of the distribution undertaking claims that a similar measure taken in a Roma district of another city was in fact unable to prevent interference;
  - (h) it is not assumed that an electrical installation in one of these urban districts, a transformer station, will need to undergo measures similar to those taken to protect electricity meters?

- **Case C-385/11: Reference for a preliminary ruling from the *Juzgado de lo Social de Barcelona* (Spain) lodged on 19 July 2011**  
*Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*

***Referred questions by Juzgado de lo Social de Barcelona***

1. Does a contributory retirement pension such as the one provided for under the Spanish social security system on the basis of the contributions made by and on behalf of the worker during his working life, fall within the concept of ‘employment conditions’ to which the prohibition of discrimination in Clause 4 of [the Framework Agreement annexed to] Directive 97/81 refers?
2. If Question 1 were to be answered in the affirmative and a contributory retirement pension such as that governed by the Spanish social security system were to be regarded as falling within the concept of ‘employment conditions’ referred to in Clause 4 of [the Framework Agreement annexed to] Directive 97/81, is the prohibition of discrimination laid down in that clause to be interpreted as preventing or precluding national legislation which – as a consequence of the double application of the ‘pro rata temporis principle’ – requires a proportionally greater contribution period from a part-time worker than from a full-time worker for the former to qualify, if appropriate, for a contributory retirement pension in an amount reduced in proportion to the part-time nature of his work?
3. As a supplementary question to the previous ones, may rules such as the Spanish rules (contained in the 7th Additional Provision of the General Law on Social Security) governing the method of contribution, access and quantification with regard to the contributory retirement pension for part-time workers, be considered to be among the ‘aspects and conditions of remuneration’ to which the prohibition of discrimination in Article 4 of Directive 2006/54, and Article 157 TFEU, refer?
4. As an alternative question to the previous ones, in the event that the Spanish contributory retirement pension were not regarded either as a ‘condition of employment’ or as ‘pay’: is the prohibition of discrimination on the grounds of sex, either directly or indirectly, laid down in Article 4 of Directive 79/7 to be interpreted as preventing or precluding national legislation which – as a consequence of the double application of the ‘pro rata temporis principle’ – requires a proportionally greater contribution period from part-time workers (the vast majority of whom are women) than from full-time workers for the former to qualify, if appropriate, for a contributory retirement pension in an amount reduced in proportion to the part-time nature of their work?

# European Court of Human Rights Case Law Update

May 2011 – October 2011

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## ▪ Case of Lyubenova v Bulgaria (application no. 13786/04) of 18 October 2011

### *Facts*

The applicant is a Bulgarian national who was born in 1975 and lives in Dupnitsa. She married and gave birth to a son in 1994. Her husband went to the US and the applicant followed her husband. She left her son in the care of her in-laws.

According to the applicant her relationship with her husband deteriorated rapidly and she was subjected to acts of violence on his part. On returning to Bulgaria one month later, with her husband, she was admitted to a psychiatric hospital for two months. Her husband returned to the US in March 1999. She learned some time later that he was cohabiting with another woman and that they had had a child together.

According to the applicant her in-laws had resisted when she wanted to see her son. After different national proceedings, the son remained living with his grandparents. The father returned from the US with his new partner and their two children at the end of the summer of 2008. He found his first son at his parents' home and moved in with them to live as a family. Between September and December 2008 the applicant was able to meet her son on a number of occasions. The couple decided to divorce by mutual consent. Their son, showing no affection for either his mother or his father, showed only a desire to live with his paternal grandparents.

Relying on Article 6 § 1 (right to a fair hearing within a reasonable time), the applicant complained of the refusal of the domestic courts to order her in-laws to return her son to her. She argued that the authorities had not taken the necessary steps to facilitate reunion with her minor son.

Relying on Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for private and family life), she further alleged that she had been the victim of discriminatory treatment on the part of the judicial authorities.

### *The Court*

The Court considered that, under Article 8 of the Convention, it was for the authorities to take the necessary measures to enable family life to be maintained as it had been until September 2000. More active steps should have been taken as a matter of urgency particularly as the child was only six years old at the time of the separation. The Court concluded that all measures of the child protection services had lacked the effectiveness required under Article 8. The Court also noted that the lack of any temporary measure to facilitate contact between the mother and the child had been due to a shortcoming in Bulgarian domestic law at the material time.

The applicant complained that the decision of the Regional Court to refuse to return her son to her had been based on discriminatory considerations. She believed that the court's decision would have been different had she been the child's father.

The Court did not accept the argument that the impugned court decision could be categorised as discriminatory treatment on the basis of sex. It considered that complaint to be ill-founded.

### *Press release*

<http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=93528&sessionId=81983502&skin=hudoc-pr-en&attachment=true>

### **Judgment (in French only)**

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=893875&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

#### **▪ Case of Jacinta Natividad Méndez Pérez and others v Spain (application no. 35473/08) of 4 October 2011**

##### ***Facts***

On 1 March 2007, at a meeting of the members and sympathisers of the Popular Party in Garachico, the local policy committee of the Popular Party was elected. The President of this committee invited interested persons to become a candidate for the local elections of 27 May 2007. All potential candidates were female, which might have been in conflict with the Equality Act. The act requires a balanced composition of men and women on all of the candidates lists, so that there are at least 40 % of candidates of both sexes. The President invited therefore men to candidate, but no men reacted, therefore the list was a women-only list. According to the Electoral Commission the party elections infringed the Equality Act. The Party argued that the provision on quotas was unconstitutional and discriminatory and took the case to the Constitutional court, which was of the opinion that the quotas provision was in compliance with the constitution.

##### ***The Court***

The Court reiterated that discrimination means treating differently, without a reasonable objective, persons in similar situations. In the present case, the application of the electoral law could not amount to a difference in treatment, to the extent that a list of candidates consisting of men, not respecting the legal quota of 40 % of candidates belonging to the other sex, was also disqualified. The Court noted that the statute in question establishes a system of percentages that applies equally to candidates, to ensure a balanced participation of women and men to elected office.

### **Judgment (in French only)**

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=35473/08&sessionId=82145189&skin=hudoc-en>

#### **▪ Case of Bah v the United Kingdom (application no. 56328/07) of 27 September 2011**

##### ***Facts***

Relying on Article 14 in conjunction with Article 8, Ms Bah complained that she had been discriminated against by not being treated with priority for social housing. Having unsuccessfully claimed asylum in the United Kingdom following her arrival there in 2000, in 2005 she was granted indefinite leave to remain in the UK. Her son, born in 1994, joined her in London in 2007. He was allowed to enter and remain in the UK on the condition that he did not have recourse to public funds.

Shortly after her son arrived, Ms Bah was asked to leave the room she was renting, as her landlord was unwilling to accommodate her son. Ms Bah applied to the London Borough of Southwark for priority treatment in obtaining social housing. Individuals who become unintentionally homeless and have minor children are normally treated with priority by the local authority when deciding on the provision of social housing. However, because Ms Bah's son had only been granted leave to remain in the United Kingdom on the condition that he did not have recourse to public funds, he could not be taken into account in assessing whether she had a priority need for housing assistance. The local authority helped Ms Bah to find private sector accommodation outside the borough and she and her son were not homeless at any point. However, she had to pay a higher rent than she would have for a council flat and her son had to commute about four hours each day as his school was far away from where they

lived. Some 17 months later, Ms Bah was offered a one-bedroom council flat in Southwark, which she accepted.

### ***The Court***

Without underestimating the anxiety which she must have suffered as a result of being threatened with homelessness, the Court observed that she had never actually been homeless. The flat which she obtained had been secured with the assistance of the local authority. In addition, even people who would have been treated with priority would have – in all likelihood – received social housing offers at approximately the same time as her.

The Court concluded that the UK authorities had reasonably and objectively justified their refusal to treat Ms Bah with priority when providing social housing assistance. There had therefore not been a violation of Article 14 taken in conjunction with Article 8.

### ***Press release***

<http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=92698&sessionId=81938302&skin=hudoc-pr-en&attachment=true>

### ***Judgment***

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbk&action=html&highlight=%20%7C%2056328/07&sessionId=81936506&skin=hudoc-en>

## **▪ Case of Klouvi v France (application no. 30754/03) of 30 June 2011**

### ***Facts***

Klouvi is a French national who was born in 1953 and lives in Ozoir-la-Ferrière (France). In 1994 she lodged a criminal complaint against her former line manager, alleging rape and sexual harassment. After a final ruling that there was no case to answer for lack of sufficient evidence, the man she had accused brought criminal proceedings against her for false accusation. She was ordered to pay more than EUR 12 000 in damages. The judge based his decision in particular on Article 226-10 of the Criminal Code, which provided at the time that a final ruling that there was no case to answer automatically meant that the complainant's accusations were deemed to have been false. Relying in particular on Article 6 § 2 (presumption of innocence) of the Convention, the applicant complained about this statutory presumption of guilt. To rectify this situation, condemned by both the Court of Cassation and the National Assembly, a new law was adopted on 9 July 2010.

### ***The Court***

The Court decided that Article 6 §§ 1 and 2 (fairness) had been violated. The Court ordered a settlement of EUR 8 000 (non-pecuniary damages) and EUR 4 832 (costs and expenses)

### ***Press release***

<http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=91225&sessionId=82115484&skin=hudoc-pr-en&attachment=true>

### ***Judgment (in French only)***

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbk&action=html&highlight=30754/03%20%7C%2030754/03&sessionId=82116059&skin=hudoc-en>

## **▪ Case of RR v Poland (application no. 27617/04) of 26 May 2011**

### ***Facts***

The case concerned a pregnant mother-of-two – carrying a child thought to be suffering from a severe genetic abnormality – who was deliberately denied timely access to the genetic tests



to which she was entitled, by doctors opposed to abortion. During her pregnancy different scans showed that the foetus was malformed and she requested, in different hospitals, termination of her pregnancy, which was refused. Later she received the results of the genetic tests which confirmed that her child had Turner syndrome. She renewed her request for an abortion the same day. The doctors in that hospital refused because the legal time limit for abortion had passed.

RR complained that she was denied access to the prenatal genetic tests to which she was entitled when pregnant, due to doctors' lack of proper counselling, procrastination and confusion. She therefore missed the time limit for a legal abortion and subsequently gave birth to a baby suffering from Turner syndrome. She relies on Articles 3, 8 and 13 (right to an effective remedy).

### ***The Court***

The Court recalled that RR had made several efforts to get information and to request termination, which was refused by different doctors. The Court found it a matter of great regret that she had been so shabbily treated by the doctors dealing with her case. The Court agreed with the Polish Supreme Court's view that the applicant had been humiliated. There had therefore been a violation of Article 3 according to the Court.

In RR's case, what was at stake was essentially timely access to a medical diagnostic service that would, in turn, have made it possible to determine whether or not the conditions for lawful abortion had been met, since the Act of 1993 only allowed termination in specific situations. The Court stressed that, as Polish domestic law allowed for abortion in cases of foetal malformation, there had to be an adequate legal and procedural framework to guarantee that relevant, full and reliable information on the foetus's health be made available to pregnant women.

In RR's case, however, there had been a six-week wait between the first relevant scan and the receipt of the amniocentesis results. It was important to note too that the Supreme Court had criticised the conduct of the medical professionals who had been involved in RR's case and the procrastination shown in deciding whether to give her a referral for genetic tests. As a result, she was unable to obtain a diagnosis of the foetus's condition, established with the requisite certainty, by genetic tests within the time limit for abortion to remain a lawful option for her.

The Court concluded that the Polish authorities had failed to comply with their obligations to ensure the effective respect for RR's private life and that there had therefore been a violation of Article 8.

### ***Press release***

<http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=90432&sessionId=82117359&skin=hudoc-pr-en&attachment=true>

### ***Judgment***

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=27617/04&sessionId=82115022&skin=hudoc-en>

# News from the Member States, EEA Countries, Croatia, FYR of Macedonia and Turkey May 2011 – October 2011

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## AUSTRIA – Neda Bei

### Policy developments

As in other European countries, the necessity to cope with the financial crisis within a European institutional framework is the main issue of political debate; gender-related issues are scarcely raised in this context. The Federal Minister for Women and Civil Service has made the gender pay gap and wage transparency a focus of her activities. One of the measures taken to further wage transparency in enterprises was the amendment to the Equal Treatment Act providing for income reports in enterprises.<sup>1</sup> The first reports of enterprises employing more than 1,000 employees were due at the latest by the end of July. While, for instance, VAMED-KMB, a health service provider, took the opportunity to present their report in the media and to commit themselves publicly to gender equality, more than half of the enterprises concerned proved reluctant to deliver.<sup>2</sup> The income reports are a topic of on-going controversial debate among legal experts; the debate covers technical aspects of the reports such as the relevant definition of pay, supposed inconsistencies in the legal provisions on the structure of data and the extent of confidentiality, as well as points of principle, for instance, whether the reports in the given form are likely to promote income transparency within enterprises more effectively than law enforcement in individual cases.<sup>3</sup> Furthermore, in order to implement the National Action Plan on Equality of Women in Professional Life, the Minister launched the website <http://www.gehaltsrechner.gv.at/> (literally: wages calculator); such a tool had been agreed upon in principle by the social partners. The site aims at raising awareness and at supporting especially women in individual wage negotiations with their employers, providing interactive software which should enable the user to determine whether the wages she (he) is paid or going to demand were under or above average values. The user enters data such as sex, age, qualification etc, can search in various sectors or branches of economic activity and gets, as a result, an animated graph of a spectrum of wages ranging from a minimum to a maximum value; however the user does not get information about the legal minimum wage, which is essentially determined by collective agreements. The tool was developed by *Statistik Austria*, supposedly without taking into account the legal minimum wage even as a weighting factor; this might be considered a flaw in usability, especially when the maximum value indicated by the calculator is significantly below the legal minimum wage.<sup>4</sup> Equal Pay Day was held on 4 October 2011. Further activities of the Minister concern the promotion of women in sports including their representation in relevant decision-making bodies, and she constantly makes the representation of women on company boards an issue.

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<sup>1</sup> OJ. No. I 7/2011, gradual entry into force depending on the size of the company. The income report is in fact an aggregation of anonymous data, structured as prescribed by legislation; for details see in *European Gender Equality Law Review* No. 1/2011, p. 48.

<sup>2</sup> Austrian Press Agency 0463 2011-09-29/15:08.

<sup>3</sup> K. Firlei 'Entgelttransparenz ultralight – der Einkommensbericht gem § 11a GIBG', *DRdA* (2011), p. 238; R. Schindler 'Replik zu Firlei, Einkommensberichte "ultralight" oder ein spannender Paradigmenwechsel', *DRdA* (2011), p. 491; K. Firlei 'Duplik zu Schindler, Einkommensberichte "ultralight" oder ein spannender Paradigmenwechsel?', *DRdA* (2011) p. 493; S. Konstatzky & H. Schneller 'Einkommensberichte, Verschwiegenheitspflichten und Ermittlungsrechte', *ecolex* (2011) p. 591; F. Schrank 'Die geschlechts-differenzierende Entgeltberichtspflicht größerer Arbeitgeber gemäß § 11a GIBG', *RdW* (2011) p. 542.

<sup>4</sup> Oral communication courtesy of Ms Margit Epler, president of the Austrian Statistical Society, member of the European Statistical Governance Advisory Board (ESGAB).

## Legislative developments

In September, the Green Party tabled a motion in Parliament with a draft proposal to amend the Equal Treatment Act. The draft proposal aims at extending the time limit concerning the bringing of an action before a court in cases of sexual or sex-related harassment from one year, as at present, to three years, thus providing for the same time limit in all cases of sex discrimination, with the exception of ending the employment relationship, and moreover reconciling the provisions of the Equal Treatment Act (private sector) with the Federal Equal Treatment Act (public sector).<sup>5</sup> In October the Ministry of Labour, Social Affairs and Consumer Protection launched negotiations with the social partners and the Litigation Association of NGOs Against Discrimination (*Klagsverband*)<sup>6</sup> on amending the Equal Treatment Act (private sector). The Ministry of Labour is again trying to bring the Equal Treatment Act up to the level of the European Commission's proposed Directive of 2 July 2008 implementing equal treatment in the access to goods and services on grounds other than ethnic origin or sex/gender.<sup>7</sup> The Ministry also intends to broaden the horizontal protection against discrimination in the access to and the supply of goods and services. Furthermore, the equality bodies for the private sector will be discussed. The Ministry is striving to reduce the number of members of the Equal Treatment Commission's senates, while the *Klagsverband* aims at an overall reform of the procedural regime, taking (compulsory) arbitration according to § 7k Employment of Disabled Persons Act (*Behinderteneinstellungsgesetz*) as a model.<sup>8</sup>

In October the Ministry for Economic Affairs, Family and Youth sent draft legislation for pre-parliamentary consultation, essentially concerning amendments to the Child Care Allowance Act and providing, inter alia, for new complex models in the case of a person having an additional income while receiving the allowance.<sup>9</sup>

## Case law of national courts

### Supreme Court

In the case of a discriminatory dismissal, a victim is only entitled to choose between claiming damages or contesting the dismissal if the discrimination occurred after 31 July 2008, that is after the amendment to the Equal Treatment Act entered into force.<sup>10</sup> Prior legislation did not entitle the victim to damages; the victim could only claim that her (his) employment should have continued. Those principles of the Equal Treatment Act also apply to actions for damages which, in a case of sexual harassment, were founded on other legal provisions such as the Employee Act or the Civil Code.<sup>11</sup>

### High Administrative Court

The Court applied Article 4 of Directive 79/7/EEC on the interrelated provisions on unemployment benefits and pensions which, in 2004, had in principle introduced an entitlement for unemployed persons, who were born after 1955, to an old age pension. In previous decisions, the Court had held that the indirect discrimination against women, which arose in making an entitlement to unemployment assistance (*Notstandshilfe*) dependent on their spouses' income, was justifiable as a legitimate means of social policy. However, the Court considered the same principle neither justifiable nor applicable to persons born before

<sup>5</sup> A 1664/A BlgNR 24.GP, [http://www.parlinkom.gv.at/PAKT/VHG/XXIV/A/A\\_01664/index.shtml](http://www.parlinkom.gv.at/PAKT/VHG/XXIV/A/A_01664/index.shtml), accessed 20 October 2011, concerning *recte* § 15 (1) Equal Treatment Act.

<sup>6</sup> '*Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern*', <http://www.klagsverband.at/> accessed 1 October 2011. This association, sponsored inter alia by the Ministry for Labour, the Federal Chancellery and the Province (*Land*) of Salzburg, is the only NGO entitled to third party intervention within the scope of the Equal Treatment Act for the private sector (§ 62 Equal Treatment Act OJ No. I 2008/98). COM (2008) 426 final.

<sup>7</sup> OJ No. 22/1970 as amended by OJ No. I 67/2008.

<sup>8</sup> 324/ME BlgNR 24.GP, [http://www.parlinkom.gv.at/PAKT/VHG/XXIV/ME/ME\\_00324/index.shtml](http://www.parlinkom.gv.at/PAKT/VHG/XXIV/ME/ME_00324/index.shtml) accessed 20 October 2011.

<sup>10</sup> OJ No. I 98/2008.

<sup>11</sup> Supreme Court 28 February 2011, 9 ObA 115/10t.

1955, when assessing their entitlement to an old age pension and taking periods of unemployment assistance into account. Thus, for purposes of solely determining an entitlement to a pension, the spouses' income, which would have precluded the right to unemployment assistance, is irrelevant; moreover, taking it into account is indirect discrimination.<sup>12</sup>

### Equality body decisions/opinions

Senate I of the Federal Equal Treatment Commission (public sector) gave ten opinions on individual cases between January and October 2011, three of them negative. Seven cases concerned the right to preferential treatment of women in career advancement to higher functions or positions. The Commission accepted that there had been discrimination, mostly by infringement of the relevant Affirmative Action Plan, in the following areas: social administration, education (three cases, one of them concerning the significant underrepresentation of women in professional training institutions), financial administration (monitoring illegal employment), and a position at a high level of administration in the Ministry of Justice.<sup>13</sup> In a further case, the Commission held that there had been discrimination by non-assignment to a teacher's post on ethnic grounds and would not exclude sex-related reasons.

Senate I of the Equal Treatment Commission (private sector, world of work) gave around 20 opinions on individual cases between January and August 2011, focusing on the termination of employment mostly in the probation period (I/255/10 – male nurse for the elderly; I/217/09, I/323/11 – pregnancy), and on sexual harassment (I/238/09 – receptionist in a fitness centre harassed by client; I/237/09 – nurse harassed by patient; I/231/09 – receptionist at a hotel harassed by the owner's spouse; sexual harassment and sex-related harassment; I/309/10 – IT helpline worker harassed by supervisor at a Christmas party). Further cases concerned, inter alia, wage discrimination (I/255/09 – indirect discrimination by detrimental gender-stereotyped application of a collective agreement in a transport enterprise; I/242/09 – editor-in-chief), access to professional training (I/228/09 – male applicant for a training post in child care), denial of assignments to a job or discrimination in job applications (I/221/09 – consultant; I/206/09 – disco security), or working conditions (I/194/08). Cases of multiple discrimination brought before the Senate concerned mostly sex/age or sex/ethnicity.<sup>14</sup>

Senate III of the Equal Treatment Commission (private sector, access to and supply of goods and services) stated that the complainant, the client of a driving-school, had been sexually harassed by the owner as well as by her driving instructor (III/71/10, 7 April 2011). In three cases the Senate considered the general terms of public transport in Town A showed direct sex-based discrimination as they provided for reductions for retirees, available for men when they reached the age of 65 and for women when they reached 60, linking the reduction directly to different ages irrespective of whether a person had retired or not (III/51/09, III/54/09, III/69/10, 31 May 2011; cf. Constitutional Court 15 December 2010, V 39/10-13, V 40/10-13).<sup>15</sup>

<sup>12</sup> Directive 79/7/EEC, OJ L 006, of 10 January 1979, pp. 24–25 (31979L0007); High Administrative Court 25 January 2011, 2007/08/0035.

<sup>13</sup> Opinions of the Federal Equal Treatment Commission, Senate I: <http://www.frauen.bka.gv.at/site/5538/default.aspx>, accessed 20 October 2011.

<sup>14</sup> Opinions of the Equal Treatment Commission (private sector), Senate I – discrimination on grounds of sex, multiple discrimination: <http://www.frauen.bka.gv.at/site/6611/default.aspx>, accessed 20 October 2011. If not explicitly mentioned otherwise, the persons concerned were women.

<sup>15</sup> Opinions of the Equal Treatment Commission (private sector), Senate III – access to and supply of goods and services: <http://www.frauen.bka.gv.at/site/6613/default.aspx>, accessed 20 October 2011.

## Miscellaneous

### *Case law of other bodies*

The Upper Disciplinary Commission (federal civil servants) confirmed that continued verbal sexual harassment of an employee ranked lower in the hierarchy than her harassing supervisor, constituted grave misconduct not to be trivialised, and the provisions of the Federal Employees Act on disciplinary sanctions applied. The Commission found the supervisor guilty and decreed a fine of EUR 300, refraining however from any other disciplinary sanction.<sup>16</sup>

### *Report*

By the end of April, Austria had transmitted its combined 7th and 8th report to CEDAW.<sup>17</sup>

## BELGIUM – Jean Jacqmain

### Policy developments

While attempts to set up a new federal coalition have been unsuccessful so far, the political situation remains unchanged. Still in charge of current affairs, the Cabinet which resigned eighteen months ago felt unable (and unwilling) to propose any reform, except on urgent matters (although one might wonder why, for instance, simplifying the social security contributions which are owed by students performing occasional paid work and their employers was more urgent than adopting the various ancillary Royal Decrees which the Gender Act of 10 May 2007 is still lacking). Meanwhile, the federal Parliament continued to pass legislation on a wide variety of issues, whenever a proposal forwarded by some of its members was supported by an ad hoc majority.

### Legislative developments

#### *Improvements to parental and paternity leave*

Four recent Acts of the federal Parliament, the first two promulgated on 13 April<sup>18</sup> and the other two on 11 June 2011,<sup>19</sup> are aimed at improving the reconciliation of work and family responsibilities.<sup>20</sup>

The first Act of 13 April concerns parental leave. Since 2010, employees have been entitled to parental leave until a child is 12 years old, whatever the circumstances. In consideration of the extra difficulties that the parents of a disabled child are confronted with, the Act set the maximal age for such a child at 21 (i.e. the age by which parents cease to be entitled to family benefits for a disabled child). The Unemployment Insurance Office (which provides a social security allowance in lieu of remuneration to an employee who is on

<sup>16</sup> Upper Disciplinary Commission (*Disziplinaroberkommission*, deciding as second level instance) 28 April 2011, 17/8-DOK/11, <http://www.ris.bka.gv.at> accessed 15 October 2011, document No. DOKRS\_20110328\_17\_8\_DOK\_11\_01; cf High Administrative Court 12 July 2011, 2008/09/0355, stating that the disciplinary law applying to public employees differs from penal law or administrative penal law, insofar as it does not strictly define types of behaviour which are linked to strictly determined sanctions and based on an objective assessment of the legal wrong. Rather, it would be the obligation of members of a disciplinary commission to undertake such an objective assessment on their own.

<sup>17</sup> Relevant documents and links are to be found on <http://www.frauen.bka.gv.at/site/5551/default.aspx>, accessed 12 October 2011.

<sup>18</sup> *Moniteur belge/Belgisch Staatsblad*, 10 May 2011, available (in French and Dutch) on <http://www.juridat.be>, accessed 23 September 2011.

<sup>19</sup> *Moniteur belge/Belgisch Staatsblad*, 20 July 2011, available (in French and Dutch) on <http://www.juridat.be>, accessed 23 September 2011.

<sup>20</sup> See J. Jacqmain, 'Congé parental, congés de paternité: le retour du parlement refoulé' *Statut des administrations locales et provinciales – Actualités en bref*, No.243 (June 2011) p. 3 and 'Congés de paternité: il fallait attendre la suite', *ibidem* No. 244 (August 2011) p. 3.



parental leave) immediately indicated that it would comply with the legal innovation, but the various regulations applicable to staff members in the public service still have to be adapted accordingly.

The second Act of 13 April 2011 is intended to adjust paternity leave to the social evolution in the composition of families. Hitherto, only the biological father was entitled to paternity leave, a notion which, due to a legislative blunder, applies to two entirely different situations, governed by different legal provisions:

- a 10-day period of leave, to be taken in one or more parts, during a period of four months from the day of a child's birth;
- the transfer of the unused maternity leave to the father, when the mother dies after giving birth, or has to remain hospitalised while the child can be brought home (in the latter case, two maternity leaves are actually granted, one to the mother and one to the father).

Recognising that same-sex marriages and partnerships (registered or 'common law') are now an accepted reality, the second Act of 13 April 2011 made both types of leave available to the (usually female) second member of the pair, in the absence of a biological father claiming paternity of the child.

As to the two Acts of 11 June 2011, both are concerned with the protection against dismissal of employees who take paternity leave. In the case of transfer of the unused maternity leave to the second member of a pair, such a protection was already provided by the Royal Decree of 17 October 1994, ancillary to Article 39 of the Working Conditions Act of 16 March 1971. Dismissal was prohibited, except for reasons entirely unconnected to the employee's taking of the leave; if the employer could not demonstrate such reasons, fixed damages equal to three months' pay were imposed. The first Act of 11 June 2011 integrated these provisions in Article 39 of the Act of 16 March 1971 itself, and brought the fixed damages up to six months' pay, i.e. the same as in case of dismissal related to maternity leave.

Finally, hitherto an employee who applied for the 10-day period of leave after the child's birth was not protected against dismissal. This gap in the transposition of Directive 2006/54/EC (Article 16) was filled by the second Act of 11 June 2011: as from the moment when an employee informs the employer in writing that he or she will make use of the leave and for a period of three months, dismissal is now prohibited except for reasons entirely unconnected to the leave, to be demonstrated by the employer; in case of unlawful dismissal, the fixed damages are equal to three months' pay.

### ***Prohibition of wearing burqa and niqab in public spaces***

After the Senate (second House of the federal Parliament) decided not to summon the text which had been adopted by the House of Representatives (first House) for examination,<sup>21</sup> the Act 'aimed at prohibiting the wearing of any attire which conceals one's face completely or for the most part' was promulgated on 1 June.<sup>22</sup>

Under the new Article 563*bis* which the said Act inserted in the Penal Code, the prohibition is enforceable in any spaces open to the public; the only possible exceptions are those exceptions provided in working rules (e.g. safety masks) or allowed at festivals (e.g. Carnival). Offenders are liable to a penal fine of EUR 75 up to 125; by-laws of local councils may provide for similar administrative fines, to be imposed if the public prosecutor decides not to take action in the Penal Court.

