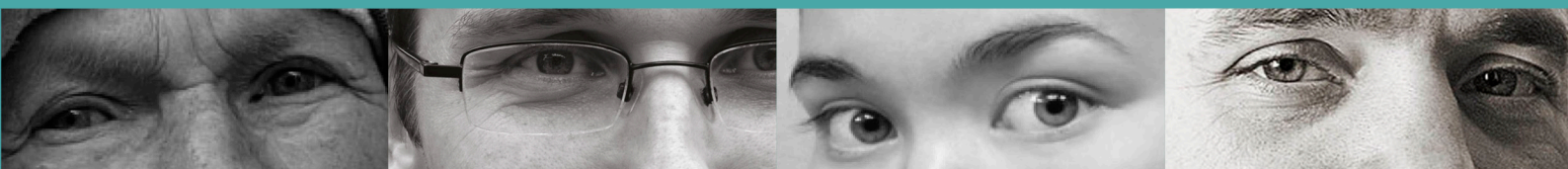




EUROPEAN NETWORK OF LEGAL EXPERTS
IN THE FIELD OF GENDER EQUALITY

European Gender Equality Law Review

No. 1 / 2013



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the Gender Balance among Non-Executive Directors of
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This report was financed by and prepared for the use of the European Commission. It does not necessarily represent the Commission's official position.

This publication was commissioned by the European Commission under the framework programme PROGRESS (Decision 1672/2006/EC of the European Parliament and the Council, OJ L 315/1 of 15.11.2006). For more information on PROGRESS see:
<http://ec.europa.eu/social/main.jsp?catId=327&langId=en>

Manuscript completed in June 2013.

The information contained in this report reflects, as far as possible, the state of affairs on 4 March 2013.

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Editorial

The Rule of Law and Gender Equality in the European Union

*Christopher McCrudden**

One of the most striking developments in the practice of politics in the Western world over the past twenty or thirty years has been the dramatically increased role that law and lawyers play. Spend just a little time in Berlin, or Brussels, or Washington DC, and the centrality of legal issues and lawyers is hard to escape. I'm using 'politics' here in a broad sense to include social and economic policy making, as well as electoral and party politics in a traditional sense. Healthcare reform in the United States, welfare reform in Germany, same-sex marriage in Britain, bail-out packages in Ireland, labour market reforms in Portugal and France, the election of the President in the United States – all these involve or involved complex and protracted legal debate that is central to the politics of the issues.

It is a truism that all economics is global and that all politics is local. But what about *law*? Is law local or global in this sense? When I was an undergraduate in the 1970s, it was pretty clear that law was a predominantly local phenomenon. Even then, things were changing, but the general pattern was clear: law was intensely local. Now, it is hard to identify an area of law that is untouched by legal globalization. Law has become multi-layered to an extent that would have seemed next to impossible thirty years ago. In the United Kingdom, for example, we now have common (that is, judge-made) law, legislation adopted by the local devolved assemblies in Scotland, Wales and Northern Ireland, national legislation, European Union law, human rights law, international economic law, and all these are layered one on top of the other.

The sources of gender equality law are equally diverse and multi-layered. This comes through clearly in one of the articles published in this edition of the EGELR, by Nada Bodiroga-Vukobrat and Adrijana Martinović, on the interpretation and enforcement of EU equality law in Croatia. They describe how Croatian law provides that domestic equality legislation should not be interpreted or applied in a way that would limit or reduce the content of guarantees of gender equality arising from a series of other legal obligations: the general rules of international law, the EU *acquis communautaire*, the Convention on the Elimination of All Forms of Discrimination Against Women, the UN Convention on civil and political rights, and the UN Convention on economic, social and cultural rights and the European Convention on Human Rights.

Why is this relevant to the future of gender equality in the European Union? Well, if law is increasingly central to politics, and if law is increasingly globalized, spare some sympathy for the local politician, policy-maker, and judge. Even assuming that they want to do the right thing, implementing gender equality law in conformity with these layered requirements, this is a pretty major undertaking. One of the major tasks they have these days in delivering the policies they want (if they are politicians and policy-makers) and interpreting legislation (if they are lawyers and judges), is the negotiation and the management of these multi-layered legal systems that apply, sometimes in apparently contradictory ways, and sometimes in pursuit of seemingly opposite goals.

And this negotiation of globalized legal obligations in the field of gender equality has to be applied in a domestic procedural and evidential context. Linda Senden and Mirella Visser's discussion in this edition of the EGELR on the EU Directive on improving the gender balance among non-executive directors of boards of listed companies shows the importance for this

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initiative of a legal obligation to ensure appointment and recruitment procedures on the basis of clear, transparent and gender-neutral criteria. They consider that, if implemented effectively, this could make a significant contribution to realizing this. But this initiative, as do the other gender equality Directives, depends on the effectiveness of the domestic legal context.

Three recent reports by the European Network of Legal Experts in the Field of Gender Equality, now published on the Commission's website,¹ each tell a story of the gap between EU gender discrimination law 'on the books,' and the reality in practice. The report on *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood* details the challenges in implementing the relevant directives in the areas of pregnancy, maternity and parental leave, including gaps in national law, and problems of enforcement and effectiveness. *'Harassment related to Sex and Sexual Harassment Law in 33 European Countries: Discrimination versus Dignity'* identifies the pitfalls of implementation in each country surveyed, and identifies issues in need of attention. The report on *The Personal Scope of the EU Sex Equality Directives* examines how the personal scope provisions of the five main directives concerning sex equality, pregnant workers and parental leave have been implemented in national legislation and analyzes the relevant differences.

These reports clearly identify how many, if not all, States have problems in implementing one or more sets of requirements arising from the relevant Directives. And this story, and the reasons for this implementation gap are familiar. However, the issue I want to focus on here is somewhat more fundamental. It is whether there is a broader issue at the heart of the implementation gap in some States: that some of the essential pre-conditions for effective implementation may be so lacking as to call into question whether that State's legal system is able to cope with EU legal requirements of the type included in the gender equality directives.

Again, the article by Nada Bodiroga-Vukobrat and Adrijana Martinović is in point. An important operating assumption in EU law is that domestic judges should be empowered to interpret national law in a way that most effectively implements EU law; judges are given extensive discretion to apply a broad set of principles, rather than detailed legal rules. Indeed, in recent years, the Court of Justice of the EU (CJEU) has been even more committed to viewing what equality rules there are as simply instantiations of general principles. And this is, I think, in general an appropriate way to implement equality law. Cases are to be decided applying a general principle and only later, when sufficient cases have been decided, a rule is extracted from the mass of single instances.

We have seen that each domestic legal system has had some difficulties in adapting to the approaches adopted by EU case law. One issue encountered in the past focussed on the judicial method adopted in EU interpretation by the CJEU. The case method, is not (at least formally) the approach that civil law systems adopt. Yet, despite teething problems, these systems have, in general, adapted pretty well, and the case law method of the CJEU has been, more or less, successfully established in most continental civil-law countries.

But not everywhere. Evidence is growing that the former Eastern-bloc States, in particular, have not made the transition to the case-law method of adjudication and interpretation that is necessary if EU gender equality law is to be implanted effectively. Why? Two factors have sometimes been identified. One factor may be that, as primarily civil-law jurisdictions, these newer States are simply going through the teething problems that other civil-law States encountered in their process of adapting to EU law. Another factor may lie in the intensely rule-bound approach that judges adopted in Eastern-bloc countries before the fall of the Berlin Wall, and why this rule-bound approach was adhered to. The reason could be (I am no expert) that the adoption of a rule-bound approach was one of the methods that judges in these countries adopted to protect themselves from being disciplined by Communist party

¹ In each case covering the situation in 33 countries: all 27 EU Member States, Croatia (approaching accession on 1 July 2013), the Former Yugoslav Republic of Macedonia, Turkey, and the EEA countries. For the reports, see: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 23 May 2013.

apparatchiks; if all the judge was doing was applying a rule, and no discretion was involved, who could blame the judge?

Survival, therefore, may have necessitated judges reducing the degree of judicial discretion and encouraging a highly legal-positivistic approach to interpretation, one which developing EU law has rejected in favour of the famous teleological approach. If this is the case, this meant that when these States joined the EU legal system, the judges were faced with a massive challenge, one that involved not only being confronted with legal globalization but also with a legal mentality that was precisely the opposite of what they had been trained to adopt. But this does not appear to be a problem in all former-Communist countries, and so the puzzle remains. Whatever the reasons, the result is what we see in too many States today: a dysfunctional judicial system unable to implement EU gender equality law effectively. The losers are those women who seek to rely on their rights before these courts. On one analysis, this is a clear breach of the Rule of Law.

This is the reason, I suggest, why those of us who are interested in the more effective implementation of gender equality law should take a greater interest in recent EU developments that at first sight may seem distant to our concerns.² Inadequate appreciation of the meaning and implications of the Rule of Law is not only becoming a significant barrier to the implementation of gender equality law, but of EU law more generally, particularly in those areas of EU law that rely on judges to ensure this day-to-day effectiveness.

Terms like the Rule of Law tend, at least in my experience, to be concepts that are often so vacuous as to be useless in practice. Still, recent debates within the EU that are attempting to build on this concept are potentially important in addressing some of the problems of judicial under-performance of which we are often too well aware in the area of gender equality.

Respect for human dignity and human rights, liberty, democracy, equality and the Rule of Law are the common values, enshrined in Article 2 of the Treaty on the European Union, on which the EU is based. Respect for these principles is a condition of membership of the Union. Article 7 of the Treaty on the European Union (TEU) and Article 354 of the Treaty on the Functioning of the EU (TFEU) provide the EU Institutions with the means of ensuring that all Member States respect these values, but operationalizing Article 7 has sometimes been described as the ‘nuclear option’, meaning that, because of its devastating impact, it is one that is unlikely ever to be brought into play (at least not in the context of gender equality; let’s be realistic.)³

Short of that, however, there is very little else the Institutions can do if the Commission does not require effective changes to be implemented as part of the process of accession. Infringement proceedings have been notoriously difficult to use effectively. That aside, persuasion and soft power have been the usual default mechanisms applied, with very mixed results.

Recent events in Romania and Hungary, however, may be the catalyst for changes that may be useful. This is because the confrontations with Hungary in particular over such questions as judicial independence have generated significant push-back by some Member States about what they see as the evasion by other Member States in the former Eastern-bloc of the values on which the Union is founded, including the Rule of Law, defined to include the independence of the judiciary from political interference.⁴

In a well-reported move, four Foreign Ministers (of Germany, the Netherlands, Denmark and Finland) have apparently recently written to Commission President José Manuel Barroso

² See, e.g., G. de Búrca, ‘Stumbling into Experimentalism: The EU Anti-Discrimination Regime’ in: C.F. Sabel & J. Zeitlin *Experimental Governance in the European Union* p. 215 Oxford, Oxford University Press 2010.

³ The term ‘nuclear option’ is to be found in the recent speech of Vice-President Reding, Justice Commissioner, ‘Safeguarding the rule of law and solving the “Copenhagen dilemma”: Towards a new EU mechanism,’ 22 April 2013, http://europa.eu/rapid/press-release_SPEECH-13-348_en.htm (‘...one should think twice or better even three times before resorting to this instrument’).

⁴ Cf. C-286/12 *Commission v Hungary*, 6 November 2012 (First Chamber), in which the CJEU held that Hungary discriminated on the grounds of age by lowering the compulsory retirement age of judges from 70 to 62.

to urge that a more effective mechanism should be developed to safeguard fundamental values in the Member States, including one that would permit the Commission to address deficits in respect of EU values in a given country at an early stage, and enable the Commission to require the Member State to remedy the situation.

Whether coincidentally or not, the Irish Presidency, galvanized by the Irish Minister for Justice, has recently initiated a debate within the Council on how to protect fundamental rights and promote the Rule of Law in Europe. At the time of writing, a forthcoming Presidency Conference (in May 2013) will consider how to strengthen the institutional framework to protect human rights and equality in the Union. Whilst this initiative primarily focuses on the problem of hate crimes, xenophobia, anti-Semitism and homophobia, the major interest from a gender equality perspective will be how far these Rule of Law initiatives will percolate through to tackle the implementation issues regarding women's equality.

Croatia's Accession in the Light of Gender Equality

Nada Bodiřoga-Vukobrat and Adrijana Martinović *

1. Introduction

The conclusion and implementation of the Stability and Association Agreement¹ and the launch of the formal accession negotiations between the EU and the Republic of Croatia in 2005 required comprehensive modification of Croatian legislation covering the *acquis communautaire* described in 35 negotiation chapters. Chapter 19 'Social policy and employment' and Chapter 23 'Judiciary and fundamental rights' were crucial for the harmonisation of legislation in the field of equal opportunities, equal treatment and non-discrimination. It entailed the adoption of a series of new legislative acts (such as the Gender Equality Act (GEA), the Anti-Discrimination Act (ADA), the Act on Forms of Same-Sex Cohabitation, the Act on Professional Rehabilitation and Employment of Persons with Disabilities), as well as amendments to existing legislation (e.g. the Labour Act (LA), the Pension Insurance Act, and the Criminal Code)).² The judiciary system had to be adapted with a view to increasing its efficiency and accessibility. Each stage of the negotiation process was verified and closely monitored by the European Commission. The progress in acceptance, transposition, implementation and enforcement of the EU *acquis* was analysed and evaluated in periodic monitoring reports.³ It seems that the more 'problematic' areas (mostly associated with the protection of fundamental rights and peaceful post-war reintegration, sanctioning of war crimes, reform of the judiciary etc.) were under tighter control than other areas, primarily regarding the capacity and efficiency of the institutions to properly enforce the accepted commitments.

This contribution will not attempt to critically analyse the entire harmonisation process in the field of gender equality law. Its purpose is simply to provide a solid basis for the answer to the question of whether the Croatian judicial system has (so far) caught up with the normative inflation of anti-discrimination legislation, especially gender equality law. The underlying question is whether the system can cope with the challenge of implementing

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¹ The Stabilisation and Association Agreement was signed on 21 October 2001 and entered into force on 1 February 2005.

² Article 3 of the Constitution of the Republic of Croatia guarantees equal rights and gender equality (along with freedom, national equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system), as the highest values of the constitutional order and grounds for interpretation of the Constitution. Article 14 of the Constitution guarantees all persons in the Republic of Croatia enjoyment of rights and freedoms, with an open-ended enumeration of prohibited discriminatory grounds. Anti-discrimination legislation in Croatia includes special Acts, such as the Anti-Discrimination Act (ADA) and the Gender Equality Act (GEA), as well as anti-discriminatory provisions in other Acts, such as the Labour Act (LA), the Act on Forms of Same-Sex Cohabitation, the Criminal Code, the Constitutional Act on the Rights of National Minorities, etc. The first Gender Equality Act was adopted in 2003 (Official Gazette No. 116/03) and was in force until the adoption of a new Gender Equality Act in 2008 (Official Gazette No. 82/08), in an effort to further align legislation and fulfil one of the criteria for closing negotiations on Chapter 19: Social Policy and Employment.

On 1 January 2009, the Anti-discrimination Act (Official Gazette No. 85/08) entered into force, as a horizontal Act in the field of equal opportunities which includes an exhaustive list of discriminatory grounds (gender, race, ethnic origin, skin colour, language, political or other opinion, national or social origin, property, trade union membership, education, social status, marital or family status, age, health, disability, genetic heritage, gender identity and expression, or sexual orientation) and prescribes judicial protection in discrimination cases.

³ The last and final Report was published on 26 March 2013: Communication from the Commission to the European Parliament and the Council Monitoring Report on Croatia's accession preparations, Brussels, 26.3.2013 COM(2013) 171 final.

international and European anti-discrimination standards, which imply reconsidering the traditional role of the judiciary in the interpretation and application of positive legal norms.

Before going into the subject matter any further, an initial remark should be made. In the last 10 years (i.e. since the adoption of the first Gender Equality Act in 2003), there has been no substantial increase in case law specifically relating to gender equality issues. Therefore, many conclusions in this paper are drawn in connection and by analogy with the judicial approach and reception of the wider notion of anti-discrimination law.

2. The jurisdiction of courts in anti-discrimination cases

The general and special jurisdiction of national courts is stipulated in the Judiciary Act and other special laws (e.g. the Civil Procedure Act (CPA) and Criminal Procedure Act). The judicial power in the Republic of Croatia is exercised by regular and special courts (Article 14(1) and (2) of the Judiciary Act). Regular courts include municipal courts and county courts. The highest judicial authority is the Supreme Court of the Republic of Croatia. The municipal courts are vested with a general and broad open-ended catalogue of competences. In civil proceedings, they adjudicate in the first instance in disputes relating to civil, family, labour, housing and other areas of law, which are not in the first instance the jurisdiction of other courts in accordance with special laws (Article 34(2) CPA). Pursuant to the ADA, municipal courts have subject-matter jurisdiction in litigation based on special legal action for protection against discrimination (Article 17(1) ADA and Article 18(1) ADA).⁴ County courts adjudicate first-instance disputes prescribed by law and decide on appeals against decisions of the municipal courts. In the field of equality law, county courts have subject-matter jurisdiction for joint legal actions (representative actions) for protection against discrimination.⁵ The Supreme Court is the highest judicial authority, whose task is to ensure the uniform application of laws and the equality of all before the law (Article 116 of the Constitution of the Republic of Croatia⁶). In civil proceedings, its authorities include deciding on appeals against first-instance decisions of county courts and revisions as extraordinary legal remedies against (final and binding) second-instance decisions, in cases prescribed by law.

The Constitutional Court of the Republic of Croatia decides on the compliance of laws with the Constitution, compliance of other regulations with the Constitution and with laws, and on constitutional claims against individual decisions taken by government agencies, bodies of local and regional self-government and legal persons vested with public authority where such decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia (Article 125 of the Constitution of the Republic of Croatia).

⁴ Apart from special legal action for the protection against discrimination, the ADA authorises any person who claims that his/her rights have been violated as a result of discrimination to seek protection in proceedings deciding upon that right as the main issue (Article 16(1) ADA). The GEA authorises any party who considers that her/his rights have been violated due to discrimination described in that Act to file a legal action before the regular court of general jurisdiction (Article 30(1) GEA), in other words, to initiate litigation before a municipal court.

⁵ Pursuant to Article 24(1) ADA, associations, bodies, institutions or other organisations set up in accordance with the law and having a justified interest in protecting collective interests of a certain group, or those which within their scope of activities deal with the protection of the right to equal treatment, may bring a legal action against a person that has violated the right to equal treatment. Representative action is a collective remedy available under the GEA as well, but the general conditions are prescribed in the ADA.

⁶ Official Gazette 56/90, 135/97, 113/00, 28/01 and 76/10. Consolidated version of the Constitution of the Republic of Croatia drafted by the Constitutional Court of the Republic of Croatia in accordance with its Report No. U-X-1435/2011 of 23 March 2011, available at <http://www.usud.hr/uploads/Redakcijski%20prociscen%20tekst%20Ustava%20Republike%20Hrvatske,%20Ustavni%20sud%20Republike%20Hrvatske,%202023.%20ozujka%202011.pdf>, accessed 25 March 2013.

3. The capacity of the judiciary to apply EU equality law

Courts are to administer justice according to the Constitution, law, international treaties and other valid sources of law.⁷ Strictly speaking, case law is not formally a general source of law in the Republic of Croatia.⁸ Nevertheless, in the interest of uniform application of laws, a legal interpretation adopted at the meeting of all judges or judicial departments of the Supreme Court or the county court, for example, binds all second-instance judicial panels or judges in that department or court (Article 40(2) of the Judiciary Act).⁹ Legal opinions of the Constitutional Court adopted in its case law establish binding legal standards of protection of human rights, which all state, local and regional authorities are obliged to respect and follow when deciding in individual legal matters.¹⁰

Given the above, what implications arise out of the interpretative power of CJEU case law in the Croatian legal system? Understanding CJEU case law is indispensable for the correct application of EU equality law, and consequently, of the national equality law that transposes it. The capability of the Croatian judiciary to apply gender equality legislation must be evaluated with the following aspects in mind:

1. In the past decade, a significant normative expansion of anti-discrimination legislation has occurred, introducing new legal terminology and standards, which have more often than not been left undefined, open for interpretation, indeterminate and sometimes inconsistent with other laws. In the field of gender equality, for example, the Constitutional Court's Decision to annul the first Act on Gender Equality of 2003 on formal grounds¹¹ (due to violation of the procedure for the adoption of the Act) was reason for the adoption of the new Act on Gender Equality in 2008. The fact that the new Act also contained material amendments compared to the previous one, as well as that it required adoption of new subordinate implementing rules has resulted in potential misinterpretation and uncertainty in its application.
2. The impact of educational programmes and training for the application of anti-discrimination legislation in general is so far unclear. Systematic training programmes of judges are organised by the Judicial Academy, but the question remains how many judges are reached and participate in those programmes? It may be necessary to improve targeting and change the educational approach, e.g. educating the educators in specific aspects and fields of anti-discrimination law for them to be able to organise workshops at their respective courts. Corresponding education and training of lawyers, within their national or regional chambers, as well as targeted and repeated public campaigns to raise awareness among the general public are necessary to truly implement gender equality in practice.
3. The overall 'weakness' of the Croatian judicial system is poor accessibility and non-publication of case law in the field of anti-discrimination legislation, which constitutes the likely cause of inconsistent interpretation, inefficiency and low visibility of decisions

⁷ Article 118 of the Constitution of the Republic of Croatia; Article 5 of the Judiciary Act, Official Gazette 28/2013.

⁸ A court decision is binding only upon the parties who participated in the proceedings and the legal positions expressed therein oblige neither that court nor any other court in future proceedings.

⁹ Department meetings are convened to discuss, inter alia, disputable questions of law and unification of case law, as well as differences in the application of certain laws between certain departments, panels or judges. A meeting is also convened if a certain panel or judge deviates from a previously accepted interpretation (Articles 38 and 40 of the Judiciary Act). These provisions of the new Judiciary Act 2013 basically consolidate and maintain the provisions of the previous Judiciary Act 2005 (Official Gazette 150/05, 16/07, 113/08, 153/09, 116/10, 27/11, 130/11). However, the new Act omits the previously existing authority of the president of the court or department if a certain judge or panel deviates from the interpretation taken by another judge or panel. In that case, the issuing of the transcription of the decision could have been suspended until the difference in interpretation was discussed at the meeting of judges or panels.

¹⁰ Decision of the Constitutional Court U-III-3695/2010 of 10 November 2011. Under Article 31(1) of the Constitutional Act on the Constitutional Court of the Republic of Croatia, decisions and rulings of the Constitutional Court are obligatory and every legal or natural person is required to follow them.

¹¹ Decision of the Constitutional Court U-I-2696/2003 of 16 January 2008.

in this area. Specifically regarding gender equality, the public perception of inequality seems to exceed by far the actual case law on gender equality related issues.¹²

Ad 1 The Croatian courts base their rulings on laws and other regulations. Case law is not a formal source of law.¹³ However, the courts, faced with predominantly new legislative instruments, seem to prefer the old ways and apply, where possible, other laws instead of applicable and binding anti-discrimination laws. There is a vague perception of what discrimination actually is, and how is it recognised and proved.¹⁴ The main problem is that the Croatian anti-discrimination regulations were mostly adopted in haste, under the pressure of compulsory harmonisation with the *acquis*,¹⁵ without taking sufficient time for in-depth reflection to understand the far-reaching consequences of a given legislative solution in the domestic legal arena. In addition, the understanding that those provisions, i.e. the relatively new and sometimes vague legal terms contained therein, will have to be interpreted in accordance with CJEU case law, is slow to set in. The level of knowledge of EU anti-discrimination case law is relatively low, and so is the perception that it is indispensable for interpreting those rules. The primary hurdle is that the purposive or teleological interpretation applied by the CJEU differs from the traditional rule-based approach to interpretation inherent to the Croatian legal system. In this connection, Article 4 GEA appears especially important for the future development and application of anti-discrimination legislation in Croatia. It explicitly stipulates that the provisions of that Act shall not be interpreted nor applied in a manner that would limit or reduce the content of guarantees of gender equality arising from the general rules of international law, the *acquis* Communautaire, the Convention on the Elimination of All Forms of Discrimination Against Women, the UN Conventions on civil and political, as well as economic, social and cultural rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. This provision highlights the European and international conditionality of legal standards regarding the protection of the principle of equal treatment. According to Dika, it also places a heavy burden on those who will have to apply that Act.¹⁶ To our knowledge, no national court decisions have referred to the said provision yet.¹⁷

¹² For example, gender discrimination is considered the third most common ground of discrimination in the labour market by employed and unemployed persons. See Franc et al. (eds.) *Raširenost i obilježja diskriminacije na hrvatskom tržištu rada*, Zagreb, Institut Ivo Pilar 2010. However, as shown below, case law specifically relating to gender discrimination is extremely scarce.

¹³ However, even in a country with a strong rule-oriented tradition in interpretation, there is room for a creative function of case law in the interpretation of legal rules, especially when legal provisions are incomplete or there are gaps and inconsistencies. The persuasiveness and the strength of arguments expressed in a given decision could create a consistent interpretation practice. See S. Triva & M. Dika *Građansko parnično procesno pravo* 7th Ed., Zagreb, Narodne novine 2004, 44.

¹⁴ Ž. Potočnjak & A. Grgić 'Važnost prakse Europskog suda za ljudska prava i Europskog suda pravde za razvoj hrvatskog antidiskriminacijskog prava' in: Crnić et al. (eds.) *Primjena antidiskriminacijskog prava u praksi* pp. 6-67 Zagreb, Centar za mirovne studije 2011, 7. For further explanations see Section 4.1. below on the burden of proof.

¹⁵ The ADA, for example, explicitly refers to and declares its compatibility with Directive 2000/78, Directive 2000/43, Directive 2004/113 and Directive 2006/54 (Article 1.a ADA).

¹⁶ M. Dika 'Sudska zaštita u diskriminacijskim stvarima' in: Crnić et al. (eds.) *Primjena antidiskriminacijskog prava u praksi* pp. 69-95 Zagreb, Centar za mirovne studije, 2011, 74.

¹⁷ It would be interesting to see how a Croatian court would decide in a hypothetical case of incitement (Cro. *poticanje*) to discriminate committed under the GEA. Pursuant to Article 6(5) GEA, incitement of another person to discriminate falls under the definition of discrimination, if committed with intent. The equivalent provision was contained in Article 4(1) ADA until intent was erased as constitutive element in the latest amendments to that Act (Official Gazette 112/12 of 11 October 2012). The justification for this amendment was found in the necessity of complete approximation with Directives 2000/78 and 2000/43, which do not mention intent either. In comparison, intent is not required for incitement to discriminate under the Act on Forms of Same-Sex Cohabitation either. 'Incitement' (the term used in Croatian legislation) is understood in theory to have a much broader meaning than 'instruction' (the term used in the EU anti-discrimination directives), and as not depending on the relations of influence or subordination, as in the event of instruction. See A. Horvat 'Novi standardi hrvatskoga i europskoga antidiskriminacijskog zakonodavstva', *Zbornik PFZ* 58(6) (2008), pp. 1453-1498, 1463. Coupled with the fact that the scope and meaning of the 'instruction to discriminate' are still not clear in CJEU case law (see the contribution of I. Asscher-Vonk in EGELR

Ad 2 In light of the above, the solution for uniform and correct application of EU law in the situation of unprecedented normative expansion is accompanying education of all participants in the legal system. Regular education of judges is organised by the Judicial Academy.¹⁸ Corresponding education of other participants and stakeholders in the judicial and administrative system is lacking.¹⁹ It would be wrong and unfair to point the finger only to the judiciary when it comes to applying European standards. Great responsibility lies on lawyers (attorneys at law) as well. It is precisely education of the latter which can contribute to the development and recognisability of protection against discrimination and compliance with the EU law and CJEU case law. Their education, however, primarily depends on individual ambition and assessment, although they are, in our opinion, capable of providing important incentive for the development of case law, by demanding the court to recognise international and European legal standards of protection in the course of representing their clients. Until this awareness is raised, the clients, even when represented by attorneys, often will only assert discrimination as a last resort in later stages of the proceedings, when submission of evidence and establishment of factual background is no longer possible (appellate proceedings, revision).²⁰ Lacking proper advice, victims of discrimination might even refrain from initiating proceedings.

Crucial for a proper understanding of EU anti-discrimination case law is a basic knowledge of the EU legal system. Croatian judges and other lawyers are still not quite familiar with the functioning of this system and consider it as an 'intruder' in the national legal order.²¹ Of special importance are the occasional conferences²² and workshops²³ on

No. 1/2012), the different treatment of the incitement to discriminate in various Croatian laws could become an issue. Reference to Article 4 GEA seems plausible, but not likely, as it could entail deviation from an explicit legal norm. Existing case law where incitement to discriminate is asserted within the framework of the ADA refers to the period prior to amendments, where intent was necessary (see the decisions of the Supreme Court of the Republic of Croatia in cases Gž-38/11, Gž-12/11).

¹⁸ Since 1 January 2010, the Judicial Academy is a public institution established by law with the purpose of implementing programmes for public legal officials and continuous professional training of judges and state attorneys.

¹⁹ Administrative barriers may prove to be the hardest to overcome in an effort to fully accomplish the principle of equality in practice. Recently, a county office of state administration and the Ministry of Justice refused to change the data on gender and name in the main entry in the Registry of Birth, by interpreting the legally prescribed requirement of 'appropriate medical documentation' as a basis for such entry to mean only the documentation attesting to a gender change operation. The Ombudsperson for Gender Equality condemned such practice as direct discrimination and warned the mentioned bodies that they violated the prohibition of direct discrimination based on sex and the principle of effective legal protection against discrimination. See <http://www.prs.hr/index.php/odluke-prs/prema-obliku-diskriminacije/izravna/446-upozorenje-i-preporuka-vezano-za-spolnu-diskriminaciju-u-postupku-izmjene-temelnog-upisa-spola-u-matici-rodenih-3>, accessed 29 March 2013.

²⁰ E.g. the decisions of the Supreme Court of the Republic of Croatia VSRH Revr-829/07; VSRH Revr-850/07.

²¹ So far, the only available empirical research study analysed the attitudes of judges towards the application of EU law in the national legal arena. It was conducted in 2011 as part of the project 'Knowledge and Understanding of European and International Law in the Republic of Croatia'. See further B. Preložnjak 'Poznavanje, razumijevanje i stavovi hrvatskih sudaca o europskom i međunarodnom pravu' in: I. Šimonović (ed.) *Poznavanje i vrijednosno prihvaćanje europskog i međunarodnog prava u Republici Hrvatskoj* Zagreb, Sveučilište u Zagrebu, Pravni fakultet, 2012, 128. Even though the scope of this study is unfortunately very limited, it may be used as an indication of the current and future capacity of judges to accept and recognise the challenges placed before them once Croatia joins the EU. The results have shown that, despite the judges' critical self-assessment of their level of knowledge of international and European law as mediocre, they are in fact fairly well educated in these areas. They have shown very good knowledge of EU law, with the percentage of correct answers to specific questions regarding EU institutions and primary and secondary EU law reaching 85-87 %. However, these findings are limited to the judges who participated in the educational seminars on EU law and its implication for national legal systems, and the study was conducted immediately after completion of those seminars. Only 61 judges participated in the study. It would have been interesting to subject the judges who never attended such educational seminars, or those particular ones, to the same questions, and compare the results. It would also be useful to further explore who apply for education and training. Are all judges, not just in theory, but also in practice free to participate, or are they restricted by, for example, organisational decisions of the presidents of the courts? What effect could this have on the level and pace of Europeanisation of a national judge?

²² E.g. the international conference 'Anti-Discrimination Law and Practice', 27 April 2009, Zagreb. The press release following the conference warned that final and binding judgments were rare and showed that the

specific aspects of judicial anti-discrimination protection, organised in academic circles and by civil society organisations. Valuable publications on the application of anti-discrimination laws in practice are published from time to time.²⁴

Ad 3 This leads us to what seems to be the crucial cause of incoherent and sporadic case law. Case law in anti-discrimination cases in general is not published or updated regularly and is very hard to come by. The examination of case law of lower courts often boils down to personal contacts and collegial assistance by judges. Published case law (judgments of the Supreme Court, judgments of the Constitutional Court, selected judgments of county courts) is classified in a non-transparent manner and case-law search engines are far from user-friendly. These problems may not appear so difficult for a seasoned researcher or other skilled person trained to investigate different areas of anti-discrimination protection, but for an average user and for those who should benefit from it the most – the victims of discrimination – they may be insurmountable. This also has a negative impact on the uniformity and efficiency of judicial protection in the entire Croatian territory, because until the Supreme Court takes a position on a certain issue (which may not necessarily happen), the courts are basically left without any possibility of knowing the positions and interpretations of other courts. Their only points of reference are internal interpretations of that particular court, provided that there are any. There is no obligation to publish either final and binding judgments, or judgments pending appeal. Even though courts at all levels have their own websites where, applying the rules on anonymisation,²⁵ case law may be published, in most cases this is not done at all.²⁶

One of the last monitoring reports for Croatia prior to its accession has found that, apart from fully aligning its legislation in the area of anti-discrimination, ‘...measures aimed at developing a comprehensive system of monitoring cases of discrimination are on-going.’²⁷

national courts were having trouble recognising what discrimination is, and what is not, and that therefore the education of police officers, state attorneys, judges, attorneys, public officials and civil society stakeholders regarding international and national legislation and case law of international courts on the fight against discrimination seems to be decisive for the actual application of the new national anti-discrimination laws. Press release, http://www.ombudsman.hr/dodaci/Poruka_zajavnost.pdf, accessed 28 March 2013.

²³ E.g. several workshop/training seminars were organised in 2012 as part of the project ‘Strengthening of civil society organisations for effective implementation and monitoring of anti-discrimination policy in Croatia’ financed by the EU through the IPA 2008 instrument. Occasional seminars and workshops on different aspects of gender equality are organised or supported by the Office for Gender Equality and local and regional gender equality committees, as well as CSOs. It is important to mention the seminar series on gender equality organised by the Academy of European Law (ERA) in Trier, which are open to legal practitioners, members of judiciary and academics. Unfortunately, the authors of this paper have no information on participants from Croatia.

²⁴ Such as I. Crnić et al. (eds.) *Primjena antidiskriminacijskog prava u praksi* Zagreb, Centar za mirovne studije 2011; T. Šimonović Einwalter (ed.) *Vodič uz Zakon o suzbijanju diskriminacije* Zagreb, Ured za ljudska prava Vlade Republike Hrvatske 2009; S. Lalić et al. (eds.) *Report on Implementation of the Anti-Discrimination Act in 2011* Zagreb, Centre for Peace Studies 2012.

²⁵ In the opinion of the Agency for the Protection of Personal Data, there are no obstacles for publishing case law on websites. The operation of courts is public, unless an Act or the Constitution excludes the participation of public. It is also ‘well-known that court decisions and judgments are public’. However, the protection of privacy dictates differentiation of the public from the private sphere and entails protection of personal data of natural persons – parties in court proceedings in relation to judgments containing personal data, which are made publicly available; <http://www.azop.hr/news.aspx?newsID=43&pageID=25>, accessed 25 March 2013. The Supreme Court has adopted the Rules on anonymisation of court decisions, Su-748-IV/03-2 of 31 December 2003 and the Instruction on anonymisation of court decisions, Su-748-IV/03-3 of 31 December 2003 for decisions published on the website of the Supreme Court of the Republic of Croatia and recommended their application to all other courts, if they do not adopt their own rules modelled upon those rules.

²⁶ As part of the PHARE 2006 project ‘Approximation and publication of case law’, the Supreme Court announced the new and improved information system called *SupraNova*. Introducing improved options to search court decisions, the *SupraNova* system should soon be published and become available to the wider public and take the role of the existing *SuPra* system. <http://www.vsrh.hr/EasyWeb.asp?pcpid=937>, accessed 3 April 2013.

²⁷ Commission Staff Working Document, Comprehensive Monitoring Report on Croatia, Brussels, 10 October 2012, SWD(2012) 338, 30. The very last Monitoring Report published on 26 March 2013 only concludes that Croatia has completed legal alignment in the fields of anti-discrimination and equal opportunities.

Although it is true that the statistical framework for monitoring anti-discrimination case law has been established,²⁸ the available data hardly allows drawing any correct conclusions on the actual state of case law in this area. For example, according to the Report on the Implementation of the National Gender Equality Policy 2006 – 2010 for 2009 and 2010,²⁹ Measure 1.6 (to improve the accessibility of justice and legal protection for women in cases of violation of their rights and to develop the methodology of gathering data on the number and types of legal actions concerning discrimination and their results, including the raising of awareness of women regarding the mechanisms of legal protection) has been fully implemented. However, it is argued that statistics do not reflect the real status of anti-discrimination case law, especially in the field of gender equality. The methodology does not disaggregate cases based on different anti-discrimination laws and other legislation, even if the majority of discrimination cases might occur in specific branches of law (e.g. labour relations). Another problem is the low visibility of records, since the Ministry of Justice does not make them publicly available.

With this in mind, the following reservations apply to the case law analysed and referred to in this contribution. First, the majority of case law (even cases recently decided by the Supreme Court) is based on factual background which occurred before the entering into force of the existing special anti-discrimination legislation (ADA, GEA, the Act on Forms of Same-Sex Cohabitation). Although the fundamental principles of equality and non-discrimination were protected even then and guaranteed by the Constitution and other laws (primarily by the Labour Act in the field of employment and working conditions), this fact puts the conclusions on the degree of development of Croatian anti-discrimination case law into some perspective. The hope remains that 'good' existing case law will set the scene for legal standards and interpretation of the anti-discrimination rules in force.³⁰

Second, and partly due to the first point, the majority of analysed case law refers to discrimination in the field of employment, work and working conditions and interprets the provisions on the prohibition of discrimination from the Labour Act which was previously in force.³¹ The search of the case-law database of the Supreme Court *SuPra* does not yield any

Communication from the Commission to the European Parliament and the Council Monitoring Report on Croatia's accession preparations, Brussels, 26.3.2013 COM(2013) 171 final, 10.

²⁸ According to the Report on Implementation of the Anti-Discrimination Act in 2011, the Ministry of Justice has been collecting data since 2009, when the ADA came into force, but the statistical monitoring forms changed only in 2010, enabling access to the data on specific grounds of discrimination, which previously was not possible. There are 20 grounds of discrimination using which discrimination is monitored, with some artificial categories (such as expression, separate from gender identity), which makes the monitoring of the real number of cases, according to specific discrimination grounds, impossible. See Lalić et al. (eds.), 46. Monitoring is conducted separately according to the type of competent court (civil, criminal and misdemeanour cases). The ADA provides for civil and misdemeanour liability, whereas the Criminal Code provides for criminal liability. In the area of gender discrimination, for example, there was only 1 new reported civil case in 2011, with 3 cases pending from the previous period. No case categorised as gender discrimination was resolved in the same period, leaving a total of 4 cases unresolved at the end of the reporting period. In comparison, a total of 29 new discrimination cases on all discrimination grounds were registered before civil courts in the same year. In the same period, there were 16 new misdemeanour gender discrimination cases, 7 of which were resolved (out of which 4 convictions). The Report makes the important recommendation for the courts to record statistics of cases that are not filed under the ADA but are interpreted as such.

²⁹ Office for Gender Equality of the Government of the Republic of Croatia, Report on the implementation of the national gender equality policy 2006-2010 for 2009 and 2010, Zagreb, 2011. The Office was established in 2004 as an administrative and professional service of the Croatian Government.

³⁰ The courts should be very careful to avoid considering any difference in treatment as discrimination, regardless of the existence of discriminatory grounds. For such examples, see especially VS RH Revr-300/06 where the court asserted that dismissal was discriminatory because the claimant was 'placed in an unequal position', without any further mentioning or identification of discriminatory grounds, let alone explaining what the discrimination consisted of. In VS RH Revr-787/07 the Court rightly dismissed the claimant's vague and unsubstantiated allegation that he had suffered harm as a result of discrimination by his employer, without stating any discriminatory grounds or indeed providing any factual background to corroborate that assumption. In VS RH Revr-116/07 the claimant's argument that he had been 'discriminated against by having been fired' was rightly dismissed.

³¹ Until the entry into force of the new Labour Act in 2009, the previous Labour Act of 1995 (Official Gazette 38/95, 54/95, 65/95, 17/01, 82/01, 114/03, 142/03, 30/04 and 137/04 – consolidated version) prohibited the

results in the legislative directory for the search 'Gender Equality Act', whereas the search 'Anti-Discrimination Act' offers only two results. The subject-matter directory yields more results: approximately 20 results for the search 'prohibition of discrimination; discrimination; or discrimination – prohibition and fight against discrimination', most of which are labour disputes regarding the annulment of the termination of a labour contract or payment of salary.³²

Finally, the observed case law refers to all discriminatory grounds, not just gender, because it includes interpretation of common legal terms. Another reason is that, were it just strictly gender equality case law presented, there would hardly be any material for analysis, given the scarcity of case law in this field.

4. Case law: examples of interpretation

4.1. The burden of proof

All EU anti-discrimination directives contain basically identical provisions on the burden of proof: Member States are to take the necessary measures, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. Member States are free to introduce rules of evidence which are more favourable to plaintiffs. The wording of the two main anti-discrimination laws in Croatia, the ADA and the GEA, on the burden of proof slightly differs, which may lead to inconsistent interpretation.

Under Article 20 ADA, a party claiming discrimination does not have to prove it with any degree of certainty – it suffices to establish probability³³ that the discrimination occurred ('shall make it plausible that discrimination has taken place'), while the respondent has to prove the contrary with sufficient degree of certainty. Failing this, it is considered that the right to equal treatment was violated.³⁴ The concept of probability is not defined in Croatian civil proceedings legislation.³⁵ The claimant has to prove the probability of facts, on which the right to equal treatment and its violation depend. These facts need not be proven with the degree of certainty normally required from the party who bears the burden of proof.³⁶ According to Dika, probability in this context should be interpreted as *prima facie* evidence, a legal standard which is not applied in Croatian law and practice. It involves the creation of a

discrimination of any person in employment relations based on race, colour of skin, gender, sexual orientation, marital status, family commitments, age, language, religion, political or other conviction, national or social background, economic situation, birth, social status, membership of a political party or trade union and physical or mental disabilities and described the field of application of those provisions, exceptions, burden of proof and the right to damages in Articles 2-6. The previous Act also contained definitions of direct and indirect discrimination, harassment and sexual harassment. The existing LA 2009 (Official Gazette 149/09 and 61/11) was horizontally adjusted with anti-discrimination legislation, so that the LA now only contains a general prohibition of direct and indirect discrimination in the field of work and working conditions, in accordance with special Acts (Article 5(4) LA). Equal pay for men and women is still explicitly prescribed in the LA (Article 83).

³² This contribution is based not only on the case law published in the mentioned database and the database of the Constitutional Court of the Republic of Croatia, but also on the judgments obtained from other sources (in cooperation with certain courts, attorneys and civil society organisations).

³³ Cro. '...učiniti vjerojatnim...'

³⁴ In a recent judgment of the Supreme Court Gž-25/11 of 28 February 2012 the respondent's statement was deemed to have violated the dignity of persons of homosexual orientation within the meaning of Article 3(1) ADA (harassment). Whereas the first-instance court found no discrimination, the appellate court was of the opinion that it was enough for the claimant in a representative action to present the respondent's statement to the court and concluded that the 'purposive meaning of that statement was evident per se: humiliation and degradation of that category of persons'. The claimant showed with probability that discrimination of the target group occurred as a result of that statement, which was enough for the burden of proof to shift to the respondent.

³⁵ M. Dika, 84.

³⁶ M. Dika, 85.

preliminary standpoint on the existence of discrimination, based on typical developments, which, according to the rules of experience, refer to a causal connection with the discriminatory behaviour or liability for such behaviour. By lowering the required standard for presentation of evidence, the task of the party bearing the (initial) burden of proof is facilitated.³⁷ The following case law illustrates this approach in practice. The existence of harassment, which is defined as a form of discrimination in Article 3(1) ADA, depends on the court's margin of appreciation. Thus, the Supreme Court reached different conclusions in recent related cases involving discrimination based on sexual orientation. In cases Gž-25/11 and Gž-41/11 the rules on the burden of proof were interpreted so as to shift the burden of proof to prove that there had been no discrimination to the respondent, when the meaning of his statement was obvious in itself (degradation and humiliation).³⁸ In case Gž-12/11 the respondent's statement declaring support for the statement of the respondent in the previously mentioned cases was found to fall within the boundaries of the freedom of speech: the initial probability was not evident.