Immediately, the young woman who was involved in litigation against the borough of Etterbeek<sup>23</sup> and another woman applied to the Constitutional Court for annulment of the Act of 1 June 2011. The case is now pending.

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<sup>21</sup> See *European Gender Equality Law Review* No.1/2011, p. 51.

<sup>22</sup> Published on 13 July in the *Moniteur belge/Belgisch Staatsblad*, available in French and Dutch on <http://www.juridat.be>, accessed 23 September 2011.

<sup>23</sup> See *European Gender Equality Law Review* No. 1/2011, p. 51.

### ***Gender quotas: boards of directors***

The proposal which had been adopted by a commission of the House of Representatives<sup>24</sup> was amended after consideration of the opinion of the *Conseil d'État/Raad van State* (in its capacity of legal adviser) and finally adopted by the full House on 16 June. The Senate decided not to amend it and the Act was promulgated on 28 July 2011.<sup>25</sup>

The new Act inserted similar provisions in the Act of 21 March 1991 concerning the (federal) Economic Public Bodies, the Act of 19 April 2002 concerning the National Lottery, and the Company Code (concerning companies which are quoted on the stock exchange): on the board of directors at least one-third of members must be of the other sex from the rest; as long as this quota is not fulfilled, a person belonging to the minority sex must be appointed to any vacant position and any appointment which does not comply with this rule is void. Moreover, the amended Company Code provides a specific sanction: as long as the composition of a board does not comply with the quota, any advantage (financial or otherwise) attached to the position of director is suspended for all the members of the board.

The provisions of the Act of 28 July 2011 are applicable to every relevant enterprise as from the next financial year. However, the amendment to the Company Code is only applicable after a considerable delay (from six to eight years).

### **Case law of national courts**

#### ***Constitutional Court judgment of 30 June 2011***

The Constitutional Court delivered its final judgment<sup>26</sup> in the *Test-Achats/Test-Aankoop* case. Following the decision of the ECJ (to which it had referred for a preliminary ruling) in Case C-236/09 (2011, nyr),<sup>27</sup> the Constitutional Court found that the principle of equal treatment of men and women, as enshrined in Articles 10 and 11*bis* of the Constitution as well as in Articles 21 and 23 of the European Union Charter of Fundamental Rights, Article 14 of the ECHR and Article 26 of the International Covenant on Civil and Political Rights, was breached when national legislation admitted the use of gender-segregated actuarial factors in life insurance without any time restriction. Consequently, the Constitutional Court annulled the Act of 21 December 2007 which had amended the Gender Act of 10 May 2007 to that effect; however, the annulled Act will continue to be effective until 21 December 2012 at the latest.

#### ***Labour Court in Namur, judgment of 13 July 2011***

The local council of Namur had appointed an architect under a one-year employment contract, preliminary to a longer term post under a subsidised employment scheme. Soon after beginning her service, she communicated that she was pregnant, thus rousing her supervisor to make indignant comments. At the end of her contract, she was not reappointed.

Relying on the ECJ's decision in Case C-438/99 *Jiménez Melgar* (2001-I-6915), the employee challenged the local council's failure to reappoint her, citing direct discrimination under the Gender Act of 10 May 2007. The Institute of Equality of Women and Men (the gender equality agency) used its locus standi (provided by the Gender Act) to take legal action at her side.

In its judgment of 13 July 2011,<sup>28</sup> the Labour Court of Namur found that the local council had failed to reverse the *prima facie* evidence of discrimination, and the court awarded the employee the fixed damages provided by the Gender Act (i.e. six months' remuneration). It is not known yet whether the local council intends to appeal against the judgment.

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<sup>24</sup> See *European Gender Equality Law Review* No. 1/2011, p. 51.

<sup>25</sup> Published in the *Moniteur belge/Belgisch Staatsblad* of 14 September 2011 (2<sup>nd</sup> edition), available (in French and Dutch) on <http://www.juridat.be>, accessed 23 September 2011.

<sup>26</sup> Judgment No. 116/2011 of 30 June 2011, available (in French and Dutch) on <http://www.constitutional-court.be>, accessed 23 September 2011.

<sup>27</sup> See *European Gender Equality Law Review* No. 1/2011, p. 53.

<sup>28</sup> *Rôle général* No. 09/1476/A, unreported.

## Policy developments

Bulgaria is not immune from the economic crisis in Europe, and unemployment increased here during the second trimester of 2011, the rate registered by the National Statistical Institute being 11.2 %. The data show that the unemployment rate was 12.2 % among men and 10 % among women. The same trend is evident from the figures of long-term unemployment: 7 % for men and 5.6 % for women. Given the characteristics of female employment as being more precarious, irregular and lower paid, it could also mean more insecure and exploitative employment for women during the crisis. This fact does not necessarily entail more labour disputes and discrimination cases related to such patterns of employment, but from the cases reported and still pending before the Equality Body there are indications for more case law in the near future.

In addition to the labour market, another sphere that currently highlights gender issues in Bulgaria is the political arena. Both presidential and local elections are forthcoming, but the possibility of a breakthrough in the glass ceiling in politics seems unlikely. Among the candidates for presidential elections, women are present mainly as candidates for vice-presidential posts just for gender balance of the couple of candidates. The only female candidate for President – Mrs. Meglena Kuneva, a former EU Commissioner – is ranked by the pollsters among the first three favourites in these elections. Despite all her professional qualities and her charisma, her campaign does not explicitly mention the fact that she is a woman who challenges the stereotypes in this traditionally male domain in Bulgaria. Similarly, the campaigns of the women mayors lack any emphasis on the gender of the candidates and on the fact that, until now, only up to 10 % of mayors in Bulgaria are women. Mrs. Fandakova, mayor of Sofia and a candidate for re-election, makes no mention of the fact that she is the first female mayor of the capital and does not rely on that in her campaign. In fact, the campaigns of Mrs. Kuneva and Mrs. Fandakova do not contain any specific references to the fact that they are two successful women in their respective fields, nor do the campaigns address equality issues and women's issues in any way. During the election period, no considerations were raised about gender quotas in politics and decision-making in a country which is already a member of the EU.

The election procedures are scrutinised in a study implemented by the Bulgarian Gender Research Foundation, which also includes an analysis of media content.<sup>29</sup> The first conclusions of this study show that the theme of gender equality is not given enough weight and is not analysed in sufficient depth, but just dealt with on a formal level. Thus, women are mentioned mainly when a social issue is discussed, and particularly in relation to maternity, child care and family relations. For four months at the beginning of 2011 the themes of foreign policy and the economy were studied as displayed in the media. At the same time, the presence of women in other fields and their portrayal in the media was studied as well. It was found that the fields of foreign policy and the economy are not related at all to Bulgarian women; women's participation in internal policy is not reflected either, even in this specific, pre-electoral period; expert opinions are given predominantly by men. Even in the most serious and analytical electronic media there are sexist pictures of women, almost naked, with brief comments on their sexual aspirations.

In relation to women in politics, the study identifies the prevalence of the attitude towards women as being not competent enough to occupy a managerial position, often for the reason that women cannot behave 'in a man's way'. Women in higher positions are often perceived as covering up for their husbands' deals and tax evasion. The media also describe women as 'militant' candidates and claim that men are 'attacked' by them and are their 'victims'. The attitude towards Bulgarian women politicians is rather ironic, given the positive attitude

<sup>29</sup> 'Gender stereotyping in media and public life in Bulgaria. Attitudes towards and possibility for introducing a gender equality legislation', BGRF, 2011 (not yet published).



shown towards foreign women politicians such as Hillary Clinton or the Brazilian president, Dilma Rousseff.

In that respect, no concrete measures were taken to implement the 2011 action plan for gender equality. The plan has a special section on the elimination of stereotypes which will obviously remain just on paper.

### **Legislative developments**

In the period under review, there have been no substantial legislative developments in the field of gender equality. This is partly due to the prioritisation of the issue of tackling the economic crisis and also to the preparations for the double elections in October.

There are, nevertheless, important developments related to the implementation of legislation and to decisions and recommendations of UN treaty bodies, which can potentially entail legislative changes.

At the end of June 2011, the Ministry of Justice finally took the decision to allocate BGN 500 000 (EUR 250 000) for NGO projects for combating domestic violence in Bulgaria. This action was taken in accordance with the Law on Protection against Domestic Violence, which provides for such allocations from the budget of the Ministry of Justice each year. The majority of the funds went to women's NGOs active in the field and members of the Alliance for Protection against Domestic Violence. Despite this positive development, the Government is not considering signing and ratifying in the near future the Council of Europe Convention for preventing and combating violence against women and domestic violence.

In the meantime, the Committee for the Elimination of Discrimination against Women found Bulgaria to be in violation of CEDAW. On 28 August 2008, Mrs. V. K. received the views of the Committee concerning Communication No. 20/2008 about the rights of a mother and her underage children in a domestic violence case. After taking into account the facts stated in the Communication and the evidence presented, the Committee found Bulgaria to be in violation of Articles 2, 5 and 16, in line with Article 1 of the Convention and in line with the General Recommendation N19/1992, deciding that the State through its bodies did not provide the victim with effective protection against domestic violence. The Regional and District courts in Plovdiv had not made correct judgments from the evidence presented and had not taken into account all instances of domestic violence, which were thoroughly documented by the applicant. The courts had underestimated the forms of psychological and emotional violence that the applicant suffered, had not reversed the burden of proof during the lawsuit and made judgments based on gender stereotypes. Taking into consideration all these facts, the Committee made a range of individual and general recommendations to the Bulgarian Government. The latter has to report to the Committee on the implementation of its decision in six months time. A claim for compensation of EUR 10 000 was brought by the victim against the Government, which is an unprecedented procedure in Bulgaria.

Another document with potential impact on legislation contains the concluding observations of the Human Rights Committee from 25 July 2011 to the Governmental report of Bulgaria under the ICCPR.<sup>30</sup> Among the principal matters of concern, and recommendations pertinent to gender equality and women's rights are the following:

- the State party should take all the necessary measures to disseminate knowledge of the provisions of the Covenant among judges, prosecutors and lawyers to enable them to invoke and apply the Covenant in relevant cases. The State party should include in its next periodic report detailed examples of the application of the Covenant by the domestic courts, and of the access to remedies provided for in the legislation by individuals claiming a violation of the rights contained in the Covenant;
- the State party should develop additional policies for effective gender equality and adopt and implement specific legislation on equality between men and women, thereby officially recognising the particular nature of discrimination against women and

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<sup>30</sup> <http://www.ccprcentre.org/en/home/44>., accessed 2 August 2011.

- adequately addressing it. In addition, the State party should adopt the necessary measures to monitor and put an end to gender-stereotyped messages in society; and
- the State party should vigorously pursue its efforts to prevent domestic violence, in particular domestic violence against women, and encourage the victims to report the cases to the authorities. The State party should initiate gender-sensitive monitoring of these cases and analyse the reasons why they are rarely reported. The State party should also secure the criminal investigation, prosecution and sanction of all case of domestic violence.

These recommendations of the treaty bodies of the UN show that Bulgarian legislation and its implementation are not yet sufficiently in line with the universal standards of gender equality and women's rights. These standards are also translated into EU requirements and other European standards in the framework of the Council of Europe.

### **Equality body decisions/opinions**

So far as the practice of the equality body – the Commission for Protection against Discrimination – is concerned, the trend in 2011 shows an increase in the number of cases brought before the Commission based on alleged sex discrimination. In fact, while the cases on the grounds of sex numbered 23 for the whole of 2010, the same number of cases (23) had already been brought before the equality body by the end of July 2011. Hopefully, it will generate good practice on interesting cases of sex discrimination in the near future, as many of the cases are in the area of employment, including sexual harassment cases.

Currently, there are several cases of sexual harassment in the workplace, perpetrated by a male manager against women from an all-female unit of a big public company in Sofia, pending before the Commission for Protection against Discrimination. Some of the victims also took complaints to trade unions and to the mayor of Sofia, and one of the cases was referred to the prosecutor. Developments are expected in the months to come. In addition to the acts of sexual harassment reported, there is a strong possibility of victimisation cases being brought by women who agreed to witness in favour of their colleagues in these cases. As a matter of fact, one of the witnesses in a recent sexual harassment case brought before the Equality Body has already been intimidated and threatened that she would be fired.

The Supreme Administrative Court, acting at first instance, considered the case of a sexist advertisement for an alcoholic beverage at the beginning of June 2011 and issued a decision upholding the refusal of the equality body to recognise discrimination and harassment based on sex in this case. Moreover the Supreme Court, although finding that the complainants were obviously offended, insisted on the fact that the 13 women were not representative enough of the opinion of women in Bulgaria on this issue and that research data were needed about attitudes which were generally in acceptance of sexist advertisements in Bulgaria. The decision was appealed by the complainants to a court of second instance – a panel of five members of the Supreme Administrative Court – and a final decision will follow in the near future.

We observe that the main shortcomings of the judicial response to cases of sex discrimination are:

- lengthy and dissuasive procedures;
- non-application of the rule of the burden of proof and of the notion of *prima facie*; and
- the effect of revictimisation of women by the courts in some cases.

To that list can be added the non-allocation of compensation by the courts when discrimination has been found by the equality body. According to the anti-discrimination law, the equality body has no competence in the field of compensation for discriminatory acts. It is up to the courts to recognise the decision of the equality body and to rule on the compensation claim. Despite that, very often the courts refuse to allocate compensation to the victims of discrimination, including sex discrimination.

## Policy developments

There have been several significant policy developments.

### *National Policy for Sex Equality*

First, the Croatian Parliament (*Sabor*) has adopted the National Policy for Sex Equality for the Period 2011–2015 (the Policy). The Policy contains measures for seven thematic areas:

1. promotion of human rights of women and gender equality;
2. equality of opportunities in the labour market;
3. gender sensitive education;
4. equality in the process of decision-making in political and public life;
5. elimination of violence against women;
6. international politics and cooperation; and
7. institutional mechanisms and manners of implementation.

These measures form the so-called Action Plan (AP). The AP lists key activities according to their priority, identifies the institutions responsible for carrying them out and sets implementation deadlines. An overall impression is that the AP measures are too general and sometimes somewhat vague. In that respect they will need further elaboration by relevant institutions.

### *A new Ombudsman Act*

Second, *Sabor* also adopted the new Ombudsman Act. The Act eliminates the office of the specialised Ombudsperson for Sex Equality and merges that office with the Office of the Public Ombudsman. The merger was carried out under the excuse of strengthening the human rights protection offered by the national system of Ombudspersons. In that respect it is worth mentioning that this merger went explicitly against the opinion of the relevant public bodies. There was not a single non-governmental organisation or civil sector institution that supported the merger. Furthermore, none of the existing Ombudspersons, including the Public Ombudsperson who was supposed to benefit from the reform, supported the merger. To the contrary, all of them explicitly opposed the Act for exactly the same reason, namely that they are all convinced that the merger will lower the level of existing human rights and anti-discrimination protection. They offer several reasons for such criticism: lack of consultation or involvement of relevant public bodies or people (including the Ombudsperson for Sex Equality herself), the absence of any analysis of the advantages and drawbacks of the existing as well as the future system of anti-discrimination protection, inefficiency of the manner in which the Act reforms the functioning of the Office of the Public Ombudsperson, which is likely to lower the level of anti-discrimination protection offered, and a failure to increase the institutional capacity of the Office of the Public Ombudsperson, which was the main justification offered by the Act's drafters. The Act increased the responsibilities of the Public Ombudsperson, while at the same time it effectively decreased the number of key staff supporting the Ombudsperson. The Act prescribes that the merger will not take place before 1 July 2012. Bearing in mind that parliamentary elections will take place in December and that the Act enjoys the support of the current majority only, there is enough time for a new Parliament to abandon the merger.

### *A new Ombudsperson for Sex Equality proposed*

Third, although it decided to eliminate this position from 1 July 2012, the Government selected and proposed to Parliament its candidate for the new Ombudsperson for Sex Equality. The selection procedure raises doubts as to the transparency of that selection. The Government formally issued a public announcement for the new Ombudsperson for Sex Equality. However, the Government selected its candidate in secrecy in closed session and other candidates were not called for a formal interview or informed on the criteria that the

Government used as the basis for the selection process. Moreover, they did not receive the decision refusing their application with appropriate reasons. It is far from clear why the Government chose to select its candidate at a session that was closed to the public: the selection of the new Ombudsperson for Sex Equality is hardly a matter of national security that needs to be kept from public scrutiny. Parliament is supposed to vote on the proposed candidate on the last day of its session. Parliament will be dissolved on the same day to allow for the December elections.

## **Legislative developments**

### ***Act on Birth and Parental Support amended***

Since the last report, Parliament has amended the Act on Birth and Parental Support in order to make it fully compliant with Directive 92/85/EEC on Pregnant Workers.<sup>31</sup> The amendment introduced the definitions of the terms ‘pregnant worker’, ‘worker who gave birth’ and ‘worker who is breastfeeding’, in accordance with the corresponding definitions in the Directive. The amendment also extended the mandatory maternity leave to 98 days (28 days before the expected day of birth and 70 days after the birth). The mandatory maternity leave is not transferable. At the same time, fathers are not granted a similar child-birth leave. After the expiration of mandatory maternity leave, mothers have the right to optional maternity leave until the child is six months old. This optional leave is transferable to fathers. However, it requires the approval of the mother as well as the agreement of the father. The amendment also provided pregnant workers with a right to take one free day each month of pregnancy for the purposes of medical pre-natal examination.

## **CYPRUS – Lia Efstratiou-Georgiades**

### **Policy developments**

On 5 August 2011 the President of the Republic of Cyprus, Mr Demetris Christofias, appointed a new Minister of Foreign Affairs, Mrs Erato Kozakou-Marcoullis and a new Minister of Commerce, Industry and Tourism, Mrs Praxoulla Antoniadou Kyriacou. This is the first time that there have been three female Ministers in the Cabinet of the Republic of Cyprus. The third female Minister is Mrs Sotiroula Charalambous, Minister of Labour and Social Insurance.

### ***Subsidy for women’s organisations and trade unions***

To help women’s organisations and trade unions carry out their action plans on the basis of the National Action Plan for Gender Equality 2007-2013, the National Machinery of Women’s Rights subsidised them in 2011 by up to EUR 17 086 each.

## **Legislative developments**

### ***Amendment of the Protection of Maternity Law (Law No. 70(1)/2011)***

On 14 April 2011, the House of Representatives voted an amendment to the Protection of Maternity Law (Law No. 70(1)/2011) for better harmonisation with Article 10 of Directive 92/85/EEC and the interpretation given by the ECJ in ‘Case C-460/06 *Nadine Paquay v Société d’architectes Hoet + Minne SPRL* [2007] ECR I-8511.’<sup>32</sup>

Specifically the amendment to the Law provides:

1. maternity leave is given to a mother who adopts a child, provided she gives notice to her employer and to the Social Welfare Services, that she will take care of the child to be adopted, who is under the age of twelve years;

<sup>31</sup> *Zakon o rodiljnim i roditeljskim potporama* (NN 85/08) amended by the *Izmjene I dopune Zakona o rodiljnim i roditeljskim potporama* (NN 88/11).

<sup>32</sup> C-460/06 *Nadine Paquay v Société d’architectes Hoet + Minne SPRL*, [2007] ECR I-8511

2. additional maternity leave is given in the case where an infant is hospitalised in an incubator due to prematurity or any health problem (one week for every 21 days);
3. when a worker gives a written notice to her employer that she is pregnant, termination of employment and/or giving notice for termination of employment to that worker is prohibited from the beginning of her pregnancy and up to three months after the end of her maternity leave (which lasts 18 weeks); Termination of services and/or giving notice for termination of services to a pregnant worker when the employer is not aware of her pregnancy is revoked, if the worker presents medical certificate within five days from the day the notice was given to her.
4. in the case of a mother who adopts a child, it is prohibited to terminate employment and/or to give notice for termination of employment for a period of three months after the end of the maternity leave (which lasts 16 weeks), when she presents to her employer a declaration/document from the Social Welfare Services that she has, under her care, the child for the purposes of adoption;
5. leave of absence from her work can be given to a pregnant mother for a prenatal examination if she gives an early warning to her employer and presents the relevant medical certificate; and
6. the rights of the worker during her maternity leave for promotion or to return to the same or similar work are ensured and her earnings or other benefits are not affected.

### **Case law of national courts**

#### ***Supreme Court Application No. 503/2009***

The applicant held a degree in 'Science of Physical Education and Athletics' from Athens University, Greece, which he obtained on 3 March 1992, with the mark 'Very Good'. On 19 June 1992 he applied for registration on the list of candidates to be teachers of physical education. His application was accepted and he was included in the relevant list of August 1992.

The appointment of teachers in public secondary education is made on the basis of the order in which their name appears on the list of candidates and in accordance with the Public Educational Service Law of 1969 (Law No. 10/1069) as amended by Law Nos. 180/87 and 245/87. The order of priority is first determined by the year in which candidates obtained their first university degree. Between candidates who obtained their first university degree in the same year, the order of priority is determined on the basis of criteria which give candidates specific points. Those who serve in the National Guard (the Army) of the Republic obtain one point. Only male citizens have an obligation to serve in the Army and to carry out military service of 24 months' duration.

The applicant alleged that the method followed for the determination of the order of candidates on the list contravenes the principle of equality and non-discrimination and is therefore unconstitutional and that male candidates, because of service in the National Guard, are subject to discrimination compared with female candidates, who do not serve in the National Guard.

This situation contravenes:

1. the constitutional principle that prohibits discrimination between the two sexes (Article 28 of the Constitution);
2. the principle of the same or similar treatment of all citizens under the same or similar conditions (Article 38 of the Law on the General Principles of Administrative Law of 1999 (Law No. 158(I)/99));
3. the principle against direct or indirect discrimination on the ground of sex as regards access to employment (Articles 2 and 8 of the Equal Treatment of Men and Women in Employment and Occupational Training Law No. 205(I)/2002 as amended); and
4. the relevant EU Directives (76/207/EEC and 2006/54/EC) and the case law of the ECJ on the matter of equality between the sexes.

The court found that the granting to male candidates of one point for their two-year obligatory service in the National Guard as compensation for the ensuing delay in obtaining their university degree and the resulting delay in applying for registration on the list of candidates causes inequality. On the other hand, their female colleagues do not face such delays as they are not obliged to serve in the National Guard. This obvious inequality unavoidably adversely affects also all the benefits that teachers are entitled to during their career, such as the duration of service for the purpose of promotion (the seniority criterion), remuneration benefits related to longer service, etc.

The Court concluded that the provisions create indirect discrimination against male candidates and violate the provisions of Article 28 of the Constitution as well as Article 38 of Law No. 158(I)/1999 and Articles 2 and 8 of Law No. 205(I)/2002 as amended. The Court declared the decision relating to the method used for the applicant's registration on the list of candidate teachers and his place on the list as null and void by virtue of Article 146.4(a) of the Constitution.

### **Equality bodies decisions/opinions**

#### ***Case relating to the employer's obligation to take measures for the safety of a pregnant employee***

In this case the Ombudsman's decision was based on the Protection of Maternity Law which was passed to harmonise the law with Directives 92/85/EEC and 2006/54/EC and on the Regulations issued under the Safety and Health at Work Law of 1966 to 2002 (Administrative Regulations No. 255/2002) and also on the Equal Treatment of Men and Women in Employment and Occupational Training Laws of 2002 to 2009. The Ombudsman also referred to ECJ 'Case C-421/92 *Gabriele Habermann-Beltermann and Arbeiterwohlfahrt, Bezirksverband Ndb./Opf. eV* [1994] ECR I-1657'.

On 1 August 2011 Mr CS, the husband of a pregnant employee at the Famagusta District Land Registry Office, which is located in Larnaca, filed a complaint with the Ombudsman that his wife, who was at an advanced stage of pregnancy and had previously experienced a miscarriage of which her supervisor was aware, had difficulty in breathing and a tendency to faint because of the high temperature and humidity prevailing at the workplace. At that time the Government had banned the use of air conditioning in Government offices because the electricity supplied by the Electricity Authority of Cyprus from the Vasiliko power station had been greatly reduced after the explosion of 98 containers with ammunition that had taken place at the nearby Mari Naval Base on 11 July 2011 and the destruction of a great part of the power station. Consequently, there were frequent power cuts.

The pregnant woman's supervisor informed her husband that, as a result of a circular which was circulated to all Government offices, the use of air conditioning was not allowed in order to save electricity and that he had no power to intervene in order to change the Government's decision.

The Director of the Land Registry Department informed the Ombudsman that they had to obey the Government's decision not to use air conditioning (the use of electric fans was allowed) and that if the use of air conditioning by the complainant was allowed, the probability that other officers, invoking health problems, would request similar treatment could not be excluded.

At that time the Meteorological Service informed the Ombudsman that the temperature and humidity in Larnaca were very high and could endanger the health and safety of the pregnant woman and the foetus and that the use of an electric fan was not satisfactory.

The Ombudsman stated in her report that the use of air conditioning should continue as long as the climatic conditions were such that its use was necessary, taking into consideration the state of the complainant and that the omission on the part of the employer to take measures for the protection of the pregnant employee constituted discrimination on the ground of sex. The employer had an obligation to take any necessary measures and effect any necessary changes in the workplace if there were reasons to justify such measures, and the

presence of factors which endangered the health and safety of a pregnant employee and the foetus justified the taking of such measures.

A few days after the filing of the complaint, the use of air conditioning was allowed at the Famagusta District Land Registry Office.

The reasons given for the initial rejection of the employee's claim to use air conditioning, namely that the Government's circular did not permit it, and the assertion that if her claim was accepted other employees would request the same treatment, were not compatible with the provisions of the above-mentioned laws. Pregnant women could not be considered to be in the same position as women who were not pregnant or as their male colleagues.

Therefore, the Ombudsman concluded, pregnant women should be treated in accordance with the needs and circumstances of each case for the purpose of ensuring their protection.

## **CZECH REPUBLIC – Kristina Koldinská**

### **Legislative developments**

#### ***Recent proposals to change laws with consequences for equal treatment for men and women***

Recently, there were two proposals with consequences for gender equality – one negative, one positive. In the first case, the Ministry of Labour and Social Affairs presented a proposal to amend the Employment Act in order to make unemployment allowance more effective. For this purpose, it proposed that unemployment allowance should be provided only to persons who work for at least 20 hours per month in work of public benefit. It is, however, not clear, how this condition could be met by parents of young children, if they, being unemployed, are not entitled to place their child in a public kindergarten.<sup>33</sup>

Another proposal has been made recently by a member of Parliament in order not to discourage students from having children. This proposal could be included in a newly prepared bill on universities. Provision could be made so that a student who becomes a mother during her regular studies and whose study period is prolonged due to motherhood, should not be obliged to pay for prolonged studies, as other students are, if the regular time of studying is exceeded by one year. This proposal is positive as it stands; however it obviously only affects mothers, not fathers, which seems to be somewhat out of line with EU law.

Both proposals are at a very early stage and can be subject to many changes.

### **Case law of national courts**

#### ***Czech police disinclined to act if sexual abuse claimed***

One of the most prominent Czech doctors has finally been charged by the police and currently faces a tenth rape accusation. The Czech police have long known of allegations that a Czech doctor – the politically well-connected director and co-owner of one of Prague's private hospitals – had threatened, drugged, physically and sexually abused female assistants, but the police had failed to bring charges against him.

He was accused in 2007 for physically assaulting a female assistant. Over the past four years several other women have gone to the police with claims of abuse, but no charges were filed against this person who, in his capacity as Lion's Club president, regularly mingled with the Czech political and business elite, and who allegedly threatened to use his connections against the women if they spoke out.

This account shows very well how weak a claim still is which has been made by a woman that she has been raped or sexually harassed, especially if the man accused is 'politically strong'. In fact, there are several other cases where women went to the police

<sup>33</sup> A reaction of a very prestigious NGO, – called Gender Studies –, to this proposal can be found at <http://www.feminismus.cz/fulltext.shtml?x=2291614> accessed 3 October 2011.

claiming similar occurrences, but they have not been listened to with adequate attention, and often not much has been done about the claims.

## **DENMARK – Ruth Nielsen**

### **Policy developments**

On 15 September 2011, there was a general election in Denmark. On 3 October 2011, a new government was formed by the Social-Democrats, the Socialist People's party and the Radical party (a centre party). The new Danish Prime Minister is Helle Thorning Schmidt from the Social-Democrats. She is the first ever female Prime Minister in Denmark. The Social-Democratic party appointed five female Ministers and six male, the Socialist People's party appointed three female Ministers and three male Ministers, whereas the Radical party appointed one female Minister (the leader of the party) and five male Ministers.

## **ESTONIA – Anneli Albi**

### **Policy developments**

In the previous law review, an overview of the study on the gender pay gap in Estonia was presented. The study included policy recommendations for reducing the gender pay gap.