The burden of proof according to Article 30(4) GEA is somewhat differently construed: a party claiming that his/her right has been violated has to present facts which raise the suspicion that discriminatory behaviour has occurred;³⁹ the burden of proof then shifts to the opposing party who has to prove that there has been no discrimination. Dika argues that this wording can be interpreted to mean that it is sufficient for the alleged victim of discrimination to present facts, which, in themselves, if true, would raise the suspicion that discriminatory behaviour occurred, which is an even lighter burden than proving the probability.⁴⁰ In our opinion, this provision was probably influenced by the identical wording contained in the provision on the burden of proof from the old Labour Act 1995.⁴¹ In a recent case VS RH Revr-1469/10 involving the said provisions of the old Labour Act 1995, the Supreme Court concluded that the burden of proof for mobbing and harassment is essentially the same and that the lower courts were wrong in treating them differently: the claimant has to present facts which raise the suspicion that the respondent acted in violation of his obligation of non-discrimination. It is then upon the respondent to prove that there has been no discrimination.

4.2. Discriminatory grounds

Unlike Article 1 ADA, which includes an exhaustive enumeration of discriminatory grounds, Article 14(1) of the Constitution of the Republic of Croatia is an open-ended clause. This means that the legislator, as well as courts when adjudicating cases based on the Constitution and laws may establish any other ground not mentioned in the Constitution, the ADA, the GEA or any other act, as discriminatory.⁴² Basically, the court will have to find convincing arguments to rely on Article 14(1) of the Constitution and establish a certain feature as discriminatory in the relevant case.⁴³ Consequently, all cases where unequal treatment is alleged deserve special care as to the ground of discrimination claimed.⁴⁴

³⁷ *Loc. cit.*

³⁸ In both cases that share the same factual background, the first-instance courts concluded that the claimants did not make discrimination plausible, i.e. did not show probability that the respondent's statement had caused direct discrimination. See judgments of the County Court in Zagreb Pnz-8/10 and Pnz-7/10.

³⁹ Cro. '...opravdavaju sumnju...'

⁴⁰ M. Dika, 86.

⁴¹ Labour Act of 1995 (Official Gazette 38/95, 54/95, 65/95, 17/01, 82/01, 114/03, 142/03, 30/04 and 137/04 – consolidated version).

⁴² Ž. Potočnjak & A. Grgić, 19.

⁴³ In Supreme Court case Revr-85/11, the Court confirmed that the enumeration of discriminatory grounds from the (old) Article 2 LA 1995 is not complete (even though that provision also contained an exhaustive enumeration) and that the Court may establish other discriminatory grounds within the meaning of Article 14 of the Constitution and the guaranteed right to equal treatment. In case Revr-1676/09, the fact that the (old) Article 2 LA 1995 does not mention education as one of the discriminatory grounds, does not mean that such discrimination would not be possible in labour relations, within the meaning of the Constitution. The Constitutional Court expands this case law even further, by finding that, for example, legislation which distinguishes between two categories of drivers (those who have a certain amount of alcohol in their blood and those who have the same amount of alcohol but also commit an offence) are treated unequally as to their

4.3. Direct and indirect discrimination: justifications or derogations?

In EU gender equality law, derogations from discrimination law must be explicitly prescribed, whereas justification (in accordance with the principle of proportionality) is included only in the definition of indirect discrimination.

It seems that the position of Croatian legislation and case law is that objective justification is possible for direct as well as for indirect discrimination. Potočnjak and Grgić cite the decision of the Constitutional Court of the Republic of Croatia USRH U-I-764/2004 (salaries of judges and public legal officials), where the Court reasoned that even though the legislator is free to regulate rights and obligations, any difference in treatment must be reasonably and objectively justified, i.e. must be proportional to the goal it pursues.⁴⁵ In U-I-1152/2000 (gender equality in the pension system), the Constitutional Court referred to the previously mentioned decision and reiterated that the Constitution does not prohibit the legislator from prescribing rights and obligations of same or similar groups in a different manner, if it serves to correct existing inequalities among those groups or if there are other justifiable reasons based on the Constitution. Different requirements for obtaining certain rights arising from the pension system (different age requirements for men and women, based exclusively on gender) are, nevertheless, found to be constitutionally unacceptable. There are no similar decisions relating to pregnancy discrimination. However, some provisions on the protection of pregnant workers are potentially contradictory to the constitutional guarantee of equal treatment. For example, under Article 49(1) LA employers are prohibited from ordering pregnant women to do night work, except if a pregnant woman explicitly requests such work and presents a medical certificate that such work is not harmful to her health or the health of the foetus, which could in reality present an obstacle to equal treatment. Under Article 39 of the Occupational Safety and Health Act, pregnant women and women who are breastfeeding are *a priori* prohibited from performing a number of explicitly listed jobs, without the assessment of the actual risk involved. These provisions have never been tested before the Constitutional Court.

Therefore, even in direct discrimination cases the test of legitimate goal and proportionality applies, which is similar to the case law of the European Court of Human Rights.⁴⁶

4.4. Comparable situation

A constitutive element of direct discrimination is the existence of a comparable situation (except in the event of pregnancy discrimination). It seems that the Croatian judiciary takes a predominantly formalistic approach and overemphasises the importance of a comparator.⁴⁷

liability for the offence (the first category not punishable at all, the second category punishable both for the presence of alcohol and for the other offence committed), which represents a violation of the right to equal treatment, unless objectively justified by a legitimate aim and proportional. See U-I-3084/2008 (Act on Road Safety). For a strict interpretation of discriminatory grounds as exhaustive, see VS RH Revr-787/07.

⁴⁴ See the Decision of the Constitutional Court in cases U-I-764/2004 and U-I-3084/2008.

⁴⁵ Ž. Potočnjak & A. Grgić, 29-30.

⁴⁶ *Loc. cit.* Typically very strong, constitutionally acceptable reasons are required if the Constitutional Court is to declare that the regulation which prescribes the difference in treatment based exclusively on one of the grounds enumerated in Article 14(1) of the Constitution is compatible with the Constitution. However, if general measures of economic and social policy are at stake, the legislator's margin of appreciation is considerably wider, in which case the Constitutional Court will, as a rule, respect the choice of the legislator. See the Decision of the Constitutional Court, USRH-I-764/2004, Paragraph 12, U-I-2578/2004, U-I-2670/2004, U-I-3006/2004, U-I-1452/2005; as well as U-I-1152/00, U-I-1814/2001, U-I-1478/2004, U-I-3137/2002 and U-3760/2005.

⁴⁷ The analysis of case law in the field of anti-discrimination protection, conducted by the Ombudsperson for gender equality in 2010 shows that the courts are reluctant to link anti-discrimination protection with the proportionality test, that they tend to 'over-formalise' protection, confuse equal treatment with completely identical treatment and overemphasise the importance of a comparator. See <http://www.prs.hr/index.php/>

For example, the claimant will be required to prove that the respondent should have treated him/her equally to another person in a comparable situation, whereby any difference in formal requirements overturns comparability (e.g. where a job classification system exists, any formal difference might exclude comparability). For example, it seems that the performance of actual tasks will be relevant only where there is no legally prescribed salary classification system. If the classification system exists, the employer will be found in breach of a specific obligation arising out of binding legislation or subordinate regulations if he abides by the equal pay principle.⁴⁸ In a recent series of judgments the Supreme Court did not allow a cross-employer comparison even in cases where employers were a parent company and a fully-owned affiliate. It consequently rejected the claimant's argument of comparability with an employee performing identical tasks, but formally working for another employer (a parent company), even though the claimant worked in the business premises and used the assets of the parent company.⁴⁹ This position is dubious from the point of view of CJEU case law.⁵⁰

5. Conclusion

The aim of the present contribution was to evaluate the capacity of the national judiciary in the application of gender equality law, which largely originates from the EU *acquis*. The approximation at normative and institutional levels, i.e. the formal transposition of the equal treatment directives and the creation of new institutional mechanisms, such as the Ombudsperson for gender equality, seems to be at a satisfactory level. However, it takes more time and effort to accept and implement the interpretative openness of EU equality law, as applied by the CJEU, in practice. In our opinion, education and accessibility of national case law play a crucial role in preparing the judiciary for the challenging shift of approach in adjudication.

Gender continuously ranks among the top three discriminatory grounds, according to various studies. The reported rise in the number of gender discrimination cases brought before the Ombudsperson for gender equality in recent years does not necessarily mean that these forms of discrimination occur more often, but that people are increasingly becoming aware of their rights to be protected from discrimination and exercise these rights. For example, about one fifth of all new cases before the Ombudsperson for gender equality in 2012 concerned the area of work, working conditions and self-employment. Gender discrimination was claimed in 99.1 % of those cases.⁵¹ Yet, there is a striking mismatch between the number of reported cases and the number of court proceedings regarding the protection against gender

[analize-i-istrazivanja/obrazovanje-4/181-istrazivanje-sudske-prakse-u-podrucju-antidiskriminacijske-zastite-2010](#), accessed 23 March 2013. There are no similar studies concentrating on gender equality case law.

⁴⁸ Case law on comparability is numerous and exceeds the limits of this contribution. However, some examples have to be highlighted. In case VS RH Revr-1676/09 the claimant asserted having been paid less for work of equal value, when she actually performed tasks of a higher skilled worker. The Court concluded that since the determination of salary in public services is prescribed by law (categories and coefficients), the respondent may only pay the claimant in accordance with her qualifications, because they would otherwise contravene the explicit and legally binding rule. In VS RH Revr-246/10 the formal job classification was deemed crucial for denying comparability. In VS RH Revr-1545/11, the Supreme Court concluded that the claimant failed to prove comparability, because the respondent 'did not threaten or physically assaulted the claimant [*sic*]' so it could not be claimed that their situation was comparable. For a contradictory approach, see the ruling in equal pay case VS RH Revr-135/09, where it was concluded that the title of the job or its classification do not automatically give the right to be paid equally to another worker with the same job title, but that the pay depends on actual work and tasks performed by a particular worker.

⁴⁹ See VS RH Revr-1429/10.

⁵⁰ I.e. Case C-320/00 *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd*. [2002] ECR I-07325, Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* [2004] ECR I-00873: A cross-employer comparison may be allowed where there is a single source and a single body responsible for inequality which could restore equal treatment. See C. Barnard *EU Employment Law*, 4th ed., Oxford, Oxford University Press 2013, 307-311.

⁵¹ Ombudsperson for gender equality, Annual Report 2012, <http://www.prs.hr/attachments/article/633/IZVJESCE%20PRS%20SABORU%20RH%20ZA%202012%20GODINU.pdf>, accessed 6 May 2013.

discrimination. This leads us to conclude that court protection in gender discrimination cases, as in discrimination cases in general, is still perceived as too slow and inefficient.

Effectively combating discrimination and protecting rights and freedoms, in the words of Supreme Court Judge Mr R. Marijan, require an independent and professional judiciary and the existence of clear and fair legislation, including strict procedural rules.⁵² It is only the combination of these two fundamental preconditions that can yield the required results.

Let us conclude with a quote, which summarises the foregoing:

‘Judges feel the burden of their judgments every day, live under the constant pressure of responsibility for their decisions and carrying the heavy weight inherent to their profession, which is not properly valued in this country. Many of them endure these conditions with honesty and bravery, but some, unfortunately, do not.’⁵³

⁵² R. Marijan ‘Uloga sudstva u suzbijanju diskriminacije’ in: Crnić et al. (eds.) *Primjena antidiskriminacijskog prava u praksi*, pp. 155-161, Zagreb, Centar za mirovne studije 2011.

⁵³ R. Marijan ‘Uloga sudstva u suzbijanju diskriminacije’ in: Crnić et al. (eds.) *Primjena antidiskriminacijskog prava u praksi*, pp. 155-161, Zagreb, Centar za mirovne studije 2011.

Balancing a Tightrope: The EU Directive on Improving the Gender Balance among Non-Executive Directors of Boards of Listed Companies

Linda Senden and Mirella Visser*

1. Introduction

More equal participation and representation of men and women in decision-making bodies, including company boards, has been on the agenda of the European Union for nearly 30 years now. In various recommendations the Council has called upon the Member States to take the necessary action to make progress in this issue.¹ Clearly, any measures taken have not been effective enough, as today the average share of women on company boards across Member States of the EU has been found to range from around 3 % to 28 % for non-executive directors and from 0 % to 21 % for executive directors.² In recent years the average annual increase of women on company boards was found to be merely at a rate of 0.6 %.³ In a European community of States that is seriously committed to the principle of equal treatment and equal opportunities for men and women, as expressed now in a number of articles in the TEU, TFEU and the Charter of Fundamental Rights, this very slow progress should be considered unacceptable and should work as an important driver for action. It should also be understood that more gender-balanced company boards do not only contribute to this general societal interest and the private individual's interest, but also bring important benefits to the companies themselves and the EU.

Gender quota rules may provide a useful tool to achieve more balanced participation in economic decision-making, including company boards. The Commission seeks to promote gender balance on boards by putting forward its proposal for a Directive of the European Parliament and the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures.⁴ Yet, the issue of gender quota is a very sensitive subject that often leads to immediate strong and negative reactions, often dominated by misconceptions about for instance the actual scope of the obligations and the penalties imposed. This also goes for the Commission proposal, which has been fiercely rejected by some, including by 6 national parliaments that have challenged compliance with the subsidiarity principle.⁵ Also a number of national governments have taken a defensive stance on the proposal, stating that they are not supportive of it and that it goes beyond Union competences (e.g. the Netherlands,⁶ Germany). At the same time, there are voices – including within the European Parliament – calling for a more ambitious approach and for more far-reaching obligations to be imposed on the Member States than those contained in the proposal. Clearly, some political battles will still have to be fought over the proposal and

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¹ Recommendation 84/635/EEC of 13 December 1984 on [...], OJ L 331 of 19 December 1984, p. 34 and Recommendation 96/694/EC of 2 December 1996 on [...], OJ L 319 of 10 December 1996, p. 11.

² See Progress Report: Women in economic decision-making in the EU, March 2012, available on: http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf accessed 22 May 2013.

³ See Progress Report: Women in economic decision-making in the EU, March 2012, available on: http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf accessed 22 May 2013.

⁴ COM(2012)614 final, 14.11.2012, available on: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0614:FIN:en:PDF>, accessed 22 May 2013.

⁵ http://ec.europa.eu/commission_2010-2014/redirecting/pdf/ml3_10_en.pdf, accessed 22 May 2013.

⁶ See the *Staat van de Europese Unie 2013*: 'Bruggen slaan in Europa', 15 February 2013.

finding a compromise will require quite some delicate balancing of a rather thin tightrope, given the different interests and viewpoints at stake. Yet, all actors involved should understand the importance of finding such compromise for the sake of making progress on this issue EU-wide, in all Member States and not just in some of them. If the Commission proposal fails to be adopted by the European Parliament and the Council, the momentum will be lost for the years to come and stagnation will be a real risk.

In our view, a full and sound assessment of the Commission's proposal requires a three-step approach. First of all, it needs to be considered in more detail why gender-balanced company boards are an important goal to strive after at all and what benefits they bring to individuals, companies and society as a whole. Or, in other words, what are the normative justifications for developing rules for the achievement of this goal by the EU (Section 2)? Secondly, what approaches have already been developed in the Member States to enhance female representation in company boards (Section 3)? Only then can we consider the rules and obligations the Commission seeks to establish in its proposal and assess how they square with the competences and own rulemaking of Member States on the matter and what the added value of EU rules would be (Section 4). We conclude with some final remarks (Section 5).

2. The problem of gender-imbalanced company boards

The Commission's proposal aims to provide a solution for the persistent problem of underrepresentation of women on company boards. It is important to first consider what the current situation of gender composition of boards is, and the actual scope and nature of the problem, and why gender-balanced boards should be aimed for.

2.1. The scope of the problem

To begin with, the definition of the problem concerns its scope, which has two aspects: the low numbers of women on boards and the lack of real progress over the past decades. Statistics show that women's entry into the labour force over the past decades, with a current employment rate in the EU of 62.4 % (against men at 74.6 %), has not been translated into equal representation on company boards.⁷ Women now hold 16 % of board positions of the largest listed boards.⁸ However, the extent of the problem is difficult to establish since data in the EC Database on Women and Men in Decision-Making is limited to the 'largest publicly listed companies' in each country, with a maximum of 50 of the primary blue-chip index per country based on market capitalisation and/or market trades.⁹ Therefore, the EC Database statistics are indicative but do not provide an accurate overview of the underrepresentation of women on boards of listed companies. This can be illustrated by the following figures of the UK and the Netherlands:

UK

% of women on boards reported in the EC Database: 19 %¹⁰

EC Database includes 47 out of 100 companies of 'blue-chip index' FTSE100

% of women on boards FTSE100: 17.3 % and on FTSE250: 13.3 %¹¹

⁷ Statistics obtained from Eurostat, 2012.

⁸ See the EC Database on Women and Men in Decision-Making, available on: http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/executives-non-executives/index_en.htm, accessed 22 May 2013.

⁹ 'Blue chip' is stock in a corporation with a national reputation for quality, reliability, and the ability to operate profitably in good times and bad ones.

¹⁰ http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/supervisory-board-board-directors/index_en.htm, accessed 22 May 2013; data collected between 29 September 2012 and 15 October 2012.

¹¹ March 2013; The Female FTSE Board Report 2013, Cranfield University; <http://www.som.cranfield.ac.uk/som/dinamic-content/media/Research/Research%20Centres/CICWL/FTSEReport2013.pdf>, accessed 22 May 2013.

The Netherlands

% of women on boards reported in the EC Database: 22 %

EC Database includes 20 out of 96 listed companies at Euronext Stock Exchange

% of women on boards Dutch Stock Exchange (96): 10.4 %¹²

It is important to note that the proposal will affect around 5 000 companies in total across the EU, of which it is estimated that around 950 are listed in the UK and more than 100 in the Netherlands.¹³ The statistics of the EC Database only refer to 5 % of the British but almost 20 % of the Dutch companies that will be affected by the proposal. In several country reports¹⁴ it has also been shown that large listed companies often have higher numbers of women on their boards than companies in general. While further research would be needed on this, explanatory factors for this difference may be internationalisation, higher visibility (scrutiny by public, press and government) and professionalisation of board selection processes at larger listed companies.

Based on the above, one could argue that the underrepresentation of women on corporate boards of large listed companies is in fact the tip of the iceberg, and that the underlying problem, underrepresentation of women on company boards in general, is much larger. This would mean that the so-called ‘trickle-down effect’ of the instrument becomes even more important, i.e. the effect that the instrument of setting targets for gender-balanced boards of large listed companies will have on gender composition of boards of all companies. Yet, the Norwegian quota law has demonstrated that the trickle-down effect may actually be non-existent. Research¹⁵ has found that the increased proportion of women on the boards of public limited companies that were covered by the law did not result in an increase in the proportion of women on private limited liability companies’ boards that were not covered by the law. The reason is that those boards do not have to change.¹⁶ In this regard, it is also important to note the Commission proposal’s primary focus on non-executive or supervisory board positions as opposed to executive boards. Since operational management experience is one of the key criteria for most non-executive board positions, and women are severely underrepresented in executive boards, the impact of the proposal may be that women will be disproportionally recruited from sectors other than the corporate world, such as academia, politics, government, and NGOs. This limits the potential of the trickle-down effect. We will discuss this further in 4.3.2..

The second part of the problem is the lack of real progress. As early as in 2005, *The Economist* qualified progress made so far as progress ‘of a glacially slow sort’.¹⁷ Calculations vary but have one conclusion in common: it will take decades before gender balance (40 % of each sex) will be reached if there is no active intervention. When it comes to the business world, the saying prevails: ‘If it gets measured, it gets done’.

¹² Dutch Female Board Index 2012, Nyenrode Business University; <http://www.nyenrode.nl/FacultyResearch/corporategovernanceinstitute/Documents/TheDutchFemaleBoardIndex2012.DEF.pdf>, accessed 22 May 2013.

¹³ This was the estimation made in 2011, see http://ec.europa.eu/justice/gender-equality/files/womenonboards/womenonboards-factsheet-uk_en.pdf, accessed 22 May 2013.

¹⁴ http://ec.europa.eu/justice/gender-equality/tools/good-practices/review-seminars/decision_making_en.htm, accessed 22 May 2013.

¹⁵ M. Teigen, ‘Gender Quotas for Corporate Boards in Norway: Innovative Gender Equality Policy’ in C. Fagan et al. (eds.), *Women on Corporate Boards and in Top Management: European Trends and Policy*, Palgrave Macmillan 2012.

¹⁶ M. Teigen, ‘Exchange of good practices on gender equality-: Norway’, discussion paper 2012, available on: http://ec.europa.eu/justice/gender-equality/files/exchange_of_good_practice_no/no_discussion_paper_no_2012_en.pdf, accessed 22 May 2013.

¹⁷ ‘The conundrum of the glass ceiling’, *The Economist*, 21 July 2005, available on: <http://www.economist.com/node/4197626>, accessed 22 May 2013.

In this regard the situation in the US can serve as an example that progress can level off after a period of relatively strong organic growth.¹⁸ Without binding measures in place, the proportion of women holding board seats in Fortune 500 companies grew at a relatively fast rate from 1995 to 2005: from 9.6 % to 14.7 %. Growth levelled off from 2005 to 2012, when women held 16.6 % of board seats. This was despite the introduction of the disclosure rule by the Securities and Exchange Commission in 2009, requiring listed companies to disclose in their SEC filings whether, and if so how, the company took diversity into account when identifying nominees for director positions.¹⁹ The Centre for Work-Life Policy identified as the main bottleneck for a further increase of women at senior levels in companies ‘the lack of male advocacy’.²⁰ Concerned about the lack of progress, a joint initiative from industry leaders, civil society, institutional investors and corporate governance experts was started in 2011.²¹ Increasing the turnover rate at boards and the number of vacancies by imposing limitations to director’s terms in office is currently being promoted as a measure that might have a positive effect on the underrepresentation of women on boards.²²

2.2. The nature of the problem

The definition of the problem also requires consideration of the nature and roots of the problem of underrepresentation of women. The challenges for women to reach top positions in corporations can be found at three levels that interact and influence each other during the course of a woman’s career,²³ i.e. the societal, the organisational and the individual level. At *societal level* obstacles can be found in the expectations and prejudices about women’s role in society. In many cultures women are expected to take care of (most of the) household and care tasks and working mothers are severely criticised. Stereotypes around leadership positions and the necessary style and behaviours make it more difficult for women to aspire to top positions. In addition, access to sufficient (child/other dependants) care facilities of good quality and other support mechanisms (such as access to and opening hours of facilities and shops) may form practical barriers. In some countries taxation and benefit policies do not stimulate women to work, or even discourage them. At the educational level, women choose subjects that often do not provide the best preparatory ground for senior leadership in the corporate world.

At *organisational level*, a lack of opportunities for (temporary) flexible or part-time work may decrease the overall female talent pool for senior positions at an early stage. Most common impediments cited by women to getting promoted from middle to senior management are the lack of access to informal networks, the absence of female role models and the lack of challenging positions open to them. Certain elements in corporate culture, such as valuing long working hours over output, may make it more difficult for women with care responsibilities to combine a high position with raising a family or other responsibilities. Certain choices or expectations in career development, such as the preference for staff functions and supporting roles over line and operations management, may lead to diminished chances and lack of the experience necessary for top functions. Gender bias in the recruitment, selection and promotion system may further reduce women’s chances.

At the *individual level* bottlenecks for women’s advancement to senior positions can be found in the individual choices women make in the course of their career, often in relation to their other responsibilities and influenced by social pressure. Especially when raising a family,

¹⁸ *Catalyst*, see: www.catalyst.org, accessed 22 May 2013.

¹⁹ <http://www.sec.gov/news/press/2009/2009-268.htm>, accessed 22 May 2013.

²⁰ S.A. Hewlett, ‘The Sponsor Effect: Breaking Through the Last Glass Ceiling’, *Harvard Business Review*, December 2010. https://www.worklifepolicy.org/documents/Sponsor_Effect.pdf, accessed 22 May 2013.

²¹ <http://www.30percentcoalition.org/>, accessed 22 May 2013.

²² <http://online.wsj.com/article/PR-CO-20130501-912870.html>, accessed 22 May 2013.

²³ See in more detail, M. Visser ‘Advancing gender equality in economic decision-making’, 2011, available on: http://ec.europa.eu/justice/gender-equality/files/conference_sept_2011/background-paper-decision-making_en.pdf, accessed 22 May 2013.

many women struggle with how to create a workable work-life balance. At middle management level women often make career choices, such as preferring supporting or staff roles, which typically do not lead to a top position or board membership. Last but not least, women may be reluctant to self-promote and as a consequence they are less well-known and less visible as a qualified candidate in circles where new board members are recruited.

2.3. Normative justifications for dealing with the problem in EU regulation

The above does not as yet address the reasons why it is important to achieve gender balance in company boards. Normative justifications for this, and for EU regulation to achieve this, can be found at the private corporate level as well as at the level of the private individual and the general public interest.

Here we must start by noting that the argument that a gender-imbalanced board affects the financial performance of the company is a slippery slope. Causation, positive or negative, so far has not been unequivocally proven and the argument has in fact been instrumental in creating emotional resistance to the introduction of gender quota rules. Nevertheless, the overwhelming number of studies and reports indicating a (positive or negative) correlation between the presence of women on boards and a company's financial performance indicates that there is a trend in society that CEOs and boards need to take women seriously and to address this fact with appropriate actions. Other arguments from the business perspective that provide a more forceful and convincing normative justification for such introduction are the following. First of all, it may well be that companies with more women on their boards outperform their peers because their culture is more open, more innovative and better able to capture and translate customers' needs into products and services. This may be the result of more women in managerial positions, or the company culture may stimulate more women to join and advance in the company to managerial positions. Secondly, companies have come under increasing public scrutiny in terms of their leadership and business practices. The almost exclusive focus on shareholders' interests in the past is making way for modern stakeholder management, in which not only shareholders' interests but also societal interests are (more) actively pursued. An absence of women at top levels of a company does not combine well with companies taking their social responsibility seriously.

This already hints at the more general public interest that is at stake as well: actions of large listed companies such as those targeted by the Commission's proposal may have an important impact on society as a whole, including women's lives, e.g. in terms of working conditions and safety requirements, and from that perspective it is a question of common sense and (also individual) fairness that they are included in decision-making processes in such companies. In legal terms, this connects to the principles of equal treatment and of equal opportunities. These ensue from Articles 2 and 3(3) TEU, 8 and 10 TFEU and Article 21 and 23 of the Charter of Fundamental Rights which position equality of women and men as a core, fundamental value of Union law. It can be argued that the principles of equal treatment and equal opportunities have to be concretised and operationalised as much as possible so as to avoid the risk that these remain empty vessels. Here one can refer in particular to the case law of the CJEU in which it has clearly linked the notions of equality of opportunity and preferential treatment to combating gender stereotypes, by holding that preferential rules may be used 'if such a rule may counteract the prejudicial effects on female candidates of prejudices and stereotypes concerning the role and capacities of women in working life'.²⁴ In doing so, the CJEU has in fact not only recognised the desirability of preferential treatment but even the need thereof with a view to reducing 'actual instances of inequality which may exist in the real world', because prejudices and stereotypes often remain well concealed during a decision-making process.²⁵ Even if this case law concerned national positive action

²⁴ Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363, Paragraph 29.

²⁵ *Marschall v Land Nordrhein-Westfalen*, Paragraph 31.

measures, it is difficult to see why the reasoning would be different with regard to the normative justification of EU positive action rules that would be adopted under Article 157(3) specifically with a view to promoting equal treatment and equality of opportunities. So, clearly, Member States – acting within the framework of the Council of Ministers of the EU – can be said to be under a certain duty to take action in this regard whenever this appears necessary and the Treaties provide an appropriate legal basis for this. We will describe this in more detail in Section 4.1.

3. National rules and policies to enhance gender-balanced boards

3.1. *Convergence of minds*

Consensus is growing regarding more gender-balanced company boards being a legitimate policy goal and that something needs to be done to achieve quicker progress on this. This appears first of all from the Special Eurobarometer 376 on women in decision-making positions held in September 2011 in the EU.²⁶ It showed that 88 % of Europeans share the view that women should be equally represented in company leadership positions. 62 % are of the opinion that women are as qualified as men for these positions, whereas 58 % referred to the fact that it is about equal rights for women and men. However, there is less convergence of minds among European citizens about the method to achieve this. There is a slight preference (31 %) for self-regulation, 26 % for binding legal measures and 20 % for voluntary measures such as non-binding Corporate Governance Codes and Charters. 15 % does not know and 8 % states that no action is needed because balance is not needed.

We may also refer to the subsidiarity check that the Commission's proposal passed on 15 January 2013. Only six out of 27 national parliaments argued that the proposal does not comply with the subsidiarity principle and that the objective of more balanced gender participation in company boards can be reached by way of national initiatives. For this reason, the parliaments of the Netherlands, the Czech Republic,²⁷ Denmark, Poland, Sweden and the UK were against measures at European level.²⁸ But interestingly, the reasoned opinions that were issued included no discussion or disagreement about the fact that actions are needed to address the gender imbalance in boards. So when it comes to the necessity of action, there appears to be clear convergence of opinions. This is also exemplified by the fact that in recent years a number of Member States have taken regulatory steps to improve the situation. Yet, there is quite some national divergence when it comes to the type of measures and methods being applied, as will be seen in more detail in the next subsection.

Finally, there is also agreement in the business world. If we take Norway as an example, it has been documented that the resistance among business leaders to appointing women to their boards has disappeared as a result of the quota law and that it is 'back to business as usual'.²⁹

²⁶ http://ec.europa.eu/public_opinion/archives/ebs/ebs_376_en.pdf, accessed 22 May 2013.

²⁷ The Chamber of Deputies, not so the Senate.

²⁸ The opinions can be found via www.ipex.eu, accessed 22 May 2013.

²⁹ M. Teigen, 'Gender Quotas for Corporate Boards in Norway: Innovative Gender Equality Policy' in C. Fagan et al. (eds.), *Women on Corporate Boards and in Top Management: European Trends and Policy*, Palgrave Macmillan 2012, and M. Teigen, 'Gender Quotas in Norwegian Corporate Boards: A distinct national political process with global policy consequences' paper presented at the 17th International Conference of Europeanists, Montreal, Canada, 15-17 April 2010. See also *Financial Times*, 23 October 2012 'Déjà-vu in Norway over EU's women quotas', accessed 22 May 2013 at <http://www.ft.com/intl/cms/s/0/13eb95be-1d1f-11e2-a17f-00144feabdc0.html#axzz2TH8pYOOJ> and A. Bolsø and S. Sørensen, presentation at House of Commons on 23 January 2013, p. 9, <http://www.ntnu.no/documents/10265/0/How+the+quota+law+came+about.pdf>, accessed 22 May 2013.

3.2. Divergence of approaches

In the past few years we have actually seen an unprecedented wave of measures and initiatives in Europe, ranging from individual company's programmes, such as developing the business plan, setting targets and developing tools like mentoring and training programmes, to cross-company or sector initiatives, like Prizes, Awards and Charters. In many countries, industry self-regulation instruments have been introduced in the form of corporate governance codes. As appears *inter alia* from a report produced in 2012 by the European Network of Legal Experts in the Field of Gender Equality, 16 countries have now implemented some form of legislated quotas or targets, some of a binding nature, guaranteeing an outcome (Belgium, France, Italy) and others of a voluntary nature (Austria, Denmark, Finland, Germany, Greece, Luxemburg, the Netherlands, Poland, Portugal, Slovenia, Spain, Sweden, and the UK).³⁰ In 11 other Member States no provisions have been put into place (Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Ireland, Latvia, Lithuania, Malta, Romania, and Slovakia).

Europe's lead country in this development (even if not an EU Member State) has been Norway, which passed quota legislation in 2003 stipulating that a minimum representation of 40 % of each gender on Norwegian boards was required; for state-owned and inter-municipal companies this entered into force in 2004, for new public limited companies in 2006, for all public limited companies in 2008 and for cooperative companies in 2009. It led to an increase of female board members to more than 40 % in just three years after the introduction of the law; from 6 % in 2002 to 25 % in 2007 and 40 % in 2009.

A combination of factors contributed to the success of the Norwegian approach:

- Responsibility for the legal amendments (Companies Act and not Gender Equality Act) lay with the Minister of Economic Affairs and the prevailing argument was that 'it was good for business';
- The 'Norwegian quota tradition' to address inequality by using the tool of quota created willingness by politicians to take this route after having given companies ample opportunity to correct the imbalance themselves;
- The process included professional preparation (identification, mentoring and training) of a large pool of qualified female candidates to take up board responsibility;
- Cooperation took place between all stakeholders (like the Government, employers, companies, unions, women's organisations) to create the necessary support systems;
- Norwegian society offered female role models, since more than 40 % of the senior positions in Government and state-owned companies had already been taken by women (as a result of quota); and
- Legal sanctions can be imposed in the event of breach of the quota law, ranging from official warnings and financial penalties to ultimately delisting the company from the Stock Exchange.³¹

Although the Norwegian example has served as an inspiration for many countries, none of the EU countries have copied its model outright, the main reason for this being that, unlike in the EU, Norwegian society and policymakers had been comfortable with the quota instrument as

³⁰ G. Selanec & L. Senden 'Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards', report of the European Network of Legal Experts in the Field of Gender Equality, 2012. Available on: http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf accessed 22 May 2013. See also http://ec.europa.eu/justice/gender-equality/files/womenonboards/factsheet-general-2_en.pdf, accessed 22 May 2013.

³¹ http://ec.europa.eu/justice/gender-equality/files/quota-working_paper_en.pdf, accessed 22 May 2013. See also M. Teigen, 'Gender Quotas for Corporate Boards in Norway: Innovative Gender Equality Policy' in C. Fagan et al. (eds.), *Women on Corporate Boards and in Top Management: European Trends and Policy*, Palgrave Macmillan 2012, and M. Teigen, 'Exchange of good practices on gender equality-: Norway', discussion paper 2012, available on: http://ec.europa.eu/justice/gender-equality/files/exchange_of_good_practice_no/no_discussion_paper_no_2012_en.pdf accessed 22 May 2013.

an effective tool to address gender imbalance in society since its introduction in 1981 for appointments of publicly appointed boards, councils and committees. Also, in EU countries the Norwegian model was fiercely criticised for its ultimate penalty, delisting the company from the Stock Exchange in case of non-compliance. Although the penalty of removing a company from the Stock Exchange would only be applied after the company has consistently acted in breach of the law, after having been warned and fined, it was felt as too harsh and disruptive to the economy. This element of Norwegian law became the focal point of many who opposed quota legislation, including businesswomen. Still, most importantly, the Norwegian experience has led to increased professionalisation of recruitment practices for company boards and to the strengthening of corporate governance. However, the trickle-down effect, i.e. the quota law's effect on women in top management and on companies that are not covered by this law, has been disappointing so far, as explained in Section 2.1.³²

An important argument put forward by the Commission in the proposal is that the most significant progress has been recorded in Member States where binding measures have been introduced and that self-regulatory initiatives have not yielded 'any similarly noticeable changes.'³³ Indeed, the recent introduction of binding measures in France has resulted in an impressive increase in the share of women on company boards.³⁴ After the first year, an increase of 10 percentage points to 22 % was recorded in January 2012. This can be explained by the companies' commitment to reaching the first plateau of the target introduced by the new quota law in January 2011 (i.e. 20 % by 2014, 40 % by 2017). However, it should be noted that in a number of countries non-binding measures have produced significant results too.

Countries that have reported relatively high increases in the number of women on corporate boards without introducing binding quotas are Finland, Sweden and more recently the UK.

Finland has relied on other measures, as opposed to quota laws, to increase the number of women on supervisory boards, now at 29 % (EC Database).³⁵ The strategy consisted of four components:

- research and studies demonstrating the link between women's representation in top management and firms' profitability;³⁶
- corporate governance codes including the recommendation that both sexes be represented on the board;
- Government commitment to set a target of at least 40 % women on boards of state-owned companies and achieving it; and
- an active and positive role of the media, putting pressure on companies to make the necessary changes and avoid negative publicity.

The Commission's appeal to companies' social responsibility coincides with the public's increased scrutiny of top managers' behaviours. This is in line with one of the main factors in Finland's successful progress in the representation of women on boards: public pressure.

Sweden also relied on another strategy, as opposed to quota legislation. Currently, women occupy 26 % of supervisory board seats (EC Database). Sweden's strategy included:

³² http://ec.europa.eu/justice/gender-equality/files/exchange_of_good_practice_no/no_discussion_paper_no_2012_en.pdf, accessed 22 May 2013.

³³ Explanatory Memorandum COM(2012) 614/5, p. 2, Paragraph 3.

³⁴ http://ec.europa.eu/justice/gender-equality/files/womenonboards/communication_quotas_en.pdf, accessed 27 May 2013.

³⁵ http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/supervisory-board-board-directors/index_en.htm, accessed 22 May 2013; data collected between 29 September 2012 and 15 October 2012.

³⁶ E.g. http://www.eva.fi/wp-content/uploads/files/2133_Analyysi_no_003_eng_FemaleLeadership.pdf, accessed 22 May 2013.

- the Government's target to have at least 40 % of each gender represented on boards of state-owned companies (leading to 49 % women in 2011);³⁷
- corporate governance codes (2004) stating that companies need to '...strive for equal gender distribution on the board'; and
- the requirement for companies to disclose the representation of women in top management, thus creating transparency.

The UK has adopted a voluntary regulatory approach to boardroom gender diversity, based on the argumentation of the 'business plan' and better talent management.³⁸ When only 12 % women on boards was recorded in 2010, the UK Government turned to Lord Davies, an ex-minister and ex-Chairman, for recommendations for the future. The Davies report stated that chairmen should set targets (minimum of 25 %) for women on their boards by 2015.³⁹ Other recommendations included disclosure of proportions of women, advertisement of vacancies in non-executive directorships, and a code of conduct for executive search firms. From March until September 2012 impressive progress was made: 44 % of new FTSE 100 board appointments and 36 % on FTSE 250 companies went to women. But over the past six months, until March 2013, these numbers have dropped to 26 % and 29 % respectively. Currently 17.3 % of FTSE 100 and 13.3 % of FTSE 250 board positions are held by women.⁴⁰ This makes it unlikely that Lord Davies' recommendation of 25 % women on boards by 2015 will be reached. The Government has repeatedly indicated that quotas remain a real possibility if the target is not met through the current voluntary business-led approach.

An important issue to consider at more length in the next section is the extent to which the Commission's proposal acknowledges the variety of approaches in countries without (binding) quota legislation and leaves room for their continued development and application. Before we can engage in this discussion, however, we must first address the objections that have been raised regarding the Union's (exercise of) competence to adopt any legislation of the kind proposed by the Commission.

4. The Commission proposal

4.1. Its legal basis

The proposal of the Commission is based on Article 157(3) TFEU, which reads:

'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, *shall* adopt *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.'
(Emphasis added.)

Some (Member States) contest the use of this provision as a legal basis, fundamentally arguing that appointment to a company board cannot be seen as a matter of employment and occupation and that the principles of equal treatment and of equal opportunities cannot be interpreted in such a way as to allow the EU to adopt the positive action measures as

³⁷ Annual report state-owned companies 2011, Sweden; <http://www.government.se/content/1/c6/20/44/34/bd7320d8.pdf>, accessed 22 May 2013.

³⁸ http://ec.europa.eu/justice/gender-equality/files/exchange_of_good_practice_no/uk_discussion_paper_no_2012_en.pdf, accessed 22 May 2013.

³⁹ Women on Boards, February 2011, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf, accessed 22 May 2013.

⁴⁰ The Female FTSE Board Report 2013, Cranfield School of Management: http://www.som.cranfield.ac.uk/som/som_applications/somapps/oecontent.aspx?pageid=14249&apptype=newsrelease&id=4856, accessed 22 May 2013.

proposed. The Commission's proposal would as such go beyond the Union's legislative powers. We hold a different view on this for the following reasons.

4.1.1. *The scope of the principle of equal treatment and equal opportunities*

First of all, it must be noted that with the insertion of Article 157(3) in the Treaties the Member States in their capacity of masters of the Treaties have created a specific legal basis for furthering by way of EU law the realisation of equal treatment and equal opportunities of men and women in employment and occupation. This can be seen as an explicit confirmation on their part of the fundamental rights' status of the equal treatment principle in the employment and occupation sphere, as recognised in the Court's case law since as far back as the mid-seventies.⁴¹ Directives 2002/73 and 2006/54 (Recast) have been based on this provision and have clearly been tied to the goal of enhancing equal opportunities and equal treatment in employment and occupation. In addition to what we observed in Section 2.3 as to what falls within the scope of the principle of equal opportunities and equal treatment of men and women, we can also refer to the fact that the Court is supportive of not merely realising formal equality but understands and interprets these principles in a broader, substantive equality sense. The very recognition of the notion of indirect discrimination implies the recognition that formal equal treatment can actually lead to a discriminatory result, which is prohibited unless there is an objective justification. The Court of Justice also explicitly recognised that the result pursued by Directive 76/207/EEC on access to employment and working conditions (now repealed by Recast Directive 2006/54/EC, which has the same aim and scope) is substantive, not formal equality.⁴²

The notion of 'equal opportunities' as such 'recognises that the effects of past discrimination can make it very difficult for members of particular groups to even reach a situation of 'being alike' so that the right to like treatment becomes applicable.'⁴³ As equality of opportunities is geared towards equalising the starting point for all, giving everyone the same opportunities, this approach may well involve unequal treatment. Even more so, it can be argued that the realisation of equal treatment and equal opportunities and the remedying of the disadvantages that some groups suffer, requires positive action measures for the disadvantaged group.⁴⁴ The goals of 'equal treatment and equal opportunities' as contained 'in tandem' in Article 157(3) can thus be said to impose in fact a functional, teleological interpretation of this legal basis: EU legislative action should not lead to achieving merely formal equality but should also enhance substantive equality in the sense of bringing about equality of opportunity for men and women. In that sense, the logic underlying Article 157(3) as regards Union action is similar to the logic underlying Article 157(4) as regards Member States' action. These provisions should also be interpreted in the light of Articles 2 and 3(3) TEU, 8 and 10 TFEU and Article 21 and 23 of the Charter of Fundamental Rights in which equality of women and men has been positioned as a core value of Union law as observed above.

Importantly, equality of opportunity is not to be confused or equated with equality of results. From the Court's case law it is clear that equality of opportunity does not imply equalising the outcome or result. A binding European quota rule, regardless of qualifications of candidates, imposing a certain result to be achieved by a certain date, would indeed not be in conformity

⁴¹ To start with Case 43/75 *Defrenne v SA Belge de Navigation Aérienne (SABENA)* [1976] ECR 455. Cf. also the Court's statement in Case C-50/96 *Deutsche Telekom v Lilli Schröder* [2000] ECR I-743 Paragraph 57 that 'the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right'. It must also be noted that until the introduction of this legal basis, the gender equality Directives were based on (old) Articles 100 and 235 of the EC Treaty, requiring a link to the functioning of the internal market.

⁴² See *inter alia* Case C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés v Thibault* [1998] ECR I-2011 Paragraph 26, and Case C-13/94, *P v S and Cornwall County Council* [1996] ECR I-2143.

⁴³ In this sense E. Howard 'The European Year for Equal Opportunities of All-2007: Is the EU Moving Away from A Formal Idea of Equality?' *European Law Journal*, Volume 14 No. 2 2008 pp. 168-185, at p. 171.

⁴⁴ *Ibid*, at p. 172.

with the competence to promote equality of opportunity as contained in Article 157(3) and in the case law of the CJEU.⁴⁵ Yet, the Commission's proposal – in particular its Article 4(1) – should not be read as imposing an obligation of result on the Member States to reach the target of at least 40 % women on listed company boards. This provision stipulates that:

‘Member States shall ensure that listed companies in whose boards members of the under-represented sex hold less than 40 % of the non-executive director positions make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria, in order to attain the said percentage at the latest by 1 January 2020 or at the latest by 1 January 2018 in case of listed companies which are public undertakings.’