On 20 September 2011, Parliament adopted a decision to make a proposal to the Government of the Republic to initiate a strategy to reduce the gender pay gap in Estonia.<sup>34</sup>

The proposal was initiated by the Social Democratic Party. It is pointed out in the explanatory memorandum to the decision of Parliament that the gender pay gap in Estonia is the highest in the European Union, having stood at 31.4 % in 2008. It was concluded that, in order to reduce the gender pay gap, the Government is to initiate an action plan with concrete measures to be taken, such as state supervision, analysis of the legislation, awareness-raising and promotion of collective bargaining.<sup>35</sup>

Further, on 29 September 2011 an association of female members of Parliament was established. All 20 female members of Parliament, which totals 101 members, belong to this body.

### **Case law of national courts**

On 7 June 2011, the Supreme Court *en banc* declared Article 57(6) of the Health Insurance Act in part unconstitutional and invalid.<sup>36</sup>

In that decision, the Supreme Court clarified the conditions for applying Article 12(1) of the Constitution. Article 12(1) of the Estonian Constitution provides the following: 'Everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds.' The Supreme Court has applied different tests for this provision on earlier occasions. In the decision of 7 June 2011, the Court pointed out that the right not to be discriminated against can be restricted for any legitimate purpose that is compatible with the Constitution; i.e. it is not necessary to apply the stricter test. However, the Court noted that if the difference in treatment takes place on grounds that the person cannot change, then more weighty reasons usually have to be found to limit this constitutional right.<sup>37</sup>

<sup>34</sup> Published in the State Gazette, RT III 26 September 2011, p. 1.

<sup>35</sup> The draft Act No. 44 OE. Available at (in Estonian): [www.riigikogu.ee](http://www.riigikogu.ee) accessed 21 September 2011.

<sup>36</sup> Decision of the Supreme Court, No. 3-4-1-12-16. Available at (in Estonian): [www.nc.ee](http://www.nc.ee) accessed 9 October 2011.

<sup>37</sup> Ibid., pp. 30-31.



Article 57(6) of the Health Insurance Act limited the right to sickness benefit of persons who are 65 years of age or older to 90 days per year, whereas younger persons had the right to sickness benefit for up to 250 days per year. The Supreme Court additionally declared unconstitutional a clause establishing a limit pursuant to which persons over 65 years of age receive sickness benefit for up to 60 consecutive days only, whereas younger persons have the right to sickness benefit for up to 182 consecutive days.

## FINLAND – Kevät Nousiainen

### Miscellaneous

#### *Finland's seventh periodical report to CEDAW*

The Finnish Foreign Ministry has prepared the seventh periodical report of Finland to the Committee on the Elimination of Discrimination Against Women (CEDAW Committee). The Finnish Draft Report (21 October 2011) has been prepared by the Ministry, and was presented for NGO and expert comments on 4 November. The draft report has been prepared following the new treaty-specific reporting guidelines for the Convention on the Elimination of All Forms of Discrimination against Women, and with special care due to the fact that the Concluding Observations of the CEDAW Committee on the previous periodical country report (combined fifth and sixth reports)<sup>38</sup> in June 2008 expressed concerns, presented recommendations and also required Finland to provide information on certain issues, such as measures to combat violence against women. A special report on violence against women was submitted accordingly in 2010.<sup>39</sup> Finland was recommended to introduce a comprehensive programme to combat violence against women, monitor the use of conciliation procedures in cases of domestic violence, provide adequate services for victims and take measures to penalise sexual harassment. At least partly as a consequence of the special reporting procedure, a national programme on violence against women was also launched in 2010 – but without an increase of resources earmarked for the purpose. Finland will also concentrate on certain issues in the next periodical report.

All Finnish Ministries were asked to provide information for the seventh periodic country report on measures that the concerns and recommendations of the CEDAW Committee had presented. Among these was the Committee's concern that discrimination against women, including multiple discrimination. This concept should be duly considered during the ongoing reform of equality legislation, and the equality bodies should be given adequate resources. The draft periodical report refers to the present state of the reform of equality legislation. There is a Committee proposal<sup>40</sup> for the amendment of the Non-discrimination Act (Act 21/2004), which covers other grounds of discrimination. Sex discrimination is presently prohibited under the Act on Equality between Women and Men (Act 609/1986). The proposed amendment contains a provision on multiple discrimination, but would not change the two-track model of keeping provisions against discrimination on the grounds of sex under a separate act, while unifying the two separate boards to monitor the acts. The Equality Ombudsman and the Ombudsman for Minorities would also continue as separate equality bodies. At hearings for the previous periodical report, Finnish NGOs expressed their concern at the loss of resources for gender equality, if the two pieces of legislation monitored by two separate sets of bodies were abolished.<sup>41</sup> The current Finnish Government has

<sup>38</sup> CEDAW/C/FIN/CO/6 41.

<sup>39</sup> CEDAW/C/FIN/CO/6/Add 1.

<sup>40</sup> *Ehdotus uudeksi yhdenvertaisuuslaiksi ja siihen liittyväksi lainsäädännöksi. Yhdenvertaisuustoimikunnan mietintö*, Ministry of Justice, 2009:4 (Proposal for a new Equal Treatment Act).

<sup>41</sup> *Ehdotus uudeksi yhdenvertaisuuslaiksi ja siihen liittyväksi lainsäädännöksi. Lausuntotiivistelmä yhdenvertaisuustoimikunnan mietinnöstä*, Ministry of Justice 46/2010 (Summary of the opinions on the proposal for a new Equal Treatment Act).

promised to continue the amendment which was prepared under the previous one,<sup>42</sup> but no date has been given for a Government Bill to be presented to the Parliament.

The CEDAW Committee recommended that gender mainstreaming should be coordinated at a high level to guarantee effective implementation. The seventh draft country report mentions equality working groups in most Ministries, and refers to a decision to strengthen the resources of authorities and women's organisations in this respect. Women's organisations still consider the resources to be inadequate. Little information is given on the exact funding earmarked for gender mainstreaming, except for the EU funds that were used for mainstreaming in education in 2008-2009.

Finland was asked to present statistics and other information on the representation of women, including immigrant women, in political and public activities, science and foreign policy representation. The draft seventh report states that the proportion of women in the 2011 Parliament elections rose to the highest ever, namely 43 %, and that the number of women in higher State offices had increased, but that there was no rise elsewhere in public life. In academia, the disproportionately low number of women professors compared with the number of women with doctoral degrees has not changed. No figures are presented on the number of immigrant women in these positions, but it is definitely not a high figure.

The present treaty-specific guidelines for the CEDAW Convention require that reporting focuses on the concerns and recommendations resulting from the previous report, and explains non-implementation and difficulties concerning them. The guidelines also require that the periodic reports are structured in an analytic and result-orientated manner, specifying the steps and measures undertaken towards implementation. The Finnish draft seventh country report is more structured than previous reports. The information provided in the draft report is still abundant (containing about 60 pages), and it remains difficult to pinpoint which results may arise from measures undertaken by the Government in order to fulfil the obligations under the CEDAW Convention. The difficulty partly follows from the fact that obligations other than those based on the CEDAW Convention (such as obligations based on EU law) also influence national politics. In part the difficulty reflects the abstract, unspecified formulation of gender equality policies.

## FRANCE – Sylvaine Laulom

### Legislative developments

#### *New sanctions for collective bargaining on equality*

Since 2001, at company level, the employer has had a duty to negotiate with trade unions in order to define the objectives concerning equality between men and women in the enterprise and to design the measures to be implemented in order to attain these objectives. If an agreement is reached, the obligation to negotiate only applies every three years. To improve negotiations, the Law adopted on 23 March 2006 specifies that the pay gap must disappear before 31 December 2010. The employer must also give information on equality to workers' representatives. Employers in enterprises with at least 50 employees must present to the works council, each year, a written report on the comparative situation of men and women in the enterprise. However, despite this legal framework, few collective agreements have been concluded and the written report is very often of poor quality. The general reform of pensions, aiming to lower their financial burden, was adopted in the autumn of 2010 (Law No. 2010-1330 of 9 November 2010 on pensions (*'portant réforme des retraites'*)) and the law includes some provisions regarding gender equality, aimed at improving the content of collective agreements and of the written report and it provides that the report must now contain an 'action plan' to ensure occupational equality between women and men when there is no collective agreement. A decree has recently been adopted (7 July 2011) to clarify the content

<sup>42</sup> Programme of the Finnish Government, 22 June 2011 (Prime Minister Jyrki Katainen's Government), para. 4.

of the collective agreement and of the action plan for equality.<sup>43</sup> The decree provides that the action plan must be based on clear, precise and operational criteria, it must indicate the measures adopted the year before and it must define the objectives for the year to come and the necessary action to attain these objectives. If the objectives are not reached, or the measures not taken, the action plan must explain the reasons for this. In enterprises employing fewer than 300 employees, the action plan must, at the least, contain measures in two of the following fields: recruitment, training, qualification, promotion, working conditions, pay and the balance between professional and private life. In larger enterprises, the action plan should contain measures in at least three fields.

The most important measure of the pension law is that sanctions are now prescribed for when enterprises employing at least 50 employees have not concluded any agreement on sex equality or have not produced an 'action plan'. If a labour inspector records that there is no collective agreement or action plan in an enterprise, he or she will require the employer to comply with the law. The employer will have six months to fulfil his or her obligation. After this period a sanction can be imposed. The sanction provided by the law is a maximum fine of 1 % of the wages due to the workers during the period when an agreement should have applied. This sanction is not automatic and will depend on the effort made by the employer to adopt an action plan.

It is not the first time that the legislature has tried to improve collective bargaining on gender and to make the obligations of the employer to adopt gender measures more effective. This time again, it is doubtful that this decree will be enough to improve the situation. In particular, the system of sanctions and the procedure is very complicated and the sanction will not be automatic.

## **Case law of national courts**

### ***A discrimination without a comparator***

In a decision of November 2009, the *Cour de cassation* admitted a discrimination without a comparator (Cass. Soc. 10 November 2009, No. 07-42849). The *Cour de cassation* confirms this in a new decision of June 2011 (Cass. Soc. 29 June 2011, No. 10-14067). The case concerns a discrimination based on trade union activity but the reasoning could be extended to other sorts of discrimination including sex discrimination. In this case, the worker established that the employer left him without any work to do for long periods of time. For the Court of Appeal the discrimination was not established as the worker did not show any element of comparison with other workers. The *Cour de cassation* states, to the contrary, that a comparison with other workers is not necessary to establish a discrimination. Here, the fact that the employer did not give the worker any work to do for long periods was enough to presume the existence of a discrimination.

## **GERMANY – Ulrike Lembke**

## **Policy developments**

### ***Gender quotas on company boards***

The issue of gender quotas for supervisory and executive boards is constantly being debated in Germany. The concept of 'flexiquota', presented by the Minister for Family, Senior Citizens, Women and Youth,<sup>44</sup> is favoured by the Chancellor. Accordingly, each of the DAX-30 companies sets itself a target women's quota between 11 % and 30 %; these targets were published in October. Contrary to general expectations, the target quotas did not apply to supervisory and executive boards. The German Women Lawyers Association (*Deutscher*

<sup>43</sup> Decree No. 2011-822, 7 July 2011, OJ 9 July, p. 11930.

<sup>44</sup> Minister for Family, Senior Citizens, Women and Youth, [http://www.bmfsfj.de/BMFSFJ/gleichstellung\\_did=172756.html](http://www.bmfsfj.de/BMFSFJ/gleichstellung_did=172756.html), accessed 3 October 2011.

*Juristinnenbund*) and other influential institutions continue their campaigns for an increasing number of women on the boards of companies, because they consider the ‘flexiquota’ to be ineffective.<sup>45</sup> The parliamentary opposition tried to initiate strict quota legislation requesting a 40 % minimum quota for both sexes on supervisory and executive boards.<sup>46</sup> Neither the ‘flexiquota’ nor other concepts have been laid down in legislation so far.

### ***Child care benefits***

The German law on parental leave grants a parental allowance to parents of no less than EUR 300 per month for up to 14 months. Furthermore, an agreement of the coalition of the parties in power generally provides for child care benefits (*Betreuungsgeld*) for parents who want to care in person for their children as long as they are less than three years old (instead of sending them to kindergarten). The coalition assumes that child care benefits guarantee the free choice of parents as to how to raise their toddlers and the Government has a statutory obligation to initiate legislation accordingly. But politicians, lawyers and other experts are questioning the compliance of child care benefits with the constitution, gender equality and the welfare of the child.<sup>47</sup> It is feared that child care benefits might exclude children from kindergarten’s pre-school education, because parents might choose, by claiming the benefits, to improve their financial situation. (This is a very dangerous argument because poor families might well become subject to an unjustified general suspicion.) Moreover, child care benefits are broadly seen as a bonus for women who do not return to work – and such a bonus would be incompatible with the constitution. Most recently, the Minister for Family, Senior Citizens, Women and Youth declared that the state can only afford child care benefits amounting to EUR 150 per month for up to 12 months. It is doubtful whether this will end the debate about their ineffectiveness and unconstitutionality.

## **Legislative developments**

### ***Federal Women’s Emergency Hotline***

In July 2011, the Federal Government adopted a draft law on the establishment of a nationwide Emergency Hotline ‘Violence against Women’.<sup>48</sup> The hotline will provide further information about specialised support facilities for women who are victims of sexual or domestic violence, forced marriage, female genital mutilation or trafficking in women. On request, the counselling will be multilingual and anonymous. The hotline will start working by the end of next year.

### ***Combating forced marriages***

On 1 July 2011 the law on combating forced marriages and protecting their victims came into force.<sup>49</sup> According to an amendment of the Penal Code, forced marriage is considered to be a crime and will be punished with imprisonment for up to five years. Amendments to the Residence Act (*Aufenthaltsgesetz*) make legal re-entry easier for victims of a forced marriage

<sup>45</sup> For further information see: [http://www.djb.de/Projekt\\_HV/Das%20Projekt/Women%20Shareholders%20Demand%20Gender%20Equality/](http://www.djb.de/Projekt_HV/Das%20Projekt/Women%20Shareholders%20Demand%20Gender%20Equality/), accessed 3 October 2011.

<sup>46</sup> For example: a draft bill on a gender-adequate composition of supervisory boards presented by the Greens parliamentary group of 13 October 2010, <http://dip21.bundestag.de/dip21/btd/17/032/1703296.pdf>, accessed 3 October 2011, and the Social Democratic Party’s request for a legal provision on gender quotas for executive and supervisory boards of 9 February 2011, <http://dip21.bundestag.de/dip21/btd/17/046/1704683.pdf>, accessed 3 October 2011.

<sup>47</sup> Most of the arguments were presented in the hearing before the Federal Parliament on 4 July 2011, <http://www.bundestag.de/bundestag/ausschuesse17/a13/anhoerungen/Betreuungsgeld/index.html>, accessed 3 October 2011.

<sup>48</sup> Draft bill available under <http://www.bundesrat.de/SharedDocs/Drucksachen/2011/0401-500/455-11.html>, accessed 3 October 2011.

<sup>49</sup> Law on Combating Forced Marriage and on Better Protection for Victims of Forced Marriage (*Gesetz zur Bekämpfung der Zwangsheirat und zum besseren Schutz der Opfer von Zwangsheirat*) of 23 June 2011, Official Journal (*Bundesgesetzblatt, BGBl*), part I p. 1266, [http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger\\_BGBl&start=/\\*\[@attr\\_id=%27bgbl111s1266.pdf%27\]](http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBl&start=/*[@attr_id=%27bgbl111s1266.pdf%27]), accessed 3 October 2011.

which took place abroad, but the German legislature wanted to combat fictitious marriages as well. Family reunification is currently one of the few legal channels of immigration to Germany. To eliminate abuses, the state of marital cohabitation has to have lawfully existed in Germany for a certain period of time before the immigrating foreign spouse can acquire an independent right of residence. And this requisite duration of the lawful state of marital cohabitation has been extended from two years to three years. Normally, victims of forced marriages are reluctant to seek help, especially when they fear expulsion and deportation. Therefore, one main consequence of the amendment to the Residence Act may be that victims of forced marriages are forced to stay in an abusive relationship for a further year.

### **Reconciliation of work and role as a carer**

On 6 June 2011, the Federal Government adopted a draft law on the better reconciliation of work and a role as a carer<sup>50</sup> which has been severely criticised by the German Women Lawyers Association.<sup>51</sup> The principal criticism is the absence of a legal entitlement to ‘carers leave’. Furthermore, the draft law is bureaucratic, (mostly female) care-giving relatives are burdened with the risks of the new arrangements and men are not encouraged to take ‘carers leave’. A future entitlement to ‘carers leave’ should not be restricted to immediate family members. The social protection for periods of ‘carers leave’ should be looked at in a more flexible and fairer way, and carers must be granted the right to return to their former working position. The legislative impact assessment must give explicit consideration to the questions of gender equality.

### **Case law of national courts**

#### ***Federal Constitutional Court (Bundesverfassungsgericht), decision 1 BvL 15/11 of 19 August 2011***

The Federal Constitutional Court rejected an application for the judicial review of Section 4 of the Federal Law on Parental Allowance and Parental Leave (*Bundeselterngeld- und Elternzeitgesetz*).<sup>52</sup> The law on parental leave provides for a parental allowance to parents for up to 14 months, provided that at least two months are taken by the other parent, otherwise the parental allowance is limited to 12 months. One main purpose of the law was to encourage fathers to take parental leave. The referring lower court considered the requirement of caring by the other parent, without any exceptional provision, to be in contravention of the constitution by violating the freedom of choice concerning the division of work and parental care. The Federal Constitutional Court very briefly recalled the importance of gender equality as requested by Article 3 of the German constitution, the necessity to overcome existing gender role allocations, and legislative discretion, including incentives for more partnership-based divisions of work and parental care.

#### ***Federal Labour Court (Bundesarbeitsgericht), judgment 9 AZR 584/09 of 15 February 2011***

The Federal Labour Court had to decide on a collective agreement providing early retirement pensions for a transitional period.<sup>53</sup> These pensions were granted for the period between the actual retirement from working life and the date of the right to claim the statutory pension. Due to previous legislation, women born between 1940 and 1951 reach the statutory pension age three years earlier than men. The Federal Labour Court considered the dependence of the collective agreement provisions on the (gender specific) statutory pension age to be unlawful indirect discrimination.

<sup>50</sup> Draft bill available under [http://www.bundestag.de/bundestag/ausschuesse17/a13/anhoerungen/Familienpflegezeit/Gesetzentwurf\\_und\\_Antraege/1\\_17\\_6000.pdf](http://www.bundestag.de/bundestag/ausschuesse17/a13/anhoerungen/Familienpflegezeit/Gesetzentwurf_und_Antraege/1_17_6000.pdf), accessed 3 October 2011.

<sup>51</sup> For further information see: <http://www.djb.de/Kom/K4/st11-12/>, accessed 3 October 2011.

<sup>52</sup> [http://www.bundesverfassungsgericht.de/entscheidungen/lk20110819\\_1bv1001511.html](http://www.bundesverfassungsgericht.de/entscheidungen/lk20110819_1bv1001511.html), accessed 3 October 2011.

<sup>53</sup> <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2011&nr=14961&pos=0&anz=14>, accessed 3 October 2011.

***Federal Social Court (Bundessozialgericht), judgment B 10 EG 17/09 R of 17 February 2011***

This decision concerned the regulations for calculating the amount of parental allowance when the entitled parent had received strike benefits within the twelve months before the birth of the child.<sup>54</sup> The law on parental leave provides for a parental allowance to parents for up to 14 months, provided that at least two months are taken by the other parent. The amount is calculated on the average income of that parent during the twelve months before the birth of the child. The Federal Social Court decided that strike benefits are not income within the meaning of the law on parental leave. When trade unions go on strike, their members are no longer paid by their employers but receive strike benefits as a consequence of their union membership. Due to the decision of the Federal Social Court 'income' only covers the regular salary paid by their employers, so the 'income' of a trade union member is little or nothing in the event of a strike. But the law on parental leave defines 'income' as the basis for calculating the amount of parental allowance. Consequently, when trade union members are involved in a strike and receive strike benefits (instead of their regular salary) within twelve months before they become parents, they are only entitled to a significantly reduced parental allowance (compared with an allowance calculated on the basis of their regular salary). The Federal Social Court made the assertion that this judgment would not violate constitutional provisions. On the contrary: the obvious discrimination based on union membership is as unconstitutional as indirect discrimination based on gender.

**Equality body decisions/opinion**

There were no decisions issued during this period.

**Miscellaneous**

German women's rights organisations submitted an alternative report in response to the Written Information of Germany on the steps undertaken to implement the recommendations of the CEDAW Committee of 12 February 2009.<sup>55</sup> The main issues of the alternative report are the reduction and elimination of pay and income differences between women and men, the dialogue with non-governmental organisations for intersexual and transsexual people, and the lack of efforts to spread human rights education. In the alternative report, the remaining gender pay gap in Germany is regarded as a key indicator of the absence of a comprehensive and effective approach to end this discrimination by searching for appropriate measures including temporary special measures and the state obligation to end discrimination by businesses. The continual debate on statutory gender quotas in Germany is just part of a larger problem.

**GREECE – Sophia Koukoulis-Spiliotopoulos**

**Policy developments**

***The topical character of the issue of the burden of proof***

The issue of the burden of proof in discrimination cases is currently very topical. The traditional rules contained in the Code of Civil Procedure (Article 216 and 338) and the Code of Administrative Procedure (Articles 73 and 145) assign the burden of proof to the claimant: the claimant has to invoke and prove all the facts of his/her case. This deters people from lodging a complaint for gender discrimination, alongside other factors such as, in employment

<sup>54</sup> <http://juris.bundessozialgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bsg&Art=ps&Datum=2011&Sort=3&anz=8&pos=0&nr=11981&linked=urt>, accessed 3 October 2011.

<sup>55</sup> The alternative report is available under <http://www.djb.de/Kom/K5/st11-10/> (in English), accessed 3 October 2011.



cases, the fear of victimisation or of having a ‘bad name’ in the labour market. Such fears, which potential witnesses share, increase in times of economic crisis, alongside the deregulation of employment relationships and soaring unemployment. Analogous problems arise in the area of vocational training, as well as in the area of access to goods and services – in the latter area there are problems in particular when the provider is in a strong position vis-à-vis the aggrieved person (e.g. a doctor or a public official vis-à-vis a person seeking his/her services).

On 2 June 2011, the General Secretariat for Gender Equality (GSGE), a governmental agency under the Ministry of the Interior, Decentralization and Electronic Governance, which is competent to plan, implement and monitor the implementation of policies on equality between women and men in all sectors,<sup>56</sup> organised a conference on ‘Sexual harassment in Greece: legal framework, extent, consequences’. The speakers included the Deputy Ombudsman dealing with gender equality and independent gender equality experts.<sup>57</sup> The Deputy Ombudsman stressed that the investigation of complaints of sexual harassment is being seriously impeded by the inability of the complainants to adduce evidence and deplored having to drop cases on this ground. A legal expert recalled the EU rule on the transfer of the burden of proof and deplored the non-application of this rule by the Greek courts and other authorities, which is due, to a great extent, to its not having been included in the procedural codes. She gave examples of cases which would succeed if that rule were applied. She also mentioned judgments which relied on circumstantial evidence as examples to be followed. The same subject came up at a conference on ‘30 years: the role of the EU in gender equality in Greece’, organised by the GSGE on 11 November 2011.<sup>58</sup> The audience in both conferences were eager to discuss ways to overcome the problems of the burden of proof and the lack of evidence, which account to a great extent for the very low levels of gender equality litigation, in spite of widespread gender discrimination in practice. The reference to judgments relying on circumstantial evidence made a strong impression and was mentioned in newspaper reports on the conferences.<sup>59</sup>

### ***Why the EU rule on the burden of proof is not known in Greece***

The discussions at the above conferences confirmed both the crucial importance and the general non-awareness of the EU rule on the burden of proof. This rule, which requires the transfer of the burden of proof to the defendant once the claimant establishes a presumption of discrimination, was first included in Decree 105/2003<sup>60</sup> transposing Directive 97/80/EC (the Burden of Proof Directive).<sup>61</sup> In its opinion on the legality of the draft decree, the Council of State (the Supreme Administrative Court) had recommended that, for reasons of legal certainty, this rule should be incorporated in the Code of Civil Procedure and the Code of Administrative Procedure, but this was not done.<sup>62</sup> This rule was subsequently included in Act 3488/2006<sup>63</sup> transposing Directive 2002/73/EC,<sup>64</sup> and then in Act 3896/2010<sup>65</sup> transposing Directive 2006/54/EC (the Recast Directive).<sup>66</sup> Act 3769/2009 transposing

<sup>56</sup> <http://www.isotita.gr/en/index.php>, accessed on 5 December 2011.

<sup>57</sup> See the programme on [http://www.isotita.gr/var/uploads/NEWS-EVENTS/%CE%95%CE%9A%CE%94%CE%97%CE%9B%CE%A9%CE%A3%CE%95%CE%99%CE%A3/programme\\_sexual%20harassment%20debate\\_2-6-2011.pdf](http://www.isotita.gr/var/uploads/NEWS-EVENTS/%CE%95%CE%9A%CE%94%CE%97%CE%9B%CE%A9%CE%A3%CE%95%CE%99%CE%A3/programme_sexual%20harassment%20debate_2-6-2011.pdf), accessed 3 December 2011, and the press release on [http://www.isotita.gr/var/uploads/PRESS%20\(APO%20SEP%202010\)/DT\\_2%20IOUNIOU%202011\\_sexual%20harassmentdebate.pdf](http://www.isotita.gr/var/uploads/PRESS%20(APO%20SEP%202010)/DT_2%20IOUNIOU%202011_sexual%20harassmentdebate.pdf), accessed 3 December 2011.

<sup>58</sup> See the programme on <http://www.isotita.gr/index.php/news/1241>, accessed 4 December 2011. The proceedings of this conference will be published on this website.

<sup>59</sup> See e.g. the widely-read daily newspaper ‘H Kathimerini’ 3 June 2011: <http://www.kathimerini.gr>, accessed 2 December 2011.

<sup>60</sup> OJ A 96, 23.4.2003.

<sup>61</sup> Directive 97/80/EC, OJ L 14, 20.1.1998, p. 6.

<sup>62</sup> Council of State Opinion 348/2003.

<sup>63</sup> OJ A 191, 11.09.2006.

<sup>64</sup> OJ L 269, 5.10.2002, p. 15.

<sup>65</sup> OJ A 207, 8.12.2010.

<sup>66</sup> OJ L 204, 26.7.2006, p. 23.

Directive 2004/113/EC (the Services Directive)<sup>67</sup> contains the same rule for gender discrimination regarding access to and the supply of goods and services. This rule applies before all courts (except for the criminal courts) and all other authorities which are competent to deal with cases of gender discrimination within the respective scope of these Acts. However, it is still the case that, outside the above, this rule is not implemented in Greek equality legislation with the result that it is mostly unknown to lawyers and judges and is not applied. The Greek National Commission for Human Rights (NCHR) constantly deplores this situation,<sup>68</sup> to which the Greek Ombudsman has also drawn attention.<sup>69</sup> The only known case where the issue of the burden of proof was addressed by a Greek court was an employment case, which led to a preliminary reference,<sup>70</sup> but this does not seem to have encouraged the use of the rule in other cases.

### **Case law of national courts**

Without yet modifying their approach to the burden of proof, the Greek courts tend in some cases to facilitate proof, e.g. by relying on circumstantial evidence (evidence by persons who have suffered similar treatment to the claimant by the same person). This very welcome practice does not, however, help at the first stage of the trial, when the claimant has, according to the traditional rules, the burden to invoke all the facts of his/her case. This is the first problem to be faced for the claim to be held admissible, and it is a difficult one to overcome, as crucial facts are often only known to the employer.

Cases of sexual harassment are particularly difficult to prove, as there are seldom any eyewitnesses. We will give one example of the case law approach to the burden of proof and the means of adducing evidence in one of the very few cases brought before the Greek courts.

### ***The typical approach to the burden of proof***

Most sexual harassment cases are brought to court after the dismissal of the harassed person. In such cases, under the traditional rules, the claimant has to invoke and prove both the facts which constitute sexual harassment and the facts which show that the dismissal was due to the rejection of the harassing conduct. A typical example of the approach of the Greek courts follows.

*The sexual harassment of a female worker in the private sector* (SCC judgment 84/2011).