While the current formulation may not be unequivocally clear – as many appear to understand it as an obligation of result – this provision actually seeks to impose only an obligation of effort upon the Member States. More in particular, the obligation imposed on Member States concerns the taking of the necessary measures by companies that will allow for a more balanced representation of men and women by applying recruitment and appointment procedures that meet certain basic conditions. The rule of 40 % is therefore to be considered as an aspirational, non-binding one only, the legal obligation of Article 4(1) actually being focused on equalising the starting points more so that the underrepresented sex can enjoy better opportunities and more equal access to company board positions. As such, this approach is not only in line with the Court's case law as explained above but also reflects the criteria the Court formulated itself.⁴⁶ The element that could still be reinforced in the proposal in this regard is the need for evaluation processes to be transparent, a requirement that can be derived from the same case law. More in particular, the CJEU has held that the application of criteria ‘must be transparent and amenable to review in order to obviate any arbitrary assessment of the qualifications of candidates.’⁴⁷

Article 4(3) contains a second obligation that is imposed through the Member States on listed companies, namely the application of a priority rule for the under-represented sex. This provision reads:

‘In order to attain the objective laid down in paragraph 1, Member States shall ensure that, in the selection of non-executive directors, priority shall be given to the candidate of the *under-represented sex* if that candidate is *equally qualified* as a candidate of the other sex in terms of suitability, competence and professional performance, *unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex.*’ (Emphasis added.)

If we understand positive action in the more narrow sense of including measures that entail some type of preferential treatment for members in the group of a socially disadvantaged position,⁴⁸ it is not so much the proposal's target in itself that should be considered as such – being only soft and aspirational in nature – but rather this particular rule so as to achieve the target.⁴⁹ While the conditions the CJEU has set for the lawfulness of positive action measures

⁴⁵ *Ibid.* See cases like *Kalanke v Freie Hansestadt Bremen* C-450/93 [1995] ECR I-3051 and *Marschall* C-409/95, [1997] ECR I-6363.

⁴⁶ Case C-407/98 *Abrahamsson and Anderson v Fogelqvist* [2000] ECR I-5539 Paragraphs 49-50.

⁴⁷ *Ibid.*, Paragraph 49.

⁴⁸ Cf. S. Fredman ‘Reversing discrimination’ 13 *L.Q.R.*, pp. 578-580.

⁴⁹ See for more in-depth information on the conceptualisation of positive action and quota rules: L.A.J. Senden and G. Selanec ‘Report on Positive Action Measures to Ensure Full Equality in Practice between Men and Women, Including on Company Boards’, European Network of Legal Experts in the Field of Gender Equality,

so far have only concerned national positive action measures, it is – again – reasonable to assume that these would also apply to similar EU measures. At any rate, it is not to be expected that these would be tested more leniently, as they will also have to be in line with the Court’s interpretation of the principle of equal treatment and equality of opportunity. Compliance with the following requirements therefore appears essential before a priority measure in relation to the actual distribution of employment positions is acceptable under EU law:⁵⁰

- i. The measure must apply to the ‘under-represented sex’ and not to either sex;
- ii. Candidates need to be ‘equally qualified’, and;
- iii. It must not apply in an automatic, unconditional and absolute way, and should contain a savings clause.

The proposed Article 4(3) clearly takes account of these requirements and does not guarantee women (or men) absolute and unconditional priority for appointment or promotion, as the Court has specifically precluded in cases like *Kalanke* and *Marschall*.

In short, the proposal does not seek to substitute equality of opportunities by equality of results, given that it imposes only an obligation of effort to reach a more balanced representation of 40 % of the underrepresented sex. The legal obligations that are imposed to this end concern the adjustment of recruitment and appointment procedures of listed companies in such a way that these contribute towards achieving the 40 % target. This adjustment concerns both ensuring clarity, transparency and gender-neutrality of these procedures and ensuring application of a priority rule for the underrepresented sex. The sanctions the proposal provides for in its Article 6 relate to violations by companies of national provisions that impose these obligations and *not* the non-achievement of the 40 % target. The formulation of the proposal should be improved so as to make this unequivocally clear and to remove any misunderstandings about the obligations actually imposed on Member States and companies.

4.1.2. The scope of ‘matters of employment and occupation’

The other core element to be considered concerns the question of how to interpret ‘matters of employment and occupation’ in Article 157(3). In this respect it is instructive to consider how this notion is perceived in the aforementioned Recast Directive (2006/54), as this Directive has been grounded on the legal basis of Article 157(3) and specifically concerns ‘the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.’ So, its very purpose is to ensure the implementation of this principle and according to its Article 1 ‘to that end, it contains provisions to implement the principle of equal treatment in relation to: (a) access to employment, including promotion, and to vocational training; (b) working conditions, including pay and; (c) occupational social security schemes.’ Article 14 further specifies that

- ‘1. There shall be no direct or indirect discrimination on grounds of sex in the *public or private sectors*, including public bodies, in relation to:
- (a) conditions for access to *employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;*
- (Emphasis added.)

From this provision we can infer that Article 157(3) has been given a wide scope by the Union legislator – including the Member States within the framework of the Council – in the

available on: http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf, accessed 27 May 2013.

⁵⁰ Including in particular the already cited cases *Kalanke*, *Marschall* and *Abrahamsson*. See for a concise discussion, the report mentioned in the previous footnote, especially pp. 9-13.

sense that it explicitly includes the private sector and is not confined to strict employment issues, but also extends to occupation and self-employment, while Article 157(3) itself does not make any mention of self-employment. Furthermore, it covers selection criteria and recruitment conditions in whatever branch of activity and at whatever level of professional hierarchy, including promotion. The argument that selection and appointment for company boards cannot be considered as ‘a matter of employment and occupation’ does not square with this wide interpretation.

In this regard, it is also important to consider the Court’s ruling in the *Danosa* case.⁵¹ It follows from this ruling that the fact that someone is a board member does not automatically exclude the possibility that he/she is a ‘worker’. The Court starts by confirming that the ‘essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration.’ (Paragraph 39). Whether or not there is question of such a relationship of subordination does not depend on whether an employment contract has been concluded or not (as in the case of Ms Danosa), the Court stating that ‘it is necessary to consider the circumstances in which the Board Member was recruited; the nature of the duties entrusted to that person; the context in which those duties were performed; the scope of the person’s powers and the extent to which he or she was supervised within the company; and the circumstances under which the person could be removed’ (Paragraph 47). This reasoning shows once again that the Court gives a wide interpretation to the concept of worker and that it does not seem to be favourable to attempts to narrow down the personal scope of the equal treatment guarantees in the labour market. Yet, it must also be noted that the *Danosa* case concerned an executive board member. The question therefore remains whether the *Danosa* ruling can also be extended to the group of board members primarily covered by the Commission proposal, i.e. non-executive or supervisory board members. But it can be argued that Paragraph 51 of the judgment actually provides support for this. Here the Court states that:

‘While it cannot be ruled out that the members of a directorial body of a company, such as a Board of Directors, are not covered by the concept of ‘worker’ as defined in paragraph 39 above, in view of the specific duties entrusted to them, as well as the context in which those duties are performed and the manner in which they are performed, the fact remains that Board Members who, in return for remuneration, provide services to the company which has appointed them and of which they are an integral part, who carry out their activities *under the direction or control of another body of that company and who can, at any time, be removed from their duties without such removal being subject to any restriction*, satisfy prima facie the criteria for being treated as workers within the meaning of the case-law of the Court, as referred to above.’ (Emphasis added.)

It seems as if this formulation leaves open the possibility that also non-executive or supervisory board members satisfy the criteria set out for ‘workers’, as their appointment, removal or dismissal takes place by a decision of shareholders. This might be seen as constituting a relationship of subordination or at least of non-executive board members being ‘under the direction or control of another body of that company’. Furthermore, non-executive board members can also be said to provide services for remuneration, for on the basis of consistent case law of the CJEU it is immaterial whether a minimum level of subsistence is earned with the job that is being performed and whether it concerns full-time or part-time work, as long as it can be considered a genuine and effective economic activity and not a merely marginal and ancillary one.⁵²

⁵¹ Case C-232/09 *Danosa* [2010] ECR I-11405.

⁵² Cf. Case 53/81 *Levin* [1982] ECR 1035 and Case 139/85 *Kempf* [1986] ECR 1741.

Yet, there are also non-executive directors or supervisory board members that specialise in supervisory tasks as a main source of their income and that may organise these activities in a legal entity, such as a limited liability company providing consultancy and supervisory board services. Professional supervisory board members holding multiple board seats and receiving their income from multiple sources could then in fact be considered ‘self-employed’.

Last but not least, there is also the more open notion of ‘occupation’, contained in both Article 157(3) and the aforementioned Article 14 of Directive 2006/54, which has so far remained undefined in EU law. However, simply equating it with ‘employment’ and/or ‘self-employment’ or with working conditions as some propose is not convincing, as this would add nothing to what these notions already entail and it would be devoid of any proper significance. A stronger argument would be that its relevance – and thereby added value – lies precisely in covering those situations of professional activity that are not captured as such by the notions of (self-)employment (conditions). The very open and wide phrasing in Article 14 that ‘conditions for access to occupation, whatever the branch of activities and at all levels of professional hierarchy’ must be free of discrimination would therefore appear to aim at including all different types of professional activity, which could well include non-executive board membership.

But even if one accepted the argument that it may be difficult or impossible to fit non-executive company board membership exclusively into one of these three categories – employment, self-employment or occupation – it can be said to combine elements of each of these categories. Since Article 157(3) has already been used as a legal basis for measures seeking to ensure equal treatment and equal opportunities for all these different types of professional activity, there is much ground for arguing that it can also be used for enhancing gender-balanced supervisory board membership. In view of the above, the Commission can be said to have rightly based its proposal on this legal basis.

4.2. Subsidiarity, proportionality and national discretion

In addition to objections against the choice of the legal basis, subsidiarity and proportionality objections have also been raised. It has been argued by some national parliaments that company boards and company law are ‘special’ and that the proposal is too restrictive of business freedom and ignores the functioning logic of the business environment. National corporate law would not be suitable for the Commission’s approach and a labour-law view could not be applied to a corporate structure that is determined by ownership. Yet, in addition to what we observed above, corporate structure cannot be considered as an excuse for not complying with the principle of non-discrimination on grounds of sex, especially given that this principle represents one of the core values of EU law. Legal support for this position can be found in the fact that Article 157 has been recognised to also have horizontal direct effect, clearly also imposing legal obligations on private companies and actors like social partners. The Court concluded in the *Defrenne* case⁵³ that the prohibition on discrimination between men and women as protected in Article 119 EEC (now Article 157 TFEU) applies not only to the action of public authorities, but also covers all agreements that are intended to regulate paid labour collectively, as well as contracts between individuals.⁵⁴

Some national parliaments have recognised the need for EU action, but argued that this should take the form of soft law such as recommendations. In this regard, it can be noted that the EU has pursued this course of action for the past thirty years, without achieving the desired result. While a soft-law approach may produce effective results in some Member States, it certainly has failed to realise significant progress EU-wide. Furthermore, it can also

⁵³ Case 43/75 [1976] ECR 455, Paragraph 39.

⁵⁴ See also Case C-127/92 *Enderby* [1993] ECR I-5535, Paragraphs 20-23 and Case C-33/89 *Kowalska* [1990] ECR I-2591, Paragraphs 17-20.

be argued that Article 157(3) does not merely empower the Union legislator to take action to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, but in fact imposes an active duty upon the Union legislator to do so by speaking of ‘shall adopt measures’. As Article 157(3) states that such measures must be adopted ‘in accordance with the ordinary legislative procedure’, which according to Article 289 TFEU leads to the adoption of legislative acts in the form of a regulation, directive or decision, the logic of this provision also points into the direction of adopting hard-law measures.

But most importantly, quite a number of Member States and national parliaments argue that EU-action is not necessary because they are capable of dealing with the problem of underrepresentation of women on company boards themselves and that they have already taken measures to tackle it. They do not wish to be forced to replace their own rules and policies by those proposed by the Commission. In this regard, it must be observed that the proposal leaves considerable discretion to the Member States to pursue their own policies in many respects. To begin with, the obligation of effort to realise the 40 % target concerns only listed companies of over 250 employees with an annual turnover of over EUR 50 million and/or an annual balance sheet of over EUR 43 million, so in particular those that also operate on a cross-border scale.⁵⁵ Furthermore, Article 4(6) stipulates that the target does not concern listed companies where the members of the underrepresented sex represent less than 10 % of the workforce. Articles 4(7), 7 and 8(3) allow Member States to maintain certain national rules and policies they have already put into place, provided they demonstrate that these measures and policies are of equivalent efficacy to attain the objective in Article 4(1). More in particular, these provisions leave room for Member States to comply with the aspirational target set in the proposal by way of national policies and rules already in force, but they will have a duty to communicate the results of such policies and to explain whether they have been effective (Article 8(3) in conjunction with Article 9(2)). Further improvements could be made to the text of the proposal to clarify the legal scope of the discretion actually left to the Member States.

In short, the proposal curtails national discretion predominantly for those – eleven – Member States that are lagging (too much) behind and that have not so far put any policies or procedures into place to encourage more balanced representation in company boards. In respect of these countries and especially with a view to realising EU-wide progress, it can be concluded that binding EU action is required. In addition, by allowing the other Member States to maintain rules and policies that are already in place, it reinforces the importance of these rules and policies, especially in countries where they have been made subject to automatic revocation after a certain period of time regardless of the attained result (such as in the Netherlands).

4.3. The added value of the proposal

4.3.1. Comply-or-explain

Following along the lines of the last observation, an important added value of the proposal lies in the comply-or-explain approach it advocates. On the one hand this approach encourages regulatory action on the part of the Member States that have remained passive so far, as they will need to put rules into place to comply with the two main obligations that the proposal imposes (see Section 4.1). On the other hand, it puts pressure on the already active Member States to make sure that the approaches they have been developing are truly effective, by imposing a duty on them to explain any unsatisfactory results. As such, the

⁵⁵ However, it would be advisable to clarify in the Directive what to understand exactly by ‘listed at stock exchanges’. For example, the London Stock Exchange distinguishes between the Premium Listed Main Market for the bigger companies and the Alternative Investment Market (AIM) for smaller SME’s. The LSE has 2938 companies listed from 60 countries, 1151 of which on the AIM. See also below, Section 4.3.2.

Directive can represent important support for the proponents of gender-balanced company boards in those countries.

4.3.2. *Limitation to listed companies is unclear*

There is an inconsistency that may cause confusion, as the title of the Directive proposal refers to ‘...companies listed on stock exchanges...’, Article 1 refers to ‘...a more balanced representation of men and women among the non-executive directors of listed companies....’ and Article 3 includes an ‘Exclusion of small and medium-sized enterprises’. It should be clear that the Directive applies to all listed companies except SME’s.

4.3.3. *The focus on supervisory/non-executive directors*

The EC Database⁵⁶ reflects a large discrepancy between the representation of women in executive (10 %) and non-executive boards (17 %). Research⁵⁷ has revealed that the real problem of the underrepresentation of women in supervisory boards lies in the advancement of women to the executive level (see also Section 2.1). Companies are increasingly appointing women to supervisory roles from outside the company and from sectors other than the corporate world, such as politics, NGOs, academia, non-profit organisations and (semi-) government bodies. Executive board members are full-time employees, typically recruited and promoted from within the company, whereas non-executive/supervisory board members are ‘part-time advisers’, with a portfolio of activities at multiple companies or organisations.

The proposal focuses on women on supervisory boards or non-executive directors and not on executive boards, the argumentation being that non-executive directors are able to influence HR policies and the advancement of women in the company. The responsibility of a supervisory board member is not to directly influence the decision-making in individual cases, but to check if proper procedures are in place, e.g.:

- making sure that for key positions and in the senior management talent pool women are on the list for selection and promotion;
- encouraging the company to benchmark itself against competitors in the sector and compare key figures of the hierarchical pyramid;
- carrying out regular analyses of the gender composition of the pool for international assignments and high-profile projects, to ensure talented women are included; and
- getting involved in the recruitment and selection process for new board members and ensuring that profiles and the selection processes are gender neutral.

While non-executive, supervisory boards play an important role in ensuring clear, gender-neutral and transparent selection and recruitment procedures are in place in the company, the confinement of the proposal to such boards limits the value of women role models. Since supervisory board members are far less visible than executive board members, their impact as a role model is far weaker than that of a female executive board member. A lack of female executive board members in relation to the appointment of female supervisory board members from outside the company may well send a negative signal to female employees regarding their career opportunities in the company. Supervisory board members typically do not look for publicity and PR since they are not responsible for the day-to-day running of the business and often have multiple interests and organisations to represent in addition to their supervisory duties.

In this light, it is worth noting that the proposal provides an ‘escape clause’ in Article 4(7): the objective that Member States need to ensure that listed companies in whose boards members of the underrepresented sex hold less than 40 % of the non-executive directorships can also be reached if members of the underrepresented sex hold at least one third of all

⁵⁶ http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/executives-non-executives/index_en.htm, accessed 27 May 2013.

⁵⁷ ‘Pipeline’s broken promise’, by *Catalyst* 2010; C. Helfat, D. Harris, P. Wolfson, ‘The pipeline to the top’, in: *Academy of Management Perspectives*, November 2006.

director positions, irrespective of whether they are executive or non-executive. Only in 6 countries is the percentage of female executive directors higher than that of non-executives, i.e. Estonia (20 vs 8 %), Cyprus (9 vs 6 %), Malta (7 vs 4 %), Portugal (10 vs 7 %), Romania (31 vs 13 %) and Croatia (17 vs 16 %). In most countries experts agree that the lack of women in the so-called pipeline, i.e. in positions below board level, is the main cause of the current underrepresentation of women in executive and supervisory boards. The current proposal, however, does not identify this issue as a core issue.

4.3.4. Appointment of board members

In fact, the proposal places an obligation on Member States to ensure that listed companies remove gender bias from the appointment decisions of supervisory board members. It must be understood however that the appointment decision is the final decision in a long process that can take many months, involve many parties and is characterised by subsequent and multiple selection decisions. It may involve executive searchers, external (psychological) evaluation bureaus, internal company human resources and management development departments and, for supervisory board members, executive board members (often the CEO, and depending on the portfolio of the board member the CFO too) and other supervisory board members, often in the form of the board's selection and/or nomination committee(s). The formal appointment of a non-executive director will be effectuated by the meeting of shareholders. In case of the appointment of supervisory board members for companies operating in specific sectors, such as banking and finance, government agencies (such as the Central Bank) might be included in the selection process and may block an appointment altogether on technical (formal education) or behavioural (conduct) grounds. Removing gender bias will only produce results if it is removed from all stages of the process, so from drafting the board profiles and publishing them, via the composition of the long list of candidates, the short list(s), and various personal interview rounds up to the final appointment decision. The legal obligation to ensure that appointment and recruitment procedures comply with clear, transparent and gender-neutral criteria as stipulated in the proposal can make a significant contribution to realising this.

5. Concluding remarks

In this contribution we have sought to address and clarify a number of prevailing misunderstandings regarding the Commission's proposal and to indicate some room for its improvement that could be helpful in resolving these misunderstandings and to clarify the legal obligations actually imposed. Most importantly, the draft Directive does not oblige Member States to introduce quotas in the strictest sense, i.e. to achieve a minimum representation of women on non-executive boards, but it prescribes a number of criteria that recruitment procedures must meet and a preferential treatment procedure if Member States have so far failed to adopt any rules and policies to improve the gender balance in company boards. As such, it does not impose an obligation to guarantee a certain result, but an obligation to put in one's best efforts to take the necessary measures that can contribute to achieving the objective. Such legal clarification seems vital with a view to generating sufficient support for the proposal in the Member States and in order to avoid the risk that the decision-making actors involved fall from their tightrope during the negotiations on the proposal. Moreover, Member States should look beyond their own borders and be aware of the necessity to make progress, not only in their home market but also on an EU-wide scale. The Commission's proposal can be seen as a modest and not too intrusive step to realise this, respecting existing national approaches as much as possible. Failing to reach agreement on the proposal would mean missing an opportunity to achieve any progress at all in the near future in a significant number of Member States.

EU Policy and Legislative Process Update

November 2012 – May 2013

1. In May 2013 the report of the European Network of Legal Experts in the Field of Gender Equality entitled *The Personal Scope of the EU Sex Equality Directives* was published. This report aims to clarify how the personal scope provisions of the five main directives concerning sex equality, pregnant workers and parental leave have been implemented in the national legislation of 33 countries: the 27 EU Member States, Croatia (approaching accession on 1 July 2013), the Former Yugoslav Republic of Macedonia, Turkey, and the EEA countries. In addition, the differences in personal and material scope between the sex equality directives and Directives 2000/43/EC (equal treatment between persons irrespective of racial or ethnic origin) and 2000/78/EC (equal treatment in employment and occupation) are discussed in the national reports, illustrated by national and European case law.

The report can be ordered from the EU Bookshop, on:

<http://bookshop.europa.eu/en/the-personal-scope-of-the-eu-sex-equality-directives-pbDS3112375/>

The report is published on:

http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final.en.pdf

2. In May 2013 the report of the European Network of Legal Experts in the Field of Gender Equality entitled *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood* was published on the website of the Commission. This report details the implementation, and related challenges, of the pregnancy, parental leave, and other equality and employment-related directives in 33 countries: the 27 EU Member States, Croatia (approaching accession on 1 July 2013), the Former Yugoslav Republic of Macedonia, Turkey, and the EEA countries.

The report can be ordered from the EU Bookshop, on:

<http://bookshop.europa.eu/en/fighting-discrimination-on-the-grounds-of-pregnancy-maternity-and-parenthood-pbDS3012145/>

The report is published on:

http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final.en.pdf

3. On 21 March 2013 the European Commission presented a proposal for a Council Decision authorising Member States to ratify the International Labour Organisation 2011 Convention concerning decent work for domestic workers (Convention No. 189). Countries ratifying the ILO Convention agree to ensure fair and decent conditions for domestic workers by protecting their fundamental labour-related rights, preventing abuse and violence and establishing safeguards for young domestic workers. The Convention deals with aspects related to the anti-discrimination field where European Union law sets minimum requirements regarding employment equality, gender equality and maternity protection.

The proposal of the Commission can be found on:

<http://ec.europa.eu/social/BlobServlet?docId=9922&langId=en>

4. On 1 March 2013 the European Commission published a brochure with information on the gender pay gap for a broad public. The brochure explains the gender pay gap, its causes, and why closing it makes sense for both businesses and society in general. Key figures on equality between men and women in work are also provided, as well as

information on the EU's work to tackle the pay gap and examples of national good practices.

The brochure can be found on:

http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/130422_gpg_brochure_en.pdf

5. On 6 March 2013 the Commission organised a round-table discussion with the Member States to address genital mutilation. Moreover, the Commission launched a public consultation on the development of measures at EU level against genital mutilation. On 6 February 2013 the Commission made a joint statement against genital mutilation on the International Day of Genital Mutilation.

Press release:

http://ec.europa.eu/justice/newsroom/gender-equality/news/130306_en.htm

Public consultation:

http://ec.europa.eu/justice/newsroom/gender-equality/opinion/130306_en.htm

Joint statement:

[http://europa.eu/rapid/press-release MEMO-13-67_en.htm](http://europa.eu/rapid/press-release_MEMO-13-67_en.htm)

6. On 19 February 2013 the European Parliament and the Council adopted the European Protection Order (Directive 2011/99/EU), which provides uniform safeguards for victims in criminal proceedings. European Commissioner Viviane Reding stressed the need for this protection for victims of domestic violence ‘Women who have suffered violence in their home do not want strategies – they want concrete rules they can rely on. With today's agreement on the European Protection Order this is exactly what we are delivering. The new rules will ensure that victims of domestic violence are protected Europe-wide’.

The Directive can be found on:

http://ec.europa.eu/justice/criminal/files/directive_2011_99_on_epo_en.pdf

Press release of the European Commission:

[http://europa.eu/rapid/press-release MEMO-13-119_en.htm](http://europa.eu/rapid/press-release_MEMO-13-119_en.htm)

7. In early 2013 a report on the impact of the economic crisis on the situation of women and men and on gender equality policies of the Expert Group on Gender and Employment (EGGE) was published.

The report can be accessed on:

http://ec.europa.eu/justice/gender-equality/files/documents/130410_crisis_report_en.pdf

8. In January 2013 the report of the Network of Legal Experts in the Field of Gender Equality on harassment and sexual harassment was published. The report, entitled ‘Harassment related to Sex and Sexual Harassment Law in 33 European Countries’, presents an analysis of harassment as a form of discrimination and of the transposition of EU-law provisions into national law. Moreover, the aim of the report is to examine what the added value is of combating harassment related to sex and sexual harassment in the form of a prohibition of discrimination. The second part of the report contains the national reports from the 33 countries covered by the Network.

The report can be ordered from the EU Bookshop, on:

<http://bookshop.europa.eu/en/harassment-related-to-sex-and-sexual-harassment-law-in-33-european-countries-pbDS3212019/>

The report can be accessed on:

http://ec.europa.eu/justice/gender-equality/files/your_rights/final_harassement_en.pdf

9. On 25 January 2013 the Commission released mid-term figures on the share of women on boards in listed companies. The new figures show an increase in the number of women on boards to 15.8%, up from 13.7% in January 2012.

Press release:

http://europa.eu/rapid/press-release_IP-13-51_en.htm

10. On 21 December 2012, Article 5(2) of Directive 2004/113 became invalid, in accordance with the judgment of the Court of Justice in *Test-Achats* (C-236/09). In that judgment, of 1 March 2011, the Court of Justice declared invalid as from 21 December 2012 the exemption in EU equal treatment legislation which allowed Member States to maintain differentiations between men and women in individuals' premiums and benefits.
11. In November 2012 the European Women's Lobby and the European Trade Union Confederation sent an open letter to the EU Heads of State to unlock the negotiations on the revision of the Pregnant Workers' Directive. Two years have passed since the European Parliament adopted its first reading position and no response from the Council of the EU has followed since.

The open letter can be found on:

http://www.womenlobby.org/spip.php?action=acceder_document&arg=2090&cle=9e45a39ea04538dbe865a639b4c283d0681650a3&file=pdf%2Fjoint_letter_ewl_etuc_maternity_leave_directive_nov_2012_.pdf&lang=en

Court of Justice of the European Union Case Law Update

October 2012 – May 2013

▪ Case C-401/11 of 11 April 2013

Blanka Soukupová v Ministerstvo Zemědělství

Regulation (EC) No. 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF)

Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security

Facts

Ms Soukupová was denied early retirement support because she had already reached the retirement age applicable to women under Czech law, which is lower than that applicable to men. As a consequence of her challenging this decision, the Supreme Administrative Court of the Czech Republic referred a series of questions to the Court of Justice concerning the interpretation of Regulation No. 1257/1999. In essence the national referring court asked whether European Union equal treatment principles preclude denial of early retirement support to a woman in circumstances in which it would have been paid to a man.

Judgment of the European Court of Justice

It is incompatible with European Union law and the general principles of equal treatment and non-discrimination for ‘normal retirement age’, for the purposes of the second indent of Article 11(1) of 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, to be determined differently depending on the gender of the applicant for support for early retirement from farming and, in the case of female applicants, on the number of children raised by the applicant, under the provisions of the national retirement scheme of the Member State concerned relating to the age required for entitlement to an old-age pension.

▪ Case 427/11

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

Article 157 TFEU (Article 141 EC) and Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women

Facts

The appellants in the main proceedings are civil servants employed by the Minister and assigned clerical duties in An Garda Síochána (the national police). According to the appellants, they are engaged in work equivalent to that of other male An Garda Síochána employees also assigned clerical duties in specific posts reserved for members of the police, called ‘designated’ or ‘clerical’ posts.

After the Equality Tribunal rejected their claim of discrimination, the applicants appealed to the Labour Court. The Labour Court found that the proportions of men and women in the relevant groups revealed prima facie indirect pay discrimination, given that, when the eight initial claims were filed in July 2000 there were, on the one hand, 353 designated posts occupied by police officers, of whom 279 were male and 74 female, and on the other hand, 761 clerical officers, most of whom were female. The Labour Court also found at the time of the hearing in May 2007 that the number of designated posts was 298 and that it was the defendant’s policy to reduce that number to 219.

With the agreement of the parties to the main proceedings, the Labour Court decided to examine the question of objective justification of the *prima facie* case of indirect pay discrimination as a preliminary matter and therefore assumed that the appellants in the main proceedings and the chosen comparators were engaged in ‘like work’ within the meaning of Section 7(1) of the Employment Equality Act 1998.

Judgment of the European Court of Justice

Article 141 EC (now Article 157(1) TFEU) and Directive 75/117/EEC must be interpreted as follows:

- employees perform the same work or work to which equal value can be attributed if, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation, which is a matter for the national court to ascertain;
- in relation to indirect pay discrimination, it is for the employer to establish objective justification for the difference in pay between the workers who consider that they have been discriminated against and the comparators;
- the employer’s justification for the difference in pay, which is evidence of a *prima facie* case of gender discrimination, must relate to the comparators who, on account of the fact that their situation is described by valid statistics which cover enough individuals, do not illustrate purely fortuitous or short-term phenomena, and which, in general, appear to be significant, and have been taken into account by the referring court in establishing that difference, and
- the interests of good industrial relations may be taken into consideration by the national court as one factor among others in its assessment of whether differences between the pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex and are compatible with the principle of proportionality.

▪ **Case C-385/11 of 22 November 2012**

Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)

Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security

Facts

Ms Elbal Moreno applied to the INSS for a retirement pension. Previously, she had worked exclusively as a cleaner for a Residents’ Association part-time for four hours a week (10% of the 40-hour statutory working week in Spain) for 18 years.

By decision of 13 October 2009, Ms Elbal Moreno’s application for a pension was refused on the ground that she had not completed the minimum contribution period of 15 years, required for entitlement to a retirement pension, as provided under Article 161(1)(b) of Spanish General Law on Social Security.

Judgment of the European Court of Justice

Article 4 of Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as precluding, in circumstances such as those of the case before the referring court, legislation of a Member State which 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.

▪ **Case C-44/12: Order of the President of the Court of 16 November 2012**

Andrius Kulikauskas v Macduff Shellfish Limited, Duncan Watt

The President of the Court has ordered that the case be removed from the register.

▪ **Case C-680/11, Order of the President of the Ninth Chamber of the Court of 14 November 2012**

Anita Chieza v Secretary of State for Work and Pensions

The President of the Ninth Chamber has ordered that the case be removed from the register.

OPINIONS OF ADVOCATES-GENERAL

▪ **Joined cases C-512/11 and C-513/11 Opinion of Advocate-General Kokkot of 21 February 2013**

Terveys- ja sosiaalialan neuvottelujärjestö TSN

Directive 92/85/EEC 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

Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC

Facts

The case concerns two Finnish workers who during their care leave became pregnant. According to Finnish law women have a right to social security during pregnancy leave. However, according to the Collective Agreement applicable to these two women, the part of the salary which is higher than the pregnancy allowance is paid in addition. Still, a condition is that this extra payment only applies in those situations in which the female worker is not on unpaid leave, such as care leave.

The Advocate-General advises the Court of Justice

to decide that Directives 92/85/EEC, 2006/54/EC and 96/34/EC do not preclude a collective agreement that grants an entitlement to extra payment to pregnant workers during their pregnancy leave, setting a condition that the worker at stake does not enjoy unpaid leave.

▪ **Case C-5/12, Opinion of Advocate-General Wathelet of 11 April 2013**

Betriu Montull

Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

Facts

According to Spanish legislation, a mother has to take a 6-week leave directly after giving birth to a child. After that period of 6 weeks, a parental leave of 10 weeks is granted to the mother. This 10-week parental leave is transferable to the father. The relevant Act recognises employed mothers as holders of a primary and separate right to leave once the 6-week period following the birth has elapsed, except in cases where the mother's health is at risk, and employed fathers as holders of a secondary right, which can be enjoyed only where the mother also has the status of employed person and agrees to the father taking a designated part of that leave. The question of the national court was whether this legislation would lead

to unequal treatment of the mother and the father, since the father's right to leave is construed as a secondary right.

The Advocate-General advises the Court of Justice

to decide that Directive 76/207/EEC precludes a national measure allowing unequal treatment based on gender by granting the employed mother the right to a leave of longer than the 6-week mandatory leave after giving birth, whereas the employed father only has this right if the mother, who chooses to transfer part of her leave to the father, is also employed.

CASES PENDING BEFORE THE COURT OF JUSTICE

▪ **Case C-595/12: Request for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio (Italy) lodged on 19 December 2012**
Loredana Napoli v Ministero della Giustizia – Dipartimento Amministrazione Penitenziaria

Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

Referred questions

1. Is Article 15 of Directive 2006/54/EC (return from maternity leave) applicable to attendance of a professional training course in the context of an employment relationship and must it be interpreted as meaning that, at the end of the leave period, the female worker concerned has the right to be re-admitted to the same course still underway, or can it be interpreted as meaning that the female worker concerned may be enrolled in a subsequent course, even though the timing, at least, of that subsequent course is uncertain?
2. Must Article 2(2)(c) of Directive 2006/54/EC, which provides that any less favourable treatment related to maternity leave constitutes discrimination, be interpreted as affording female workers protection, which is absolute and cannot be affected by divergent interests, against any substantial inequality, so as to preclude national legislation which, by requiring dismissal from a professional training course and at the same time guaranteeing the option of enrolling in the following course, pursues the objective of providing adequate training but deprives the female worker of the opportunity to take up, at an earlier date, a new post together with male colleagues from the competition and course, and thus to receive the corresponding pay?
3. Must Article 14(2) of Directive 2006/54/EC, under which a difference of treatment based on characteristics constituting a genuine occupational requirement does not amount to discrimination, be interpreted as permitting the Member State to delay access to employment to the detriment of a female worker who has been unable to undergo full professional training as a result of maternity leave?
4. In the scenario set out in [Question 3], and accepting, in abstract terms, that Article 14(2) is applicable to the case set out therein, must that provision nonetheless be interpreted, in accordance with the general principle of proportionality, as precluding national legislation which requires that a female worker absent on maternity leave be dismissed from the course rather than ensuring that parallel remedial courses be set up in order to allow the training shortfall to be remedied, thereby combining the rights of the working mother and the public interest, but with the organisational and financial costs attached to that option?
5. If it is interpreted as precluding the national legislation referred to above, does Directive 2006/54/EC set out, in that regard, self-executing rules which are directly applicable by the national court?

▪ **Case 476/12: Reference for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 24 October 2012**

Österreichischer Gewerkschaftsbund v Verband Österreichischer Banken und Bankiers

Framework Agreement annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work

Referred questions

1. Is the principle of *pro rata temporis* under Clause 4.2 of the Framework Agreement annexed to Directive 97/81/EC concerning the Framework Agreement on part-time work, to be applied to a child allowance provided for in a collective agreement – such allowance being a social benefit provided by the employer in order to meet part of the parents’ expenses for the maintenance of the child in respect of whom the allowance is obtained – on the basis of the (appropriate) nature of that benefit?
2. If Question 1 is answered in the negative:
Is Clause 4.1 of the Framework Agreement annexed to Council Directive 97/81/EC to be interpreted as meaning that unequal treatment of part-time workers, by means of a proportionate reduction in their entitlement to child allowance according to working time, is – having regard to the social partners’ wide discretion in the determination of a particular social and economic policy objective and of the measures capable of achieving it – objectively justified on the basis that a prohibition of a proportionate grant:
 - (a) makes part-time work in the form of parental part-time working (*Elternteilzeit*) and/or minor activity during a period of parental leave (*Elternkarenzurlaub*) more difficult or impossible; and/or
 - (b) leads to distortion of competition on account of the greater financial burden placed on employers who employ a larger number of part-time workers, and to a lesser willingness on the part of employers to take on part-time workers; and/or
 - (c) leads to more favourable treatment of part-time workers who have additional part-time work and multiple entitlement to a benefit – such as child allowance – under a collective agreement; and/or
 - (d) leads to more favourable treatment of part-time workers, because they have more free time than full-time workers and thus have better childcare options available to them?
3. If Questions 1 and 2 are answered in the negative:
Is Article 28 of the Charter of Fundamental Rights to be interpreted as meaning that where, in a system of employment law in which substantial elements of minimum employment standards are established in accordance with the agreed social policy assessments of specially selected and qualified parties to a collective agreement, a point of detail in a collective agreement (a point that breaches the European Union law principle of non-discrimination) – in this case, the proportionate grant of child allowance in the case of part-time work – is invalid (according to national practice), the penalty of invalidity extends to all the provisions of the collective agreement relating to that area (in this case, child allowance)?

European Court of Human Rights Case Law Update

October 2012 –May 2013

▪ ***Panteliou-Darne and Blantzouka v Greece* (Application nos. 25143/08 et 25156/08) of 2 May 2013**

Facts

Both applicants are wives of civil servants and were recruited in 1984 and 1990, respectively, as air hostesses by Olympic Airways (O.A.), which at the time was a state-owned company. In 1989 and 1996 they each had a child. In 1997 new provisions were added to the law of 1984 concerning the restructuring of public servants' salary scales, under which family allowances would be paid to only one of the spouses where both were employed in the public sector. Under these new provisions, O.A. stopped paying family allowances to the applicants. In a decision of the special Supreme Court in March 2001, these provisions were declared unconstitutional. The Court of Appeal ruled that the applicants were entitled to receive the sum of the allowances. However, it found under Article 281 of the Civil Code that they had exercised their rights improperly and thus dismissed their cases. Further appeals by the applicants to the Court of Cassation were ultimately dismissed in 2007.

The Court

In view of the period of several years that had elapsed before the applicants brought their cases to court, the Court found that their employer had been legitimately entitled to conclude that they had waived any claims to such allowances. In addition, the Court took the view that the retroactive payment of family allowances to all employees would have had serious consequences for the economic viability of the airline – which was already in administration. The Court thus concluded that the Greek courts' dismissal of the applicants' claims had not upset the fair balance between the requirements of the general interest and the protection of their right to the peaceful enjoyment of their possessions.

Judgment

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119048> (in French)

Press release

<http://hudoc.echr.coe.int/webservices/content/pdf/003-4345127-5211017>

▪ ***Case of Zorica Jovanović v Serbia* (Application no. 21794/08) of 26 March 2013**

Facts

The applicant is a Serbian national who was born in 1953 and lives in Batocina (Serbia). The case concerns the alleged death of her healthy new-born son in 1983 in a state-run hospital. After giving birth to her son, the applicant had regular contact with him, both being in the hospital. After a number of days she was told that her son died, without any indication of the cause. The request of the applicant for more information was refused, because, according to the hospital, the details had since been destroyed. Not having been allowed to see his body, she suspects that her son may still be alive, having unlawfully been given up for adoption. A criminal complaint filed by Ms Jovanovic and her husband in 2003 against the staff of the clinic – following reports in the media about similar cases – was rejected as unsubstantiated.

Relying in particular on Article 8 (right to respect for private and family life), she complains of the Serbian authorities' continuing failure to provide her with any information about what happened to her son and the continuing failure to provide her with redress for the breach of her rights.

The Court

According to the Court the applicant has suffered a continuing violation of the right to respect for her family life on account of the respondent State's continuing failure to provide her with credible information as to the fate of her son. There has accordingly been a violation of Article 8 of the Convention. The Court:

1. declares the application admissible;
2. holds that there has been a violation of Article 8 of the Convention;
3. holds that there is no need to examine separately the complaint under Article 13;
4. holds
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 Paragraph 2 of the Convention, the following amounts, to be converted into Serbian Dinars at the rate applicable at the date of settlement:
 - (i) EUR 10 000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damages;
 - (ii) EUR 1 800 (one thousand and eight hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. dismisses the remainder of the applicant's claim for just satisfaction;
6. holds that the respondent State must, within one year from the date on which the present judgment becomes final in accordance with Article 44 Paragraph 2 of the Convention, take all appropriate measures to secure the establishment of a mechanism aimed at providing individual redress to all parents in a situation such as or sufficiently similar to the applicant's;
7. decides to adjourn, for one year from the date on which the present judgment becomes final, all similar applications already pending before the Court, without prejudice to the Court's power at any moment to declare inadmissible any such case or to strike it out of its list of cases in accordance with the Convention.

Judgment

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-118276>

Press release

<http://hudoc.echr.coe.int/webservices/content/pdf/003-4306497-5150967>

▪ **Case of *Garcia Mateos v Spain* (Application no. 38285/09) of 19 February 2013**

Facts

The applicant is a Spanish national who was born in 1965 and lives in Perales Del Río (Madrid). As a mother with legal custody of her son, who was under six at the time, she requested permission to reduce the number of hours she worked at a supermarket. Her employers refused. She complains that the Constitutional Court failed to repair the violation of the principle prohibiting gender-based discrimination, which it had found in her case. She alleges that her right to a fair hearing within a reasonable time was violated, and that she had been the victim of gender-based discrimination, which is prohibited by the Convention. She relies on Articles 6 Paragraph 1 (right to a fair hearing), 13 (right to an effective remedy) and 14 (prohibition of discrimination).

The Court

The Court observed that the State was required to enable applicants to obtain the proper enforcement of decisions given by the national courts and that a decision in the applicant's favour did not deprive him or her of 'victim status' unless the authorities had recognised and then remedied the violation of the Convention.

In the case of Ms García Mateos, the violation of the principle of non-discrimination found by the Constitutional Court had not to date been remedied in spite of two judgments by that court. The applicant submitted a compensation claim only because she no longer qualified for a working-time reduction, her child having passed the age limit. The Constitutional Court, having refused her compensation, did not give her any indication about the possibility of taking her claim to any other administrative or judicial body.

The Court ruled that the protection afforded by the *amparo* ruling had ultimately proved illusory. First, Ms García Mateos' claim about the refusal to grant her a reduction in working time had not been settled on the merits, and, secondly, her *amparo* appeal had proved meaningless, as the Constitutional Court had considered that its institutional law did not provide for compensation as a means of redress for a breach of a fundamental right. Accordingly, the Court found that there had been violation of Article 6 Paragraph 1 in conjunction with Article 14. With regard to that conclusion, the Court found that it was not necessary to examine the applicant's complaint under Article 13.

The Court held that Spain was to pay Ms García Mateos EUR 16 000 in respect of non-pecuniary damages.

Judgment

<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-116985> (in French)

Press release

<http://hudoc.echr.coe.int/webservices/content/pdf/003-4264379-5082962>

▪ Case of *Csoma v Romania* (Application no. 8759/05) of 15 January 2013

Facts

The applicant is a Romanian national who was born in 1972 and lives in Covasna (Romania). When the applicant, a nurse by profession, was in her sixteenth week of pregnancy, the foetus was diagnosed with hydrocephalus and it was decided that the pregnancy should be interrupted. After complications following treatments that Ms Csoma received to induce abortion, her doctor had to remove her uterus and excise her ovaries in order to save her life. She alleges that failures in her treatment have endangered her life and left her permanently unable to bear children. She further complains that, because of the deficiencies of the investigation, doctors' liability was not established. She relies in substance on Article 8 (right to respect for private and family life).

The Court

The Court concludes that by not involving the applicant in the choice of medical treatment and by not informing her properly of the risks involved in the medical procedure, the applicant suffered an infringement of her right to private life.

Furthermore, the system in place at the date of the facts of the present case made it impossible for the applicant to obtain redress for the infringement of her right to respect for her private life. The respondent State therefore failed to comply with its positive obligations under Article 8 of the Convention.

The Court:

1. *joins* to the merits the Government's objection as to the exhaustion of domestic remedies and *dismisses* it;
2. *declares* the application admissible;
3. *holds* that there has been a violation of Article 8 of the Convention;

4. *holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 Paragraph 2 of the Convention, EUR 6 000 (six thousand euros) plus any tax that may be chargeable, in respect of non-pecuniary damages, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *dismisses* the remainder of the applicant's claim for just satisfaction.**Judgement**

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115862>

Press release

<http://hudoc.echr.coe.int/webservices/content/pdf/003-4212890-5000712> (in French)

▪ **Case of *G.B. and R.B. v The Republic of Moldova* (Application no. 16761/09) of 18 December 2012**

Facts

On 4 May 2000 G.B. gave birth to a child. The head of the obstetrics and gynaecology department of the hospital performed a Caesarean section on her. During the procedure he removed her ovaries and Fallopian tubes, without obtaining her permission. As a result of the operation she went through early menopause, at the age of 32. According to the results of an examination carried out by a medical panel on 18 March 2003, the removal of the first applicant's ovaries and Fallopian tubes had been unnecessary and the surgery had resulted in her being sterilised.

In criminal proceedings the relevant doctor was found guilty, but he was absolved of criminal responsibility because the limitation period for sentencing by the Supreme Court had expired. The applicants started civil proceedings to claim compensation from the doctor and the hospital. In these proceedings the applicants were awarded non-pecuniary damages of approximately EUR 600.