The claimant had been hired on a contract of indefinite duration by a wine-producing firm. The personnel director behaved towards her in an excessively 'friendly' way. He continuously complimented her on her appearance; he visited her office without any reason connected to her work. His continuous presence and his compliments embarrassed her, as they surpassed the limits of politeness or goodwill. Without going so far as to insult her dignity, this conduct created a feeling of insecurity and stress as far as she was concerned, as she had to be continuously on the defensive, while also having to face gossip by her colleagues. She informed her husband of this situation, but they both decided not to complain to the firm's management. However, she made it clear to her superior, but in a polite way, that she was only interested in her family and her work. After this, his behaviour changed; he started to create unjustified problems regarding her work and behaved towards her in a hostile and insulting way. It was obvious that this change of conduct was due to her having rejected his advances. The claimant complained to the chair of the firm's board who addressed recommendations to her superior. This infuriated him and when the management of the firm changed, he was able to arrange the claimant's dismissal.

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<sup>67</sup> OJ L 373, 21.12.2004, p. 37.

<sup>68</sup> See NCHR *Comments on the bill transposing Directive 2006/54* and NCHR *Letter to the Minister of Labour and Social Security* dated 31 October 2010: <http://www.nchr.gr> accessed on 2 December 2011. The NCHR, an independent body established according to the UN 'Paris Principles' (UN General Assembly, 85th Plenary Assembly, 20 December 1993, A/RES/48/134), gives non-binding opinions to the Government on matters related to human rights. See also *European Gender Equality Law Review* No. 1/2008, 'Greece'.

<sup>69</sup> Greek Ombudsman, *The Ombudsman's experience in the matter of sexual harassment (2006-2010)* December 2010: <http://www.synigoros.gr/diakriseis/index.htm>, accessed on 2 December 2011.

<sup>70</sup> Case C-196/02 *Nikoloudi v Organismos Tilepikoinonion Ellados (OTE)* [2005] ECR I-1789.



The claimant sued the firm before the Athens First Instance Court (AFIC) seeking the recognition of the nullity of her dismissal, because it was due to hostility by the firm's agents, for whose conduct the firm is responsible under Greek civil law. She alleged that such a dismissal constituted an abuse of rights, in violation of Article 281 of the Civil Code which prohibits the abuse of rights. The case succeeded at first instance, but then failed on appeal and finally succeeded at the Supreme Civil Court (SCC). The SCC held that for a dismissal to be considered an abuse of rights, it must be due to specific reasons which must be clearly and fully invoked and proven by the claimant. It is not sufficient that the grounds of the dismissal invoked by the employer are untrue or that no obvious grounds exist. In the case at hand, all the facts of the case were properly invoked and proven by the claimant. Thus, the claim was admissible and well founded. Consequently, the SCC referred the case back to the Athens Court of Appeal to formally declare the nullity of the dismissal. The SCC also held that it was not necessary for the claimant to invoke specifically sexual harassment. It was sufficient for her to invoke and prove facts which made it clear that her dismissal was due to the hostility of her superior. There is no reference to gender discrimination or to the EU rule on the burden of proof which was already transposed into Greek law at the time the case started and even at the time that the facts of the case occurred. It is not clear how the claimant proved the facts underlying her allegations, but had she not fully proven them, then her case would have definitely failed.<sup>71</sup>

## HUNGARY – Csilla Kollonay Lehoczky

### Policy developments

In the reviewed period (between April and October 2011) Hungary continued its struggle with multiple economic difficulties: unemployment, negative balance of payments, indebtedness of the population, growing economic polarisation. The Conservative governing party, the Conservative middle-right Fidesz (Hungarian Civic Union), in alliance with the small Christian-Democratic Party, continued its intensive legislative activity in the fields of social and economic policy relying on its safe two-thirds majority. The main thrust of this legislative activity has been in the area of benefits and social services and in the economy, in order both to save on public spending costs (e.g. by reorganising disability benefits and applying coercive measures to drive the long-term unemployed to work on public projects) and also to increase the budget income, albeit the personal single rate of income tax (16 %) has not been raised.

### Legislative developments

#### *Cutting the employment and social security rights of workers during pregnancy and post-natal period*

An amendment to the Labour Code (LC) has excluded pregnant women, in the case of pregnancy-related inability to work, from the opportunity to take (a maximum of three weeks) sick leave paid by the employer at 70 % of the salary.<sup>72</sup> They can now only receive the lower rate of social insurance sickness benefit which had already been reduced to 60 % of the salary, and, for a period of eventual hospitalisation or in the case of a shorter than required preliminary insurance period, such women can only receive 50 % of their salary. In addition,

<sup>71</sup> On the problems related to the burden of proof before Greek courts see S. Koukoulis-Spiliotopoulos 'Harcèlement en raison du sexe et harcèlement sexuel' in AFEM & Ligue Hellénique pour les Droits des Femmes *Égalité des genres et combat contre le harcèlement sexuel: les politiques de l'Union européenne* pp. 119-148 Athènes/Bruxelles, A. N. Sakkoulas & Bruylant 2009. Mental Health Europe *Violence against women at work...Let's talk about it! The mental health effects of violence and harassment against women at work*, 2010: <http://www.mhe-sme.org> and <http://www.ekpse.gr>, accessed 20 August 2011

<sup>72</sup> LC Article 137(1), as amended from May, 2011.

the social insurance sickness payment has a cap, introducing a further discouraging factor for women earning above the national average.

Another amendment to the Labour Code<sup>73</sup> has halved the entitlement to annual leave during parental leave. In the past, employees were entitled to their annual leave for the period of maternity leave and for the first year of parental leave. Now this latter has been reduced to six months. The accumulated leave could formerly have been taken immediately upon return from parental leave or at any later time that the parent requested. Now the employer is only obliged to provide it within 183 days after the return from parental leave.<sup>74</sup> Another change is that this accumulated leave can now be 'paid off' by the employer whereas, in the past, payment in lieu of annual leave was only possible in the case of termination of employment.<sup>75</sup>

### ***Increase in job security for women in top managerial positions***

The Labour Code excludes top executives of companies (and those classified as such by the owner) from a number of provisions protecting regular employees. Among others, the employer may give them notice without declaring the reason for the termination. Since July 2011, however, the dismissal of a pregnant top executive has had to be justified in writing. (The prohibition of dismissal still does not cover top executives.)

This apparently pro-pregnancy amendment may have little positive impact on the position of those very few women who are covered by the provision, and is not likely to promote the opportunity of women to take up such positions. There has already been a precedent in case law that the termination of employment might be invalidated for discriminatory motives, even if the employer did not have to give the reasons (e.g. during a probationary period, in case of prolongation of a fixed-term contract or, in a very similar situation when, according to the law on civil servants, the dismissal did not have to be justified). In such situations, if there is an alleged discrimination the employer has to convince the Equal Treatment Authority (ETA) or the court of the good reasons for the termination. The reasons are particularly carefully scrutinised in the case of pregnant women (including employees receiving IVF treatment) or workers taking care of small children.<sup>76</sup> Therefore, the discriminatory termination might be rectified without such a legal provision, while the substantive reasons for the dismissal of a CEO may have, indeed, been reasons that might be difficult to clearly and formally reveal or to make public. (This lack of job security is compensated for by the generally long period of notice and high severance pay.) Thus, the no or minimal gain brought about by the new provision might prevent rather than promote the opportunity of women to get into such top executive positions.

### **Case law of national courts**

Discrimination cases reaching the courts and the ETA continue to deal predominantly with discrimination against the Roma and, in the second place, the disabled. Political and trade union activities are also covered. Sex or gender discrimination cases continue to be rather scarce. However, there has been a slight improvement in the reviewed period in that there have been four cases relevant to gender discrimination published on the Hungarian court website<sup>77</sup> and each of them shows a refinement of the case law.

### ***Wage discrimination and clarification of the burden of proof***

In a simple wage discrimination case, the ETA carried out a detailed investigation and established that the significantly lower wage of the claimant compared with that of her two fellow workers was not justified. In spite of some differences in their education, language knowledge and breadth of skill, they all carried out the same tasks on about the same level, they regularly replaced each other and had the same rights and procedural entitlements within

<sup>73</sup> Article 130 (2)(c) as amended from July 2011.

<sup>74</sup> Article 134 (4).

<sup>75</sup> Article 136 (1) as amended from July 2011.

<sup>76</sup> See: *European Gender Equality Law Review* No. 1/2011, decisions of the ETA, second case.

<sup>77</sup> <http://www.birosag.hu/engine.aspx?page=anonim>, accessed 12 November 2011.

the work organisation. In summary, the employer could not produce any reasons that would have justified the significant difference in the wages. The ETA imposed the equivalent of a EUR 2 000 fine on the employer and prohibited it from further pursuing such discriminatory practices. The employer sued the ETA claiming that the decision was invalid and the victim of the discrimination intervened on behalf of the defendant ETA. In court, the plaintiff/employer referred to the difference between the employee and her comparators in their education, foreign language knowledge and breadth of skill and claimed that, in the legal proceedings, the burden of proof was on the ETA (and the intervening employee) to prove that the differentiation was discriminatory. The Supreme Court rejected the assertion that the burden of proof was differently allocated in the administrative procedure and in the court proceedings. And the Supreme Court established, in line with the ETA and the lower courts, that the position did not need either a higher standard of education or foreign language knowledge and that the three employees performed at an equal level. Therefore, either their wages should have been based on their equal performance, or an additional reason for the differentiation should have been proved by the employer.<sup>78</sup>

### ***Development of the case law on harassment***

In this case a public servant was dismissed during the probationary period. She accepted that there were minor deficiencies in her work performance, but still claimed that the reason for the termination of her employment was her rejection of sexual advances made by the notary (the administrative executive) of the local government organisation. In the proceedings at the labour court she presented offensive phone messages as evidence and she provided witnesses. The court of first instance turned down the claim for unlawful dismissal essentially for two reasons. First, that during probation there is no substantive precondition for termination of employment; therefore anything can be a reason, even minor mistakes. Second, the labour court did not accept that there was sufficient proper evidence of the harassment nor that there was a causal link with the termination. The credibility of the plaintiff was thrown into question by her long and silent tolerance of the harassment. Furthermore, the court did not even admit all the evidence of the harassment, asserting that even if the harassment was true, there was no evidence that the rejection of the sexual advances was the reason for termination. The second instance court reversed the decision on the basis of collecting and analysing all the evidence and hearing the witnesses. Upon appeal by the employer, the Supreme Court maintained this reversal on the basis of a careful analysis of the case, assessing the conduct of both parties, accepting the reasonability of not reporting the harassment in the intimidating workplace environment, and also finding that, during the probationary period, the employer was more satisfied than dissatisfied with the employee's work performance.<sup>79</sup>

### ***Reversal of ETA decision finding collective harassment against Roma women***

The Supreme Court has reversed a decision of the ETA, which had been confirmed by the lower courts, in which a mayor was found to be committing harassment by collectively violating the dignity of Roma women living in the neighbourhood by alleging that they intentionally damaged their fetuses in order to claim the higher amount of family allowance due in the case of a disabled child. The Supreme Court has not investigated the merits of the case, instead it investigated whether the mayor had made these statements within his scope of activity as a mayor, determined by the Act on local government, and whether there was any administrative law relationship between the mayor and the offended group of women. It was established that the action did not fall within the competence of the mayor. Therefore, even though he made the allegations at an assembly of local government representatives, he committed the act in his private capacity. Thus, it was not covered by the personal and material scope of the Equality Act and so fell outside the remit of the ETA.<sup>80</sup>

<sup>78</sup> Case LB-H-KJ-2011-635 on the court website (no internal case number is indicated).

<sup>79</sup> Mfv.I.10.250/2010/3.szám, LB-H-MJ-2011-444.

<sup>80</sup> Kfv.II.37.551/2010/5.szám, LB-H-KJ-2011-350.

### ***Family and social situation as a ground for differentiation – the concept of ‘equally situated’***

An employee who received financial support from the employer in order to obtain a higher education degree failed to qualify for the diploma within the agreed time. The support was based on a contract that was thus breached. As a sanction for the breach the employer compelled the employee to pay back the support, although the employer permitted the debt to be paid in instalments to make things easier. Nevertheless, the employee felt discriminated against and sued the employer because in the case of another employee who had also failed to qualify for the diploma within the agreed time, the employer had made more generous allowances for repayment and had waived a part of the debt because of the family and social situation of the employee. Since Article 8 prohibits discrimination on the grounds of – among others – family status and financial status, the plaintiff employee claimed that he was discriminated against by the applied differentiation. The ground of discrimination was alleged discrimination on the grounds of family status, number of children and financial status. Reversing in part the decision of the lower courts, the Supreme Court found that – contrary to the assessment of the lower courts – the two employees were not equally situated. The Supreme Court argued that despite the common failure to qualify for the diploma within a specified time, the employer was free to consider the differences in the family and financial situation especially in regard to the purpose of facilitating repayment of the debt. The Supreme Court also referred to the established principle of the Constitutional Court that permits differentiation if there is a reasonable justification on objective grounds and it is not an arbitrary decision.<sup>81</sup>

### **Decisions of the Equal Treatment Authority (ETA)<sup>82</sup>**

Two out of the three decisions of the ETA published as ‘significant decisions’ for the reviewed period are connected to harassment of a woman due to pregnancy or attempted pregnancy.

#### ***Taking part in IVF treatment***

In one case the claimant, who was a language teacher in a school, had undergone a course of IVF treatment. After the director of the school had become aware of this situation and also of the legal protection of the Labour Code prohibiting her dismissal, he started to harass her and to make her teaching work difficult. The employee submitted a claim to the ETA which investigated the case, using, inter alia, messages on the employee’s mobile phone that showed the offensive, humiliating and degrading tone of the superior. The fact that sensitive, personal information was communicated to her colleagues which influenced their relationship with her, was particularly taken into account. During the procedure the employee was dismissed by immediate (extraordinary) dismissal; that was assessed by the ETA to be retaliation. The ETA imposed a fine of the equivalent of EUR 2 000 and ordered the publication of the decision on the homepage of the ETA and of the employer for three months.<sup>83</sup>

#### ***Harassment due to the notification of the employer of pregnancy***

The claimant – the employee of a small undertaking – turned to the ETA because when she announced her pregnancy to the manager of the firm, he received the news in a humiliating and degrading manner. The manager told her in an unacceptably offensive way that her pregnancy would cause financial problems to the firm and that she would be liable for such damages. The highly improper reaction of the boss undermined the health of the woman who had already had problems with the pregnancy and prevented her from continued working. Besides witnesses, the ETA accepted the mobile phone voice record as evidence that proved

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<sup>81</sup> Mfv.II.10.557/2010/6.szám, 4-H-MJ-010-288.

<sup>82</sup> The more important cases of the ETA are published at <http://www.egyenlobanasmod.hu/index.php?g=jogesetek.htm>, last accessed 18 November 2011.

<sup>83</sup> EBH 301/2011.

the offensive tone of the superior and a business partner enumerating the negative business consequences of the pregnancy. The ETA also made it clear that harassment does not require a process or a flow of acts; it can be found on the ground of one such deeply humiliating and degrading conversation. The ETA imposed a fine of the equivalent of EUR 2 400 and ordered the publication of the decision on the homepage of the ETA and of the employer for three months.<sup>84</sup>

### ***The right to return to the same job after childcare leave***

The complainant wished to return from childcare leave when her child reached the age of two. She notified the employer half a year in advance, receiving the response that there was no adequate job for her. Later it became known that the fixed term contract of her replacement was to expire; however, the employer did not admit this but instead, upon expiry of the fixed term contract, hired the replacement for an indefinite term. When the child reached the age of two, the mother tried again, but was offered a less favourable job in another location that she rejected. After the expiry of childcare leave, when the procedure at the ETA was already underway, the employer reinstated her in her original job. The ETA concluded that there had been a violation of equal treatment with regard to the child and the family situation. It was revealed that the employer had previously refused to reinstate another mother who had wanted to return to the workplace before the expiry of parental leave. Having regard to the reinstatement after the expiry of parental leave and having regard to the compromise reached by the employer, the ETA did not impose a fine.<sup>85</sup>

## **ICELAND – Herdís Thorgeirsdóttir**

### **Policy developments**

Amendments to the Act on Maternity/Paternity Leave and Parental Leave No. 95/2000 (hereinafter the AMPPL) were adopted by the Althing (Parliament) on 19 September. The main amendment pertains to the condition for the accumulated work period on the domestic labour market with the period of work in another Member State of the EEA, when the right to leave on the basis of the AMPPL is determined.

The EFTA surveillance agency had made remarks regarding the provision of the AMPPL, which sets out the condition that a parent must have been active on the domestic labour market for at least one month before being allowed to add a working period in another Member State of the EEA to assess the right to maternity/paternity leave.

The present amendment maintains the above general principle that parents must have been active on the domestic labour market for at least one month before acquiring the right to maternity/paternity/parental leave, yet it is left to the Directorate of Labour to assess each case individually in order to determine whether the working period in another Member State of the EEA can be taken into consideration.

### **Legislative developments**

#### ***Transposition of Directive 2010/18/EU***

Directive 2010/18/EU in accordance with the revised framework agreement on parental leave has been adopted, prolonging parental leave from 13 weeks to 4 months.<sup>86</sup>

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<sup>84</sup> EBH 805/2011.

<sup>85</sup> EBH 151/2011.

<sup>86</sup> <http://www.althingi.is/alttext/139/s/1837.html>, accessed 7 October 2011.

## Equality body decisions/opinions

In a ruling on 2 September 2011 (Case No. 5/2011)<sup>87</sup> the Gender Equality Complaints Committee (hereinafter GECC) found Company SV – a public company – to have violated the Gender Equality Act No. 10/2008 (hereinafter the GEA) by the dismissal of a woman (the applicant). The applicant, a forestry specialist, was dismissed by the Forest Service Company SV in September 2010. She brought her case before the GECC claiming that her dismissal was a violation of Article 26 of the GEA prohibiting employers from discriminating on the basis of gender at work. Company SV maintained that dismissing the woman had been necessary in the light of severe budget cuts to the company, which is state run. The GECC emphasised that the aim of the GEA is to establish and maintain equal status and equal opportunities for women and men in all spheres of society. If the likelihood is adduced that direct or indirect discrimination on grounds of gender has taken place, the employer must demonstrate that his/her decision was based on grounds other than the individual's gender.

When Company SV decided to dismiss the applicant in September 2010 the company had three employees. The applicant was the only part-time worker, working 80 % as a forestry specialist, based at home, while the regional supervisor and the Director's work was defined as 100 % and both were based in the main office of the company.

When assessing whether the woman had been discriminated against when dismissed, the GECC pointed out that the Director is appointed by the board of directors and according to law he has a preferential position in comparison with those he hires, so the choice was between dismissing the applicant or the regional supervisor. For this reason a comparison had to be made based on the educational qualifications, working experience, specialised knowledge or other special talents demanded in the relevant position, according to law or regulations, which must otherwise be considered as being of use in the position. That comparison led the GECC to conclude that the applicant was at least as competent as and in many respects more competent than the regional supervisor.

The employer had not been able to demonstrate that his decision was based on grounds other than the individual's gender. The employer had tried to reason that it was more convenient to dismiss the woman as she was based outside the main office and that the regional supervisor stationed in the main office was working closer with him. It was furthermore revealed that important tasks had been delegated to the applicant by the regional supervisor. Sufficient and objective reasoning for dismissing the woman rather than the man was lacking and the GECC ruled that there had been violation. The ruling is, according to Article 5 of the GEA, binding on the parties and they may refer the GECC's rulings to a court of law, which is the only way for the woman if she wants to seek compensation for the unfair dismissal. The procedure before the GECC is simpler, as it is all in writing, than taking a case directly to a court of law. Furthermore, it strengthens the case of the applicant before a court of law if the GECC has already ruled in her favour.

## IRELAND – Frances Meenan

### Policy developments

The Irish Government announced on 17 November 2011 that as part of a public service reform plan (arising from the IMF/EU Understanding) the Equality Authority and the Irish Human Rights Commission are to be merged into one body. In addition, the Equality Tribunal and other employment rights bodies are to be merged into one body. All these changes are to take place before the end of 2012.<sup>88</sup> The Minister for Justice, Equality and Defence on 6 October 2011 announced the appointment of a Working Group to advise him on the establishment of a new and enhanced Human Rights and Equality Commission (HREC). The

<sup>87</sup> <http://www.rettarheimild.is/Felagsmala/KaerunefndJafnrettismala/nr/3778>.

<sup>88</sup> <http://per.gov.ie/wp-content/uploads/Public-Service-Reform-pdf2.pdf>, accessed 18 November 2011.



Minister reaffirmed his commitment ‘that this new more streamlined body would be able to more effectively, efficiently and cohesively champion human rights and equality’. He also pointed out that the new body must ensure that it promoted a culture that respects the human rights and equal status of everyone in Irish society. The time frame is that the Minister intends to have a new Commission in place by the end of February 2012. Aside from practical organisational matters, the Minister has asked this Working Group to advise on what is the best practice for the HREC in devising specific objectives and what performance indicators should be used to measure the attainment of the objectives, and to advise on the best approaches or means of achieving change, for example, making greater use of codes of practice or of strategic cases to achieve change. One question being asked is as to whether the greater use of codes of practice would be a more effective tool than bringing cases. The Group is to advise also on the best form of enquiry powers and to consider whether the approach used in recent Catholic Church child abuse inquiries should be adopted, e.g. the Report into the Catholic Diocese of Cloyne (The Cloyne Report, December 2010). Such enquiries have consisted of a judge sitting with two other persons who carry out an investigative fact-finding role under the Commissions of Investigation Act 2004 which investigates matters of public concern. The Employment Equality Act 1998 and the Human Rights Commission Act 2000 also provide for enquiries; however the 2004 Act is a much broader and clearer piece of legislation. The Cloyne Report was seen as a particularly speedy, cost effective and efficient investigation. It should be made clear that the same team carried out a major investigation into abuse in the Dublin Catholic Archdiocese as well. It must be noted that the merging of these two bodies is a cost-saving exercise arising generally from the IMF/EU Understanding.<sup>89</sup>

In addition, there are ongoing discussions about reform of the employment rights and industrial relations bodies and procedures, the purpose of which is to make access to employment law less complicated than the present structure. This may involve some access issues to the Equality Tribunal but it is likely to have more impact on other areas of employment law such as unfair dismissal.<sup>90</sup>

### Legislative developments

The Civil Law (Miscellaneous Provisions) Act 2011<sup>91</sup> amends the Employment Equality Acts 1998–2010 by providing that in equal treatment cases there may be an order for compensation up to a maximum of two years’ remuneration or EUR 40 000 whichever is the greater<sup>92</sup> and/or an order for a specified course of action. Where the claimant is not an employee the maximum award is EUR 13 000.

### Case law of national courts

In *Hannon v First Direct Logistics Limited*,<sup>93</sup> the complainant, a male to female transsexual, was employed by the respondent as a business development manager from January 2007 (having previously done work as a self-employed person for the employer) until the date of her dismissal. In 2005, the complainant was diagnosed with gender identity disorder and she revealed her true female identity to the respondent in October 2006. She informed her employer that she would be resigning in May 2007 in order to pursue her true identity. In response thereto, the employer said that there was no requirement for her to leave and that the

<sup>89</sup> <http://www.justice.ie/en/JELR/Pages/PR11000188>, accessed 10 October 2011. [http://www.justice.ie/en/JELR/Cloyne\\_Rpt\\_Intro.pdf/Files/Cloyne\\_Rpt\\_Intro.pdf](http://www.justice.ie/en/JELR/Cloyne_Rpt_Intro.pdf/Files/Cloyne_Rpt_Intro.pdf); accessed 15 November 2011.

<sup>90</sup> <http://www.djei.ie/publications/employment/2011/ReformConsultationPaper.pdf>, accessed 10 October 2011.

<sup>91</sup> <http://www.oireachtas.ie/viewdoc.asp?DocID=18716&CatID=87>, accessed 10 October 2011.

<sup>92</sup> The maximum amount of compensation can only be awarded by the Equality Tribunal, even though a claimant may have been successful on more than one discriminatory ground. Claimants have the option of a reference to the Circuit Court where there may be an award of compensation for the last six years of discrimination with no upper financial limit.

<sup>93</sup> DEC-S2011-066; EE/2008/043; [2011] 22 ELR 215.

employer would be supportive of her. On 15 February 2007, the complainant began taking an oestrogen hormone and changed her name by deed poll to Louise Hannon. At that time her employer stated that she would have to complete her sales over the phone in her male identity and that the operations manager, rather than the complainant herself, would personally meet clients. She was informed that she would have to use her male identity for work until Christmas 2007. There were complaints about the complainant's productivity and she found her new working conditions extremely difficult and asked if she could return to work in the office and then was told that there was no room for her. She was requested to hand in her letter of resignation on 14 August 2007. The complainant brought claims under both the gender and disability grounds. The Equality Tribunal considered that the complainant had established a *prima facie* case of discriminatory treatment on the gender and disability grounds regarding her conditions of employment. The Tribunal held that the gender ground protects transgender persons from sex discrimination, relying on *PVS v Cornwall County Council*.<sup>94</sup> It was also considered that there was direct discrimination on both the gender and disability grounds in that the request that the complainant switch between her male and female identity was direct discrimination. There was no genuine business need for the complainant to work from home and if she had remained in her male identity she would not have been asked to work from home. As stated above, the complainant brought her claim also on the disability ground and the Equality Tribunal considered that, by virtue of her disability, the complainant did not require reasonable accommodation (that is special assistance, treatment or facilities) *per se*, but she did require a workplace that recognised her right to be identified as female as a form of reasonable accommodation. The complainant was awarded EUR 35 422.71 together with Courts Act interest and, most importantly, the Tribunal decided that there was no duty under the Employment Equality Acts 1998–2008 for a complainant to mitigate or lessen his or her loss as there was in an unfair dismissal case where a complainant would be obliged to seek alternative employment so as to reduce his or her loss of income resulting from the unfair dismissal.

The issue of harassment of a female teacher was referred to recently by the High Court in a personal injury action where the plaintiff complained of psychiatric injury following being bullied and harassed by the principal of the school. The principal of the school had engaged a private investigator and the Court considered that this amounted to serious harassment of the plaintiff and described how the principal 'arranged for this single lady to be stalked by a private investigator'. The Court held that the employer, the board of management of the school, was vicariously liable for the acts of the principal as such acts were committed by him within the scope of his employment. The Court found that, on the balance of probabilities, the plaintiff discharged the onus on her of establishing that she suffered from psychiatric illness and that a direct causative connection existed between that injury and continuous bullying and harassment of her by the principal. The plaintiff was awarded substantial damages.<sup>95</sup>

## ITALY – Simonetta Renga

### Policy developments

#### *The economic crisis faced by a confused Government*

During the summer, the attention of the whole country has been entirely focused on the economic crisis and on the consequent Government budgeting acts. In particular, the Government, badly weakened by the Prime Minister's involvement in judicial scandals, has made two interventions, the first one in July and the second in September.<sup>96</sup> Both

<sup>94</sup> [1996] IRLR 347.

<sup>95</sup> *Sweeney v Ballinteer Community School* [2011] IEHC 131. See <http://www.courts.ie/Judgments.nsf/Webpages/HomePage?OpenDocument>, accessed 10 October 2011.

<sup>96</sup> Act No. 111/2011 and Act No. 148/2011, published in OJ No. 155 of 6 July 2011 and No. 216 of 16 September 2011, [http://www.parlamento.it/leg/ldl\\_new/sldlelencoordcron.htm](http://www.parlamento.it/leg/ldl_new/sldlelencoordcron.htm), accessed 27 September 2011.



interventions are geared towards a reduction in public spending. This will result, among other things, in a marked reduction in public services, such as health and education. As regards labour law, collective agreements at plant and local level can depart from social protection legislation and provide for less favourable conditions; anti-discrimination legislation, however, cannot be derogated by collective agreements. These interventions also provide for the equalisation of the pensionable age of women and men by 2026. The responsibility for raising taxes has been left to local authorities; central Government has increased the rate of VAT by one percentage point, the cost of which is borne by consumers. The September provisions are very much based on the fight against tax evasion, but there is no idea as to how much extra revenue this will provide. The two acts also provide a facade of reducing the cost of politics, but this has only been done to stop criticism and it is not, in fact, a great reduction. The Government legislation has been strongly criticised by employees, employers and trade unions as a plan that will cause recession, and as a plan which asks for sacrifices from workers without providing for growth in industrial development or output.

## **Legislative developments**

### ***Women's representation on companies' boards of directors and auditors***

On 12 July 2011, Parliament finally approved Act No. 120 which introduces a quota system for the appointment of managing directors and auditors of listed companies and state subsidiary companies.<sup>97</sup> The bill was presented for the first time about two years ago by Lella Golfo (who is a centre-right Member of Parliament) together with Alessia Mosca (who is a centre-left Member of Parliament), and was noticeably 'softened', as regards both sanctions and terms of enforcement, during its approval process, in line with the amendments presented by the Government after strong opposition from employers and banking associations.

Act No. 120/2011 modifies an article of the merchant banking Code, and provides that company statutes must state criteria regarding the election of directors and auditors, with the aim of ensuring gender balance. In particular, directors and auditors of one sex cannot be elected in a proportion greater than two-thirds compared with directors and auditors of the opposite sex. This rule is to be enforced for three periods of tenure of directors and auditors, but for the first period of tenure the proportion will be one-fifth to four-fifths and it will come into force only at the first change of board members one year after the law came into force (12 August 2011).

The sanctions procedure in the case of infringement of the rule is very gradual. Act No. 120/2011 provides for a warning by the *Consob* (National Securities and Exchange Commission) to apply the quota system within four months and, in a case of non-compliance, for a fine of EUR 100 000 up to EUR 1 million (EUR 20 000 up to EUR 200 000 for auditors), together with a second warning for the quota to be achieved within three months, failure to do so resulting in dissolution of the company's board. The statute must also make provision for substitution of members of a company's board during their terms of office so as to ensure the balanced participation of the two sexes as specified by law.

The *Consob* is authorised to watch over the enforcement of this rule and must issue a regulation concerning it within six months from the coming into force of Act No. 120/2011.

As regards state subsidiary companies not quoted in the regulated market, the same principles are enforceable but a regulation must be issued within two months of the law coming into force so as to ensure compliance with the rule on gender balance by laying down terms and conditions for implementation.

The success of the bipartisan effort of the two promoters of the bill is clearly underlined by the approval of Act No. 120/2011 by a very large majority. Most comments on the law have been positive but, during the long-lasting passage through Parliament, it met with a certain opposition from businesses and with strong criticism by some politicians, mainly of the centre-right parties, even though it provides for a gradual implementation and is a

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<sup>97</sup> Act No. 120 of 12 July 2011, published in OJ No. 174 of 28 July 2011, <http://www.normattiva.it/base/ricercaSemplice>, accessed 27 September 2011.

temporary measure. There are no further details about how temporary the measure is, but it would almost certainly not have been passed had it been permanent

In any case, the first effects of the law will only be felt after 2012, but nevertheless, at the first reappointment of company boards, businesses might adopt these principles voluntarily in view of the final change which will enable, within nine years, 700 more women to sit on company boards and 200 on auditing councils. The same remarks also apply to the public sector where very few women (no widespread data on percentages are available) occupy positions of higher responsibility in state subsidiary companies.

So, although the final text is definitely weaker than the first draft, which provided for the immediate dissolution of boards in cases of infringement,<sup>98</sup> without a previous warning, and the application of the one-third quota from the first reappointment of boards after the law came into force, it will still involve a remarkable change to our system, both in the private and in the public sector.

In actual fact, its implementation is largely assigned to the *Consob* (or to the specific regulation to be issued for state-owned companies), which will play a crucial role in the effectiveness of the quota system, as it is charged to issue regulations for its enforcement, including deciding on cases of infringement.

An important amendment to the previous law, for the effective implementation of which the *Consob* is also responsible, regards the introduction of specific rules aimed at ensuring the gender balance in the case of replacing members of the board of directors, which was not considered in the previous law. In fact, the latter expressly mentioned the quota only in respect of the results of the election, with the risk of an easy get-out simply by replacing the members of the less represented gender with members of the opposite gender. Nevertheless, some problems arise from the absence of a similar provision concerning gender balance in cases of replacement for the board of auditors. Moreover, for the latter, pecuniary sanctions in cases of infringement of the quota system are lower than those provided for boards of directors.

### ***Equalisation of pensionable age***

Article 18 of Act No. 111/2011 has provided for the equalisation of the pensionable age of women and men at 65 by 2026; the process of equalisation will start in 2020. Until then, women's pensionable age, i.e. for the purpose of the old-age pension, is still set at five years below that of men. Given women's higher life expectancy, and the fact that, in Italy, men and women pay the same rate of pension contributions, it can be argued that the possibility of women's earlier access to pensions gives a higher real rate of yield for women's pensions than for men's. Until the pension ages are fully equalised, women can carry on working until the pensionable age set for men and in these conditions, the pensionable age is only flexible for women, not men.

### **Case law of national courts**

#### ***Protection of motherhood***

Judgment No. 116 of 4 April 2011 of the Constitutional Court<sup>99</sup> gives a very wide interpretation of Art. 16 of the Code on the Protection of Motherhood and Fatherhood, which provides a ban on women working:

1. during the two months before the expected date of the birth (except for the possibility of postponing for one month after the birth, if compatible with mother's and baby's well-being (Art. 16(a));
2. in a case where a baby is overdue, during the period from the expected date of birth until the actual date (Art. 16(b));

<sup>98</sup> [http://www.camera.it/\\_dati/leg16/lavori/stampati/pdf/16PDL0046610.pdf](http://www.camera.it/_dati/leg16/lavori/stampati/pdf/16PDL0046610.pdf), accessed 17 February 2012.

<sup>99</sup> Judgment No. 116 of 4 April 2011 of the Constitutional Court, published in <http://www.giurcost.org/decisioni/index.html>, accessed 27 September 2011.

3. for three months after the birth (or four if the mother chooses to postpone for one month as in 1 above (Art. 16(c)).

Finally, Art. 16(d) states that any days of compulsory leave which have not been taken before a birth which actually occurred before the expected date, are to be added to the normal three (or four) months of compulsory leave to be taken after the birth and these additional days are also covered by the ban on work. The Court deemed this provision to be inconsistent with constitutional principles, as Art. 16 does not allow the mother (whose health is certified to be compatible with work), in a case of premature birth followed by hospitalisation of the baby, to choose to postpone the compulsory maternity leave until the date when the baby comes home. The judges explained that the rigid link of the right to compulsory leave to the date of the birth, as expressly ruled by Art. 16, is at odds with constitutional principles aimed at the protection of the family, as provided by Arts. 29, 30, 31 and 37 of the Constitution. In fact, in cases where the birth is premature and requires the hospitalisation of the baby for long periods, during which time the mother cannot assist him or her, when the baby eventually comes home the compulsory maternity leave could be at an end. This results in frustrating the effectiveness of the provision which is aimed at the protection of the special relationship between the mother and the baby that should begin immediately after birth.

Once more the Court has shown a special sensitivity for the protection of motherhood and has given a wide interpretation of Art. 16 which enables the very heart of the constitutional provision mentioned above, as already identified by the constitutional judges, to be guaranteed. In fact, the judges clearly describe what can happen in the case of a very premature birth with long hospitalisation of the baby (where the mother herself is in good health and asks to go back to work) and firmly reject the interpretation of the National Social Security Institute which considered the constitutional principles on the protection of motherhood to be ensured by other rights, such as time off for illness of the child and parental leave. The Court stated that these provisions have a different objective and cannot fill in the gap in protection in the situation mentioned above. In fact, as the judges clearly underlined, in a case where the mother is not allowed to postpone the compulsory maternity leave until the date when the baby goes home, the special relationship protected by Art. 16 cannot be ensured as it can in all other cases and this difference has no reasonable justification.

## **LATVIA – Kristine Dupate**

### **Legislative developments**

There has been no legislative development directly concerned with the implementation of EU gender equality law. However, the legislature adopted amendments to the Labour Law for the purposes of implementing the Temporary Agency Work Directive (Directive 2008/104)<sup>100</sup> which, among other rights, requires the provision to a temporary agency worker of basic working and employment conditions at the temporary place of employment equal to those provided to permanent workers there.<sup>101</sup> Basic working and employment conditions must include, inter alia, equal treatment between men and women and special protection of workers during pregnancy and maternity. The relevant requirements are now provided for by Article 7(4) and (5) of the Labour Law. However, they are not very precise, because the wording does not highlight gender equality and non-discrimination on the grounds of sex, race and ethnic origin, religion, belief, disabilities, age and sexual orientation, but merely states that the principle of equality and prohibition of differential treatment must be applied. On the one hand, such a formulation may lead to a broader interpretation than the gender equality and non-discrimination obligation provided for by EU law, namely as including the prohibition of any unequal treatment in general and discrimination on more specific grounds. On the other

<sup>100</sup> OJ L 327, 5 December 2008, p.9-14.

<sup>101</sup> Amendments to the Labour Law, OG No. 103, 6 July 2011.

hand, however, a vague understanding of the principle of equality and imprecise wording of the non-discrimination principle (prohibition of differential treatment) may cause problems with enforcement, starting with the comprehension of the rights by temporary agency workers themselves and ending with the correct application of such rights before national courts.

### **Case law of national courts**

#### ***Prohibition of dismissal of pregnant worker also during probation period***

On 8 December 2010 the Supreme Court delivered a decision in a case regarding the right to dismiss a pregnant worker during a probationary period.<sup>102</sup>

The facts of the case are as follows. The claimant was recruited by EuroPark Latvia Ltd on 25 November 2008 with a probationary period of three months. This is the maximum probationary period according to Article 46(2) of the Labour Law. On 11 February 2009, the employer issued a dismissal notice terminating the employment from 13 February 2009. On 12 February 2009, the claimant submitted a medical certificate confirming her pregnancy of 13/14 weeks. Nevertheless, the employer did not revoke the dismissal notice and the employment ended on 13 February 2009. The claimant brought a claim before the court on 3 March 2009 of unfair dismissal contrary to Article 109 of the Labour Law which precludes the giving of a notice of dismissal to a pregnant worker except in strictly defined cases not connected with pregnancy. She claimed reinstatement and compensation for moral damages on account of discrimination.

The respondent/employer claimed that the dismissal was legal because notice of dismissal during a probationary period may be given without any statement of grounds of dismissal, and also that the employer was not informed and was not aware of the pregnancy when giving notice of dismissal on 11 February 2009. Consequently, the employer considered the claim to be unfounded.

The Supreme Court, like both courts of lower instance, upheld the claim and decided that the claimant must be reinstated and paid any arrears arising from the work stoppage. The Supreme Court, in this particular decision, provided answers to two important issues regarding interpretation of the Labour Law concerning: special dismissal rights during a probationary period; and protection of pregnant workers in the light of national and EU law.

First, the Supreme Court ruled that the provision on special protection for pregnant workers against dismissal (Article 109 of the Labour Law) is a special provision in the context of generally applicable norms on the dismissal procedure during a probationary period (Articles 46 and 47 of the Labour Law). Consequently, an employer is bound to follow the dismissal requirements of Article 109 in the case of the dismissal of a pregnant worker during a probationary period.

Second, the Supreme Court made it clear that, in the context of Article 10 of Directive 92/85,<sup>103</sup> the exact moment of the provision of notification of pregnancy is irrelevant. The main requirement is that the employer was aware of the pregnancy during the employment relationship, even if that was after notice of dismissal had been given. In fact, this issue was unclear under national law on account of the fact that the decisive factor or time in the dismissal procedure is the giving of notice rather than the actual termination of the employment relationship.

However, the Latvian courts missed the opportunity to rule on the fact of discrimination and the right to compensation.

#### ***Amount of childcare allowance and right to maternity leave***

In Latvia, the amount of childcare allowance depends on the amount of social insurance payments made during the 12 months before the baby is born. However, the law contains one special provision. This provision stipulates that in the case where a parent becomes entitled to

<sup>102</sup> Decision of the Supreme Court of Latvia in Case No. SKC-11706/2010, 8 December 2010, available (in Latvian) at <http://www.at.gov.lv/files/archive/departments/2010/skc-1170-10.pdf>, accessed 5 September 2011.

<sup>103</sup> OJ L 348, 28 November 1992, p.1-7.

childcare allowance while an older child has not reached the age of two, he/she may claim childcare allowance for an amount equivalent to that received during the childcare leave for the older child. This provision was implemented to improve the situation of parents who have several children within a short period of time.

This particular case was about a mother who was on maternity leave with her second child while the first was two years old. When she applied and became entitled to childcare allowance for the second child, the first was already two years and ten days old. So, in accordance with the law, the Latvian authorities decided that the claimant could not benefit from that special provision and that she was only entitled to the minimum childcare allowance of LVL 56 (EUR 80) instead of the LVL 392 (EUR 558) that she had received in childcare allowance for the first child.

The claimant contested this decision on the grounds of: Article 2<sup>1</sup> of the Social Security Law (an umbrella law) providing for the principle of non-discrimination throughout the social security system; Article 11 of CEDAW providing for the prohibition of the loss of rights to any social protection entitlement due to the use of the right to maternity leave; and the Administrative Procedure Law stipulating the obligation to apply the law which is higher in the hierarchy in the case of a collision of norms.

Both the Administrative District Court and the Administrative Regional Court decided that there was no violation of the principle of non-discrimination on the grounds of maternity, since the right to childcare allowance is equally provided for both sexes, and men and women are in a comparable situation with regard to the right to childcare allowance and, although the umbrella law provides for the principle of non-discrimination, the State has a wide margin of discretion to adopt special legal regulations on the entitlement and calculation of childcare allowance. Those decisions, demonstrating a lack of understanding of the concept of discrimination on the grounds of maternity, were overruled by the Supreme Court on 3 December 2010.<sup>104</sup>

Although the decision of the Supreme Court was in favour of the claimant, it does not, however, recognise direct discrimination based on sex, namely, less favourable treatment on the grounds that a woman has made use of her right to maternity leave. The Supreme Court based its decision on the grounds of social justice and the necessity to attain the aim intended by the legislature – to provide the highest possible protection to a parent in the case of childcare. Overall, this decision, like the previous decision reported above, demonstrates a lack of understanding of the concept of discrimination with regard to pregnancy and maternity.

## LIECHTENSTEIN – Nicole Mathé

### Policy developments

#### *Family council*<sup>105</sup>

The Government of Liechtenstein has appointed a family council which had its opening session on 8 April 2011. It consists of five experts who come from Liechtenstein, Switzerland, Austria and Germany.

The family council met under the presidency of the head of the Government, who is also the Minister for Family Affairs, and discussed key questions of family policy. It will help to develop Government strategies in family policies. With the newly appointed family council consisting of international experts, the Government wants to send out a clear signal about modern and emancipated family policies.

<sup>104</sup> Decision of the Supreme Court of Latvia in Case No. SKC-527/2010, 3 December 2010, available(in Latvian) at [http://www.tiesas.lv/files/AL/2010/12\\_2010/03\\_12\\_2010/AL\\_0312\\_AT\\_SKA-0527-2010.pdf](http://www.tiesas.lv/files/AL/2010/12_2010/03_12_2010/AL_0312_AT_SKA-0527-2010.pdf), accessed 30 September 2011.

<sup>105</sup> Press release of the Information Office Liechtenstein, dated 8 April 2011.

### ***Equality Office***

For the past 15 years the Equality Office has been actively working for gender equality in Liechtenstein.<sup>106</sup> In accordance with planned administrative reform, small offices have to be restructured and merged with other offices. In order not to lose the public presence of the Equality Office, a discussion is going on as to how the new offices will be structured and what they will be called.<sup>107</sup>

### ***Training course: 'Women 55-plus in mid-life'***<sup>108</sup>

On 7 October 2011, the first interregional training course, 'Women 55-plus in mid-life' started in Feldkirch (Austria) and it will end in March 2012. It is organised by the Equality Office of Liechtenstein and the Women's Office of Vorarlberg (Austria). Registration was possible until 15 September 2011. The course will enable women to exchange ideas with others and to reflect on their life experiences gained up to now, and will encourage them to find new purposes in life and formulate new aims for the future.

### ***Violence has no home***

In cooperation with the women's refuge of Liechtenstein, the women's Office of Vorarlberg (Austria) and the violence protection Office of Feldkirch (Austria), the Equality Office has organised the project 'S.I.G.N.A.L' in recent years.<sup>109</sup> Out of this intervention programme several measures against domestic violence during marriage and partnership have been developed. A brochure entitled 'How can I help?', contains information for family members, relatives, friends, neighbours and colleagues as to how to react and help. Very important is knowing where and how to find professional help for the woman concerned and for oneself, so contact addresses are included. Furthermore, so-called emergency cards, in several languages, containing important information are available for free at the Equality Office in Liechtenstein.

## **Legislative developments**

### ***Gender Equality Act***

On 8 June 2011 the amendment of the Gender Equality Act (GLG) regarding the implementation of Directives 2004/113/EC and 2006/54/EC into Liechtenstein's legislation entered into force.<sup>110</sup>

This implementation had been expected for a long time but has only recently entered into force. The main elements of the law are implementing both directives in a correct manner. Essentially, the GLG was restructured with regard to the Recast Directive. Concerning the Directive of Goods and Services. Articles 4a and 4b GLG were introduced to cover the prohibition of discrimination as well as discrimination by harassment on the grounds of sex and sexual harassment.

### ***Maternity leave***

On 8 June 2011 the amendment of the labour law norms in the Civil Code with regard to the return to the workplace after maternity leave, entered into force (Art. 1173a Civil Code Art. 36b).<sup>111</sup> After maternity leave the employee has the right to return to the former or equivalent workplace. The employee has the right to any improvements of working conditions introduced during the period of maternity leave to which she would have been entitled had she still been working then.

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<sup>106</sup> Newsletter of the Office for Equal Opportunities, May 2011, [http://www.llv.li/pdf-llv-scg-newsletter\\_05-2011.pdf](http://www.llv.li/pdf-llv-scg-newsletter_05-2011.pdf), accessed 28 September 2011.

<sup>107</sup> Report of the Government ('*Interpellationsbeantwortung*') Nr. 82/2011.

<sup>108</sup> Press release of the Information Office Liechtenstein, dated 22 August 2011.

<sup>109</sup> Press release of the Information Office Liechtenstein, dated 4 July 2011.

<sup>110</sup> LGBL 2011/212, <http://www.gesetze.li/Seite1.jsp?LGBL=1999096.xml&Searchstring=Gleichstellungsgesetz&showLGBL=true>, accessed 27 September 2011.

<sup>111</sup> LGBL 2011/214, <http://www.llv.li/pdf-llv-rdr-2011214.pdf>, accessed 28 September 2011.



### ***Registered partnerships***

On 1 September 2011 the law on registered partnerships for same-sex couples entered into force.<sup>112</sup> Registered partnerships are construed as marriages with regard to the main elements (e.g. monogamy, mutual duty of disclosure, public register, inheritance law) of such a union. However, adoption and medically assisted procreation is not permitted for registered partnerships (Art. 25).

### ***Abortion***

On 18 September 2011 the population of Liechtenstein rejected the initiative to introduce a law permitting an abortion within the first three months of pregnancy.<sup>113</sup> So abortion remains illegal in Liechtenstein and is punished with up to one year's imprisonment (Art. 96 Criminal Code),<sup>114</sup> even if the abortion has been performed abroad (Art. 64 Criminal Code). Sentences with respect to this, however, have not been passed for many years.

### ***Parental leave***

On 23 August 2011 the Government of Liechtenstein presented the report and proposal of the amendments to several relevant acts regarding the implementation into Liechtenstein's legislation of Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BusinessEurope, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.<sup>115</sup> The Government intends an 'economy-friendly' and therefore minimum implementation of the innovations in the directive.

### **Miscellaneous**

#### ***European conference of small nations***<sup>116</sup>

On 16 September 2011 the head of the Government hosted a gala dinner on the occasion of the 25th anniversary of the Gender Equality Commission and also welcomed the delegation of the European conference of small nations.

The conference organised by 'Frauennetz' Liechtenstein, in cooperation with the Ministry of the Family and Equal Opportunities, took place in Liechtenstein for the first time. At the conference, which takes place periodically, delegates of NGOs from Andorra, Iceland, Luxemburg, Malta, Monaco and Cyprus participated.

Aims of the conference are better networking between small nations as well as regular exchanges of experiences in best practice concerning gender equality. Topics of this year's country reports include, for example, women's networks, women in decision-making positions, quotas and family as factor of success.

## **LITHUANIA – Tomas Davulis**

### **Legislative developments**

#### ***The new ground of prohibited discrimination – intention to have children***

Section 2 (1) point 4 of the Labour Code,<sup>117</sup> which consolidates specifically the principle of equality in labour law, was amended<sup>118</sup> to include the new ground of prohibited discrimination – the employee's intention to have a child/children. It was believed that the family plans of a female candidate revealed in the procedure of recruitment often ended in the

<sup>112</sup> LGBl. 2011/350, <http://www.llv.li/pdf-llv-rdr-2011350.pdf>, accessed 28 September 2011.

<sup>113</sup> <http://www.hilfestattstrafe.li>, accessed 28 September 2011.

<sup>114</sup> LGBl. 1988/37, <http://www.gesetze.li/Seite1.jsp?LGBI=1988037.xml&Searchstring=stgb&showLGBI=true>, accessed 28 September 2011.

<sup>115</sup> BuA No. 79/2011.

<sup>116</sup> Press release of the Information Office Liechtenstein, dated 16 September 2011.

<sup>117</sup> State Gazette, 2002, no. 64-2624.

<sup>118</sup> Amendments of 12 April 2011 (State Gazette, 2011, no. 49-2370).

employer's refusal to accept the candidate. Despite the fact that discrimination on the grounds of starting a family could be considered as already banned under existing legal provisions,<sup>119</sup> the latent character of violations deserves special attention and a specific mention in the text of the law.

### ***New rules on state social benefits during parental leave***

For the last two years the level of social benefits for parents on parental leave was gradually decreased in order to balance the state social insurance fund budget in the light of economic difficulties and demographic developments. In essence, the legislator has limited the maximum level of those benefits as well as increased the length of reference periods for calculating the level of those benefits. The amendments which came into force on 1 July 2011<sup>120</sup> relate to the social allowances for parents on parental leave until the child has reached the age of three. Before, during parental leave from the end of maternity (paternity) leave until the child had reached the age of one, the employee was entitled to an allowance equal to 100 % of the previous remuneration, and 85 % until the child had reached the age of two. Since 1 July 2011, employees may opt for the one-year 100 % allowance or choose the two-year allowance, in which case for the first year the allowance would amount to 70 % of the relevant salary and 40 % for the second year. The second option allows parents to receive salary or other income during the second year of the leave which was previously prohibited. In addition, the new rules abolish the doubling or tripling of the allowance for parents with two or three children under the age of three.

### **Case law of national courts**

#### ***The State Family Policy Concept was declared unconstitutional***

The Constitutional Court of the Republic of Lithuania has declared the State Family Policy Concept, adopted by the Parliament on 3 June 2008,<sup>121</sup> unconstitutional on the grounds that it had restricted the definition of 'the family' to families based on official marriage between man and woman only. As the Constitutional Court stated in its ruling of 28 September 2011, the limitation of the definition of the family to the officially registered marriages only would lead to the negligence of interests and further ignorance of the need for support of families which already exist or may exist. 'Other' types of families may exist on the grounds of permanent emotional ties, mutual obligations and respect but without official marriage (e.g. families with single parent, couples in long lasting relationships etc.). The ruling of the Court has sparked public debates on the notion of the family and possible recognition of the institution of partnership both between persons of different sexes and between persons of the same sex. It is worth noticing that the ruling of the Constitutional Court will not allow the legislator to use official marriage as an essential precondition for the implementation of the policies supporting families.<sup>122</sup>

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<sup>119</sup> Such as the gender equality legislation (Section 5 of the Equal Opportunities Act for Women and Men) or the same Section 2 (1) point 4 of the Labour Code which details the non-exhaustive list of prohibited grounds for discrimination not related to professional skills. Section 2 (1) point 4 of the Labour Code also mentions the family status of an employee as one of the prohibited grounds for discrimination.

<sup>120</sup> State Gazette, 2010, no. 86-4533.

<sup>121</sup> State Gazette, 2008, no. 69-2624.

<sup>122</sup> For example, when introducing the paternity leave in 2006 the legislator made the paternity allowance conditional upon the fact of marriage of the father with the mother of the child. This precondition was abolished after one and half year.



## Policy developments

### *Parental leave*

After having announced a possible reduction of the duration of parental leave from six to four months, the Government decided to perform a detailed analysis of the results of the measure before any reform. The analysis will be carried out in 2012, which is the year that Directive 2010/18/EU<sup>123</sup> implementing the revised Framework Agreement on parental leave has to be implemented into national law. A reduction of the duration of parental leave by the implementing law could risk resulting in a reduction of the protection afforded to workers in the field of parental leave.

The *Comité du Travail Féminin* (Women's Labour Committee) adopted an opinion on Directive 2010/18/EU in March 2011. This advisory body consists of representatives of the National Council of Women, employers' and workers' organisations and ministries. It is responsible for studying, either on its own initiative or at the Government's request, all matters connected with the work, training and professional advancement of women. In its opinion, the Committee does not oppose the reduction of parental leave from six to four months, on condition that the Government considers adapting the allowance for parental leave and introducing more flexibility into the procedures. Regarding the allowance, the Committee suggests making it a percentage of the salary, rather than the current fixed amount. It also suggests allowing workers to take parental leave by dividing the total duration into various shorter periods.

### *Gender quotas in the private sector*

On 22 January 2011, the Minister of Equal Opportunities announced that she has not ruled out legal quotas in the private sector. At first, she wants employers to put efforts into establishing gender-mixed teams until 2014. At the present, no precise percentage has been discussed.

## Equality body

The *Centre pour l'Égalité de Traitement* or *CET* (Centre for Equal Treatment) is concerned with discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. The CET published its annual report covering the period from 1 November 2009 to 31 December 2010. During that period it registered 139 new claims. 18 claims introduced previously were still pending. 90 out of 157 claims were filed by men. 13 claims were about gender discrimination.

## Legislative developments

### *Goods and services*

On 21 April 2010, the Government introduced Bill No. 6127, which aims to include the content of media and advertising as well as education within the scope of the law that implemented Directive 2004/113/EC.<sup>124</sup>

The purpose of the Bill is to eliminate the current hierarchy of protection. In point of fact, currently the protection against discrimination regarding gender in the field of access to and the supply of goods and services does not include media, advertising and education. However, protection against discrimination on the other five grounds does include these areas. The Bill is still under the legislative procedure (October 2011).

<sup>123</sup> OJ L 68/13 of 18 March 2010

<sup>124</sup> OJ L 373/37 of 21 December 2004

### ***Succession to the throne***

On 20 June 2011, the Grand Duc of Luxembourg announced that the internal family regulation of Luxembourg-Nassau had been amended in order to open the succession to the throne to women.

The regulation, which had excluded women from the succession to the throne, meant that Luxembourg had had to put a reservation on the CEDAW convention. The new regulation states that the first-born child is to succeed to the throne.

## **FYR of MACEDONIA – Mirjana Najcevska**

### **Policy developments**

#### ***Parliamentary elections***

In the second half of 2011, general parliamentary elections took place in the FYR of Macedonia. Matters of gender and/or gender equality were not the focus of the campaigns of the political parties and they were not used as a tool to attract voters or voters' attention. In the programmes of most of the political parties, the gender issue was mentioned generally, but without the development of strategies for achieving gender equality. The gender issue was not put into the context of discrimination nor dealt with as a global political priority. There were very few activities related to the gender issue during the elections. The only body that organised a series of 11 debates on the issue was the lobby group entitled 'Macedonian Women's Lobby', which was in charge of running the debates supported by a group of NGOs and foundations.<sup>125</sup>

The overall percentage of women in the Parliament is 30.89 %, which is still less than the legal minimum for the candidates' lists. In the current composition of the Parliament there are 21 political parties acting as separate political entities. Out of them, only nine political parties have women as members of Parliament, the political parties of the ethnic Albanians have apparently the smallest percentage of women (less than 25 %), while the political parties of all the other ethnic communities (Turks, Bosniaks, Roma, Serbians) have no women members of Parliament at all.<sup>126</sup>

The structure of the parliamentary commissions further confirms the gender inequality. For example, in the parliamentary Commission on Gender Equality out of 12 members, only two are men.<sup>127</sup> On the other hand, in the Commission on Economic Issues out of 12 members, only two are women,<sup>128</sup> while in the Commission on Defence and Security there is no single woman member.<sup>129</sup>

The Cabinet is composed of 23 Ministers, of whom only three – 13 % – are women.<sup>130</sup> There are no visible activities related to the previously adopted strategies and plans of action, nor are there any changes in these strategies and plans of action.

During the campaign on the Census 2011, there were no gender related messages. This campaign was aimed at raising awareness for all citizens. However, in the campaign the message was clear that the data for the family (family, income, and property data) was to be given by the head of the family (which means the man of the house).

There are no visible activities of the gender linked NGOs nor the gender-related activities of the wider civil society.

<sup>125</sup> <http://www.ferizbori.mk/> accessed 11 October 2011.

<sup>126</sup> <http://www.sobranie.mk/?ItemID=C5223B907BD9D247A9245C0C30C2E6AE>, accessed 11 October 2011.

<sup>127</sup> <http://www.sobranie.mk/?ItemID=9AC5F4B52914F44DB588E6AB26960308>, accessed 11 October 2011.

<sup>128</sup> <http://www.sobranie.mk/?ItemID=A31692B37CFAA74EA4DB59B826CF9208>, accessed 11 October 2011.