The applicants complained to the Court that their rights protected under Article 8 of the Convention had been breached as a result of the first applicant's sterilisation and the nominal amount of compensation awarded to them.

The Court1. *declares* the application admissible;2. *holds* that there has been a violation of Article 8 of the Convention;3. *holds*

(a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 Paragraph 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 12 000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damages;

(ii) EUR 2 000 (two thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *dismisses* the remainder of the applicants' claim for just satisfaction.

Judgement

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115395>

Press release

<http://hudoc.echr.coe.int/webservices/content/pdf/003-4203051-4985618>

- **Case *Pertti Kaikko v Finland* (Application no. 49865/09) of 4 December 2012, *Matti Antero Puttonen v Finland* (Application no. 49894/09) of 4 December 2012 and *Timo Juhani Kärkkäinen v Finland* (Application no. 49872/09) of 4 December 2012**

Facts

In these three cases concerning the retirement age of the civil servants of the Bank of Finland, the applicants submitted complaints against the equalisation of the retirement age.

On 3 May 1977 the Trustees of the Bank, where the applicants were employed as civil servants, introduced an equal retirement age of 60 years for all men and women who entered the service of the Bank on that date or later. The retirement age for women was thereby raised from 55 years to 60 years while for men the retirement age remained unchanged. As the rule was not retroactive, the different retirement ages for men and women still applied to those persons who had started employment before 3 May 1977.

The applicants complained under Articles 6, 14 and 17 of the Convention and Article 1 of Protocol No. 12 to the Convention that the difference in treatment in financial terms of men and women who had entered into the service of the Bank of Finland before 3 May 1977 when they applied for early retirement amounted to discrimination on grounds of sex.

The Court

The application must be declared inadmissible under Article 35 Paragraphs 1 and 4 of the Convention for non-exhaustion of domestic remedies. In the light of all the material in its possession, and insofar as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. Accordingly, this part of the application must be rejected as manifestly ill-founded and declared inadmissible pursuant to Article 35 Paragraphs 3(a) and 4 of the Convention.

The Court unanimously declares the application inadmissible.

Judgments

http://anttalainen.com/suomi/echr/40000/49865_09.html,

http://anttalainen.com/suomi/echr/40000/49894_09.html and

http://anttalainen.com/suomi/echr/40000/49872_09.html (not available on HUDOC)

- **Case of *I.G. and others v Slovakia* (Application no. 15966/04) of 13 November 2012**

Facts

The applicants are Slovakian nationals who were born in 1983, 1981, and 1972 respectively. R.H. died on 9 October 2010 and her three children expressed the wish to pursue the application in her stead. The case concerned three women of Roma origin who complained in particular that they had been sterilised without their full and informed consent, that the authorities' ensuing investigation into their sterilisation had not been thorough, fair or effective and that their ethnic origin had played a decisive role in their sterilisation. They relied in particular on Article 3 (prohibition of torture and of inhuman or degrading treatment), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy).

The Court

The first applicant was sterilised in the context of a delivery by Caesarean section. Her sterilisation was not a life-saving intervention, and neither the applicant's nor her legal guardians' informed consent had been obtained prior to it. The procedure was therefore incompatible with the requirement of respect for her human freedom and dignity. The fact that the doctors had considered the procedure necessary because the first applicant's life and health would be seriously threatened in the event of a further pregnancy cannot affect the position. The Court accepts that the first applicant was susceptible to feeling debased and humiliated when she learned that she had been sterilised without her or her legal guardians' prior informed consent. Taking into account the nature of the intervention, its circumstances, the age of the applicant and also the fact that she belongs to a vulnerable population group (Paragraphs 146 and 178), the Court considers that the treatment at issue attained a level of severity which justifies its qualification as degrading within the meaning of Article 3. Moreover, the way in which the domestic authorities proceeded with the case was not compatible with the requirement of promptness and reasonable expedition. The Court therefore holds unanimously that there has been a substantive and a procedural violation of Article 3 of the Convention.

The failure to respect the statutory provisions combined with the absence at the relevant time of safeguards giving special consideration to the reproductive health of the first and second applicants as Roma women resulted in a failure by the respondent State to comply with its positive obligation to secure to them a sufficient measure of protection enabling them to effectively enjoy their right to respect for their private and family life. The Court holds that there has been a violation of Article 8 of the Convention.

The Court finds no violation of Article 13 of the Convention.

The Court does not examine whether Article 12 and 14 of the Convention are violated.

Judgment

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114514>

Press release

<http://hudoc.echr.coe.int/webservices/content/pdf/003-4153303-4903272>

▪ **Case of *Z v Poland* (Application no. 46132/08) of 13 November 2012**

Facts

The applicant, Z, is a Polish national who was born in 1951 and lives in Piła (Poland). In September 2004, her daughter, who was pregnant and suffered from ulcerative colitis, died in hospital of septic shock after a number of operations. Relying in particular on Article 2 (right to life), Z complained that the doctors treating her daughter had failed to provide her with adequate treatment and that no effective investigation had been conducted which would have allowed to establish the responsibility for her daughter's death.

The Court

While the Court has no doubt that the applicant's daughter's illness caused her inordinate pain, it notes that she had received treatment in various specialised hospitals and was subjected to various medical tests. In this respect the Court observes that it is not its function to question the doctors' clinical judgment as regards the seriousness of Y's condition or the appropriateness of the treatment they proposed (see, *mutatis mutandis*, *Glass v the United Kingdom*, no. 61827/00, Paragraph 87, ECHR 2004-II). Nor can it be said that the quality and promptness of the medical care provided to Y had put her health and life in danger (see, *a contrario*, *Dzieciak v Poland*, no. 77766/01, Paragraph 101, 9 December 2008).

It follows that this complaint must be rejected as manifestly ill-founded pursuant to Article 35 Paragraphs 3(a) and 4 of the Convention.

Judgment

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114521>

Press release

<http://hudoc.echr.coe.int/webservices/content/pdf/003-4153303-4903272>

▪ **Case of *H. v Finland* (Application no. 37359/09) of 13 November 2012**

Facts

The applicant, H., is a Finnish national who was born in 1963 and lives in Helsinki. H. underwent male-to-female gender reassignment surgery in 2009 and, having previously changed her first names, wished to obtain a new identity number that would indicate her female gender in her official documents. However, in order to do so her marriage to a woman would have to be turned into a civil partnership, which H. refused to accept.

The applicant complains that making the full recognition of her new gender conditional on the transformation of her marriage into a civil partnership violates her rights under Article 8 (right to respect for private and family life), Article 12 (right to marry) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights.

The Court

1. declares the complaints concerning Articles 8, 12 and 14 of the Convention admissible and the remainder of the application inadmissible;
2. holds that there has been no violation of Article 8 of the Convention;
3. holds that there has been no violation of Article 14 taken in conjunction with Article 8 of the Convention;
4. holds that there is no need to examine the case under Article 12 of the Convention.

Judgment

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114521>

Press release

<http://hudoc.echr.coe.int/webservices/content/pdf/003-4344426-5210071>

News from the Member States, EEA Countries, Croatia, FYR of Macedonia and Turkey

October 2012 – April 2013

AUSTRIA – Neda Bei

Policy developments

In January, a plebiscite (Volksbefragung) resulted in a two-third majority in favour of maintaining mandatory military service including a substitute civilian service. The outcome, however, has raised doubts whether the current voluntary participation of women in the Federal Army (Bundesheer) can be maintained or will have to cede to a truly general draft including women.¹ The Federal Minister for Women and Civil Service re-tabled the obligatory father's leave of one month, without result. The Minister called attention to the 20th anniversary of the Federal Treatment Act; she said that positive action in the public sector could serve as a model for private enterprises.

Legislative developments

Discussion in Parliament on the comprehensive draft amendments to the Equal Treatment Act (private sector) was scheduled for 6 November 2012. Unexpectedly, the People's Party (ÖVP), supported by the (Catholic) Bishops' Conference, broke the consensus that had been achieved on 'levelling up' the standard of protection against discrimination in the access to and the supply of goods and services as regards religion or belief, age and sexual orientation, especially as regards the last ground.² Re-negotiation was to no avail. Since then, neither the Government nor the social partners have resumed tripartite negotiations.³

In consequence of the Constitutional Court's repeal of legislation attributing exclusive care (Obsorge) for a child born out of wedlock to the child's mother, effective 31 January 2013, major amendments to family law entered into force on 1 February 2013.⁴ The less controversial part of this legislation makes it easier to obtain hyphenated names (*Doppelnamen*), firstly for children regardless of their parents' civil status, but also in case of marriage. As to care, the mother of a child born out of wedlock remains the main carer, unless – and this is new – the father contests this in the name of the best interests of the child. Courts will furthermore decide on the division of care if parents cannot agree in the case of divorce; it is new that courts can decree shared care. This constitutes a significant change in the system. The new provisions are further being discussed by family law professionals as well as

¹ The Social Democrats, having proposed a professional army to be complemented by a year of voluntary social services (freiwilliges Sozialjahr), failed. The Federal Minister for Women and Civil Service had promoted this model by pointing out women's better career opportunities in a professional army. The plebiscite was held on 20 January 2013. As to the constitutionality of the current situation see professor H. Mayer, University of Vienna, interviewed by dieStandard.at; <http://diestandard.at/1356427048125/Debatte-um-moegliche-Frauen-Wehrpflicht>, accessed 5 March 2013.

² 'Levelling up' to the standards of the European Commission's proposal for a Council Directive COM(2008), 426 final, 2 July 2008; for the rebuttal see <http://diestandard.at/1353206838284/Gleichbehandlungsnovelle-vertagt>, accessed 20 February 2012.

³ Informal oral communication courtesy of Ms R. Ettl, Vienna Chamber of Labour. Re-drafted legislation could comprise the complete present piece of draft legislation with the exception of the controversial provisions, which were a core issue. Another option is focussing on the mandatory minimum, i.e. the transposition of Directive 2010/41/EU before August 2012 at the latest. It is not clear which, if any, option will be negotiable or feasible.

⁴ VfGH 28.6.2012, G 114/11-12; Kindschafts- und Namensrechts-Änderungsgesetz 2013 – KindNamRÄG 2013, OJ No. I 15/2013.

by legal scholars.⁵ Guidelines for another newly introduced instrument, mandatory counselling on the division of care between the parents before entering into divorce procedures, have not been issued yet.⁶

Case law of national courts

Supreme Court

Legislation does not provide for a basis to obtain a declaratory judgment (*Feststellungsurteil*) confirming that a person is a foster parent. The status of foster parent is obtained by law, provided that certain decisive factual circumstances, such as essentially full-time care and an emotional bond, are given facts. As the Supreme Court stated obiter, there could be no doubt that the same-sex partner of the child's mother, having lived with her in the same household for several years, met these factual requirements and was to be considered foster parent.⁷

If a genetic paternity test positively identifies the DNA of one of two identical twins, and it is established that both twins had intercourse with the woman concerned, the other's paternity is equally probable and the test result cannot constitute a valid defence against an alimony suit; the Court will assume and state the defendant's paternity.⁸

Constitutional Court

At the request of the High Administrative Court, the Constitutional Court has repealed a provision of the Citizenship Act barring children born out of wedlock to a non-Austrian mother and an Austrian father from Austrian citizenship.⁹

Rejecting the complaint of two women in a registered partnership as well as the request of the Supreme Court, the Constitutional Court upheld a provision of the Reproductive Medicine Act limiting medically supported reproduction to different-sex couples.¹⁰

Miscellaneous

CEDAW

In its 54th session (11 February until 1 March), the Committee on the Elimination of all Forms of Discrimination of Women (CEDAW) discussed the combined 7th and 8th Austrian State Report and NGOs' critical contributions.¹¹ The latter highlighted four issues: the lack of coherent human rights policies as regards women, especially the human rights of migrant women, female refugees and women seeking asylum; the continuing discrimination in the labour market, resulting in an increase of poverty among women; persisting traditional attitudes caused by approaching women's politics mainly as family politics; the lack of effective measures to reconcile family responsibilities and employment (lack of childcare facilities).

⁵ The interdisciplinary periodical for family law iFamZ dedicated their February issue to the reform.

⁶ <http://derstandard.at/1358304975410/Unklarheit-bei-Scheidungsgespraech>, accessed 8 March 2013.

⁷ OGH 28.6.2012, 8 Ob 62/12v. A related topic was dealt with in a most recent judgment of the ECHR which found that Austria had violated Articles 14 and 8 of the Convention by denying 'second-parent' adoption to a same-sex partnership (two women), but not to unmarried heterosexual couples, ECHR 19.2.2013 X and Others v Austria appl. no. 19010/07, referring to negative decisions of the Constitutional Court (2005) and of the Supreme Court (2006).

⁸ OGH 13.12.2012, 1 Ob 148/12i.

⁹ VfGH 29.11.2012, G 66/12-7, G 67/12-7, effective 31 December 2013, with reference to the ECHR's judgment *Genovese*, 11 October 2011, appl. 53.124/09.

¹⁰ VfGH 2.10.2012, G 14/10-8, G 47/11-18.

¹¹ <http://www2.ohchr.org/english/bodies/cedaw/cedaws54.htm>; the shadow report may be found on <http://bim.lbg.ac.at/en/womens-rights/womens-rights-austria-cedaw-committee-recently-examined-austria>, accessed 6 March 2013.

BELGIUM – Jean Jacqmain**Policy developments**

The federal Government has adopted a Bill of law amending the Act of 22 April 2012 ‘aimed at fighting the pay gap between men and women’¹² in order to remedy a number of technical defects. The Bill will be submitted to *the Conseil d’État/Raad van State*’s legal scrutiny before it can be tabled in Parliament.

Legislative developments***Goods and services: gender-segregated actuarial factors***

It was previously reported¹³ that, complying with the CJEU’s decision in *Test-Achats*,¹⁴ the Constitutional Court annulled the Act of 31 December 2007, while allowing the annulled Act to produce its effects until 21 December 2012 at the latest.¹⁵

To recapitulate: the original Article 10 of the Gender Act of 10 May 2007 provided that the use of gender-segregated actuarial factors in any insurance was prohibited as from 21 December 2007, but the Act of 21 December 2007 had amended it to allow the use of such factors, in life insurance only but without any time restriction. This amendment was grounded on Article 5.2 of Directive 2004/43/EC, which the CJEU later declared invalid in *Test-Achats*.

Instead of having the original Article 10 of the Gender Act come back into force at the end of the period allowed by the Constitutional Court, the federal Government found that it was necessary to redraft this whole provision, in order to prohibit the use of gender-segregated actuarial factors in life insurance as from 21 December 2012, while preserving existing contracts within the limits which the European Commission had suggested in its Guidelines of 22 December 2011.¹⁶ At the same time, the federal Government found that, in order to guarantee the coherence and legal certainty of the insurance market, similar rules had to be inserted as a new Paragraph 3 in Article 12 of the Gender Act, which deals with equal treatment in occupational social security schemes. This additional provision concerns those schemes which are excluded from the material scope of Directive 2006/54/EC under its Article 8.1, e.g. individual contracts for self-employed workers.

The Act amending the Gender Act was promulgated on 19 December 2012.¹⁷ According to its Article 2, it is aimed at implementing Directive 2004/113/EC as affected by the CJEU’s decision in Case 236/09.

Right to leave in case of hospitalisation of a child

Within the general framework of career breaks (now ‘time credits’), the Royal Decree of 10 August 1998 organised a special scheme under which any employee is entitled (with certain restrictions) to take leave in order to care for a member of his/her household or family who is seriously ill. This leave may be either full or part time (i.e. a reduction of the working time by 1/5th or 1/2). No remuneration is paid, but a social security benefit is provided (of EUR 771.33 as from 1 February 2012 for full-time leave). The maximum duration of the leave is normally one year (full time) in respect of the same patient. The minimum duration is one month, and notice must be given to the employer at least seven days in advance.

More recently, these last two requirements have been found to cause unnecessary difficulties to working parents when a sick or wounded child has to be rushed to hospital.

¹² See EGELR 2012/1, p. 37 and EGELR 2012/2, p. 47.

¹³ EGELR 2011/2, p. 48.

¹⁴ Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL and Others v Conseils des ministres* [2011] ECR I-00773.

¹⁵ Constitutional Court, no. 116/2011, 30 June 2011, *vzw Belgische Verbruikersunie Test-Aankoop*.

¹⁶ C(2011)9497 final.

¹⁷ *Moniteur belge/Belgisch Staatsblad*, 25 January 2013 (2nd ed.), available (in French and Dutch) on <http://www.juridat.be>, accessed 19 February 2013.

Consequently, the Royal Decree of 10 October 2012¹⁸ has amended the R.D. of 10 August 1998 to provide that, in such an event, the minimum duration of the leave is one week, immediately renewable by one further week, to be used during or immediately after the child's hospitalisation; and that no advance notice needs to be given if the child's physician attests that the event was unforeseen. Moreover, the employer's right to postpone the leave for managerial reasons is waived in such an occurrence.

The R.D. of 10 August 1998 is applicable to all employees in the private sector and to all staff members of local councils. There are similar schemes which are applicable to most other public services, but those will now have to be amended along the lines of the R.D. of 10 October 2012.

Finally, the amendments inserted by the R.D. of 10 October 2012 are an obvious implementation of Clause 7 of the European framework agreement on parental leave (Directive 2010/18/EU), which concerns 'time off from work on grounds of *force majeure*', but the recital of the R.D. contains no mention of this dimension.¹⁹

Case law of national courts

Constitutional Court judgment of 6 December 2012

When the Act of 1 June 2011²⁰ inserted the new Article 563*bis* into the Penal Code, pursuant to which wearing any attire which conceals one's face completely or for the most part in any space open to the public is liable to a penal fine, a number of persons and associations filed applications for annulment of that Act with the Constitutional Court. Two of them also applied for a suspension of the enforcement of the Act; these applications were rejected because the Constitutional Court found that the claimants had not demonstrated that they would suffer 'serious and almost irreparable damage' if the Act was enforced immediately.²¹

On 6 December 2012, the Court rendered its judgment n°145/2012²² on the merits, and rejected all claims for annulment, with the sole proviso that the phrase 'any space open to the public' cannot be reasonably construed as including spaces dedicated to worship.

Essentially, the Court had to refute the claimants' arguments that the Act of 1 June 2011 entailed a violation of several constitutional provisions combined with Article 9 (freedom of religion) and 10 (freedom of expression) of the ECHR. The Court referred to the stated purposes of the Act, which is aimed at ensuring security in public spaces; guaranteeing women's dignity and gender equality; and promoting a conception of togetherness which is not compatible with concealed faces. Considering those purposes as legitimate, the Court then proceeded to demonstrate that the encroachment on personal freedoms was proportionate and necessary in a democratic society, nearly following in the footsteps of the European Court of Human Rights.²³

Labour Court of Appeal in Brussels, judgment of 9 November 2012

With this judgment, the Labour Court of Appeal in Brussels wrote the final page in the long case of *C. Meerts v N.V. Proost*. Ms Meerts, who was employed under a full-time contract of indefinite duration, had used her right to half-time parental leave. She was dismissed before the end of the leave and received compensation in lieu of a notice period. When she challenged the dismissal, the dispute rapidly grew into a saga that took the case up to the Court of Cassation, which referred to the CJEU for a preliminary ruling. In *Meerts*,²⁴ the CJEU found that under Clauses 2.6 and 2.7 of the original framework agreement on parental

¹⁸ *Moniteur belge/Belgisch Staatsblad*, 22 October 2012, available (in French and Dutch) on <http://www.juridat.be>, accessed 19 February 2013.

¹⁹ See J.Jacqmain 'Hospitalisation d'un enfant' *Statut des administrations locales et provinciales – Actualités en bref*, Kluwer, n°258, November 2012.

²⁰ See EGELR 2011/2, p. 47.

²¹ Constitutional Court, no. 148/2011 of 5 October 2011, see also EGELR 2012/1, p. 39.

²² Available (in French, Dutch and German) on <http://www.constitutional-court.be>, accessed 19 February 2013.

²³ See *Leyla Sahin v. Turkey* (Application no. 44774/98) 10 November 2005.

²⁴ Case C-116/08 *Christel Meerts v Proost NV* [2009] ECR I-10063.

leave (Directive 96/34/EC), the compensation in lieu of notice had to be calculated on the basis of the full-time remuneration, and not the half-time remuneration paid by the employer during the half-time leave.²⁵

On 15 February 2010,²⁶ the Court of Cassation complied with the CJEU's decision and quashed the judgment of the Labour Court of Appeal in Antwerp, which had only taken the reduced remuneration into account. The Court of Cassation also found that the Labour Court of Appeal had wrongly decided that the dismissal had been grounded on considerations entirely unrelated to the employee's parental leave. The case was referred to the Labour Court of Appeal in Brussels.

Concerning the compensation in lieu of notice, this second Labour Court of Appeal²⁷ simply followed the CJEU's interpretation and the Court of Cassation's decision. However, the latter had not questioned the former as to the employee's protection against victimization. In compliance with Clause 2.4 of the original framework agreement, now Clause 5.4 of the revised one (Directive 2010/18/EU), Article 101 of the Financial Stabilisation Act of 22 January 1985 provides that when the employer is unable to demonstrate that the grounds for dismissal were entirely unrelated to an employee's parental leave, fixed damages equal to six months' remuneration are due. Thus, the question of the basis of calculation arose in this respect as well. The Labour Court of Appeal in Brussels decided that the CJEU's reasoning (based on the purposes of the framework agreement) could be extended to the fixed damages, so that the full-time remuneration had to be taken into account.

However, it should be recalled that parental leave in Belgium is organized as a special scheme under the general career break/time credit scheme, for which the Act of 22 January 1985 provides a legal framework. Thus, to comply with the CJEU's decision in *Meerts*, the Act of 30 December 2009 promptly amended Article 105 of the former Act as to the calculation of compensation in lieu of notice – but strictly regarding part-time parental leave, given that EU law does not deal with other hypotheses of career break/parental leave. Consequently, the Court of Cassation and the Constitutional Court obstinately keep deciding that compensation in lieu of notice (and, presumably, fixed damages) must be based on the reduced remuneration when part-time leave is used for other purposes than parental leave (including under other – and rather similar – special schemes: leave to attend to a terminally ill family member (up to 2 months) or seriously ill family member (up to 2 years)). Given the unequal distribution of family tasks, the indirect discriminatory effects of such case law on women are obvious, but can hardly be challenged, as using these various leaves is entirely optional for employees.

Still, in a judgment of 14 January 2013 concerning the dismissal of a female employee who had taken half-time leave under the general time credits scheme, the Labour Court of Appeal in Ghent, quoting the decision of the CJEU in *Seymour-Smith and Perez*,²⁸ found that the CJEU's reasoning in *Meerts* could be extended to any other form of career break/time credits, and that failing to do so would induce indirect discrimination against women.²⁹

²⁵ See E. Claeys 'De ontslagvergoeding van een werknemer in deeltijds ouderschapsverlof' *Sociaalrechtelijke Kronieken*, 2010, p. 353.

²⁶ See EGELR 2010/1, p. 50.

²⁷ Judgment of 9 November 2012, *Algemene Rol* n° 2011/1B/648, unreported, available (in Dutch) on <http://www.juridat.be>, accessed 19 February 2013.

²⁸ Case C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR I-00623.

²⁹ *Algemene Rol* n° 2010/AG/376, unreported, available (in Dutch) on <http://www.juridat.be>, accessed 19 February 2013.

BULGARIA – Genoveva Tisheva**Policy developments**

During the period under consideration, the changes in policy, legislation and legal practice in the field of gender equality definitely have to be seen in the context of the social, economic and political situation in Bulgaria. The symptoms of the social and political crisis are no longer reflected only in the recent cool statistics of Eurostat marked by the uniform conclusion that Bulgaria is the country in the EU where people are most at risk of poverty, where children and people with disabilities are most at risk, and where youth unemployment is highest.

The ultra-liberal Government of Prime Minister B. Borisov failed in its main tasks and was compelled to step down in February 2013 following pressure from the people in the streets, all this despite the assertions of the Government that Bulgaria benefited from the assessment as being one of the financially most stable EU countries with a strongly controlled budget deficit. Unfortunately, obviously, the country turned out to be the most stable in its poverty indicators.

Therefore, special attention should be paid by the EU and the European Commission to the austerity protests in all towns of Bulgaria in February-March 2013, as they may influence the situation throughout Europe. Some political analysts have called them ‘the Bulgarian Spring’.

The Concluding Observations and Recommendations of the Committee on Economic, Social and Cultural Rights from November 2012 presented to the Government of Bulgaria are also very symptomatic of how the social and economic policy of the Government has affected the social rights of citizens and gender equality in Bulgaria.³⁰ In fact, the Committee recommended the state party to intensify its efforts to eliminate societal gender stereotypes and prejudices, by starting awareness-raising campaigns and by improving the gender balance in education disciplines traditionally dominated by one of the sexes. The Committee also called on the state party to adopt specific legislation on equality between men and women. This Committee, the CESCR – as opposed to the CEDAW Committee which issued observations and recommendations to the Bulgarian Government in July 2012 – does not specify that Bulgaria needs a gender equality law. It seems clear from the way that the CESCR expresses this suggestion, however, that it is again an argument in favour of such a law. The Committee sees this legal gap as an obstacle to the full realisation of equality in the exercise of economic, social and cultural rights. It also requests the state party to include, in its next periodic report, sex-disaggregated statistics on the participation in the labour market and on the average actual earnings disaggregated by occupation, branch of activity, and level of qualifications, with respect to both the public and the private sector. In addition to this, the Bulgarian Government has to strengthen its programmes and adopt effective strategies to reduce unemployment rates and move progressively towards the full realisation of the right to work, avoiding any retrogressive steps with regard to the protection of workers’ labour rights. The Committee recommends that high-quality vocational training, especially for the long-term unemployed, should continue to be prioritised taking into account the needs of disadvantaged and marginalised individuals and groups. The Committee further recommends the adoption of employment strategies and plans of action targeting regions where unemployment is most severe. It also requests the state party, in its next periodic report, to submit tables of annual statistics on the general employment situation, disaggregated by sex, age, nationality, disability, and by urban or rural region. In that regard, the Committee draws the state party’s attention to its General Comment No. 18 (2005) on the right to work. The Committee also draws the state party’s attention to its open letter of 16 May 2012 to state parties on economic, social and cultural rights in the context of the economic and financial crisis.

³⁰ E/C.12/BGR/CO/4-5, 30 November 2012.

Legislative developments

It is in this context that on 19 December 2012 the Council of Ministers adopted the National Plan on Gender Equality for 2013. The new plan contains the main sections and tasks that were also mentioned in the previous National Plan for 2012, and this repetition shows that many tasks were not implemented in all fields: state policy on gender equality, economic independence of women, reconciliation of professional and family life, enhancing women's participation in decision making, protection against gender-based violence, and combating gender stereotypes.

Two major successes were achieved by the Bulgarian Government in the field of gender equality policy as a prerequisite for future legislation both at national and EU level, thanks to the efforts and networking of women's NGOs in Bulgaria.

As a result of the recommendations made in July 2012 by the CEDAW Committee to the Government, and thanks to the pressure of women's NGOs, such as the Bulgarian Gender Research Foundation and the Alliance for Protection against Domestic violence, as associated members of the National Council on Equality between Women and Men, a working group was established by Order of the Minister of Labour and Social Policy,³¹ to draft, within three months, a plan to comply with Bulgaria's obligations based on the Convention and to follow the Committee's recommendations. The Government indicated that the working group would take into account not only the CEDAW Committee's recommendations but all recommendations made in recent years by UN treaty bodies and procedures in the field of gender equality.

In mid-September 2012 Bulgaria blocked the proposal for a directive of Commissioner Viviane Reding to determine quotas for women and men in the non-executive boards of public companies in Europe.³²

In response to the position of Bulgaria, women's NGOs launched a massive campaign, sending official letters, reports and articles to the media, lobbying at meetings and events, and at a meeting of the National Council on Equality of Women and Men at the beginning of November 2012. An open letter dated 21 September 2012 by the Alliance for Protection against Domestic Violence, *BGRF*, and the Bulgarian women's lobby was sent to the President of Bulgaria, the Chairwoman of Parliament, the Prime Minister, the Minister of Justice, the Minister of Labour and Social Policy, the Ombudsman and the Commission on Protection against Discrimination.³³

The strong response of the NGOs was also a result of the invaluable support, information, arguments and networking provided by European networks, such as the European Women Lawyers' Association (EWLA).

In mid-November 2012, it was announced that thanks to Bulgaria's change of position as one of the opposing countries, Viviane Reding's proposal was de-blocked. As part of the directive a 40 % quota is to be introduced for women in the boards of listed companies, a ratio that affects board members who are not engaged in the management of companies. This objective is to be achieved by 2020.³⁴ According to official EU statistics, at the end of 2012 the percentage of women in such positions in Bulgaria was 15 %.³⁵

This is a good example of the contribution of Bulgarian civil society influencing EU legislation and policy in this specific area.

Another change achieved in relation to EU legislation is the amendment of insurance legislation due in order to comply with the *Test-Achats* case. In February 2013,³⁶ Article 65a

³¹ Order No. RD 0148/23/01/2013.

³² <http://www.eubusiness.com/news-eu/ecb-economy-women.idp>, accessed on 17 April 2013.

³³ The letter was published in Newsletter No. 3/2012 of the Bulgarian Gender Research Foundation called 'Equality issues', not yet online.

³⁴ http://europa.eu/rapid/press-release_IP-12-1205_en.htm, accessed 17 April 2013. See also: *European Gender Equality Law Review* No.2/2012, p. 2.

³⁵ http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/index_en.htm, accessed 17 April 2013.

³⁶ *State Gazette* No. 20/2013.

of the Insurance Code and Article 246 of the Social Insurance Code were amended, to incorporate provisions that using sex as an actuarial factor in insurance benefits and in long-term voluntary pension insurances is no longer permitted

Case law of national courts

In the period under consideration, no significant decisions in our field were issued by the Equality Body or by the courts.

Nevertheless, it has to be mentioned in connection with the relevant changes made in the insurance field in the third pillar, that similar changes have not been implemented in the field of using sex as an actuarial factor in the obligatory supplementary social insurance. This practice and the respective administrative acts which are contrary to EU equal treatment law have been challenged before the Supreme Administrative Court, but this case has been pending for two years now and the court is hesitant about whether and how to apply EU standards in this obvious case of discrimination in the first social security statutory pillar. Similar to other cases related to gender equality, the court has got stuck in procedural issues about admissibility and its inability to interpret the burden of proof in cases concerning gender equality. This is becoming a symptomatic deficiency of Bulgarian courts.

Despite this stagnation at national level, feminist lawyers and NGOs have continued to bring gender equality and women's rights cases before the CEDAW Committee and the ECtHR in Strasbourg. An example for the period under consideration is *S.V.P. v Bulgaria*, with views issued by the CEDAW Committee on the need for compensation of a girl victim of sexual abuse and for changes in legislation and policy related to sexual violence against women and girls.³⁷

CROATIA – Nada Bodiroga-Vukobrat

Policy developments

New amendments to the Labour Act are being prepared. The information about their content is very scarce and at the time of writing this report, it still had not been publicly presented. According to the available information, they will primarily address the issue of fixed-term contracts, collective redundancies, some aspects of working hours, temporary employment agencies etc. The Croatian Employers' Association has been very active in advocating amendments which would redefine obligations and shift the burden for the protection of pregnant workers, workers who have recently given birth or take care of children from employers to the State. The employers would like to see the burden of paying the salaries of pregnant workers who are not able to perform their work tasks during pregnancy, and where it is impossible to transfer them to an equivalent post, shifted from employers to the State. This obligation is particularly cumbersome for small and medium-sized enterprises. Another proposal by the Employers' Association is to relax the absolute ban on dismissal of pregnant workers and workers on maternity or parental leave. The relaxation of rules for the protection against dismissal should, according to this proposition, be restricted only to dismissal in connection with the use of rights related to maternity or parenthood, and it should not include situations where the worker on maternity/parental/adoptive leave is in serious breach of an employment contract, not related in any way to the use of those rights. The presentation of the draft of the amendments to the Labour Act is expected shortly, which would allow a wider public debate.

³⁷ *S.V.P. v Bulgaria*, Communication No. 31/2011, CEDAW/C/53/D/31/2011.

Legislative developments

The Draft Act on Child-Minders (Zakon o dadiljama) was unanimously accepted in the second reading in the Croatian Parliament on 13 March 2013 and a formal vote will follow shortly. It is designed to address the pressing need for the development of non-institutional forms of childcare as one of the priorities of family policies in the Republic of Croatia. So far, childcare was legally restricted to institutional settings (nurseries, kindergartens, etc.). The main purpose of the Act is to regulate the safe and standardised provision of this social service in a non-institutional setting, which is widespread, but so far is exclusively provided in the realm of the 'grey economy'. In recent years, 132 women have completed special programmes of education for babysitters, funded by the EU as part of the active labour market policies in local communities. However, given the lack of a supporting regulatory framework and especially the fact that the activity of babysitting was not recognised as a formal qualification, the aims of this initiative were largely frustrated in practice. The new Act should address this deficiency and contribute to the employability of unemployed women, especially in aged 50+. Although the Draft Act on Child-Minders highlights gender neutrality, public perception and the legislative debate almost exclusively concentrated on the employability of female babysitters. The initial proposal that babysitters should register a company, occupation or a cooperative for the performance of their activities was abandoned, and the final Act only contains the obligation to register an occupation for the performance of babysitting activities. Since part of the financing of this activity should fall upon local communities, it could be challenging for many of them.

The Amendments to the Act on Maternity and Parental Benefits were accepted in the first reading in the Croatian Parliament on 24 January 2013 and the final proposal is currently being prepared. It redistributes the existing types of maternity and parental leave and related types of leave, with the intention of creating more and better incentives for fathers to take the parental leave and actively participate in childcare. The parental leave will be extended from three to four months for each employed or self-employed parent (i.e. from six to eight months), with the possibility of transferring two months of leave to the other parent. However, given the current economic situation, the household budget will continue to have a decisive impact on the involvement of fathers, even if the above amendments are adopted. Given the very modest number of adopted children in the Republic of Croatia (annually around 140 to 150 adoptions), the existing legislative solution will be amended to equalise the duration of parental leave to that of adoptive leave, regardless of the age of the adopted child.

Case law of national courts

No new anti-discrimination case law was reported in the relevant period.

Equality body decisions/opinions

Apparently triggered by the repeated media reports on the discrimination of pregnant women and women with children under two in the labour market and in employment, the Ombudsperson for Gender Equality has launched an anonymous internet survey to establish the scope and effects of this form of discrimination.³⁸

Miscellaneous

A high-level conference entitled 'Achieving gender equality – promoting women alliances in politics and civil society' was held at the Croatian Parliament on 28 February 2013, organised by the Gender Equality Committee of the Croatian Parliament in cooperation with the Centre

³⁸ The survey was opened on 17 February 2013 and the online questionnaire is available on: <http://www.prs.hr/index.php/80-najave/587-poziv-za-sudjelovanje-u-istrazivanju-diskriminacija-temeljem-trudnoce-i-materinstva-iskustva-trudnica-i-zena-s-malom-djecom-na-hrvatskom-trzistu-rada>, accessed 10 April 2013.

for Education, Counselling and Research (CESI) and with the support of the Embassy of the United States in Zagreb. The aim of the conference was to analyse the economic, social and political position of women in the current crisis and consider new strategies of cooperation among women in politics and civil society. Primary questions were whether the economic crisis, with growing unemployment, mostly affects women and how it reflects on the emancipation of women in society. Prominent female politicians and activists took part in the discussions and the following conclusions were reached: additional efforts are needed to create new and promote existing cooperation models among women in politics, civil society organisations and trade unions; additional efforts are needed to encourage more political involvement of women, better representation of women in political life and representative bodies at regional and local levels; stronger implementation of the legislative framework for gender equality is advocated. Given the fact that women in politics are still underrepresented and that gender quotas for female candidates on electoral polls are not adhered to, it is not surprising that the ratio of female representatives in the National Croatian Parliament stands at only 20 %. The analysis of media representation of women in politics reveals that it also contributes to gender inequality in politics.³⁹

CYPRUS – Lia Efstratiou-Georgiades

Policy developments

On 24 February 2013, the new President of the Republic of Cyprus, Mr Nicos Anastasiades, was elected. On 27 February 2013, the Ministers of the new Cabinet were appointed. On 2 April 2013 Mrs Zeta Emilianidou was appointed Minister of Labour and Social Insurance, replacing Mr Harris Georgiades. Three women have been appointed in other offices: Katie Clerides as Presidential Commissioner for expatriate issues and religious groups, Ioanna Panayiotou as Commissioner for the Environment, and Emmanuella Moushounta Lambrianides as Commissioner for Public Services Reform. Furthermore, Maria Kyriacou took a seat in Parliament. Today out of 56 MPs, 49 are men and 7 are women.

The Department of Labour Relations of the Ministry of Labour and Social Insurance is currently implementing the Project ‘Actions for reducing the gender pay gap’, which is co-financed by the European Social Fund. The budget of the Project is approximately EUR 3 million. The implementation of the Project started in July 2010 and will be concluded by the end of 2015.

The Project consists of a comprehensive mix of measures, aiming to combat the root causes that create and sustain the gender pay gap.

The different actions of the Project that are being implemented (or have been concluded) include:

- Improvement of inspection mechanisms for equal pay legislation (Equal Pay between Men and Women for the Same Work or for Work to which Equal Value is attributed Law 2002 – 2009).

This action includes theoretical as well as on-the-job training of Officers and Inspectors of the Department of Labour Relations (DLR) and the Department of Labour, of the Ministry of Labour and Social Insurance, as well as Officers of the Ombudsman Office, regarding the enforcement of equal pay and equal treatment in employment legislation. The training started in October 2012.

- Study on how to increase the use of parental leave through the introduction of pay benefits.
- Establishment of a Gender Equality Certification Body.

The aim of this action is the establishment of a Gender Equality Certification Body which will evaluate enterprises as regards the implementation of best practices relating to equal

³⁹ Ombudsperson for Gender Equality, Parliamentary Elections 2011, <http://www.prs.hr/attachments/article/184/Parlamentarni%20izbori%202011.pdf>, accessed 12 March 2013.

treatment and/or equal pay principles in their working environment. The Certification Body will provide two kinds of certification: one for 'Equality Employer', and one for implementing a 'Good Practice relating to equal treatment and/or equal pay'. The establishment of the Certification Body is expected to take place in the first semester of 2013, and the first certification round will take place in the autumn of 2013.

- Activities in the education sector to eliminate occupational and sectoral gender-based segregation.

Also, Equal Pay Day will be celebrated in Cyprus for the first time, in the context of Women's day. An event to raise public awareness will take place on 9 March, which will be co-organised by the Ministry of Labour and Social Insurance, the European Parliament Office in Cyprus, the European Commission Representation and the Press and Information Office, with the participation of the Business and Professional Women's Federation of Cyprus.

Legislative developments

All Articles of Directive 2004/113/EC have been incorporated in Law on Equal Treatment between Men and Women as regards the Access to and Supply of Goods and Services No. 18(I)/2008. A draft Bill to amend No. 18(I)/2008 has been prepared, the contents of which have not yet been agreed upon by the stakeholders. The matter is still being discussed between the stakeholders at the Ministry of Justice and Public Order. It is understood that their intention is that the amendments will follow the *Test-Achats* Ruling.

Equality body decisions/opinions

File No. A.K.I 74/2012, dated 6 September 2012

Mrs A.A., a nursing officer on a casual basis at the Nicosia General Hospital, submitted a complaint to the Ombudsman on 27 August 2012 related to her successive requests to the Ministry of Health in 2011 to transfer her to Limassol, the town of her residence, as she was the mother of a four-month-old baby, until her baby was nine months old.

The Ministry of Health replied to her request in October 2011 and stated that 'her request was noted and would be examined as soon as a suitable opportunity arose'.

The Ombudsman examined the complaint on the basis of the Protection of Maternity Law of 1997 to 2008 and of the Equal Treatment for Men and Women in Employment and Occupational Training Law of 2002 to 2009.

The Ombudsman, based on the facts of the case and on the relevant legislation of the Republic of Cyprus and the EU, found that there had been direct discrimination against A.A. on the ground of sex. The Ombudsman intends to call the complainant and the Ministry of Health, as her employer, for consultations under Article 22 of the Combating of Race and Some Other Discriminations (Ombudsman) Law of 2004, before she prepares her final recommendation.

File No. A.K.I 1/2011, dated 15 January 2013

The general secretary of the women's branch of the Cyprus Green Party submitted a complaint to the Office of the Ombudsman against the Cyprus Athletics Organisation relating to the publication in the Official Gazette of the Republic dated 17 December 2010 of a vacancy for the post of 'female cleaner' (hourly-paid staff) for the sports premises of the Organisation in the Limassol District. In spite of the progress made in achieving the equality of sexes through legislation, it appears that job segregation still exists in the labour market, where some jobs are advertised as 'male' or 'female'.

Any publication of job vacancies which is addressed to persons of one sex is prohibited by the Equal Treatment of Men and Women in Employment and Vocational Training Law of

2002 as amended.⁴⁰ Violation of this Law may render guilty not only the employer but also any natural or legal person that promulgated the ‘publication’. In this context, the mass media and/or the Government Printing Office may be held responsible for violating the Law when they advertise jobs for public organisations, as happened in the present case, where the publication was addressed only to women.

On the basis of the above, and particularly keeping in mind the fact that the mass media and the Government Printing Office have the responsibility as well as the capability to contribute effectively to combating sex discrimination and to promoting equal treatment, the Ombudsman submitted to them the following recommendations: 1. to ensure that any text advertising vacancies does not violate the law, before publishing it; 2. to inform the persons interested in publishing vacancies about the provisions of the law, to ask them to explain why they want a particular wording that excludes one sex, and if necessary to ask them to rephrase the text in neutral language; and 3. if the interested persons do not comply with the request to use neutral language so as to avoid conflict with the law, to refuse to publish the relevant vacancies.

CZECH REPUBLIC – Kristina Koldinská

Case law of national courts

Discrimination on grounds of pregnancy – Supreme Court case law

The Supreme Court recently decided on the case of a policewoman who argued that she was discriminated against because of her pregnancy.⁴¹ The policewoman was given a lower position with lower pay after she informed her employer that she was pregnant. According to the records of the employer, the employee had declared at the beginning of her pregnancy that she was not willing to pursue further education in order to obtain a better position and that she wanted to concentrate only on her pregnancy and care for her baby once born. The claimant appealed against the decision of the district directorate through internal procedures of the Czech police. This appeal was rejected and no discrimination was found. The claimant therefore went to court and argued that she had been discriminated against on the basis of her pregnancy. The lower courts rejected her claim as they did not feel competent to decide the case, and so she took her case to the Supreme Court. Among other things, she requested the Court to present preliminary questions to the CJEU in the event that the Supreme Court was not sure whether Directive 76/207/EEC had been correctly implemented as regards adequate protection for victims of discrimination (Article 6 of Directive 76/207/EEC).⁴² The question was whether it is possible for a member of the police to go to a general court and claim compensation because of discrimination on the ground of sex.

The Supreme Court stated that Article 6 of Directive 76/207/EEC had not been breached and there was no reason to ask the CJEU any preliminary questions. The Supreme Court concluded that it was possible to apply the antidiscrimination rules contained in the Labour Code at the time in question and that the Minister of the Interior was at that time competent to decide on the claim of a member of the police even if the employment relationship had ended. The Supreme Court however did not determine whether a breach of Article 6 would occur in a case where the Minister of the Interior is competent, but the general courts have no competence to hear the case itself. It was only stated that the Czech law gives the competence to decide on service relationships of members of police to the Minister of the Interior and that no competence is afforded to general courts.

⁴⁰ Harmonisation with Directives 76/207/EEC, 97/80/EC and 2002/73/EC, which amended Directive 76/207/EEC.

⁴¹ Case No. 30 Cdo 2470/2012-73 of 9 January 2013.

⁴² The facts of the case occurred in 2006 and 2007, and the Directive 76/207/EEC in force at that time was considered. Today Article 17 of Directive 2006/54.

This is the first case of discrimination brought by a public servant (a police officer) to be decided by the Supreme Court. This decision however might cause some doubts. In fact, it is questionable, whether Directive 76/207/EEC (today Dir. 2006/54/EC) was correctly implemented, as it was only the Ministry of the Interior that has the power to consider claims of members of police (including claims of discrimination) according to the laws on service relationships concerning members of the police. This case however worked with the facts from 2006 and 2007. In the meantime, the Anti-Discrimination Act was adopted. This act applies also to public service relationships, including the relationships of the members of police, and additionally guarantees access to judicial procedures for all victims of discrimination.

Decision of equality body – discrimination of women because of maternity leave

The Czech Republic's equality body, the Public Defender of Rights, accepted a claim by the National Contact Centre for women and science⁴³ at the Sociological Institute of the Academy of Sciences of the Czech Republic.⁴⁴ The National Contact Centre argued that the Czech Science Foundation (an independent research funding organization founded by the Czech Government) had practices which indirectly discrimination against women. Such indirect discrimination, it argued, was present in the rules regarding financial support for post-doctoral grants. The rules made it very difficult and complicated to interrupt a project in the event of pregnancy and parental obligations, making them discriminatory against those who aim to fulfil scientific as well as parental obligations. Moreover, the post-doctoral grant can only be awarded to the same person once. If a scientist applies for a post-doctoral grant and in the period between the application and the decision that the grant will be awarded the scientist falls pregnant, and therefore decides to give the awarded support back, it will not be possible for her to apply for the grant again in the future. It is also quite complicated to interrupt the post-doctoral project when the support has already been awarded. Before 2012, this was almost impossible, and since 2012 there is only the possibility to ask for an interruption of a project; this can only be requested twice a year (in January and in July), and there are no specified criteria based on which it would be possible to predict the decision of the Czech Science Foundation.

The Public Defender of Rights criticised the impossibility of postponing projects in the event of pregnancy, as well as the fixed dates for an application to interrupt a project (as a consequence, maternity allowance may be reduced), the impossibility of interrupting a project for a period shorter or longer than one year (which goes against the logic of maternity and parental leave as legislated by Czech law), and the lack of any transparent or predictable criteria.

The Public Defender of Rights also recommended that the Czech Science Foundation should reflect on possible positive measures to support equal representation of men and women in evaluation bodies and scientific commissions.

DENMARK – Ruth Nielsen

Policy developments

As stated in EGELR 2012-2, the Danish Government has developed a model for more women in business management. The model consists of four elements that are targeting both private companies and public companies: 1) The approximately 1 100 largest Danish companies are required to establish targets for the number of the underrepresented sex on the main governing body (board of directors and the like). Each company must set concrete targets that are

⁴³ The centre's main objective is to improve the situation of female professionals in research and science and to increase the proportion of women in executive positions in research and science.

⁴⁴ <http://www.soc.cas.cz/articles/cz/20011/6629/OMBUDSMAN-GRANTOVA-AGENTURA-CR-DISKRIMINUJE-NA-ZAKLADE-POHLAVI.html>, accessed 28 February 2013.

realistic and ambitious for the company itself. 2) These companies must have a policy for increasing the number of the underrepresented sex at company management levels generally. Each company must create the proper basis for recruitment of female managers based on the company's specific needs and ideas. 3) Companies must clarify the status of compliance with the set targets in the annual report including, where appropriate, why the company has not reached its objective. In addition, companies must disclose in the annual report how the policy is implemented, and what has been achieved. If they fail to do this, it is possible to impose a fine on them. 4) State enterprises, regardless of size, must set targets and develop a policy for more women in management.⁴⁵ Under present law state enterprises must have a balanced gender composition: what is new is primarily that they should draw up targets and develop a recruitment policy. Municipalities and regions are encouraged to develop common guidelines on how to promote women in management at the regional or municipal level.

This strategy has now resulted in the adoption of two amendments to Danish legislation, see below.

Legislative developments

On 14 December 2012, the Danish Parliament adopted an amendment to the Gender Equality Act and an amendment to the Companies Act and certain other laws putting the above-described model for more women in management into effect.

The amendment to the Gender Equality Act mainly concerns Sections 11 and 12 of the Act on the gender composition of boards in the public sector.⁴⁶ Section 11(1)-(4) now reads:

Section 11.

Paragraph 1. Boards and other collective management bodies in institutions and companies of the State should have an equal mix of women and men.

Paragraph 2. Boards and other collective management bodies in institutions and companies that are not covered by Paragraph 1 should have a balanced mix of women and men as much as possible, if the cost of the institution or company is mainly covered by state funds or if the State owns the majority of the institution or company.

Paragraph 3. The main governing body should set targets for the share, including the number, of the underrepresented sex in boards and other collective management bodies as referred to in Paragraphs 1 and 2.

Paragraph 4. The central governing body shall, in the institutions and companies referred to in Paragraphs 1 and 2 with 50 employees or more, draft a policy to increase the number of the underrepresented sex on their other management levels.

Section 12(1) now reads:

Section 12(1). The Minister responsible for appointing board members etc. shall, regardless of whether the institution or company is governed by Section 11, make sure that the members of the board appointed by the Minister reflect an equal gender balance.

The amendment to the Companies Act and certain other laws⁴⁷ introduced new provisions into Danish company legislation requiring the approximately 1 100 largest Danish companies to establish targets for the number of the underrepresented sex on the main governing body (board of directors and the like). Each company must set concrete targets that are realistic and

⁴⁵ This applies only to State enterprises and does not include publicly owned enterprises.

⁴⁶ Act No. 1288 of 19 December 2012 amending the Gender Equality Act. The most important amendments are those of Sections 11 and 12, which deal only with state level enterprises. Further amendments were also made concerning, *inter alia*, partial adaptation of Danish law to the *Test Achats* judgment on the use of actuarial factors in insurance.

⁴⁷ Act No. 1383 of 23 December 2012 amending the Companies Act and certain other laws.

ambitious for the company itself. They must have a policy for increasing the number of the underrepresented sex at company management levels generally. Each company must create the proper basis for recruitment of female managers based on the company's specific needs and ideas. Companies must clarify the status of compliance with the set targets in their annual report including, where appropriate, why the company has not reached its objective. In addition, the companies must disclose in the annual report how the policy is implemented, and what has been achieved.

ESTONIA – Anu Laas

Policy developments

The coalition Government, consisting of two right-wing political parties (the Estonian Reform Party and the Union of Pro Patria and Res Publica) has enacted both a conservative fiscal policy and a modest social policy, alongside limited spending in the social sphere. At the time of writing there is just one female Minister out of a total of 13. The Prime Minister has attempted to explain such poor representation of women in high offices and top politics as the result of women's low ambition and lack of interest.⁴⁸ Despite this, gender inequality issues (especially with regard to the gender pay gap) have remained on the political agenda.

An interpellation concerning the Gender Equality Council was submitted to the Prime Minister by a group of MPs on 14 November 2012. On 14 January 2013, MPs confronted the Prime Minister with further questions using the same method. The main issue concerned the lack of monetary and human resources allocated to the Office of the Gender Equality and Equal Treatment Commissioner (the Commissioner).

Estonia has initiated active cooperation with other states concerning equal treatment of men and women. In 2011, Estonia and Norway signed the Memorandum of Understanding on the Implementation of the Norwegian Financial Mechanism 2009-2014 which subsequently became the financier of a gender mainstreaming programme: 'Mainstreaming Gender Equality and Promoting Work and Life Balance'. This programme aims to establish a good basis for regular awareness-raising activities regarding gender equality issues in university studies, and in the basic and in-service training of teachers and officials. Additional aims of the programme include the financing of measures to promote an effective work-life balance, improvement of the collection of statistical data (especially on the remuneration of women and men), and the support of activities and capacity building of the Gender Equality and Equal Treatment Commissioner and the Commissioner's Office. Financing decisions were expected to be finalised for 2012, but full implementation of the programme has been slow. The project to improve the quality of work commenced in 2012, yet the number of employees in the Commissioner's Office has not yet increased. The work of the programme is now expected to continue through 2015.

In 2003 the Nordic and Baltic Ministers for Gender Equality, Justice and Internal Affairs adopted a joint statement and recommendations, agreeing that by 2005 all participating countries would have a national action plan in place to fight the trafficking of human beings, in particular women and children. Estonia prepared the national action plan for 2006-2009 and subsequently established an inter-agency coordination network for human trafficking issues in 2006. In 2010, the Estonian Government approved the national action plan on combating violence for 2010-2014. This focuses on four main topics: juveniles committing violent crimes, violence against children, domestic violence, and human trafficking. A noteworthy detail is that the Ministry of Justice coordinated the activities against human

⁴⁸ Interpellation No. 213 about the poor funding of the Office of Gender Equality and Equal Treatment Commissioner Council. Reply by Prime Minister Andrus Ansip, 5th Working Week of the 5th Session of the 12th Riigikogu Plenary Assembly, 14 January 2013. Stenograph available on <http://www.riigikogu.ee/?op=steno&stcommand=stenogramm&date=1358168289#pk11820> (in Estonian), accessed 7 April 2013.

trafficking as a measure of national criminal policy. Important amendments to the Penal Code were made in April 2012, with more amendments expected for April 2013.

Legislative developments

Law-enforcing measures regarding punishment in cases of human trafficking entered into force in April 2012. For example, human trafficking has now become punishable by a maximum of 15 years' imprisonment and assistance in human trafficking punishable by a maximum of 10 years' imprisonment. The criminalisation of sexual exploitation was an important step towards better legal protection of victims of forced prostitution and forced labour. This amendment process was widely inclusive and incorporated NGOs (Eluliin, the Estonian Women's Associations Round Table, the Estonian Women's Shelters Union, the Association of Women Lawyers), representatives of different Ministries, the Prosecutor's Office and the police. In addition, the Estonian Government in cooperation with third-sector organisations has prepared documents for the Estonian Parliament (Riigikogu) to prepare amendments to the Penal Code according to Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims.⁴⁹ The concept of what should be considered trafficking in human beings adopted by this Directive is broader than that of the Framework Decision 2002/629/JHA, and therefore includes additional forms of exploitation. Member States are expected to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 6 April 2013.

The Government of the Republic has prepared the Bill on Amendments to the Insurance Activities Act and Other Associated Acts (349 SE) and presented it to Parliament in January 2013. The Explanatory Memorandum of the Bill explores the content of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. The Memorandum makes reference to Article 5(2) on temporary transitional periods, regarding the rule of unisex premiums and benefits until 21 December 2012. The Directive allowed proportionate differences in individuals' premiums and benefits where the use of sex was a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Memorandum refers to the decision of the Court of Justice in *Test-Achats*. It explains why the exemption to unisex premiums and benefits as provided by Article 5(2) of 2004/113 was declared invalid by the Court of Justice and states that since 21 December 2012 the exemption is invalid.

From 2007-2012 Estonian insurance companies used the right to include sex as a factor in three types of insurance: life insurance, personal accident insurance and health insurance. From December 2012 this has been discontinued; insurance companies started to take the new regulations seriously. Despite this positive development, at the time of writing the Insurance Activities Act still has not been amended. Amendments will be made to Articles 14¹ and 262 of the Insurance Activities Act and to Article 5 of the Gender Equality Act. The new rule on equality (prohibiting gender differentiations in insurance) will only apply to contracts concluded after 20 December 2012.

Equality body decisions/opinions

The Government of Estonia has taken a position on improving the gender balance among non-executive directors of companies listed on stock exchanges. The Estonian position was confirmed in December 2012 and was negative regarding the implementation of quotas as a temporary measure.⁵⁰ The Social Affairs Committee of the Estonian Parliament asked its legal

⁴⁹ Directive 2011/36/EU, OJ L 101, of 15 April 2011.

⁵⁰ The Estonian Government discussed the matter in December 2012 and did not support the introduction of an obligatory quota either, preferring alternative measures that are less contradictory to the freedom of entrepreneurship. This position was formulated into a communication and sent to the Members of the European

advisor from the Department of Gender Equality at the Ministry of Social Affairs to present a special report on gender quotas in listed companies and on the European Commission's work and efforts. This report, of 14 January 2013, revealed that the Social Affairs Committee supported the opinion presented by the Government of Estonia. Other parliamentary committees, including the European Union Affairs Committee, were also against the quotas.

Miscellaneous

In the summer of 2012, Estonia started to prepare the fifth and sixth periodic reports on the implementation of the Convention on the Elimination of All Forms of Discrimination against Women. The reporting tasks were divided between different Ministries and agencies. The report is not yet available, but was expected to be ready in late 2012.

FINLAND – Kevät Nousiainen

Policy developments

The Finnish Constitution requires that the Government informs Parliament about proposed EU legislation and the position that the Government takes in the matter. The Government has done so concerning the Draft Directive on gender quotas for company boards.⁵¹ The government communication to Parliament on the proposal for a directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures⁵² was sent to the Parliament's Grand Committee in the beginning of February. The Grand Committee, the Parliament body to be informed, requested reports by two other standing committees, the Employment and Equality Committee and the Commerce Committee.

The position of the Finnish Government, according to the communication, is positive in the main. For a small market such as Finland it is better to have regulation at EU than at national level on the matter, and the proposal is therefore not considered to infringe the principles of proportionality and subsidiarity. The Government believes that the demands presented in the draft directive to the listed companies are not excessive, taking into account the benefits arising from it, such as improved and more transparent nomination procedures. The aims of the directive coincide with those of the Government's Equality Programme, and the Government assumes that it will be easier for Finnish listed companies to comply with the quota requirement than for most European companies, because of Finnish women's high level of education and presence in the labour market relevant for listed companies. While Finland may thus support the directive proposal, the Government considers that it is still unclear whether Article 157(3) TFEU presents a proper legal basis for the proposal, and also expects that the sanctions required by the proposed directive should be clarified in the legislative process to follow.

The Parliament's Employment and Equality Committee has already presented a report and states that it supports the Government's position. The Commerce Committee, which has not yet done so, will probably be more critical than the Employment and Equality Committee, as it pays special attention to the representatives of entrepreneurship, trade and stock exchange. At hearings, these stakeholders have criticised the proposal as costly and unnecessary, claiming that even now the representation of women in Finnish company boards has increased through self-regulative and voluntary measures already taken by companies.

Parliament. Source: Government Office Correspondence No. 2-5/12-02339-5 to the MEPs, 13 December 2012; <https://dhs.rigikantselei.ee/avalikteave.nsf/documents/NT001B2DDA?open>, accessed 10 April 2013.

⁵¹ COM(2012)614.

⁵² *Valtioneuvoston kirjelmä Eduskunnalle komission ehdotuksesta Euroopan parlamentin ja neuvoston määräraikaiseksi direktiiviksi julkisesti noteerattujen yhtiöiden toimivaan johtoon kuulumattomien johtokunnan jäsenten sukupuolijakauman tasapainottamisesta ja siihen liittyvistä toimenpiteistä (Listayhtiöiden hallitusten sukupuolikiintiö-direktiivi)*, U81/2012 vp.

The willingness of corporations to appoint women in company boards has voluntarily increased since a clause was added in the Government's Equality Programme for 2012-2015 stating that if a better gender balance cannot be achieved in the boards of listed companies, legislative means may be used to reach this target.

Case law of national courts

The Finnish Supreme Court has decided two cases, which stem from the same disagreement concerning pay. *Tehy* (Union of Health and Social Care Professionals), a labour union representing nurses, threatened some years ago to go on strike unless the pay increase they demanded was accepted by employers' organisation *KT* (Local Government Employers). In the common opinion, nurses were considered a severely underpaid female profession. The parties in the conflict accepted the agreement proposed by a conciliation committee nominated by the Ministry of Labour. The pay rise received by members of *Tehy* was not extended to members of another labour union also representing nurses, whose members often do work similar to that of *Tehy* members. In 2010, the Deputy Chancellor of Justice decided two complaints concerning the matter,⁵³ and held that paying different wages for the same work, depending on the collective agreement under which a person worked, violated the prohibition of discrimination under the Non-Discrimination Act. Because the Equality Ombudsman had been a member of the conciliation committee, the Deputy Chancellor advised the Ombudsman on what he saw as a violation of the principle of equal treatment.

Two cases concerning this matter were brought before the Supreme Court. The Supreme Court decided that although the prohibition of discrimination and requirement under the Employment Contracts Act is a mandatory provision which cannot be set aside by a collective agreement, the provision is only to be applied to situations where employees are under the same collective agreement.⁵⁴ When employees are members of different unions and thus under different collective agreements, their work conditions are a consequence of their choice of union membership. An employer who applies two different collective agreements acts under a legal obligation to do so. Although the employer in such a situation does not violate the prohibition of discrimination, the principle of equal treatment requires that the employer aims at reducing the inequality of the pay system by adopting a pay system based on objective factors. Here, the Supreme Court referred to joined cases *Hennigs* and *Mai*, which concern age discrimination.⁵⁵

The Supreme Court explicitly stated that these two cases had nothing to do with discrimination on the ground of gender, and that therefore European Union law and case law on gender equality were not relevant. It should be kept in mind, however, that the disagreements between the unions and the municipal employers' representative *de facto* concerned low pay for work for women in a typically female profession. The collective agreement that was the outcome of the disagreement caused another type of inequality problem, consisting of unequal pay for the same work, not on the basis of sex, but on the basis of union membership.

The Court in fact evaluated different grounds of discrimination differently by implicitly admitting that the outcome could have been different if the disputed pay difference had been directly related to sex. However, the Court's description of the Finnish legal tradition concerning collective agreements is rather problematic even for sex discrimination. The Supreme Court stressed that pay should be considered as a consequence of the choice of union membership, that the employer has the legal duty to apply each collective agreement irrespective of its unequal outcome, and that in doing so an employer does not violate the prohibition of discrimination. If similar arguments are used as to gender pay discrimination, it would be difficult to compare pay structures in order to make sure that none of the parts of

⁵³ Decisions concerning complaints OKV/1333/1/2007 and OKV/181/1/2008, issued on 11 January 2010.

⁵⁴ Decisions KKO:2013:10 and KKO:2013:11.

⁵⁵ Cases C-297/10 *Sabine Hennigs v Eisenbahn-Bundesamt* [2011] and C-298/10 *Land Berlin v Alexander Mai* [] E.C.R. [2011]I-07965.

pay are discriminatory. Where an employer employs groups of employees consisting of mostly women and men doing the same work or work of equal value, it should be kept in mind what the EC Court stated in *Enderby*: the employer must not rely on the absence of discrimination within collective bargaining processes conducted separately and without discriminatory effect within each group for groups consisting mostly of men and women as a justification for pay differences between these groups.⁵⁶

FRANCE – Sylvaine Laulom

Policy developments

Negotiations on equality

Since the election of a new President and a new Parliament, in May and June 2012, a new policy on equality between men and women has been promoted. The Government has asked the social partners to negotiate on certain issues including gender equality. The social partners are currently negotiating on this issue, especially on how to improve women's employment, and how to share family responsibilities. If an agreement is reached by the social partners at national level, a Bill could implement it, otherwise a Bill on gender equality will be presented by the government.

Legislative developments

The consequences of the Test-Achats case

French legislation makes use of the exemption from the principle of equal treatment allowed by Article 5 Paragraph 2 of Directive 2004/113/EC. Article L 111-7 of the Insurance Code provides that the Minister in charge of the economy may, by a specific decision, authorize differences in premiums and benefits which take gender into account and which are proportionate to the risks when relevant and accurate actuarial and statistical data establish that gender is a determining factor in assessing the insurance risk. Some decrees adopted by the Minister indeed authorize gender differentiations e.g. in life insurance, private health insurance and motor car insurance. The Test-Achats ruling was enforced in December 2012.⁵⁷ A ministerial order adopted on 18 December 2012 states that gender differentiations can only apply to insurance contracts concluded before 20 December 2012 or those which are tacitly renewed⁵⁸. The implementation of the Test-Achats ruling occurred at the last moment possible and for the moment it leaves unchanged the legislative part of the Insurance Code. A Bill has been presented to Parliament, which should be discussed in February 2013. The Bill is about the separation and regulation of banking activities, but also includes a provision on equality in insurances (Article 25). However, the new rule on equality (prohibiting gender differentiations in insurance) will only apply to contracts concluded after 20 December 2012.

A new regulation on part-time work?

Employee and employer representatives concluded a National Interprofessional Agreement (ANI) on employment security on 11 January 2013⁵⁹. The main aim of the ANI is to implement a flexicurity model. One provision of the Agreement regards women. As required by the Government, the agreement contains some measures in order to limit forced part-time work. The ANI has set a minimum of 24 hours per week for part-time employees, except with

⁵⁶ Case C-127/92 *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-05535.

⁵⁷ Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

⁵⁸ Order of 18 December 2012, on equality between men and women in insurances, JO 20 December 2012.

⁵⁹ ANI du 11 janvier 2013 pour un nouveau modèle économique et social au service de la compétitivité des entreprises et de la sécurisation de l'emploi et des parcours professionnels des salariés, http://www.cfdt.fr/upload/docs/application/pdf/2013-01/ani_du_11_janvier.pdf, accessed 1 February 2013.

respect to individual private employers, employees younger than 26 who are still students, or based on a written and justified request of the employee. Overtime work must be paid with an increase of 10 % until it reaches 1/10th of the working time agreed in the employment contract; beyond, the increase will amount to 25 %. These provisions must be implemented at the latest on 31 December 2013. The ANI clearly includes an effort to reduce the use of very small part-time work contracts and also to reduce some of the flexibilities induced by part-time work by making overtime more expensive. The mechanisms defined in the ANI are complex and it leaves much room for collective bargaining at sectoral and enterprise levels. The ANI will now be transformed into a law and is being discussed in Parliament. We will have to wait and see how the Agreement will be implemented by the legislator.

Case law of national courts

Proving discrimination

One of the most important difficulties in discrimination cases is how to prove the discrimination and the access for employees to the information held by the employer. The CJEU has recently had to deal with this issue in two cases, the Meister case⁶⁰ and the Kelly case.⁶¹ The Cour de cassation has heard a similar case.⁶² In this last case, two women employed by a company believed that they were discriminated against, but they did not have access to all the information needed on wages and classification of the other workers. They addressed the tribunal to ask for an order for the employer to give them this information. Their demand was based on Article 145 of the Code of Civil Procedure under which ‘if there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of a petition or by way of a summary procedure’. The Court of Appeal applied this Article and the Cour de cassation confirmed this position. For the Cour de cassation, respecting an employee’s personal life and respecting the employer’s business secrets are not in themselves an obstacle to the application of Article 145 when a Court finds that the requested measures are legitimate and are necessary for the protection of the rights of the party who has requested them. The Court of Appeal was right in deciding that the employees had a legitimate aim in demanding the communication of information necessary for the protection of their rights, information that only the employer had and that he refused to communicate. This decision shows how it is possible to use the Code of Civil Procedure in order to obtain the necessary information to establish the facts from which it may be presumed that there has been direct or indirect discrimination.

GERMANY – Ulrike Lembke

Policy developments

Sexual harassment: a broad public debate

A sexist comment made by a male political leader (of the co-governing Liberal Party) and published by the newspaper *Stern* has caused a broad public debate on sexual harassment in Germany. During an interview, a young female journalist was told that she ‘could fill out a Dirndl’.⁶³ A ‘dirndl’ is a traditional Bavarian dress which has a figure-hugging cut and is most cleavage revealing. Since blogger Anne Wizorek suggested the hash tag #aufschrei (outcry) to capture stories about sexism and sexual harassment on 25 January 2013, over 100 000

⁶⁰ Case C-415/10 Galina Meister v Speech Design Carrier Systems GmbH [2012] (n.y.r).

⁶¹ Case C-104/10 Patrick Kelly v National University of Ireland (University College, Dublin) [2011] (n.y.r).

⁶² Cass. Soc. 19 December 2012, nos 10-20526 and 10-20528.

⁶³ See the article of the newspaper *Stern* of 23 January 2013 about the sexist remarks of Rainer Brüderle: <http://www.stern.de/politik/deutschland/rainer-bruederle-der-spitze-kandidat-1959408.html>, accessed 28 February 2013.

tweets have been shared⁶⁴ and thousands of stories about sexism, harassment and assault have been collected.⁶⁵ Sexism and sexual harassment have been the topic of every major German newspaper and most of the major chat shows.

The arguments of the debate are very heterogeneous. Some people criticise the fact that the journalist first wrote about the incident immediately after the respective political leader had been named top candidate for his party in the coming parliamentary elections. Most commentaries agree that the debate is not about anyone or anyone's behaviour in particular but about daily sexism at the workplace and in public in Germany. Some people think that men and women are different by nature and that what men might mean as a compliment, women might consider as (sexual) harassment or assault. Some authors try to prove that women act in a sexist manner as well. The Federal Minister for Development, member of the Liberal Party, asserted without further explanation that men are victims of sexual harassment by female supervisors, and to the question whether he had ever suffered sexual harassment himself he answered: "Unfortunately not."⁶⁶

But many people emphasise that the debate was long overdue in Germany. In legal as well as in political discourse there is still strong resistance in dealing with sexual harassment. German law does not address unintentional sexual harassment, which has to be seen in a very critical light concerning the fact that many people think (or say) that sexist remarks might have been meant as a compliment. And surprisingly, the prohibition of sexual harassment under Section 3(4) of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*) is restricted to the area of employment and does not explicitly cover the private sector, education, the access to and supply of goods and services or the public sphere.

Second 'gender equality atlas'

The Federal Ministry for the Family, Senior Citizens, Women and Youth and the Baden-Wuerttemberg Ministry for Employment, Social Affairs, Family, Women and Senior Citizens presented the second 'gender equality atlas' for Germany on 24 January 2013.⁶⁷ The atlas contains sex-disaggregated data on equality-relevant issues such as political participation, executive positions in administration, academia and management, education, qualification and occupational choice, employment and income, domestic violence and life expectancy.

The atlas is a valuable source of equality-relevant data showing major obstacles to gender equality as well as minor progress in this area. Somewhat disturbing is the lack of data on domestic violence, insufficiently explained with the inconsistent practices of data collection by the responsible state authorities. This is even more disturbing in light of the fact that many people still trivialise the problem of domestic violence or even assert that men are attacked by women in the same way and extent – a false 'argument' which has appeared repeatedly in the public debate on sexual harassment (see above).⁶⁸

Anti-discrimination bodies at state level: Baden-Württemberg

Since the state elections in March 2011, Baden-Württemberg has been ruled by a coalition of the Greens and the Social Democratic Party (*Sozialdemokratische Partei, SPD*). One of the Greens' campaign promises was the establishment of an anti-discrimination body at state level. The anti-discrimination authority at federal level (*Antidiskriminierungsstelle des Bundes*) is dependent on a network of regional and local equality bodies and people need a competent contact person on the ground. However, for the state of Baden-Württemberg no anti-discrimination body has been established until now, because the relevant state ministries are not able to agree on the proper allocation of the body to one of them. Thus, the government of Baden-Württemberg has broken its promises and moreover, has missed the

⁶⁴ See <https://twitter.com/search?q=%23aufschrei&src=hash>, accessed 28 February 2013.

⁶⁵ See <http://alltagssexismus.de/>, accessed 28 February 2013.

⁶⁶ As seen on German television.

⁶⁷ See <http://www.bmfsfj.de/BMFSFJ/gleichstellung.did=195724.html>, accessed 28 February 2013.

⁶⁸ See GiG-net (ed.) *Gewalt im Geschlechterverhältnis* pp. 34-37 Opladen, Verlag Barbara Budrich 2008.

great opportunity to establish an independent anti-discrimination body solely responsible to the state parliament (as proposed for the federal level as well).

Legislative developments

Unisex insurance rates

In March 2011, the Court of Justice of the European Union declared sex-segregated insurance rates invalid as from 21 December 2012 (*Test-Achats* ruling). In October 2012 the governing coalition presented amendments to the SEPA-accompanying Act (*SEPA-Begleitgesetz*) to implement the *Test-Achats* ruling,⁶⁹ which should enter into force by 21 December 2012 at the latest. The German Association of the Insured (*Bund der Versicherten*) as well as the German Insurance Association (*Gesamtverband der deutschen Versicherungswirtschaft, GDV*) and the Association of Private Health Insurance Companies (*Verband der privaten Krankenversicherung*) agreed with the proposed implementation of the *Test-Achats* ruling in the amendment to the SEPA-accompanying Act. But on 14 December 2012, the SEPA-accompanying Act was referred to the Conciliation Committee (*Vermittlungsausschuss*) by the Federal Council.⁷⁰ It has not become law yet.

The Federal Council did not disagree with the implementation of the *Test-Achats* ruling, but with specific regulations concerning life insurances. The insurance industry held on to 21 December 2012 as the final date.⁷¹ Private insurance companies in Germany had broadly published advertisements for cheaper insurances before 21 December 2012, especially aiming at male customers. It is obvious that afterwards insurance rates are increased for both sexes and thus the only winner from unisex rating are the companies themselves.⁷²

Gender quotas for company boards

In 2013, many supervisory boards of German listed companies will face new elections for their members ('super election year'). But there are strong opponents of statutory gender quotas for company boards in Germany, such as the Minister for the Family, Senior Citizens, Women and Youth (favouring her concept of a non-legally binding 'flexiquota'), and the political leaders of the governing parties (Christian Democratic Union, Liberal Party and Christian Social Union).

Since the Niedersachsen state elections in January 2013, the majority within the Federal Council (*Bundesrat*) has changed. From now on, the Federal Council with its new majority of members of the Social Democratic Party and the Greens will present drafts on controversial topics. On 16 January 2013, the competent committee of the Federal Parliament held a public consultation on three different drafts on statutory gender quotas for company boards. The drafts were presented by the Federal Council⁷³ and the parliamentary groups of the Social Democratic Party and the Greens.⁷⁴ The drafts contain statutory minimum quotas for both sexes for supervisory (and executive) boards of listed private companies. A minimum quota of 20 % has to be achieved by 2018, followed by a minimum quota of 40 % which has to be achieved by 2023. Furthermore, the drafts cover reporting requirements and require the

⁶⁹ See http://www.bundestag.de/bundestag/ausschuesse17/a07/anhoerungen/2012/SEPA_10_VAG-Novelle_CDU-CSU_und_FDP/index.html, accessed 28 February 2013.

⁷⁰ See http://www.bundesrat.de/cln_227/nn_6898/DE/presse/pm/2012/211-2012.html?__nnn=true, accessed 28 February 2013.

⁷¹ See <http://www.versicherungsbote.de/id/88125/Nach-Geschlecht-differenzierte-Tarife-ab-21122012-ungueltig/>, accessed 28 February 2013.

⁷² See <http://www.manager-magazin.de/finanzen/versicherungen/0.2828.849065.00.html>, and <http://www.manager-magazin.de/finanzen/versicherungen/0.2828.851956.00.html>, both accessed 28 February 2013.

⁷³ Draft law on promoting equal participation of women and men on company boards, approved by the Federal Council (*Bundesrat*): <http://dipbt.bundestag.de/dip21/btd/17/112/1711270.pdf>, accessed 28 February 2013.

⁷⁴ Drafts on promoting equal participation of women and men in companies and/or governing bodies, presented by the parliamentary group of the Social Democratic Party: <http://dipbt.bundestag.de/dip21/btd/17/088/1708878.pdf>, and presented by the Greens and the Social Democratic Party: <http://dipbt.bundestag.de/dip21/btd/17/111/1711139.pdf>, both accessed 28 February 2013.

publication of statistical information. To become law, these drafts had to be adopted by a majority of the Federal Parliament (*Bundestag*) as well. It was not to be expected that the Federal Parliament would adopt any of these drafts before the federal elections in September 2013.

On 18 April 2013, the attempt to adopt one of the drafts by a cross-group majority has failed. Three days before, the governing Christian Democratic Union had promised to include statutory minimum gender quotas of 30% in its party program – as well as its leaders had reminded all women in their ranks of the federal elections and the potential damage of public disagreement.

Gender pay gap: minimum wages

The gender pay gap in Germany remains at 23 %.⁷⁵ The employment rate of women in Germany has been growing steadily since 2001,⁷⁶ but this increase is mainly based on part-time, marginal, low paid and precarious work. One useful instrument against the resulting ‘work in poverty’ as well as the gender pay gap itself is that of statutory minimum wages. On 1 March 2013, the Federal Council presented a draft law on nationwide statutory minimum wages of EUR 8.50 per hour.⁷⁷ The governing parties constantly rejected the idea of minimum wages in the past. But presumably with a view to the federal elections in September 2013, they are now considering sector-specific and region-specific minimum wages determined by a commission formed by the social partners. This concept is strongly criticised by politicians and trade unions.

Case law of national courts

Gender-segregated private school

On 30 January 2013, the Federal Administrative Court decided that gender-segregated private schools are compliant with German and international human rights treaties.⁷⁸ The Ministry for Education of the State of Brandenburg had refused its permission for the foundation of a private secondary school for boys only in Potsdam. The Ministry argued that a school for boys only would violate the constitutional principle of gender equality and that this principle would demand co-educational private and public schools. But the Federal Administrative Court held that there is no broader scientific evidence that gender-segregated schools because of their organisational form might not be able to communicate the idea of gender equality and decided that the permission could not be denied due to this fact. The Ministry of Education announced that it will have a closer look at the communication of gender equality in the respective school when forced to give its permission. It would be most desirable for every competent state Ministry to take its task of school supervision in this regard seriously in *all* public and private schools in Germany.

Pregnancy discrimination: unemployment benefits for EU citizen

On 28 February 2013, the State Social Court of Berlin-Brandenburg decided on the entitlement to unemployment benefits for a pregnant EU citizen.⁷⁹ The entitlement to unemployment benefits assumes (inter alia) that the applicant is capable of working and that his or her right of residence under the EU Freedom of Movement Law is not based on looking for work but on actual (self-)employment. First, the Court decided that the pregnancy of the female applicant did not make her unable to work. Then it explained that the self-employment of the applicant as a sex worker was not illegal but protected under the freedom of

⁷⁵ See https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2012/03/PD12_101_621.html, accessed 28 February 2013.

⁷⁶ See <http://statistik.arbeitsagentur.de/Statischer-Content/Arbeitsmarktberichte/Jahresbericht-Arbeitsmarkt-Deutschland/Generische-Publikationen/Arbeitsmarkt-2011.pdf>, accessed 28 February 2013.

⁷⁷ See <http://www.spiegel.de/politik/deutschland/bundesrat-spd-gruene-und-linke-wollen-mindestlohn-durchsetzen-a-884666.html>, accessed 28 February 2013.

⁷⁸ Federal Administrative Court, judgment of 30 January 2013, 6 C 6/12.

⁷⁹ State Social Court of Berlin-Brandenburg, judgment of 28 January 2013, L 14 AS 3133/12 B ER.

establishment. Finally, the Court held that the right of residence was still based on current self-employment when the applicant was taking a break due to her pregnancy, emphasizing the special protection of maternity and the prohibition of sex discrimination under the German Constitution.

GREECE – Sophia Koukoulis-Spiliotopoulos

Policy developments

As reported before in this Review,⁸⁰ a serious impediment to the promotion of gender equality is the low level of litigation and complaints, as compared to the extent of actual gender inequalities and discrimination, which mostly affect women. The lack of information and support, and the socio-economic context, which is marked by rapidly increasing female unemployment and the persistence of stereotypes concerning the role and capacities of women, coupled with the fear of acquiring a ‘bad name’ in the labour market, make women reluctant to claim their rights. Moreover, women are often unable to prove their case, as crucial evidence either does not exist or is in the possession of their employer. Possible witnesses are as reluctant to come forward as the victims of discrimination, for the same reasons. Thus, gender discrimination victims often cannot benefit from the effective remedies and sanctions traditionally applied by Greek courts.⁸¹ Community rules on the shifting of the burden of proof and on the possibility for organisations to bring aggrieved workers’ cases before courts and other competent authorities (*locus standi*), or to intervene on their behalf in cases brought by victims, are highly effective means to cope with this deplorable situation, provided that they are properly transposed, well known to judges, lawyers, trade unions and the general public, and effectively applied, which unfortunately is still not the case in Greece.

The Council of State (Supreme Administrative Court - CS) judgment described below marks an interesting development for the *locus standi* of organisations. It was given in a test case brought before the CS by the Greek NGO ‘League for Women’s Rights’ (the League).

Case law of national courts

Council of State judgment No. 4875/2012

Several decisions of the Minister of Education have excluded periods of maternity and parental leave from the period required for state school teachers to apply for the posts of school director and school counsel. An example is Decision F 351.1/03/19075/D1 concerning the posts of school counsels.⁸² As soon as this decision was published, a female MP asked the Minister whether this discriminatory practice would cease. The Minister’s response was vague and the practice continued.⁸³ However, following a petition for annulment lodged by the League, the CS, by judgment No. 4875/2012, annulled this decision. An important feature of this judgment is that it upheld the standing of the League.

The CS pointed out that the employment of state school teachers is governed by the Civil Servants’ Code (CSC) (included in Act 3528/2007, as amended).⁸⁴ It further pointed out the following: Article 52(1) CSC provides for paid maternity leave of two months before and three months after childbirth. Article 53(2) CSC provides for a nine-month paid parental leave, until the child reaches the age of four, if the parent does not make use of the reduced working day (by two hours until the child reaches the age of two and one hour until the child reaches the age of four) – an alternative to parental leave as provided by this Article.

⁸⁰ See S. Koukoulis-Spiliotopoulos ‘Greece’ *EGELR* 1-2008, pp. 72-74.

⁸¹ See S. Koukoulis-Spiliotopoulos ‘Gender equality in Greece and effective judicial protection: issues of general relevance in employment relationships’ *Neue Zeitschrift für Arbeitsrecht* Beilage 2/2008, pp. 74-82.

⁸² OJ B 247/15.02.2011.

⁸³ MP E. Tsoumani-Spentza, Question dated 18 March 2011: www.tsoumani.gr, accessed 28 February 2012.

⁸⁴ OJ A 26/09.02.2007.

The parental leave, which in compliance with Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (L 145), was provided by Article 53 [of the previous] CSC (Act 2683/1999) [...] for civil servants who are mothers only, was subsequently extended legislatively, for the first time, by Act 3528/2007 [see above] to civil servants who are fathers, so as to be granted to all civil servants who are parents irrespective of sex. The ‘child-raising leave’ (as termed in the CSC, but ‘parental leave’ in EC/EU law) is granted in the framework of the principle of harmonisation of professional and family life, as a natural corollary to the principle of gender equality, and as a means for substantive implementation of this principle. This is achieved by recognising for ‘workers’ in the private and public sector, men and women, a personal right to parental leave, so that they may occupy themselves with raising their child and that the combination of their professional obligations with their family responsibilities be made feasible, and in particular that men be encouraged to take on an equal part of family responsibilities, by taking parental leave so that they also occupy themselves with raising their child.⁸⁵

The League based its *locus standi* on its objective: the promotion of gender equality and women’s rights. The CS upheld the *locus standi*, as the League ‘had a legitimate interest to seek the annulment of the above decision regarding the exclusion of both maternity leave, which concerns exclusively women, and parental leave, since, as stated above, the latter is granted as a natural corollary to the gender equality principle, and in particular, it is granted to men so that they are encouraged to take on an equal part of family responsibilities’.

The impugned decision was issued on the basis of provisions of Act 3848/2010⁸⁶ which laid down the qualifications for assessing candidates for higher posts in state education and enabled the Minister of Education to provide, by relevant decision, ‘the procedure for filing applications, the documents to be submitted and any necessary details’. The CS upheld the League’s allegation that the decision went further than the enabling statutory provision allowed, as it did not merely provide for procedures and details, but introduced further rules regarding the qualifications of the candidates. Consequently, the CS annulled the decision.

The importance of the judgment

According to well-established CS case law, legal persons have *locus standi* to seek the annulment of administrative acts which are related to their specific objectives.⁸⁷ As explained above, the League’s objective was the promotion of gender equality and women’s rights. The legal counsel of the Ministry of Education alleged in court, inter alia, that the League did not have *locus standi* to seek the annulment of the decision to the extent that it concerned parental leave, as parental leave was not an exclusive right of women, but also a right of men; consequently, the clause of the decision concerning parental leave was not related to gender equality. However, the CS, referring to clauses of Directive 96/34/EC, its own previous case law, CJEU and ECtHR case law and the Introductory Report to the provision of Act 3528/2007 which implemented Directive 96/34 (see above), reaffirmed that parental leave and the EU principle of conciliation (‘harmonisation’ as the CS itself had termed it) of professional obligations with family responsibilities, which was reflected in Directive 96/34/EC, were closely related to the League’s objective. The League had also invoked Article 18, in conjunction with Article 3(4), of Act 3896/2010⁸⁸ implementing Directive 2006/54/EC, which equates unfavourable treatment of parents due to parental leave to gender discrimination. The CS did not consider it necessary to rely on these provisions, as it deemed its well-established case law sufficient for upholding the League’s *locus standi*. However, its

⁸⁵ See ‘agreement on parental leave’ incorporated in Directive 96/34/EC, Preamble and General Considerations, Paragraph 8; Introductory Report to Act 3528/2007 regarding Article 53; C-104/09 *Pedro Manuel Roca Alvarez*, [2010] ECR I-08661 Paragraphs 36-39; CS Nos. 1, 2/2006, Paragraph 9, and other CS judgments; ECtHR judgment of 22 March 2012 *Konstantin Markin v Russia* (Grand Chamber), Paragraph 141.

⁸⁶ OJ A 71/2010.

⁸⁷ CS 1535/2009.

⁸⁸ OJ A 207/08.12.2010.

previous case law concerned matters of substantive law, i.e. the right to parental leave. It was the first time that the CS used it in a procedural matter, such as *locus standi*.

HUNGARY – Beáta Nacsa

Policy developments

In February 2013, the Hungarian Parliament started the debate on the fourth amendment of the Fundamental Law (the Hungarian Constitution). The fourth amendment, as the Fundamental Law itself (which came into force in January 2012), was enacted by a two-third majority of the middle-right *FIDESZ* Party and its ally, the small *KNDP* (Christian-Democratic Party), without any support from the opposition. The amendment inserts into the main text of the Fundamental Law many of the regulations that were previously nullified by the Constitutional Court, seriously criticised by EU bodies, certain Member States and international institutions, and sparked strong protest in major demonstrations. Both content and procedure have been widely criticised for several reasons, among which the most serious criticism is that this action completes the breakdown of the rule of law in Hungary. Despite continuous political pressure, the two-third parliamentary majority of *FIDESZ-KNDP* passed the amendment on 11 March 2013.

The Government's education policy has caused heated demonstrations organised by students. In October 2012, the Government announced the elimination of all state-funded places in the most popular university faculties (law, economics, media, etc.).⁸⁹ The supporting argument stated that students of these faculties may finance their studies through student loans, which could easily be paid back from the high salaries earned in these sectors. Under the pressure of the continuous demonstrations of students, the Government started to reframe its decisions on higher education, including the number of state-funded places.⁹⁰ College and university admissions started under a shadow of great uncertainty, which resulted in a further serious reduction in the number of college/university matriculations (109 000 in 2012 compared to 141 000 in 2011).⁹¹ From the gender point of view, reduction of state-funded places entails the risk that raising tuition fees could reinforce not only patterns of social stratification, but also gender segregation in higher-paid professions, because economic criteria play an important role in families' decision-making process about the education of their sons and daughters.

Legislative developments

The joint committee (composed of representatives of different state bodies and NGOs) in charge of developing the new law on the criminalisation of domestic violence has made some progress during the investigated period. No agreement has been reached yet on three major issues, however. The first major point of disagreement is the question whether violence by ex-partners should be covered by the special legislation. The government representatives' opinion is that after the family relationship has ended, the trust has also ended between the parties, and if there is no intimate relationship based on trust, there is no need for special criminal regulation. The second point of disagreement is whether the new criminal law should be enforced only through private prosecution, or – as the NGOs suggest – through public prosecution as well. The most contentious issue is whether psychological harassment or

⁸⁹ The speech of Orbán Viktor, Prime Minister, at the Conference of the Rectors' Council, 17 October 2012, 'We need a self-sustaining financial system in higher education', http://www.miniszterelnok.hu/beszed/onfenntarto_penzugyi_rendszerre_van_szukseg_a_felsooktatásban, accessed 29 April 2013.

⁹⁰ The speech and video message of Orbán Viktor, Prime Minister, 15 December 2012, 'Higher education must remain free above a certain score' http://www.miniszterelnok.hu/cikk/ingyenesnek_kell_maradnia_a_felsooktatásnak_bizonyos_pontszám_felett, accessed 29 April 2013.

⁹¹ http://www.felvi.hu/felveteli/ponthatarok_rangsorok/jelentkezők_es_felvettek/2012a_felvettek_gyorsjelentes/, accessed 29 April 2013.

economic dependency will be covered by the new legislation. The Women's Riot Facebook Group provided the NGOs taking part in the negotiations with great support by encouraging considerable numbers of people to demonstrate at the turning points of the negotiations.⁹²

The Commissioner for Fundamental Rights filed a petition with the Constitutional Court requesting the abolishment of Article 65(5) of Act No. I. of 2011 of the Labour Code, according to which a pregnant employee may invoke protection against dismissal only if she has informed her employer of her pregnancy prior to the notification of dismissal. According to the argument of the Ombudsman, the obligation of such notification violates pregnant women's human dignity and their right to privacy. The information on early pregnancy is part of the female employee's most personal circumstances, her state of health and her (family) relationships. In the first three months, pregnancy may miscarry due to several causes. In such cases, the notification of pregnancy may lead to an unreasonably humiliating situation harming very personal feelings, since the employer has to be informed of the miscarriage as well. The petition also pointed out that potential misuse of the law could not be prevented by such legislation and that therefore such law lacks any adequate justification.⁹³ As Hungarian legislation in this regard is in line with Article 2a. of Directive 92/85/EEC, the judgment of the Hungarian Constitutional Court may add certain new points to the debate about the issue.

Case law of national courts

The Constitutional Court, upon the petition of the Commissioner for Fundamental Rights, has abolished the provision on the definition of families of Act No. CCXI of 2011 on the protection of families, because it was excessively restrictive and therefore discriminatory. According to the repealed definition, 'family' was a marriage between a man and a woman plus their direct descendants or adopted children.⁹⁴

Equality body decisions/opinions

Dismissal of pregnant woman during probationary period

In consistence with its well-established case law, the Equal Treatment Authority (ETA) in a new case again concluded that dismissal of a pregnant woman during the probationary period is discriminatory if no proper and well-grounded reason of dismissal is presented by the employer. A woman, employed as a public employee by one of the bodies of Budapest's Municipality, went on sick leave during her probationary period. Later on, but still during the 4-month probationary period, she informed her employer that her illness was related to her pregnancy. The employer suggested the termination of the employment relationship by mutual consent, which was refused by the employee. Later on she was dismissed with immediate effect, still during the probationary period. In the ETA procedure the employer could neither prove that they had decided on the dismissal prior to learning about the employee's pregnancy, nor that they had any work-related ground of dismissal (refusing to do the work of the cashier, not handling financial documents properly, etc.). Since the employer could not present convincing evidence of violation of work rules, or inappropriate work performance, the ETA found discrimination based on the fact that the employer dismissed the woman after she revealed her pregnancy. The ETA did not impose a fine, but only prohibited the public employer from further violating the law, and ordered the publication of the order on its website for 60 days.⁹⁵ (Reinstatement and compensation cannot be awarded, since the ETA has no such power.)

⁹² The members of this group also formed the Women's Riot Association on 28 October 2012.

⁹³ Short news on the activity of the Ombudsman is available in English on <http://www.obh.hu/allam/eng/index.htm>, accessed 11 March 2013.

⁹⁴ The fourth amendment of the Fundamental Law contains a definition of the family that is identical to the one that was repealed by this judgment of the Constitutional Court.

⁹⁵ EBH/585/2012. The order was published on the official website of the ETA from 20 February 2013 to 20 April 2013, <http://www.egyenlobanasmod.hu/data/585-2012.pdf>, accessed 1 March 2013.

Miscellaneous

A nine-month inquiry by the Commissioner for Fundamental Rights on community employment has revealed that several basic rights of workers in community employment are violated. The report on the project ‘Dignity of Labour’, among many other aspects, highlighted that community employment does not help people (re-)enter the primary labour market, their statutory minimum wage is lower than that of those employed in the primary labour market, and the weekly payment system applied in community work lacks any reasonable justification. The Commissioner also warned that it is unacceptable that people are deprived of any welfare benefits because of being unable to work for at least 30 days per year through no fault of their own. In this regard the Commissioner called attention to the need to prevent large numbers of people dropping out of the social welfare system, and to provide alternative solutions to those who do not have access to job opportunities either in the field of traditional labour market or in community employment.⁹⁶

ICELAND – *Herdís Thorgeirsdóttir*

Policy developments

At the initiative of the Minister of Welfare and the Minister of Finance and Economic Affairs, the Icelandic Government decided on 22 January to take immediate measures to promote equal pay and to correct the share of job sectors where women are a majority.

There has been a backlash in the public service sector regarding pay equality matters.

The Ministry of Finance and Economic Affairs has been analysing equal pay developments among civil servants. The share of gender-based choice of work is significant and the focus is on the gender-based pay gap in fields where one sex is a majority. The results show that the pay gap is largest in the healthcare sector, which is the largest sector in the public service.⁹⁷

Recently large numbers of nurses have resigned (the majority of whom are women) who were employed at the Landspítali National University Hospital, due to their low wages, while there is also news of salaries almost ten times higher among those working in financial institutions. The situation regarding the nurses is seriously threatening the healthcare service in Iceland. A new institutional contract between the Landspítali National University Hospital and the Nurses’ Union was signed on 13 February 2013, including salary increases of 5 to 9.6 %, depending on education and work experience.

On 7 January 2013, the Minister of Welfare installed an action group composed of representatives appointed by the authorities as well as confederations in the labour market. The task of this group, appointed for two years, is to promote equal pay.⁹⁸

Legislative developments

The Icelandic Parliament, (the *Althing*), has passed amendments to Act on Maternity, Paternity and Parental Leave No. 95/2000, which entered into force on 1 January 2013. The aim of these amendments initiated by the Minister of Welfare is to reintroduce the maternity/paternity scheme so that parents will be equally positioned, as they were before the constraint measures taken in the wake of the financial collapse. The overall leave that parents can take, separately and jointly, will be gradually extended from 9 months to 12 months in total. In 2016 the full 12-month period leave will apply.⁹⁹

⁹⁶ <http://www.ajbh.hu/allam/jelentes/201203025.rtf>, accessed 1 March 2013.

⁹⁷ <http://www.velferdarraduneyti.is/frettir-vel/nr/33722>, accessed 28 February 2013.

⁹⁸ <http://www.velferdarraduneyti.is/frettir-vel/nr/33700>, accessed 28 February 2013.

⁹⁹ <http://www.velferdarraduneyti.is/frettir-vel/nr/33655>, accessed 28 February 2013.

The new amendments apply to parents of children born, primarily adopted or taken into permanent foster care on or after the above date.¹⁰⁰

The main amendments to Act on Maternity/Paternity and Parental Leave No. 95/2000 are as follows:

1. The right to maternity/paternity leave or maternity/paternity benefits in connection with the birth of a child expires when the child reaches the age of 24 months or 24 months after the adoption of a child or after the child is taken into permanent foster care.
2. A single mother who has undergone artificial insemination or a single parent who has adopted a child or taken a child into permanent foster care acquires the right to maternity/paternity leave or benefits up to 9 months and subsequently in segments for 12 months.
3. The Maternity/Paternity Leave Fund's monthly payment to a parent who is on leave will be 80 % of her/his average total wages during a certain reference period, with a maximum of EUR 2 122 (ISK 350 000).
4. The maximum payment is raised from ISK 300 000 to ISK 350 000 per month (a raise of EUR 1965 to EUR 2292)
5. Parents now have permission to extend their joint right to parental leave or benefits due to the illness of a child. It is now allowed to extend the right for up to 7 months in the case of a seriously ill child or a severely disabled child, which requires more parental care.

Equality body decisions/opinions

The Equality Complaints Committee ruled on 12 December 2012 in favour of a woman who claimed that she was more qualified than a man who had been hired as a specialist with the Central Bank of Iceland. The Committee held that there was a considerably smaller number of women specialists working for the Central Bank and the woman in question was at least equally qualified as the man, hence the Bank should have hired the woman referring to Article 18 of Gender Equality Act No. 10/2008, which imposes the obligation on employers in the labour market to specifically place women and men on an equal footing within their enterprises and to place particular emphasis on achieving equal representation of women and men in managerial and influential positions. The Central Bank was found to be in breach of the Gender Equality Act.¹⁰¹

Miscellaneous

Speaking of influential positions, it may be pointed out that there is a highly male bias when looking at the leaders in Icelandic politics at present. Parliamentary elections will be held on 27 April 2013. There are five main political parties competing and their leaders are all middle-aged men with similar backgrounds, apart from one woman (leading the smallest party of the five). The conservatives have a male leader and a female deputy; the second largest party has a male leader and male deputy; the social democrats have a male leader and a female deputy; the 'bright future' party has a male leader and a younger, female deputy and the Left Greens have replaced their long-time chairman with a young woman. The chief editor of the most conservative daily newspaper has accused the former chairman (whose party is going down in polls) of using the younger woman (at present Minister of Culture) as 'window dressing'.¹⁰²

¹⁰⁰ <http://www.faedingarorlof.is/frettir/nr/493/> and <http://www.althingi.is/dba-bin/ferill.pl?ltg=141&mnr=496>, accessed 27 February 2013.

¹⁰¹ Case No. 6/2012 Equality Complaints Committee; <http://www.urskurdir.is/Felagsmala/KaerunefndJafnrettismala/2012/12/12/nr/5542>, accessed 28 February 2013.

¹⁰² <http://evjan.pressan.is/frettir/2013/02/18/ritstjori-morgunbladsins-segir-katrinu-gluggaskraut-ogedsleg-kvenfyrirlitning/>, accessed 3 April 2013.

IRELAND – Frances Meenan**Policy developments**

The Minister for Justice and Equality announced¹⁰³ on 18 December 2012 that Directive 2010/18/EU of 8 March 2010 was going to be transposed into Irish law. The European Union (Parental Leave) Regulations¹⁰⁴ which came into operation on 8 March 2013 provide that each employee parent (with one year's service) is entitled to 18 weeks unpaid leave for each natural or adopted child up to eight years of age. Leave is non – transferable between parents except when they are working for the same employer. Parental leave may consist of a continuous period of 18 weeks or of separate blocks of a minimum of six continuous weeks or by agreement on more favourable terms. In addition to the right to return to work in their own job or suitable alternative employment, employees are allowed to request a change in their working hours or pattern of work. Employers are required to consider the request but are not required to grant it. However, what is of particular note is that the Minister has stated that the opportunity will be taken to consolidate all legislation regarding family leave into one piece of legislation. The legislation presently comprises the Maternity Protection Acts 1994 and 2004, the Adoptive Leave Acts 1995 and 2005, the Parental Leave Acts 1998 and 2006 and the Carer's Leave Act 2001. All this legislation is very complicated and now comprises numerous amending statutes and regulations. Any consolidation and simplification would be welcome. It must be emphasised, however, that this project will take some time.

Legislative developments

The Equal Status (Amendment) Act 2012¹⁰⁵ entered into force on 20 December 2012. The Act provides for the amendment of certain provisions of the Equal Status Act 2000 so as to provide in Irish law for the mandatory introduction of unisex premia and benefits in insurance as from 21 December 2013.¹⁰⁶

The administration of the Equality Tribunal has been transferred to the Department of Jobs, Enterprise and Employment from the Department of Justice and Equality.¹⁰⁷ This development is one of the first stages in the development of a new adjudication system in employment protection legislation. The intention of the new system is to provide speedier, cheaper and more efficient access to adjudication in respect of employment protection legislation.

The Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012¹⁰⁸ aims to give practical guidance to employers, employers' organisations, trade unions and employees on what is meant by sexual harassment and harassment in the workplace, how it may be prevented and what steps to take if it does allegedly occur to ensure that adequate procedures are available to investigate the complaint and prevent recurrence. The Code only applies to sexual harassment or harassment on any of the nine grounds under employment equality legislation: gender, civil status, family status, age, religion, race, sexual orientation, disability and the traveller grounds.

Case law of national courts

Surrogacy has been the subject of a number of cases more recently. Under Irish legislation the woman who gives birth to a child, also the surrogate mother is the legal mother of the child (even if the ovum from which the child was produced was provided by one of the

¹⁰³ <http://www.justice.ie/en/JELR/Pages/PR12000356>, accessed 2 March 2013.

¹⁰⁴ S.I. No. 81 of 2013.

¹⁰⁵ <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2012/11012/d.pdf>, Accessed 4 March 2013.

¹⁰⁶ <http://www.oireachtas.ie/viewdoc.asp?DocID=22367&&CatID=59&StartDate=01>, Accessed 24 April 2013.

¹⁰⁷ Equality Tribunal (Transfer of Departmental Administration and Ministerial Functions) Order 2012 S.I. No. 531 of 2012.

¹⁰⁸ S.I. No. 208 of 2012.

commissioning adults, or by a donor). Under the Guardianship of Infants Act 1964, the mother of a child born outside marriage is the child's sole guardian.¹⁰⁹ A mother who did not give birth to a child (who had been born to a surrogate mother) may not be registered as the mother of the child on the birth certificate. However, the recent High Court judgment in *MR and DR (suing by their father and next friend OR) and OR and CR v An tArd Chlaraitheoir* [Registrar General], *Ireland and the Attorney General*¹¹⁰ granted a declaration that that CR is the mother of MR and DR pursuant to the Status of Children Act 1987. OR and CR are husband and wife who respectively are the genetic father (whose sperm was used in the fertilisation process) and genetic mother (whose ovum was used in the fertilisation process) of the applicant twins who were born to a surrogate mother. It was also declared that the continued failure to recognise and acknowledge that CR and OR as parents of MR and DR was unlawful and fails to vindicate and protect the constitutional rights of the applicants. It has been announced that the State will appeal the judgement to the Supreme Court 'to bring certainty to this vital area of law and to ensure that the legislature's scope to legislate is absolutely clear'. In addition, there are concerns that 'the judgment raised important questions about how motherhood may be determined under Irish law and has potentially very serious consequences which could, by linking motherhood exclusively to genetic connection, affect a potentially large number of families'.¹¹¹ It was announced during the course of the case that the Minister for Justice and Equality intends to publish the heads of a Bill (draft legislation) entitled the Family Relationship and Children's Bill.

In *A Complainant v Department of Social Protection*¹¹² the dispute concerned a complaint of unlawful discrimination by not recognising the complainant's entitlement to maternity or adoptive leave where the complainant states she is the biological mother of a child born to a surrogate in another jurisdiction. The equality officer considered that the complaint was compelling but nonetheless given that there is no legal recognition of surrogacy that the claim must fail. In addition, there is also the reference to the CJEU for a preliminary ruling from the Irish Equality Tribunal in the case of *Z v A Government Department and the Board of Management of a Community School*¹¹³ where the CJEU is requested to consider as to whether inter alia Directive 2006/54/EC is to be interpreted as meaning that there is discrimination on the grounds of sex where a woman whose genetic child has been born through a surrogacy arrangement and who is responsible for the care of her child from birth is refused paid leave from employment equivalent to maternity leave and/or adoptive leave.¹¹⁴

¹⁰⁹ Extracted from Department of Justice and Equality Citizenship, Parentage, Guardianship and Travel Documents Issues in Relation to Children Born as a Result of Surrogacy Arrangements Entered into Outside the State. See <http://www.justice.ie/en/JELR/Pages/Surrogacy>, accessed 4 March 2013.

¹¹⁰ [2013] IEHC 91, <http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256fc3004a279de/e3f0dc917872554c80257b250052dab3?OpenDocument>, accessed 21 June 2013.

¹¹¹ Irish Times, 6 June 2013, <http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/c3f0dc917872554c80257b250052dab3?OpenDocument>, accessed 20 June 2013.

¹¹² DEC-S2011-053. See <http://www.equalitytribunal.ie/Database-of-Decisions/2011/Equal-Status-Decisions/DEC-S2011-053-Full-Case-Report.html>, accessed 4 March 2013.

¹¹³ See Case 363/12 See <http://curia.europa.eu/juris/liste.jsf?pro=&nat=&oqp=&lg=&dates=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=363%252F12&td=ALL&pcs=O&avg=&page=1&mat=or&parties=z&jge=&for=&cid=117645> accessed 21 June 2013. The case was heard on 28 May 2013 and the Advocate General's Opinion is expected in October 2013.

¹¹⁴ Please note that in all these cases that there are no names or details as there is strict confidentiality.

ITALY – Simonetta Renga**Policy developments*****Cuts in funds of Positive Action Plans***

Act No. 229 of 24 December 2012 does not allocate any funds to support the Positive Action Plans required by Article 44 of the Code for Equal Opportunities. One of the main trade unions (CGIL) and the National Committee for Equal Opportunities, which, among other duties, is in charge of selecting the Action Plans to be approved for public financing, both requested the immediate reallocation of the funds in order to start executing the Action Plans submitted to the Committee last year. No answer had been provided yet before the recent political elections. So the buck has been passed to the next government, which is expected to be in charge by the end of March.

The lack of public funds, although clearly due to the serious economic crisis, shows once again that women are not really considered a resource. Most of all, the promotion of equal opportunities is not perceived as a win-win solution which can contribute to the renewed kick-start of the economy but as an expensive intervention reserved for times of plenty. Also the criticism from unions and the Committee particularly hits the mark where it underlines that the financial cuts will have a detrimental effect on the parties that have already presented Action Plans (289) and have spent economic and intellectual resources to this end.

Legislative developments***Regulations implementing Act No. 120/2012 on a quota system for company boards of state subsidiary companies***

After the timely implementation of Act No. 120/2012 for listed companies, Decree No. 251 of 30 November 2012 finally established the regulations to enforce this Act for state subsidiary companies as well. The latter Act introduced a quota system for the appointment of managing directors and auditors by providing that statutes shall ensure the balanced participation of the two sexes in company boards. With this aim, for three periods of tenure, the less-represented gender shall obtain at least one third of the posts compared to the other sex. Moreover, in the event of infringement of the regulations, a sanction procedure is provided to be applied by the Watch Authority following the regulations specifically issued for this purpose.

Under this recent new Decree, both the Prime Minister's Office and Minister for Equal Opportunities are responsible for the task of both monitoring the implementation of the law and reporting on it to Parliament every three years. The board of managers/auditors must therefore inform them on the composition of the company boards (including possible changes as the quota system also applies to substitutes) and allow them to apply, in the event of inadequate balance, the sanctioning procedure, which ranges from a first short-term warning to the dissolution of the company board. The same notice on possible gaps in the gender balance can be given by any interested party. Both the compulsory notice and the possibility for any party to report the unbalance can certainly increase the effectiveness of the law by strengthening the control on its state of implementation, although no remedies have been provided if the notice is not given.

From this point of view, another part of the regulations can also be appreciated, where they state that if the calculation of the quota does not result in a round number for the members of the less-represented gender, the latter is to be rounded up. In any case, some further issues regarding the regulations for state subsidiary companies, as well as those regarding listed companies, will probably have to be postponed until the first renewals of company boards and auditor boards after the law came into force on 12 August 2012.

Gender representation in politics, local government bodies and public administration

Act No. 215 of 23 November 2012 introduced new regulations aimed at achieving gender equality in politics and in hiring procedures in public administration. Although many regional, provincial and municipal statutes already included provisions aimed at rebalancing gender

representation, Act No. 215/2012 is definitely a step forward in the implementation of the principle of equal opportunities in this field, most of all where it stipulates the presence of women as a condition for legitimacy of the appointment of local government bodies, and other corporate bodies (not elective ones) of the municipality or the province, or in businesses and institutions depending on them. The new regulations also introduce a quota system for all administrative elections regarding the lists of candidates, where neither of the two sexes can be represented in a ratio higher than two thirds.

Unfortunately, the intervention is less 'invasive' at the regional level (where it only refers to the aim to ensure gender equality to be included in the statutes) and also leaves out political elections. In any event, the debate on women's participation in politics in recent years has had definite impact both on the recent changes mentioned above and on gender representation in lists of candidates, mainly of centre-left parties, for the political elections which have just taken place. Actually, the enforcement of statute rules regarding equal opportunities together with a very high result of the new movement of citizens called '5 stars', largely consisting of youngsters and women, has increased women's representation in Parliament from 20 % to 31 %.

In this respect, Article 4, which provides that the media, as regards broadcasts on politics, shall respect the principle of gender equality in the access to public posts and elective offices provided by Article 51 of the Constitution for the promotion of equal opportunities, seems very interesting, although its wording could be clearer. On the whole, the attention for this issue has been higher than it was in the past and about 50 associations promoting gender equal opportunities have signed an 'Agreement for Equal Democracy' to promote women's participation in politics in the next legislature and also in the last electoral campaign.

Finally, Article 5 amends Article 57 of Decree No. 165/2001 (regarding equal opportunities in public administration) by providing that the Equality Adviser must be informed of the appointment of each commission for hiring competitions in the public sector, so as to check that at least one third of the members is a woman. If women's representation in the commission is lower, the Equality Adviser must warn the public administration to eliminate the infringement and if it persists she/he must take the public administration to court. This amendment could actually improve the effectiveness of the law as it helps the Equality Adviser to ensure its enforcement.

Self-employment and entrepreneurship: parental leave

Act No. 228 of 24 December 2012 mainly includes some amendments which were necessary in order to implement EU law. It extended the regulations on both maternity allowance and parental leave provided for self-employed workers by the Code for the Protection of Motherhood and Fatherhood to self-employed fisherwomen in small-scale coastal and inland fishing. It also changed the regulations on parental leave in general by entitling parents to use this leave by the hour, according to criteria to be established by collective agreements. This change could certainly improve the conciliation between private and working life, although we will probably be able to evaluate its real impact only after the next renewal of collective agreements.

Other amendments to the Code for Equal Opportunities regard the duty to exchange information with EU institutions at the respective level, which is given to Equality Bodies, and the extension of the ban on discrimination in the access to work provided by Article 27 to 'the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity'. In particular, this extension can be considered a useful clarification, although it shows once again the bad habit to transpose EU directives by mere literal translation, without any real effort of implementing it in the specific national legal system.

LATVIA – Kristine Dupate

Legislative developments

On 29 November 2012, the Latvian Parliament (*Saeima*) after long political discussions finally adopted amendments to the Law on Prohibition of Discrimination against Natural Persons – Performers of Economic Activities.¹¹⁵ They entered into effect on 2 January 2013.

Such amendments were necessary to correctly transpose Directive 2010/41/EU and Directive 2000/78/EC. With regard to Directive 2010/41/EU it was necessary to transpose Article 4(1) requiring to also cover ‘*the launching or extension of any other form of self-employed activity*’ and with regard to Directive 2000/78/EC it was necessary to provide non-discriminatory access to self-employment on the grounds of disability, age, religion and belief and sexual orientation.

Hot political debate concerned the idea to extend non-discrimination rights on the grounds of sexual orientation and age with regard to the access to goods and supply of services necessary for the performance of self-employed activities. In the end, the Latvian Parliament decided to grant non-discrimination rights on the grounds of disability, religion and belief, and sexual orientation, leaving age uncovered. Such political decision was taken on account of the pressure of the Employers’ Confederation arguing that non-discrimination on the ground of age would outlaw any promotion of goods and services at discount prices for special age groups such as children or persons who have reached the retirement age. The attempt was in vain to explain the broad margin of appreciation provided by EU law allowing justification of the supply of goods and services on different conditions for special groups in special circumstances.

On 20 December 2012, the Latvian Parliament adopted amendments to the Law on Statutory Social Insurance, which entered into effect on 9 January 2013. The amendments envisage amendment of the Informative Notice of the Law with reference to Directive 2010/41/EU.¹¹⁶

The respective amendments are formal. No other measures in the field of social security were taken in order to transpose Directive 2010/41/EU. The officials of the Ministry of Welfare consider that all the necessary rights were already granted by the measures taken to transpose Directive 86/613/EEC. The Law on Statutory Social Insurance and secondary Regulations of the Cabinet of Ministers already provide mandatory social insurance for all self-employed persons and a voluntary right to access social insurance for married spouses of economically active persons. Such social insurance provides the right to maternity, paternity and childcare allowance.

The fact that national law does not recognise the status of ‘helping spouse’ of a self-employed person and/or individual entrepreneur (e.g. owners of agricultural farms) and that the number of spouses who have voluntarily accessed statutory social insurance is very small deserves further research and debate on the effectiveness of the transposition of Directive 2010/41/EU in Latvia.

Case law of national courts

On 2 November 2012, the Supreme Court of Latvia adopted a decision in which the Court provided an interpretation of the reversal of the burden of proof in cases of victimisation.¹¹⁷

It held that norms on victimisation provided by the Labour Law¹¹⁸ (Article 9) must be interpreted so that they do not require an employee to submit proof of victimisation. An employee must merely show facts which testify to possible victimisation.

¹¹⁵ *Fizisko personu – saimnieciskās darbības veicēju – diskriminācijas aizlieguma likums*, Official Gazette No. 199, 19 December 2012.

¹¹⁶ Amendments to the Law on Statutory Social Insurance (*Grozījumi likumā “Par valsts sociālo apdrošināšanu”*), Official Gazette No. 6, 9 January 2013.

¹¹⁷ Decision of 2 November 2012 of the Senate of the Supreme Court of Latvia in Case No. SKC - 941/2012, available in Latvian on <http://www.at.gov.lv/lv/info/archive/departments/2012/>, accessed 4 March 2013.

Although Article 9 of the Labour Law expressly provides a definition of the reversal of the burden of proof in cases of victimisation, the Supreme Court felt it necessary to explain, once again, the application of the respective instrument to the lower courts. It was reported that already on 6 June 2012 the Supreme Court provided a similar explanation of the concept of the reversal of the burden of proof in discrimination cases.¹¹⁹ In this new decision, the Supreme Court repeated the same explanation with regard to victimisation. In substance the Court made it clear that Article 9(2) of the Labour Law providing for a reversal of the burden of proof in case of victimisation must be interpreted in the same way as Article 29(3) which provides for the same reversal of the burden of proof in discrimination cases.

This new case did not concern victimisation in the context of non-discrimination rights, because victimisation under the Labour Law is also prohibited in cases where an employee uses any of his/her employment rights or reports on possible offences by an employer to administrative institutions. Since this is an interpretation of a general norm – Article 9(2) – such an interpretation will also be binding in cases of victimisation concerned with gender equality.

Miscellaneous

On 19 December 2012, the Supreme Court of Latvia adopted a decision on the concept of pay under national law.¹²⁰ It declared that the concept of pay under national law (Article 59 of the Labour Law)¹²¹ also includes compensation for dismissal in the context of calculation and amount.

The Court reached this conclusion on the basis of the CJEU's judgment in *Barber*.¹²² The Court did not take into account the fact that EU law defines the concept of pay only with regard to certain aspects, i.e. gender equality (as in *Barber*), non-discrimination and pay during paid annual leave (or compensation for unused annual leave in case of dismissal). EU law cannot constitute the correct legal basis for the interpretation of the concept of pay within the meaning and context of national law as in the present case. The conclusion of the Supreme Court to rely on EU law as a basis for the interpretation of the concept of pay in a national context is therefore incorrect in view of the relationship between EU and national law.

Nevertheless, the use of the same concept of pay under both EU law and national law may be welcomed, because it ensure uniformity of labour law at both levels, it is easier to understand for those to whom it may concern (employees and employers) and easier to apply by the authorities.

LIECHTENSTEIN – Nicole Mathé

Policy developments

Old-age pensions of non-working parents

In the spring of 2012, the Government installed a working group to examine options for improvement of the position of non-working parents with respect to pension schemes.¹²³ Old-age provisions for non-working parents are a very important topic because parents who stop working or reduce their volume of paid work in order to care for their children suffer

¹¹⁸ Labour Law (*Darba likums*), Official Gazette No. 105, 6 July 2001.

¹¹⁹ Decision of 6 June 2012 of the Senate of the Supreme Court of Latvia in Case No. SKC - 684/2012, available in Latvian on <http://www.at.gov.lv/lv/info/archive/departments/2012/>, accessed 4 March 2013.

¹²⁰ Decision of 19 December 2012 of the Senate of the Supreme Court of Latvia in Case No. SKC 1979/2012, available in Latvian on <http://www.at.gov.lv/lv/info/archive/departments/2012/>, accessed on 4 March 2013.

¹²¹ Labour Law (*Darba likums*), Official Gazette No. 105, 6 July 2001.

¹²² Case C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, ECR 1990 Page I-018899.

¹²³ <http://www.llv.li/amtstellen/llv-ikr-pressemittelungen/pressemittelungen-alt.htm?pmid=175643&lpid=3789&imainpos=2165>, accessed 27 February 2013.

significant financial disadvantages at the pensionable age. Therefore the working group was to examine possibilities to create sustainable benefits for old-age pensions of non-working parents. The interim report states that measures in the framework of the first and the second pillar of the existing pension scheme will not achieve the desired results and it proposes examining the transformation of the former maternity allowance into a sustainable benefit to supply old-age pensions to non-working parents. The Government has considered the idea, deciding it worthwhile to be pursued, and mandated the working group to elaborate further steps.

Reconciliation of work and family

A conference on the reconciliation of work and family was initiated and organised by the governmental department for family and equal opportunities, the Gender Equality Office, Infra (an NGO) and LANV (an employees' association). The conference especially addressed companies, human resource professionals, economic organisations and political decision makers.¹²⁴ The keynote speech stated that effective reconciliation of work and family has significant positive effects on business management. It allows higher productivity of employees, stronger motivation, less absence from work as well as stronger customer loyalty. There is a great variety of measures to allow effective reconciliation of family and work, but each company has to find its own individual way to do so. At the conference, some companies presented their model as best practice examples.

Legislative developments

Parental leave

On 21 August 2012 the Government's report and proposal with regard to the amendment of the Civil Code concerning the transposition 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, was presented to Parliament.¹²⁵ The amendment concerns the framework of Directive 2010/18/EU, which will implement innovations of Directive 2010/18/EU.

The proposal contains the following new aspects: extension of the parental leave from 3 to 4 months; taking into account the interests of employer and employee when deciding on which time basis parental leave can be taken; and changing working hours after returning from parental leave for a certain period of time as agreed between employer and employee.

The Gender Equality Commission has criticised the legislative proposal regarding the way that parental leave is to be financed by the State and by companies, because it is rather impossible for the average family to afford taking unpaid leave. This not only concerns the loss of income but also the obligation to pay all costs for social benefits during the parental leave. The Gender Equality Commission requests in its statement that financing be discussed in order to make sure that parental leave is actually used, citing the commitment of the Government to act with due awareness of the needs of families in fields like infrastructure, politics regarding the world of employment and time allocation, and solidarity in recognising, promoting and supporting family work. Therefore the Gender Equality Commission appeals to all Members of Parliament to vote for a legislative change that goes beyond the strict minimum for the transposition of the above-mentioned Directive.

¹²⁴ <http://www.llv.li/amtstellen/llv-ikr-pressemitteilungen/pressemitteilungen-alt.htm?pmid=175556&lpid=3789&imainpos=2165>, accessed 27 February 2013.

¹²⁵ Press release by the Liechtenstein Information Office, dated 19 September 2012, <http://bua.gmg.biz/BuA/index.jsp>, BuA 2012/82, accessed 27 February 2013.

Miscellaneous

Domestic violence

A project organised by the women's refuge, the Gender Equality Office and the organisation Safe Liechtenstein, in cooperation with many bakeries and shops in Liechtenstein, has addressed the whole general public.¹²⁶ The aim of the project was to make it clear that violence against women is in violation of human rights and to confirm that this is the main message of the international day against violence against women. The project lasted from 25 November until 10 December 2012. During that period bakeries and shops sold their bread wrapped in bags printed with the following message: 'Domestic violence does not come into the bag' (*Häusliche Gewalt kommt nicht in die Tüte*). In German, the slogan means that domestic violence is not accepted at all. With these bread bags the message should have arrived at people's home, where violence mostly takes place. Furthermore very important emergency telephone codes were also printed on the bags, which victims of domestic violence can call to find help.

Family Council

On 13 December 2012 the Family Council held a meeting with members of the Government in order to discuss topics related to the reconciliation of work and family, as well as systems of financing care for children outside the home.¹²⁷ Further topics of the work programme included the following: education for parents, old-age provisions for non-working parents, and prevention of debts made by children and young people.

LITHUANIA – Tomas Davulis

Legislative developments

Test-Achats ruling implemented

With Law no. XI-2277 of 16 October 2012, national legislation (the Law on Insurance)¹²⁸ has now been amended to bring it into line with the CJEU ruling in *Test-Achats*.¹²⁹ Two options were proposed to implement the ruling in Lithuania: the first draft Law No. XIP-4679 was proposed on 20 July 2012 to revise the whole Law. Considering the fact that the first draft Law might not be adopted soon, the Ministry of Finances on 30 August 2012 proposed the second draft Law, No. XIP-4723, which deals with the problem of gender discrimination only. The legislator decided in favour of the first option and the new version of the Law on Insurance was adopted.¹³⁰ Section 95(2) of the Law on Insurance contains the prohibition for the insurer to take into account the gender of the insured person when defining the level of the benefits and calculating the insurance contributions. In addition, Section 95(3) states that the risk of the insurance must not be affected by factors related to pregnancy and maternity. The amendments will enter into force on 1 January 2014. Therefore the current version of the Law still contains the exception to the principle of equality 'previously' allowed.

¹²⁶ <http://www.liv.li/amtstellen/liv-ikr-pressemitteilungen/pressemitteilungen-alt.htm?pmid=176135&lpid=3789&imainpos=2165>, accessed 27 February 2013.

¹²⁷ <http://www.liv.li/amtstellen/liv-ikr-pressemitteilungen/pressemitteilungen-alt.htm?pmid=176749&lpid=3789&imainpos=2165>, accessed 27 February 2013.

¹²⁸ State Gazette, 2003, no. 94-4246; 2011, no. 145-6816.

¹²⁹ Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL and Others v Conseils des ministres* [2011] ECR I-00773.

¹³⁰ State Gazette, 2012, no. 127-6385. The Law can be found on http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=413102 accessed 15 March 2013.

Equality body decisions/opinions

In Lithuania, the Office of the Ombudsman for Equal Opportunities (established in 1999) has overall responsibility for the supervision and implementation of the Law on Equal Opportunities for Women and Men (1998) and the Law on Equal Treatment (2005). The Ombudsman investigates individual complaints on the grounds of gender, age, racial or ethnic origin, religion and belief, disability, sexual orientation, language and social status, and submits recommendations and proposals to Parliament and government institutions regarding the priorities of gender equality policy, including recommendations on amendments to relevant legislation.

In 2012 the Ombudsman submitted several recommendations and proposals to Parliament and government institutions regarding the revision of Acts and the priorities in the policy of equal rights between men and women.

Decision on requirements for candidates for the position of teacher and researcher and on performance evaluation of teachers and researchers

The Law on Higher Education and Research of the Republic of Lithuania establishes the procedure of admission to the position of teacher and researcher in higher education and research institutions.¹³¹ Section 65(1) of the Law on Higher Education and Research stipulates that persons shall be accepted for the position of teacher and researcher in higher education and research institutions, with the exceptions indicated in this Law, in an open competition procedure and for a five-year term of tenure. Section 65(4) of the Law establishes that an employment contract for an indefinite period of time for this position shall be concluded with a person who has won the competition for the same position of teacher or researcher for the second time in succession. A performance evaluation of this person shall be carried out every five years, in accordance with the procedure laid down by higher education and research institutions. A person who fails this performance evaluation shall be dismissed. Persons shall be accepted for a higher position of teaching staff member or research staff member in an open competition procedure as well.

The Office of the Ombudsman for Equal Opportunities concluded that Section 65(4), if applied without taking into account an employee's parental leave, constitutes indirect discrimination against women. In order to establish uniform conditions for performance evaluation for researchers, both women and men, it has been held that it is appropriate and advisable to change the regulations such that the researcher who used pregnancy or maternity leave or childcare leave during this five-year term is to comply with requirements that are reduced in proportion to the time of the leave, or to exclude the period of this special-purpose leave from the five-year performance evaluation period, and not to carry out the performance evaluation for the employee for the relevant period.

Decision on published vacancy

The Office of the Ombudsman for Equal Opportunities investigated an individual complaint raising the question whether a vacancy for waiters with the requirement for the candidate to be male contradicts Section 11 of the Law on Equal Opportunities. Said provision stipulates that in vacancies or in advertisements offering civil service or education opportunities it is prohibited to specify requirements expressing preferences on the grounds of gender, race, nationality, language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin or religion, except for the cases specified in this Law.

The head of the company that placed the vacancy explained that it was placed without any intention to discriminate on the ground of gender, but for unbiased reasons related to the worker's duties, which would also include the organisation of efficient unloading and storage of incoming goods. This job would require lifting 15 kg and heavier boxes and carrying them over distances larger than 10 metres.

¹³¹ State Gazette, 2009, no. 54-2140.

The Office of the Ombudsman for Equal Opportunities concluded that there were no legal provisions prohibiting accepting a woman, even if loads weigh more than 15 kg. In such a situation, the employer must take all possible measures (technical measures including carts and hoists, and organisational measures dividing lifting activities between two persons for example) to reduce the occupational risks to an acceptable level. Based on the Law on Equal Treatment and the Law on Equal Opportunities for Women and Men, the Ombudsman decided to recommend to discontinue the actions violating equal rights, to avoid discriminatory formulations in future vacancies and to prevent restricting access of any person to recruitment procedures.

Decision on the calculation of life insurance premiums

The Office of the Ombudsman for Equal Opportunities received a complaint regarding possible discrimination based on sex. The complainant stated that he was planning to buy a life insurance when he noticed that there was a big difference between the annual premiums for men and women.

A proposal to amend the Law on Insurance of the Republic of Lithuania had already been circulated. The aim of this proposal was to include, among other things, the *Test-Achats* ruling of the Court of Justice of 1 March 2011. The changes proposed in the (at the time Draft) Law on Insurance had been inserted to bring the Law into line with the practice of the CJEU. Given this fact, the Office of the Ombudsman for Equal Opportunities decided to stop the investigation.

LUXEMBOURG – Anik Raskin

Policy developments

Effects of the economic crisis on gender equality

The economic crisis has had no specific legal effects yet. However, on a political level, the budget of the Ministry of Equal Opportunities has been cut in the last few years, which has an impact on its activities and on the activities of the associations that receive financial support from the Ministry.

Gender quotas in the private sector

On 22 January 2011, the Minister of Equal Opportunities announced that she did not rule out the option of introducing a legal obligation for quotas in the private sector. She first wanted employers to put effort into establishing gender-mixed teams until 2014. No precise percentage was set.

In February 2012, the Ministry of Equal Opportunities presented an update of figures on the participation of women in decision-making jobs in the private sector. The percentage of women on boards increased from 16 % in 2003 to 20 % in 2011. This also included all societies run by a board. In Luxembourg, only 8 societies are listed which probably explains why the discussions on gender quotas do not address listed societies.

Between March 2012 and June 2012, Business Federation Luxembourg (*FEDIL*) organised four conferences focussing on gender diversity in business. In July 2012, the *FEDIL* and the Ministry of Equal Opportunities presented a report on the topic, including the conclusions of the conferences.¹³²

Equal pay

The Ministry of Equal Opportunities has launched an improved version of the online tool LOGIB, which can be used by employers in order to evaluate the pay structure of their

¹³² http://www.fedil.lu/fileadmin/user_upload/publications/divers/Fedil_Gender_Diversity_web.pdf, accessed 5 September 2012.

employees and to identify a possible gender pay gap.¹³³ The new version of the tool is said to be easier to use. Recently, the Minister of Equal Opportunities said that she was thinking of imposing an obligation to use the tool on large employers.

Legislative developments

Goods and services

Since 5 July 2012 the content of media and advertising as well as education within the scope of the law that implemented Directive 2004/113/EC¹³⁴ are included in the field of protection against discrimination.

This means that the previous hierarchy of protection between different grounds of discrimination has been eliminated. Before, the protection against discrimination regarding gender in the field of access to and the supply of goods and services did not include media, advertising and education. However, protection against discrimination on the other five grounds did.

On 25 July 2012 the Minister in charge of financial affairs presented a Bill to Parliament to amend the law transposing Directive 2004/113/EC in order to comply with judgment C-236/09 (*Test-Achats*) from the European Court of Justice.¹³⁵

Domestic violence

A Bill aiming to amend the current law on domestic violence has been pending since August 2010.¹³⁶ The Bill is meant to increase protection for victims and their children in cases of domestic violence. In November 2011, the Government introduced amendments to the Bill of August 2010. These amendments have been strongly criticised by civil society, as they are meant to reinforce the rights of the aggressor. One of the amendments enables the specific service that was created years ago in order to provide therapy for aggressors to represent the accused in court, which was not part of the original Bill. Moreover, the original Bill of August 2010 gave the police some new powers. The amendments of November 2011 no longer include these new powers.

Pension reform

A reform on pension rights was approved in December 2012. The reform does not include mandatory individualisation of pension rights, although mandatory individualisation was proposed by the Women's Labour Committee.¹³⁷

Social dialogue

On 25 February 2013, the Minister in charge of employment affairs presented Bill No. 6545¹³⁸ to Parliament in order to reform the 'social dialogue', adapting employee delegation rules. Regarding gender equality one change has to be highlighted. At present, businesses with a certain minimum number of employees have a specific employee representative in charge of gender equality. According to the Bill, the competence of the 'equality representative' will be extended to other grounds of discrimination.

¹³³ <https://logib-lux.personalmarkt.de/>, accessed 5 September 2012.

¹³⁴ OJ L 373/37 of 21 December 2004.

¹³⁵ http://www.chd.lu/wps/PA_1_084AIVIMRA06I4327I10000000/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/133/165/113624.pdf, accessed 5 September 2012.

¹³⁶ http://www.chd.lu/wps/PA_1_084AIVIMRA06I4327I10000000/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/024/913/092132.pdf, accessed 5 September 2012.

¹³⁷ See *European Gender Equality Law Review* 2012-2, p. 106.

¹³⁸ http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/195/199/119948.pdf, accessed 24 April 2013.

Miscellaneous

Annual report of the equality body

The Centre for Equal Treatment (*Centre pour l'Égalité de Traitement* or CET) is concerned with discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. The CET has published its annual report covering the period from 1 January to 31 December 2011. During this period it registered 118 new claims, 14 of which concerned gender discrimination. The CET did not find any gender discrimination in any of the claims.

Since April 2011, the CET has carried out a systematic analysis of employment advertisements in newspapers in order to identify discrimination. It has identified 94 advertisements containing illegal references, 89 mentioning gender, 4 stipulating an age limit, and 1 mentioning both gender and age.

FYR of MACEDONIA – Mirjana Najcevska

Policy developments

In the period from October 2012 until February 2013, the Government continued to adopt new strategies, action plans and annual operational plans for the implementation of action plans.

The latest document adopted by Parliament is the ‘Strategy for gender equality 2013-2020’.¹³⁹ According to the information submitted to Parliament by the Parliamentary Commission for Equal Opportunities: ‘This is the first strategic document of this scale’.¹⁴⁰ It is worth noting that the Strategy was adopted on 20 February 2013, one day before the combined fourth and fifth periodic reports for FYR of Macedonia were submitted to the Committee on the Elimination of Discrimination against Women.¹⁴¹ According to NGOs involved in the preparation of the shadow report submitted to the Committee on the Elimination of Discrimination against Women¹⁴² none of the main NGOs working on issues related to gender equality were involved in the preparation of the Strategy. The whole process of consideration of the Strategy in parliamentary commissions took one day, in only two commissions (the Legislative Commission and the Commission for Equal Opportunities) and without any discussion.¹⁴³

Several operational plans were adopted in the same period: The National Action Plan for combating human trafficking and illegal migration in the FYR of Macedonia (2013-2016),¹⁴⁴ the Action Plan (2013) for enforcement of the National Action Plan of the FYR of Macedonia on the implementation of UN Resolution 1325 (2013-2015),¹⁴⁵ the Action Plan (2013) for implementation of the National Strategy for equality and non-discrimination on grounds of ethnicity, age, mental or physical disability and gender 2012 – 2015,¹⁴⁶ and the Action Plan for implementation of the Strategy to introduce Gender-Responsive Budgeting in the FYR of Macedonia for 2013.¹⁴⁷ According to the shadow report submitted to the Committee on the Elimination of Discrimination against Women: ‘The annual planning of the priority measures

¹³⁹ <http://www.sobranie.mk/ext/materialdetails.aspx?Id=0e309626-494c-49a5-83ef-0ade562bac26>, accessed 3 March 2013.

¹⁴⁰ Information of the Commission for Equal Opportunities No. 28 – 887/2, 18 February 2013.

¹⁴¹ <http://www2.ohchr.org/english/bodies/cedaw/cedaws54.htm>, accessed 3 March 2013.

¹⁴² <http://www2.ohchr.org/english/bodies/cedaw/cedaws54.htm>, accessed 3 March 2013.

¹⁴³ <http://www.sobranie.mk/ext/materialdetails.aspx?Id=0e309626-494c-49a5-83ef-0ade562bac26>, <http://www.sobranie.mk/ext/sessiondetails1.aspx?Id=9daece80-d231-450e-ac6c-95ecf44a1da5>, stenogram from the parliamentary session: <http://www.sobranie.mk/ext/materialdetails.aspx?Id=0e309626-494c-49a5-83ef-0ade562bac26>, all accessed 3 March 2013.

¹⁴⁴ http://www.mtsp.gov.mk/WBStorage/Files/strategy_and_nap_en_0.pdf, accessed 3 March 2013.

¹⁴⁵ <http://www.mtsp.gov.mk/?ItemID=BD66FCC3A7FBCB47AB9150CBFECD2C96>, accessed 3 March 2013.

¹⁴⁶ <http://www.mtsp.gov.mk/?ItemID=BD66FCC3A7FBCB47AB9150CBFECD2C96>, accessed 3 March 2013.

¹⁴⁷ <http://www.mtsp.gov.mk/?ItemID=BD66FCC3A7FBCB47AB9150CBFECD2C96>, accessed 3 March 2013.

and activities regarding the realisation of the National Plan for gender equality is determined by the planning and financial resources of international organisations and donors. There are no established procedures for accountability and responsibility regarding the implementation of annual operational plans for realisation of the National Plan for gender equality.’¹⁴⁸ By way of example: the Action Plan to introduce Gender-Responsive Budgeting in the FYR of Macedonia for 2013 includes not a single activity.

Legislative developments

On 23 January 2013, the Official Gazette of the FYR of Macedonia published the Law Amending the Law on Labour Relations (Amendments) concerning protection of pregnancy, birth and parenthood. The most substantive change is the introduction of an Article (9-b) stipulating protection from discrimination of female workers on the grounds of pregnancy, birth and parenthood. Furthermore, there is a significant change to Article 101 where the ban on firing workers (in this Article the word ‘female’ is not used) during pregnancy, birth and parenthood is elaborated both in favour of the pregnant worker and against possible misuse of pregnancy. A novelty in this Article is the introduction of prior consent of the Trade Union if the pregnant worker is allegedly fired due to violation of contractual obligations or due to heavier disciplinary violations. If the worker is not a member of a Trade Union, the Labour Inspectorate is entitled to give or refuse the prior consent. If no such consent is given, the employer is to initiate court proceedings in order to effectuate the dismissal.

One might dispute whether these amendments were necessary at all, apart from the introduction of prior consent by the Trade Union. This is because the ban on firing workers in the period of pregnancy, birth and parenthood was also present in the previous text of the Labour Law and it was supported by well-spread case law (quite a good example is the case against DTU ‘Handy Telekom’ where all courts – the Basic, the Appellate and the Supreme Courts – were unanimous in declaring void the decision of this company to fire a pregnant worker).¹⁴⁹

Case law of national courts

There has been a verdict of the Appellate Court of Bitola concerning discrimination of a person (the gender is not disclosed) who, once having successfully fought dismissal from work and being back on the job with the same employer, faced victimisation by having to register his or her working hours at another legal entity seated four kilometres from his or her office.¹⁵⁰ Both the Labour Inspectorate and the Basic Court found discrimination, but the Appellate Court nullified this and concluded, inter alia, that: a) the claimant ‘did not prove that there was unequal treatment, and b) that victimisation is of no relevance for the case; ‘if there was some right being violated, the plaintiff should have sued to protect that right’. Both the shift of the burden of proof and victimisation are covered by the current Law on Labour Relations.

Miscellaneous

Promoting regressive traditional models for division of roles and family values

The greatest concern is the increased trend of promoting regressive traditional models for the division of roles and family values through interventions in legislation and policies, as well as a large number of media campaigns supported by significant funding from the national

¹⁴⁸ http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/ESEandAkcijaZdruzenska_FYROM_ForTheSession_CEDAW54.pdf, accessed 3 March 2013.

¹⁴⁹ Supreme Court of the Republic of Macedonia, 22 December 2011, under Rev2.br.927/2011.

¹⁵⁰ Case 557-12 of 16 October 2012.

budget.¹⁵¹ This builds on previous anti-abortion campaigns as well as on a controversial speech of the Prime Minister where he stated that the main role of women is to bear children, and that this is much more important than some useless debate about the rights of women and gender equality.¹⁵² The promotion of traditional values is also present in elementary school textbooks.¹⁵³

Violation against female parliamentarians

On 24 December 2012, parliamentarians from the opposition parties were thrown out of the Parliament's premises by the police. The parliamentarians, including women, were dragged and violated and there was no reaction to this during the violation, which took place right in front of other parliamentarians, by the Minister of Internal affairs and the Minister of finance, or later on by the Commission for Equal Opportunities or the Women's Lobby.¹⁵⁴

Platform for female entrepreneurship

According to the media, a platform for female entrepreneurship has been established in FYR of Macedonia. No other details are available to support this information.¹⁵⁵

MALTA – Peter G. Xuereb

Policy developments

The national elections in March 2013

The situation in Malta is in a state of flux. Elections were held in March and Malta now has a Labour Government for the first time in over 20 years (barring a short two year period in 1996 -1998). The introduction of divorce in Malta in 2011 would appear to have resulted in a general cultural and policy shift in Maltese politics that appears to have cleared the way for other measures related to family rights, such as same-sex civil partnership or civil union (as part of the proposed Cohabitation Law) and the possible adoption of a Gender Identity Law that will give rights to transgender persons, including the right to marry. The Labour Party (while still in opposition) had promised civil unions for same-sex couples.¹⁵⁶ But any new Government, of whatever colour it might be, was expected to introduce Bills on these issues shortly after the election. The main new element being proposed by all political parties, with some nuance, was the inclusion of the new legal institution of 'civil partnership' or civil union for same-sex couples. What can be said is that the two main parties, as well as the smaller ones,¹⁵⁷ had been falling over themselves to appear progressive and this is particularly obvious in their promises to introduce apposite legislation on same-sex 'marriage' – calling it civil partnership or civil union – adoption rights for same-sex couples to be granted 'if in the

¹⁵¹ http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/ESeandAkcijaZdruzenska_FYROM_ForTheSession_CEDAW54.pdf, <http://www.plusinfo.mk/vest/82104/Vladata-kje-poarchi-57000-evra-za-novi-reklami-za-se-mejnite-vrednosti>, accessed 3 March 2013.

¹⁵² <http://24vesti.mk/se-sretnaa-so-premierot-no-ne-se-razbraa> and http://www.telma.com.mk/index.php?task=content&cat=1&rub=15&item=21058&utm_source=daily.mk, both accessed 3 March 2013.

¹⁵³ One example is the textbook for 5th grade pupils (http://issuu.com/e-ucebnici/docs/makedonski_5?mode=embed&layout=http://e-ucebnici.mk/issuu/theme/layout.xml&showFlipBtn=true) where sexual harassment, the role of the father as head of family and gender prejudices are promoted (see: 'The lazy wife' on p. 85; 'Girl turtle went out' on p. 109 and 'Same words with different meanings' on p. 108), accessed 3 March 2013.

¹⁵⁴ <http://alon.mk/wordpress/archives/77225>, accessed 3 March 2013.

¹⁵⁵ <http://www.time.mk/cluster/774f89237c/makedonija-ima-mal-broj-zeni-pretpriemaci.html>, accessed 3 March 2013.

¹⁵⁶ 'Labour promises civil unions for same-sex couples', The Times 12 January 2013; <http://www.timesofmalta.com/articles/view/20130112/elections-news/labour-commits-to.452947>, accessed 13 February 2013.

¹⁵⁷ 'AD for full equality on LGBT rights', The Times 17 January 2013; <http://www.timesofmalta.com/articles/view/20130117/elections-news/ad-for-full-equality-on-lgbt-rights.453534>, accessed 13 February 2013.

child's best interests',¹⁵⁸ women on company boards (the two main parties – Nationalist and Labour, and the Alternattiva Demokratika, the Democratic Alternative Party), better provisions on paternity leave (the Democratic Alternative Party), reform of the Social Security Act to move away from the male bread-winner model,¹⁵⁹ and universal free childcare facilities (all parties).¹⁶⁰ As to women on company boards, the Nationalist Party would have required all government-owned companies to implement a quota of 40 % of the seats for women, while the Labour Party had proposed giving the public the right to contest and vote for boardroom seats in public entities.¹⁶¹ It was stated to be the policy of both of the main political parties to encourage female participation in decision-making at all levels and in all sectors, but not – until recently – to make provisions for such through measures of mandatory positive action, such as a mandatory quota for women on company boards. Things are changing.

Legislative developments

Maternity leave

Maternity leave has been extended. Parliament had previously increased the period of statutory maternity leave from fourteen weeks to sixteen weeks for the year 2012, and has now increased it to eighteen weeks as from 1 January 2013.

The Brief of the National Equality Body (the National Commission for the Promotion of Equality)

Parliament has widened the brief of the main national equality body, the National Commission for the Promotion of Equality (NCPE) to cover other forms of discrimination beyond the current brief of sex equality, and discrimination on grounds of race (excluding employment issues).¹⁶² Coming now within the NCPE's brief are the grounds of gender identity and sexual orientation, religion or belief, and age. The NCPE was given a brief to protect the self-employed and the spouse of a self-employed person in accordance with Directive 2010/41/EU, which required implementation by the Member States by 5 August 2012.

One of the first acts of the new Labour Government was to settle a long-standing court case whereby a transsexual person by the name of Joanne Cassar was claiming her right to marry according to her new identity. The Government has undertaken to change the law in order to clearly give this right, and has agreed to pay full compensation to Ms Cassar, who was financially badly hit by the litigation upon which she was forced to embark when the Registrar of Marriages refused to publish marriage banns in her case on the grounds that marriage could by Maltese law only be entered into by a heterosexual couple.

¹⁵⁸ 'Consensus over gay adoption welcomed', The Times 16 January 2013; <http://www.timesofmalta.com/articles/view/20130116/local/Consensus-over-gay-adoption-welcomed.453457>, accessed 14 February 2013.

¹⁵⁹ 'Muscat promises more gender equality' The Times 11 January 2013; <http://www.timesofmalta.com/articles/view/20130111/elections-news/muscat-promises-more-gender-equality.452824>, accessed 14 February 2013.

¹⁶⁰ 'Proposal could be catalyst for cultural change' The Times 28 January 2013; <http://www.timesofmalta.com/articles/view/20130128/local/-Proposal-could-be-catalyst-for-cultural-change-.455144>, accessed 14 February 2013.

¹⁶¹ 'Handle glass ceiling with care' The Times 2 February 2013; available on <http://www.timesofmalta.com/articles/view/20130202/editorial/Handle-glass-ceiling-with-care.455831>, accessed 13 February 2013; Josette Grech 'Draft Directive on women on boards' The Times 22 November 2012; available on <http://www.timesofmalta.com/articles/view/20121122/business-comment/Draft-directive-on-women-on-boards.446433>, accessed 13 February 2013.

¹⁶² Article 2(1) of the Equality for Men and Women Act 2003, Chapter 456 of the Laws of Malta, as amended by Act IX of 2012, available on <http://www.justiceservices.gov.mt>, accessed 4 April 2013. The Act also redefines 'self-employed worker' and 'discrimination' accordingly.

Case law of national courts

There has been a judgment of some noteworthiness by the Civil Court on a question of damages for sex discrimination.¹⁶³ The daughter of a port worker was refused to succeed her father. According to the Port Workers' Regulations of 1996, if a port worker retired, his eldest son (or his son if only one) had the right to succeed his father on the register of port workers. The father retired in 1992. He had no sons, but had one daughter. She applied for the post but was refused. The Port Workers' Board allotted the post to the father's brother. She sued in the Civil Court and the matter was also referred to the Constitutional Court. The Port Workers' Regulations were held to be unconstitutional due to being in violation of the prohibition against discrimination on grounds of sex (the case occurred before the passage of the Employment and Industrial Relations Act of 2002 and Equality for Men and Women Act of 2003). However, the Port Workers' Board ignored the court rulings. She then brought an action demanding an order for damages in liquidation of those damages. By ordinary standards the damages in this case, as awarded by the Court, were very considerable, amounting to EUR 799 168. It was the dismissive attitude on the part of the Port Workers' Board and that of its successor, Transport Malta, towards the previous court judgments that was held to be the cause of her financial losses, and for this failure, amounting to contempt of court, the Court awarded these record damages. The case is noteworthy for the zero tolerance approach of the Court to sex discrimination.¹⁶⁴

Miscellaneous

Hate crime

Hate crime appears to be on the increase. One widely reported attack last year involved a gang attack on a lesbian couple.¹⁶⁵ The Minister for Justice last year declared that homophobia would be declared a hate crime and the result is the amendment of the Criminal Code, which previously spoke only of racial hatred.¹⁶⁶ Previously, the perpetrators could only be charged with harassment and/or bodily harm.

Equality Mark

I reported last year that twenty-two new organisations had been awarded the NCPE's Equality Mark in recognition of best practice in gender equality.¹⁶⁷ Another fifteen firms were awarded the Equality Mark by the NCPE last year.

¹⁶³ Victoria Cassar v Chairman, Port Workers' Board, First Hall, Civil Court, Case No. 1560/1993/2, decided 15 November 2012, Mr Justice Silvio Meli. Not yet reported. First Hall (Constitutional jurisdiction), 19 October 2000, and Constitutional Court 2 November 2001, cited in the above judgment.

¹⁶⁴ 'Woman awarded €800 000 over gender discrimination' The Times 17 November 2012; <http://www.timesofmalta.com/articles/view/20121117/local/Woman-awarded-800-000-over-gender-discrimination.445643>, accessed 14 February 2013.

¹⁶⁵ Claudia Calleja 'Updated: Thugs attack girl on a bench' The Sunday Times 22 January 2012; <http://www.timesofmalta.com/articles/view/20120122/local/Thugs-attack-lesbian-16-on-a-bench.403284>, accessed 28 March 2012.

¹⁶⁶ Article 82A of the Criminal Code (Chapter 9 of the Laws of Malta) as amended now reads as follows: '82A. (1) Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up violence or hatred against another person or group on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion or whereby such violence or racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months. (2) For the purposes of the foregoing subarticle 'violence or hatred' means violence or hatred against a person or against a group of persons in Malta defined by reference to gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion'. The Criminal Code is available on <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574&l=1>, accessed 14 February 2013.

¹⁶⁷ 22 more organisations obtain Equality Mark, The Times, Thursday 13 December 2012, available at <http://www.timesofmalta.com/articles/view/20121213/business-news/15-more-organisations-obtain-Equality-Mark.449414> accessed 15 December 2012.

THE NETHERLANDS – Rikki Holtmaat

Policy developments

On 5 November 2012 a new Liberal (*VVD*) and Social Democrats (*PvdA*) Government was installed in the Netherlands. The Coalition Agreement contains a paragraph on ‘emancipation and equal treatment,’ where the parties explain their view that equality is an important principle and announce that they will take a number of measures in this area.¹⁶⁸ One of these measures concerns the ‘sole ground construction’ in the exception for churches and schools to make a distinction on the basis of their religious denomination (Articles 5(2) a and c General Equal Treatment Act (GETA)). It has been argued, in particular by LGTB and women’s NGOs that this exception leaves too much room to discriminate (inter alia on the grounds of sexual orientation and sex). The new Government will remove this option from equal treatment legislation. The new Government also announced that it will make education on sexual diversity compulsory. Transsexuals from now on will not need to be sterilised before they can change their registered sex. The (already adopted) law that allows co-parenting by lesbian women will enter into force as soon as possible. Combating all forms of oppression of women and violence in relations of dependency is a priority, as well as criminalizing ‘fake marriages’ (in order to obtain immigration papers) and forced marriages. The Government promised to actively combat unequal pay between men and women.

Legislative developments

On 2 October 2012 the newly established Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*; hereafter: NIHR) was officially opened. This Institute is an integrated Equality Body: the old (since 1994) Equal Treatment Commission (hereafter: ETC) has been merged into the newly established NIHR. The main tasks and authorities of the Equality Body are now regulated in a specific Chapter 2 of the NIHR Act: ‘Investigations and findings relating to equal treatment’ (Articles 9-13).¹⁶⁹ A specific division of the Institute will be charged with dealing with these individual complaints about discrimination (Article 9).¹⁷⁰

National case law: Opinions of the Netherlands Institute for Human Rights (NIHR; former ETC)

Discrimination against a transsexual

A transsexual (male → female) was denied access to an intimate erotic party for lesbian and bisexual women. The reason for the refusal was that some persons who had attended a pre-party and had met this woman there, thought that the transsexual woman was a man or that she was a woman who very much looked like a man. Because in the past men had tried to gain access to their intimate women’s parties, these women felt threatened and uneasy by the claimant’s presence/appearance. The transsexual woman decided to submit a complaint with the NIHR (former ETC).¹⁷¹ The NIHR decided that the refusal to allow the claimant access to the party amounted to direct discrimination on the ground of sex. Offering tickets for the party on the Internet at a price meant that, although it was meant to be an intimate party and although the defendant did not organise these parties as a commercial activity with the intent

¹⁶⁸ See <http://www.rijksoverheid.nl/regering/documenten-en-publicaties/rapporten/2012/10/29/regeerakkoord.html>, accessed 16 November 2012.

¹⁶⁹ Act of 24 November 2011 establishing the Netherlands Institute for Human Rights (*Wet van 24 november 2011, houdende de oprichting van het College voor de rechten van de mens (Wet College voor de rechten van de mens)*, Staatsblad 2011, 573).

¹⁷⁰ For a detailed description of the NIHR’s competences and powers, see: J.E. Goldschmidt, ‘Protecting Equality as a Human Right in the Netherlands. From Specialised Equality Body to Human Rights Institute’, in: *The Equal Rights Review*, 2012, vol. 8, pp. 32-49.

¹⁷¹ Equal Treatment Commission, Opinion 2012-146, published on the website of the NIHR: www.mensenrechten.nl (search: *publikaties/oordeelen*/search form: Oordeel 2012-146), accessed 16 November 2012.

of making a profit, the defendant had indeed publicly offered a service (the organisation of a party). This situation falls under the scope of Article 7(1) sub (d) GETA. The private character of a party is not the same as a legal relationship with a private character – which is excluded from the scope of the GETA (Article 7(3) sub (a) GETA).

Positive action

Again, a Dutch university with a positive action programme in support of female academics (in order to promote better career opportunities) had to defend its policy before the NIHR.¹⁷² Compared to a case in 2011, reported in EGELR 2012-1,¹⁷³ the NIHR took a different route this time by allowing ‘exceptional circumstances’, which may lead to the conclusion that the main criterion of the CJEU, that every position should always in principle be open to applicants of both sexes and that an individual assessment of all candidates regardless of sex should always take place, need not be applied. Such exceptional circumstances can only be accepted when there is proportionality between the measure taken and the aim of the programme. In that regard it must be established that the programme aims to eliminate underrepresentation of female academic staff which is ‘serious and persistent’. Apart from the fact that it now concerns a Technical University that has even greater difficulty in attracting female staff members (since there are fewer females with a degree in technical studies in the Netherlands), it is not very clear why and how the situation in the earlier case of 2011 is substantially different from that in 2012. Nevertheless, it is to be applauded that the NIHR has changed its approach to positive action programmes. The main argument used by the NIHR not to apply the very strict criterion of the CJEU is that the CJEU based its judgments concerning positive action on a legal framework that is different from the current framework. The earlier exception for positive action programmes (in particular in Directive 76/207/EC) was related to the goal of ‘creating equal opportunities’; the current legal framework (inter alia Article 157 TFEU and Recast Directive 2006/54/EC) speaks of ‘ensuring full equality in practice between men and women’.

No discrimination against female applicant by Supreme Court

A female judge who had applied to become a member of the Supreme Court of the Netherlands was not placed on the list of candidates and submitted a complaint about discrimination on the ground of sex at the NIHR.¹⁷⁴ The NIHR found on the basis of the evidence presented by the claimant and the information provided by the SC that there was not enough evidence to conclude that there was a *prima facie* case of discrimination. As regards the non-transparency of the procedure, the NIHR confirmed that indeed any procedure in which a job vacancy is being filled should be clear and precise and should be implemented in a systematic manner (see Opinion 2010-15). This is necessary, because otherwise the organisation runs the risk that consciously or subconsciously there is unlawful discrimination, and does not allow any control over the procedure. The selection procedure at the SC was indeed found not to be transparent or clear and was not applied systematically. Procedural obscurity as well as unbalanced representation of both sexes in the workforce may indicate discrimination, but there need to be other concrete circumstances to indicate that this may be the case. In fact, the NIHR was convinced that the claimant had been offered an extra opportunity in the internship. Finally, the NIHR discussed the low percentage of female SC judges. These figures are of a general nature, and as such cannot contribute to the suspicion that discrimination has taken place. In conclusion, the NIHR stated that the evidence provided by the claimant did not amount to a suspicion of discrimination in the selection procedure for SC judges. Nevertheless, it recommended the SC to make the selection procedure for SC judges more transparent and to apply this procedure in a systematic manner.

¹⁷² NIHR Opinion 2012-195, published on the website of the NIHR: www.mensenrechten.nl (search: *publikaties/oordelen*/search form: Oordeel 2012-195), accessed 6 February 2013.

¹⁷³ *European Gender Equality Law Review* 2012-1, p. 89.

¹⁷⁴ NIHR Opinion 2012-189, published on www.mensenrechten.nl (search: *publikaties/oordelen*/search form: Oordeel 2012-189), accessed 12 February 2013.

Miscellaneous

In January 2013, the European Commission finally decided to take a case against the Netherlands to the CJEU because it believes that the Netherlands have not fully implemented the Recast Directive.¹⁷⁵ Dutch national legislation does not contain an explicit provision that women have the right to return to the same job/position after their pregnancy and maternity leave and can benefit from all favourable changes in labour conditions during their period of leave. The Dutch Government believes that this has been sufficiently regulated in labour legislation. However, considering the number of complaints from women on this issue submitted to the NIHR, it remains to be seen whether Dutch labour legislation really offers sufficient protection.

As regards the proposal of the European Commission for a ‘Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures’ (Proposal of 14 November 2012 (COM (2012) 614 final), the Government as well as a majority in Parliament believes that this proposal is contrary to the principle of subsidiarity.¹⁷⁶ Therefore, this Directive is not likely to receive any support from the Dutch Government.

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¹⁷⁵ See http://europa.eu/rapid/press-release_MEMO-13-22_nl.htm, accessed 1 March 2013.

¹⁷⁶ Kamerstukken II, 2012-2013, 33 483, no. 2.

¹⁷⁷ Equal Treatment Commission, Opinion 2012-146, published on the website of the NIHR: www.mensenrechten.nl (search: *publikaties/oordeelen*/search form: Oordeel 2012-146), accessed 16 November 2012.

¹⁷⁸ NIHR Opinion 2012-195, published on the website of the NIHR: www.mensenrechten.nl (search: *publikaties/oordeelen*/search form: Oordeel 2012-195), accessed 6 February 2013.

¹⁷⁹ *European Gender Equality Law Review* 2012-1, p. 89.

underrepresentation of female academic staff which is ‘serious and persistent’. Apart from the fact that it now concerns a Technical University that has even greater difficulty in attracting female staff members (since there are fewer females with a degree in technical studies in the Netherlands), it is not very clear why and how the situation in the earlier case of 2011 is substantially different from that in 2012. Nevertheless, it is to be applauded that the NIHR has changed its approach to positive action programmes. The main argument used by the NIHR not to apply the very strict criterion of the CJEU is that the CJEU based its judgments concerning positive action on a legal framework that is different from the current framework. The earlier exception for positive action programmes (in particular in Directive 76/207/EC) was related to the goal of ‘creating equal opportunities’; the current legal framework (inter alia Article 157 TFEU and Recast Directive 2006/54/EC) speaks of ‘ensuring full equality in practice between men and women’.

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Miscellaneous

In January 2013, the European Commission started an infringement procedure against the Netherlands because it believes that the Netherlands have not fully implemented the Recast Directive.¹⁸¹ Dutch national legislation does not contain an explicit provision that women have the right to return to the same job/position after their pregnancy and maternity leave and can benefit from all favourable changes in labour conditions during their period of leave. The Dutch Government believes that this has been sufficiently regulated in labour legislation. However, considering the number of complaints from women on this issue submitted to the NIHR, it remains to be seen whether Dutch labour legislation really offers sufficient protection.

As regards the proposal of the European Commission for a ‘Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures’ (Proposal of 14 November 2012 (COM (2012) 614 final), the Government as well as a majority in

¹⁸⁰ NIHR Opinion 2012-189, published on www.mensenrechten.nl (search: *publikaties/oordelen*/search form: Oordeel 2012-189), accessed 12 February 2013.

¹⁸¹ See http://europa.eu/rapid/press-release_MEMO-13-22_nl.htm, accessed 1 March 2013.

Parliament believes that this proposal is contrary to the principle of subsidiarity.¹⁸² Therefore, this Directive is not likely to receive any support from the Dutch Government.

NORWAY – Helga Aune

Policy developments

The Government will mark 100 years of women's right to vote in political elections on 11th June 2013 with an open celebration in front of the Parliament. The celebration will address children alongside adults through various artistic performances. A variety of lectures and programs will also mark the anniversary.

Legislative developments

Parental leave periods divided in three parts

Parents (including those who adopt) have a right to extensive leave from work as stipulated in the Working Environment Act (WEA), for a period of up to three years, one of which is paid. The right to benefits during this leave is laid down in the National Insurance Act (NIA). The parental benefit entitlement period in conjunction with birth is either 47 weeks at the full rate, or 57 weeks at the reduced rate. Currently, the mother must take three weeks leave before the birth and 6 weeks after the birth. The father is entitled to 12 weeks leave. It is up to the couple to decide how to spend the remaining period of the leave. From 1 July 2013 the rules on parental leave will be amended; 12 weeks are reserved to each parent as maternity and paternity leave. The amendments do not alter the existing leave period but are (according to the politicians) an important step towards raising awareness, especially regarding fathers' entitlement to leave. At present this entitles women to parental leave, but not to a specific maternity leave. This may be seen as conflicting with Directive 92/85 article 8, re article 2b and the Framework agreement clause 2 no. 2 in conjunction with Directive 2010/18/EU. These all explicitly state that maternity leave serves another purpose than parental leave.¹⁸³

New Gender Equality Act

The Government presented on the 22nd March 2013 its proposal for a new Gender Equality Act.¹⁸⁴ In general the Government states that the main reason for not proposing one common act for all grounds of discrimination is that it is imperative that the gender aspect remains clear and visible. However, in order to increase public usability, the government proposed to create a common design to be applied to all anti-discrimination acts. The preparatory works state that the intention is not to alter the content of the former act of 1978, but rather to transform it into its new design. The extent to which this has been achieved remains to be seen. The parliamentary discussions have been arranged for the 10th June 2013.

Part-time employees right to contract to average working time during the last 12 months

The Government presented on the 15th March 2013 various proposals for amendments to the Working Environment Act (Prop. 83 L (2012-2013) in an effort to combat involuntary part-time work. Approximately 40% of all employed women in Norway work part-time. Involuntary part-time work occurs when an employee wishes to work more, but is unable to secure employment contracts for full-time positions. This is especially prevalent in the health-sector, education and retail industry. In these such sectors part-time, rather than full-time, positions predominate. The proposed amendments are:

¹⁸² Kamerstukken II, 2012-2013, 33 483, no. 2.

¹⁸³ See also Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxemburg* [2005] ECR I-03067.

¹⁸⁴ Prop. 88 L (2012-2013).

- New section 14-1: An obligation on the side of employers to have at least once a year, consultations with the employee's representatives on the use of part-time work at the enterprise.
- New section 14-3, third paragraph: When an employee has made use of its preferential right to expanding her position to a full time or a bigger position (according to section 14-3 first and second paragraph), has the employer an obligation to discuss/consult with the employee about the matter before making its decision.
- New section 14-4 a: This section provides a completely new right into the Working Environment Act providing a right for part-time workers to an employment contract to a position equal to the average of the actual time worked during the last 12 months, unless the employer can provide documentation that the need for the extra work is no longer present.
- New section 14-4 b: This section regulates the effects of violations of part-time workers right to a position according to section 14-4 a. The court may after demand from the employee state that the person is awarded such a position (equal to the average of the last 12 months of working). In addition the employee may be awarded damages.

The Parliament has set the date for recommendations from the Committee to 23rd May, and the subsequent parliamentary discussions are expected to take place on the 4th June 2013.

The proposed amendments seem to be adequate steps towards addressing the structural element of inequality between men and women in the Norwegian employment market. In reality, women in certain professions are routinely expected to work part-time. The protection against discrimination at the collective level does not provide much help in these cases where the problem is at the individual level.

Case law

In a case concerning direct discrimination arising from a violation of Section 3 of the Gender Equality Act, the Borgarting Court of Appeal decided that the rules on positive action (Section 3a) were applicable.¹⁸⁵ In this case, the military (*Forsvarssjefens stab*) ranked a man as the best qualified in its recommendation for employment as the new head of the military's schools, whereas the Ministry of Defence recommended a woman. The King (as the Government) followed the Ministry's recommendation and employed the woman. The Court of Appeal found contrary to the Court of First Instance that the Government had put emphasis on sex, and since the appeal Court did not find the two applicants even nearly equally qualified, the pre-conditions for using positive action according to section 3a were not satisfied. The Norwegian state was found in violation of the Gender Equality Act and the male applicant was awarded NOK 600 000 (Euro 86 551) in damages and NOK 50 000 (Euro 6 658) in non-pecuniary damages. In newspapers it has been reported that the State is considering an appeal to the Supreme Court.

POLAND – Eleonora Zielińska

Policy developments

In Poland, promoting equal treatment is no longer considered a priority issue (if it ever was). This is evidenced by the complete lack of support in the Polish Parliament for the draft directive on improving gender balance among non-executive directors of companies, to which many deputies of the governing coalition (PO and PSL) contributed. This decision has placed Poland in the group of 6 Member States that did not express support for the draft directive.

Another significant example illustrating the current situation is the refusal of Parliament to accept any of the three draft laws on civil partnerships, one of which was presented by the

¹⁸⁵ LB-2011-198142, 7 May 2013.

ruling party (PO). The accompanying parliamentary debate included a wide range of homophobic statements by MPs. In addition, Polish registry offices, despite repeated interventions of the Government Plenipotentiary for Equal Treatment,¹⁸⁶ continue to refuse to issue Polish citizens intending to conclude same-sex marriages abroad with certificates proving their unmarried status to confirm that according to Polish law they are allowed to conclude a marriage abroad.

It is also significant that the draft law which should amend the Polish Labour Code so as to comply with the requirements set forth by the Council 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, is still pending,¹⁸⁷ although the deadline for its implementation (already extended once) will expire on 8 March 2013.

The Strategy of State Development until 2020, adopted in December 2012, mentions the difficult demographical situation and includes measures to combat this problem (e.g. extending the period of employment and increasing people's professional activity), without considering the problem from a gender perspective, however.¹⁸⁸ For the Human Rights Defender (RPO), discrimination with regard to sex is not a priority either. Her recent actions as equality body have mostly concentrated on problems of people with disabilities, immigrants and the elderly.¹⁸⁹

There have also been some developments, however, which could improve the implementation of the prohibition to discriminate with regard to sex. With the objective to improve the reconciliation of private and professional life, the Prime Minister has announced the introduction of family-friendly legal regulations in 2013 (see below). Worthy of approval is the fact that, despite some objections, the Council of Europe Convention on preventing and combating violence against women and domestic violence has finally been signed. The Government Plenipotentiary for Equal Treatment has also shown significant activity with regard to combating sex discrimination.

Legislative developments

Lack of support in Polish Parliament for EU draft directive aimed at increasing proportion of women on company boards

As reported before, on 4 January 2013, the Polish Parliament decided that the draft directive of the European Parliament and of the Council on improving gender balance among non-executive directors of listed companies and the relevant measures would be incompatible with the principle of subsidiarity.¹⁹⁰ The reasoning of the Parliamentary Commission report, constituting the basis for this decision, indicated among other things that the matter of gender imbalance in company bodies is perceived by the European Commission only through the prism of a specific number of women, expressed in percentages, who currently hold positions in the bodies of the largest publicly-traded companies.¹⁹¹ According to Polish parliamentarians the Commission did not provide any analysis of this phenomenon in terms of its causes in the different Member States and that more useful in this regard would be e.g. to compare in various Member States the number of women who have applied for high positions in companies and the number of women who were actually selected. This, according to the PL Parliament, would allow better identification of the source of the problem in various Member

¹⁸⁶ http://rownetraktowanie.gov.pl/sites/default/files/scan0322_000.pdf, accessed 20 January 2013.

¹⁸⁷ *Projekt z dnia 8 listopada 2012*, <http://www.mpips.gov.pl/bip/projekty-aktow-prawnych/projekty-ustaw/prawo-pracy/pustawa-o-zmianie-ustawy--kodeks-pracy/#akapit5>, accessed 28 February 2013. As mentioned in the *European Gender Equality Law Review* No. 2/2012, p. 127.

¹⁸⁸ https://sejmometr.pl/sejm_druki/2202246, accessed 25 February 2013.

¹⁸⁹ <http://www.rpo.gov.pl/pl/rowne-traktowanie>, accessed 25 February 2013.

¹⁹⁰ Transcript of the 31st meeting of the *Sejm* on 3 January 2013; http://orka2.sejm.gov.pl/StenoInter7.nsf/0/9A800994DF91F323C1257AEC002D7E52/%24File/31_a_ksiazka.pdf, accessed 25 February 2013.

¹⁹¹ Report of the Parliamentary Commission on the European Union. Parliamentary Print No. 1003, accessed 20 February 2013.

States, which is not necessarily the same everywhere. According to the opinion, not knowing the source of the problem, it is impossible to tell whether the proposed solution has any chance of being effective at all.

Poland signs Council of Europe Convention on prevention and combating violence against women and domestic violence

On 18 December 2012 the Government Plenipotentiary for Equal Treatment, on behalf of the Polish Government, signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210). The debate about signing this Convention went on for many months. Opposed to the Convention was the Minister of Justice, arguing that the Convention contains provisions that are contrary to how the vast majority of Poles live their lives. 'This is a convention, which obliges the State to fight stereotypical roles of men and women, particularly in terms of motherhood and marriage. The Polish State would be obliged to combat these values' he said.¹⁹²

Also against signing the Convention was the Polish Episcopate and numerous Catholic organisations, arguing that the aim of the Convention included 'enforcement of gender ideology, promoting of non-stereotypical sexual roles and interference in the educational system and its ratification would force Poland to change our constitutional values with regard to family and largely negate the current education of our children'.¹⁹³ Eventually, the signing of the Convention was accompanied by the general statement that the Government will apply the Convention only in accordance with the Polish Constitution.

Anticipated changes

Governmental proposal for new pro-family policy measures

The Minister of Labour and Social Policy announced that, starting from 1 September 2013, paid maternity leave will be extended to up to one year. It will consist of a basic leave of 20 weeks and an additional leave of 6 more weeks (at the time of writing), which may be extended by another 26 weeks. The mother and father may freely decide how to share the leave, with the only exception that the first 14 weeks after childbirth have to be taken by the mother.¹⁹⁴

Parents who decide to take a six-month leave will receive 100 per cent of their salary. Those intending to take a full year's leave and having decided to do so immediately after the birth of their child will receive 80 per cent of their salary. Parents who take this decision after the first six months can count on 60 per cent of their salary after the first six months. Parental leave may be combined with part-time employment. In that case the parent may receive his/her salary as well as the respective part of the leave.¹⁹⁵ It is anticipated that the duration of paternity leave will also be extended.¹⁹⁶ It is currently two weeks and will probably be extended to eight weeks. Paternity leave is fully paid and also provides protection against dismissal. Currently the father must take the leave before the child turns one. Following the intended change he will have two years from the child's birth to take the leave. Also expected is the introduction of parental leave for self-employed persons. The proposed changes are related to the fact that pro-family measures introduced in 2010 have failed to produce the hoped-for results. An advantage of the proposed solutions is their flexibility. It is expected that after introduction of such form of paternity and parental leaves, the situation of women

¹⁹² See <http://natemat.pl/47545.jaroslaw-gowin-konwencja-o-zwalczaniu-przemocy-wobec-kobiet-dlugo-poczeka-na-ratyfikacje>, accessed 20 January 2013.

¹⁹³ See http://ekai.pl/wydarzenia/temat_dnia/x62428/trzeba-mowic-o-groznym-nastepstwach-ratyfikacji-konwencji-ws-przemocy/, accessed 20 February 2013.

¹⁹⁴ See http://gazetapraca.pl/gazetapraca/1,90443,12864378,Nowe_urlopy_rodzicielskie_dla_kogo_i_jak_dlugi_urlop.html, accessed 16 February 2012.

¹⁹⁵ See http://www.praca.wnp.pl/wydluzenie-urlopu-macierzynskiego-od-1-wrzesnia-2013-r,183098_1_0_0.html, accessed 25 February 2013.

¹⁹⁶ Draft Law amending the Labour Code. Parliamentary Print No. 666 (extension of paternity leave); <http://orka.sejm.gov.pl/Druki7ka.nsf/0/C49681DC759D5EF4C1257A6900371969/%24File/666.pdf>, accessed 20 January 2013.

on the labour market will improve. However, the proposed solution also entails the risk of reducing opportunities for many women to have successful professional careers.

Case law of national courts

Entitlement to so-called 13th-month salary

The 13th-month salary is a legally guaranteed additional payment in the public sector (civil service, education) aimed to compensate relatively low and non-indexed remuneration levels. Employees who have worked at least six months in the relevant year are entitled to this bonus, which on average amounts to 8.5 % of the total year's earnings. The relevant criteria meant that mothers who took maternity leave for a period of more than six months in one calendar year did not meet the legal requirements, thus not qualifying for the additional payment. The Constitutional Tribunal decided that the provisions of the law were unconstitutional to the extent that they fail to include maternity leave in the exceptions to the six-months requirement.¹⁹⁷ The Tribunal called attention to the fact that the legislator was required to respect the constitutional obligation to offer special support to mothers, before and after giving birth,¹⁹⁸ by taking factual and effective action in legislation influencing the situation of pregnant women and new mothers. The challenged regulation not only failed to improve their situation, but was even likely to worsen it.

Extended alimony obligation

In October 2012 the Constitutional Tribunal decided a case that does not directly address gender issues, but does things, that this regulation aims to protect the economically weaker party to the marriage agreement, which is usually the woman. It also noted that the position of the spouse who was not found guilty of the divorce deserves protection, as opposed to the situation of the other spouse, whose negative behaviour influenced the economic situation of both of them (statistically, in most cases men are found guilty of the divorce). The indefinite duration of the obligation to pay alimony to the divorced spouse is the consequence of the legislator's intentions regarding the institution of marriage, aiming at creating a legal and social relationship to last a lifetime.

Child benefits for single-parent families raising many children

The Government Plenipotentiary for Equal Treatment brought a case before the Constitutional Tribunal, challenging the regulation of child benefits for single-parent families raising more than two children and the supplement to this benefit for families raising children with disabilities.¹⁹⁹ The problem in question was that the amounts of the benefit/supplement were generally fixed per child, but the regulations additionally provided for a fixed maximum amount, irrespective of the actual number of children.²⁰⁰

The Tribunal found the regulations to be in accordance with the principle of equality²⁰¹ and with the obligation of the State to offer special support to families finding themselves in difficult material and social circumstances – particularly those with many children or a single parent.²⁰² The Tribunal noted among other things that the actual costs of raising more than two children are usually lower than the result of multiplying the costs of raising one child by the number of children. The Tribunal also noted that there were other means of state-funded social care benefits for such families, supplementing child benefits.

¹⁹⁷ Constitutional Tribunal ruling of 9 July 2012, P 59/11.

¹⁹⁸ Article 71 Item 2 of the Constitution.

¹⁹⁹ Constitutional Tribunal ruling of 20 December 2012, K 28/11, accessed 26 February 2013.

²⁰⁰ According to the law in question, the maximum amount of child benefit is approximately EUR 42 (PLN 170) per child, but cannot exceed EUR 84 (PLN 340). The supplement to the benefit for children with disabilities is approximately EUR 20 (PLN 80) per child, but cannot exceed EUR 40 (PLN 160).

²⁰¹ Article 31 Item 1 of the Constitution.

²⁰² Article 71 Item 1 of the Constitution.

Equality body decisions/opinions

There are no decisions or opinions on the matter of gender equality to report. As mentioned above, gender discrimination is not included to the priority of part of the Polish equality body's (Human Rights Defender - *RPO*) activities related to equal treatment.

PORTUGAL – *Maria do Rosário Palma Ramalho*

Policy developments

In the period covered by this issue of the EGELR (from October 2012 to February 2013) there were no specific developments concerning gender equality or non-discrimination on other grounds, since all efforts seem to be focused on emergency legislation justified by the Portuguese financial and economic crisis.

The economic crisis seems to be at its peak now, with an ever-growing level of unemployment (the rate was 16.3 % in October 2012 but is foreseen to exceed 17 % in 2013), especially among young people (around 35 %), massive emigration, and the collapse of dozens of companies every day.²⁰³ Also in 2012 alone, the birth rate fell by 20 %, thus compromising the natural replacement of generations and the financial sustainability of the social security system in the future.

Legislative developments: side effects on gender equality and reconciliation of family and working life

Some general measures and reforms are taking place, under the Financial Assistance Programme to Portugal. Despite the general nature of these measures they have a strong impact on families, and this may reflect in new developments and practices indirectly linked to gender equality.

In this context two kinds of legal measures are worth mentioning: the reform of the Labour Code, which is still on-going, and the measures imposed by the National Budget Law for 2013 (Law No. 66-B/2012, of 31 December 2012).

The reform of the Labour Code is still on-going, with the approval of several Acts. The more important one, so far, is Law No. 23/2012, of 15 June 2012, which approved significant changes, mainly in the following areas: working hours arrangements, which became more flexible; payment reductions for overtime and work on holidays; reduction of national holidays; reduction in annual vacation period; reduction in severance payments for the termination of labour contract; increased flexibility of dismissal on objective grounds, making them easier to apply; and increased possibility for the workers council to negotiate collective agreements at plant level.

The National Budget Law for 2013 establishes new cuts in social security benefits (including pensions) and in the national healthcare system. Also, the tax rates for 2013 have been significantly increased, with almost no exceptions. Specifically in relation to civil servants (in a broad sense), the National Budget Law also maintains for 2013 several measures limiting new contracts, promotions and salary (including salary reductions) that had been put in place for 2012, by the previous budget law.

Despite their general nature, these measures are already affecting gender equality or are inducing practices that have a side effect or direct effect on gender and reconciliation issues. The following examples show this direct or indirect effect:

- the cuts on pensions are affecting women more harshly than men because their pensions tend to be lower;

²⁰³ These data are available at the Portuguese Agency for Employment and Professional Training (IEFP) – www.iefp.pt, *Informação Mensal do Mercado de Emprego*, n° 12, Dezembro de 2012, e *Estatísticas do Emprego*, Dezembro de 2012, accessed 30 January 2013.

- families with more children are more strongly affected by the cuts in their income than other families, because no compensation measures were taken;
- the combination of more strongly reduced incomes with the high unemployment rate is inducing different practices in relation to reconciliation of family and working life that may have negative results in the long term: e.g. postponing the decision to have children; removing dependents (young children and elderly people) from care facilities and back home, because it is less expensive, but when this happens the member of the couple that assumes the role of carer is usually the woman, which constitutes indirect discrimination;
- due to the constant threat of losing their job or to flee from present unemployment, people are more willing to accept bad labour conditions, especially in relation to working hours arrangements, which make the reconciliation between family and working life very difficult.

In conclusion, we can state that on account of the emergency measures to face the crisis, gender equality and reconciliation have not only become a secondary issue, but the practices in this area are at the risk of suffering great setbacks in the near future.²⁰⁴

ROMANIA – Iustina Ionescu

Policy developments

There are no policy developments to report.

Legislative developments

Romania has partially transposed Directives 2010/41/EU and 2006/54/EC. There is still an on-going infringement regarding Romania in this field.

In December 2012, the Romanian Government decided to amend gender equality legislation in order to partially transpose Directives 2010/41/EU and 2006/54/EC. It chose to pass an emergency ordinance, which ensured a quick entry into force: on 13 December 2012.²⁰⁵ The Parliament approved this emergency ordinance on 24 April 2013, which became Law 115/2013. An extensive legislative proposal to amend the Gender Equality Law was introduced by a group of members of the Parliament in March 2013 (BP120/12.03.2013).²⁰⁶

The Government's amendments explicitly include in the scope of gender equality legislation self-employed workers and their assisting spouses. Other novelties are the definitions for 'family status' and 'marital status' and the updates of the names of the institutions mandated in the field of gender equality, after the closing down of the National Agency for Equal Opportunities between Women and Men (*Agenția Națională pentru*

²⁰⁴ Nonetheless, it should be noted that the European Commission is aware of the possibly negative implications to gender equality as a result of the constraining measures taken in the countries under Economic and Financial Assistance Programs. In this sense, Commissioner Redding, when confronted with a question on this issue at the European Parliament, on 27 March 2013, declared: 'The Commission is firmly committed to ensuring that the principle of equal pay for equal work is comprehensively applied. The measures under the Economic and Financial Assistance Programme for Portugal concern the general financial and economic policies that are considered necessary to restore sustainable and balanced growth of output and employment and do not have a bearing on equal pay between men and women which is a directly enforceable obligation for each employer', Declaration P-002212/2013, available at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2013-002212&language=EN>, accessed 22 June 2013.

²⁰⁵ Government Emergency Ordinance No. 83 of 4 December 2012 amending Law No. 202/2002 regarding equal opportunities and equal treatment between women and men (*OG Nr. 83 din 04.12.2012 pentru modificarea și completarea Legii nr. 202/2002 privind egalitatea de șanse și de tratament între femei și bărbați*) published in Official Journal No. 839 of 13 December 2012.

²⁰⁶ The law proposal is available at http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=13134 accessed 23 June 2013.

Egalitate de Șanse între Femei și Bărbați). The new law also raises the administrative fines to a maximum of approximately EUR 23 250 (RON 100 000).

There are two aspects that are problematic in this new law. First, the definition of ‘burden of proof’ is not clear and its wording differs from the definition applicable to all other grounds of discrimination. Second, trade unions, human rights organisations and other entities are granted the right to represent or assist a person having suffered discrimination on the ground of sex only in administrative procedures (not courts), which is more limited than Article 9(2) of Directive 2010/41/EU.

In addition, the Government states in the text of the Emergency Ordinance 83/2012 that this law partially transposes Directive 2010/41/EU. However, Articles 6, 7, and 8 of the Directive 2010/41/EU are not transposed through this ordinance. The activity and benefits of self-employed workers and their assisting spouses are currently regulated in the Government Emergency Ordinance 44/2008 on economic activities by authorised individuals, individual enterprises and family businesses. There are some indications that the transposition is partial. While stipulating that these categories of persons are insured in the public pensions system and have the right to be insured in the public health insurance system and the unemployment security system,²⁰⁷ Emergency Ordinance 44/2008 does not contain similar explicit provisions regarding maternity benefits. This could raise questions as to the eligibility for maternity benefits of self-employed workers and their assisting spouses under Romanian law (Article 8 of the Directive 2010/41/EU).

Case law of national courts

Public information on court case law is not available. Furthermore, case law data bases available to view for the purposes of research do not cover discrimination or, consequently, gender discrimination in their scope.

Equality body decisions/opinions

On 12 November 2012, the National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării (CNCD)*) ruled to be discriminatory on the ground of sex the fact that police schools allocate places based on sex and that much fewer places are allocated to women compared to men.²⁰⁸ The CNCD rejected the arguments presented as defence by the Ministry of Internal Affairs that this difference is made to protect women from taking the risky job of policeman, to ensure gender balance in operating teams, to protect women during pregnancy, and to stop the increase in the number of women in the police force. The CNCD stated that: ‘5.7. ... it is for the candidates to decide whether to take such risks... all candidates, irrespective of sex, have the right to choose their own profession no matter how hard or soft that profession is.’ It further stated that the employer has the means to assess the performance of each candidate corresponding to the activity that she/he will carry out and pointed out that women are now discriminated against even when accessing the specialties that do not require physical strength or pose major risks. While the CNCD rejected the argument that there is a need to stop the inflow of women in the police force, arguing that figures still show higher numbers of men, it did accept the possibility of limiting women’s access to this profession to ensure gender balance, but only as a temporary measure.

A women's rights organisation complained that a service provider that published an announcement at the ticket booth that women were not allowed to buy tickets for a particular football game had discriminated against women.²⁰⁹ The CNCD found discrimination against women in the access to goods and services because the announcement excluded female

²⁰⁷ Government Emergency Ordinance No.44/2008 on economic activities by authorized individuals, individual enterprises and family businesses, Art.28.(3). See also: Law 263/2010 regarding the unitary system of public pensions, Art.6.(1).IV.b, Law 76/2002 regarding the unemployment security system and the stimulation of work force, Art.20.d, Art.22.

²⁰⁸ Romania, Consiliul Național pentru Combaterea Discriminării, Decision No. 485 of 12 November 2012.

²⁰⁹ Romania, Consiliul Național pentru Combaterea Discriminării, Decision No. 489 of 21 November 2012.

football fans.²¹⁰ The CNCD rejected the service provider's and the football club's justification that this was to protect women from the violence that was expected to escalate at that particular game. The CNCD stated that the measure did not serve a legitimate aim because these events should not be violent in the first place and such a way of addressing violence in sports may give rise to the idea that women should be excluded from football events in general.

Miscellaneous

After the general elections of 9 December 2012, the representation of women in Parliament and the Government still remains lower than the average level in the European Union. In the 2008-2012 Parliament, women only represented 9.65 % (11.2 % in the Chamber of Representatives and 5.9 in the Senate) and there were only 4 female ministers, out of 21. The new Parliament elected in December 2012 has 11 % of women (65 women out of 588 Members of Parliament), while the new Government has 6 female ministers, out of 28.²¹¹ In Parliament, 5 out of 37 presidents of parliamentary commissions are women, 8 out of 56 vice-presidents and 6 out of 56 secretaries. However, the positions occupied by women are in areas considered less significant in the state mechanism, such as the environment, labour, tourism, social dialogue, health, education, European affairs, human rights, and equal opportunities.

At the same time, a 2010 draft law introducing a quota in legislative elections (of 40 %) is under review in Parliament, but lacks political support.²¹² Although aimed to obtain all-party support, the Bill, introduced by a single initiator, has been rejected by several parliamentary commissions,²¹³ and criticised by civil society.²¹⁴ It is now waiting to be voted down by the plenary of the Chamber of Representatives.

SLOVAKIA – Zuzana Magurová

Policy developments

LGBT Committee

On 3 October 2012 the Government approved the supplement to the Council's²¹⁵ Statute, concerning the establishment of the Committee on the Rights of Lesbian, Gay, Bisexual, Transgender and Intersexual Individuals (LGBT Committee). The LGBT Committee was established as a permanent expert body of the Council. Members of the LGBT Committee

²¹⁰ Romania, Consiliul Național pentru Combaterea Discriminării, Decision No. 489 of 21 November 2012.

²¹¹ www.femeileinpolitica.ro/, accessed 4 February 2013; http://www.gov.ro/cabinet_c711p1.html, accessed 4 February 2013; <http://www.ziare.com/alegeri/rezultate-alegeri-parlamentare-2012/cine-sunt-femeile-din-viitorul-parlament-1207528>, accessed 4 February 2013.

²¹² Draft Law No. 333/2011 regarding the introduction of a mandatory quota for political representation of women in the Romanian Parliament (*PL-x nr. 333/2011, Proiect de Lege privind introducerea cotei obligatorii de reprezentare politică a femeilor în Parlamentul României*), available on: http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=12039, accessed 4 February 2013.

²¹³ *Comisia pentru Drepturile Omului, Culte și Problemele Minorităților Naționale*, Advice of 7 June 2011, available on: www.cdep.ro/comisii/drepturile_omului/pdf/2011/av333.pdf, accessed 4 February 2013; *Comisia pentru Administrație Publică, Amenajarea Teritoriului și Echilibru Ecologic*, Advice No. 26/222 of 1 June 2011, available on: www.cdep.ro/comisii/administratie_publica/pdf/2011/av333.pdf, accessed 4 February 2013.

²¹⁴ Tudorina Mihai *Cotele de gen în politică și aplicarea lor în România* pp. 43-50, 2011, available on: http://media1.webgarden.ro/files/media1:4f869b1f10e27.pdf.upl/Tudorina_Mihai_Cotele_de_gen_si_aplicare_a_lor_in_Romania.pdf, accessed 4 February 2013.

²¹⁵ The Government Council for Human Rights, National Minorities and Gender Equality (Council) is a permanent expert, advisory, coordinating and consultative body of the Government in the area of the protection of fundamental human rights and freedoms, political and civil rights, rights of national minorities and ethnic groups, economic, social and cultural rights, rights for the protection of the environment and cultural heritage, as well as in the area of children's rights and furthering of children's best interests and the enforcement of the principle of equal treatment and principle of equality, including gender equality.

were nominated by NGOs and the state administration. The tasks of the LGBT Committee's secretariat are carried out by the Ministry of Justice. The move was positively assessed by several NGOs defending LGBT rights.²¹⁶ Other organisations – including civic association Life Forum (*Fórum života*), the Slovak Bishops Conference (KBS) and the Christian Democratic (KDH) party – have, however, voiced their disagreement with the Committee's formation.

At the beginning of 2013, civic associations Life Forum and the Leva XIII Institute (*Inštitút Leva XIII*) started to appeal on the Government to limit and decrease subsidies for the enforcement of gender equality and LGBT rights, reasoning that they 'support the culture of death'. The human rights NGOs reacted to this accusation in their 'Open letter to the Prime Minister' of 12 February 2012. In this letter they noted that although the social acceptance of LGBT individuals by Slovak society had been increasing every year, it still remained the second lowest in the EU. This means that the current support provided to NGOs is insufficient and that the public appeal for the limitation of subsidies for work of non-governmental organisations is unjustified.

Legislative developments

Amendments to the Antidiscrimination Act and the Insurance Act

On 31 October 2012 the Government approved amendments to the Antidiscrimination Act²¹⁷ (*Antidiskriminačný zákon*) and the Insurance Act²¹⁸ (*Zákon o poisťovníctve*). The amendments proposed to repeal Article 8 Section 8 of the Antidiscrimination Act and Article 35 of the Insurance Act, containing the regulation on gender-differentiated differences in insurance premiums and benefits.²¹⁹ Initially the amendments should have entered into force on 21 December 2012, but Parliament only approved them on 5 February 2013,²²⁰ so the effective date was postponed until 1 April 2013.

The amendment to the Antidiscrimination Act also contains a new definition of indirect discrimination. It expands the possibility of adoption of temporary balancing measures by all entities of state and public administration, including non-public entities. What is very important, however, is that it allows the adoption of temporary balancing measures aimed at eliminating discrimination on the ground of sex or gender.

Draft amendment to the Act on Registry Offices and women's rights to decide the circumstances of birth

Just before Christmas (on 20 December 2012) the Ministry of the Interior submitted a draft amendment to the Act on Registry Offices (*Zákon o matrikách*) for interministerial comments.²²¹ Fourteen non-governmental organisations and 1 811 individuals submitted to the Ministry of the Interior a collective comment on the draft amendment, which in their view seriously violates the rights of women, children and their fathers. The comment requires removal of the discriminatory provisions from the amendment. The authors also appeal on the Government to proceed with legal regulation of home childbirth, so that Slovak legislation

²¹⁶ On 30 July 2012 the Council recommended that the Government should set up the LGBT Committee. This proposal was rejected by the previous Government of Ivetta Radičová on 11 May 2011, when the motion failed to pass by one single vote. The Christian Democratic Movement (KDH) and some Slovak Democratic and Christian Union (SDKÚ) Ministers were among those who voted against it.

²¹⁷ 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), as amended.

²¹⁸ Act No. 8/2008 Coll. Insurance Act, as amended.

²¹⁹ In June 2012 the Slovak Republic received the communication from the European Commission (Case No. 3531/12/JUST), which among others evaluated the transposition of Council Directive 2004/113/EC. In this communication the European Commission called attention to the incorrect definition of indirect discrimination in the Antidiscrimination Act and noted that the EU Court of Justice in its judgment in *Test-Achats* (C-236/09) had declared Article 5(2) of the Directive invalid with effect from 21 December 2012. On the basis of this communication, the Slovak Government prepared amendments to the respective Acts.

²²⁰ Act No. 32/2013 Coll.

²²¹ Act No. 154/1994 Coll. Act on Registry, as amended.

meets national and international human rights standards and supports the right of women to freely decide on the setting and circumstances of childbirth. This regulation should also include the method of registration of a child at the registry office.

Although the European Court for Human Rights has already confirmed that women have the right to opt for home childbirth and that the State has the obligation to provide them with this option, home childbirth in Slovakia is not regulated at all. The State pushes it into the illegal sphere *inter alia* by allowing midwives to only assist in childbirths in healthcare facilities. It also causes practical problems with the registration of home-born children at the registry office.

The submitted amendment tightens the conditions of registration of births at the registry office after childbirth outside maternity clinics. It makes home childbirth very difficult, because it introduces the obligation to submit a medical report regarding termination of pregnancy by childbirth, otherwise the new-born baby cannot be registered at the registry office until the court decides on the determination of maternity. Women would be forced to undergo a gynaecological examination immediately after childbirth, whether they wish it or not. This would violate their right to freely decide on their own body and on the setting and circumstances of childbirth.

The approval of this amendment would also create many practical problems and negatively affect many rights in the social area – e.g. the payment of the childbirth allowance and the supplement to this allowance, parental allowance, children's allowance or maternity allowance. This is because these are paid on the basis of the registration of a child at the registry office. However, the amendment not only discriminates against women, but also against new-born babies and their fathers. According to this amendment the registration of a child will only depend on whether a woman undergoes the gynaecological examination. If she decides not to undergo the examination, the father of the new-born baby will not have the possibility to register the baby at the registry office. The amendment also seriously violates the rights of children embodied in the Convention on the Rights of the Child – the right to non-discrimination, the right to registration immediately after birth, the right to a name, the right to a nationality, etc.

Parliament refuses to pass same-sex partnership proposal

During the November 2012 session Parliament rejected a proposal to introduce same-sex registered partnerships. It was put forward by the opposition party Freedom and Solidarity (SaS). The draft law contained several measures supporting cohabitation of same-sex couples. Partners would, for example, have been able to learn about each other's health conditions, represent each other in court, or become one of the first heirs in the event of the other partner's death. The refusal to pass the proposal was welcomed by the civic initiative Something Doesn't Fit Here, which instead called for the introduction of a constitutional law defining marriage as a union of one man and one woman.

Case law

European Court for Human Rights issues third verdict in one year in favour of Romany woman regarding forced sterilisation

In *I.G. and others v Slovakia* (Application no. 15966/04) three Romany women submitted a complaint to the ECtHR in 2004, claiming they had been forcibly sterilised at the Krompachy Hospital under various different circumstances in 1999-2002.²²²

Applicant I.G. was sterilised in 2000, during the delivery of her second child. This was also the applicant's second delivery by Caesarean section. She was not informed about the intervention at the time and found out about it only three years later, after she examined her medical records at the Krompachy Hospital.

²²² *I.G. and others v Slovakia* (Application no. 15966/04) 13 November 2012.

Applicant M.K. was sterilised in 1999, also during the delivery of her second child by Caesarean section. She and her parents found about the intervention only after it had already been performed.

Applicant R.H. was sterilised in 2002 without her informed consent. Since 2003, all applicants had been seeking recognition of the illegal nature of the interventions and claimed compensation at courts in Slovakia, including the Constitutional Court. They also acted as injured parties in the relevant criminal proceedings, initiated by the Slovak law enforcement authorities in 2003. Only applicant M.K. received a compensation of EUR 1 593 from the District Court in Spišská Nova Ves. The ECtHR, however, did not find this compensation adequate in the light of the severity of the violations.

In its decision of 13 November 2012, the ECtHR ruled in favour of applicants I.G. and M.K. Since the third applicant, R.K., died in the course of proceedings, the ECtHR did not consider her complaint. The ECtHR declared that the sterilisation without informed consent of their legal guardians violated the Slovak legislation valid at the time of the interventions. As such, it violated their right to be free from inhuman and degrading treatment, guaranteed by Article 3 of the Convention. The ECtHR also found that the investigation by the Slovak law enforcement authorities into the case did not meet the standards of effective investigation guaranteed by the Convention (procedural aspect of Article 3). Also, the ECtHR found that Slovakia had violated the positive obligation under Article 8 of the Convention to provide effective protection of the reproductive right of Romany women, who are a particularly vulnerable group in the population. In addition to finding violation of Articles 3 and 8 of the Convention, the ECtHR ordered the Slovak Government to pay compensation to the applicants in the amounts of EUR 28 500 and EUR 27 000 respectively, plus reimbursement of their legal costs.²²³

Miscellaneous

Equality in Slovak reality – Overcoming institutional barriers while implementing the principle of equal treatment by increasing the potential for equality mainstreaming

From January to December 2012, the non-governmental organisation Citizen, Democracy and Accountability (OaDZ) and the Centre for Civil and Human Rights (Poradňa) in cooperation with the Government Office (Úrad vlády) organised the PROGRESS (2007 – 2013) project *Equality in Slovak Reality*. Its project aims were implemented through participation activities – discussions, meetings, workshops, seminars, training, student summer schools, a round-table debate and a regional symposium. The project results included expert reports, analyses, studies and a series of short films on antidiscrimination, but also the establishment of a network of experts, male and female, in antidiscrimination law. The main results were three publications that appeared at the end of 2012.

The Centre for Civil and Human Rights issued a publication entitled *Searching for barriers in the access to efficient legal protection against discrimination*, which offers a detailed survey of the application of antidiscrimination legislation in recent years in Slovakia. The summary and recommendations in the conclusion have been translated into English.²²⁴

The panel of experts then issued the study *Data on equality in Slovak reality*, which addresses a persistent problem in Slovakia, i.e. the lack of reliable data in the area of discrimination on the grounds of ethnical origin and race (especially membership of the Roma community), sex/gender, disability, age, marital status, religion, sexual orientation, but also social position and multiple discrimination. One of the consequences of this situation is the impossibility to evaluate the efficiency of antidiscrimination policies and their individual measures concerning unequal treatment. Its ambition is to contribute to the intensification of

²²³ The full decision of the ECtHR is available on <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114514>, accessed 8 April 2013.

²²⁴ The full text is available on <http://poradna-prava.sk/wp-content/uploads/2012/11/Publik%C3%A1ciu-si-m%C3%B4žete-stiahnuť-A5-tu-105-MB.pdf>, accessed 8 April 2013.

experts' interest in overcoming existing barriers in the collection, accumulation, evaluation, presentation and distribution of data on (in)equality. This objective is not an end in itself. It is part of and a condition for efforts at a new level of equality mainstreaming, which includes integration of equality impact assessments into policy-making processes at all levels.²²⁵

The ambition of the second study, *Legal aspects of equal treatment in Slovak reality*, is to contribute to the intensification of discussion and cooperation of experts in non-discrimination and to formulate proposals for amendments to the Antidiscrimination Act, the Civil Code and the Code of Civil Procedure.²²⁶

SLOVENIA – Tanja Koderman Sever

Policy developments

Governmental crisis

Slovenia has its first female Prime Minister-designate to form a new government since its independence in 1991. Alenka Bratušek, the 42-year-old leader of the largest opposition party, has recently started negotiations after a parliament vote of constructive no-confidence vote against the current Government of Janez Janša.

Activities of the Labour Inspectorate

The Labour Inspectorate has highlighted the case of a pregnant worker who was unlawfully dismissed for business reasons despite the fact that her employer was aware of her pregnancy. With the presentation of this case they wanted to raise awareness of the rights of pregnant women according to the Employment Relationship Act.

Activities of the Commission for Petitions, Human Rights and Equal Opportunities

Members of the Parliamentary Commission for Petitions, Human Rights and Equal Opportunities have dealt with the proposed legislation of the European Commission on 40 % quotas for women on company boards of large companies. Members of the Parliamentary Commission agreed to quotas, but pointed out that, in addition to quotas, other changes are needed in our society as well in order to increase the number of women on company boards.

Activities of the Ministry of Labour, Family and Social Affairs

The Ministry of Labour, Family and Social Affairs organised an international conference on paternity leave in September 2012. The ministry organised this conference in order to exchange different views on the issue of paternity leave, because they are preparing amendments to the current legislation on paternity leave in order to encourage more fathers to take paternity leave and parental leave.

Activities of the Service for Equal Opportunities and European Coordination

In September 2012, the Service for Equal Opportunities and European Coordination organised a conference on gender equality in family life. The discussion focused on the reconciliation of work and family life; the involvement of Slovenian fathers in childcare and domestic work compared to fathers elsewhere; whether Slovenian laws promote gender equality in family life; how to encourage employers in this respect; how well employees know their rights; and planned changes to legislation dealing with parental leave. Furthermore, the conference presented the latest survey findings on gender equality in family life and in partnerships.

²²⁵ The full text is available on http://www.diskriminacia.sk/sites/default/files/Data_o_rovnosti_text.pdf, accessed 8 April 2013.

²²⁶ The full text is available on http://www.diskriminacia.sk/sites/default/files/Pravne_aspekty_text.pdf, accessed 8 April 2013.

Legislative developments

The new pension reform

The new Pension and Invalidity Insurance Act, adopted in December 2012, entered into force on 1 January 2013. It no longer prevents gender equality in relation to the determination of different conditions for the acquisition of old-age and invalidity pensions as regards the pensionable age and the completion of the pension-qualifying period. The pensionable age was increased to 65 and the pension-qualifying period to 40 years. Both conditions will be equal for both genders after the transitional period.

Case law of national courts

Although gender discrimination is not so rare in Slovene society, victims of discrimination rarely decide to bring gender equality cases before court. For this reason, there has been no case law worth mentioning in the area of gender equality in the past six months.

Equality body decisions/opinions

No significant cases have been decided by the Advocate of the Principle of Equality and no opinions have been issued by the Advocate regarding the area of gender equality.

Miscellaneous

Conference on diversity in employment in the public and private sector

The Institute for African studies, the IN Agency and the European network for gender equality organised a conference to mark the completion of the one-year project entitled Empower – Diversity Pays Off. The main speaker at the conference, entitled ‘Diversity in employment in the public and private sector,’ stressed the importance of diversity in the workplace. She specifically referred to consistent implementation of labour legislation and the need to amend some sections of the Employment Relationship Act. According to the Ombudsman’s observations diversity in employment causes stigmas and discrimination. Unfortunately, the people affected rarely initiate proceedings because judicial protection is not considered as an efficient legal remedy. It is too expensive and too time consuming.

Call for scholarships for women in science

Partners in the national programme ‘For Women in Science’ published the seventh call for scholarships for female researchers in October 2012. The main purpose of this programme is to encourage female researchers to continue their scientific work. The scholarships are intended for women in the last year of their Ph.D. studies in the field of natural sciences, biotechnology and medicine in Slovenian research institutions.

Seminar for women in politics

In September 2012, the Slovenian Sociological Association organised a seminar for women in politics. The main purpose of the event was to facilitate the involvement and participation of women in politics and to advise those who have recently entered politics or are preparing to enter. In addition, the representation of women in Slovenian politics was discussed. It was pointed out that quotas did contribute to greater representation of women. Nevertheless, women are still underrepresented.

SPAIN – María Amparo Ballester Pastor**Policy developments**

On 23 October 2012 the Spanish Women's Institute introduced the Aurora programme, a project aimed at promoting the labour participation and social integration of women in the rural areas. The programme targets women who, based on age or training, have greater difficulties in finding a job. The programme aims to facilitate professional routes for these women by providing occupational training related to the local labour supply. The professional routes are aimed at promoting self-employment as well. In addition to promoting the social and labour market integration of women in the rural areas, by promoting their economic autonomy, the Aurora programme aims to recognise the role that women play in the rural environment. The Aurora programme is funded in part by the European Social Fund and it involves a total investment of EUR 1 million.

On 20 November 2012 the Government of the Autonomous Community of Catalonia approved its seventh Strategic Plan for women's policy for the period 2012-2015. Its objectives are the following: 1) to increase the measures taken to achieve full equality between women and men in all areas and sectors of Catalan society, 2) to increase the value and visibility in the labour market of women's careers and talents, 3) to improve institutional cooperation to promote equality between women and men, and 4) to improve the mechanisms to prevent, detect and eradicate gender-based violence.

Legislative developments***Reduction in contribution to social security system applied to employers who have to transfer pregnant or breastfeeding women to another position***

The State General Budget Law for 2013 provides for a reduction in employers' social security contributions when they have to make a change to the workplace of women who are pregnant or breastfeeding.²²⁷ Article 26 of the Law for the Prevention of Occupational Hazards (Law 31/1995, 8 November 1997) establishes this obligation if the original workplace may cause a risk to the mother's or the child's health. The new provision tries to encourage employers to primarily change women's workplace in these situations, instead of suspending their contracts (in which case they are paid 100 % of their salary by the social security system). The new legal provision establishes a 50 % reduction in social security contributions for the employer if the workplace change has to take place due to incompatibility with pregnancy or breastfeeding.

Entry into force of four-week paternity leave postponed

The State General Budget Law for 2013 includes another delay in the entry into force of the four-week paternity leave.²²⁸ According to this Law, paternity leave will be four weeks from 1 January 2014. The Law of Effective Equality between Men and Women (Law 3/2007, of 22 March 2007) first established the right to paternity leave in Spain. It established the right of the father (or of the other natural parent) to 13 days of leave that could not be transferred to the mother. The short length of the paternity leave, however, made it difficult to reach its purposes. For this reason, Law 9/2009 established that, from 2011, paternity leave would be four weeks. However, the entry into force of this extension of paternity leave was postponed year after year and has never come into effect. The new delay is a consequence of the austerity measures taken by the current Government as a result of the economic crisis.

²²⁷ Additional Disposition 77 of Law 17/2012, of 27 December 2012, State General Budget Law for 2013 (*Disposición Adicional 77 de la Ley 17/2012, de 27 de Diciembre de 2012, de Presupuestos Generales del Estado para 2013*), http://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-15651, accessed 1 March 2013.

²²⁸ Final Disposition 18 of Law 17/2012, of 27 December 2012, State General Budget Law for 2013 (*Disposición Final 18 de la Ley 17/2012, de 27 de Diciembre de 2012, de Presupuestos Generales del Estado para 2013*).

Case law of national courts

The decision of the Supreme Court of Spain of 19 July 2012²²⁹ (published in October 2012) gives the final solution to a rather controversial issue that emerged as a result of the interpretation of Additional Disposition 44 of the General Law on Social Security (*Disposición Adicional 44 de la Ley General de Seguridad Social*). This Article establishes, for the benefit of women who became mothers while not being workers, a fictitious period of 112 days per child that could be considered as effective time of work for the purposes of accessing certain benefits from the social security system, including pensions. The Supreme Court had to solve the issue of the application of this benefit for accessing a system of pensions that has now disappeared. It is still recognised for workers who can prove a period of work of 1 800 days before 1 January 1967 (a *SOVI* retirement pension). The *SOVI* retirement pension is still applied in Spain for the benefit of workers who do not have access to any other kind of pension. That is why the *SOVI* pension is considered to be a kind of welfare pension. So far, the Supreme Court had recognised the application of the fictitious period established in Additional Disposition 44 of the General Law on Social Security regarding women who had given birth before 1 January 1967, the time during which the *SOVI* pension existed. The issue that gave rise to the decision of the Supreme Court of 19 July 2012 referred to a more complex situation, given that the births that could have resulted in the woman completing the 1 800 days required by the *SOVI* system had taken place after 1967. Without these fictitious periods of 112 days the woman in question could not have access to a pension. The Supreme Court in its decision of 2012 stated that the only births that could serve to add the fictitious periods contained in Additional Disposition 44 of the General Law on Social Security in order to have access to a *SOVI* pension were the ones that took place before 1 January 1967. As a consequence, the births that took place after that date could not be taken into consideration in order to add the 112 days per child. The *SOVI* retirement pension is usually the only one which many women who are now reaching the retirement age have a right to. During the 1960s many women were forced to leave their jobs when they married, at times because marriage was actually a reason for dismissal (*excedencia forzosa*) and sometimes because leaving their jobs voluntarily in order to marry gave them the right to certain benefits (*dote*).

SWEDEN – Ann Numhauser-Henning

Legislative developments

Amendments to the (2008:567) Discrimination Act regarding insurance and sex discrimination

On 21 December 2012 the (2008:567) Discrimination Act was amended to ban sex discrimination in insurance services in accordance with Government Bill 2011/12:122. The previously existing exception in Chapter 2 Section 12 of the Discrimination Act was eliminated in response to the CJEU's judgment in *Test-Achats*²³⁰ and replaced by a new Section 12 a. Regarding insurance this Section reads: 'Where insurance services are concerned there must not be any difference between women and men in insurance premiums or insurance compensation for the individual on the ground of gender-related factors.' (An exception is still allowed concerning differential treatment of men and women in regard to services and housing, if this is for a legitimate aim and the means of achieving this aim are appropriate and necessary.)

The reform thus entered into force on 21 December 2012 and the requirement regarding gender-neutral calculations only applies to insurance contracts entered into after that date.

²²⁹ Rec. 4361/2011.

²³⁰ Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL and Others v Conseils des ministres* [2011] ECR I-00773.

(The new rules do not apply to an automatic prolongation of an insurance contract entered into before 21 December 2012.)

The proposed amendment to the 2008 Discrimination Act will put an end to existing and previously accepted sex discrimination as regard insurance services, especially frequent in private pension schemes and car insurances.

Amendments to the (2008:567) Discrimination Act extending the ban on age discrimination

On 1 January 2013, the (2008:567) Discrimination Act was extended to cover age discrimination not only in working life and related areas and education, but also in all other areas covered by the 2008 Discrimination Act concerning other grounds including sex. This means that the ban on age discrimination now also covers the areas of goods and services, housing, public gatherings, healthcare, social services, social security, unemployment benefits, study benefits and public positions. This makes the ban on age discrimination more equal to discrimination concerning other grounds. However, age discrimination still includes exceptions that are somewhat ‘broader’ than the other grounds.

This extension of the ban on age discrimination will make it more ‘equal’ to other grounds of discrimination covering the same areas. The 2008 Discrimination Act is therefore truly ‘horizontal’ in its design. Each discrimination ban – concerning working life, goods and services, etc. – tacitly covers all grounds incorporated in the Act, and the explicit exception for age discrimination concerning the areas mentioned above has now been eliminated. In relation to the previously existing bans on sex discrimination in the relevant areas, the amended version (including the ban on age discrimination) can be expected to facilitate claims on multiple/intersectional discrimination.

Case law of national courts

There has been no significant case law in the area of sex discrimination in the last six months.

Miscellaneous

On 21 January 2013, the then Minister of Gender Equality Nyamko Sabuni announced that she was stepping down as Minister with immediate effect. On the very same day, the Government appointed Maria Arnholm as the new Minister of Gender Equality.

TURKEY – Nurhan Süral

Policy developments

Turkey submitted its 6th Periodical Country Report to the Committee on the Elimination of Discrimination Against Women (CEDAW) and defended it in 2010. The report was evaluated by the CEDAW Committee and in the Concluding Observations additional information was requested on implementation recommendations regarding two topics: studies conducted to evaluate the impact of the headscarf ban in the fields of education, employment and health, together with political and public measures taken to eliminate any discriminatory consequences of the ban and measures adopted to address violence against women.²³¹ Subsequently, an interim report was prepared and submitted to the CEDAW Committee by the General Directorate on the Status of Women (GDSW), the Ministry of Family and Social Policies. This Report provided information on continuing policy developments to carry out

²³¹ Committee on the Elimination of Discrimination against Women Fifty-fourth session 11 February -1 March 2013, Concluding observations of the Committee on the Elimination of Discrimination against Women: Turkey Addendum Information provided by the Government of Turkey on the follow-up to the concluding observations of the Committee (CEDAW/C/TUR/CO/6), <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.TUR.CO.6.Add.1.pdf>, accessed 20 March 2013.

the implementation recommendations and expressed the commitment to continuing the work and studies on both subjects with the cooperation of all other stakeholders. Turkey will provide more information on these two topics in its next periodical report.

Legislative developments

By-Law on the Implementation of the Law on the Protection of the Family and the Prevention of Violence against Women²³²

Turkey is making speedy progress in the combat of violence against women, which is a very serious social problem. The Law on the Protection of the Family and the Prevention of Violence against Women,²³³ which makes special reference to the Council of Europe Treaty on Preventing and Combating Violence against Women and Domestic Violence, was accepted unanimously in Parliament on 8 March 2012. This Law abrogates the former Law on the Protection of the Family.²³⁴ The new By-Law on the Implementation of the Law on the Protection of the Family and the Prevention of Violence against Women²³⁵ provides rules to make concepts and procedures more detailed and concrete so that the Law will be easy to implement by all those concerned.

By-Law on the Establishment and Functioning of Guest Houses

Among the measures to enhance the support for victims envisaged by the Law on the Protection of the Family and the Prevention of Violence against Women is effective provision of shelters where victims of violence will be accommodated with their dependants and receive financial, psychological, legal and social assistance. Shelters, the so-called ‘guest houses’, can be established by the Social Services and Child Protection Agency (SHÇEK),²³⁶ municipalities, local administrations (elected local public bodies with administrative and financial autonomy),²³⁷ and non-governmental organisations (NGOs). The Law on the Protection of the Family and the Prevention of Violence against Women and the Municipalities Law²³⁸ obliges all municipalities in towns with a population of over 100 000 residents to open a women’s shelter. For municipalities in towns with a population of less than 100 000 inhabitants, establishment of guest houses is an option to be decided on by the municipality according to financial constraints and priorities. Prior to an amendment made by Law no. 6360 in the Municipalities Law, municipalities with a population of over 50 000 inhabitants were requested to create a guest house but this was not an obligation (compulsory).²³⁹

The By-Law on the Establishment and Functioning of Guest Houses provides detailed provisions on the establishment and functioning of guest houses.²⁴⁰ Previously, as a result of being run by SHÇEK, municipalities, local administrations, and NGOs, there were different arrangements and separate practices in guest houses. According to the Law on the Protection of the Family and the Prevention of Violence against Women, the Ministry of Family and Social Services is responsible for the coordination and cooperation between public bodies and

²³² A by-law is a type of regulation aiming at making laws clearer, more concrete and more detailed. By-laws are follow-ups of laws and cannot contradict laws. By-laws can be issued by the Prime Ministry, the ministries and public corporate bodies.

²³³ *Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanun*, Law no. 6284, Official Gazette 20 April 2012, no. 28239.

²³⁴ *Ailenin Korunmasına Dair Kanun*, Law no. 4320, Official Gazette 17 January 1998, no. 23233. For a detailed analysis and comparison of these laws see: ‘Turkey’ *European Gender Equality Law Review*, No. 2/2011, pp. 106-17, and No. 1/2012, pp. 115-117.

²³⁵ *6284 sayılı Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanuna İlişkin Uygulama Yönetmeliği*, Official Gazette 18 January 2013, no. 28532.

²³⁶ *Sosyal Hizmetler ve Çocuk Esirgeme Kurumu*.

²³⁷ *İl özel idareleri*.

²³⁸ *Belediye Kanunu*, Law no. 5393, Official Gazette 13 July 2005, no. 25874.

²³⁹ *On Üç İlde Büyükşehir Belediyesi ve Yirmi Altı İlçe Kurulması ile Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun*, Official Gazette 6 December 2012, no. 28489.

²⁴⁰ *Kadın Konukevlerinin Açılması ve İşletilmesi Hakkında Yönetmelik*, Official Gazette 5 January 2013, no. 28519.

NGOs. Therefore, the By-Law aims at eliminating separate practices by setting across-the-board codes and standards for all shelter homes.

Guest houses are to provide a temporary place to live, far removed from violence, and also to present an opportunity to access economic, health, social and legal services. For many women, these places will provide the immediate emergency services needed when escaping violence as well as the assistance they need to access longer-term economic and support services. Women may be accompanied by their children.

The main principles in the Law and By-Law are that guest houses are open to all female victims of violence, provide 24-hour service, have sufficient funding, well-trained staff, assure safety to women and their dependants, and place special emphasis on the guarantee of confidentiality.

In 2012, the number of women's shelters affiliated to the GDSW was 60, with a capacity of 1427.²⁴¹

Case law of national courts

There is a case about lawyers wearing headscarves that is worth mentioning.²⁴² In Turkey, rigid understanding and strict interpretation of secularism by military and civil elites attempt to confine religion to individual spirituality, excluding it from the public sphere. Since the foundation of the Republic, artificially created public apprehension, i.e. fears of sharia and separatism, have always served as a pretext to oust governments and to close down political parties. In spite of lessened/weakened military and judicial tutelage, the dress codes in state and private employment are still a sensitive issue.²⁴³ There are discussions as to whether women parliamentarians or public officials may wear headscarves.

According to the dress code prepared by the National Bar Association, women lawyers and interns have to work bareheaded at the courts. The Istanbul Bar Association extended this rule banning legal interns from entering its premises, courses, conferences and lectures and refusing to issue IDs without a bareheaded photo. Such de-facto bans are devoid of any legal basis and are the results of self-created powers by self-proclaimed guardians of secularism. A lawyer brought these prohibitions before the 8th Chamber of the Council of State, which in turn issued an injunction order (stay of execution; temporary restraining order). The final decision is pending. The *Ağrı* Bar Association granted a lawyer's license with a photo including a headscarf on the basis of this injunction order.²⁴⁴ In the meantime, the 8th Chamber of the Council of State quashed the decision of an administrative court in Ankara that approved the Civil Engineers' Chamber's refusal to provide a female civil engineer a self-employment license with a photo including a headscarf. This decision was based on the constitutional right and freedom to work and absence of such a restrictive legal rule.²⁴⁵

UNITED KINGDOM – Aileen McColgan

Policy developments

In October 2012 the Government announced its decision to repeal a number of provisions of Equality Act 2010, notably the explicit prohibition on harassment by third parties, the power of Employment Tribunals to make recommendations for action other than that relating specifically to the individual claimant, and the provisions providing for discrimination

²⁴¹ Turkey Addendum Information, referenced in footnote no. 1, p. 15.

²⁴² *Basortusunu yasaklamak din ve vicdan hurriyetine aykiri* 'Star' daily newspaper, and *Basortulu avukata vize* 'Taraf' daily newspaper, both 25 January 2013.

²⁴³ The By-Law on the Garments of Public Personnel (Official Gazette 25 October 1982, no. 17849), which was issued by the leaders of the September 1980 military coup, covers officials and workers in the public sector. According to this By-Law, men and women have to work bareheaded (Article 5).

²⁴⁴ *Taraf*, daily newspaper, 22 April 2013.

²⁴⁵ *Star*, daily newspaper, 15 April 2013.

questionnaires. Such questionnaires have been in use for decades, the statutory provisions allowing tribunals to draw adverse inferences from failures to answer questions put to employers and others by potential or actual claimants. The decision to repeal these provisions was taken in the face of overwhelming resistance from those who responded to the Government's consultation questionnaire.²⁴⁶

Also under threat may be the obligation on public authorities to consider the impact of their decision making on equality. The Government has lost a number of high profile judicial review claims in which it was alleged that decision makers erred in law in inadequately assessing the impact of their decision making on equality. David Cameron also announced his intention radically to reduce the number of legal challenges to governmental decision making by making judicial review more expensive and by reducing the three-month maximum period within which claims must be brought.²⁴⁷

Legislative developments

The Equality Act 2010 was amended in November 2012 to give effect to the decision in the *Test-Achats* case²⁴⁸ by removing the exception which had permitted sex discrimination in relation to insurance. The amendment does not apply to contracts concluded prior to 21 December 2012.

Case law of national courts

In the last EGELR two relevant decisions were reported on.²⁴⁹ In *Dunn v The Institute of Cemetery and Crematorium Management* the Employment Appeal Tribunal (EAT) ruled that the prohibition on discrimination against married persons was wide enough to capture discrimination which was because of the *identity* of the claimant's husband rather than merely the fact that she was married.²⁵⁰ In *Hawkins v Atex Group Ltd* another division of EAT disagreed and ruled that a claimant who was dismissed because her husband, who was the respondent company's chief executive officer, had been instructed no longer to employ members of his family, was not dismissed because of her married status. A successful claim of marital status discrimination required that the reason for the less favourable treatment be the fact of marriage or civil partnership rather than, as here, the existence of a close personal relationship with a particular other.²⁵¹

In *X v Mid Sussex Citizens Advice Bureau* the UK's Supreme Court ruled that volunteers are not protected by the Equality Act 2010's prohibition on employment-related discrimination.²⁵² The Supreme Court ruled that the claimant, a volunteer who was expected to be available on three days each week, fell outside the provisions of the Act and that EU law did not assist. The Court took the view that the concept of 'occupation' in EU law did not extend to volunteers.

Miscellaneous

The Prime Minister reshuffled his Cabinet of Senior Ministers in September 2012 with the result that the proportion of women in the most senior ministerial roles in the UK declined from 17.2 % to 16.1 %. The Government Equalities Office appears to have been reduced in

²⁴⁶ <http://www.homeoffice.gov.uk/publications/about-us/consultations/equality-act-wider-enforcement/consultation-response?view=Binary>, accessed 8 March 2013.

²⁴⁷ <http://www.bbc.co.uk/news/uk-politics-20400747>, accessed 8 March 2013.

²⁴⁸ Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL and Others v Conseils des ministres* [2011] ECR I-00773.

²⁴⁹ See European Gender Equality Law Review No. 2-2012, p. 144.

²⁵⁰ *Dunn v The Institute of Cemetery and Crematorium Management* (Sex Discrimination: Marital status) (Rev 1) [2011] UKEAT 0531_10_0212 (2 December 2011).

²⁵¹ *Hawkins v Atex Group Ltd & Others* (Sex Discrimination: Marital status) [2011] UKEAT 0302_11_1303 (13 March 2012).

²⁵² *X (Appellant) v Mid Sussex Citizens Advice Bureau and another* (Respondents) [2012] UKSC 59.

significance by being moved from the very powerful Home Office to the much less significant Department of Culture, Media and Sport, not the most obvious home for equality. Now responsible for equalities issues is Secretary of State for Culture, Media and Sport (Maria Miller), whose secondary function is Minister for Women and Equalities. Ms Miller has taken a broadly anti-choice approach in abortion matters in the past (voting to lower the limit for legal abortion to 20 weeks) and has been an opponent of gay marriage.²⁵³

Sex and Power 2013: Who Runs Britain?, published in February 2013, reported that female participation in public life and in politics in the UK is in a period of rapid decline. Despite 35 years of sex equality legislation Britain was in 60th place of 190 countries in terms of female representation in the democratic system (down from 33rd in 2001). Women account for only 22.5 % of UK's MPs, 33.3 % of MEPs and 18.5 % of NI's Assembly members. Two in every three public appointments in Britain go to men. Men account for 87 % of elected mayors, 88 % of Council leaders, 84 % of the most senior civil servants, 95 % of the editors of national newspapers and 86 % of the senior judiciary.²⁵⁴

BME women are particularly disadvantaged in many ways. A recent report by the Runnymede Trust found that they experience discrimination at all stages of recruitment, in particular at application and interview stages. 17.7 % of black women and 20.5 % of Bangladeshi women were unemployed by comparison with just 6.8 % of white women, with hijab-wearing Muslim women experiencing particular disadvantage because of their dress. Women of Pakistani and Bangladeshi origin were disproportionately likely to be questioned about their intentions as regards marriage and motherhood.²⁵⁵

Shortly after the announcement that a renowned philosopher, Baroness Onora O'Neill, had been appointed as Chair of the Equality and Human Rights Commission, on 25 January 2012 the Minister for Women and Equalities (and Secretary of State for Culture, Media and Sport) announced the appointment of a number of new EHRC Commissioners and details of the Commission's budget for the years to 2015. The Commission, which had an annual budget of EUR 81 million (£70 million) on its establishment, will receive EUR 20 million (£17.1 million) per year from 2013/14, although with an additional EUR 1.2 million in 2013/14 and EUR 1.6 million in 2014/15 and access to additional funding in the region of EUR 9 million per year during this period in respect of involvement in 'frontline services'. The Danish Institute for Human Rights, which serves a population of 5.6 million (less than 10 % of the UK population), had a budget of EUR 15 million in 2011.

²⁵³ *Guardian* 4 September 2012 'Cabinet reshuffle: a good day for Maria Miller but a bad day for women'.

²⁵⁴ www.countingwomenin.org/, accessed 8 March 2013.

²⁵⁵ <http://www.runnymedetrust.org/projectsand-publications/parliament/appg-2/appg-inquiry.html>, accessed 8 March 2013.

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