<sup>129</sup> <http://www.sobranie.mk/?ItemID=5DA06A757E494B4A882891E3C7806796>, accessed 11 October 2011.

<sup>130</sup> <http://www.vlada.mk/?q=node/2840>, accessed 11 October 2011.

## Legislative developments

### *Draft Law on Equal Opportunities for Women and Men*

In September 2011 the Ministry of Labour and Social Policy initiated a public discussion on a new draft Law on Equal Opportunities for Women and Men.<sup>131</sup> The changes in the law are aimed at creating links with the Anti-discrimination Law including the possibility of appealing to the Anti-discrimination Commission, as well as harmonising definitions and terminology. The draft Law also further elaborates the legal remedies and misdemeanour provisions and, finally, it also encompasses the private and wider social area. Yet, on the website of the Ministry there is no explanation concerning the reasons for a new law, nor is there any elaboration on the changes and goals to be achieved which include the transposing of certain EU directives.

The draft Law on Equal Opportunities for Women and Men has already entered the parliamentary procedure, being under discussion in different parliamentary commissions.<sup>132</sup>

### Case law of national courts

There is still no case law on any ground of discrimination.

However, there are two final verdicts of the Shtip Basic Court and Appellate Court on mobbing – both went against the alleged victims of psychological harassment, i.e. in favour of the defendants.

There is one final verdict of the Skopje Basic and Appellate Court which also went against the alleged victims of sexual harassment. The Skopje case revealed the problems that the classical approach of the Macedonian Criminal Code faces. A professor in a medical school was reported for sexual harassment of a number of his female students. However, the indictment filed against him was for Forceful Sexual Act Based on Abuse of Position (Article 189 of the Criminal Code) against one of the students. The medical school fired him, based on strong indications that he was the perpetrator of sexual harassment. The indictment in the Criminal Court failed, and the allegations of sexual harassment were not even considered. The professor requested and the civil court granted him compensation for being dismissed from the medical school and for damage suffered by the public exposure of the allegations of sexual harassment.

### Equality body decisions/opinions

#### *Agent for equal opportunities*

The agent for equal opportunities has already been appointed;<sup>133</sup> however, up until now no initiatives have been put before the equality unit in the Ministry for Labour and Social Politics.

During the second half of 2011, there were no reactions or appearances related to gender activities from the agent for equal opportunities, the newly established Commission on Protection from Discrimination, the gender equality commissions established in some of the ministries, the gender equality commissions at local government level, nor from the Ombudsperson's office.

According to publicly distributed information, there are no claims on the basis of gender discrimination before the newly established Commission on Protection from Discrimination.

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<sup>131</sup> <http://www.mtsp.gov.mk/?ItemID=463B79E2DAE454468BBCDFEC8D2D7845>, accessed 26 September 2011.

<sup>132</sup> <http://www.sobranie.mk/ext/materialdetails.aspx?Id=a194e9f4-68e6-46d9-beaf-301c6321de14>, accessed 11 October 2011.

<sup>133</sup> <http://www.mtsp.gov.mk/?ItemID=463B79E2DAE454468BBCDFEC8D2D7845>, accessed 11 October 2011.

## Miscellaneous

### *Decrease in number of NGOs on gender issues*

There has been a further reduction in the number of NGOs working on gender issues in the public domain. Except for a few announcements related to the elections,<sup>134</sup> there are no analyses, announcements, discussions or reactions on the issues linked with gender equality.

However, during this period there has been some more visible activity by the trade union associations on issues related to gender.<sup>135</sup> Trade unions are involved in the development of the network that is designed to react in cases of mobbing.<sup>136</sup> And the Conference on Women and Trade Union Leadership, organised by the trade unions, took place at the end of September 2011.<sup>137</sup>

## MALTA – Peter G. Xuereb

### Policy developments

No major policy developments are reported for the period under review. It remains current Government policy to provide incentives to women to enter or re-enter the labour market, and the forthcoming national budget is expected to provide further tax and other incentives, as well as to make further provision for childcare facilities for working parents. At the same time, it remains Government policy to encourage female participation in decision-making at all levels and in all sectors, but not to make provision for this through measures of mandatory positive action.

### Legislative developments

#### *Equality body powers*

The powers of the Maltese equality body, the National Commission for the Promotion of Equality (NCPE) have been significantly boosted by new regulations made under the main piece of legislation, the Equality for Men and Women Act 2003 (henceforth EMWA, Chapter 456 of the Laws of Malta). The Procedure for Investigation Regulations 2011 (Legal Notice 316 of 2011) finally give the Commissioner acting with the assistance of the Commission the power, inter alia, to require the submission of documents and to summon witnesses to give information orally in the course of investigations carried out under the terms of the EMWA. The Commission had been pressing for these powers for several years.

#### *Partners of EU citizens and entry and residence in Malta under free movement rules*

Legal Notice 329 of 2011<sup>138</sup> amends Legal Notice 191 of 2007,<sup>139</sup> which had sought to transpose the so-called Freedom of Movement Directive, namely Directive 2004/38/EC.<sup>140</sup> By virtue of the amendments, the Order now provides for the recognition of a durable partnership in addition to marriage, in so far as such relationship is duly attested, while also providing that even if no formalisation of the durable relationship exists, the authorities will take other proof of such durable relationship into full account, and this for the purposes of free movement of partners under the Directive. The Director<sup>141</sup> must give due and proper consideration in

<sup>134</sup> [http://www.antiko.org.mk/novosti\\_detail.asp?ID=187](http://www.antiko.org.mk/novosti_detail.asp?ID=187), accessed 11 October 2011.

<sup>135</sup> [http://www.ssm.org.mk/index.php?option=com\\_content&view=article&id=651%3Aizbran-sekretarijat-na-sekcijata-na-zeni&catid=49%3Ahealth&Itemid=146&lang=mk](http://www.ssm.org.mk/index.php?option=com_content&view=article&id=651%3Aizbran-sekretarijat-na-sekcijata-na-zeni&catid=49%3Ahealth&Itemid=146&lang=mk), accessed 11 October 2011.

<sup>136</sup> [http://www.ssm.org.mk/index.php?option=com\\_content&view=article&id=431%3Asto-e-mobing&catid=129&Itemid=148&lang=mk](http://www.ssm.org.mk/index.php?option=com_content&view=article&id=431%3Asto-e-mobing&catid=129&Itemid=148&lang=mk), accessed 11 October 2011.

<sup>137</sup> [http://www.ssm.org.mk/index.php?option=com\\_content&view=article&id=670%3Aseminar-za-zenskoto-sindikarno-liderstvo&catid=49%3Ahealth&Itemid=146&lang=mk](http://www.ssm.org.mk/index.php?option=com_content&view=article&id=670%3Aseminar-za-zenskoto-sindikarno-liderstvo&catid=49%3Ahealth&Itemid=146&lang=mk), accessed 11 October 2011.

<sup>138</sup> European Union Nationals and their Family Members (Amendment) Order 2011.

<sup>139</sup> Free Movement of European Union Nationals and their Family Members Order 2007.

<sup>140</sup> Directive of the European Parliament and the Council of 29 April 2004, OJ L 158/77, of 30 April 2004.

<sup>141</sup> The Director of Citizenship and Expatriate Affairs.

relation to admission and residence of any family member and of any partner with whom the Union citizen has a durable relationship by undertaking an extensive examination of the personal circumstances, and must justify any denial of entry or residence to such persons.

### **Equality body decisions/opinions**

The relevant Maltese equality body is the National Commission for the Promotion of Equality (NCPE).<sup>142</sup> The NCPE is not empowered to make decisions. However, it is empowered to investigate complaints, to mediate, and to support claimants in their claims before any Court or Tribunal. The NCPE held its seventh annual conference in March 2011, at which its seventh annual report was presented. This has now been published on the NCPE website.<sup>143</sup> The annual report 2010 provides, without supplying a full breakdown of cases by subject matter, or providing details, the number, range and broad breakdown into general headings of complaints received during 2010. A summary of some selected case examples used to be provided in the past, but this practice appears to have been discontinued. As for the number of complaints, we are told that 13 complaints were filed, of which 10 related to alleged discrimination in employment and 1 related to discrimination in access and supply of goods and services, but no details are given.<sup>144</sup> It is clear that there is a problem of under-reporting of cases of discrimination.

### **Case law of national courts**

#### ***Transgender marriage***

The litigation saga of Ms Joanne Cassar continues.<sup>145</sup> Having had a gender reassignment, Ms Cassar had applied for marriage banns to be published, but had had this request refused by the Registrar of Marriages. The matter was fought all the way to the Constitutional Court, which ruled on 23 May 2011 that, although Ms Cassar's rights under Articles 8 and 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 had been breached by the refusal, no remedy for the refusal to publish marriage banns in such a case as the present was available in law in Malta. This ruling does not affect the right of a transgender person to have his or her birth certificate changed to show his or her new sex and name. The case is of general relevance to the application by the Maltese Courts of the relevant provisions of the Convention, but also hypothetically raises potential issues in the event of any case arising with a free movement of persons component, in a context where one of the parties is a transgender person who wishes to marry in Malta.

### **Miscellaneous**

#### ***Divorce***

Although not strictly a gender issue, the affirmative vote to introduce divorce in a referendum in May 2011 and the subsequent adoption by Parliament of the divorce law<sup>146</sup> were accompanied by the instrumentalisation of the situation of women by both sides of the argument as to the 'divorce or not' question. Each side argued its version as to whether or not divorce (and therefore its introduction into Maltese law) would be detrimental or beneficial for women. However, this was frequently done in general and often emotional terms, and the

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<sup>142</sup> Website at [www.equality.gov.mt](http://www.equality.gov.mt)

<sup>143</sup> Annual report 2010, available at [https://secure2.gov.mt/socialpolicy/SocProt/equal\\_opp/equality/resources/annual\\_reports.aspx](https://secure2.gov.mt/socialpolicy/SocProt/equal_opp/equality/resources/annual_reports.aspx) accessed 29 September 2011.

<sup>144</sup> Ibid. pp. 28–29.

<sup>145</sup> 'Joanne Cassar Loses Transsexual Marriage Case', *Times of Malta*, 23 May 2011, <http://www.timesofmalta.com/articles/view/20110523/local/joanne-cassar-loses.366791> accessed 28 September 2011. Further references can be found in the previous report for Malta in EGELR 2011-1 at p. 111.

<sup>146</sup> Civil Code (Amendment) Act 2011, Act XIV of 2011, of 29 July 2011. Available at <http://www.doi.gov.mt/EN/parliamentacts/2011/default.asp> accessed 29 September 2011.

implications for women, for example by reference to pension laws, still have to be worked out.

### ***Projects***

Several projects are under way. The NCPE undertakes several projects annually and on a multiannual basis. Full information is provided on the NCPE website.<sup>147</sup> Of note for this reporting period is the EU co-funded project ESF 3.47, Unlocking the Female Potential, on access to employment and enhancing the participation and progress of women in the labour market.

## **THE NETHERLANDS – Rikki Holtmaat**

### **Political developments**

#### ***Criminalisation of wearing a burqa***

Following the Coalition Agreement of the current minority Government (Christian Democrats and Liberals), the Minister of Interior announced in September 2011 that the Government would soon send a Bill to Parliament under which wearing a burqa in any public place will be made a criminal offence, punishable with a fine of up to EUR 380. Since the Government in this respect is supported by the Freedom Party (PVV) of Mr Wilders, it is to be expected that any such proposal will have the support of the majority in Parliament.

### **Case law of national courts**

#### ***Prohibition against wearing Islamic headscarf in a Catholic school***

On 7 January 2011 the ETC, in a case of a Muslim pupil against the board of her Catholic secondary school, concluded that the school had unlawfully discriminated on the grounds of religion by prohibiting the pupil from wearing the Islamic headscarf.<sup>148</sup> Since ETC Opinions are not binding, the school board upheld its policy of prohibiting the scarf (included in a list of head-coverings that were prohibited in the school) and threatened to expel the pupil from the school as soon as she started wearing her scarf again on the school premises. The pupil then brought a case before the District Court of Haarlem (cantonal sector, summary proceedings), in which she asked the Court to declare this policy illegal. Contrary to the ETC, this Court, in a very brief judgment of 4 April 2011, declared that a Catholic school does have the right to prohibit (inter alia) the Islamic headscarf and the pupil lost her case.<sup>149</sup> The case was finally decided by the Amsterdam Court of Appeal in a judgment of 6 September 2011.<sup>150</sup>

The District Court of Haarlem stated that – as the ETC had concluded – the Catholic school did not have a consistent policy in this regard, but it then continued by stating that, in fact the school did not have a policy at all. Next, it reasoned that a school has a very wide margin of appreciation to decide what its (future) policies will be and that it is not for the judge to intervene unless these policies are clearly unreasonable. This was not the case, according to the Court, and therefore the school had a right to prohibit the headscarf. This policy has nothing to do with discrimination or with a limitation on the freedom of religion, said the Court. One other remarkable point is that the Court rejected the pupil's argument that the school's policy restricted her right to express her religion, by stating that this standpoint could not be upheld because the claim to express one's religion unmistakably will interfere

<sup>147</sup> At [https://secure2.gov.mt/socialpolicy/SocProt/equal\\_opp/equality/projects/intro.aspx](https://secure2.gov.mt/socialpolicy/SocProt/equal_opp/equality/projects/intro.aspx) accessed 26 September 2011.

<sup>148</sup> ETC Opinion 2011-02, 7 January 2011. See: [www.cgb.nl](http://www.cgb.nl) (Search term: 2011-02.), accessed 10 February 2011.

<sup>149</sup> District Court Haarlem (Section: Cantonal court of Zaandam) 4 April 2011: <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BQ0063>, accessed 13 April 2011.

<sup>150</sup> Court of Appeal Amsterdam 6 September 2011: <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR6764>, accessed 10 September 2011.



with the feelings of other people not to be confronted with any such religious expressions. Finding a balance between these rights is a task for the school board, not for the judge.

In the appeal case the Court of Appeal in Amsterdam came to the same conclusion, although in a somewhat different way. This Court first stated that the Foundation that governed the school did not have to be consistent in every way and so, in that respect, it was not a problem that another school, run by the same Foundation, did in fact allow the headscarf. It then held that the school board had made it sufficiently clear that, according to its own Catholic standards, the prohibition of the Islamic headscarf is necessary to maintain its 'Catholic foundation'. The Court stated that it is not for a judge to evaluate these Catholic standards and to determine what measures in that regard are 'necessary'. Only in the case of 'special circumstances' could a judge conclude otherwise. The Court of Appeal did not clarify what other circumstances could count as 'special'. The Court briefly discussed some international standards (ECHR and UN Treaties), but rejected their applicability in this case.

The District Court's judgment has aroused considerable discussion in the media and in academic circles in the Netherlands. In particular, the rejection of the pupil's argument that her freedom to religious expression is at stake, by the claim that any such religious expression might run against the feelings of others who might not want to be confronted with such an expression, has met with a lot of criticism. If this 'norm' were to be applied more generally, the Government might well have to consider prohibiting all religious displays, tearing down all religious buildings and/or prohibiting all church bells from being rung on Sunday mornings!

The Court of Appeal's judgment has met with less critical reviews, although again one could conclude that the Court does not really seem to apply international (especially EU) standards in this respect in a correct and restrictive way. In the light of the case law of the ECJ on the topic of how exceptions or justifications to the non-discrimination norm should be interpreted, one could expect a more restrictive approach.

Like the Opinion of the ETC, both courts' judgments neglect the fact that the prohibition of the Islamic headscarf has a disparate negative impact on Islamic schoolgirls and therefore could also be considered as a sex discrimination case.

### ***Supreme Court rejects right to pregnancy and maternity benefit for self-employed women***

In the Netherlands, in the period between 2004 and 2008, there was no right for self-employed women to enjoy a social security benefit during the period before and after the birth of their children. If they wanted compensation for their loss of income in that period, they had to conclude a private insurance contract. However, many insurance companies imposed severe conditions on these women (e.g. a waiting period of two years), so that it was practically impossible for most of them to get a pregnancy and maternity benefit. Some self-employed women, who gave birth to children in that period of time, stated that this situation had infringed their rights under Art. 11(2)b of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and Articles 4 and 8 of the Self-Employed Directive.<sup>151</sup> Their claim was rejected in two instances (District Court, Court of Appeal) and finally they also lost their case before the Supreme Court (SC). The SC, in its judgment of 1 April 2011,<sup>152</sup> stated that Art. 11(2)b CEDAW was not unconditional and not sufficiently precise to be applied directly by judges in the Dutch legal system. As far as the Directive was concerned, the SC stated that Article 8 only includes a recommendation to Member States to investigate whether such a social security scheme is feasible, and that therefore Article 4 about the right to equal treatment is not applicable to this situation.

With this judgment a long series of complaints (at the Equal Treatment Commission) and court cases, all supported by the Clara Wichmann Trial Case Fund, has come to an end. Considering the rejection of their claims in the first two instances, it came as no surprise that the appellants also lost their case before the SC. Although according to the Courts, there is

<sup>151</sup> Directive 86/613/EEC OJ L 359 of 19/12/1986.

<sup>152</sup> Supreme Court of the Netherlands (Hoge Raad der Nederlanden), 1 April 2011, LJN BP3044. See: <http://zoeken.rechtspraak.nl/> (Search: LJN: BP3044.), accessed 8 September 2011.

apparently no case of discrimination when a State does not provide a pregnancy and maternity social benefit for self-employed women, the Dutch Government nevertheless, in 2008, decided to reintroduce such a right after many protests from women's NGOs and political pressure from the opposition parties in Parliament. It is a pity, however, that the Dutch judges did not take the opportunity to ask the ECJ preliminary questions about the interpretation of the Directive. The claimants in this procedure have announced that they will now issue a complaint against the Dutch Government under the Optional Protocol to the CEDAW Convention.

## Decisions of the Equality Body

### *A centre for physiotherapy may advertise for a female replacement during summer holidays*

A centre for physiotherapy asked the Equal Treatment Commission (ETC) to give an Opinion about its decision to advertise a vacancy for a female physiotherapist to replace workers on holiday during the summer months.<sup>153</sup> A complaint had been made about this advertisement by a local anti-discrimination bureau.

The ETC concluded that such an advertisement was directly discriminating on grounds of sex and as such prohibited under Article 3(1) of the Equal Treatment Act (ETA). Article 3(2) of the ETA, however, states that in advertising for a job vacancy, an employer may ask for workers of a particular sex in cases where the law allows for an exception to the equal treatment norm and provided that the advertisement clarifies the reason for asking for someone of a particular sex. The latter condition had been fulfilled by the centre for physiotherapy, where the advertisement stated that it wanted a female physiotherapist because of the number of female Muslim patients that were under treatment in the centre. The next question was whether the centre could rely on one of the legal justification grounds for making a direct distinction on grounds of sex.

The ETA makes, in Article 5(2) and 5(3), an exception which allows distinctions to be made in a situation where sex is a determining factor. In a special Decree on professional activities for which sex may be a determining factor (*Besluit Beroepsactiviteiten waarvoor het geslacht bepalend kan zijn*) of 1989, last amended in 2005,<sup>154</sup> it is made clear in which situations this may be the case. Article 1(f) of this Decree mentions as such professional activities which consist of personal care, nursing or childcare, or giving assistance to people, when the proper functioning of these activities within the particular work organisation requires that they are performed by a person of a particular sex. The ETC first examined whether physiotherapy fell under this provision and concluded that indeed it did. The main reason for this was that, in Article 2(e) of the same Decree, professional activities in the personal household of someone which require physical contact between people are also exempted. Next, it examined whether the second requirement was fulfilled: was it necessary within this organisation to have a female physiotherapist? The centre had made it clear that it was situated in a neighbourhood with a large immigrant population and that many of its clients were of Muslim origin. Muslim women, in particular had found their way to the centre. It employed two female physiotherapists and one male physiotherapist. Since female Muslim patients insisted on being treated by a female therapist, it was necessary in the period of summer holidays to have enough staff to serve these particular patients. It was a very small centre; therefore this problem could not be solved in any way other than by means of appointing a female replacement. The ETC accepted this as a sufficient reason to apply the exception of the genuine occupational requirement.

It is remarkable that the ETC quite easily accepted the fact that female Muslim patients at this centre demanded to be treated by a female physiotherapist. In the Netherlands this is a topic of considerable debate: how far may patients, within the context of a professional medical organisation, demand on the grounds of religious belief, that they are treated by someone of the same sex? It is argued by some that giving in to such demands would lead to

<sup>153</sup> ETC Opinion 2011-52 11 April 2011. See [www.cgb.nl](http://www.cgb.nl). (Use 2011-52 as search term.) accessed 13 April 2011.

<sup>154</sup> See: Staatsblad 2005, 529. The Decree was also changed in 2004, see Staatsblad 2004, 163.



strictly sex-segregated medical care and this is a direction that most people would not want to take. Others maintain that women, no matter what religion they have, have a right to privacy and safety, and therefore cannot be forced to accept medical treatment or care from male medical professionals. Considering these discussions, one could have expected that the ETC would have spent some more time on the acceptability of the argument brought forward by the centre for physiotherapy. In equal treatment doctrine in general (e.g. as clarified by the European Court of Justice in Case C-54/07, *Feryn*)<sup>155</sup> an organisation may not shield behind others when it discriminates; in this case, the centre for physiotherapy may not shield behind its Muslim patients. That is, unless in the particular case at hand the freedom of religion, or any other fundamental rights (like e.g. privacy), outweigh the right to non-discrimination. Such a balancing of fundamental rights, however, was not made by the ETC in this Opinion. The outcome, in fact, might have been the same: giving women (from whatever religion!) a right to be treated by a female physiotherapist.

### ***ETC rejects right to bonus during pregnancy and maternity leave***

In the past, in a number of cases the Dutch Equal Treatment Commission (ETC) has decided that a refusal to pay a bonus over the period that a woman was on pregnancy and maternity leave or was absent because of illness related to pregnancy and maternity, constituted discrimination on the grounds of sex.<sup>156</sup> Under the influence of a judgment of the Court of Appeal of Arnhem, given on 27 April 2010, the ETC has changed its policy in a series of Opinions, published on 19 May 2011. The Court ruled that, in that particular case, the bonus should be considered as a form of (irregular) pay, but that the system of law in the Netherlands was such that during pregnancy and maternity leave, women do not have a right to pay but a right to a social benefit (which covers 100 % of their pay). This frees the employer from the obligation to pay the salary/bonus. Therefore, there could be no discrimination against women when, for that period of time, the employer did not grant them the bonus. The ETC investigated three cases in the spring of 2011, and in two of them came to the conclusion that, according to the criteria set by the Court of Appeal, the bonus was indeed to be considered as pay. Only in one case was the bonus not in any way related to the work that the employees performed and could therefore be tested against the equal treatment law. As for the right to have a bonus over the period in which a woman is absent because of sickness or disablement that is pregnancy related, both the Court of Appeal and the ETC followed the criteria in the judgment of the ECJ in Case C-191/03, *North Western Health Board v McKenna*.<sup>157</sup>

The decision of the ETC to follow the Court of Appeal seems legally correct, although one point stands out: both instances did not really investigate whether the social security offices would add the bonus to the salary in order to establish the amount of pregnancy and maternity benefit. If that is not the case, the woman would still suffer a detriment. That, however, would be caused by a Government regulation, which cannot be tested by the ETC because it does not have the authority to test whether ‘unilateral acts of the Government’ are in accordance with the Equal Treatment Laws.

### ***Refusal to grant internship to 52-year-old male student***

A male student of a medical educational institution was required to do an internship at a hospital in order to finish his education/training and get his diploma for being a doctor’s assistant. He applied to a hospital in Amsterdam and although he was more or less promised a place by the co-coordinator for internships, he got an email at the very last moment stating that he could not do this internship because of his age and his lack of experience in the care sector. Later, other arguments were also mentioned by the hospital, like the fact that the candidate did not fit into the team and that there was soon due to be a vacancy that would have to be filled by someone younger (preferably a woman), because the existing team

<sup>155</sup> Judgment of 10 July 2008, ECR 2008, I-05187.

<sup>156</sup> E.g. in ETC Opinion 2008-142 and 2007-90.

<sup>157</sup> Judgment of 8 September 2005, ECR 2005, I-07631.

already had a number of older (over 40) doctor's assistants. The department, however, needed a full-time doctor's assistant. The intern for these reasons could not fill the expected vacancy and it would be impossible to have two new people in the team at the same time. Another reason to deny the internship/job to this student was that the hospital has a regulation for employees older than 55, which grants them 100 hours extra holiday per year.

The Equal Treatment Commission (ETC) found that this was a clear case of direct discrimination on the grounds of age.<sup>158</sup> In theory, it is possible to bring forward objective justifications for (direct) discrimination on the grounds of age. The board of the hospital however denied that there was age discrimination and therefore brought forward no arguments that could justify such discrimination. The ETC rightly pointed out in an *obiter dictum* that the hospital in this case apparently not only discriminated on the grounds of age, but that the grounds of sex and 'employment status' (full-time/part-time contract) also played an important role.

It seems that we have here a clear case of multiple or intersectional discrimination. This, however, did not make a difference to the outcome of the case as such, because the ETC cannot impose any sanctions, therefore it could not increase any sanction on the grounds that multiple discrimination was also an issue.

## Miscellaneous

### *Survey on unequal pay in hospitals by the Equal Treatment Commission*

The Equal Treatment Commission (ETC) has published a report on the basis of a so-called 'investigation on its own initiative'. This is a possible way, which is hardly ever used, for investigating certain practices in a sector or company when the ETC suspects that there is systemic or structural discrimination. (See Art. 12(1) of the General Equal Treatment Act.) The report deals with the issue of unequal pay between men and women in general hospitals in the Netherlands.

The report is a very enlightening piece of work on the causes of unequal pay between men and women in this particular sector. The research is also exemplary because of the (intensive and interactive) methodology that was used to gather the necessary information, as well as the way in which the results were disseminated in the hospitals and how the various actors in the field were instructed about ways in which they could improve their pay practices in such a way that unequal pay would decrease. The project serves as a very good example of a proactive strategy to combat discrimination against women. The outcome is striking, in the sense that it illuminates that it is mostly 'informal' and incidental factors that cause structural pay discrimination between men and women. The largest differences in pay between men and women who are working in general hospitals are attributable to pay negotiations, guaranteed salaries, or other criteria such as career-related salary arrangements.

The ETC has published the report on the Internet, including a summary of the main findings in English.<sup>159</sup>

## NORWAY – Helga Aune

### Policy developments

#### *The Gender Equality Act will remain as no common anti-discrimination law is to be introduced*

There will be no proposal for a common anti-discrimination law covering all discrimination grounds including gender. The Minister of Children and Equality and Social Inclusion, Audun

<sup>158</sup> ETC 2011-83, 25 May 2011. See: <http://www.cgb.nl/oordelen/oordeel/222017/volledig> accessed 8 September 2011.

<sup>159</sup> ETC Opinion 2011-54, 21 April 2011. See: <http://cgb.nl/english/publications/reports> (The summary is listed under the heading: Research Reports.) accessed 10 June 2011.

Lysbakken, announced that the Government is not going to propose one common anti-discrimination law covering all the grounds.<sup>160</sup> One common law was the recommendation of the Graver Committee in its early preparatory work (White Paper; Norwegian Official Document (NOU) 2009:14) for a possible law. The Norwegian legislative status in discrimination law will remain as it is, with several different acts depending on the discrimination ground. The Government has put decisive weight behind the argument that the gender perspective may lose attention/emphasis if it is included as one ground amongst many others in one act. In addition to the existing laws, the Government will propose one new law providing general protection against discrimination for homosexuals, transsexuals and transgender persons. The new act is expected to be proposed in 2012/2013.

### ***Report from the Government to Parliament about the common responsibility for a sound labour market***

In its evaluation of several factors affecting the conditions for a first-rate and sound employment market, the Government also addressed the issue of involuntary part-time work.<sup>161</sup> Various issues relating to gender are touched upon, such as working time arrangements in the health sector as well as the new wage agreement in the cleaning and homecare business. This sector is dominated by women and is heavily represented in the grey economy. The evaluation provides a good overview of the status quo and presents in addition some possible solutions through a variety of means, including projects involving the organisations as well as the tripartite system. The term 'tripartite system' refers to the tradition of intensive co-operation between the employee organisations, employer organisations and the Government. Very often they work out solutions in close co-operation, including where the Government may also contribute financially.

The report is not at the stage of discussing possible legislative acts.

### ***Report on female entrepreneurship.***

The Government launched an action plan for the period 2008-2013 with the goal of reaching 40 % of female entrepreneurs by 2013. A midway evaluation reveals that the plan is not sufficiently clear on the structure of what types of measures are to be used to reach the set goal and there is a lack of clarity as to the statistical material to be used to measure the goal. The evaluation is clear in its advice on increased visibility as to the measures chosen to inspire and encourage female entrepreneurship. In addition, increased economic support is advised in order to strengthen the plan.<sup>162</sup>

### **Legislative developments**

The fathers' quota of parental leave was extended by two weeks so that the total of the fathers' quota of the leave constitutes 12 weeks, starting with children born or adopted on 1 July 2011 and thereafter.<sup>163</sup> This leaves a difference of three weeks between time off for men and women: women have compulsory leave of three weeks before the birth and six weeks afterwards. In reality, women tend to take most of the leave, even though the trend is that more and more couples share the leave.

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<sup>160</sup> See the Government press release: <http://www.regjeringen.no/nb/dep/bld/aktuelt/nyheter/2011/arbeidet-med-ny-diskrimineringslov-givnin.html?id=653933>, and the Graver Committee's report: <http://www.regjeringen.no/nb/dep/bld/dok/nouer/2009/nou-2009-14.html?id=566624>, both accessed 12 October 2011.

<sup>161</sup> Meld. St. 29 'Felles ansvar for eit godt og anstendig arbeidsliv'. See the report (in Norwegian) <http://www.regjeringen.no/nb/dep/ad/dok/regpubl/stmeld/2010-2011/meld-st-29-20102011.html?id=653071>, accessed 12 October 2011.

<sup>162</sup> 'Evaluerer av handlingsplanen for mer entreprenørskap blant kvinner', NIFU report 20/2011. See the report (in Norwegian) <http://www.regjeringen.no/upload/NHD/Vedlegg/Rapporter2011/Evalueringhandlingsplanen.pdf>, accessed 12 October 2011.

<sup>163</sup> <http://www.regjeringen.no/nb/dep/bld/pressester/pressemeldinger/2010/pm-1211.html?id=619700>, accessed 5 April 2011.

## Case law of national courts

### *Judgment from the Appeal Court concerning multiple discrimination (age and gender) in relation to hiring*

*Frostating Appeal Court Case, LF-2011-16188 (judgment 2010-06-17)*<sup>164</sup>

This concerned alleged multiple discrimination on the grounds of sex and age in relation to hiring. A was a man, 61 years old, who alleged that he had been discriminated against on the grounds of sex and age when he was not among the applicants called for an interview and also not employed as a job coach by the State Employment Agency (NAV). The man filed a complaint to the Equality and Anti-Discrimination Ombudsman. The Ombudsman concluded that the man had been a victim of gender and age discrimination. A filed a case against the State (representing NAV) in the court of first instance and was awarded damages of NOK 125 000 (EUR 15 625). The State appealed the case to Frostating Appeal Court. The Appeal Court found that no discrimination had taken place.

The State claimed that the judgment at first instance was incorrect. On the question of age discrimination the Appeal Court split 4:1. The majority concluded, with some doubt, that there had been no age discrimination as they believed the explanation of the employer, represented by two of the interviewers, who explained that they had been looking for expertise not then present amongst the workforce. Applicant A had expertise which was already available to the employer. In addition, they emphasised that A had been away from this field of work for a period of nine years, thus throwing into question his level of up-to-date expertise in this field. The majority's conclusion, after considering this, was that no age discrimination had taken place. No evaluation of any possible discrimination based on gender was made. The minority, however, that had found that discrimination had taken place did not accept that the State had proved that age discrimination had not taken place. This (minority) judge said that he could not accept that age had not been an issue, at least subconsciously, as one of the interviewers representing the employer had admitted that this might have been an issue subconsciously since A was only six months younger than the person they were going to replace.

The case is typical of the few times when two grounds of discrimination are raised at the same time – age and gender. It illustrates the effects of, in fact, double discrimination (no interview, no employment). For the Ombudsman and the Court of First Instance multiple discrimination (age and sex) were considered to affect the compensation. The case for the Appeal Court, however, was only presented as an issue of age discrimination and the Appeal Court concluded, based on the testimonies of the witnesses, that no discrimination had taken place. Reducing the issue of multiple discrimination to only focusing on one of the grounds can be considered to be typical for when such cases go to the Appeal Courts.

## Equality body decisions/opinions

### *The Gender Equality and Anti-Discrimination Tribunal*

One case from the Tribunal is commented upon in the following paragraph in which the Tribunal made some clear statements regarding 'post' explanations regarding a job applicant's personal suitability for a position when no documentation of any kind can be presented.

### *Pregnancy – direct discrimination*

A woman was invited to a job interview and she informed the interviewer that she was pregnant.<sup>165</sup> After the interview the employer called her and said that they needed someone

<sup>164</sup> National law: the Gender Equality Act Sections 3 and 4, the Working Environment Act Chapter 13. EU law: Article 3.1 of the 2000/78/EC Equal Framework Directive and Article 14 of the 2006/54/EC Recast Directive. See case at: <http://websir.lovdato.no/cgi-lex/wiftsok?txt=text&emne1=likestillingslov&emne2=kj%F8nn&emne3=&emne4=&instans=&dato=&publise rt=&saksgang=&parter=&forfatter=&button=%A0+S%D8K+%A0&trunker=on>, accessed 12 October 2011.

who could stay for a longer period in the job, but that she was welcome to reapply after her leave with the baby. The woman claimed to be the victim of direct discrimination due to pregnancy. The employer claimed that his decision was not due to the pregnancy but to the fact that, after the interview, it appeared that the woman was not sufficiently qualified for the position. The Tribunal stated that, in its practice, it did not accept 'post' explanations regarding a job applicant's personal suitability for a position when no documentation of any kind could be presented; see for instance the Ombudsman cases 7/2006 and 10/2007. The Tribunal concluded that the employer had violated the prohibition of direct discrimination because of pregnancy.

### ***The Gender Equality and Anti-Discrimination Ombudsman***

One case from the Ombudsman is particularly of interest as it is one of the first cases regarding direct discrimination because of men taking their fathers' quota leave.

#### *Paternity leave/direct discrimination*

Upon return from his leave of 10 weeks fathers' quota, an employee was not allowed to take up again his task to act as a deputy leader when the leader was away.<sup>165</sup> Instead the employee was told that the person who had served as deputy leader while he had been taking his fathers' quota had done the job well and the employer saw no reason why there should be a change after the employee had returned from his leave. The Ombudsman stressed that the rights of employees taking their lawful leave need robust protection in order to preserve the right to maternity or paternity leave as a real right for employees. The Ombudsman concluded that the employee who had been taking his fathers' quota was the victim of direct discrimination because of gender, in violation of the Gender Equality Act of 9 June 1978 no. 45, Section 3. This is one of the first cases regarding direct discrimination because of men taking their fathers' quota leave.

## **POLAND – Eleonora Zielińska**

### **Policy developments**

At the beginning of October parliamentary elections were being held in Poland. The period reported on is therefore significantly influenced by the requirements of the electoral campaign. This means, on the one hand, general deceleration of the legislative process. On the other hand, it gives a good opportunity to examine what the major political parties have to offer women in their programmes. Unfortunately, the picture was not optimistic. The governing party, PO (Citizens' Platform), which finally got 207 seats in Sejm (the lower chamber of Parliament, and the great majority of seats in the upper chamber – Senate) focuses in its programme on two problems, the first connected with women returning to the labour market after giving birth, and the second concerning the elimination of a pay gap. With regard to the second issue, however, the PO's declarations are very imprecise and they do not exceed the scope of general legal provisions explicitly resulting from the Labour Code. The second governing party, PSL (Polish Peasants' Party, which finally got 28 seats), and the largest opposition party, PIS (Law and Justice with 157 seats), consider women's problems not from the perspective of a woman's rights but solely in the context of the protection of the family. Another opposition party, SLD (Democratic Left Alliance, now with 27 seats), declares equality policy to be one of its priorities.. The party fails, however to specify where the funds

<sup>165</sup> See Tribunal's case 5/2011 of 7 June 2011. National law: the Gender Equality Act Section 3.2.2. See: <http://www.diskrimineringsnemnda.no/>, accessed 12 October 2011.

<sup>166</sup> The Equality and Anti-Discrimination Ombudsman's decision, Case 11/85 of 8 July 2011. Legislative provisions: national law: the Gender Equality Act 9 June 1978 no. 45, Section 3 and EU law: the 2006/54/EC Recast Directive. See the Ombudsman's decision (in Norwegian) <http://www.ido.no/no/Klagesaker/Arkiv/2011/Mann-forskjellsbehandlet-pa-grunn-av-fedrekvote-ved-valg-av-stedfortreder/>, accessed 12 October 2011.

should come from. The most developed equality and anti-discrimination programme is offered by the recently established RPP (Palikot's Support Movement, with 40 seats in Parliament); the chances of this party to influence the mainstream of state policy, however, are rather small. The implementation of the parity law, which provides for a quota of 35 % of places on electoral lists for women, indicates that this requirement has been subject by some parties to numerous manipulations: e.g. active and educated women are being intentionally excluded, placed in districts where their parties are less popular, or pushed down to the bottom of electoral lists. On the other hand, it shows that the relatively highest percentage of women has been introduced into Parliament by the PO which has clear and fairer internal party rules in this respect (in every three top places on an electoral list there must be at least one woman and in every five top places two women). In effect, women after the 2011 elections constitute 24 % of the deputies in Sejm; which does not mean a spectacular growth in comparison with the previous election of 4 %, but nevertheless the highest number of women in Parliament in Polish history.

### **Case law of national courts**

#### ***Protection from dismissal of pregnant women employed by appointment***

The Supreme Court, in a judgment of 19 October 2010,<sup>167</sup> rejected a cassation claim filed in the following case. A teacher had been informed about her dismissal from work; previously, however, she had discovered she was pregnant. By a ruling of 21 September 2009, the Regional Court in Szamotuły rejected her claim, holding that she was not subject to the special protection of employment for pregnant women, provided for in Article 177 of the Labour Code (LC), because she did not have an employment contract, but was an appointed employee, thus subject to the regulation of the Teachers' Charter of 26 January 1982 (which does not provide for such special protection against dismissal during pregnancy). As a result of an appeal lodged by the claimant, the District Court in Poznań overturned the ruling of the Regional Court and reinstated the claimant in her post. The defendant school lodged a cassation claim at the Supreme Court, which was rejected.

Worth noting are the grounds of both judgments, that of the District Court and of the Supreme Court, as they frequently refer to EU law and jurisprudence of the European Court of Justice. In particular, it was stated that Article 10 of Council Directive 92/85/EEC<sup>168</sup> obliges the Member States to introduce the necessary means to prohibit dismissal of pregnant women, without restricting this obligation either to cases when the pregnancy occurs before the dismissal, or to employment relations established by an employment contract. According to this provision, the prohibition against dismissing a pregnant worker can only be overruled when two conditions are met: (1) reasons occur which are not connected with the fact of pregnancy; and (2) dismissal is admissible according to national law and/or existing practice and the relevant authorities have approved such conduct.

Therefore, it was declared that the exclusion of the protection according to Article 177 LC, with regard to appointed teachers, had no justification. According to both courts, if the legislators had wanted to restrict or annul this protection, they would have done so specifically in the Labour Code or in the Teachers' Charter. Such provisions have not, however, been introduced with regard to appointed teachers. The cited opinions have been confirmed in the case law of the European Court of Justice.<sup>169</sup> In order to preserve conformity between Polish law and Directive 92/85/EEC, the provisions of the Teachers' Charter had to be interpreted in such a way as to allow Article 177 LC to apply to appointed teachers. The ruling of the court of first instance would result in a conflict between Polish law and EU provisions, which would mean that Poland had unacceptably failed to fulfil its obligations regarding the implementation of EU law.

<sup>167</sup> Case no. II PK 85/10, not published.

<sup>168</sup> 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, OJ L 348, 28 November 1992, pp. 1–8.

<sup>169</sup> Recital 54 of the ruling in Case C-63/08 *Virginie Pontin v T-Comalux SA* 29 October 2009 (nir).

### ***Disclosure by an employee of the remuneration of other employees as ground for dissolution of the employment contract***

On 26 May 2011 the Supreme Court issued a ruling, directing the re-examination of a case which has great significance with regard to the ability to monitor the application in practice of the rule of equal pay for equal work (or work of equal value).<sup>170</sup> The claimant in this case was a man, yet the reasoning of the Supreme Court refers to provisions on equal treatment contained in the Labour Code and can just as well be applied in cases of gender-based pay discrimination. The facts established in the case showed that the defendant employer obliged employees to keep confidential the amount of their salary. The claimant, employed as a marketing specialist (one of the best employees of his department), asked his superior a question about the method of calculating the amount of his bonus for achieving one of the best deals and incomes in the company. He was answered with an electronic message, in which his superior ‘mistakenly’ did not erase information about the remuneration and bonuses of other employees in his department. The employee, surprised by ‘significant differences in the amount of their remuneration’, forwarded the message to his colleagues and met them to discuss the issue. Later on, after the case reached the director of the company, the superior was reprimanded for “‘unintentional’ disclosure of company secrets. The claimant received the same punishment. After insisting on clarifying the discriminatory differentiations in the employer’s remuneration policy, the claimant was dismissed from work. This was the ground for the court proceedings.

Both the Regional Court and the District Court held that the dismissal of the employee from work was justified by law. The claimant lodged a cassation claim from these rulings. According to the Supreme Court, the claimant’s actions were justified, with regard to Article 18<sup>3b</sup> § 1, Section 2 LC, thus he had not exceeded the limits of his rights as an employee to clarify information about salary discrimination between marketing department employees, received from his superior. According to Article 18<sup>3b</sup> § 1, Section 2 LC, the fact that an employee has exercised his rights due to a violation of the principle of equal treatment in employment, does not constitute grounds for termination of an employment relationship by the employer, with or without notice. This provision also covers the clarification or support given to other employees, aimed at preventing potential violation of the principle of equal treatment in employment, regardless of the way that the employee came into possession of the information indicating the violation of the principle of equal treatment in employment in salary matters. In a case where the employee undertakes such legal actions aimed at preventing violation of the principle of equal treatment in employment in salary matters, the employer cannot apply any sanctions provided for by labour law, which would deprive an employee of the protection provided by, or interfere with, the legal effectiveness of, the unconditionally binding provisions on equal treatment in employment (Article 18<sup>3a</sup>–18<sup>3e</sup> LC). This means that employers are prohibited from exploiting so-called confidentiality or ‘secrecy’ clauses with regard to an employee’s salary, for reasons other than protection of company secrets, the disclosure of which could jeopardise important interests of the company, e.g. the ability to compete. Such potential threats to the company were not identified during the proceedings. For this reason, the classified salary information forwarded by the employee to his colleagues, aimed at preventing salary discrimination, could not constitute a ground for termination of an employment relationship by the employer, without notice.

## **PORTUGAL – Maria do Rosário Palma Ramalho**

### **Legislative developments**

#### ***Changes in labour law and social security law***

During the time covered by this issue of the European Gender Equality Law Review, there have been no changes in equality law in Portugal.

<sup>170</sup> Case No. II PK 304/10, not published.



However, several changes have been or are being introduced in labour law and in social security law, under the Agreement between the Portuguese Government, the European authorities and the International Monetary Fund, aiming for the recovery from Portugal's financial crisis.

The measures in this Agreement that regard employment include:

- easing of working time arrangements;
- easing of the transition of workers across occupations, firms and sectors;
- actions directed to the improvement of employment opportunities for young people and other disadvantaged categories;
- easing of conditions for dismissal based on objective grounds;
- revision of the lay-off system;
- reduction of severance payments for the ending of fixed-term contracts;
- reduction of compensation for dismissal;
- indexation of wages increases to productivity; and
- reform of collective bargaining.

At this stage, several benefits related to employment have already been reduced or removed. For instance, all workers will lose half of their Christmas allowance this year, and as far as next year is concerned, it has already been announced that public servants will lose a part of their holiday allowance and of their Christmas allowance. Also in the public sector there is a general prohibition on making new contracts and promoting workers.

Where social security is concerned, the measures range from the revision of the unemployment insurance system to a general decrease in pensions and health benefits, as well as maternity and paternity benefits. Some of these measures are already in place, while others will be introduced in the near future.

Although these measures are gender neutral, some of them risk having an unequal impact on women and on men, due to the more disadvantaged situation that women already have in some issues. This is the case in, among others, the measures related to fixed-term contracts (since more women than men have these contracts), and in the measures related to pensions (since the value of pensions is already lower for women than for men, due to other factors).

## **ROMANIA – Roxana Teşiu**

### **Policy developments**

#### ***Declaration by the Prime Minister on the position of the President of Romania being occupied by a woman***

At the National Convention of the Women's Organisation of the Liberal Democratic Party that took place on 15 October 2011, the Prime Minister, Emil Boc, stated that sooner or later a woman will be in a position to be elected as the President of Romania. The Liberal Democratic Party representatives stated that the party had the necessary resources in terms of human capital to nominate and support the candidature of a woman for the most important position in the State.

### **Legislative developments**

#### ***New Civil Code***

Starting on 1 October 2011, the new Civil Code entered into force in Romania. The new Civil Code has been adopted through Law no. 71 of 15 July 2011. The new Code represents a marked change from the old one adopted in 1864; a number of wholly new legal topics have been introduced. The new Civil Code has 2 664 articles and it deals with the subject of pecuniary and non-pecuniary relations between people subject to the civil law. Among the most important completely new topics introduced by the new Civil Code are the provisions on: the institution of matrimony; equal parental authority and the legal regime of common



property; freedom of expression; the right to dignity and the right to private life as non-pecuniary rights. It is likely that the adoption of a new Civil Code, replacing the one in force since 1864, will have an impact on gender equality. However, at this moment it is too early to assess such an impact; there is a need for further legal development and decisions by the courts in order to start identifying the impact.

#### ***Draft of the Social Assistance Law***

The Romanian Government adopted on 1 June 2011 the draft of the Law on Social Assistance. The draft of the Law on Social Assistance is currently before the Commission for Labour of the Senate, the first chamber of the Romanian Parliament. According to statements by the Prime Minister, out of the current 54 social benefits provided for under the existing social assistance legislation, the proposed Law on Social Assistance will only grant nine. In order for the Law on Social Assistance to be enforced, a number of the other 15 laws applicable in the field of social assistance will need to be amended. According to the draft, there will be four different categories of benefits categories, as follows:

- social benefits for combating poverty and social exclusion;
- social benefits for supporting the child and the family;
- social benefits for supporting persons with special needs;
- social benefits granted for special events.

Women represent a large portion of the population in the groups at risk, such as individuals suffering from poverty and at risk of social exclusion, as well as single parents. It is therefore estimated that the Social Assistance Law will have an impact on gender equality.

#### **Case law of national courts**

There is no public information available on developments related to case law on gender equality. Romanian courts do not publish their decisions, hence it is very difficult to assess to what extent the gender equality law is enforced.

The Romanian mass media recently made public details about a judge from Constanta county who had been excluded from the profession following allegations of sexual harassment filed by the female court clerks. The decision to be excluded from the profession was issued by the Superior Council of the Magistrature.

#### **Equality body decisions**

No decision of the National Council for Combating Discrimination pertinent to gender-based cases has been published during the past six months.

### **SLOVAKIA – Zuzana Magurová**

#### **Policy developments**

##### ***The Gender Equality Committee***

The Gender Equality Committee, which acts as a specialised body of the Government's Council for Human Rights, National Minorities and Gender Equality, met for the first time in September. It set up working groups that will prepare analyses and data for elaboration of the gender equality strategy.

##### ***Draft amendments to Family Allowance Act***

Parliament is currently discussing deputies' draft amendments to acts regulating family allowance, social assistance benefit and childbirth allowance. Amendments proposed by the coalition deputies were accepted by the Government in June.

The purpose of the amendment to the Family Allowance Act is to increase the motivation to find and keep a job, even at lower-wage positions, and at the same time to eliminate the negative motivation of socially excluded groups in the population to gain and increase their own income through social benefits related to the number of children. The deputies expect that the amendment to the Childbirth Allowance Act will bring a saving of EUR 5.92 million per year. The proposed amendments require that:

1. the criterion for the assessment of entitlement to a supplement to the childbirth allowance for the first, second and third child should be a condition that at least one of the parents:
  - had had sickness insurance by having worked for at least 270 days; or
  - had prepared himself or herself for his or her future profession by studying at a university; or
  - had become a graduate from a university or had finished a secondary school, during the four years before entitlement to the supplement to childbirth allowance has been established; and
2. the amount of family allowance has been reduced by 50 % in a case where at least one of the parents had not had:
  - sickness insurance for a period of at least 270 days, including the period of drawing maternity allowance; or
  - a period of study at a university (1st or 2nd degree), or at a secondary school, during the four years before the entitlement to family allowance has been established. Social assistance benefit should not be increased, even in case of a reduction of family allowance.

In June, nearly 60 NGOs sent to the Members of Parliament an open letter, appealing to them not to approve these amendments because the NGOs regarded the amendments to be unconstitutional and contrary to the commitments made to the EU. One of the draft amendments to the Act reduces the amount of family allowance by 50 %, from EUR 190.10 to EUR 95.05, if at least one of the entitled persons had not had sickness insurance for at least 270 days or had not prepared himself or herself for his or her future profession by studying at an university during the four years before the entitlement to allowance has been established. According to the NGOs, such a regulation would most threaten persons with a low representation in the labour market and with low qualifications who, however, often found themselves in this situation due to discrimination in access to education and employment (e.g. Roma women). The third sector's representatives also questioned whether the Act as proposed would bring the expected savings in public finance. For those affected, it would not increase their chances of finding a job either. On the contrary, it would draw these people and their children deeper into the vicious circle of problems. At the request of members representing the NGOs, the Government's Council for Human Rights, National Minorities and Gender Equality will deal with the proposed amendments at an extraordinary meeting, because, due to a lack of time, discussion on this issue could not be finalised and an opinion adopted at the ordinary September meeting.

## **Legislative developments**

### ***Act on Civil Service of Professional Soldiers***

In June 2011 an amendment to the Act on Civil Service of Professional Soldiers<sup>171</sup> was adopted. This amendment incorporated into Slovak law Council Directive 2010/18/EU, OJ L 68, of 18 March 2010, p. 13, implementing the revised Framework Agreement on Parental Leave. At the end of parental leave, soldiers have the right to return to their previous position and, if that is impossible, they will return to an equivalent or similar position. At the same time, the rights of a professional soldier, to which he would be entitled if he were working at his position, are retained until the end of parental leave. According to the Act, a pregnant professional soldier or a professional soldier who permanently cares for a child younger than

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<sup>171</sup> Act No. 346/2005 Coll.

eight, can apply for a change in the length of service and for a change in the organisation of service time. The service office manager or the commander will be obliged to grant such an application, unless an important interest of civil service prevents him from doing so.

This amendment brought compliance with the amended Labour Code. Amendment to the Labour Code<sup>172</sup> with effect from 1 April 2011, incorporated Council Directive 2010/18/EU implementing the revised Framework Agreement on Parental Leave concluded between BUSINESS EUROPE, UEAPME, CEEP and ETUC and was harmonised with the case law of the European Court of Justice ( see, e.g. Case C-116/08 *Meerts* [2009] ECR-I 10063). The Labour Code provides that an employee (male or female) shall return to work under conditions that are not less favourable to them than those available to them at the time of taking the maternity leave (woman) or parental leave (man), and that they shall be entitled to benefits resulting from any improvement that would have occurred if they had not taken this (maternity or parental) leave. Moreover, this regulation also applies to employees (male and female) who return from parental leave after their child reaches the age of 3 or 6 (if the child is chronically and seriously disabled). If the employee cannot be assigned to the same work and workplace, because the work is not carried out any more and the workplace has been closed, the employer is obliged to assign the employee to work corresponding to their employment contract.

## **Equality body decisions/opinions**

### ***The Slovak National Centre for Human Rights***

In June the Government approved an analysis of the activities of the Slovak National Centre for Human Rights. The Centre was established in 1994 and its tasks were extended in accordance with the Antidiscrimination Act<sup>173</sup> in 2004, when it started to fulfil the functions of an equality body. Based on this analysis, prepared by vicepremier for human rights and national minorities, the functioning of the Centre in its current structure was seen to be unsustainable in the long term and it will have to go through a transformation. The Centre is currently unable to ensure fully the real and effective fulfilment of functions in the areas of support and assurance of equal treatment and protection of human rights. For this reason the agenda of the Centre should be divided and the function of the equality body should be taken over by a new institution. Competences in the area of protection of human rights would be transferred to the Ombudsman's office. The analysis refers, among other things, to the inertia of the Centre in the case of two Roma sisters whom several schools refused to employ as teachers. Eventually, an NGO provided them with legal help in legal proceedings. Weaknesses in the financing of the Centre's activities are pointed up by the fact that the report on the observance of human rights, including the observance of the principle of equal treatment, in the Slovak Republic for the year 2010 still has not been translated into English, so the website only contains its Slovak version.<sup>174</sup>

## **SLOVENIA – Tanja Koderman Sever**

## **Policy developments**

### ***Governmental activities***

In July 2011, the Government adopted the Annual Report of the Advocate for the Principle of Equality for 2010. According to the Annual Report, ministries and governmental offices are instructed to report to the Secretariat-General of the Government of the Republic of Slovenia

<sup>172</sup> Act No. 48/2011 Coll., amending Act No. 311/2001 the Labour Code and Act No. 365/2004 Coll., the Antidiscrimination Act.

<sup>173</sup> Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination and on the amendment of certain acts (Antidiscrimination Act).

<sup>174</sup> <http://www.snsrlp.sk>, accessed 7 October 2011.

by the end of September 2011 on their activities in order to overcome the shortcomings of the current system.

In addition, the Government adopted a decision on the setting up, functions and composition of the inter-departmental working group for the preparation of the amending Act Implementing the Principle of Equal Treatment. A decision was adopted on the basis of analysis of the current institutional regulation for ensuring equality and protection against discrimination in Slovenia, prepared by an inter-ministerial and inter-office coordination working group appointed by the government to evaluate the effectiveness of the existing system of legal protection against discrimination. The analysis has clearly shown that the institutional regulation of protection against discrimination in Slovenia is insufficient and that there is a need to improve it.

### ***Ombudsman activities***

The Human Rights Ombudsman submitted its Annual Report for 2010 to the National Assembly. According to the Ombudsman, there is a need to establish an independent specialised body for protection against discrimination.

### ***Activities of the Advocate for the Principle of Equality***

The Advocate for the Principle of Equality presented his Annual Report for 2010, which was submitted to the Government at the end of March 2011. He again expressed the concern that the existing system of legal protection against discrimination is not effective. In his opinion, legal remedies exist mainly on paper and are not effective, not user-friendly and discouraging. Furthermore, assistance to victims of discrimination is not independent or effective, which shows the need to establish an independent specialised body for protection against discrimination. In addition, it is necessary to draw up and implement effective and coordinated policies to prevent and eliminate discrimination.

### ***Activities of the Office for Equal Opportunities***

Since 2009, the Office for Equal Opportunities has carried out training for effective gender mainstreaming in the policies of individual ministries. The courses are aimed at persons involved in policy- and decision-making processes at the individual departmental work areas (directors, managers and policy-makers). The courses are adapted to the working area of each ministry. In September 2011 such training was conducted at the Ministry of Agriculture, Forestry and Food.

In addition, in September 2011 the Office for Equal Opportunities, together with the Ministry of Public Administration, organised the sixth training session for counsellors and advisers for assistance and information, in accordance with the Regulation on Measures to Protect the Dignity of Employees in Public Administration. So far, over 400 people have been trained. The next training session is scheduled for spring 2012.

## **Legislative developments**

There have been no legislative developments in the area of gender equality in the past six months.

## **Case law of national courts**

There are two cases of sexual harassment from 2010 that are worth mentioning. In the first case,<sup>175</sup> two female complainants were victims of sexual harassment at the workplace during 2005 and 2006. The employer was the Slovene Army and the women were harassed by a superior. Although the women complained to the Slovene Army, it did not act against the harassers and denied all the charges. The complaints even gave rise to further discrimination against the women. That is why they decided to file a lawsuit against the Slovene Army and

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<sup>175</sup> Judgment of the High Labour and Social Court, No. Pdp 499/2009 of 3 March 2010.

to claim for damages for not providing a working environment in which none of the workers is subjected to sexual or other harassment on the part of a superior or co-workers. The High Labour and Social Court decided that the Slovene Army was liable in damages for the verbal and non-verbal sexual harassment by their employees and awarded the female claimants compensation of EUR 5 000.

In the second interesting case of the High Labour and Social Court,<sup>176</sup> the court found that female complainants were subject to unwanted conduct of a sexual nature at work from early 2003 onwards. Their superior was sending them e-mails with inappropriate content (with attachments of pictures of naked women and men, genital organs, and women in degrading poses) and was verbally harassing them with inappropriate words and sentences at work. Following the extensive assessment of evidence, the court found that the defendant (employer) had failed, by allowing the improper conduct of its employee, to provide the complainants with a working environment in which none of the workers was subjected to unwanted conduct of a sexual nature. Furthermore, the court decided that the complainants themselves contributed by 30 % to the damage because they continued to open and read e-mails even though the titles of the e-mails made it plain that they did not contain employment-related instructions or guides from their superiors, and also because they did not inform the management earlier about the unwanted behaviour of their superiors. Four complainants were each awarded compensation ranging from EUR 2 240 to EUR 2 919.

### **Equality body decisions/opinions**

#### ***Advocate for the Principle of Equality***

The Advocate for the Principle of Equality decided in a case of alleged discrimination in employment.<sup>177</sup> He found direct discrimination based on gender in a kindergarten, due to the use of only the masculine form in internal documents, employment contracts, and in dealings with employees etc. Furthermore, the Advocate warned the kindergarten that, as an employer, it was not taking appropriate measures in order to protect workers from sexual and other harassment or from bullying in the workplace, which was contrary to Article 45 of the Employment Relationship Act.

### **Miscellaneous**

#### ***Women's Lobby of Slovenia***

In June 2011, the Women's Lobby of Slovenia responded to the rejection of the amendments to the General Assembly Elections Act. Two main proposed changes had been the abolition of compulsory voting districts and the introduction of the absolute preferential vote. The Women's Lobby presented an analysis in which they showed that the proposed changes to the electoral legislation would increase participation by women in the General Assembly. The analysis, which was financed by the Office for Equal Opportunity, has shown that current women quotas did not and will not lead to a more balanced representation of women and men in politics. Following on from the analysis, it can be seen that there is a systemic barrier in the General Assembly Elections Act that prevents the effectiveness of positive measures for ensuring equal opportunities for women and men. Nevertheless, the Women's Lobby of Slovenia will continue with their activities in order to encourage public debate, both in society and the media. In addition, in the autumn they will present a comprehensive study of the weaknesses of the current electoral legislation, in order to achieve a more balanced representation of women in the next elections to the General Assembly.

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<sup>176</sup> Judgment of the High Labour and Social Court, No. Pdp 631/2009 of 8 April 2010.

<sup>177</sup> Decision of the Advocate for the Principle of Equality, No. 0921-12/2010-UEM/21 of 20 July 2011.

## Policy developments

### ***Economic incentives for small and medium-sized companies to develop and apply an equality plan – Resolution of 18 May 2011, BOE 31 May 2011***

Some companies with 250 employees or more must negotiate and implement an equality plan, but this new economic incentive is for those companies with fewer employees which would voluntarily like to develop an equality plan, even though not being under any obligation to do so. To be eligible for such economic incentives the equality plan should promote certain measures, including all the relevant areas such as conditions of work and access to employment, promotion and training, working time and joint responsibility, and prevention of and action against harassment including sexual harassment, etc. The measures to be adopted also cover the main aspects, e.g. equal opportunities of access to any job within the company, equal pay, and the presence of women in positions of responsibility, etc. The drawing up of the plan should comprise several phases, the first of which is an assessment of the situation of the company prior to developing any measures. The call for economic incentives on the part of public administrations (state administration and *Comunidades Autonomas*) to promote equality plans in companies on a voluntary basis is not new, but promotion of these incentives continues to be very important, especially when, at the heart of such a call, the principal areas of action of the equality plans are clearly set out.

## Legislative developments

### ***Regulation of the Andalusian Council of Women's Participation***

Decree 154/2011, of 10 May 2011, regulates the Consejo Andaluz de Participación de la Mujer (Andalusian Council of Women's Participation) (BOJA of 23 May 2011). This Decree creates the Andalusian Council to facilitate the participation of women's organisations in gender equality policies. The participant organisations should be registered with the Andalusian Institute of Women and can be associations, federations or confederations of women. The Council will have several functions, amongst which is representing women's associations before the Andalusian administration. The Council will also have, as a function, to give advice in the field of equality in certain cases, to disseminate information and to participate in the drawing up of equality plans.

### ***Royal Decree 1148/2011 for welfare benefit for carers of minors affected by cancer or other serious illness***

This Royal Decree introduces a new welfare benefit in the general law of social security when working time is reduced because of the need to take care of minors. This benefit will be applicable when both parents (whether biological or adoptive) are working (either as employees or self-employed) and the minor must be hospitalised or must remain at home with medical treatment after the hospitalisation. To be entitled to the benefit, a parent must show a reduction in their working day of at least 50 %. The benefit will be in proportion to the percentage of working time reduction and is equivalent to the income lost.

### ***Act 3/2011, of 30 June 2011, for support for the family and to the coexistence in Galicia (BOE 30 July 2011)***

This Law considers that the family is a basic structure of society and the Law's objective is to support motherhood and dependent persons. The concept of 'family' is wide, and includes one-parent families and families with special circumstances (with older, disabled or dependent members). Chapter I deals with the joint responsibility of men and women in family life, particularly in the maintenance and care of children, the elderly and dependants, as well as in children's education. Chapter IV is dedicated to the promotion of the birth rate, with public policies to support motherhood. Chapter V develops measures to reinforce the reconciliation of personal, family and working life in terms of the equality of men and

women, and the joint responsibility for family obligations. Examples of such reconciliation measures are: increasing the opening hours of schools to take care of minors under 12 years old, the opening of schools during school holidays, the promotion of teleworking, and preference in the awarding of public contracts to companies supporting conciliation measures, etc. The aim of these public policies to support motherhood is to do so by means of the promotion and institutional protection of the right to life. For this purpose there will be campaigns to raise public awareness about the importance of motherhood and the protection of the right to life in utero. It is a Law that, at this point, does not consider the right of a woman to decide on her pregnancy and conflicts in some respects with Act 2/2010 on sexual and reproductive health and voluntary interruption of pregnancy.

***Protocol against labour harassment (mobbing) in the State General Administration***

The Agreement of 6 April, 2011, between the State General Administration and the representative unions, regulates the protocol against labour harassment (mobbing) of the State General Administration (published by Resolution of 5 May 2001, BOE 1 June 2011). The purpose of the protocol is to establish an action procedure to cover possible situations of labour harassment. The protocol includes 'all kinds' of harassment, and thus also harassment because of sex and sexual harassment. Nevertheless, a problematic point is the fact that the only definition given is that of 'mobbing', and a list of types of conduct corresponding to a situation of harassment also focuses on 'mobbing'. The joint treatment of all types of harassment as 'moral' harassment is not the best way to deal with discriminatory gender harassment, especially sexual harassment. The action procedure starts with a formal (written) complaint presented by the person who is being harassed. The principles of the procedure are secrecy, speed and confidentiality. In certain cases it is possible to move the employee to a different department or section during the procedure, if necessary.

***Fundamental right to non-discrimination because of personal or family circumstances related to paternal responsibility in the care of minors***

The judgment of the Constitutional Court 26/2011, 14 March 2011, deals with the case of a father of two minors who had asked to work the night shift at his place of work in order to be able to take care of his children, but the company had refused the request. The employee argued that the restrictive application of Articles 36 and 34 of the Workers' Statute, that provide for the possibility to adapt working hours, but not shift work, in order to reconcile working and family life, is against his right to non-discrimination on the grounds of gender. The Constitutional Court stated that the constitutional dimension of the right to a reasonable balance between working and family life must be considered by the courts and, furthermore, that the constitutional dimension must prevail and serve as a guide in the interpretation and resolution of these Articles of the Workers' Statute. This forces the need to evaluate the personal and family circumstances of the worker and balance them against the needs of the company in organising its work schedules. The objective is to assess whether the company's refusal to allow the worker to work the night shift is or is not an unjustified obstacle to the compatibility of family and working life. The Constitutional Court stated that this evaluation and balance was not done and that fact violates the father's right. This is the first judgment of the Constitutional Court based on the fundamental right to non-discrimination because of the personal or family circumstances related to paternal responsibility in the care of minors.



## Policy developments

### *Gender Equality Politics 2011-2014*

Following the introduction of the 2008 Discrimination Act, the legislature has been somewhat inactive in the area of gender discrimination law as well as discrimination law in general. The Government has now, however, announced its intention of initiating an inquiry regarding the lack of equality in working life, pointing to – among other things – the persistent gender wage gap.<sup>178</sup> The gender wage gap, working life equality and equality in education, as well as violence against women (including trafficking and forced marriages) are areas of special concern for the future, according to the Government's Communication to the Swedish Parliament regarding Gender Equality Politics 2011-2014 (Skr. 2011/12:3).<sup>179</sup>

## Miscellaneous

### *A single Swedish Equality Ombudsman*

The introduction of the single Non-Discrimination Act – the (2008:567) Discrimination Act – on 1 January 2009 also entailed the creation of the new 'single' Swedish Equality Ombudsman, replacing four former specialised ombudsmen against discrimination. Following months of harsh internal as well as public<sup>180</sup> criticism of the leadership of the new agency, and the increasing balance of complaints, the Ombudsman early on this year (1 February 2011) was dismissed with immediate effect from her role as Equality Ombudsman by the Government. On 1 October 2011 a new Ombudsman was finally installed; Mrs Agneta Broberg, a former employee of the Swedish Consumer Agency.

Perhaps because of the diffuse leadership of the Equality Ombudsman agency in recent times, the supervising body can be said to have been characterised by a 'low profile' during 2011. The Ombudsman is, however, continually responsible for initiating mainly out-of-court settlements concerning allegations of discrimination in all areas and on all legislated grounds, including sex/gender, as well as other activities.<sup>181</sup>

## TURKEY – Nurhan Süral

## Policy developments

### *Composition of the new Parliament following the general election on 12 June 2011*

The number of female representatives (MPs) increased from 48 to 79 at the last general election held in June 2011. The total number of representatives is 550. Despite the increase, the percentage (14.36 %) of female representatives is still too low. In the cabinet, there is only one woman who is the Minister for Family and Social Policies. The trend in the number of female representatives and distribution of representatives according to gender can be observed in the following tables.

<sup>178</sup> <http://www.regeringen.se/sb/d/15123/a/177462>, accessed 7 October 2011.

<sup>179</sup> <http://www.regeringense/sb/d/7407/a/176284> accessed 7 October 2011.

<sup>180</sup> See articles in the Swedish daily newspapers *Dagens Nyheter* 6 September 2010 (*DO dröjer med beslut om heltäckande slöja*), 22 November 2010 (*Ny kritik mot DO för senfärdighet*), 9 December 2010 (*DO kritiserar av eget expertråd*) and *Svenska Dagbladet* 1 February 2011 (*Kritiken mot Linnas ledarstil på DO har varit hård*).

<sup>181</sup> See <http://www.do.se/sv/Om-DO/Stamningar-och-forlikningar/> accessed 7 October 2011.

Table 1: Number of female representatives (MPs)<sup>182</sup>

General election year	Total no. of representatives	No. of female representatives	Percentage
1935	395	18	4.6
1939	400	15	3.8
1943	435	16	3.7
1946	455	9	2.0
1950	487	3	0.6
1954	535	4	0.7
1957	610	7	1.1
1961	450	3	0.7
1965	450	8	1.8
1969	450	5	1.1
1973	450	6	1.3
1983	400	12	3.0
1987	450	6	1.3
1991	450	8	1.8
1995	550	13	2.4
1999	550	22	4.0
2002	550	24	4.4
2007	550	48	9.1
2011	550	79	14.36

Table 2: Distribution of representatives according to gender<sup>183</sup>

Political party	Women		Men		Total
	No.	%	No.	%	
Justice and Development Party ( <i>Adalet Ve Kalkınma Partisi, AK Party</i> )	46	14.06	281	85.93	327
Republican Peoples' Party ( <i>Cumhuriyet Halk Partisi, CHP</i> )	19	14.07	116	85.92	135
Nationalist Action Party ( <i>Milliyetçi Hareket Partisi, MHP</i> )	3	5.76	49	94.23	52
Peace and Democracy Party ( <i>Barış Ve Demokrasi Partisi, BDP</i> )	9	31.03	20	68.96	29
Unaffiliated representatives	2	28.57	5	71.42	7
Total	79	14.36	471	85.63	550

## Legislative developments

### *Draft Law on Protection of Women and Family Members against Violence*

Violence against women is a very serious social problem in Turkey. Turkey offered only the criminal law to protect people against domestic violence until the adoption of the Law on the Protection of the Family (Law no. 4320) in 1998.<sup>184</sup> This law, as amended in 2007,<sup>185</sup> established a protection order system under which a person, male or female, abused by a family member 'under the same roof', can apply directly or through a prosecutor for an order from a family court. The system, which is designed to bring about prompt action, envisaged orders including, amongst others, restraint orders, an offender being ordered to vacate the

<sup>182</sup> Directorate of Women's Status (*Kadının Statüsü Genel Müdürlüğü*), Türkiye'de Kadının Durumu (Women's Status in Turkey), July 2011, pp. 32-33, accessed 28 September 2011 and <http://www.tbmm.gov.tr>, accessed 28 September 2011.

<sup>183</sup> Source: <http://www.tbmm.gov.tr>, accessed 28 September 2011.

<sup>184</sup> *Ailenin Korunmasına Dair Kanun*, Official Gazette 17 January 1998, no. 23233.

<sup>185</sup> Law no. 5636, Official Gazette 4 May 2007, no. 26512.

home, the surrender of weapons, and an offender being ordered to refrain from violence, threats or damaging property. A protection order can be issued for a six-month period and then renewed and an abuser may be required to pay maintenance payments to the victim and ordered to apply to a health institution for treatment. Unfortunately, time revealed gaps in the law and implementation failures by police, prosecutors, judges and other officials.

The most important shortcomings are: exclusion of certain groups of women from the law's scope; and implementation problems. Women who are most vulnerable to violence in Turkey are: divorced women; married or single women who have deserted their home, for example to get divorced, or to marry someone not consented to by the family; and unmarried daughters who leave the family home when pregnant. The law covers an officially married spouse, a child, or other family members if they live under the same roof. A family member who lives separately on the basis of a legal right or a court ruling to live separately or a spouse living separately *de facto* is also covered. But the law does not cover divorced women, fiancées or partners. Police, prosecutors and judges, in many cases, prioritise the reconciliation of women with their abusers rather than the enforcement of security procedures. The Human Rights Watch report of May 2011, '[He Loves You, He Beats You: Family Violence in Turkey and Access to Protection](#)', documents violence against women and girls by husbands, partners and family members, and the survivors' struggle to seek protection.<sup>186</sup> Gauri van Gulik, author of the report, concludes that: 'With strong laws in place, it is inexcusable that Turkish authorities are depriving family violence victims of basic protections. Turkey has gone through exemplary reform on women's human rights, but police, prosecutors, judges, and social workers need to make the system exemplary in practice, not just on paper.'

Shelters for women and children are another important element of Turkey's response to domestic abuse. The Law on Municipalities<sup>187</sup> envisages the provision of shelters in municipalities with 50,000 or more residents, but Turkey falls far short of meeting this requirement. Moreover, women reported to Human Rights Watch that some existing shelters have dismal conditions and inadequate security procedures. It was also reported that staff in some shelters have allowed abusers to enter and have urged women to be reconciled with their abusers.

For the time being, a draft Law on the Protection of Women and Family Members against Violence<sup>188</sup> has been prepared and submitted for the views and considerations of the relevant bodies and institutions. Fatma Şahin, Minister for Family and Social Policies, presided over a consultative meeting on the draft law with presidents of provincial Bars (lawyers' provincial organisations) on 13 September 2011. The draft law was opened for the information and concerns of the public on 16 September 2011. Citizens may send their comments via e-mail. When passed, this law will repeal the current Law on Protection of the Family and it is hoped that it will be more efficient in deterring violence, both with its extended scope and also with its extended deterrent measures. The draft law extends its scope by not using the term 'living under the same roof' and by covering fiancées, partners, divorcees and those in a similar close relationship. It also makes it clear that the judge is not going to ask for evidence or documents substantiating violence. The abuser can be monitored by an electronic tag. Means of support for the victim are also extended: free health care, psychological and financial help, as well as guidance in finding a job will be provided.

### ***Council of Europe Convention on preventing and combating violence against women and domestic violence (Convention CETS No. 210)***

As the current Chair of the Committee of Ministers, Turkey played an important role in drafting the Council of Europe Convention on preventing and combating violence against women and domestic violence. The Convention was signed and opened for signature on the

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<sup>186</sup> <http://www.hrw.org>, accessed 30 September 2011.

<sup>187</sup> *Belediye Kanunu*, Official Gazette 13 July 2005, no. 25874.

<sup>188</sup> *Kadın ve Aile Bireylerinin Şiddetten Korunmasına Dair Kanun*, <http://www.ksgm.gov.tr>, accessed 30 September 2011.

occasion of the 121st Session of the Committee of Ministers, which took place in Istanbul on 11 May 2011, after more than two years of negotiations. The Convention is also open to accession by non-member countries. The first legally binding international Convention specifically addressing violence against women was the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (the Convention of Belem do Para), which was adopted in 1994. This was followed by the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in 2003 by the African Union, which also addressed the issue of violence against women. The Council of Europe Convention on preventing and combating violence against women and domestic violence is, however, the first in the region and is the most comprehensive legal document to date on violence against women.<sup>189</sup> The Convention establishes an international mechanism to monitor its implementation at national level. Countries that have signed the convention are Turkey, Austria, Finland, France, Germany, Greece, Iceland, Luxembourg, Montenegro, Portugal, Slovakia, Spain and Sweden.

## UNITED KINGDOM – Aileen McColgan

### Legislative developments

#### *Implementation of Equality Act 2010*

There have been no significant legislative developments in this area since April 2011, when the second tranche of implementation of the Equality Act 2010 occurred. Regulations have been implemented setting out the (significantly reduced) 'specific duties' imposed on public authorities, the purpose of which duties is to facilitate compliance with the 'general duty' imposed by section 149 of the Equality Act 2010 to (broadly) pay 'due regard' to the need to eliminate discrimination and further equality on grounds including sex, pregnancy, maternity, and gender reassignment. The general duty came into force in April 2011 and the Equality Act 2010 (Specific Duties) Regulations 2011 in September 2011. In their new form (substantially watered down from those applicable under the Sex Discrimination Act 1975, as amended) the specific duties require only that public authorities publish information to demonstrate their compliance with the general equality duty and prepare and publish equality objectives. The Regulations apply only to England, the Welsh Assembly and the Scottish Parliament having the power to devise their own specific duties and the Equality Act 2010 not applying in North Ireland.

The Coalition Government implemented much of the Equality Act 2010 but it is clear that the provision on 'dual discrimination' (Section 14) will not now be brought into force and the provision regulating harassment by third parties (Section 40(2)) is likely to be repealed.

### Case law of national courts

#### *Abdullah v Birmingham City Council [2011] IRLR 309*

In *Abdullah v Birmingham City Council* [2011] IRLR 309 the High Court allowed an equal pay claim to be brought as a breach of contract claim, thus allowing the claimants to circumvent the very strict six-month deadline applicable in the employment tribunal (the time limit for breach of contract claims is six months except in Scotland, where it is five). There is competing authority in the form of a county court decision in *Ashby & Ors v Birmingham City Council* (13 October 2009, unreported) and the Court of Appeal heard the Council's appeal on 7 October 2011 (judgment awaited).

<sup>189</sup> <http://www.hrw.org/news/2011/05/09/europe-landmark-domestic-violence-treaty-launches>, and [http://www.unifr.ch/ddp1/derechopenal/temas/t\\_20110807\\_05.pdf](http://www.unifr.ch/ddp1/derechopenal/temas/t_20110807_05.pdf) both accessed on 30 September 2011.

***St Helens & Knowsley Hospitals NHS Trust v Brownbill & Ors [2011] EWCA Civ 903***

In *St Helens & Knowsley Hospitals NHS Trust v Brownbill & Ors* [2011] EWCA Civ 903 the Court of Appeal ruled that female healthcare assistants and receptionists could make an equal pay claim in respect of the fact that their male comparators, although employed on lower basic hourly rates, enjoyed significantly greater enhancements to their basic rates in respect of unsocial hours than the claimants did. So, for example, whereas the claimants received between 115 % and 133 % of their normal hourly rate for working nights, weekends and other unsocial hours, the comparators (who were employed as drivers, porters and car park attendants) received double time or time-and-a-half. Interestingly, only one of the claimants was paid less on a weekly basis than her comparators. The Court of Appeal, ruling on a preliminary point, ruled that a tribunal had been wrong to consider the claimants' contractual pay 'in the round' and that the Employment Appeal Tribunal (EAT) had been correct to treat the term providing for payment of enhanced rates if unsocial hours were worked as a discrete term of the contract which was capable of being compared with the equivalent term in the contracts of the male comparators.

***Copple v Littlewoods plc [2011] ICR 296***

Other interesting equal pay cases include *Copple v Littlewoods plc* [2011] ICR 296 in which the EAT ruled that claimants who had been denied access to their employers' pension scheme because they were part-time workers, had to prove, in order to obtain a remedy, that they would in fact have joined the scheme had it been open to them. The appeal was heard by the Court of Appeal on 10 October 2011 and the judgment is awaited.

***Bamber v Greater Manchester Police (Manchester; 13 April 2011; case no. 2401829/09)***

In *Bamber v Greater Manchester Police* (Manchester; 13 April 2011; case no. 2401829/09) an employment tribunal ruled that a requirement to complete a 'shield run' (a 500-metre run in protective clothing carrying a shield) within three minutes constituted unlawful indirect discrimination on grounds of sex (and age) against the claimant, a police inspector who wished to retain her qualification to undertake public order policing. The tribunal accepted that the physical test had the legitimate aim of ensuring officers' fitness to carry out the relevant duties, but took the view that the imposition of the time limit was not a proportionate means to achieve that aim given that 10 % of women failed, while no men did. Other police forces tested fitness in different ways and in the tribunal's view these '[a]lternative tests (...) may have had a better relationship to the demands of the role and have been better validated'.

***Cuthbert and others v Glasgow City Council (Glasgow, 11 May 2011; case nos. S/104536/10 and others)***

By contrast, in *Cuthbert and others v Glasgow City Council* (Glasgow, 11 May 2011; case nos. S/104536/10 and others) an employment tribunal found that indirect sex discrimination was justified in a case in which predominantly female childcare workers were excluded from a voluntary redundancy scheme open to other staff. It was accepted by the respondent that women were put at a particular disadvantage, and by the claimants that the council had a legitimate aim in exempting the childcare staff from the voluntary redundancy scheme in order to ensure that there were sufficient childcare workers in place to deliver high quality nursery care. The person making the decision on the redundancy package had not realised that the exclusion of childcare staff was indirectly discriminatory (in the sense of impacting disparately on women) but had considered four alternatives to the exclusion of such staff from the scheme, deciding on exclusion only after concluding that none of the alternatives would have delivered the aim of maintaining nursery provision. Further, the trade union representing the majority of workers had argued strongly that nursery staff should be excluded from the redundancy package. The decision-maker had not carried out a balancing exercise between the needs of the employer and the discriminatory impact of the disputed provision (because she was unaware of the impact), but the tribunal itself carried out this exercise and decided that the discrimination was justified.

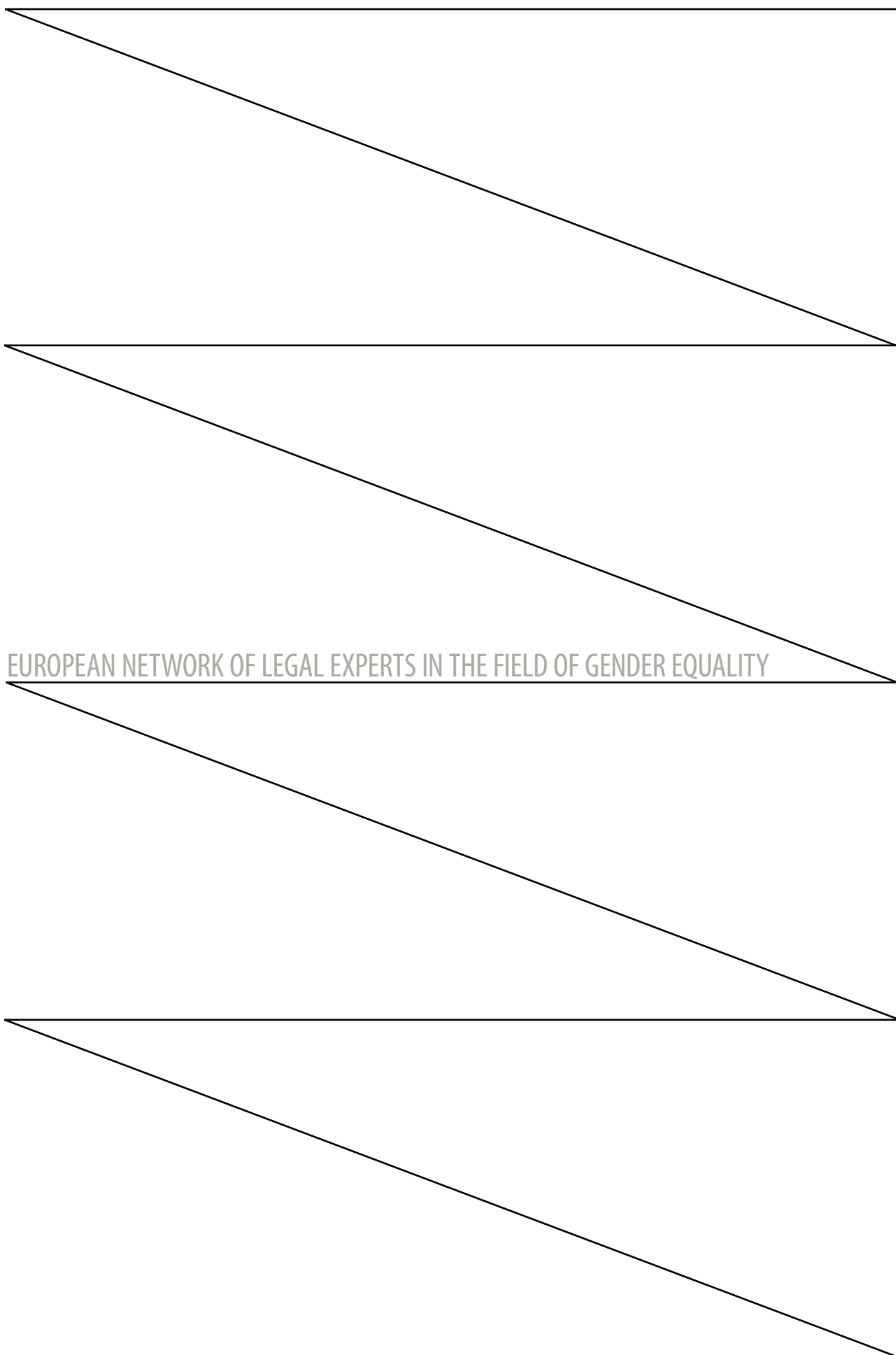
## Miscellaneous

### *Omission of dual discrimination from the implementation of the Equality Act*

The decisions not to implement the Equality Act's prohibition on dual discrimination and, it seems, to scrap the prohibition on third party harassment were mentioned above. Even more alarmingly, a government initiative ('the red tape challenge') whose purpose is to review 'unnecessary bureaucracy' and reduce 'burdensome red tape' has invited input from the public on whether and how the Equality Act should be amended to this end. The red tape challenge website ([www.redtapechallenge.cabinetoffice.gov.uk/themehome/equalities-act/](http://www.redtapechallenge.cabinetoffice.gov.uk/themehome/equalities-act/), accessed 21 November 2011) states that '[f]airness is important' and that 'it is not the Government's intention to abolish the Equality Act'. The Act, however, 'cannot be exempt from a comprehensive look to check that we are not imposing burdens that are out of proportion to the good they seek to do'. Referring to the decision already taken not to implement some of the Equality Act's provisions, the announcement states that the 'red tape challenge spotlight gives you the opportunity to look at all provisions in the Equality Act and tell us if they are too bureaucratic and burdensome for the benefit they bring, whether they could be simplified or better implemented, or if you think they should be kept exactly as they are.' The website goes on to invite specific comment in relation to 'Who is protected', 'Prohibited conduct', 'At work', 'Buying goods and using services', 'Specific sectors – in housing, at school or college, on transport', 'Positive action', 'Enforcing equality law' and 'In the public sector', the questions posed being as follows:

- Should we scrap [the relevant provisions] altogether?
- Could their purpose be achieved in a non-regulatory way (e.g. through a voluntary code)?  
How?
- Could they be reformed, simplified or merged? How?
- Can we reduce their bureaucracy through better implementation? How?
- Can we make their enforcement less burdensome? How?
- Should they be left as they are?

The closing date for the consultation was 30 June 2011. It remains to be seen what proposals, if any, result. But it cannot be a cause for optimism that legislation so recently enacted is already under threat.



EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY