



EUROPEAN NETWORK OF LEGAL EXPERTS  
IN THE FIELD OF GENDER EQUALITY

# European Gender Equality Law Review

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Thirty Years of the Gender Equality Network:  
Who We Are, What We Do, and Why We Do It

*Susanne Burri & Helga Aune*

Sex Discrimination in Relation to Part-Time and  
Fixed-Term Work



# European Gender Equality Law Review

2014 - 1

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

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# Editorial

Alyssa Bos\*

This 2014 edition of the European Gender Equality Law Review celebrates 30 years of the European Network of Legal Experts in the Field of Gender Equality. The past decades have been witness to a constructive and beneficial cooperation between the Network and the European Commission, and efforts to improve equality between men and women are stronger than ever. Despite the financial and economic crises, both women's participation in the economy and their contribution to family finances have increased, thereby helping to minimise the gender employment gap.<sup>1</sup> Notably, the Commission's proposal to draft a Directive that would ensure that at least 40 % of the under-represented sex is present on non-executive boards of directors by 2020 progressed well through the legislative process, and received strong endorsement by the European Parliament.<sup>2</sup> There is considerable variation between Member States concerning the proportion of female board members, and it is certain that there is still a long way to go until the 40 % quota is achieved. However, the past decade has seen significant progress; especially since 2010 when the European Commission first announced its intention to consider targeted initiatives in this field.<sup>3</sup> Complementing this progress, the Commission developed a new tool to improve pay transparency in order to *inter alia* tackle the gender pay gap.<sup>4</sup>

However, challenges remain in Europe. Despite the fact that women constitute 60 % of university graduates, they are still paid 16 % less than men per hour of work. In addition, women are more likely to work part-time, and to interrupt their careers to care for others. This directly contributes to an alarmingly high gender gap in pensions, which currently stands at 39 %. In addition, women are still less likely to hold senior positions in employment. Women account for approximately 27 % of senior government ministers in Europe, and just 17.8 % of the members of boards of directors in the largest publicly listed companies.<sup>5</sup> Furthermore, women still take on the majority share of unpaid work within the household and family.<sup>6</sup> Such challenges do not just affect women negatively. Throughout Europe, men are generally entitled to significantly less paternity leave than women are entitled to maternity leave. This has the effect of further re-entrenching social stereotypes about the roles played by men and women at work and in the family, and these cultural perceptions also strongly influence the take-up of paternity and parental leave. This presents a major obstacle to the effective

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<sup>1</sup> See the statistical annex of *Employment and Social Development in Europe 2013*, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=113&newsId=2023&furtherNews=yes>, accessed on 26 June 2014.

<sup>2</sup> Information on the legislative procedure is available at: <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0299%28COD%29&l=nl>, accessed 26 June 2014.

<sup>3</sup> Figures provided by the European Commission *Database on women and men in decision-making*, as detailed in: European Commission *Report on Progress on equality between women and men in 2013* SWD(2014) 142, 14 February 2014, pp. 27-28, available at: [http://ec.europa.eu/justice/gender-equality/files/swd\\_2014\\_142\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/swd_2014_142_en.pdf), accessed 30 June 2014.

<sup>4</sup> Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency, OJ L 69 of 8 March 2014, pp. 112-116, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:069:0112:0116:EN:PDF>, accessed 26 June 2014.

<sup>5</sup> Figures provided by the European Commission *Database on women and men in decision-making*, as detailed in: European Commission *Report on Progress on equality between women and men in 2013* SWD(2014) 142, 14 February 2014, pp. 27-28, available at: [http://ec.europa.eu/justice/gender-equality/files/swd\\_2014\\_142\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/swd_2014_142_en.pdf), accessed 30 June 2014.

<sup>6</sup> European Commission *Report on Progress on equality between women and men in 2013* SWD(2014) 142, 14 February 2014, available at: [http://ec.europa.eu/justice/gender-equality/files/swd\\_2014\\_142\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/swd_2014_142_en.pdf), accessed 26 June 2014. See in this *European Gender Equality Law Review 1/2014* at p. 25.

reconciliation of work and family life of both men and women.<sup>7</sup> These examples are just a handful of facts, which prove the necessity and relevance of the work of the Network.

For this 30<sup>th</sup> anniversary of the Network, Sophia Koukoulis-Spiliotopoulos and Hélène Masse-Dessen, who have been involved in the Network for many years, wrote an article on its history and achievements ('Thirty Years of the Gender Equality Network: Who We Are, What We Do, and Why We Do It').<sup>8</sup> In the past thirty years, the Network has provided the European Commission with independent expert information and advice on the implementation of EU gender equality law in national law and practice. It has also assisted the Commission in planning and formulating new legislation in the field of gender equality. The Network is not only a tool for the Commission, but it also acts as a disseminator of information of EU law, and of good and bad practices in the 33 participating countries.<sup>9</sup> These countries assert that the Network has shed light on the nature of gender equality as a proactive fundamental principle and right, which goes further in scope than the mere prohibition of sex discrimination.

In the second article of this Law Review, Susanne Burri and Helga Aune present some findings of the Network's recently published thematic report on sex discrimination in relation to part-time and fixed-term work.<sup>10</sup> In this article, the authors pay attention to relevant EU legislation and case law, national policies, collective agreements, and non-discrimination and working-time issues. Although the concentration of part-time work varies across Europe, women are overrepresented in part-time jobs in all countries and therefore suffer related disadvantages. These disadvantages include not earning an income sufficient enough to attain economic independence, being exposed to less career opportunities, and building up smaller pensions than those in full-time employment. These disadvantages were exacerbated by the financial and economic crises, which led to an increase of (involuntary) part-time employment, especially in Southern European countries. Although structural discrimination is hard to combat, the recommendations of the CEDAW Committee provide examples of policies and measures that could be taken both at national and EU level. These tools are also useful to address pregnancy and maternity discrimination against fixed-term workers. Furthermore, the authors highlight the need for increased vigilance in matters concerning indirect sex discrimination.

As in previous editions, the European Gender Equality Law Review also contains an overview of the relevant European case law in the field of gender equality, from both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), in the period between November 2013 and May 2014. An overview of European policy and legislative developments is also included. In addition, the national developments and case law of the 33 countries participating in the Network are detailed. Two cases of the CJEU are of particular importance and interest in this edition of the Law Review, and as such shall be briefly highlighted in this Editorial.

In these two cases, the CJEU decided that EU law does *not* entitle the intended (commissioning) mother in a surrogacy arrangement to maternity leave or its equivalent.<sup>11</sup>

<sup>7</sup> See generally: European Network of Legal Experts in the Field of Gender Equality, A. Masselot et al., *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The application of EU and national law in practice in 33 European countries*, European Commission 2012, available at: [http://ec.europa.eu/justice/gender-equality/files/your\\_rights/discrimination\\_pregnancy\\_maternity\\_parenthood\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf), accessed 29 June 2014.

<sup>8</sup> See in this *European Gender Equality Law Review* 1/2014, at pp. 5-12.

<sup>9</sup> The 28 Member States; the EFTA countries of Iceland, Liechtenstein, and Norway; and the candidate countries of the Former Yugoslav Republic of Macedonia, and Turkey.

<sup>10</sup> European Network of Legal Experts in the Field of Gender Equality, S. Burri & H. Aune, *Sex Discrimination in Relation to Part-Time and Fixed-Term Work: The application of EU and national law in practice in 33 European countries*, European Union 2013, available at: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-9](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9) and EU Bookshop: <https://bookshop.europa.eu/en/home/>, accessed 25 June 2014. See in this *European Gender Equality Law Review* 1/2014 at pp. 13-23.

<sup>11</sup> Cases C-363/12 Z v A *Government Department and the Board of Management of a Community School* [2014] and C-167/12 C.D. v S.T. [2014] ECR n.y.r.

Two Advocates-General to the CJEU gave conflicting opinions, which were published on the same day. In the case of *C.D. v S.T.* Advocate General Kokott advised that a British woman who became a legal mother through a surrogacy arrangement was entitled to part of the 14 weeks paid maternity leave; the period required by the Pregnant Workers' Directive. However, according to A-G Kokott this should not result in a doubling of maternity rights, meaning that the maternity leave must be shared with the woman who gave birth.<sup>12</sup> In contrast, in *Z v A Government Department and the Board of Management of a Community School*, Advocate General Wahl advised that EU law<sup>13</sup> does *not* apply in circumstances where a woman, whose genetic child has been born through a surrogacy arrangement (that is: the woman herself did not give birth), is refused maternity leave or equivalent. In the view of A-G Wahl, the intended legal mother in a surrogacy arrangement does not qualify for paid maternity leave, because the right to 14 weeks paid maternity leave is intended to protect a woman's biological condition after she has given birth.<sup>14</sup> In the final rulings of these cases, the CJEU clarified that Member States are not required to provide maternity leave to a female worker who, as a commissioning mother, has had a baby through a surrogacy arrangement. It is important to note that in these cases, there were no specific national rules on maternity leave for intended mothers. As the position set by the CJEU is a *minimum* standard to which all Member States must adhere, they are still entitled to legislate at national level to grant paid leave to workers who have children through surrogacy arrangements.

The members of the editorial board hope that the content will be of interest to the reader. Reactions, comments, and suggestions regarding this Law Review are, of course, very welcome.

The publications of the European Network of Legal Experts in the field of Gender Equality can be found at: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/document/index_en.htm).

<sup>12</sup> The opinion of Advocate General Kokott in Case C-167/12, delivered on 26 September 2013, is available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=142184&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=398234>, accessed 26 June 2014.

<sup>13</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

<sup>14</sup> The opinion of Advocate General Wahl in Case C-363/12, delivered on 26 September 2013, is available at: <http://curia.europa.eu/juris/document/document.jsf?docid=142181&doclang=EN>, accessed 26 June 2014.

# Thirty Years of the Gender Equality Network: Who We Are, What We Do, and Why We Do It

*Sophia Koukoulis-Spiliotopoulos and Hélène Masse-Dessen\**

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The biannual Law Review that you are now reading, the European Gender Equality Law Review (EGELR), has been produced by the European Network of Legal Experts in the Field of Gender Equality. You may wonder why and how this Network was established. Who are its members? What are its objectives and functions? What are its achievements? Thirty years after the establishment of this Network, we thought it opportune to answer these questions.<sup>1</sup>

## 1. The establishment and main tasks of the Network

The Network was established in 1983, at the initiative of Ms Odile Quintin, the then Head of the Unit dealing with the problems of women's employment and equality, and subsequently Director, in the Commission's Directorate-General for Employment and Social Affairs. It is currently linked to the Directorate-General for Justice (Unit JUST/D1, Equal Treatment Legislation).

The network coordination is assigned following a call for tenders. For many years, the tender has been won by Dutch Universities (Amsterdam, Tilburg and currently Utrecht). The names of the Network Members and their functions appear on each EGELR issue. They are independent national legal experts in various professions and activities (academics, legal practitioners, members of equality bodies, NGOs etc.) – jurists of a great number of different legal backgrounds and interests, open to other disciplines, very competent in matters of gender equality, and eager to promote it as a fundamental value and right. Although several Members have been replaced, this variety has been maintained all these years, as it ensured a variety of approaches.

We currently have thirty-three Network Members, one from each of the twenty-eight EU Member States, one from each EFTA country (Liechtenstein, Norway and Iceland) and one from each candidate country (FYR of Macedonia and Turkey). During the first years of the Network's operation, there were two experts from each country and they all came from Member States only. At that time, the Network had three working languages (English, French and German). As the EU was gradually enlarged, English became the only Network language. These three languages are still used for the EGELR, which is first drafted in English and then translated into French and German.

The first coordinator of the Network, who also set it up, was Ms Angela Byre, a lawyer specialising in labour law, social policy and industrial relations, and editor of a monthly journal on European industrial relations. She was followed by Professor Ferdinand von Prondzynski and Professor Sacha Prechal, who is currently judge at the EU Court of Justice. The current coordinator is Dr Susanne Burri, senior lecturer in Gender and Law at Utrecht University. Ms Alyssa Bos, LL.M., is a junior lecturer at the same University, and acts as assistant coordinator. Ms Alice Welland, LL.M., deals with organisational matters. There is also an executive committee consisting of three academics and a practitioner: Dr Susanne Burri, Professor Christopher McCrudden, Professor Linda Senden and Maître Hélène Masse-Dessen.

Our Network serves the Commission's need for independent expert information and advice on the implementation of gender equality in national law and practice. So, from the outset, the Network has fulfilled a 'vertically ascending' role. It helps the Commission in its

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<sup>1</sup> [http://ec.europa.eu/justice/gender-equality/tools/legal-experts/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/tools/legal-experts/index_en.htm), accessed 26 May 2014.

monitoring mission, in particular by providing it with general reports on national situations and thematic reports on specific issues; alerting it about infringements and assisting it in infringement proceedings; replying to specific questions of the Commission; and participating in meetings aimed at exchanging information and discussing courses of action at both national and EU level. It also assists the Commission in planning and formulating new legislation. The success of our Network has led to other Networks being established in several EU law areas.

Gradually an excellent *esprit de corps* developed along with proactive approaches, thanks also to the Commission officials collaborating with the Network – high-level jurists who share with the Network Members a strong sense of social justice and the will to promote concrete results of EC law in the everyday life of people residing in the EU.

## 2. The Network as a vector of sensitisation to and advancement of gender equality law

### 2.1. Organisation of and participation in conferences

Soon after its establishment, the Network became a vector of sensitisation in EU gender equality law, and more generally in fundamental rights (substantive and procedural) law, assuming a ‘distributing’ and ‘promoting’ role. It organised and/or participated in conferences that contributed to important developments at national and EU level, such as the following:

In May 1985, the Commission, the Belgian ‘Centre interuniversitaire de droit comparé’ and the ‘Centre de droit patrimonial de la famille’ of the Université Catholique de Louvain organised a high-level conference on *Equality in Law between Men and Women in the European Community*, in Brussels and Louvain-la-Neuve, coordinated by Professor Michel Verwilghen. The participants, judges, academics, lawyers, members of the European Parliament and Commission officials, joined forces with Network Members in an effort to find effective ways to disseminate EC gender equality legislation and CJEU case law, so as to promote their implementation at national level; to assess national situations and ascertain whether new measures were necessary, and if so, what kind of measures. The conference proceedings were published in two volumes,<sup>2</sup> completed by a textbook containing the EC gender equality legislation then in effect and CJEU case law, laying the foundations of EU gender equality law;<sup>3</sup> all three publications were in English and French.

In 1992, a follow-up high-level conference took place in Louvain-la-Neuve, under the auspices and with the support of the Commission, coordinated by Professor Michel Verwilghen, on *Access to Equality between Men and Women in the European Community*. Its aim was to explore means to encourage victims of discrimination to claim their rights as well as to suggest effective remedies to this end. Effective judicial protection had been proclaimed by the CJEU as a general principle and fundamental right in cases of discrimination on grounds of sex<sup>4</sup> and had then been extended to other EC law areas. This principle, like all other general principles developed by the CJEU, is binding on all national authorities – including courts – as well as on all EU institutions and bodies.

The idea to organise this conference came from the Network, which had found in the course of its work that gender equality litigation levels were too low and had identified several factors which obstructed access to courts and made the successive stages of judicial proceedings ineffective, thus reducing gender equality law to a dead letter. The Network Members greatly contributed to the elaboration of the conference programme, and presented most of the reports.<sup>5</sup> Major obstacles to judicial protection identified at the conference included the lack of possibilities for trade unions and other organisations to bring discrimination cases to court (*locus standi*); the bearing of the burden of proof by the

<sup>2</sup> M. Verwilghen (ed.) *Equality in Law between Men and Women in the European Community* Vol. 1 *General Reports*, Vol. 2 *National Reports*, Louvain-la-Neuve, Presses Universitaires de Louvain 1986.

<sup>3</sup> M. Verwilghen (ed.) *Equality in Law between Men and Women in the European Community, Textbook*, Louvain-la-Neuve, Presses Universitaires de Louvain 1987.

<sup>4</sup> Case C-224/84 *M. Johnston v. Royal Ulster Constabulary* [1986] ECR 1651.

<sup>5</sup> M. Verwilghen (ed.) *Access to Equality between Men and Women in the European Community*, Louvain-la-Neuve, Presses Universitaires de Louvain 1993. The reports are in English and French, as presented.



applicant; and the limited powers of the courts, including in matters of judicial control and sanctions which were not always real and effective.

The Louvain Conferences were followed by conferences and important case law developments in Member States. Moreover, the Commission, relying on CJEU case law on the burden of proof<sup>6</sup> and the work of the Network and the conferences, presented a proposal for a relevant Directive. The Network provided information on national legislation and practice and intensively cooperated with the Commission on the wording of this Directive, which constituted a major step forward in judicial protection.<sup>7</sup> Subsequent gender equality directives, such as Directives 2004/113/EC (access to and supply of goods and services) and 2006/54/EC (employment and occupation (recast)),<sup>8</sup> contain specific requirements aimed at promoting effective judicial protection, including regarding the *locus standi* of organisations, the burden of proof and real and effective sanctions. The Network also contributed to the drafting of these directives.

Another important high-level conference, sponsored by the Commission, co-sponsored by the Equal Opportunities Commission of Great Britain and Northern Ireland and the Oxford University Faculty of Law, and coordinated by Professor Christopher McCrudden, Member of the Network, was held in Oxford in January 1994 on *Equality of Treatment between Women and Men in Social Security* with the participation of Network Members. The conference dealt with the impact of the CJEU *Barber* judgment<sup>9</sup> which automatically invalidated certain provisions of Directive 86/378/EC on gender equality in ‘occupational’ social security schemes;<sup>10</sup> its aim was to point the way forward.<sup>11</sup> Subsequently, Directive 86/378/EC was amended by Directive 96/97/EC,<sup>12</sup> which formally adapted it to the *Barber* judgment for reasons of legal certainty. The Network was consulted by the Commission in the course of the drafting of the latter Directive. The volumes from all these conferences still constitute very useful sources and references for academics and practitioners.

Since October 2007, when the Commission organised a large conference *On 50 years of EU gender equality law*, with the participation of the Network, with a view to evaluating the progress made and planning ahead, a legal seminar has been organised every year on issues related to gender equality and gender discrimination, as well as related to discrimination on other grounds which are dealt with by another Network, the Anti-Discrimination Network. Both Networks participate in these seminars and collaborate in the organisation of these seminars, which aim to disseminate EU law, evaluate national situations and explore the necessity for further action.<sup>13</sup>

## 2.2. The regular publications of the Network

### 2.2.1. Newsletter

From 1996 to 1999, the Network produced the Newsletter ‘Equality Quarterly News’, as an internal document. This Newsletter was followed by the quarterly ‘Bulletin Legal Issues in Gender Equality’, which appeared from 2000 to 2006 on the Commission’s website, and was succeeded by the EGELR from 2008. All these publications serve to highlight topical developments in the field of gender equality at EU and national level. The EGELR in particular is widely disseminated at national and EU levels.

<sup>6</sup> Case C-109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3220.

<sup>7</sup> Directive 97/80/EC, OJ L 14, 20 January 1998, p. 6.

<sup>8</sup> OJ L 373/37, 21.12.2004, p. 37, and OJ L 204, 26.7.2006, p. 23, respectively.

<sup>9</sup> Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

<sup>10</sup> OJ L 225, 12.8.1985, p. 40.

<sup>11</sup> C. McCrudden (ed.) *Equality of Treatment between Women and Men in Social Security*, London, Dublin, Edinburgh Butterworths 1994 (reports and gender equality directives, in English).

<sup>12</sup> OJ L 46, 17 February 1997, p. 20.

<sup>13</sup> See the proceedings of the 2013 seminar at <http://www.non-discrimination.net/content/legal-seminar-2013-equality-law-what-kind-equality-0>, accessed 26 May 2014.

### 2.2.2. Reports and booklets

The work of the Network, which was first only addressed to the Commission, has also become available to the general public. The Commission decided to publish some of the reports of the Network on its website.<sup>14</sup> Some of them are also published as booklets: for example, in 2013, reports on sex discrimination in part-time and fixed-term work<sup>15</sup> and on the transposition of *gender equality law in 33 European Countries* were published.<sup>16</sup> In 2012, reports on the personal scope of EU sex equality directives<sup>17</sup> and on discrimination related to pregnancy, maternity and parenthood were published.<sup>18</sup> Further, in 2011 a report on sex and sexual harassment was published on its website.<sup>19</sup> Some of these reports are summarised in the EGELR.

The Network also publishes legal guides and *vademecums* aimed at facilitating access to EU and national gender equality law, which are often updated. All these documents are useful not only to academics, but also to practitioners at any level and national authorities, including the judiciary. They are used as a basis for conferences and teaching, and their dissemination and use are increasing.

### 2.3. Professional activities of the members of the Network

Network Members have not only worked together for the elaboration of documents required by the Commission; they also increasingly engage in common research and exchange of their findings. They have also developed several useful activities by themselves or in collaboration with other Network Members, such as academic publications, training courses in the Member States and at the Trier Academy of European Law, participation in public programmes, etc. Practitioners find help in applying EU law and good practices through the work of the Network, and can assist colleagues by means of the knowledge they draw directly from Network reports, but also from other members of the Network.

We may conclude that the network is not only a direct tool for the Commission, but also an indirect vector of dissemination of EU law and good practices in the Member States. As practitioners, we can say that the Network has greatly contributed, for example, to the implementation of the rules on the burden of proof, indirect discrimination, and many other rules and concepts, which at the beginning appeared quite foreign to national judges. In this way, the Network also contributes to the formation and consolidation of a common European spirit and conscience, in other words, to European integration.

<sup>14</sup> The EGELR is available in English, French, and German. The work of the Network, including the EGELR, is available at: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/document/index_en.htm), accessed 26 May 2014. The English version of the EGELR is also printed and distributed to equality bodies, NGOs, lawyers, and other interested parties.

<sup>15</sup> S. Burri & H. Aune, European Network of Legal Experts in the Field of Gender Equality, *Sex Discrimination in Relation to Part-Time and Fixed-Term Work: The application of EU and national law in practice in 33 European countries*, European Commission 2013, available at: [http://ec.europa.eu/justice/gender-equality/files/your\\_rights/sex\\_discrimination\\_in\\_relation\\_to\\_part\\_time\\_and\\_fixed\\_term\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/your_rights/sex_discrimination_in_relation_to_part_time_and_fixed_term_final_en.pdf), accessed 27 June 2014.

<sup>16</sup> S. Burri & H. van Eijken, European Network of Legal Experts in the Field of Gender Equality, *Gender Equality Law in 33 European Countries: How are EU rules transposed into national law?* European Commission 2013, available at: [http://ec.europa.eu/justice/gender-equality/files/your\\_rights/gender\\_equality\\_law\\_33\\_countries\\_how\\_transposed\\_2013\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/your_rights/gender_equality_law_33_countries_how_transposed_2013_en.pdf), accessed 27 June 2014.

<sup>17</sup> N. Countouris & M. Freedland, European Network of Legal Experts in the Field of Gender Equality, *The Personal Scope of the EU Sex Equality Directives*, European Commission 2012, available at: [http://ec.europa.eu/justice/gender-equality/files/your\\_rights/personal\\_scope\\_eu\\_sex\\_equality\\_directive\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf), accessed 27 June 2014.

<sup>18</sup> A. Masselot et. al., European Network of Legal Experts in the Field of Gender Equality, *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood: The application of EU and national law in practice in 33 European countries*, European Commission 2012, available at: [http://ec.europa.eu/justice/gender-equality/files/your\\_rights/discrimination\\_pregnancy\\_maternity\\_parenthood\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination_pregnancy_maternity_parenthood_final_en.pdf), accessed 27 June 2014.

<sup>19</sup> A. Numhauser-Henning & S. Laulom, European Network of Legal Experts in the Field of Gender Equality, *Harassment related to Sex and Sexual Harassment Law in 33 European Countries: Discrimination versus Dignity*, European Commission 2011, available at: [http://ec.europa.eu/justice/gender-equality/files/your\\_rights/final\\_harassment\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/your_rights/final_harassment_en.pdf), accessed 27 June 2014.

### 3. The Network as a vector of sensitisation to and advancement of EU fundamental rights law

As we know, gender equality law is part of EU fundamental rights law. Several concepts and rules developed in the framework of gender equality have been extended to other EU law areas and have thus been mainstreamed into EU fundamental rights law. This is particularly true for the Lisbon Treaty, which introduced into the EU Treaty the duty of Member States to ensure effective judicial protection (Article 19(1) TEU), which was first formulated by the Court as a binding general principle in the field of gender equality (see 2.1. above). This is also true for the EU Charter of Fundamental Rights (the Charter) which endorsed the same fundamental right (Article 47) for all areas of EU jurisdiction.<sup>20</sup>

#### 3.1. The field of the Network: gender equality as a proactive principle and right

An important contribution of the Network is that it has shed light on the nature of gender equality as a proactive fundamental principle and right, which goes further than the mere prohibition of gender discrimination. This fundamental principle and right is now reflected in the EU Treaty (Article 2), which proclaims gender equality as a foundational value of the EU, in addition to non-discrimination on grounds of sex. Gender equality is also guaranteed by the Charter as a proactive fundamental principle and right (Article 23), in addition to the right to non-discrimination on grounds of sex (Article 21).

#### 3.2. The contribution of the Network to the amendment of the Treaties and the status of the Charter of Fundamental Rights

##### 3.2.1. The European Convention

At the Commission's request, the Network contributed to the work of the European Convention, which was elaborating a draft EU Constitutional Treaty by three papers. These papers were drafted by the then coordinator of the Network, Sacha Prechal, and endorsed by the entire Network. The first paper, issued in October 2002, was titled 'The European Convention and Gender Equality: Some Initial Observations'. The second, which built upon the first, was issued in April 2003, was titled 'The European Convention and Gender Equality: Observations on the Draft Articles of the Constitutional Treaty'.<sup>21</sup> The third paper, which built upon the previous two, was issued in September 2003 after the European Convention had finalised its work and had presented a draft 'Treaty establishing a Constitution for Europe'. This was titled 'The European Constitution and Gender Equality: Observations on the Draft Treaty establishing a Constitution for Europe'.<sup>22</sup>

##### 3.2.2. The papers

These papers addressed issues of direct or indirect relevance to gender equality, and were aimed at safeguarding and strengthening the *acquis communautaire* in gender equality and the wider relevant social *acquis* in the Treaty and the Charter. The last paper was drafted with a view to the then forthcoming Intergovernmental Conference (IGC 2007), and it mostly repeated comments and proposals included in the previous papers, insisting, *inter alia*, on the necessity:

<sup>20</sup> See S. Prechal 'EU Gender Equality Law: a source of inspiration for other EU law areas?' in: European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review* 1/2008, available at: [http://ec.europa.eu/justice/gender-equality/files/egelr2008-1\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/egelr2008-1_en.pdf), accessed 26 May 2014.

<sup>21</sup> This paper was published in the Network's *Bulletin Legal Issues in Equality* No. 2/2003 (see 2.2.1 above).

<sup>22</sup> This paper was published in the Network's *Bulletin Legal Issues in Equality* No. 3/2003. See also S. Koukoulis-Spiliotopoulos 'The Lisbon Treaty and the Charter of fundamental rights: maintaining and developing the *acquis* in gender equality', in: European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review* 1/2008, available at: [http://ec.europa.eu/justice/gender-equality/files/egelr2008-1\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/egelr2008-1_en.pdf), accessed 26 May 2014.



- to include gender equality expressly among the EU foundational values;
- to maintain gender equality as a transversal objective and to impose a positive obligation to eliminate gender inequalities and promote gender equality in all EU activities (as was the case under Article 3(2) TEC);
- to prohibit gender discrimination by a provision having direct effect (not merely to provide for a legal basis for EU legal action with a view to combat gender discrimination);
- to provide for a legal basis for combating violence against women in all its aspects, including domestic violence; and
- to provide for guarantees aimed at eliminating *de facto* gender inequalities.

The paper stressed that in any event, the Constitutional Treaty ‘should be interpreted and applied by EU institutions, and in particular by the Commission, when it uses the powers conferred on it by that Treaty, including the power to propose legislation and to control the application of EU law by the Member States, in a way that ensures the effective implementation of gender equality as a well-established fundamental principle and fundamental right’.

### 3.2.3. Criticisms from the Network and the development of the Charter

In its first two papers, the Network had deplored that some of the Charter’s provisions, such as Article 33(2) on the reconciling of family and professional life, were more limited than secondary EU legislation (which was meanwhile strengthened). It also vigorously warned against endorsing the ‘drafting adjustments’ recommended by Working Group II (‘Charter’) of the Convention, which were clearly aimed at restricting the Charter’s scope.

In particular, the Network deplored a new (fifth) paragraph to be added to Article 52 of the Charter. This introduced a distinction between ‘rights’, which would be legally enforceable; and ‘principles’, which would create no enforceable rights or claims, but would only serve as an aid to interpretation or as a standard for judicial review of national or EU authorities’ action. The Network recalled well-established CJEU case law by which it was recognised that EU law provisions proclaiming principles, such as the equal pay principle (Article 141 TEC, now 157 TFEU), were sources of enforceable rights. Moreover, only acts by which Member States ‘implemented’ EU law would be interpreted or reviewed as to their legality in light of the Charter. However, according to well-established CJEU case law Member States were bound by fundamental rights whenever they acted ‘within the scope’ of EU law, irrespective of whether they implemented any EU law instrument.

The Network also criticised other ‘drafting adjustments’, such as the reference to ‘common constitutional traditions’ and to ‘national laws and practices’ in the interpretation of the Charter (new paragraph 6 of Article 52). In the view of the Network, these ‘may well lead to confusion and further limitation of the Charter’s rights’. Further, the Network criticised the reference to the ‘explanations’ on the Charter’s provisions. These were initially written by the Praesidium of the Convention that drafted the Charter; they were then ‘updated’ by the Praesidium of the European Convention with a view to reinforcing the ‘drafting adjustments’ made by the latter Convention. The European Convention also made an addition to the Charter’s Preamble, which provided that both EU and national courts should have ‘due regard’ to the explanations when interpreting the Charter.

The Network welcomed the provision of a legal basis for EU accession to the European Convention of Human Rights (ECHR), but warned that the *acquis* created by the CJEU should be preserved as the CJEU approach to gender equality was stricter, and therefore more protective.

As the Charter, including the ‘drafting adjustments’, was finally incorporated into the Constitutional Treaty, the Network recalled in its last paper the shortcomings to which it had already drawn attention as well as its proposals. It expressed hope that the CJEU would ignore the attempts to restrict the Charter’s scope and that all EU institutions, including the Commission, would preserve the *acquis* in fundamental rights.

As we know, without being incorporated into the Treaty, since 1 December 2009 the Charter acquired ‘*the same legal value as the Treaties*’ by virtue of the Lisbon Treaty

(Article 6(1) TEU). Furthermore, some new Treaty provisions correspond to proposals of the Network (see 3.2.2 above). Gender equality was thus inserted into Article 2 TEU as a EU *foundational value* – an important development achieved at the last moment in the IGC. Further, the promotion of gender equality was maintained as a *transversal EU fundamental objective* (Article 3(3) TEU), and a *transversal EU obligation* (Article 8 TFEU). In addition, the *combat against gender discrimination* was also classified as a transversal EU obligation (Article 10 TFEU). *Gender mainstreaming* was maintained as an obligation of both the EU and Member States.<sup>23</sup> Also, Declaration No. 19 annexed to the Final Act of IGC 2007 confirms that *domestic violence* is a gender equality issue and that it is the obligation of the EU and the Member States to combat it in all areas. Thus, instruments implementing Article 10 TFEU in respect of gender equality will have a clear legal basis in order to deal with domestic violence.

The Court of Justice of the EU (CJEU) is increasingly invoking provisions of the Charter in order to safeguard fundamental rights, including gender equality, with respect to Member States' and EU action. In several cases the CJEU has avoided the restriction of the Charter's scope. It has, *inter alia*, strongly reaffirmed that Member States are bound by fundamental rights whenever they act 'within the scope' of EU law,<sup>24</sup> and has maintained its approach to 'principles' as sources of fundamental rights which are capable of being invoked against both national and EU authorities (see above).<sup>25</sup>

### 3.3. The necessity to maintain vigilance

In addition to its specific work on gender equality, the Network engages in common work with other networks that are larger and have greater material means. However, it helps maintain vigilance in the field of gender equality – a field which, after having pioneered in fundamental rights law and practice, is now at risk of drowning in the general combat against discrimination and for the protection of minorities.<sup>26</sup>

It is important to note that women, the main victims of violations of gender equality, are neither a group nor a minority, but one of the two forms of the human being and therefore constitutive of more than half of humanity. The Convention that elaborated the EU Charter of Fundamental Rights was convinced by this argument to include Article 23 in the Charter, in addition to Article 21 (see above).<sup>27</sup> This is crucial in times of socio-economic crises, where women are particularly vulnerable to poverty and social exclusion; as well as to episodes of multiple discrimination within the framework of the deregulation of employment and social security, and the collapse of the welfare state.

<sup>23</sup> See S. Burri 'Introduction' in European Network of Legal Experts in the Field of Gender Equality *Gender Equality Law in 33 European Countries: How are EU rules transposed into national law?* 2013.

<sup>24</sup> Case C-617/10 Åkerberg Fransson ECLI:EU: C:2013:105.

<sup>25</sup> E.g. in C-579/12 RX-II, *Commission v. Strack* ECLI:EU:C:2013:1297.

<sup>26</sup> See H. Masse-Dessen 'The Place of Gender Equality in European Equality Law' in: European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review 1/2011*, European Commission 2011, available at: [http://ec.europa.eu/justice/gender-equality/files/egelr\\_2011-1\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/egelr_2011-1_en.pdf), accessed 26 May 2014.

<sup>27</sup> See J. Dutheil de la Rochère 'La Charte des droits fondamentaux de l'Union européenne' *Jurisclasseur* 2001, Fasc. 160, I, No 79, referring to the argument put forward by the representative of the Association of Women of Southern Europe (AFEM) at the hearing granted by the Convention.

# Sex Discrimination in Relation to Part-Time and Fixed-Term Work

Susanne Burri and Helga Aune\*

## 1. Introduction

Part-time work is quite common in many European countries, in particular among women. One in five workers in the European Union works part time, meaning that they work fewer (weekly) hours than full-time workers. When women are engaged in paid employment, three in ten work part time, while this is much less the case for men.<sup>1</sup> However, there are many differences between EU countries. While in the Netherlands, half of total employment consists of part-time employment, this is not the case for many Southern and Eastern European countries, such as Bulgaria, Slovakia, the Czech Republic and Greece, with very low part-time employment rates.<sup>2</sup> However, the current economic crisis has hit in particular the Southern European countries and led to an increase of involuntary part-time employment, for example in Portugal and Greece.<sup>3</sup> Part-time work in such situations is a sub-optimal choice of many. This entails a risk of poverty and exclusion related to a reduction in working hours and wages and this is highest among those of working age, as unemployment has risen and the number of jobless households has increased.<sup>4</sup> In some countries this trend is also intensified by a high gender pay gap.<sup>5</sup>

While (involuntary) part-time employment increased due to the economic crisis, this is not the case for fixed-term work; workers with fixed-term contracts bore the brunt of the downturn. Fixed-term work is less common in the 28 Member States of the EU than part-time work and more evenly distributed between men and women.<sup>6</sup>

Sex discrimination is often the result of gender stereotypes due to cultural, social as well as religious and historic perceptions of the roles of women and men in society. The predominance of women in part-time work is frequently explained by gender stereotypes

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<sup>1</sup> In the 28 Member States the part-time employment rate (as percentage of total employment) was 19.9 % in 2012; the male part-time employment rate was 9.4 % and the female part-time employment rate was 32.5 %: European Commission *Employment and Social Developments in Europe 2013*, European Union 2014, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=113&newsId=2023&furtherNews=yes>, accessed 29 April 2014, p. 427.

<sup>2</sup> The part-time employment rates (% of total employment) are 49.8 % in the Netherlands, 2.4 % in Bulgaria, 4.1 % in Slovakia, 5.8 % in the Czech Republic and 7.7 % in Greece: see European Commission *Employment and Social Developments in Europe 2013*, European Union 2014, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=113&newsId=2023&furtherNews=yes>, accessed 29 April 2014, pp. 448, 431, 432 and 454.

<sup>3</sup> See European Commission *Employment and Social Developments in Europe 2013*, European Union 2014, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=113&newsId=2023&furtherNews=yes>, accessed 29 April 2014, pp. 13, 32, 41, 60 and 177 and EWCO *Effects of Economic Crisis on Labour Market*, 2010, available at: <http://www.eurofound.europa.eu/ewco/2009/09/GR09090191.htm>, accessed 29 April 2014.

<sup>4</sup> See on the influence of the economic crisis the report of EGGE (Expert Group on Gender and Employment), F. Bettio et al. *The impact of the economic crisis on the situation of women and men and on gender equality policies* European Union 2012, available [http://ec.europa.eu/justice/gender-equality/files/documents/130410\\_crisis\\_report\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/130410_crisis_report_en.pdf), accessed 30 April 2014.

<sup>5</sup> For example in Portugal: see European Commission *Employment and Social Developments in Europe 2013*, European Union 2014, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=113&newsId=2023&furtherNews=yes>, accessed 29 April 2014, p. 13.

<sup>6</sup> The average fixed-term employment rate (as a percentage of total employment) in the 28 Member States of the EU was 13.7 % in 2012, the male rate was 13.3 % and the female rate was 14.2 % (as a percentage of total male/female employment): See European Commission *Employment and Social Developments in Europe 2013*, European Union 2014, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=113&newsId=2023&furtherNews=yes>, accessed 29 April 2014, pp. 13 and 427.

related to family responsibilities, but is also linked to gender segregation in employment, in particular in the educational and health sectors. Part-time work is therefore closely related to gender equality issues. Disadvantages related to part-time work, for example in relation to pay and the building up of pensions,<sup>7</sup> might amount to forms of indirect sex discrimination, when significantly more women than men work on such employment contracts. When a fixed-term contract of a woman is not renewed because she is pregnant, this amounts to direct sex discrimination.

The European Network of Legal Experts in the Field of Gender Equality has recently produced a thematic report addressing equality issues – in particular forms of sex discrimination – faced by part-time and fixed-term workers in 33 European countries: the 28 Member States, the EEA countries (Iceland, Liechtenstein and Norway); Turkey; and the FYR of Macedonia.<sup>8</sup> The main purpose of this report is to provide information on and present an analysis of the practical impact of the relevant gender equality directives as well as possible weaknesses and gaps in the existing *acquis* and its implementation and application in relation to these two groups of workers in national law. The content of this article is based on some findings of this publication. The national experts participating in the Gender Network have highlighted good practices in their reports which merit attention. However, these reports also show that combatting structural forms of sex discrimination in relation to part-time and fixed-term work is not easy.

After a short description in Section 2 of relevant EU legislation and case law, problems, policies, non-discrimination and working-time issues related to part-time work are addressed in Section 3. Section 4 discusses a few gender issues in relation to fixed-term work and Section 5 considers problems related to the effective application of the relevant legal norms.

## 2. EU legislation and case law

### 2.1. EU legislation

The issue of (sex) discrimination in relation to part-time work and fixed-term work is addressed by Treaty provisions, secondary legislation (directives), case law of the Court of Justice of the EU (hereafter CJEU or Court), soft law and EU policies.<sup>9</sup> The main relevant Treaty provisions in the two basic Treaties – the Treaty on the European Union (TEU) and the Treaty of the Functioning of the European Union (TFEU) – do not provide specific rights to part-time or fixed-term workers. They emphasize the importance of the principle of equality between men and women or are enabling provisions.<sup>10</sup> The same is true for the Charter of Fundamental Rights.<sup>11</sup> However, the principle of equal pay for equal work or work of equal value (Article 157 TFEU) has been applied in many cases, in particular in relation to part-time work, by national courts and in preliminary procedures involving the CJEU. This principle is also enshrined in the so-called Recast Directive 2006/54/EC, which applies not only to equal pay, but also to equal treatment between men and women in (access to) employment and

<sup>7</sup> The (unadjusted) gender pay gap per hour is 16.2 % on average in the EU; and even 31 % per year, given the high percentage of female part-timers: See for information on the gender pay gap for example the information provided on the website of DG Justice and the reports published on this issue on: [http://ec.europa.eu/justice/gender-equality/gender-pay-gap/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-pay-gap/index_en.htm) and [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-7](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-7).

The gender gap in pensions in the EU-27 Member States is 39 % on average and the gap is partly due to part-time employment and career interruptions: ENEGE, F. Bettio et al. *The Gender Gap in Pensions in the EU*, European Union 2013, available on: [http://ec.europa.eu/justice/gender-equality/files/documents/130530\\_pensions\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/130530_pensions_en.pdf), accessed 29 April 2014.

<sup>8</sup> European Network of Legal Experts in the Field of Gender Equality, S. Burri & H. Aune, *Sex Discrimination in Relation to Part-Time and Fixed-Term Work. The application of EU and national law in practice in 33 European countries*, European Union 2013, available at: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-9](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9) and EU Bookshop: <https://bookshop.europa.eu/en/home/>, accessed 29 April 2014.

<sup>9</sup> See for an overview: S. Burri & S. Prechal, *EU Gender Equality Law. Update 2013*, European Union 2014, available at: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-9](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9) and EU Bookshop, accessed 30 April 2014.

<sup>10</sup> See for example Articles 2 and 3(3) TEU and Articles 8 and 19 TFEU.

<sup>11</sup> See in particular Articles 20, 21, 23 and 33 of the Charter.

occupational social security.<sup>12</sup> In addition, the Statutory Social Security Directive 79/7/EEC applies to equal treatment between men and women in statutory social security schemes (including statutory pensions) and social protection, and also prohibits direct and indirect sex discrimination.<sup>13</sup>

Two directives implementing Framework Agreements of the European Social Partners specifically concern the transposition of the principle of equal treatment in relation to part-time work (Directive 97/81/EC) and fixed-term work (Directive 1999/70/EC) into national law.<sup>14</sup> In addition to the aim of improving the quality of part-time work, the purpose of the Part-Time Work Directive is to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers. The Fixed-Term Work Directive similarly aims not only to improve the quality of fixed-term work, but also to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

## 2.2. Case law of the CJEU in relation to part-time work

The CJEU has played a key role in developing the concept of indirect sex discrimination, in particular in relation to part-time work, starting with the *Jenkins* case (on basic pay) and the landmark case *Bilka* (on access to an occupational pension scheme).<sup>15</sup> This concept is now enshrined in sex equality and anti-discrimination directives and defined as follows in Article 2(1)(b) of the Recast Directive:

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

The case law on indirect sex discrimination in relation to part-time work reflects the broad personal scope of the sex equality directives as even persons working on minor part-time jobs for 7 or 10 hours per week fall under the scope of these directives.<sup>16</sup> The role of the Court was particularly important in ensuring access to occupational pensions for part-time workers, an issue that was not only at stake in the *Bilka* case, but also in *Vroege*, for example.<sup>17</sup> This problem is still a topical subject in some countries, for example in Norway. In the recent Spanish *Elbal Moreno* case, the Court found that 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 to qualify for a contributory retirement pension is contrary to Article 4 of Directive 79/7/EEC on statutory social security schemes.<sup>18</sup> This case is particularly interesting as many women employed in domestic work, caring and cleaning services and in third-sector services fall under this rule. The case also clearly shows

<sup>12</sup> OJ [2006] L 204/23.

<sup>13</sup> As set out in Article 1, OJ [1979] L 6/24.

<sup>14</sup> OJ [1997] L14/9 and OJ [1999] L 175/43.

<sup>15</sup> Case 96/80 *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd.* [1981] ECR 911 and Case 170/84 *Bilka – Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607. See on this concept C. Tobler *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Antwerpen Oxford, Intersentia, 2005.

<sup>16</sup> See for example Case 171/88 *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG* [1989] ECR 2743 (*Rinner-Kühn*) on the exclusion in national law of payment of sick pay of workers working less than 10 hours per week or 45 hours per month and Case C-435/93, *Francina Johanna Maria Dietz v Stichting Thuiszorg Rotterdam* [1996] ECR I-5223 (*Dietz*) on the right to join an occupational pension scheme for workers working less than 7 hours a week.

<sup>17</sup> Case C-57/93 *Anna Adriaantje Vroege v NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV* [1994] ECR I-4541.

<sup>18</sup> Case C-385/11 *Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)* [2012] I-000.

the added value of the concept of indirect sex discrimination in cases that do not fall under the scope of the Part-Time Work Directive (97/81/EC).<sup>19</sup>

### 3. Part-time work

#### 3.1. Problems

In many countries, for example in the Nordic countries, part-time work is especially common in typically female-dominated professions. A part-time worker works less than usual full-time working hours and this generally means a lower income, reduced opportunities to build up a pension, more limited career possibilities, fewer training opportunities, and no (or less) social security protection and less access to mortgages. These factors contribute to the overall gender pay gap, in particular when part-time work is most common in lower functions. In many countries, part-time jobs are often marginal, low-paid, precarious jobs, for example in Germany, Greece, Poland and the UK. Some groups of workers – for example casual workers – might be either or neither part-time or fixed-term workers or both. In countries with a lot of undeclared work, the problems might be even worse than in countries where part-time work is usually performed with a permanent, fixed-term or temporary agency employment contract. Specific problems arise in relation to pregnancy and maternity, for example in Greece, where women who are pregnant or returning from maternity leave are forced into part-time work, and do not dare to complain of this breach of EU law.

Preferences regarding the extent of working time do not always correspond to actual working time. In many countries, part-time work is involuntary, when full-time jobs are not available or when part-time workers would prefer a full-time job. The employer's obligation to provide information on the availability of part-time and full-time jobs is often non-existent or too weak. In some countries, part-time work is primarily viewed as related to women with family responsibilities, for example in Austria, Belgium, Germany, Italy, Luxemburg and Portugal, as well as in the Nordic countries. Such views reflect gender stereotypes linked to family-life patterns. In most countries, part-time work is uncommon in higher managerial functions.

#### 3.2. National policies and collective agreements

Specific policies on part-time work are lacking in many countries or only aimed at increasing part-time employment, as a tool to increase employment rates (for example in Germany, Hungary, Liechtenstein, FYR of Macedonia and the Netherlands). However, in Finland a tripartite working group has been appointed to study the impact of changing working norms. In France, one of the aims of a recently concluded National Interprofessional Agreement was to limit involuntary part-time work. The agreement includes a minimum of 24 hours a week for part-time employees (except with respect to private individual employers, employees younger than 26 who are still students, or following a written and justified request of the employee). In addition, overtime supplements must be paid. This agreement has now been implemented in legislation.<sup>20</sup> This is indeed an example of a good practice. When specific policies are developed to ensure that flexible work arrangements meeting the wishes of workers and voluntary part-time work are available to men, this might contribute to combatting gender stereotypes, as required by CEDAW, the UN Convention on the Elimination of All Discrimination against Women, ratified by all 28 Member States and the EEA countries.

<sup>19</sup> See on the exclusion of part-time workers and minimum requirements in a statutory social security scheme in particular Case C-102/88 *M. L. Ruzius-Wilbrink v Bestuur van de Bedrijfsvereniging voor Overheidsdiensten* [1989] ECR I-4311 (*Ruzius-Wilbrink*). See on the exclusions of mini-jobs in national provisions on compulsory invalidity insurance and old-age insurance: Case C-317/93 *Inge Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-04625 (*Nolte*) and on exclusions of mini-jobs in old-age insurance, sickness insurance and the obligation for employers to pay unemployment insurance contributions: Case 444/93 *Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz*, now *Innungskrankenkasse Rheinhessen-Pfalz* [1995] ECR I-04741 (*Megner*).

<sup>20</sup> Law No. 2013-504 on 14 June 2013.



### 3.3. CEDAW's obligation to combat gender stereotypes

Article 5a CEDAW requires States Parties to take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

Combatting stereotypes related to part-time work and taking measures to modify the gendered distribution of full-time and part-time work – in particular in relation to reconciliation issues – is an obligation, about which the States Parties have to report to the CEDAW Committee. In some reports to this Committee, the issue of part-time work is (concisely) addressed (e.g. Denmark, Estonia, France, Malta, the Netherlands and the UK). The CEDAW Committee's concluding observations on, for example, the Norwegian and the Dutch reports 2010 express concern that the Governments overestimated the degree to which part-time employment was the result of women's own choice, a concern that the Maltese Confederation of Women's Organisations shared. Regarding Iceland, the Committee expressed its concern about traditional practices and stereotypical attitudes about the roles and responsibilities of men and women in family and society. The Committee considered that this could be the cause of the disadvantaged position of women in the labour market.

A similar worry was expressed regarding Norway, in addition to concerns about the long-term consequences of part-time work. Part-time work remains common in some Nordic countries despite high childcare coverage. According to the Norwegian and Swedish experts of the Gender Network this indicates that the phenomenon of part-time work in these countries is the result of a complex mix of traditional gender roles in work and private life. The Committee offered the following recommendation to Norway: 'Implement policies targeted at women, including the adoption of temporary special measures to curb women's unemployment and involuntary part-time employment, to create more opportunities for women to extend their working hours including by mandating reduction of the scope of part-time posts especially in the governmental and public service, to gain priority access to full-time employment and guarantee all women employees with the right to choose full-time work and to strengthen its measures to promote women's entry into growth sectors of the economy'.<sup>21</sup>

How intricately the choices of individuals are intertwined with the structures of society and how these are reflected in legislative choices is well illustrated in the state reports from Germany for 2009, the CEDAW Committee's response to and questions on the report,<sup>22</sup> and the additional information from the *Alternative Report Follow-up Germany 2011* submitted by German Women's Rights Associations to the CEDAW Committee in response to the official German report.<sup>23</sup> In this alternative report, gender stereotypes and the systematic lack of gender equality in the very structure of the legislative design of basic employment and social rights are addressed in a broader context. This report underlines that: 'The general low-pay situation of women matches with the German taxation system and family-deriving social security, thus perpetuating their dependence – either from a husband/spouse or from the supporting social benefit system'.<sup>24</sup> Problems related to mini-jobs are particularly identified as excluding employees with low incomes from the German social system. Career interruptions related to family and care responsibilities or in part-time employment, particularly in mini-jobs, are held responsible for the lifelong poor earnings and low career prospects of women.

In the light of these analyses and recommendations, EU legislation has quite a narrow scope and consequently only a potentially limited impact. It mainly requires Member States to

<sup>21</sup> Following comment 30C on the report provided by Norway: CEDAW/C/NOR/CO/8.

<sup>22</sup> CEDAW/C/DEU/CO/6.

<sup>23</sup> This report is available at: [http://www.institut-fuer-menschenrechte.de/fileadmin/user\\_upload/PDF-Dateien/Pakte\\_Konventionen/CEDAW/cedaw\\_state\\_report\\_germany\\_6\\_2007\\_Zwischenbericht\\_2011\\_parallel\\_en.pdf](http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Pakte_Konventionen/CEDAW/cedaw_state_report_germany_6_2007_Zwischenbericht_2011_parallel_en.pdf), accessed 30 April 2014.

<sup>24</sup> *Alternative Report Follow-up Germany 2011*, p. 6.

implement the principle of equal treatment of part-time workers and imposes weak obligations on the organisation of working time. Up to now, the provisions of CEDAW have played no apparent role in national or EU case law. However, the binding requirements of the relevant EU provisions can be considered a first step towards the improvement and recognition of rights of part-time workers. The recommendations of the CEDAW Committee can, and should, form a source of inspiration for furthering EU and national policies and legislation in this area, in particular by combatting structural forms of discrimination and gender stereotypes in relation to part-time work. Recommendations of the CEDAW Committee concern for example monitoring requirements, gender assessments, the correct application of the burden of proof in equality cases, guaranteeing sufficient human and financial resources to Equality Bodies etc. As the gender equality principle is one of the fundamental values enshrined in the EU Charter of Fundamental Rights, there is a potential to further develop legislative tools to help ensure this principle to its full extent.

### 3.4. *Equal treatment of part-time workers*

Directive 97/81/EC requires that Member States implement the principle of non-discrimination in their national legislation. A provision on equal treatment of part-time workers compared to full-time workers requires proving that the part-time workers are treated less favourably than a comparable full-time worker. It is not necessary in such situations to establish a presumption of sex discrimination by showing that persons of one sex (usually women) suffer a particular disadvantage compared with persons of another sex. Nevertheless, the concept of indirect sex discrimination in relation to pay might have an added value in cases which do not fall under Directive 97/81/EC due to the lack of direct horizontal effect of directives, Article 157 TFEU having been applicable by national courts in horizontal relationships since 8 April 1976.<sup>25</sup> In addition, the material scope of the sex equality directives is much broader than Directive 97/81/EC, as they also cover statutory social security and goods and services. Finally, specific forms of discrimination, such as (sexual) harassment and pregnancy and maternity discrimination are unambiguously prohibited under the sex equality directives, but not (explicitly) addressed in the Part-Time Work Directive.

Directive 97/81/EC has a broad personal scope and specific groups of workers, like casual workers, are not explicitly excluded from protection against discrimination in most European countries. The CJEU considered in *Wippel* that a stand-by worker with working hours agreed on a case-by-case basis, who works irregularly and has no obligation to accept an employer's demand to work, may fall under the scope of the Framework Agreement annexed to Directive 97/81/EC.<sup>26</sup> In the *Zentralbetriebsrat* case, which concerned part-time work in which a national provision was at stake, the requirement of a 'comparable worker' was not addressed.<sup>27</sup> It would therefore seem that a specific comparator is not required when the discrimination against a group of part-time workers finds its source in legislation or a collective agreement and full-time workers do not suffer a disadvantage. This approach is similar to the interpretation of indirect sex discrimination deriving from legislation or a collective agreement. In *Allonby* for example, the CJEU considered that a woman could rely on statistics to show that a clause in state legislation was contrary to Article 157(1) TFEU because it discriminated against female workers.<sup>28</sup> Where that provision is contrary to EU law and thus not applicable, the consequences are binding not only on public authorities and social agencies but also on the employer concerned. In such a case, the legislation is the sole source of the difference in treatment. A similar approach was followed by the CJEU in

<sup>25</sup> Case 43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [ECR] 1976, 455 (*Defrenne II*).

<sup>26</sup> Case C-313/02 *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG* [2004], I-9483, paragraph 40. However, in this case Ms Wippel, who did not work on fixed hours, could not compare herself with a full-time worker whose working hours are defined, including the organisation of working time and salary, and who does not have the possibility to refuse work even if the worker cannot or wish not to do it (paras 59-60).

<sup>27</sup> C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* [2010] ECR I-3527.

<sup>28</sup> 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-873, paragraphs 81-84.



*Kowalska*, a case concerning collective agreements. The Court considered that ‘where there is indirect discrimination in a clause in a collective agreement, the members of the class of persons placed at a disadvantage are entitled to have the same scheme applied to them as that applied to other workers, on a basis proportional to their working time.’<sup>29</sup> Where finding a comparable full-time worker may be problematic at the national level, allowing a hypothetical comparator might provide a remedy, as in Spanish law. This is also an example of a good practice.

The equal treatment provision in Clause 4 of Directive 97/81/EC applies to employment conditions. It has direct effect<sup>30</sup> and may not be interpreted restrictively.<sup>31</sup> Different treatment might be justified on objective grounds. CJEU interpretations of objective justifications in the case law on indirect sex discrimination have provided guidance. The CJEU considered, for example in *Roks*, a case on income requirements in Dutch legislation, that budgetary considerations in themselves do not provide an objective justification.<sup>32</sup> Generalisations on part-time workers do not provide an objective justification either, a conclusion the Court reached in *Rinner-Kühn*, *Nimz*, *Hill* and *Seymour*, in which issues related to part-time work were at stake.<sup>33</sup> The *pro rata temporis* principle does not always apply. For example, in *Zentralbetriebsrat* the Court considered that it was contrary to the equal treatment principle when, in case of a change of working hours of a worker, the amount of leave not yet taken is adjusted in such a way that a worker who reduces his working hours from full-time to part-time suffers a reduction in the right to paid annual leave. This is the case when annual leave was accumulated, but not used while working full time, or when it is only possible to take that leave with a reduced level of holiday pay. The proportionally reduced right to paid annual holidays is thus contrary to Clause 4.2 of the framework agreement on part-time work.<sup>34</sup>

The issue of overtime is particularly interesting, as it shows different approaches. For example in Latvia<sup>35</sup> and Slovenia,<sup>36</sup> the employer may not impose additional working hours on part-time workers, unless agreed upon in the employment contract. According to Romanian law, overtime work is forbidden in all cases for part-time work contracts. Thus, even a mutually agreed clause in the employment contract regarding overtime work is not lawful. In such cases, the legal sanction is that the contract is considered a full-time work contract. In very exceptional circumstances, overtime work for part-timers is allowed in *force majeure* cases or in urgent interventions necessary to avoid accidents, or in case of accidents related to work. Scholars say that this provision was adopted to prevent employers using part-time work contracts for positions where full-time work is actually performed.<sup>37</sup> In the Czech Republic and Poland, overtime cannot be imposed on pregnant women or employees with children younger than one year old. In Slovenia, specific groups of workers (workers with family responsibilities, disabled people, people with health problems and partially retired people) who work part time are entitled to a remuneration corresponding to their actual working obligation. They have the same rights and obligations arising from their employment

<sup>29</sup> Case C-33/89 *Maria Kowalska v Freie und Hansestadt Hamburg* [1990] ECR I-2591, paragraphs 19 and 20.

<sup>30</sup> Case C-486/07 *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* [2010] ECR I-3527, paragraph 25.

<sup>31</sup> Cases C-395/08 and C-395/09, *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini and Daniela Lotti and Clara Matteucci*, [2010] ECR I-5119 (*Bruno and Pettini*), paragraph 32.

<sup>32</sup> Case C-343/92 *M. A. De Weerd, née Roks, and others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others* [1994] ECR I-571, paragraph 38.

<sup>33</sup> Case 171/88 *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG* [1988] ECR 2743, paragraphs 13-14; Case C-184/89 *Helga Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297, paragraph 14; Case C-243/95, *Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance* [1998] ECR I-3739, paragraphs 38-39 and Case 167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR I-623, paragraphs 75-76.

<sup>34</sup> Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* [2010] ECR I-3527, paragraph 35.

<sup>35</sup> Latvian Labour Law allows overtime of part-timers only on the basis of a written agreement between an employer and an employee (Article 134(7)).

<sup>36</sup> Slovenian Employment Relationships Act/1.

<sup>37</sup> Article 105 Paragraphs 1 and 2 of the Romanian Labour Code.

relationship as full-time workers. In Belgium, a national collective agreement stipulates that when overtime is imposed in a recurrent way, the employee may either apply for a revision of the employment contract or for a period of rest corresponding to the overtime. In addition, a Royal Decree provides for pay supplements.<sup>38</sup> In a few countries (e.g. Austria and the Czech Republic) overtime supplements of 25 % are paid for hours worked above the individually agreed working time (unless otherwise agreed).<sup>39</sup> In France, until recently part-time workers were not entitled to overtime supplements. However, a proposal to make overtime more expensive for employers has been adopted.<sup>40</sup> Overtime work is now to be paid with a supplement of 10 % until it reaches 1/10th of the working time. Beyond this, if recognised by collective agreement, the supplement will amount to 25 %.

The case law of the CJEU on indirect sex discrimination shows that collective agreements which stipulate that part-timers are not entitled to overtime supplements, unless the full-time working time is exceeded, are not contrary to EU sex equality law.<sup>41</sup> However, in *Elsner* and *Voß* the approach of the Court was more nuanced. In *Elsner* the Court applied the *pro rata temporis* principle.<sup>42</sup> The case concerned teachers who were only entitled to overtime supplements for hours exceeding three hours above the individual working time. The Court considered that three additional working hours are in fact a greater burden for part-time than for full-time teachers and that this therefore amounted to different treatment of part-timers compared to full-timers (Consideration 17). In *Voß* the Court also concluded that there had been different treatment.<sup>43</sup>

### 3.5. Organisation and adjustment of working time and working hours

The concept of indirect sex discrimination can apply in situations in which requests relating to working time and working hours are related to care responsibilities. The Court recognised, for example, in the *Danfoss* case in 1989 that if the criterion of mobility was understood to include ‘the employee’s adaptability to variable hours and varying places of work, the criterion of mobility may also work to the disadvantage of female employees, who, because of household and family duties for which they are frequently responsible, are not as able as men to organize their working time flexibly’.<sup>44</sup>

The adjustment of working time is addressed in Clause 5 of Directive 97/81/EC, on the organisation of part-time work, but reflects rather weak ‘soft’ law, instead of creating enforceable rights to transfer from full-time to part-time work and vice versa. National law of some countries offers more possibilities to realise working-time preferences of workers. A strong statutory right to adjust working time exists in Dutch national legislation, although this is limited to the private sector<sup>45</sup> and enterprises of at least 10 employees. The employee’s request for changes in working time may only be denied by the employer in the event of compelling reasons, i.e. financial, organisational, safety, staff composition or scheduling problems. In Greece, part-timers have priority among workers of the ‘same category’ for a full-time job. In Austria, civil servants are entitled to part-time work and to a return to full-time work without giving specific reasons.<sup>46</sup> A (conditional) right to work part time exists in France, Germany, Greece, Latvia and Lithuania, for example. In some countries, part-timers

<sup>38</sup> Collective Agreement no. 35 and Royal Decree of 25 June 1990.

<sup>39</sup> In Austria it concerns ‘additional time’ (*Mehrarbeit*) for which an additional compensation of 25 % per hour was introduced (*Mehrarbeitszuschlag*) in 2007: Paragraph 19d(3a) Working Time Act as amended by OJ No. I 61/2007.

<sup>40</sup> Law No. 2013-504, 14 June 2013.

<sup>41</sup> Joined cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Stadt Lengerich v Angelika Helmig and Waltraud Schmidt v Deutsche Angestellten-Krankenkasse and Elke Herzog v Arbeiter-Samariter-Bund Landverband Hamburg eV and Dagmar Lange v Bundesknappschaft Bochum and Angelika Kussfeld v Firma Detlef Bogdol GmbH and Ursula Ludewig v Kreis Segeberg* [1994] ECR I-5727.

<sup>42</sup> Case C-285/02 *Edeltraud Elsner-Lakeberg v Land Nordrhein-Westfalen* [2004] ECR I-5861.

<sup>43</sup> Case C-300/06 *Ursula Voß v Land Berlin* [2007] ECR I-10573.

<sup>44</sup> CJEU 17 October 1989, Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark/Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, [1989] ECR 3199, paragraph 21. See also Case 76/88 R, *Eveline La Terza v. Court of Justice of the European Communities* [1988] ECR 1741.

<sup>45</sup> A similar right exists for the public sector.

<sup>46</sup> Section 50 of the Civil Servants Act.

who would like to increase their working time enjoy preferential treatment, as in Finland, Germany, Norway and Spain. In Finland, the employer has the duty to offer more hours to those already employed.<sup>47</sup> In Norway, funding was made available by the Government for various projects at the level of individual enterprises to address involuntary part-time work, an example of a good practice.

In some countries, part-time work is facilitated for specific groups or situations, often related to care responsibilities, pregnancy, maternity or the health of relatives or the employee or after maternity and/or parental leave, for instance in the Czech Republic and Slovenia.

The organisation of working hours is of key importance for workers who combine work with family responsibilities, as some flexible working-hours schedules imposed by the employer might be particularly problematic for such workers. Therefore influence on their working hours is crucial. However, the issue of (flexible) working hours is only addressed in legislation in some countries (e.g. Bulgaria, Croatia, Italy and Malta). In some countries, the flexibility of working hours has even weakened the position of workers (e.g. in Hungary and Spain). Decisions on working time and hours might be appealed in court and even if access to justice is limited in some ways in this area, as for example in the UK,<sup>48</sup> the concept of indirect sex discrimination would not be subject to such limitations.

#### 4. Fixed-term work

In many countries, fixed-term contracts are considered to be an exception to the norm and national policies of governments and social partners are aimed at promoting stable work relationships. Fixed-term work, generally speaking, is not a gender issue, as men and women in most countries work in the same way under such employment contracts. However, fixed-term contracts often apply in sectors where women are overrepresented, for example in the education and health sector (e.g. in Ireland and Greece). It is unlikely that the concept of indirect sex discrimination can be applied to discrimination related to this form of employment contract, unless many more women than men (or the opposite) are represented in the disadvantaged group.

Pregnancy and maternity discrimination are specific problems related to fixed-term contracts, in particular in relation to the non-renewal of such contracts.<sup>49</sup> Such discrimination amounts to direct sex discrimination, which can only be justified by the exceptions provided in the directives (i.e. when sex is a determining factor, in view of protecting women in relation to pregnancy and maternity or when positive action measures are taken).<sup>50</sup> The CJEU considered in *Melgar* that the prohibition of dismissal in Article 10 of Pregnancy Directive (92/85/EC) applies both to employment contracts for an indefinite period of time and to fixed-term contracts. However, non-renewal of a fixed-term contract, when it comes to an end as stipulated, cannot be regarded as a dismissal prohibited by that provision. However, where non-renewal of a fixed-term contract is motivated by the worker's state of pregnancy, it constitutes direct discrimination on grounds of sex.<sup>51</sup>

<sup>47</sup> Chapter 2, Section 5 of the Employment Contracts Act. This right also applies to fixed-term workers.

<sup>48</sup> In the UK the right to request flexible working time includes a right of access to the Employment Tribunal, but the only complaints which may be made concern the subjection of the employee to detriment for having made a request, or a failure on the part of the employer to comply with proper procedures, rather than a challenge to the substantive response to the request.

<sup>49</sup> See on this issue the report of the European Network of Legal Experts in the Field of Gender Equality, A. Masselot & E. Caracciolo di Torella *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood. The application of EU and national law in 33 European countries*, European Union 2012, available at: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-8](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-8) and EU Bookshop, accessed 17 July 2013.

<sup>50</sup> Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941 (*Dekker*).

<sup>51</sup> Case C-438/99 *Melgar* [2001] ECR I-6915 (paragraph 47). In this case contrary to Articles 2(1) and 3(1) of Council Directive 76/207/EEC on the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, which has now been repealed by the Recast Directive.

Many experts consider it likely that pregnancy and maternity discrimination occurs in their country, but often no reliable data are available to support this statement (e.g. the Czech Republic,<sup>52</sup> Denmark, Finland,<sup>53</sup> Latvia,<sup>54</sup> Romania, Spain, Sweden and the UK). A recent study conducted by the Ombudsperson on Gender Equality in Croatia provided the empirical background for the existing public presumptions on the discrimination of pregnant workers and jobseekers and female workers and jobseekers with child-caring responsibilities.<sup>55</sup> One third of respondents confirmed unequal treatment by their employer on account of pregnancy-related or maternity-related rights. In most cases (34.1 %), the discrimination occurred as a result of the non-renewal of fixed-term contracts, 21.2 % of respondents were dismissed, and 16.4 % were transferred to inferior jobs. 52 % of respondents who worked during pregnancy or who were taking care of children were denied promotion because the employer considered that they would not be able to meet the job requirements on account of their motherhood and caring responsibilities. Almost a third of respondents (27.8 %) claimed that the employer pressured them into replacing their open-ended contracts by fixed-term contracts. 63 % of respondents believed that the employer refused to renew their expiring fixed-term contracts on account of their pregnancy-related or maternity-related rights. In the Netherlands, the Equality Body NIHR reports that 44 % of women with fixed-term contracts state that their contracts had not been renewed (partly) because of their pregnancy.<sup>56</sup>

Conducting such studies (in these cases by Equality Bodies) in order to disclose sex discrimination in relation to fixed-term contracts is an example of a good practice. The same is true for a provision of the Portuguese Labour Code, which stipulates that the employer has the obligation to communicate to the Equality Agency (*CITE*) the reason why a contract of a pregnant woman or woman on maternity leave is not renewed.<sup>57</sup> This communication is meant to facilitate action on the part of the Labour Inspection Service. The worker may possibly be reinstated by court order, on the grounds of unlawful dismissal based on sex discrimination, if it becomes evident that the contract was not renewed on account of the pregnancy or maternity leave.

## 5. Effectiveness

The issue of the effectiveness of equal treatment legislation is crucial and Equality Bodies can play an important role as they often provide aid to presumed victims of (sex) discrimination free of charge, and they conduct surveys, issue recommendations etc. Labour Inspectorates and Unions (can) also contribute to the effective application of non-discrimination norms. National experts also mention difficulties faced by claimants when bringing cases to court, such as the length of proceedings,<sup>58</sup> the costs<sup>59</sup> and/or insufficient legal aid, which hinder effective application of the equal treatment principle in general (e.g. Croatia, Greece, Portugal). Given the lower incomes of part-time workers, financial aspects might be even more problematic, but there are no specific impediments related to part-time or fixed-term work in most countries.

<sup>52</sup> The expert refers to the non-renewal of fixed-term contracts of pregnant women in education. However, no case law is available.

<sup>53</sup> The expert in particular refers to pregnancy discrimination and access to training facilities and promotion.

<sup>54</sup> A statement supported by the Latvian Confederation of Free Trade Unions and the Ombudsman.

<sup>55</sup> Presentation of research is provided in the Annual Report of the Ombudsperson for Gender Equality for 2012, <http://www.prs.hr/index.php/izvjesca/2012>, accessed 12 April 2013.

<sup>56</sup> See College voor de Rechten van de Mens *Hoe is het bevallen? Onderzoek naar discriminatie van zwangere vrouwen en jonge moeders op het werk*, Utrecht 2012, with a summary in English, available at: [http://www.mensenrechten.nl/publicaties/zoek?categorie\[0\]=434553](http://www.mensenrechten.nl/publicaties/zoek?categorie[0]=434553), accessed 30 April 2014.

<sup>57</sup> Article 144(3) of the Labour Code.

<sup>58</sup> In Ireland, the Equality Tribunal has delays of up to three years before a claim is heard. The ECtHR has often criticised Greece and has even issued a 'pilot judgment': see *Athanassiou v Greece*, Application No. 50973/08, 21 December 2010.

<sup>59</sup> In Slovenia and Greece, for example, no low-cost complaints system exists.

## 6. Conclusions

The incidence of, and problems related to, part-time work show great variety across Europe. The differences in the prevalence of part-time work between the Northern European countries on the one hand, and the Southern and Eastern European countries on the other hand are striking. In countries like the Netherlands, Denmark, Norway and Sweden, part-time jobs are quite common, in particular in female professions. The same is true for Germany, where employment in mini-jobs is common. This is much less the case in former East European countries, like Bulgaria and Slovakia, where the share of part-time work as percentage of total employment remains less than 5 %. The incidence of part-time work in the South European countries remains relatively low; however in these countries it is increasingly involuntary. Part-time work is most common in typically female professions. The incidence of part-time work is the result of gender stereotypes and considering part-time work purely as a gender issue is counter-productive. In some countries, for example Norway, unions actively try to change the part-time norm to a full-time norm in these professions. In all countries, women are overrepresented in part-time jobs and therefore suffer disadvantages related to part-time work, such as not earning enough income to reach economic independence, having less career opportunities and building up lower pensions, in particular when employed in precarious (minor) part-time jobs. An obligation to provide a minimum number of hours is meant to combat such precariousness. Quality part-time work can contribute to increased labour-market participation of women. However, structural forms of discrimination are hard to combat. A two-track approach of sex equality legislation on the one hand, and specific norms on part-time work on the other hand might be problematic, if this means that gender stereotypes and structural forms of gender discrimination are only considered when applying sex equality norms, but not in relation to specific norms concerning part-time work. In addition, until now the obligation to combat gender stereotypes as required by Article 5a CEDAW scarcely seems to be met in relation to part-time work; such an obligation can contribute to addressing more structural forms of discrimination. The recommendations of the CEDAW Committee provide examples of policies and measures that could be taken both at national and at EU level, for example in relation to quality part-time work, changing working norms and the organisation of working time and working hours. EU law primarily offers tools to combat discrimination against part-time workers and pregnancy and maternity discrimination against fixed-term workers. With the application of the concept of indirect sex discrimination, effects of underlying structural forms of discrimination in employment in relation to part-time work can be addressed not only with respect to employment conditions, but also regarding the organisation of working time and working hours. This is even more important given that the disadvantaged situation of women has been exacerbated in several countries by both the financial crisis and austerity measures.

# EU Policy and Legislative Process Update

December 2013 – April 2014

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1. On 14 April 2014 the Commission published its annual gender equality report which provides an overview of the main EU policy and legal developments in gender equality during the last year, as well as examples of policies and actions in Member States. The report shows that efforts of the European Commission to improve equality between women and men are paying off: concrete progress has been made in the area of addressing the gender pay gap, notably through the Commission Recommendation to improve pay transparency and an initiative on increasing the number of women on company boards. As the latter proposal advances in the negotiation process, the number of women on boards is on the rise. Furthermore, the rate of employment of women in the EU increased from 58 % to 63 % in 2002. The investment by the EU in childcare facilities and the promotion of women's participation in the labour market has had beneficial effects. The report acknowledges that challenges remain: with current rates of progress, it will take almost 30 years to reach the EU's target of 75 % of women in employment, 70 years to make equal pay a reality and 20 years to achieve parity in national parliaments (at least 40 % of each gender).

The report on progress on equality between women and men in 2013 is available at:

[http://ec.europa.eu/justice/gender-equality/files/swd\\_2014\\_142\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/swd_2014_142_en.pdf)

The press release of the annual gender equality report is available at:

[http://europa.eu/rapid/press-release\\_IP-14-423\\_en.htm](http://europa.eu/rapid/press-release_IP-14-423_en.htm)

2. On the occasion of International Women's Day, 8 March 2014, the European Commission published a factsheet on how Europe is boosting progress in achieving equality between women and men. While gender gaps remain, significant progress has been achieved in numerous areas, such as equality in decision-making and economic independence of women. In the factsheet key actions are formulated per area.

The factsheet is available at:

[http://ec.europa.eu/justice/gender-equality/files/documents/140303\\_factsheet\\_progress\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/140303_factsheet_progress_en.pdf)

3. On 7 March 2014, the European Commission adopted a Recommendation on strengthening the principle of equal pay between men and women through transparency<sup>1</sup> asking Member States to improve pay transparency for women and men in a bid to help close the gender pay gap. The pay gap has barely moved in recent years and is stagnating at 16.4 % across the European Union. Greater transparency in pay is an important part of tackling the pay gap, because it can reveal gender bias and discrimination in the pay structures of an organisation. This enables employees, employers and social partners to take appropriate action to ensure effective implementation of the equal pay principle. The Recommendation presents a tool box of concrete measures designed to assist Member States in taking a tailor-made approach to improving pay transparency. These measures include entitlement of employees to request information on pay, regular company reporting, pay audits for large firms and including the equal pay issue in collective bargaining. Member States will need to report back to the Commission on what action they have taken in accordance with this Recommendation by the end of 2015.

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<sup>1</sup> OJ L 69, of 8 March 2014, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:069:0112:0116:EN:PDF>, accessed 27 June 2014.

The press release is available at:

[http://europa.eu/rapid/press-release\\_IP-14-222\\_en.htm](http://europa.eu/rapid/press-release_IP-14-222_en.htm)

4. In 2014 the European Union Agency for Fundamental Rights (FRA) published the report *Violence against women – An EU-wide survey: results at a glance*. The report shows that one in three women (33 %) has experienced physical and/or sexual violence since the age of 15, one in five women has experienced stalking, and every second woman has been confronted with one or more forms of sexual harassment. What emerges is a picture of extensive abuse that affects many women's lives but is systematically under-reported to the authorities. The scale of violence against women is therefore not reflected by official data. This FRA survey is the first of its kind on violence against women across the 28 Member States of the European Union. It is based on interviews with 42,000 women across the EU, who were asked about their experiences of physical, sexual and psychological violence, including incidents of intimate partner violence (domestic violence). The survey also included questions on stalking, sexual harassment, and the role played by new technologies in women's experiences of abuse. In addition, it asked about their experiences of violence in childhood. Based on the detailed findings, FRA suggests courses of action in different areas that are touched by violence against women and go beyond the narrow confines of criminal law, ranging from employment and health to the medium of new technologies.

The report is available at:

<http://bookshop.europa.eu/en/violence-against-women-pbTK0213792/>

5. On 24 February 2014, the European Parliament adopted the *Resolution on Combating violence against women* (2013/2004(INL)) urging the European Commission to submit, by the end of 2014, a proposal for an act establishing measures to promote and support the action of Member States in the field of prevention of violence against women and girls following the detailed recommendations set out in the annex.

The Resolution is available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0126+0+DOC+XML+V0//EN&language=EN#BKMD-30>

6. In 2014 the European Network of Legal Experts in the Field of Gender Equality published the report *Gender equality law in 33 European countries, How are EU rules transposed into national law in 2013?*. The report provides a general overview of the transposition of EU gender equality law in the then 27 Member States, the EEA countries Iceland, Liechtenstein, and Norway; and the candidate countries Croatia (before accession), Turkey and the Former Yugoslav Republic of Macedonia. The report details central concepts such as direct and indirect discrimination and positive action, and discusses issues such as equal pay, pregnancy and maternity protection, pension and social security schemes, access to work and working conditions, and enforcement and compliance. In addition, relevant cases from the Court of Justice of the EU and national courts are included, along with decisions and opinions of national equality bodies. The executive summary of the report was translated into French and German.

The report is available at:

<http://bookshop.europa.eu/en/gender-equality-law-in-33-european-countries-pbDSAD14001/>

More information is available at:

[http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-9](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9)



7. In 2014 the European Parliament published the study *Challenges and achievements in the implementation of the Millennium Development Goals for women and girls from a European Union perspective*. Upon request by the FEMM Committee, this study provides background information for the delegation of the Committee on Women's Rights and Gender Equality of the European Parliament (FEMM) to the UN Commission on the Status of Women's 58th Session (CSW). The key priority theme for the Session will be 'Challenges and achievements in the implementation of the Millennium Development Goals for women and girls'. Taking into account that the outcome of this meeting will be relevant for the formulation of the post 2015 international framework for development, the study outlines the state of play of preparatory discussions. It reveals that women's rights and gender equality are largely recognised, on the one hand, as a goal of development policy in itself, and, on the other hand, as an important tool for sustainable development. Bearing this in mind, most stakeholders advocate a two-track approach: having gender equality as a stand-alone goal and a gender mainstreaming approach for all areas of the post 2015 framework

The publication is available at:

<http://bookshop.europa.eu/en/challenges-and-achievements-in-the-implementation-of-the-millennium-development-goals-for-women-and-girls-from-a-european-union-perspective-pbQA0114251/?CatalogCategoryID=cOwKABstC3oAAAEjeJEY4e5L>

8. In 2014 the European Institute for Gender Equality published the report *Effectiveness of institutional mechanisms for the advancement of gender equality, Review of the implementation of the Beijing Platform for Action in the EU Member States*. The report emphasises several important trends. Firstly, although recognised as a fundamental value of the European Union, the status and profile of gender equality currently shows signs of decreased importance. Independent bodies for the protection against discrimination on the ground of sex are increasingly replaced by bodies for the protection against discrimination on various grounds. Whereas the importance of acknowledging the heterogeneity of women and men in terms of age, class, disability, ethnicity/race and sexual orientation is crucial to the recognition of diverse experiences among women and men, the consequences of downplaying gender as a structural dimension and underlying element of all inequalities should not be overlooked. The political, social and administrative remit of gender equality has started shifting towards legal and procedural mechanisms addressing discrimination at the individual level. Gender equality is less frequently addressed and promoted through policies and institutions that tackle gender gaps and the disadvantages of certain groups of women and is more often viewed as a human right requiring legal measures to protect individual citizens against discrimination. This approach marginalises gender equality as a political goal and undermines gender equality as an important policy area in itself.

The report is available at:

<http://bookshop.europa.eu/en/effectiveness-of-institutional-mechanisms-for-the-advancement-of-gender-equality-pbMH0213481/>

9. In 2014 the European Parliament published the report *Sexual exploitation and prostitution and its impact on gender equality*. The objective of this briefing paper is to provide background information drawn from the international literature on sexual exploitation and prostitution and its impact on gender equality in relation to the report of the Women's Rights and Gender Equality Committee. The study concentrates on the debate on whether prostitution could be voluntary or rather has to be regarded in any event as a violation of women's human rights. It also presents an overview of the policies on prostitution in the Member States as well as four case studies: Germany, the Netherlands, Spain, and Sweden. Conclusions are presented with a view to enhancing the debate.



The report is available at:

<http://bookshop.europa.eu/en/sexual-exploitation-and-prostitution-and-its-impact-on-gender-equality-pbQA0113845/>

10. In 2014 the European Network of Legal Experts in the Field of Gender Equality published the report *EU gender equality law, update 2013*. The report provides a general overview of gender equality law and its developments at the EU level, and explains the most important issues of the EU gender equality acquis. The issues discussed include the central concepts of direct and indirect discrimination, positive action, and harassment, and pivotal gender equality legislation including the Recast and Pregnant Workers Directives. This publication also highlights the various forms of, and challenges to, the enforcement of EU gender equality law, providing insight on topics such as the burden of proof, compensation, and victimisation.

The report is available at:

<http://bookshop.europa.eu/en/eu-gender-equality-law-pbDS0113847/>

More information is available at:

[http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-9](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9)

11. On 9 December 2013, the Commission adopted a Report on the application of Directive 2006/54/EC on equal treatment of men and women in employment and occupation,<sup>2</sup> which focuses particularly on assessing the application of EU provisions on equal pay in practice in all Member States. It found that the main challenge for all EU countries is the correct application and enforcement of the rules on equal pay, as established by Directive 2006/54/EC. It also found that equal pay is hindered by a number of factors, including a lack of transparency in pay systems. In order to support Member States and other stakeholders in the proper implementation of the existing rules, the report includes a section on gender-neutral job evaluation and classification systems, a summary of equal pay case law of the European Court of Justice, examples of national case law on equal pay and examples of national best practices.<sup>3</sup>

The press release of the Report is available at:

[http://europa.eu/rapid/press-release\\_IP-13-1227\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1227_en.htm)

12. On 20 November 2013, the European Parliament with an overwhelming majority (459 in favour, 148 against and 81 abstentions) voted in favour of backing the European Commission's proposed law to improve the gender balance in Europe's company boardrooms. The strong endorsement by the Members of the European Parliament means the Commission's proposal has now been approved by one of the European Union's two co-legislators. Member States in the Council now need to reach agreement on the draft law, amongst themselves and with the European Parliament, in order for it to enter the EU statute book. The plenary vote follows a clear endorsement for the Commission's initiative from the Parliament's two leading committees, the Legal Affairs (JURI) and Women's Rights & Gender Equality (FEMM) committees on 14 October 2013. The most recent figures confirm that, following the Commission's determined action in this area, the share of women on boards across the EU has been on the rise for the past three years and has now reached 16.6 %, up from 15.8 % in October 2012.

<sup>2</sup> COM(2013) 861 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0861:FIN:EN:PDF>, accessed 27 June 2014.

<sup>3</sup> SWD(2013) 512 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0512:FIN:EN:PDF>, accessed 27 June 2014.

The press release is available at:

[http://europa.eu/rapid/press-release\\_IP-13-1118\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1118_en.htm)

A factsheet on gender balance on corporate boards is available at:

[http://ec.europa.eu/justice/gender-equality/files/documents/140303\\_factsheet\\_wob\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/140303_factsheet_wob_en.pdf)

More information on the legislative procedure is available at:

[http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0299\(COD\)&l=en](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0299(COD)&l=en)

13. In 2013 the European Institute for Gender Equality published a summary of the report *Review of the implementation of the Beijing Platform for Action in the EU Member States: Women and the Media – Advancing gender equality in decision-making in media organisations*. The report explores the extent to which women occupy decision-making positions across a sample of media organisations (99 in total) in the 28 EU Member States. It also analyses the extent to which these media organisations have developed internal gender equality policies and monitoring mechanisms, or implement specific initiatives to support women's career advancement in the sector. Various studies on women's career development show a positive link between policies developed within media organisations to promote gender equality and the proportion of women in decision-making roles.

The publication is available at:

<http://bookshop.europa.eu/en/review-of-the-implementation-of-the-beijing-platform-for-action-in-the-eu-member-states-pbMH3113741/>

14. In 2013 the European Network of Legal Experts in the Field of Gender Equality published the report *Sex discrimination in relation to part-time and fixed-term work, the application of EU and national law in practice in 33 European countries*. This thematic report addresses equality issues faced by part-time and fixed-term workers in the 33 countries participating in the Network: the 28 Member States, the EEA countries Iceland, Liechtenstein and Norway, and the Former Yugoslav Republic of Macedonia and Turkey. The report provides an analysis and assessment of existing gender equality legislation and case law in relation to part-time and fixed-term work, both at EU and at national level. The implementation of the five relevant EU Directives (Recast, Statutory Social Security, Goods and Services, Part-Time Work, and Fixed-Term Work) is extensively discussed in the legislative context of EU law, alongside prominent issues such as gender stereotyping, the reconciliation of work and family life, and the gender pay gap.

The report is available at:

<http://bookshop.europa.eu/en/sex-discrimination-in-relation-to-part-time-and-fixed-term-work-pbDS0313436/>

More information is available at:

[http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-9](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9)

# Court of Justice of the European Union Case Law Update

December 2013 – April 2014

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▪ **Case C-363/12 of 18 March 2014 – Reference for a preliminary ruling (Ireland)  
Z v a Government Department and the Board of Management of a Community School**

*Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation*

*Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*

**Facts**

In this case a woman who was unable to support a pregnancy had her genetic child through a surrogacy arrangement. In Ireland surrogacy arrangements are unregulated. As a matter of EU law the question is whether she is entitled to paid leave of absence from employment equivalent to maternity leave or adoption leave.

**Judgment of the Court of Justice of the European Union**

- Directive 2006/54/EC, in particular Articles 4 and 14 thereof, must be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement does not constitute discrimination on grounds of sex. The situation of such a commissioning mother as regards the granting of adoptive leave is not within the scope of that Directive.
- Directive 2000/78/EC must be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who is unable to bear a child and who has availed of a surrogacy arrangement does not constitute discrimination on the ground of disability. The validity of that Directive cannot be assessed in the light of the United Nations Convention on the Rights of Persons with Disabilities, but that Directive must, as far as possible, be interpreted in a manner that is consistent with that Convention.

▪ **Case C-167/12 of 18 March 2014 – Reference for a preliminary ruling (United Kingdom)  
C.D. v S.T.**

*Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding*

*Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation*

**Facts**

The request was made in proceedings between C.D., an intended mother (also referred to as a commissioning mother) who had had a baby through a surrogacy arrangement, and S.T., her employer, a National Health Service Foundation Trust, concerning the refusal to grant her paid leave following the birth of the baby. In the United Kingdom surrogacy is permitted under certain conditions. However, there are no specific rules on maternity leave for intended

mothers. The question is whether the intended mother can derive such a right from EU law, in particular Directive 92/85/EEC.

***Judgment of the Court of Justice of the European Union***

- Directive 92/85/EEC must be interpreted as meaning that Member States are not required to provide maternity leave pursuant to Article 8 of that Directive to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby.
- Article 14 of Directive 2006/54/EC, read in conjunction with Article 2(1)(a) and (b) and (2)(c) of that Directive, must be interpreted as meaning that an employer's refusal to provide maternity leave to a commissioning mother who has had a baby through a surrogacy arrangement does not constitute discrimination on grounds of sex.

▪ **Case C-595/12 of 6 March 2014 – Reference for a preliminary ruling (Italy)  
Napoli v Ministero della Giustizia – Dipartimento dell'Amministrazione penitenziaria**

*Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation*

***Facts***

The request was made in proceedings between Ms Napoli and the Ministero della Giustizia – Dipartimento dell'Amministrazione penitenziaria (Ministry of Justice – Prison Service Department) regarding the exclusion of Ms Napoli from a training course to become a deputy commissioner in the prison service as a result of her absence from that course for a period of more than 30 days, even though the reason for that absence was compulsory maternity leave.

***Judgment of the Court of Justice of the European Union***

- Article 15 of Directive 2006/54/EC must be interpreted as precluding national legislation which, on grounds relating to the public interest, excludes a woman on maternity leave from a vocational training course which forms an integral part of her employment and which is compulsory in order to be able to be appointed definitively to a post as a civil servant and in order to benefit from an improvement in her employment conditions, while guaranteeing her the right to participate in the next training course organised, the date of which is nevertheless uncertain.
- Article 14(2) of Directive 2006/54 does not apply to national legislation, such as that at issue in the main proceedings, which does not limit a specified activity solely to male workers but which delays access to that activity for female workers who have been unable to receive full vocational training as a result of compulsory maternity leave.
- The provisions of Article 14(1)(c) and Article 15 of Directive 2006/54 are sufficiently clear, precise and unconditional to have direct effect.

▪ **Case C-588/12 of 27 February 2014 – Reference for a preliminary ruling (Belgium)**

**Lyreco Belgium NV v Sophie Rogiers**

*Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC*

**Facts**

The request was made in proceedings between Lyreco Belgium NV and Ms Rogiers concerning the calculation of the fixed-sum protective award payable to her because of her unlawful dismissal during part-time parental leave.

**Judgment of the Court of Justice of the European Union**

On a proper construction of Clause 2.4 of the Framework Agreement on parental leave, which is set out in the Annex to Directive 96/34/EC read in the light both of the objectives of that Framework Agreement and of Clause 2.6 thereof, it is contrary to that provision for the fixed-sum protective award payable to a worker on part-time parental leave, where the employer unilaterally and without compelling or sufficient reason terminates that worker's full-time contract of indefinite duration, to be determined on the basis of the reduced salary earned by that worker on the date of the dismissal.

▪ **Joined Cases C-512/11 and C-513/11 of 13 February 2014 – Reference for a preliminary ruling (Finland)**

**Terveys- ja sosiaalialan neuvottelujärjestö TSN ry v Terveyspalvelualan Liitto ry (C-512/11) and Ylemmät Toimihenkilöt YTN ry v Teknologiateollisuus ry and Nokia Siemens Networks Oy (C-513/11)**

*Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation*

*Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC*

*Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding*

**Facts**

Ms Kultarinta (C-512/11), a nurse employed by Mehiläinen Oy, one of the main health and social services suppliers in Finland, and Ms Novamo (C-513/11), employed by Nokia Siemens, took unpaid parental education/childcare leave after an initial period of maternity leave. Ms Kultarinta and Ms Novamo wished to interrupt their parental education/childcare leave to take a new period of maternity leave. Their employers both accepted the interruption to the parental education/childcare leave but refused to pay salary during the maternity leave on the ground that the new period of maternity leave had started during a period of unpaid parental education/childcare leave. In both cases, the applicants in the main proceedings brought an action before the Työtuomioistuin (Labour Court) against the respective employers of Ms Kultarinta and Ms Novamo in order to obtain compensation for the damage which the workers considered they had suffered as victims of unlawful treatment.

**Judgment of the Court of Justice of the European Union**

Directive 96/34/EC must be interpreted as precluding a provision of national law, such as that provided for in the collective agreements at issue in the main proceedings, pursuant to which a pregnant worker who interrupts a period of unpaid parental leave within the meaning of that Directive to take, with immediate effect, a maternity leave within the meaning of Directive 92/85/EEC, does not benefit from the maintenance of the remuneration to which she would

have been entitled, had that period of maternity leave been preceded by a minimum period of resumption of work.

## OPINIONS OF ADVOCATES GENERAL

### ▪ Case C-173/13 Opinion of Advocate General Jääskinen of 27 February 2014 **Maurice Leone and Blandine Leone v Garde des sceaux, Ministre de la Justice and Caisse nationale de retraite des agents des collectivités locales (Request for a preliminary ruling from the Cour administrative d'appel de Lyon, France)**

*Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding*

#### **Facts**

Maurice Leone worked for the Hospices civils de Lyon as a civil servant in the hospital sector. In 2005, he applied for early retirement with immediate payment of his pension in his capacity as the father of three children. His application was rejected on the ground that he had not taken a break from work for each of his children. Mr Leone then started legal proceedings, claiming that he was the victim of indirect discrimination. Mr Leone claims that female civil servants automatically satisfy the condition under French law relating to a career break by reason of the automatic, compulsory nature of maternity leave, while male civil servants are for the most part excluded from those benefits because there is no legal provision enabling them to take paid leave equivalent to maternity leave. The Cour administrative d'appel de Lyon (Administrative Court of Appeal, Lyon, France) referred this issue to the Court of Justice.

#### **Conclusion**

In his Opinion Advocate General Jääskinen takes the view, as regards the service credit, that a civil servant may not simply rely on the fact that he is a father in order to benefit from that provision. The Court previously ruled that the granting of a service credit for children may be made dependent on special investment by the worker in bringing up his children, mere involvement in their conception not being sufficient in that regard. Furthermore the Advocate General states that, in order for indirect discrimination to be established, it is essential that the respective situations of the different groups should be comparable. He considers that the situation of female civil servants who have taken responsibility for bringing up their children during their compulsory maternity leave and that of male civil servants who have not proved that they have taken responsibility for bringing up their children (so agreeing to make a voluntary sacrifice during part of their careers) are not comparable in the light of the conditions for access to the service credit scheme.

As regards early retirement with immediate payment of a pension, the Advocate General uses the same reasoning as for the service credit, by making it clear that the differences that may exist between the two provisions are not decisive, for they concern male and female workers alike. The Advocate General also examined the argument that the conditions laid down by French law are automatically satisfied by female workers (women being required to take maternity leave), while it is clearly more difficult for male workers to satisfy them (because men can choose not to take a break from work which is not always remunerated). Here again, the Advocate General considers that male and female workers are in different situations that cannot be compared and that a father may legitimately be required to show that he did actually make the choice of taking a career break so as to devote himself to his children for the same length of time as a mother, if he is to enjoy the same retirement benefits. The same assessment applies to the parents of non-biological children.

If the Court were, nevertheless, to make a finding of indirect discrimination, the Advocate General considers that in the light of *Griesmar* that discrimination is not justified.

▪ **Case-476/12 Opinion of Advocate General Sharpston of 13 February 2014**  
**Österreichischer Gewerkschaftsbund v Verband Österreichischer Banken und Bankiers (Request for a preliminary ruling from the Oberster Gerichtshof, Austria)**

*Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC*

**Facts**

The Österreichischer Gewerkschaftsbund, acting on behalf of part-time employees whose contracts of employment are governed by the banking sector collective agreement, brought proceedings before the Oberster Gerichtshof seeking a declaratory judgment that such part-time employees were entitled to payment of the full dependent child allowance, rather than to a dependent child allowance reduced pro rata temporis to reflect their actual hours of employment.

The Oberster Gerichtshof has stayed proceedings and referred to the Court.

**Conclusion**

The Advocate-General advises the Court of Justice as follows:

It is appropriate, within the meaning of Clause 4.2 of the Framework Agreement annexed to Directive 97/81/EC to apply the principle of pro rata temporis to a dependent child allowance provided for in a collective agreement, where there is no statutory obligation on the parties to make provision for such an allowance.

**CASES PENDING BEFORE THE COURT OF JUSTICE**

▪ **Case C-65/14: Request for a preliminary ruling from the Tribunal du travail de Nivelles (Belgium) lodged on 10 February 2014**  
**Charlotte Rosselle v Institut national d'assurance maladie-invalidité (INAMI), Union nationale des mutualités libres (UNM Libres)**

*Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation*

*Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding*

**Referred question**

Do Sections 1 and 2 of Title III, Chapter III, of the Royal Decree of 3 July 1996 implementing the Law of 14 July 1994 coordinating compulsory medical care and sickness benefit insurance infringe Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) in failing to provide for an exemption from the minimum contribution period for a public servant who is assigned non-active status for personal reasons and is on maternity leave, whereas such an exemption is provided for a public servant who has resigned or has been dismissed?

# European Court of Human Rights Case Law Update

December 2013 – April 2014

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## ▪ Case of L.H. v Latvia (Application no. 52019/07) of 29 April 2014

### *Facts*

The applicant, L.H., is a Latvian national who was born in 1975 and lives in the Cēsis District (Latvia). This case concerns a state agency's collection of medical data about her. While Ms H. was giving birth in 1997, a Caesarean section was performed and in the course of that surgery a tubal ligation, resulting in sterilisation, was performed without her consent. Following an unsuccessful attempt to achieve an out-of-court settlement, she brought civil proceedings against the district hospital in February 2005 and, in December 2006, was awarded compensation for the unauthorised sterilisation. In the meantime, in February 2004, the Inspectorate of Quality Control for Medical Care and Fitness for Work ('the MADEKKI'), at the district hospital's director request, initiated an administrative inquiry concerning the gynaecological and childbirth assistance provided to Ms H. from 1996 to 2003. The MADEKKI received medical files from three medical institutions and, in May 2004, issued a report containing sensitive medical details, and the summary of the conclusions was sent to the hospital director. Ms H.'s lawyer lodged a claim before the administrative courts, complaining that the inquiry had been unlawful, in particular since its essential purpose had been to help the hospital gather evidence for the impending litigation, which was outside the MADEKKI's remit. The lawyer also requested to annul the report. Ms H.'s claim was rejected by the Administrative District Court in a decision eventually upheld by the Senate of the Supreme Court in February 2007. Ms H. complains that the MADEKKI, by collecting her personal medical data, violated her rights under Article 8 (right to respect for private and family life).

### *The Court unanimously*

1. declares the application admissible;
2. holds that there has been a violation of Article 8 of the Convention;
3. holds that the respondent State is to pay the applicant the following amounts: EUR 11,000 (non-pecuniary damage) and EUR 2,768 (costs and expenses);
4. dismisses the remainder of the applicant's claim for just satisfaction.

### *Judgment*

<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-142673>

### *Press release*

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4740067-5762035>

## ▪ Case of Radu v the Republic of Moldova (Application no. 50073/07) of 15 April 2014

### *Facts*

The applicant, Liliana Radu, is a Moldovan national who was born in 1969 and lives in Chişinău. This case concerns her complaint about a state-owned hospital's disclosure of medical information about her to her employer. She was a lecturer at the Police Academy and in August 2003, pregnant with twins, was hospitalised for a fortnight due to a risk of her miscarrying. She gave a sick note certifying her absence from work. However, the Police Academy requested further information from the hospital concerning her sick leave, and it replied in November 2003, providing more information about her pregnancy, her state of health and the treatment she had been given. The information was widely circulated at Ms



Radu's place of work and, shortly afterwards, she had a miscarriage due to stress. She brought proceedings against the hospital and the Police Academy claiming compensation for a breach of her right to private life, which were ultimately dismissed in May 2007 by the Supreme Court as it considered that the hospital had been entitled to disclose the requested information to Ms Radu's employer. Relying on Article 8, Ms Radu complains about the hospital's disclosure of sensitive information about her health to her employer. She also alleges under Article 6 (right to a fair hearing) that the proceedings she had brought against the hospital were unfair.

***The Court unanimously***

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 the complaint under Article 6 of the Convention;
4. holds that the respondent State is to pay the applicant the following amounts: EUR 4,500 (non-pecuniary damage) and EUR 1,440 (costs and expenses);
5. dismisses the remainder of the applicant's claim for just satisfaction.

***Judgment***

<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-142398>

***Press release***

<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-4726600-5742205>

▪ **Case of W.H. v Sweden (Application no. 49341/10) of 27 March 2014**

***Facts***

This case concerns the deportation of a failed asylum seeker from Sweden to Iraq. The applicant, W.H., is an Iraqi national who was born in 1978 and currently lives in Sweden. She is originally from Baghdad and is of Mandaean denomination. She arrived in Sweden in August 2007 and subsequently claimed asylum. Her request was examined by the Migration Board and Migration Court and ultimately rejected in 2010 on the ground that she was not in need of protection in Sweden. Relying on Article 3 (prohibition of inhuman or degrading treatment), W.H. alleges that, being a divorcee belonging to a small, vulnerable ethnic/religious minority, she would be at real risk of inhuman and degrading treatment if returned to Iraq. She submits in particular that, without a male network or any remaining relatives in Iraq, she would be at risk of persecution, assault, rape, forced conversion to another religion and forced marriage.

***The Court unanimously***

1. declares the application admissible;
2. holds that the implementation of the deportation order against the applicant would not give rise to a violation of Article 3 of the Convention, provided that she is not returned to parts of Iraq situated outside the Kurdistan Region;
3. decides to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to deport the applicant until such time as the present judgment becomes final or until further order.

***Judgment***

<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-141949>

***Press release***

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4705195-5711757>

▪ **Case of W v Slovenia (Application no. 24125/06) of 23 January 2014**

***Facts***

The applicant, Ms W., is a Slovenian national who was born in 1971 and lives in Maribor (Slovenia). This case concerns criminal proceedings against a group of men who raped her in April 1990, when she was 18 years old. Charges of rape, aiding and abetting rape and sexual assault, respectively, were brought against ten men in September 1990. In November 1990 they were acquitted, based on the findings, in particular, that Ms W. had not seriously resisted sexual intercourse and that she had changed her testimony during the proceedings. On appeal, the second-instance court quashed the judgment in April 1991, finding that the facts had been insufficiently established, and remitted the case. Subsequently there were long delays in the proceedings, since two of the defendants had left the country and could not be found. After the proceedings against the two missing men had been severed into separate cases, six of the remaining defendants were convicted, of rape and aggravated rape respectively, and sentenced to imprisonment for between eight months and one year in a judgment of June 2002, eventually upheld by the Supreme Court in July 2007. The missing defendants were eventually found and extradited to Slovenia in 2003 and 2004 and they were convicted of aiding and abetting rape and of aggravated rape, respectively, and both sentenced to imprisonment of eight months by judgments which became final in August 2004 and June 2006.

Relying, in substance, on Article 3 (prohibition of inhuman or degrading treatment), Ms W. complains in particular that the long delays in the criminal proceedings were in breach of the State's obligation to effectively prosecute the criminal offences committed against her. While she was awarded compensation at national level for the distress she suffered as a result of the lengthy proceedings, she considers that the amount of EUR 5,000 paid to her cannot be regarded as sufficient redress.

***The Court***

1. joins to the merits the Government's plea of lack of victim status and rejects it;
2. declares the applicant's complaint under procedural limb of Article 3 admissible;
3. holds that there has been a violation of the procedural limb of Article 3 of the Convention;
4. holds 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 §2 of the Convention, the following amounts: EUR 15,000 (non-pecuniary damage) and EUR 1,800 (costs and expenses).
5. dismisses the remainder of the applicant's claim for just satisfaction.

***Judgment***

<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-140030>

***Press release***

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4637350-5614415>

▪ **Case of Cusan et Fazzo v Italy (Application no. 77/07) of 7 January 2014**

***Facts***

The applicants, a married couple, had their first child, a girl, on 26 April 1999. Mr Fazzo asked to enter his daughter in the civil register under her mother's family name, Cusan. His request was dismissed and the child was registered under her father's surname, Fazzo. The couple submitted an appeal against this decision, arguing that there was no provision in Italian law which prevented their daughter from bearing her mother's surname.

The Court dismissed this appeal, noting that although there was no provision of Italian law which obliged a child born to a married couple to be registered under the father's surname, this rule corresponded to a principle which was rooted in social consciousness and in Italian history. The Court of Appeal upheld this judgment. The applicants appealed on points of law.

The Court of Cassation held that the rule governing the transmission of the father's surname to legitimate children raised an issue under the Constitution, suspended the proceedings and ordered that the case file be transmitted to the Constitutional Court. The Constitutional Court ruled the question inadmissible. It held that the system in force derived from a patriarchal understanding of the family and of the husband's powers, which had its roots in Roman law and was no longer compatible with the constitutional principle of equality between men and women. However, it considered that only Parliament could decide on which of the various solutions available should be adopted.

On 29 May 2006 the Court of Cassation took note of the Constitutional Court's decision and dismissed the applicants' appeal.

Relying on Article 8 and 14, the applicants complained about the Italian authorities' refusal to grant their request to give their daughter her mother's surname, and about the fact that Italian legislation at the relevant time made it mandatory to give the father's surname to legitimate children.

### ***The Court***

In the present case, the choice of the child's surname was determined solely on the basis of the parents' sex, as the rule in question required that the surname given was to be that of the father, without exception and irrespective of the choice made by the spouses. It was possible that the rule that the father's surname be handed down to legitimate children was necessary in practice, and was not necessarily incompatible with the Convention, but the fact that it was impossible to derogate from it had been excessively rigid and discriminatory towards women. It followed that there had been a violation of Article 14, taken together with Article 8.

### ***Judgment***

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-139896>

### ***Press release***

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4624361-5596419>

## **▪ Case of Tanbay Tüten v Turkey (Application no. 38249/09) of 10 December 2013 (final 10 March 2014)**

### ***Facts***

This case concerned the applicant's complaint that Turkish law allows married men but not married women to use their own surname after marriage and that this amounts to discrimination based on sex. She relied in particular on Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination).

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

1. declares the complaint concerning the national authorities' refusal to allow the applicant to bear only her maiden name after marriage admissible and the remainder of the application inadmissible;
2. holds that there has been a violation of Article 14 of the Convention in conjunction with Article 8;
3. holds that it is unnecessary to consider the application under Article 8 of the Convention taken alone;
4. holds that the respondent State is to pay the applicant the following amounts: EUR 1,500 (non-pecuniary damage) and EUR 570 (costs and expenses);
5. dismisses the remainder of the applicant's claim for just satisfaction.

### ***Judgment***

<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-138892>

### ***Press release***

<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-4603619-5567593>



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

December 2013 – April 2014

## AUSTRIA – Martina Thomasberger

### Policy developments

General elections for the Austrian Parliament (*Nationalrat und Bundesrat*) were held on 29 September 2013. In the main Chamber of Parliament (*Nationalrat*) the Social Democratic Party (SPÖ) won 26.9 % and the conservative People's Party (ÖVP) 24 % of the votes. Both lost about 2 percentage points compared to the 2008 elections. The right-wing Freedom Party (FPÖ) increased its support by 3.1 percentage points to a total of 20.6 %. The Green Party (*Die Grünen*) reached 12.3 % of votes, an increase by 1.9 percentage points, which was less than projected by pre-election polls. The newly founded New Austria Party (*Neos*) formed an election alliance with the Liberal Party (*Liberales Forum, LiF*), which was not represented in Parliament for two legislative periods, and won 4.9 % of the votes thereby crossing the 4 % threshold for parliamentary representation. The former government party Alliance for Austria's Future (*BZÖ*) lost all parliamentary seats, which was mostly due to political developments in the spring of 2013. Austrian-born Canadian millionaire F. Stronach had enticed five parliamentary members of BZÖ to leave their political platform and form a new political party and parliamentary group, which he named Team Stronach. This party reached 5.7 % of the votes in the autumn election.

The parliamentary seats for the new five-year legislative period until 2018 are distributed as follows:

SPÖ 52, of which 20 women (38.46 %); ÖVP 47, of which 14 women (29.79 %); FPÖ 40, of which 7 women (17.50 %); Die Grünen 24, of which 13 women (54.17 %); Neos 9, of which 2 women (22.22 %); Team Stronach 11, of which 5 women (45.45 %).<sup>1</sup>

After the 2013 elections, 61 of the 183 members of the Austrian *Nationalrat* are female (33.3 %) which is an increase of 6.01 percentage points compared to the 2008 results. Female membership in the second parliamentary chamber, *Bundesrat*, remained stable at 18 (29.51 %).

In October 2013 President H. Fischer mandated the majority parties SPÖ and ÖVP to start talks on continuing the government coalition. The two parties together hold a simple majority of 99 parliamentary votes and can legislate accordingly. For major constitutional legislation that requires a two-third majority however, they would again have to seek consensus with other parties.

The new federal Government was sworn in on 16 December 2013 based on a consensual government programme.<sup>2</sup> Until then 7 out of 18 ministerial posts (32 %) were held by women.<sup>3</sup> The new Government consists of 16 ministerial posts, of which four Ministers and one Undersecretary of State in the Ministry of Finance are female (31 %). This decrease has been viewed critically by political journalists<sup>4</sup> and by non-governmental groups.<sup>5</sup>

<sup>1</sup> <http://www.parlament.gv.at/WWER/SITZPLAN/sitzplan2Nr.pdf>, accessed 13 January 2014, shows the election results, however without taking into account the leaving of Ms Lindner and Mr Stronach.

<sup>2</sup> *Arbeitsprogramm der österreichischen Bundesregierung für die Jahre 2013 bis 2018*. Available at: <http://bka.gv.at/DocView.axd?CobId=53264>, accessed 13 January 2014.

<sup>3</sup> According to the Global Gender Gap Report 2013, Austria held sixth rank in government representation of women in 2013.

<sup>4</sup> <http://diestandard.at/1385170947359/Nur-fuenf-Frauen-in-der-neuen-Bundesregierung>, accessed 8 January 2014.

<sup>5</sup> [http://www.ots.at/presseaussendung/OTS\\_20131217\\_OTS0073/rueckschritt-fuer-frauen](http://www.ots.at/presseaussendung/OTS_20131217_OTS0073/rueckschritt-fuer-frauen) by Österreichischer Frauenring – Dachorganisation österreichischer Frauenvereine, accessed 14 January 2014.

The government programme contains one short sub-chapter on women's policies within the education chapter,<sup>6</sup> and one chapter on family policies. Under gender equality aspects these policy areas are closely related. Topics such as childcare facilities and childcare benefits that have direct impact on women's access to employment are traditionally dealt with in the family policies chapter. Gender policy issues are also mainstreamed into the chapters on growth and employment policies, pensions and also in the chapter on education policies, which contains targets on realising forms of all-day school.

The targets in the sub-chapter on women are:

1. extension of special counselling and assistance for women;
2. advancing gender budgeting processes together with the Ministry of Finance;
3. gender equality in the labour market;
4. enhancing security for women;
5. action plans for female health; and
6. further development of equal treatment legislation and equal treatment instruments.

The means for realising these targets are relatively open; the programme mainly includes soft approaches such as a follow-up to the National Action Plan on Gender Equality (NAP *Gleichstellung*), evaluation of existing legislation and information campaigns.

In the chapter on growth and employment, two targets cover gender equality policy areas directly: promotion of female employment, e.g. by extending childcare facilities and care services,<sup>7</sup> and measures to improve compatibility of work and family life. The agreed means for this target comprise the extension of maternity protection and maternity leave for atypical workers, extension of protection against dismissal for miscarriages and inclusion of foster parents into the regulations on parental leave.

The family policies chapter also includes the target of compatibility of work and family life. More importantly it contains relatively concrete targets for improving and adjusting the laws governing family benefits and especially small-child benefits (*Kinderbetreuungsgeld*).

Gender equality issues are also mainstreamed into the chapter on pensions. Financial independence of women of all ages remains a core target of social policies, especially in the statutory pension systems where the gender pay gap, shorter earning periods of women and earlier retirement ages can still result in pension gaps between men and women of up to 50 %.<sup>8</sup>

The issue of the earlier retirement age for women within the statutory pension systems for employees, farmers and self-employed workers is included in the government programme in the sub-chapter on pensions as a soft target only. Politically the topic of raising the pension age for women faster than currently required by law remains very much in view. While Social Democrats insist on remaining within the current legal regime under which the gradual increase of women's pension age starts in 2024 the Conservative People's Party keeps pointing out the financial benefits a faster time track would have for a system that is challenged by demography as well as critical economic developments such as rising unemployment. The real financial advantage of raising the female retirement age earlier cannot currently be shown with reasonable certainty, because this could correspond with an increase in unemployment numbers for women in the age bracket of 50 to 60, which cannot be estimated exactly. Currently almost 50 % of female applicants for old-age or disability pensions have been either sick or unemployed for significant periods prior to their applications. It has been estimated that current social policy changes such as raising the age requirements for early retirement and abolishing fixed-term disability pensions for persons

<sup>6</sup> This is due to the fact that G. Heinisch-Hosek (SPÖ), former Minister for Civil Service and Women's Affairs is now the newly appointed Minister for Education and Women; she will be taking the women's agenda into the new Ministry with her.

<sup>7</sup> In an interview, S. Karmasin, newly appointed Minister of Family Affairs, has stated that she will work towards greater flexibility of childcare facilities, mainly concerning early childcare and opening hours in accordance with workers' working hours. Available at: <http://derstandard.at/1388650677841/Echten-Menschen-wird-Unsauberes-unterstellt>, accessed 13 January 2013.

<sup>8</sup> Statistical Handbook for Austrian Social Security 2012 (*Statistisches Handbuch der österreichischen Sozialversicherung 2012*), Tables 3.10 to 3.35.



under 50 will result in an increase of 50 000 women in the labour market until 2020.<sup>9</sup> For the moment, the issue has been politically postponed in order to collect better data.

### Legislative developments

On 1 January 2014 improved regulations and entitlements concerning leaves of absence or alternatively part-time work during periods of care for sick family members for workers and employees (*Pflegekarenz*) entered into effect.

Workers/employees and civil servants engaged in caring for sick family members can negotiate a side agreement to their employment contracts with their employers for an unpaid leave of absence or for part-time work of at least 10 working hours that may last one to three months. This complements the provisions in the Labour Contract Adaptations Act (*Arbeitsvertragsrechtsanpassungsgesetz, AVRAG*) and in corresponding civil service laws based on which workers can negotiate leaves of absence or part-time work of up to three months in order to care for terminally ill relatives or for seriously ill children (*Familienhospizkarenz*).

If these contractual requirements are met, a newly introduced special social benefit can be applied for (*Pflegekarenzgeld*). The amount corresponds to unemployment benefits and is reduced proportionately in cases of working-hour reductions.

Eligibility depends on a separate social benefit for the sick relative who is to be taken care of. He or she must actually receive a Grade 3 care allowance (*Pflegegeld Stufe 3*, EUR 442.90), which means that he or she has to apply for the care allowance and additionally has to prove that the necessary care requires more than 120 hours per month on average. Only if the sick relative is a minor or if he or she suffers from a form of dementia, a Grade 1 care requirement of at least 60 hours per months (*Pflegegeld Stufe 1*, EUR 154.20) is sufficient. As long as these benefits are paid, recipients are included into the statutory health and pension insurance. The resulting dues are paid out of general revenues.

During these periods of absence or part-time work some protection against unfair dismissal explicitly related to the agreement or to the family situation is in place; this however does not affect regular terminations of contract, e.g. for restructurings, which still remain legal and applicable. It should be noted that these measures are closely modelled on the regulations for part-time work for parents (*Elternteilzeit*). It is expected that this will contribute to a better work-life balance for working women who have the major part of domestic care obligations, by adding more flexibility to working time schedules and securing social security entitlements.<sup>10</sup>

Major changes concerning disability pensions became effective on 1 January 2014 concerning insured persons who are under 50. Instead of collecting temporary disability pensions during periods of incapacity for work, insured persons will either be included into obligatory re-training schemes or into obligatory medical rehabilitation programmes according to the results of an extensive assessment process. Only if the health impairment is so serious that the claimant is not expected to regain his or her working ability, can a permanent disability pension be granted.<sup>11</sup> It is expected that this will contribute to raising the average retiring age and to help people with health-related working problems regain employment and remain in the labour market for longer periods. These measures are considered to also have a gender equality impact. As has been discussed in connection with raising the female retirement age, a significant part of women are either sick or unemployed for significant time periods before they can claim old-age pensions, which has been mentioned as an important reason for not starting to raise the statutory pension age for women before 2024. Statutory retraining instead of retiring into disability pensions will give women

<sup>9</sup> <http://diestandard.at/1385169374844/Jede-zweite-geht-arbeitslos-oder-invalid-in-Pension>, accessed 19 December 2013.

<sup>10</sup> BGBl I 2013/138, available at: [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2013\\_I\\_138/BGBLA\\_2013\\_I\\_138.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2013_I_138/BGBLA_2013_I_138.pdf), accessed 19 January 2013.

<sup>11</sup> BGBl I 3/2012, *Sozialrechtsänderungsgesetz 2012*, [http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2013\\_I\\_3/BGBLA\\_2013\\_I\\_3.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2013_I_3/BGBLA_2013_I_3.pdf), accessed 19 January 2013.

new and extended chances for improved labour market inclusion. As this is a new social policy approach to coping with invalidity, extensive evaluation and research processes will monitor the results.

## Case law of national courts

### *Supreme Court*

Field staff members with part-time contracts were excluded from receiving extra pay for field work (*Außendienstzulage*) because their employer based the eligibility on a high working hour requirement that could not be met by the mostly female part-time workers. The employer was ordered to pay out the benefit proportionally to the working hours of the claimants.<sup>12</sup> The Court acknowledged that there might be a case of indirect pay discrimination on the grounds of sex. As the result can be based on the provisions on part-time work in the Working Hours Act (*Arbeitszeitgesetz, AZG*) that forbids any discrimination of part-time workers, it concluded that this possible violation of gender equality provisions need not be examined extensively.

### *Constitutional Court*

After rejecting a case concerning medically-assisted reproduction for same-sex couples for formal reasons in 2013,<sup>13</sup> the Court issued a ruling declaring null and void the provisions of the Reproductive Medicine Act (*Fortpflanzungsmedizingesetz, FMedG*) that prohibit access of female same-sex couples to medically-assisted insemination by donor sperm.<sup>14</sup> According to the Court the exclusion of lesbian same-sex couples from insemination by donor sperm is discriminatory and not justified by any serious or compelling arguments. Same-sex couples under Article 8 European Convention on Human Rights have the same rights as heterosexual couples and the Constitutional Court ruled that giving equal rights to same-sex couples does not in any way diminish the societal impact of heterosexual marriages and heterosexual partnerships but complements them on a societal level. Insemination by donor sperm also does not pose any serious bioethical or moral questions. It should be taken into account however, that the Court expressly states that this ruling only applies to women in same-sex partnerships and not to single women seeking access to medical insemination by donor sperm.

In another case, the Court partly abrogated a provision in the Unemployment Insurance Act (*Arbeitslosenversicherungsgesetz, AIVG*) because it had indirectly discriminatory effects on women.<sup>15</sup> Unemployment benefits can be drawn for up to 30 weeks if the applicant has been employed and paid above the mandatory social security threshold level (2014: EUR 396.38) for at least 156 weeks in the last five years. This requisite five-year period can be extended for special reasons, especially if the applicant has had to carry out obligatory military or civilian service. The claimants were women who had had children at relatively short intervals and had therefore taken parental leave and small-child benefits (*Kinderbetreuungsgeld*). Because periods of small-child benefits are not counted as employment periods under the provision in question, the claimants could not meet the requirement of 156 weeks' employment. The Court held this to be indirectly discriminatory and found no justifying reasons, as both compulsory military or civilian service and caring for small children are in the public interest. In cases involving social security questions the Court has traditionally accepted a wide margin for political and policy adjustments by legislation. In

<sup>12</sup> OGH, 27 September 2013, 9 Ob A 58/13i, [https://www.ris.bka.gv.at/Dokumente/Justiz/JJT\\_20130927\\_OGH0002\\_009OBA00058\\_13I0000\\_000/JJT\\_20130927\\_OGH0002\\_009OBA00058\\_13I0000\\_000.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20130927_OGH0002_009OBA00058_13I0000_000/JJT_20130927_OGH0002_009OBA00058_13I0000_000.pdf), accessed 21 January 2014.

<sup>13</sup> VfGH, 2 October 2013, G 14/10-08 ua, [https://www.ris.bka.gv.at/Dokumente/Vfgh/JFT\\_09878998\\_10G00014\\_00/JFT\\_09878998\\_10G00014\\_00.pdf](https://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_09878998_10G00014_00/JFT_09878998_10G00014_00.pdf), accessed 21 January 2014. See also: European Network of Legal Experts in the Field of Gender Equality, N. Bei 'Austria' in: *European Gender Equality Law Review 1/2013*, p. 50, European Commission 2013, available at: [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelr\\_2013-1\\_final\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2013-1_final_web_en.pdf), accessed 21 March 2014.

<sup>14</sup> VfGH, 10 December 2013, G 16/2013 ua, [https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR\\_20131210\\_13G00016\\_01/JFR\\_20131210\\_13G00016\\_01.pdf](https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_20131210_13G00016_01/JFR_20131210_13G00016_01.pdf), accessed 24 April 2014

<sup>15</sup> VfGH, 10 December 2013, G 74-75/2013-13.



this case, the Court stated that indirect discrimination on the grounds of sex could be considered as a constitutional limit to policy adjustments.

### Miscellaneous

Senate 1 of the Equality Body that handles complaints on gender equality cases did not have a chairwoman for some months and consequently could not be called into session. The new chairwoman, a legal scholar with a background in civil law, was appointed on 6 March 2014. As new cases are submitted on a regular basis, the vacancy resulted in a serious backlog. Currently applicants face waiting periods of up to two years. It is doubtful whether Senate 1 can currently be seen as a working equality body as required by the directives.

## BELGIUM – Jean Jacqmain

### Policy developments

Less than three months before the General Elections of May 2014, the federal Government is still trying to table a number of bills of law in Parliament, some of which would have an impact on gender equality, e.g. bills concerning retirement pensions for civil servants or survivors' pensions under the three statutory schemes (for paid workers, self-employed persons and civil servants). There are also numerous regulations still to be adopted, e.g. ancillary Royal Decrees to the Gender Act of 10 May 2007 to provide a list of jobs for which gender is a determining factor or to define conditions under which positive action may be taken. However, these various projects remain in the phase of elaboration and it would be idle to comment on them without any certainty that they will ever come into force.

### Legislative developments

#### *Multiple breach of EU law narrowly avoided*

Belgian labour legislation provides that an employer may not dismiss an employee who finds himself/herself in a variety of situations (most of which entail leaves of absence) unless the grounds for terminating the contract are unrelated to those situations. As a deterrent of unlawful dismissal, fixed damages are granted as compensation for the moral prejudice, over and above the payment of remuneration in lieu of a notice period.

A Royal Decree of 24 September 2013<sup>16</sup> amended the Royal Decree of 28 November 1969 (ancillary to the Social Security Act of 27 June 1969) to make all those fixed damages liable to social security contributions. Consequently, a second Royal Decree of 24 October 2013<sup>17</sup> amended the Royal Decree of 25 November 1991 concerning the Unemployment Insurance Scheme to provide that all fixed damages now liable to social security contributions should be considered as remuneration, so that no unemployment benefits should be granted during corresponding periods. Immediately, the Healthcare and Sickness Insurance Office opined that the Healthcare and Sickness Insurance Consolidated Act of 14 July 1994 should be amended accordingly.

Both Royal Decrees aroused radical opposition of the trade unions, but the Council of Equal Opportunities for Men and Women, an advisory body with the federal Government, was the only voice to stress that these measures were conducive to a breach of Belgian's obligations under EU law. In its opinion no. 141 of 13 December 2013,<sup>18</sup> the Council recalled that Belgian legislation used fixed damages to implement various provisions of Directives 2006/54/EC (concerning the prohibition of gender discrimination, including sexual

<sup>16</sup> *Moniteur belge/Belgisch Staatsblad*, 27 September 2013, 2nd. ed. All legal instruments quoted are available in French and Dutch at <http://www.juridat.be>, accessed 24 February 2014.

<sup>17</sup> *Moniteur belge/Belgisch Staatsblad*, 31 October 2013.

<sup>18</sup> Available in French or Dutch at <http://www.conseildelegalite.be> or [www.raadvandegelijkekansen.be](http://www.raadvandegelijkekansen.be), accessed 24 February 2014

harassment and gender-related harassment; victimisation; and paternity and adoption leaves),<sup>19</sup> 2010/18/EU (concerning parental leave)<sup>20</sup> and 92/85/EEC (concerning protection of maternity).<sup>21</sup> Thus, the combined effect of both Royal Decrees was to make the compensation owed to the victim of a dismissal contrary to EU law less effective, given that being entitled to fixed damages had become an obstacle to receiving social security benefits after losing one's job. An employee who was dismissed while she was pregnant would have suffered the worst impact as the fixed damages provided in compliance with Article 10 of Directive 92/85/EEC would have excluded her from maternity benefits during ante and postnatal leave, provided in compliance with Article 11 of the same Directive.

The Council's opinion was certainly instrumental in convincing the federal Government that the disputed measures had to be amended. Consequently, the Royal Decrees of 21 and 26 December 2013<sup>22</sup> erased the harmful effects of the previous ones. Remarkably, the recitals of both Royal Decrees concurred with the Council's opinion that fixed damages granted as compensation for unlawful dismissal could not possibly serve as a means to evade social security contributions.

## Case law of national courts

### *Court of Cassation, judgment of 16 September 2013*

In 1983, Ms M.K. was engaged by an employer who had organised an occupational invalidity insurance scheme for his workforce. Under this scheme, the insurance company would provide grants to complement statutory benefits until the incapacitated employee reached the age of 65 (for a man) or 60 (for a woman).

After Ms M.K. was the victim of an industrial accident which left her with a 50 % disablement, the insurance company started providing her with invalidity grants, and kept doing so even after the employer terminated the scheme in 1994. However, the company stopped paying the grants when Ms M.K. reached the age of 60. When she claimed that she was entitled to the grants up to the age of 65 as a man would have been, the ensuing dispute was processed up to the Court of Cassation.

In its judgment of 16 September 2013,<sup>23</sup> the Court of Cassation found that when the occupational insurance scheme was organised, equal treatment of male and female workers, including pay, was governed by Heading V of the Economic Reorientation Act of 4 August 1978, which did not apply to occupational social security schemes (in compliance with EU law at the time). However, the present Gender Act of 10 May 2007 is *d'ordre public*, so that it is applicable to the continuing effects of a scheme which was contracted when the older legislation was in force. Given that Article 12(1) of the Gender Act forbids discrimination based on different ages in occupational social security schemes, Ms M.K. was entitled to the grants until she reached the age of 65.

When a legal instrument is *d'ordre public*, it may be relied upon at any stage of proceedings, even if it was not quoted in the writ of summons. Moreover, judges may and indeed are bound to take it into consideration *ex officio* if all parties to the dispute have failed to do so. Now, while the explanatory statements of the bills of law which resulted in the successive Acts on gender equality in employment (those of 4 August 1978, 7 May 1999 and

<sup>19</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

<sup>20</sup> 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 OJ L 68, 18.3.2010, pp. 13-20.

<sup>21</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) OJ L 348 of 28 November 1992, pp. 1-8.

<sup>22</sup> Both published in *Moniteur belge/Belgisch Staatsblad*, 31 December 2013, 2<sup>nd</sup> ed.

<sup>23</sup> C.12.0032.F, unreported, available on <http://www.juridat.be>, accessed 24 February 2014.

finally 10 May 2007) did mention that they were *d'ordre public*,<sup>24</sup> this was never stated in the Act itself, and it so happened that throughout the related case law, the Court of Cassation never had an opportunity to rule on this issue. Thus, the reported judgment is extremely important, and even more so as it can obviously be extended to the other two Acts of 10 May 2007 (on 'Race' and 'Discrimination in general') which implemented Directives 2000/43/EC<sup>25</sup> and 2000/78/EC.<sup>26</sup>

## BULGARIA – Genoveva Tisheva

### Policy developments

The political instability that marked all legislative and policy developments in 2013 has continued in 2014 but at a more 'stabilised' level, meaning that in practice instability persists, and the crisis between the state institutions and citizens, and among political parties still continues. The results of these elections for Bulgarian political forces, since they amounted to a different score of political parties compared to the current representation in the Bulgarian parliament, will define the future developments, possible preliminary elections included. In the current political situation in Bulgaria, which has been very unstable since the beginning of 2013, the results from the European elections determined in fact the new positioning of the various political parties. This may rekindle certain political controversies, which can provoke preliminary elections.

In the meantime, against this background and despite the excessive focus on politics, a range of important gender policy issues emerged. Some of them are inspired by research and surveys at EU level; others are the result of national debates.

During the period under review, the results from the first Gender Equality Index (GEI) elaborated by the European Institute for Gender Equality (EIGE) were announced at the end of 2013. Based on indicators like work, money, knowledge, time, power and health, the survey ranks the EU Member States according to their performance in previous periods.<sup>27</sup> Bulgaria is at the bottom of these classifications in relation to almost all indicators. The average GEI for the EU being 54, the GEI for Bulgaria is only 37. The GEI regarding quality of work is also low: 49.9, compared to the EU average of 69. The figures related to time, educational achievements, segregation, and lifelong learning are also alarming.

A recently distributed survey of the Fundamental Rights Agency of the EU on the incidence of violence against women in the EU should be mentioned as well in the current Bulgarian context.<sup>28</sup> The results for Bulgaria are close to the EU average data on violence against women. 23 % of interviewed Bulgarian women, or almost every fourth woman in our country has been victim of physical or sexual abuse by her partner. 14 % of women have suffered such violence in situations where the perpetrator was not their partner.

The results reported regarding sexual harassment of women in our country are quite low, compared with the average values for the EU. Between 9 and 11 % of our women have suffered sexual harassment. In Denmark, for example, reports of women who have suffered sexual harassment were between 26 and 37 %. Here some important clarifications must be made. In the first place we need to consider which acts are considered to constitute sexual harassment, as indicated by the EU Agency for Fundamental Rights. The preliminary questionnaires included the following: unwanted touching and caressing, sexual hints or jokes which are abusive, inappropriate proposals for a date; persistent questions about the woman's

<sup>24</sup> See C. Lardin, case note on Labour Court of Appeal in Liège, 9 February 2011, *Chroniques de droit social*, 2011, p. 280.

<sup>25</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19 July 2000, pp. 22-26.

<sup>26</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2 December 2000, pp. 16-22.

<sup>27</sup> Figures available at: <http://eige.europa.eu/content/activities/gender-equality-index>, accessed 2 April 2014.

<sup>28</sup> Results available at: <http://fra.europa.eu/en/publication/2014/vaw-survey-main-results>, accessed 2 April 2014.

private life, which are abusive; comments on the outer appearance with sexual and/or abusive connotations; sending of pornographic photos or sexual e-mails/text messages, which are abusive, etc. Apparently, in Bulgaria such activities are accepted as innocent rather than as a form of sexual harassment. As indicated by the EU Agency for Fundamental Rights, sexual harassment is a matter of subjective emotion, which however is formed in response to the dominant social and cultural values, norms and dispositions of society regarding women. The comparatively low percentage for Bulgaria, compared with other countries, could be explained based on the tendencies of placing the woman in a supporting position but not in a leading role in public or in private family life. This role of the woman in Bulgarian society (housewife, lover, sexual object, etc.), has been actively promoted in public for several decades.<sup>29</sup> 29 % of the women in Bulgaria, or almost 1 million of the total female population (over 3.7 million) according to data from the 2011 census, in their childhood suffered at least one of the three forms of violence – physical, sexual or psychological. The average EU percentage is 33.

Against this background very few women in Bulgaria know where to look for help; they are not familiar with the legislation and the protective measures, and do not know much about campaigns or preventive measures. The results for Bulgaria regarding these indicators (related to awareness about existing legislation and to campaigns on violence against women) are strikingly low compared to other EU countries and also come as a consequence of the lack of consistent policies and commitment on behalf of the State in regular and adequate funding of activities related to prevention and protection of women against violence. The existing services of non-governmental organisations and all other preventive and protective activities in certain urban areas are not consistently supported by the State and municipalities. This is why in many towns and villages such services are not available, and where there are such services they lack sufficient funding.

The deficit of special legislation and policies on gender equality in Bulgaria is also illustrated by the results of the FRA survey. As the Agency states in its interpretation, the greater degree of equality in a given country and the availability of policies and legislation also lead to better awareness and sensitivity regarding the problems of violence against women, to higher awareness of injustice and violation of rights.

We are convinced that the intersections between the research of the EIGE on the GEI and the FRA survey will be studied in depth and highlighted even more in the months to come. Violence against women is defined by the EIGE as an intersecting indicator and data will be collected regularly in the future, also based on the special EU-wide FRA survey.

Among the national reflections and responses to the serious challenges posed by the EU research mentioned, two main initiatives should be mentioned.

The first one is the adoption by the Council of Ministers in late December 2013 of the 2014 National Action Plan for the Promotion of Gender Equality.<sup>30</sup> The Plan was adopted as a regular policy measure of the Bulgarian Government and does not present anything new which has the potential to speed up the necessary changes and reforms required by the international treaty bodies and civil society organisations. The adoption in July 2013 of the National Plan for the implementation of the recommendations of the CEDAW Committee was marked in our previous reports as a clearly positive step. The pace of its implementation is slow in the two priority spheres regarding which the Committee expects follow-up by June 2014. Concerning the priority of putting into place a reliable gender equality system and adopting a Gender Equality Law, the process has formally started, but no additional resources have been earmarked for it in the 2014 Gender Equality Plan. The priority sphere of violence against women is mentioned in the Plan but again without the necessary resources. The explicit recommendation of the CEDAW Committee is to ensure adequate services for female victims of violence.

<sup>29</sup> Press release of the Alliance for Protection against Domestic Violence. Available via: <http://www.alliancedv.org/>, accessed 2 April 2014.

<sup>30</sup> <http://www.strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=1095>, accessed 2 April 2014.

The wide and intensive campaign by women's organisations and networks for the ratification of the Council of Europe Convention for preventing and combating violence against women and domestic violence (the Istanbul Convention) has to be mentioned as well, since it has marked the complete period from the autumn of 2013 until now.<sup>31</sup> The Government is under serious pressure, which will be intensified also in view of the recommendations of FRA based on the abovementioned survey.

### Legislative developments

Due to the sensitivity of the issues at stake and to the instability of the political situation, the legislative process has been difficult and controversial.

The new Draft Penal Code was proposed by the Ministry of Justice by the very end of 2013 and almost no time was left for debate before its passing in the Council of Ministers. The process was also criticised because many suggestions from civil society were ignored and left out of the draft. The additional criticism of the judiciary, of the society as a whole, was also reinforced by the comments of the European Commission in its report under the Monitoring Mechanism from the beginning of 2014. As a result, while the Draft Penal Code is under consideration in the 42<sup>nd</sup> National Assembly, a new consultative process with civil society was initiated by the Bulgarian Government and will, hopefully, produce a more positive outcome.<sup>32</sup> Women's organisations have demanded amendments to the Draft Penal Code, aimed at criminalising all forms of violence against women and envisaging that crimes related to such violence be consistently prosecuted as general crimes, and that crimes committed in the context of domestic violence be penalised more severely.<sup>33</sup>

It is worth noting that on 25 November 2013 a Draft Law on the amendment of the Law on Protection from Discrimination was introduced.<sup>34</sup> The changes were based on the request of the EU Commission upon review of the transposition of the Recast Directive<sup>35</sup> and are also based on the analysis of organisations of civil society. The inaccurate transposition of the principle of the burden of proof in gender discrimination cases has resulted in wrongful application of anti-discrimination law by the Equality Body and the courts, as observed in cases of sexual harassment, access to goods and services, social security, and others. As the relevant provision of the law requires the claimant to prove facts from which discrimination may be presumed, there is a risk that in practice the burden of proof never shifts to the defendant. The gaps in the transposition of the definition and application in practice of the shift of the burden of proof in cases of gender discrimination have been mentioned in the Law Reviews and other reports by the Network of Legal Experts in the Field of Gender Equality. Two main issues are the focus of the pending Bill for amendments. First, the obligation of the party claiming discrimination with respect to *prima facie* discrimination is no longer to *prove* facts from which discrimination may be presumed (as stipulated in the current Article 9 of the Law) but to *establish* such facts, for the shift of the burden of proof to be activated.

Second, the additional provisions of the Law are complemented with the clarification that the ground of sex also includes cases of gender reassignment. This issue provoked animated debates in Parliament and the passing of the Draft Law was delayed and will, most probably, be even further delayed.<sup>36</sup> We believe that the direct incorporation of gender reassignment in the definition of sex discrimination made the Draft Law problematic. It would have been

<sup>31</sup> For example, the Alliance for the Protection against Domestic Violence (Алианс за защита срещу домашното насилие). See: <http://www.alliencedv.org/>; see also the corresponding Facebook page, available via <https://bg-bg.facebook.com>, both webpages in Bulgarian, and accessed 2 April 2014.

<sup>32</sup> [http://www.parliament.bg/bg/penal\\_code](http://www.parliament.bg/bg/penal_code), accessed 2 April 2014.

<sup>33</sup> <http://www.alliencedv.org/>, accessed 2 April 2014.

<sup>34</sup> Promulgated in S.G. No. 86/ 2003 and last amended in S.G. 68/2013.

<sup>35</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

<sup>36</sup> See: <http://www.vesti.bg/bulgaria/politika/deputati-sreshnu-zashtitata-ot-diskriminaciia-6006516>, accessed 2 April 2014.



better, instead, to follow the clear recommendation of Paragraph 3 of the Preamble of the Recast Directive.<sup>37</sup>

Another controversial legislative process is the one related to the expected ‘freezing’ of the pensionable age in Bulgaria for 2014. The Bulgarian statutory social insurance system still includes a difference in pensionable age. According to the current legislation (Article 68 of the Code of Social Insurance) the right to an old-age pension is acquired at the age of 60 for women and 63 for men, with the respective requirements for insured periods being 34 years for women and 37 years for men. Since 31 December 2011, the pensionable age is being increased by 4 months for each calendar year both for men and women, to 63 for women and 65 for men. The insured periods are also increased by 4 months per year for both sexes until reaching 37 years for women and 40 years for men.

At the end of 2013, a Draft Law for amendment of the Code of Social Insurance (COSI) was introduced which provided for a freeze, starting on 1 January 2014, of the pensionable age and the insurance periods required for both men and women. The amendments were passed at first reading and it was expected that the pensionable age would be fixed at 60 years and 8 months for women and 63 years and 8 months for men, the insurance periods would, respectively, be 34 years and 8 months for women and 37 years and 8 months for men.<sup>38</sup> Finally, the amendments to the COSI were not adopted but the increase of the pensionable age was temporarily frozen for 2014 with the Law on the Budget of Social Security for this year,<sup>39</sup> awaiting a new solution in the near future.

### Case law of national courts

There are no final decisions on landmark cases of discrimination based on sex to be mentioned for the reported period. For the year 2013, the Commission for Protection from Discrimination received a very small number of complaints based on sex discrimination. This is not surprising given the fact that the burden of proof principle is not correctly applied, since the Commission requires the applicant to prove the act of discrimination. Another trend observed in the case law of both the Commission and the courts is that sexual harassment is not perceived as a form of discrimination directly, as required by law, but it is additionally required that unequal treatment is proved. In cases of discrimination based on sex, a comparator is always sought.

<sup>37</sup> *The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is male or female. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.* Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

<sup>38</sup> Here are some of the considerations presented during the process of deliberations in the Parliamentary Commission on Labour and Social Policy held in late October 2013: the real average retirement age in Bulgaria is 64 years and 5 months for men and 61 years and 3 months for women, which is much higher than the average age in the EU (61 years and 7 months for men and 61 years and 3 months for women). Only in Romania and Sweden is the average retirement age of men higher than in Bulgaria. The real average retirement age for women is even lower in 10 Member States. At the same time, the average life expectancy in Bulgaria is much lower: 7 years lower than the average life expectancy in the EU. Concerning the increase of the pensionable age for women, it has to be noted that the increase of almost 7 years in the last ten years is a considerable change and a challenge for most women. The process has been quite abrupt and the combined requirements regarding age and longer insured periods are difficult for women to fulfil.

<sup>39</sup> Law on the Budget of Social Security for 2014, Article 1 Paragraph 4, p. 33, available at: <http://www.tita.bg/page/315>, accessed 18 April 2014.

**CROATIA – Nada Bodiroga-Vukobrat****Policy developments**

The implementation of the National Policy for Gender Equality 2011-2015<sup>40</sup> continued throughout 2013 and the reporting period. Most of the measures have been implemented at a satisfactory level and pace, but some of them continue to lag behind, due to financial difficulties of the bodies responsible for their implementation. This mainly concerns the measure of promoting equal opportunities in the labour market, as well as the measures concerning the gathering and regular publishing of statistical data in a gender-disaggregated manner. In addition, not all county committees for gender equality, as consultative bodies whose task is to promote gender equality at regional level, were equally engaged in accomplishing their mission. This could also be due to regional disparities, lack of funding, etc.

**Legislative developments*****Constitutional definition of marriage***

On 1 December 2013 a national referendum on the inclusion of the definition of marriage as a union of a man and a woman in the Constitution was held. The same definition already exists in the Family Act. With a turnout of 37.9 % of voters, the majority of 65.87 % voted for the inclusion of this definition of marriage in the Constitution. The decision taken by the majority of votes cast in the referendum is binding and therefore, as of 1 December 2013, the Croatian Constitution reserves the term ‘marriage’ for the union between partners of different sexes.<sup>41</sup>

***Draft Life Partnership Act***

In January 2014, the Committee for Gender Equality of the Croatian Parliament endorsed the Draft Life Partnership Act. Under the draft Act, same-sex partners will be equal in rights to marital spouses, but the term ‘marriage’ will continue to be reserved for union of spouses of different sex. Same-sex partners will not have the right to adopt children either. The Act passed a first reading in Parliament, with the preparation of the final Act and second reading currently pending.

***Amendments to the Labour Act***

Amendments to the Labour Act<sup>42</sup> are currently being drafted and discussed among social partners. Their main goal seems to be the flexibilisation of work arrangements, with the goal to increase competitiveness. Following many exhausting rounds of negotiations, none of the stakeholders seem satisfied with the proposed amendments. Among other concerns, some of the amendments (including the increased possibility of using fixed-term contracts and rescheduling of working hours) could have adverse impacts on the position of women in the labour market and the overall gender equality in the labour relations. The trend of using fixed-term contracts has been on the rise in recent years, with more than 90 % of all new labour contracts being concluded for a fixed term. Women make up the majority of persons employed under fixed-term contracts.

<sup>40</sup> Official Gazette of the Republic of Croatia Narodne Novine no. 88/11.

<sup>41</sup> The Constitutional Court did not rule on the constitutionality of the referendum question, because there were no legal grounds for it to act. There was no ground to reject the decision of the Croatian Parliament to hold a referendum either, since the Constitutional Court held that the Croatian Parliament had expressed its binding legal will to consider the question constitutional. However, in a Communication issued after the decision of the Parliament was taken, the Constitutional Court stated that any possible amendment of the Constitution to include the definition of marriage as a union of partners of different sexes should not influence further development of a legislative framework for legal concepts, such as extramarital union or same-sex union. See Constitutional Court of the Republic of Croatia, Communication on the referendum regarding the definition of marriage, SuS-1/2013 of 14 November 2013.

<sup>42</sup> Draft amendments are not finalised nor submitted to the Croatian Parliament for an official legislative procedure.

### ***Draft Ordinance on medical documentation and conditions for change of gender or gender identity***

The Draft Ordinance on medical documentation and conditions for change of gender or gender identity<sup>43</sup> is currently open for public consultation. The need for a new Ordinance arises from the fact that, except for changing their personal name, persons with gender dysphoria currently have no other options to change their legal status. As a rule, the National Health Council issued consent for change of gender in personal records only if gender identity was changed physically, in a medical procedure, even though there was no legal obstacle to issue consent in other cases. This situation has put persons with gender dysphoria, who do not wish to change their gender physically, in a legal vacuum, since they can only be issued legal documents stating their gender at birth.

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

The case involving the complaint of a transgender person is pending before the Constitutional Court. The claimant, born with female gender characteristics, was not allowed to change her/his gender in personal records, even though he spent most of his childhood and adult life as a male. The result of the case, which is expected shortly, will have great impact on the future exercise of rights of transgender persons.

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

The Ombudsperson for Gender Equality has handled a complaint from a person (male) who applied for a position of night guard in a female residence home for high school students. The job announcement was gender sensitive, in that it did not exclude applications from persons of either gender. The male candidate's application was not accepted and instead a woman was hired. The male candidate claimed that his status as a war veteran gave him precedence over other candidates applying for the same job, and that hiring a woman was discriminatory and in direct violation of the Gender Equality Act. Upon receiving relevant documentation, the Ombudsperson established that gender constituted a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities and the context in which they are carried out. The night guard has contact with female students as the only adult person in the residence home between 10 p.m. and 6 a.m. The night guard is free to inspect all premises in the home, including dormitories, and is authorised to intervene in case of illness and issue medication for high fever or menstrual problems, as well as to communicate with female students on a confidential and personal basis. The job description therefore includes activities which are sensitive and specific, and the objective of hiring a female night guard was legitimate.<sup>44</sup>

Another case reported by the Ombudsperson for Gender Equality concerns discrimination in access to employment: job announcements for work in various catering facilities (cafeteria, restaurant) of the Student Centre (as employer) stated that preference would be given to female workers. The Ombudsperson issued a warning to the Student Centre, after which it changed its discriminatory practice in job advertisements.<sup>45</sup>

The Ombudsperson for Gender Equality was involved in reconciliation proceedings, involving the Ministry of Internal Affairs and a female employee who claimed that her male co-worker sexually harassed her. Even after having been warned by the Ombudsperson regarding discrimination and possible sexual harassment law suits, the Ministry of Internal Affairs did nothing to prevent the discrimination. The female worker was on sick leave during this time, and because her job description involved carrying and handling personal fire arms, the duration and the reason for the sick leave (psychological problems due to harassment)

<sup>43</sup> The official version of the Draft ordinance is still not publicly available.

<sup>44</sup> Ombudsperson for Gender Equality, Annual Report 2013, <http://www.prs.hr/index.php/izvjesca/izvjesce-o-radu-za-2013>, accessed 14 March 2014.

<sup>45</sup> Ombudsperson for Gender Equality, Annual Report 2013, <http://www.prs.hr/index.php/izvjesca/izvjesce-o-radu-za-2013>, accessed 14 March 2014.



could have resulted in her not being able to perform her job upon the termination of her sick leave. The employer continued to claim that harassment did not take place, and the employee was reluctant to institute court proceedings for the protection of her rights, but instead continued to ask the Ombudsperson for help. Not even the continued involvement of the Ombudsperson yielded any results and the situation resolved itself at the end by the (regular) retirement of the alleged perpetrator.<sup>46</sup>

In February 2014, the Ombudsperson for Gender Equality initiated investigation proceedings in the Ministry of European and Foreign Affairs, based on a complaint by pregnant employees of the Ministry. There are no further details about the actual allegations of adverse treatment, since the procedure is still pending.

## Miscellaneous

According to the Report of the Ombudsperson for Gender Equality for 2013,<sup>47</sup> an overall caseload increase of 40.9 % compared to 2012 was recorded. Discrimination complaints increased by 2 %. The majority of complaints concerned sex discrimination (77.6 %) and women were victims in 68.3 % of the cases. The majority of complaints concerned social protection rights (37.1 %) and labour rights (23.7 %).

The first component of the EU Progress project 'Dismantling the Glass Labyrinth – Equal Opportunity Access to Economic Decision-making in Croatia',<sup>48</sup> concerning the research and analysis of the representation of men and women in management positions in the 500 most important companies in Croatia started in February 2014. The main objective is to find out whether women are underrepresented in management positions, to analyse possible causes if such underrepresentation exists and propose measures for balancing the representation of men and women in management bodies.

## CYPRUS – Lia Efstratiou-Georgiades

### Policy developments

#### *Economic crisis*

The economic crisis in Cyprus has had stronger adverse effects on women than on men in the field of employment. According to the results of the Labour Force Survey, which refer to the 3<sup>rd</sup> quarter of 2013 and draw a comparison with the 2<sup>nd</sup> quarter of 2013 and the 3<sup>rd</sup> quarter of 2012, the rate of unemployed persons was 16.2 % of the labour force.

The unemployment rate for men was 16.5 %, whereas for women the rate was 16.0 %. In the 2<sup>nd</sup> quarter of 2013 the unemployment rate was 15.5 % (for men 16.2 % and for women 14.6 %). The respective rate for the 3<sup>rd</sup> quarter of 2012 was 12.1% (for men 12.3% and for women 11.8 %).

In the field of part-time employment, according to the same survey, the percentage of women increased to 15.1 % in the 3<sup>rd</sup> quarter of 2013 – compared to 12.6 % in the 3<sup>rd</sup> quarter of 2012 – but it slightly decreased compared to the 2<sup>nd</sup> quarter of 2013, when it was 15.4 %. For men the respective percentages were 9.7 % in the 3<sup>rd</sup> quarter of 2013, 9.6 % in the 2<sup>nd</sup> quarter of 2013 and 7.2 % in the 3<sup>rd</sup> quarter of 2012.

Analysing the unemployment rate by age shows that it is higher for young persons aged 15-24, which accounted for 38.5 % of the labour force of the same age group (men 40.5 % and women 36.6 %). In the 2<sup>nd</sup> quarter of 2013 the rate was 40.3 % (men 40.9 % and women 39.7 %). In the 3<sup>rd</sup> quarter of 2012 the respective rate was 26.4 % (men 25.6 % and women 27.1 %).

<sup>46</sup> Ombudsperson for Gender Equality, Annual Report 2013, <http://www.prs.hr/index.php/izvjesca/izvjesce-o-radu-za-2013>, accessed 14 March 2014.

<sup>47</sup> Ombudsperson for Gender Equality, Annual Report 2013, <http://www.prs.hr/index.php/izvjesca/izvjesce-o-radu-za-2013>, accessed 14 March 2014.

<sup>48</sup> <http://www.prs.hr/index.php/podrucja-aktivnosti/progress-projekt>, accessed 14 March 2014.

## Miscellaneous

The Committee on Equality in Employment and Vocational Training, which functions under the Ministry of Labour and Social Insurance, prepared a study entitled 'The direct and indirect side-effects of the economic crisis on women'. It has also distributed its Annual Report for 2013, which gives information on the activities of the Committee including suggestions for amending the Law on Equal Treatment between Men and Women in Employment and Vocational Training.<sup>49</sup>

This Committee, in cooperation with the employers' associations, has distributed a Guide to Employers entitled 'Equal Treatment of Men and Women in Employment', with the purpose of informing employers about their obligations and responsibilities stipulated in the Law on Equal Treatment between Men and Women in Employment and Vocational Training and in the Protection of Maternity Law.

On 21 February 2014, the Mediterranean Institute of Gender Studies, the Office of the European Parliament in Cyprus and the Representation of the European Commission in Cyprus, in cooperation with the Cyprus Federation of Business and Professional Women, organised a seminar entitled 'Women on company boards, Promoting the European Directive'. The purpose of the seminar was to give information on the contents of the proposed EU directive intended to increase the number of women on the boards of listed companies, and also to call upon interested stakeholders to engage in public dialogue and submit recommendations for measures that will improve the representation of women as non-executive members of company boards.

### **CZECH REPUBLIC – Kristina Koldinská**

## Case law of national courts

In November 2013, the Constitutional Court issued two similar judgments on rights of parents to raise their children. In neither of these cases did the Constitutional Court discuss the issue of discrimination on grounds of sex, although the claim did in both. The reason was the inadmissibility of both claims and no breach of procedural rules found by the Constitutional Court.

In the first case,<sup>50</sup> the father argued that several provisions of the Czech Charter of Fundamental Rights and Freedoms, the Convention on the Rights of the Child, and the European Agreement on Children's Rights had been breached. The claimant did not agree with the decision of the City Court of Prague, which in its decision regulated how often and when the father would be entitled to meet his daughter. The decision also defined his obligation to pay maintenance to the mother for their child. The claimant argued that he was discriminated against on the ground of his sex, because the usual practice of Czech courts is to entrust children to their mother after a divorce.

The Constitutional Court rejected the claim arguing that its jurisdiction over the case could not be justified, and the Constitutional Court could therefore not issue a judgment. The Constitutional Court checked the entire procedure and did not find any error, and concluded that the general courts had taken all the required procedural steps, as they were required. The Constitutional Court concluded that not even human rights guaranteed by international and regional agreements had been breached, and that the judgments of the City Court of Prague were not against the interests of the child.

The second judgment<sup>51</sup> concerned a dispute between parents which had arisen in connection with their divorce when the amount of alimony had to be settled. The claimant

<sup>49</sup> Law No. 205(1)/2002 as amended.

<sup>50</sup> Case No. IV.ÚS 2107/13 of 5 November 2013 available on <http://nalus.usoud.cz/Search/Search.aspx>, accessed 20 February 2013.

<sup>51</sup> Case No. I.ÚS 875/12 of 25 November 2013, available on <http://nalus.usoud.cz/Search/Search.aspx>, accessed 20 February 2013.

argued that his right to a fair trial has been breached by the general court because it did not take into account the evidence he presented. He felt discriminated against on the ground of his sex, because the general court considers that only men can ensure financial stability of the family, and expect only men to be the main (if not only) breadwinner. The general court therefore expected him to provide quite a high alimony (whereas his former wife was not expected to contribute such a high amount).

The Constitutional Court also rejected this claim as inadmissible, because according to the Constitutional Court the claim did not question the constitutionality of the previous decisions of the general court. In the view of the Constitutional Court, the claim simply did not agree with the conclusions of the general court concerning the amount of alimony to be paid to the mother of the child.

## Miscellaneous

After the parliamentary elections in the autumn of 2013, a new Government was appointed in January 2014. Two new Ministers were appointed, whom have both promised to focus on gender equality (among other issues).

In the new Czech Government, Mr Jiří Dienstbier<sup>52</sup> is the new Minister for Human Rights and Equal Opportunities. He is a lawyer, and was also appointed as Chairman of the Legislative Council of the Czech Government. Concerning equal opportunities, his priorities will include the right of each child to enter kindergarten so that both parents can work. Currently there are very few available places for children in public kindergartens, and in many families the mother stays at home with the children, often until they reach the age of three or four. Mr Dienstbier also intends to amend the Czech legislation so to enhance the competences of the Czech equality body (Public Defender of Rights). One of these intended amendments would enable the Public Defender of Rights to ask the Constitutional Court to abolish any piece of legislation which according to the equality body is unconstitutional. The new Minister, according to his statements, will probably also work on new legislation which would enable same-sex couples to adopt children (this option still does not exist in Czech legislation).

Michaela Marksová Tominová,<sup>53</sup> a woman dedicated to gender studies and equal opportunities for men and women, was appointed as the new Minister of Labour and Social Affairs. Marksová Tominová previously worked as the Public Relations Director in the one of the most important NGOs focused on gender equality (Gender Studies o.p.s.). Later, she led the Family Policy Section at the Ministry of Labour and Social Affairs, specialising in family policy, women's rights, equal opportunities for men and women, and the Equal Opportunities in Education Section at the Ministry of Education. Her priorities as Minister will *inter alia* cover family policy, including through supporting the harmonisation of professional and family life.

In February, Ms Anna Šabatová was elected as the new Czech ombudsman by the Chamber of Deputies, following the proposal of Senate.<sup>54</sup> Ms Anna Šabatová was deputy to the first Czech ombudsman and the head of the Czech Helsinki Committee. She is well known for her persistent human rights interests since the communist period (she was persecuted during the communist regime).

Ms Šabatová, already declared before she was elected that if she became the ombudswoman, she would, among other things, focus on antidiscrimination and try to reinforce the role of ombudsman in this area and also to raise awareness regarding the competences of the ombudsman's office in the field of equality rights. In fact, after she was elected, she confirmed this statement and declared that she wants to try to amend the existing legislation in order to empower the ombudsman's office to represent victims of discrimination

<sup>52</sup> <http://www.vlada.cz/en/clenove-vlady/jiri-dienstbier-115428//>, accessed 20 February 2014.

<sup>53</sup> <http://www.vlada.cz/en/clenove-vlady/michaela-marksova-tominova-115424/>, accessed 2 February 2014.

<sup>54</sup> <http://www.ochrance.cz/en/press-releases/press-releases-2014/anna-sabatova-becomes-new-czech-ombudsman>, accessed 20 February 2014.

before courts. This could be an important step towards a better protection of rights of victims of discrimination.

## DENMARK – Ruth Nielsen

### Policy developments

The Minister for Children, Equality, Inclusion and Social Conditions, Manu Sareen, has just submitted their plan for the coming year's work on gender equality to Parliament. This will include measures against domestic violence and repression and coercion among immigrant girls and boys.

The Perspective and Action Plan 2014<sup>55</sup> is divided into four areas of action: gender equality as a fundamental right; gender equality in the public sector, theme-based equality, and equality in a global perspective. In each area, a number of concrete initiatives will be taken. Under the heading 'gender equality as a fundamental right' the following actions are suggested: limiting the social control of immigrant girls and boys; combating domestic violence and violence in intimate relationships; and fighting human trafficking. Under the heading 'gender equality in the public sector' the following actions are suggested: strengthening surveillance of Government efforts regarding equality and increasing the dissemination of knowledge and experience, including across the Nordic region; and increasing the focus on gender in citizen-oriented services. Under the heading 'theme-based equality' the following actions are suggested: promoting women in research and management; promoting equal opportunities in the labour market; and breaking down gender-segregated educational choices. Under the heading 'equality in a global perspective' the following actions are suggested: proactive Danish participation in worldwide equality work including in the UN; further development of equality cooperation in the EU, and in a Nordic context. Within the Perspective and Action Plan 2014, EUR 5 million (DKK 36 million) has been earmarked for an action plan that focuses on the different types of violence. This applies for example to stalking, violence against men, and relationships with reciprocal violence.

The Government will also continue to focus on gender equality in employment. It will implement new legislation that strengthens the gender-divided wage statistics and thus the effort for equal pay.

### Legislative developments

Section 5a of the Danish Equal Pay Act on gender-specific wage statistics is expected to be amended during the spring of 2014. The amendment is scheduled to enter into force on 1 January 2015. Under the current Section 5a of the Danish Equal Pay Act an employer with a minimum of 35 employees shall each year prepare gender-segregated wage statistics for groups of a minimum of 10 persons of each sex. In November and December 2013, the Danish Government distributed a draft proposal for the amendment of Section 5a of the Equal Pay Act for consultation. The scope of application of the provision will be expanded to cover employers with a staff of 10 employees and at least 3 of either sex. The proposed amendment of the Equal Pay Act has not yet been presented to Parliament and has no official number.<sup>56</sup>

<sup>55</sup> Available in Danish at: [http://www.sm.dk/data/Dokumentertilnyheder/2014/Handlingsplan\\_2014.pdf](http://www.sm.dk/data/Dokumentertilnyheder/2014/Handlingsplan_2014.pdf), accessed 12 April 2014.

<sup>56</sup> The amendment can be read (in Danish) at the website 'Høringsportalen': [http://prodstoragehoeringspo.blob.core.windows.net/1ba8092d-5488-460b-847d-8ca1f63fbb0f/lovforslag\\_ligeloen.pdf](http://prodstoragehoeringspo.blob.core.windows.net/1ba8092d-5488-460b-847d-8ca1f63fbb0f/lovforslag_ligeloen.pdf), accessed 5 March 2014.

**ESTONIA – Anu Laas****Policy developments**

Estonia's Prime Minister Andrus Ansip delivered his official resignation statement to Parliament on 4 March 2014. Andrus Ansip led the Cabinet for nine years (2005–2014), having the longest career among current government leaders in the European Union. In his farewell speech he underlined three issues: the state finances being in order; the increased security; and achievements in developing the digital society.<sup>57</sup>

The Government's policy has been criticised for many years for paying limited attention to social policies and programmes. Inequalities, poverty and the unsustainable pension system and funds management have been on the agenda of public debates. On 26 March 2014 the Right-Left Government, Reform Party and Social Democrat coalition took office. The novelty of this Cabinet is that there are five women out of fourteen Ministers, which is a historic event in Estonian politics.

The National Audit Office (NAO) has studied the functioning and sustainability of the Estonian pension system. Audit results show that the State needs a sustainable long-term plan, a reform of the different pension types and further development of the second-pillar funds regulation. The number of working-age people is decreasing, the number of pensioners is increasing and people's life expectancy is growing. The NAO recommended the Minister of Finance to initiate amendment of the legislation that concerns the activities of pension funds in a manner that makes fund management more efficient. The NAO has advised the Ministers to consider abolishing early retirement, occupational, superannuation and old-age pensions under favourable conditions, and to replace the special pension schemes in some occupations with an effective rehabilitation system. Politicians have initiated a public debate about the abolition of the fixed retirement age.

Women remain less represented in national and local decision making. In October 2013 councillors for city and municipalities were elected, and among the elected councillors 31 % were women. 40 % of the candidates were women. In Estonia there are party candidates (in local elections also electoral lists) and individual candidates. Of the individual candidates only a number of male candidates succeeded, which indicates a low faith in women.

Due to the low representation of women in economic and political elite, a civil society initiative was to organise the Sixth Women's Congress of Estonia.<sup>58</sup> The Congress was entitled 'Untapped Opportunity for Estonia' and took place on 7 March 2014 in Tallinn. The Congress brings together various NGOs and aims to form a common vision for the development of a well-balanced society and empowering women through a knowledgeable discussion and finding the hidden opportunities of gender balance in women's lives and society. This process served to determine 'Estonia's path'. This is not easy, because the Minister of Social Affairs and the business elite still find women less capable for decision-making positions.<sup>59</sup>

**Legislative developments**

The project 'Diversity Enriches' (2010-2014) is managed by the Tallinn Law School at Tallinn University of Technology.<sup>60</sup> The main objectives of the project were to improve the implementation of the legislation on non-discrimination and to foster the dissemination of

<sup>57</sup> *Postimees*, 25 February 2014, available at: <http://news.postimees.ee/2708840/ansip-to-abdicate-on-shrove-tuesday>, accessed 27 February 2014.

<sup>58</sup> There was a tradition of women's congresses before the Second World War (held in 1917, 1929, 1925, 1930 and 1935). These were national women's congresses discussing women's status, and social, political and economic issues.

<sup>59</sup> Estonian Public Broadcasting, news.err.ee, 26 November 2013. Available at: <http://news.err.ee/v/society/2b9de04b-e423-483c-adfc-290ed229c77f>, accessed 27 February 2014.

<sup>60</sup> It is co-financed by the European Union (PROGRESS), the Ministry of Social Affairs and Tallinn University of Technology.

information on EU and national policy and legislation in the non-discrimination field. In the framework of this project the second edition of the handbook on the Equal Treatment Act (ETA) was published in 2012.<sup>61</sup>

In February 2014, this project started a survey for impact assessment of the ETA. An Article 14 of the ETA stipulates: 'Each ministry shall, within their area of government, monitor compliance with the requirements of this Act and shall cooperate with other persons and entities upon promotion of the principle of equal treatment'.

Survey findings show that in the majority of the Ministries, the ETA is an unknown legal Act, except in the Ministry of Social Affairs and Ministry of Culture. The majority of civil servants believe that the principle of equal treatment is required by the Constitution, international conventions and EU Directives. However, the majority of civil servants are not familiar with the ETA and have not used this legal Act in their work. The Office of the Gender Equality and Equal Treatment Commissioner has an extensive working programme and activities to tackle the limited knowledge of equality legislation.

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

The Court *en banc* is comprised of all Estonian judges and convenes every year on the second Friday of February. The Chief Justice of the Supreme Court pointed out in his speech on 14 February 2014 that the work of judges nowadays requires stronger social competence, and in addition to promoting justice they are expected to solve social conflicts and find compromises. He pointed out that the work of judges is increasingly similar to that of family therapists or of social workers with judicial competence.<sup>62</sup>

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

#### ***Increased institutional capacity***

The project 'Promoting Gender Equality through Empowerment and Mainstreaming' (2013-2015) will raise awareness of different actors on issues of gender equality and prohibition of discrimination as well as structural gender inequalities in society.<sup>63</sup> The project is promoted by the Gender Equality and Equal Treatment Commissioner and funded by the EEA and Norway Grants. It plans to increase awareness on legal remedies in discrimination cases and to improve knowledge of civil servants who can use gender mainstreaming in their work.

#### ***Gender discrimination finding before Labour Dispute Committee***

On 11 February 2014 the Labour Dispute Committee at the Labour Inspectorate issued a decision, which is important for fired pregnant employees. The Committee has studied the labour dispute between an employer (ASK Teenus OÜ) and a former employee, who was fired during her probation period (maximum duration up to four months) after notification of pregnancy. A Labour Dispute Committee found that cancellation of the employment contract with the pregnant employee during the probation period amounted to discrimination on grounds of gender. Article 92(1)(1-2) of the Employment Contracts Act (ECA) states that an employer must not cancel an employment contract on the ground that the employee is pregnant, has the right to pregnancy and maternity leave, and performs important family obligations.

The fired employee had turned to the Gender Equality and Equal Treatment Commissioner, who helped to make a complaint to the Labour Dispute Committee and represented the former employee in this labour dispute. The decision of the Labour Dispute Committee was that the female employee had been discriminated against due to pregnancy and performing parental obligations (the employee had one minor at home). Employer was

<sup>61</sup> *Võrdse kohtlemise käsiraamat*, Tallinn, 2012. [http://issuu.com/erinevusrikastab/docs/v6rdse\\_kohtlemise\\_kasiraamat\\_est\\_2012/38?e=5283261/2015162](http://issuu.com/erinevusrikastab/docs/v6rdse_kohtlemise_kasiraamat_est_2012/38?e=5283261/2015162), accessed 27 February 2014.

<sup>62</sup> <http://www.nc.ee/?id=1462>, accessed 28 February 2014.

<sup>63</sup> <http://www.svv.ee/failid/Promoting%20Gender%20Equality%20through%20Empowerment%20and%20Mainstreaming.pdf>, accessed 27 February 2014.



ordered to pay compensation to the victim of her six-month average salary and EUR 2 000 due to violation of her rights and for the non-pecuniary damage caused.

The employer justified the employment contract cancellation with the fact that the employee had hidden ‘important information’: having a child. Employers do not have the right to ask information about job applicants’ and employees’ private and family life. The burden of proof applied, but the employer had no evidence about low and inadequate skills of the fired employee. The employer did not show up in the labour dispute meetings, because the employer argued that they were not guilty, but rather the opposite, arguing that the employer was the victim in this case.

The Gender Equality and Equal Treatment Commissioner explained that women should feel secure and should have the possibility to return to the same job after parental leave. Women have the right to expect good working conditions, not worse than before their maternity and parental leave period. Upon the termination of pregnancy and maternity leave, or returning after the leave period, a woman has the right to the improved working conditions which she would have been entitled to during her absence. This is stipulated in Article 131(1) of the ECA and equal treatment is enforced in the ETA.

Matters of labour disputes are resolved by Labour Dispute Committees consisting of three members, and the decision is binding on the parties.

## Miscellaneous

### *Gender Equality Council*

According to Article 24 of the Gender Equality Act (GEA) the Gender Equality Council should have been established as an advisory body within the Ministry of Social Affairs which *approves the general objectives* of gender equality policy and performs the duties prescribed in this Act and its statutes; *advises the Government* of the Republic in matters relating to the promotion of gender equality; and *presents its opinion* to the Government of the Republic concerning compliance with Article 9 of the GEA, and national programmes presented by the Ministries. The rules of procedure of the Gender Equality Council are provided in its Statute, which was adopted in February 2005.

On 24 October 2013, the Gender Equality Council at the Ministry of Social Affairs was officially established. There are 22 members, representing the Government and different national agencies, local governments, political parties, employers, students, women’s and other NGOs. Nine years after the adoption of the GEA, Article 24 has finally been implemented.

In 2013 the Head of Gender Equality Policy was hired to lead the Department of Gender Equality at the Ministry of Social Affairs. The Head of Gender Equality Policy has several duties at the international level. One of the duties is also to co-ordinate activities of the Gender Equality Council.

### *Awareness of equal treatment law*

Fundamental principles of the strategic development objectives of Estonian society are the promotion of quality of life, tolerance and equal treatment, participation and cultural diversity.<sup>64</sup> Raising awareness of human rights and the value of education, including equal treatment, tolerance, openness, and being a citizen, constitute some of the measures to support social cohesion aimed at society as a whole.

Researchers from the Institute of Baltic Studies and the Institute of International and Social Studies of the University of Tallinn have studied the awareness of equal treatment in Estonian society in 2013.<sup>65</sup> These researchers found that attention paid to unequal treatment is

<sup>64</sup> Ministry of Culture *The Strategy of Integration and Social Cohesion in Estonia ‘Lõimuv Eesti 2020’* (‘Integrating Estonia 2020’), Tallinn, 2012, p. 10, Available at: [http://www.kul.ee/webeditor/files/integratsioon/LYIMUV\\_EESTI\\_2020%2823\\_08%29\\_ENG.pdf](http://www.kul.ee/webeditor/files/integratsioon/LYIMUV_EESTI_2020%2823_08%29_ENG.pdf), accessed 26 February 2014.

<sup>65</sup> Institute of Baltic Studies / TLÜ RASI, K. Kallas, K. Kaldur, M. Raudsepp, K. Aavik, T. Roosalu (eds.) *Equal treatment in Estonia: Awareness and promotion* (research report), Tartu, Available at:

rare and only cases based on gender have received some public attention. They also pointed out the fact that the knowledge regarding inequality is limited to the labour market (e.g. wage gap, gender segregation etc.) and that other areas of unequal treatment have not been studied and highlighted. The survey findings show a rather inadequate understanding of the principles of equal treatment in society as well as of the existence or purpose of the Equal Treatment Act. This is true for officials, employers and media, and to the population as a whole. There is a need for a more active promotion of equal treatment in society.

## FINLAND – Kevät Nousiainen

### Policy developments

#### *Interim report on men's issues in gender equality policies*

Men's issues in gender equality policies have a long history in Finland. Already in the early 1980s, the Ministry responsible for gender equality and the parliamentary Equality Board started to discuss specific men's problems and issues in gender equality. Several male problems were identified as early as in the 1980s. In 1988 a Men's Section was established in the Equality Board for equality issues connected to men. The still working Men's Section may be the public body for men's equality with the longest history in the world. In the 1990s the first national men's associations were established, and in the 2000s two political parties established men's organisations (all Finnish political parties have women's organisations). In 2011 a central organisation (*Miesjärjestöjen keskusliitto*) was established for men's associations (to match a central organisation for women's associations which has been active for decades). The aim of the new men's organisation is to promote welfare and gender equality from men's point of view. In Parliament, a male MPs network was established in 2010 (a network for women MPs has existed of old). Issues that have been brought up by the men's organisations include male over-representation in accidents, premature deaths, illness and suicide as well as the mandatory male military service, which have been discussed for decades. Issues that have been brought up more recently are men's position as to child custody, boys' underachievement in education, male victims of violence and men's position in equality politics.

Taking into account the increasing activity and visibility of men's organisations in gender equality matters, it comes as no surprise that the Minister for equality matters, Paavo Arhinmäki, in 2013 installed a working group to work on men's issues in gender equality. The working group consists of representatives for men's and boys' organisations, public bodies and representatives of sexual minority groups. While many of the issues at hand, such as the gender imbalance in results of education, are much discussed in public, there has so far been little consensus as to what should be done to address them.

The working group presented an interim report in February 2014.<sup>66</sup> The interim report summarises the actions that have been taken and takes position as to the existing national gender equality policy processes. The interim report is a preparatory document for further discussion leading to the working group's final report, and an open invitation for the main stakeholders to participate in discussion. It therefore does not include any conclusions or policy proposals by the working group members. The interim report concerns various areas of life. As to social care and healthcare, the report requires more gender impact assessments and recognition by the personnel in social care and healthcare, where the majority of service providers are women. More studies and awareness raising campaigns are needed to support men in making use of social and health services. Stricter rules on alcohol advertisements are also mentioned.

<http://www.ibs.ee/VKE/V%C3%B5rdse%20kohtlemise%20edendamine%20%282013%29%20-%20EN.pdf>, accessed 26 February 2014.

<sup>66</sup> *Mieskysymyksiä tasa-arvopolitiikassa pohtiva työryhmä: Väliraportti* (Working group for consideration of men's issues in gender equality politics: Interim report), Ministry of Social Affairs and Health, Helsinki 2014, available at <http://www.stm.fi/julkaisut/nayta/-/julkaisu/1875322#fi>, accessed 22 February 2014.



Paternity and parental leave arrangements, and divorce crises are problematic issues to be met by more equal sharing of family-related leaves. Inequalities in custody and visitation rights should be corrected by developing official decision making, and the position of the parent with whom the child does not live should be improved. Issues concerning education give rise to many proposals that should promote more equal achievements in education. Working life and marginalisation of men are presented in the interim report in terms of promoting men's access to traditionally female professions. Male occupations, especially those open to persons with merely basic education, are becoming scarce, while typically female occupations in social and health care and services show a demand for new employees. Promoting work against male marginalisation at schools and in social services is considered important, as boys on average do worse than girls at school, and men do not make use of social services to the extent that women do. The report presents various options as to male over-representation among perpetrators of crimes, dismantling gender stereotypes and broadening sex roles and identities.

A stronger emphasis on involving men in gender equality policies is apparent also in European policies. Two recent studies show differences and similarities among Member States, and contain recommendations that resemble those in the Finnish interim report.<sup>67</sup> The European Institute for Gender Equality (EIGE) published a study report in 2012 on initiatives on men's engagement in gender equality as a part of the Institute's Work Programme 2010-2012.<sup>68</sup> The Finnish Interim Report mostly follows recommendations given by the EIGE report, and stresses the need to involve men more in gender equality matters. The Finnish report shows a considerable lack of men's studies needed for equality policies, and the report is somewhat less informed by social and cultural diversity than the European report.

### Case law of national courts

#### *Harassment case under Criminal Code*

On 27 January 2014, the Helsinki District Court rendered an interesting criminal-law decision concerning harassment or bullying at the workplace.<sup>69</sup> The defendant in the case was Timo Rätty, a former trade union leader, and the victim Hilkka Ahde, the media manager of the same trade union. Rätty had been Ahde's superior. Rätty harassed Ahde by shouting at her, humiliating her in public by refusing to talk to her, and isolating her in the working community. The harassment continued even after the Occupational Safety Authority had warned Rätty about his behaviour. Rätty was convicted for harassment, but not for harassment as a form of discrimination under the Act on Equality between Women and Men, although many features in Rätty's behaviour could have been considered in terms of gender discrimination. The case was heard as an employment offence under the Criminal Code.

Harassment is prohibited in Finland under the Act on Equality between Women and Men on the basis of sex, and under the Non-Discrimination Act on other prohibited discrimination grounds. Cases of harassment and bullying are, however, more often treated under the Occupational Safety Act, which obligates the employer to eradicate harassment that harms the health of an employee. Harassment or bullying under the Occupational Safety Act may then be reported to the public prosecutor for punishment as a work safety offence under Section 1, Chapter 47 of the Criminal Code. The offence carries a punishment of fines or up to one year's imprisonment. The relatively lenient fine that is usually imposed for occupational safety offences was not applied here, as the defendant had acted intentionally and for a long period of time. The Court stated that even a prison sentence could have been possible.

Remarkably, the defendant was accused and sentenced also for assault under the Criminal Code. Assault is defined under the Finnish Criminal Code as an act of physical violence or, even without such violence, an act which injures the health of another person, causes pain to

<sup>67</sup> See, for example, EIGE, *The Involvement of Men in Gender Equality Initiatives in the European Union*, Luxembourg: Publications of the European Union 2012, and *European Strategies & Insights: Study on the Role of Men in Gender Equality*, Luxembourg: Publications of the European Commission 2013.

<sup>68</sup> *The Involvement of Men in Gender Equality Initiatives in the European Union*, p. 12.

<sup>69</sup> Court decision Helsingin käräjäoikeus (Helsinki District Court) no. 14/102866, 27 January 2014.

another person, or renders the other person unconscious. Thus the definition of assault covers mental violence which damages the health of another person. It appears there are no previous sentences such as this one in Finland, in which a person's health was injured through mental violence.<sup>70</sup> In order for an act to qualify as assault, the perpetrator has to be aware of the possibility that his or her act will cause injury to the victim. The Helsinki District Court in its decision stated that Rätty caused an illness in Ahde, and Rätty received a fine. Moreover, Rätty was ordered to pay a compensation of EUR 12 000 to Hilka Ahde. Taking into account that Finnish tort law does not allow punitive compensation, the sum is considerable. Further, the labour union in question was imposed a corporate fine of EUR 20 000 under the Criminal Code, Chapter 9. A corporation may be liable for a corporate fine if a person in a managerial position was implicated in the offence, or if the company did not act with due diligence to prevent the crime.

The parties may still appeal. The case is a good illustration of the treatment of harassment under Finnish law. Some features of the case seem to indicate sexual harassment. Both Ahde and a female secretary had been harassed by their male superior. The case was not considered as discrimination, however. Bullying and harassment is statistically relatively common in Finland, but it is difficult to say to what extent harassment involves discrimination on the grounds of sex that could be brought to court under the Act on Equality. That harassment which causes health problems may be even treated as assault under the Criminal Code may lead to stricter attitudes towards employment-related harassment. The compensation to the victim, fines and corporate fine gave a clear message that workplace harassment is not acceptable.

## FRANCE – Sylvaine Laulom

### Policy developments

Draft legislation on equality between women and men is still the subject of debate in Parliament. The project intends to adopt a comprehensive and transversal approach of equality. It aims at enhancing gender equality in all fields and spheres.<sup>71</sup> The proposal covers a broad range of issues including parental leave, abortion rights, domestic violence, single mothers facing unpaid child support, wage equality, etc. The adoption of the Bill is expected in May or June 2014.

### Case law of national courts

#### *Harassment*

According to the Penal Code, 'Harassing another person by repeated conduct which is designed to or which leads to a deterioration of his conditions of work, likely to harm his rights and his dignity, to damage his physical or mental health or compromise his career prospects is punished by two years' imprisonment and a fine of EUR 30 000' (Article 222-33-2). The *Cour de cassation* confirmed that harassment could be recognised when certain conduct was intended to deteriorate working conditions. Therefore there is no need to prove an alteration of the state of health. The possibility of an alteration is enough.<sup>72</sup> In another decision, the *Cour de cassation* annulled the ruling of a Court of Appeal which refused to recognise a situation of harassment because the worker did not produce any evidence proving that her decision to leave the company was the consequence of the harassment. In this case, the worker was dismissed because of her unjustified absences and the Court of Appeal

<sup>70</sup> The estimation of Professor Matti Tolvanen, Uusi Suomi 27 January 2014, available at: <http://www.uusisuomi.fi/kotimaa/66028-poikkeuksellinen-rikos-suomessa-professori-ei-koskaan-aiemmin>, accessed 31 January 2014.

<sup>71</sup> See: *Projet de loi pour l'égalité entre les femmes et les hommes*, available at: <http://www.senat.fr/dossier-legislatif/pjl12-717.html>, accessed 28 February 2014.

<sup>72</sup> Cass. Crim., 14 January 2014, no.11-81362.

considered that her absences were due to the worker being subjected to harassment. The *Cour de cassation* considered there to be sufficient elements to presume a situation of harassment, and it was then to the employer to prove that the dismissal was justified by an objective reason.<sup>73</sup>

### ***Indirect discrimination***

Until recently, there had been very few cases on indirect discrimination. However, since 2012 the *Cour de cassation* has applied the concept of indirect discrimination in several cases. The following is an example of the Court's emerging willingness to examine whether some differential treatment could be attributed to indirect discrimination based on gender, thus making it prohibited.<sup>74</sup> In this case, two trade unions asked a tribunal to recognise a difference of treatment between two categories of workers working at the National Opera in Paris, and to apply the same rule to the two categories. The difference concerned the retirement age for both technicians and clothing and make-up workers. The Court of Appeal declared that the decision to treat differently these two categories of workers was an administrative one, and therefore only administrative tribunals had jurisdiction.

The *Cour de cassation* annulled this ruling, stating that the case concerned European law, so court must apply it. The Court of Appeal should have analysed whether or not the relevant practice amounted to indirect discrimination, i.e. if a difference in treatment could be established, could this difference be justified and was the measure proportional. It will be for the next Court of Appeal to decide if the practice effectively constitutes prohibited discrimination. This decision of the French Supreme Court highlights the importance placed by the Court on the implementation of the prohibition of indirect discrimination. When asked, a court should examine whether a given situation reveals indirectly discriminatory treatment.

### ***Dismissal of a woman wearing an Islamic veil***

In a long-expected decision issued on 19 March 2013, the Social Chamber of the *Cour de Cassation* ruled that the dismissal of an employee from her job at a private nursery school (Baby Loup Association) for refusing to remove her Islamic veil at work amounted to religious discrimination.<sup>75</sup> The decision is about discrimination on the ground of religion. However, it is also about the refusal not to wear an Islamic veil, a matter that only concerns women. The internal rules of the nursery contained a general clause on secularism and neutrality applicable to all jobs in the company. For the *Cour de Cassation*, such a clause is invalid and the dismissal of an employee for serious misconduct on the grounds that she violated the provisions of this clause constituted discrimination on the grounds of religious conviction and must be declared void. The Court explained that because the Baby Loup nursery was a private institution whose staff did not provide a public service, the principle of secularism (*laïcité*) did not apply.

The *Cour de cassation* does not rule on the merits of a case, its function is to decide whether the rules of law have been correctly applied by the lower courts. This is why when the decision of the Court of Appeal is quashed, the case subsequently has to be heard again. Usually, the lower courts follow the interpretation defined by the *Cour de cassation*. However, in this very controversial case, the Court of Appeal of Paris decided differently from the *Cour de cassation*.<sup>76</sup> The Court of Appeal ruled that the private nursery school was justified in firing a woman who refused to remove her Islamic veil. For the Court of Appeal, the nursery, because of its specific mission, to take care of young children, was justified in enforcing religious neutrality. The story is not over, and it is likely that another appeal will be lodged. The *Cour de cassation*, probably in its plenary session, will therefore have to rule again in this case.

<sup>73</sup> Cass. Soc. 15 January 2014, no. 12-20688.

<sup>74</sup> 30 September 2013, no. 12-14752 and 12-14964.

<sup>75</sup> Cass. Soc. 19 March 2013, no. 11-228845 and 12-11690.

<sup>76</sup> CA Paris, 27 November 2013, no. 13/02981.

## Miscellaneous

In December 2013, Laurence Pecaut Rivolier, magistrate of the *Cour de cassation*, transmitted her report on collective discrimination at work: *Fighting discrimination at work: a collective challenge*.<sup>77</sup> In this report, two main recommendations are made. The first one regards the proof of discrimination to solve a problem like the one in the *Meister* case.<sup>78</sup> The report proposes to explicitly recognise the possibility to ask civil court judges to order the production of evidence when there is a suspicion of discrimination. Moreover the report proposes to introduce a mechanism to make anonymous personal information of workers who are not parties to the case.

The second proposal is certainly the most innovative in France, as the report proposes to introduce a specific type of class action in matters of discrimination. Its aim would not be compensatory but it would aim at establishing discrimination at the workplace and to order the employer to take the necessary steps to put an end to these practices. Workers could always bring their claims before the labour courts to obtain compensation.

The report also includes other recommendations, such as promoting voluntary practices of fighting discrimination with a bonus system, where companies could get some support for training or diagnostic instruments.

It is very uncertain whether the Bill currently under debate in Parliament will integrate these proposals, since they have met opposition from enterprises.

## GERMANY – Ulrike Lembke

### Policy developments

#### *Federal parliamentary elections: coalition agreement*

Federal parliamentary elections were held on 22 September 2013. On 14 December 2013, the coalition agreement between the Christian Democratic Union (*Christlich Demokratische Union, CDU*), the Christian Social Union (*Christlich-Soziale Union, CSU*) and the Social Democratic Party (*Sozialdemokratische Partei, SPD*) entered into effect for the 2013-2017 legislative period. The agreement addresses several gender equality issues.<sup>79</sup>

Gender equality and the fair division of work in family, employment and society are among the main targets of the coalition.<sup>80</sup> The research findings of the Federal Antidiscrimination Authority (*Antidiskriminierungsstelle des Bundes*) shall be taken into consideration regularly. The coalition is willing to tackle the gender pay gap (of 22 %)<sup>81</sup> in collaboration with enterprises, trade unions and works councils. It plans to increase the number of women in leading positions in state-owned companies, the federal civil service and academia. For private companies, the introduction of a statutory 30 % gender quota on advisory boards from 2016 and a statutory gender quota on executive boards within the next three years is planned. The coalition will provide for statutory minimum wages of EUR 8.50 per hour by 2016 at the latest.

The coalition will provide for the possibility of fixed-term part-time work while caring for children or the elderly and thus an individual entitlement to return to a former fulltime employment. It intends to introduce ‘mothers’ pensions’: Childcare-leave periods shall be

<sup>77</sup> L. P. Rivolier *Rapport sur les discriminations collectives en entreprise: lutter contre les discriminations au travail: un défi collectif*, December 2013, available at: <http://www.justice.gouv.fr/publication/rap-l-pecaut-rivolier-2013.pdf>, accessed 28 February 2014.

<sup>78</sup> Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* [2012] n.y.r.

<sup>79</sup> See coalition agreement of the Christian Democratic Union (*Christlich Demokratische Union, CDU*), the Christian Social Union (*Christlich-Soziale Union, CSU*) and the Social Democratic Party (*Sozialdemokratische Partei, SPD*) of 27 November 2013, available at: <https://www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf>, accessed 20 December 2013.

<sup>80</sup> However, the strong connections between gender equality and demographic changes should be noted.

<sup>81</sup> See *Federal Statistics Agency*, press release of 18 March 2014, [https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2014/03/PD14\\_104\\_621.html](https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2014/03/PD14_104_621.html), accessed 20 March 2014.

taken into account for the calculation of pensions irrespective of the child's year of birth. Mini-jobs shall become subject to statutory pension schemes. The coalition wants to promote the increase in quantity and quality of childcare facilities,<sup>82</sup> promotes occupational childcare and sets family friendliness as a main target for private enterprises. Parents shall be entitled to 28 months of parental allowances when the parental leave is taken by performing not only minor part-time work. Parents taking parental leave simultaneously by performing part-time work in the amount of 25 to 30 hours per week each will be awarded an increase of their parental allowances in the amount of 10 %.<sup>83</sup>

The coalition has made very vague promises on the elimination of violence against women; the financial support for women's shelters is no longer explicitly mentioned. The coalition intends to eliminate trafficking in women and forced prostitution.

Concerning the German policy on Europe, social security systems and social rights are exclusively mentioned in connection with the fear of social disintegration in Europe, which might adversely affect jobs in Germany. Questions of gender equality or antidiscrimination are not dealt with.

### ***Evaluation of the coalition agreement by the German Women Lawyers Association***

The German Women Lawyers Association welcomes the planned introduction of statutory gender quotas on advisory and executive boards.<sup>84</sup> In addition, it is envisioned that larger enterprises are under a duty to set themselves target gender quotas by 2015, to be achieved by 2017. The same applies to the introduction of gender quotas in academia.

The measures concerning equal pay and part-time work are criticised for their insufficient and incomplete approach although statutory minimum wages are welcomed. Concerning care, domestic work, and factual gender equality within marriage, further and more efficient measures are demanded. Pension schemes still completely depend on work which is subject to social security; the continuation of so-called mini-jobs and of spousal joint tax declarations with gender bias is therefore strongly criticised.

Measures to combat trafficking in women – especially the effective prosecution of forced prostitution and sexual slavery – are welcomed, except that clients of prostitutes are envisaged as *generally* liable to punishment.

### ***Activities of the newly elected Minister for Family, Senior Citizens, Women and Youth***

The former Ministry for Family, Senior Citizens, Women and Youth had not performed any work on gender equality issues, especially policies for women, since March 2013. The newly elected Minister now has ambitious plans such as the introduction of effective family-friendly working times with 32 hours per week for both parents. The chancellor explicitly refuses to support these plans and the question of their financing has not yet been resolved.<sup>85</sup> Nevertheless, it can be reported that the Minister is determined to pursue her plans.

In her parliamentary speech on the occasion of International Women's Day, the Minister emphasised the necessity to transform the principle of gender equality into a real-life experience.<sup>86</sup> She focused on the persisting obstacles to gender equality such as the gender-biased division of paid employment and unpaid care work, the lack of economic independence of women, the gender pay gap, the lack of female leaders in private companies as well as in political life, and gender-based violence. She mentioned several statutory measures planned by her Ministry concerning the reconciliation of family and working life,

<sup>82</sup> The intensely discussed childcare benefits (*Betreuungsgeld*) for parents who want to care for their children personally as long as they are less than three years old instead of sending them to kindergarten are not mentioned.

<sup>83</sup> Hopefully, the latter will fill the gap that arises when taking parental leave simultaneously, compared to taking parental leave consecutively.

<sup>84</sup> Evaluation of the coalition agreement 2013-2017 by the German Women Lawyers Association, available at: <http://www.djb.de/st-pm/pm/pm14-02/>, accessed 12 March 2014.

<sup>85</sup> See <http://www.spiegel.de/politik/deutschland/regierung-lehnt-schwesigs-plan-fuer-familienzeit-ab-a-942910.html>, accessed 10 January 2014.

<sup>86</sup> See <http://www.bmfsfj.de/BMFSFJ/Presse/reden.did=205352.html>, accessed 12 March 2014.

gender quotas on company boards, increased economic security for times of care work, and equal pay in practice.

### ***Male kindergarten teachers***

The establishment of a coordination centre to promote an increase in the number of male kindergarten teachers<sup>87</sup> and the accompanying publicity campaigns<sup>88</sup> are now supplemented by a website<sup>89</sup> for the promotion of boys' decisions to become a kindergarten teacher.

### ***Female soldiers face severe problems***

A new study on the integration of female soldiers into the armed forces has raised concern. Since 2001, women are allowed to enter the armed forces in Germany. In 2005, this integration was evaluated.<sup>90</sup> Few women had been entering the armed forces and female soldiers therefore faced many problems such as sexual harassment, lack of trust by fellow soldiers, harassment on the grounds of sex, gender-related prejudices concerning their abilities, problematic working conditions, etc.

In January 2014, a follow-up study from 2011 was published.<sup>91</sup> It shows some mixed results but many of its data raise concern. Female soldiers show more self-confidence than in 2005. But sexual harassment is still a serious problem. The results also indicated that male soldiers now articulate more distrust, prejudices, and rejection of female colleagues than in 2005. For example, in 2011 34 % of male soldiers believed that female soldiers cannot stand the harsh conditions on battle fields (2005: 28 %); 52 % of male soldiers think that female soldiers do not meet the physical requirements (2005: 44 %); 57 % of the male soldiers believe that the condition of the armed forces has deteriorated due to the integration of female soldiers (2005: 52 %); 51 % of the male soldiers think that female soldiers are better evaluated than they deserve (2005: 39 %); 33 % that they are better treated by superiors than their male colleagues (2005: 15 %); 22 % of the male soldiers believe that female colleagues are not able to serve as superiors (2005: only 15 %); and 48 % of the male soldiers are convinced that the integration of women into the armed forces requires greater efforts in comparison to 22 % in 2005.

### ***Public debate on sexism, sexual harassment and harassment on the grounds of sex***

At the beginning of 2013, a sexist remark made by an important male political leader caused a broad public debate on sexism, sexual harassment and harassment on the grounds of sex in Germany.<sup>92</sup> One year after, the question arises whether this has brought lasting effects. The National Centre for Political Education (*Bundeszentrale für Politische Bildung*) dedicated the last February issue of their weekly '*Aus Politik und Zeitgeschichte*' to the topic of 'sexism', dealing with gender-related myths about sexual harassment, intersecting discrimination, law on sexual harassment, and subtle forms of sexism as political and social challenge.<sup>93</sup> This periodical is regularly read by Members of Parliament and other politicians, teachers and a large general public. Thus, it is hoped that the discussion will be pursued.

<sup>87</sup> See <http://www.koordination-maennerinkitas.de/>, accessed 12 March 2014.

<sup>88</sup> For an example of a publicity campaign see: <http://www.vielfalt-mann.de/>, accessed 12 March 2014.

<sup>89</sup> See [http://www.zukunftsberuf-erzieher.de/Zukunftsberuf\\_Erzieher/](http://www.zukunftsberuf-erzieher.de/Zukunftsberuf_Erzieher/), accessed 12 March 2014.

<sup>90</sup> 2005 study on the integration of female soldiers into the German armed forces published in 2008, available at: <http://www.mgfa.de/html/einsatzunterstuetzung/downloads/forschungsbericht82.pdf>, accessed 12 March 2014.

<sup>91</sup> 2011 follow-up study on the integration of female soldiers into the German armed forces published in 2014, available at: <http://www.tagesschau.de/inland/studie-bundeswehr100.pdf>, accessed 12 March 2014.

<sup>92</sup> See European Network of Legal Experts in the Field of Gender Equality, U. Lembke 'Germany' in: *European Gender Equality Law Review 1/2013*, pp. 68-69, European Commission 2013, available at: [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelr\\_2013-1\\_final\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2013-1_final_web_en.pdf), accessed 12 March 2014.

<sup>93</sup> See <http://www.bpb.de/apuz/178658/sexismus>, accessed 12 March 2014.



## Legislative developments

### *Statutory gender quotas for company boards*

The number of women on executive boards diminished in 2013:<sup>94</sup> In 2013, only 6.3 % of the executive board members of the DAX30-companies<sup>95</sup> were female. In comparison, in 2012 this figure was 7.8 %. The ‘super election year’ raised the number of female supervisory board members from 19.4 % to 21.9 %.<sup>96</sup> On the executive boards of the 200 German enterprises with the strongest turnover, only 4 % of the members are female.

On 7 March 2014, the Minister stated that she is working on a draft law on statutory gender quotas on advisory and executive boards and the top management level.<sup>97</sup> But the presentation of the draft law will be delayed due to harsh criticism by the Minister of Economic Affairs, employers’ and industrial associations, and trade unions.<sup>98</sup>

### *Prohibition of sexist advertisements in Berlin*

On 26 February 2014, the parliament of the Berlin district Friedrichshain-Kreuzberg decided on the prohibition of discriminatory, sexist and misogynist advertisements on public advertisement panels.<sup>99</sup> The district parliament followed the example of the town parliaments of Bremen and Ulm. The definition of the prohibited advertisement was mainly adopted from the guidelines of the Austrian Advertising Council.<sup>100</sup> The district parliament intends to persuade the town parliament to adopt this prohibition for the whole city of Berlin.

## Case law of national courts

### *Gender-based insults and freedom of speech*

The Federal Constitutional Court decided that gender-based insults which affect the intimate privacy of a person can be prohibited.<sup>101</sup> The claimant was a female politician who had her photograph taken by a magazine whilst dressed in a very short skirt and latex gloves, and wearing a red wig. She was heavily criticised for these pictures. A major newspaper printed a letter, also criticising these pictures, stating: ‘Why did you do this? I tell you: You are the most frustrated woman I know. Your hormones are a mess so that you no longer know what is who and what. Love, desire, orgasm, feminism, ratio. You are a crazy woman but don’t blame men for your condition.’ The claimant demanded an order prohibiting the use of the term ‘crazy woman’.

The Court first decided that the term ‘crazy woman’ was just a summary of the insults in the previous sentences. Second, it held that speaking of frustration, hormones, orgasm, feminism and ratio would affect the intimate privacy of the claimant. Such a grave violation of the claimant’s privacy could not be justified by freedom of speech, especially while not contributing to any public discussion but merely degrading the claimant as a private person.

The decision is to be welcomed because certain insults deliberately affecting the intimate privacy are a well-known means of hampering women’s access to higher education,

<sup>94</sup> See <http://www.manager-magazin.de/unternehmen/artikel/frauenanteil-in-dax-vorstaenden-sinkt-2013-auf-6-3-prozent-a-943678.html>, accessed 15 January 2014.

<sup>95</sup> DAX30-companies are the 30 listed companies with the largest turnover in Germany, included in the German stock market index DAX.

<sup>96</sup> In the view of the author, this increase can be explained by the fact that employers were afraid of statutory quotas, and that supervisory board members are elected by employers’ and employees’ associations. The higher participation of women is predominantly the result of electoral decisions made by employees’ associations.

<sup>97</sup> See <http://www.bmfsfj.de/BMFSFJ/gleichstellung.did=205240.html>, accessed 7 March 2014.

<sup>98</sup> See <http://www.spiegel.de/politik/deutschland/gabriel-pfeift-schwesig-bei-frauenquote-in-aufsichtsraten-zurueck-a-958910.html>, accessed 16 March 2014.

<sup>99</sup> See <http://www.berlin.de/ba-friedrichshain-kreuzberg/bvv-online/vo020.asp?VOLFDNR=5911&options=4>, accessed 17 March 2014.

<sup>100</sup> See [http://www.werberat.at/show\\_4274.aspx](http://www.werberat.at/show_4274.aspx), accessed 17 March 2014.

<sup>101</sup> Federal Constitutional Court, judgment of 11 December 2013, available at: [http://www.bundesverfassungsgericht.de/entscheidungen/rk20131211\\_1bvr019413.html](http://www.bundesverfassungsgericht.de/entscheidungen/rk20131211_1bvr019413.html), accessed 10 March 2014.

employment or public and political life in general.<sup>102</sup> The claimant's file for injunctive relief concerning the term 'crazy woman' was successful whilst the court protected the freedom of speech as well, deciding explicitly that the discussion about the pictures, especially the question whether they were pornographic or not, was not to be limited with regard to the freedom of speech, thus making a wise decision.

### ***Use of gender-specific data for the calculation of pension schemes***

The Federal Administrative Court doubts that the use of gender-specific data on life expectancies for the calculation of occupational pension schemes in the civil service is compatible with the principle of equal pay.<sup>103</sup> The male applicant challenged the inclusion of severance payments by former employers into the calculation of his statutory pension schemes. The respective administration body uses gender-specific mortality tables to identify the average life expectancy of men and women and calculates pensions on this basis. The Court doubts that this method of 'pure statistical gender equality' is compatible with the Union-law principle of equal pay. It did not need to decide this question in the relevant case, and thus initiated no preliminary ruling procedure, but expressed its interest in a clarifying decision by the CJEU.

### ***Indirect sex discrimination by minimum height requirements***

On 28 November 2013, the Labour Court of Cologne decided that the requirement of a minimum height of 165 cm for the admission to a pilot training in a collective agreement constituted indirect discrimination against women.<sup>104</sup> More than 40 % of the female candidates and only 4 % of the male candidates are not admitted due to their height. The Court held that a minimum height of 165 cm is not indispensable for flight safety, and it could identify no other justification for the indirect discrimination.

Nevertheless, the female applicant, whose height was 161 cm, did not succeed in reaching the objective of her lawsuit in the end. The Court decided that her claim for damages failed due to the lack of financial loss. Her claim for compensation was rejected with reference to Section 15(3) of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*) which requires fault (intent or gross negligence) on the part of the employer, acting in accordance with the regulations of a collective agreement. However, the Court restricted the application of Section 15(3) AGG to cases of indirect discrimination and association-level collective agreements and stated that the first court decision confirming the discriminatory character of the collective agreement would constitute gross negligence on behalf of any employer applying it. The Court considered Section 15(3) AGG in this clearly restricted application to be compatible with the case law of the CJEU, especially the *Draehmpaehl* judgment.<sup>105</sup>

### ***Gender-segregated swimming lessons***

On 11 September 2013, the Federal Administrative Court decided that a Muslim female pupil is not entitled to an exemption from coeducational swimming lessons.<sup>106</sup> The court abandoned its previous case law on this matter with the argument that the applicant could wear a so-called 'burkini'. It held that further risks such as the sight of male pupils wearing swimwear has to be tolerated and that the risk of unintentional contact could be minimised by the way in which the swimming lessons are organised.

<sup>102</sup> See U. Lembke 'Sexuelle Belästigung: Recht und Rechtsprechung', *APuZ* No. 8/2014, pp. 35-40.

<sup>103</sup> Federal Administrative Court, judgment of 5 September 2013 (gender-specific life expectancy), available at: <http://www.bverwg.de/entscheidungen/entscheidung.php?ent=050913U2C46.11.0>, accessed 15 March.

<sup>104</sup> Labour Court of Cologne, judgment of 28 November 2013, 15 Ca 3879/13, available at: [http://www.justiz.nrw.de/nrwe/arbgs/koeln/arbgs\\_koeln/j2013/15\\_Ca\\_3879\\_13\\_Urteil\\_20131128.html](http://www.justiz.nrw.de/nrwe/arbgs/koeln/arbgs_koeln/j2013/15_Ca_3879_13_Urteil_20131128.html), accessed 15 March 2014.

<sup>105</sup> Case C-180/95 *Nils Draehmpaehl v Urania Immobilienservice OHG* [1997] ECR I-02195.

<sup>106</sup> Federal Administrative Court, judgment of 11 September 2013, 6 C 25/12, <http://www.bverwg.de/presse/pressemitteilungen/pressemitteilung.php?jahr=2013&nr=63> (press release), accessed 23 September 2013.



***Male equal opportunity commissioners***

On 14 August 2013, the Administrative Court of Arnsberg decided that the rejection of a male applicant for the post of an equal opportunity commissioner does not violate superior law.<sup>107</sup>

The main tasks of equal opportunity commissioners were to tackle discrimination against women in employment and working life and to offer advisory and consultancy services in cases of sexual harassment and harassment on the grounds of sex/gender. A male person could not adequately perform these tasks. Therefore, the preference for female applicants did not violate superior equality law because the statutory decision in favour of a female equal opportunity commissioner was an appropriate measure to compensate for disadvantages on the grounds of sex/gender and, moreover, because the sex/gender of the applicant constituted a genuine and determining occupational requirement under the General Equal Treatment Act. With this ruling, the Administrative Court followed a decision of the Federal Labour Court in 2010 on the justification of the preference for female applicants for the post of an equal opportunity commissioner.<sup>108</sup>

***Imposed pregnancy counselling***

On 22 July 2013, the Federal Administrative Court confirmed that imposed pregnancy counselling by a religious group immediately in front of a certified pregnancy information centre can be forbidden by the respective police authority.<sup>109</sup> The Court held that imposed pregnancy counselling violated the rights of personality and privacy and was incompatible with German regulations on the protection of the unborn child. Neither the freedom of speech nor religious rights could justify the grave breaches of confidentiality, privacy and intimacy, caused by imposed ‘counselling’ on the questions of pregnancy and abortion.

**Equality body decisions/opinions*****Second report of the federal anti-discrimination authority***

On 13 August 2013, the federal anti-discrimination authority and the federal anti-discrimination commissioners published their second report on discrimination in the fields of education and employment.<sup>110</sup> The report shortly enumerates problems of gender equality in the field of employment such as a significantly gender-segregated labour market, the high proportion of women in part-time work and in marginal employment, the gender-specific division of (care/family and professional) work, pregnancy discrimination, the lack of transparency in wages especially in collective agreements, and the lack of effective means for the practical implementation of the principle of equal pay. In the field of education, persisting gender stereotypes and heterosexism are the major challenges.

**Miscellaneous*****Federal Anti-Discrimination Authority: equal pay***

The gender pay gap in Germany remains at 22 %.<sup>111</sup> The Federal Anti-Discrimination Authority (FADA) has started the project ‘equal pay’.<sup>112</sup> The project includes definitions of equal pay, equal work and work of equal value, information on the principle of equal pay, statistical data and relevant studies and the possibility for enterprises to have their pay

<sup>107</sup> Administrative Court of Arnsberg, judgment of 14 August 2013, 2 K 2669/11, [http://www.justiz.nrw.de/nrwe/ovgs/vg\\_arnsberg/j2013/2\\_K\\_2669\\_11\\_Urteil\\_20130814.html](http://www.justiz.nrw.de/nrwe/ovgs/vg_arnsberg/j2013/2_K_2669_11_Urteil_20130814.html), accessed 23 September 2013.

<sup>108</sup> Federal Labour Court, judgment of 18 March 2010, 8 AZR 77/09, <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=14441>, accessed 23 September 2013.

<sup>109</sup> Federal Administrative Court, judgment of 22 July 2013, 6 B 3/13, <http://www.bverwg.de/entscheidungen/entscheidung.php?ent=220713B6B3.13.0>, accessed 23 September 2013.

<sup>110</sup> *Second Report on Discrimination in the fields of education and employment*, <http://dip21.bundestag.de/dip21/btd/17/144/1714400.pdf>, accessed 21 September 2013.

<sup>111</sup> See Federal Statistics Agency, press release of 18 March 2014, [https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2014/03/PD14\\_104\\_621.html](https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2014/03/PD14_104_621.html), accessed 20 March 2014.

<sup>112</sup> See: <http://www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/DE/2013/eg-check-zertifikate-20131111.html>, accessed 17 March 2014.

structures checked by experts.<sup>113</sup> In November 2013, the first three enterprises received certificates for successful examination of their pay structures. The examinations are carried out by experts, financially supported by the FADA, and their results remain confidential. Employees and employers can check discriminatory pay structures on their own using the tool ‘eg-check’.<sup>114</sup>

### ***Federal Anti-Discrimination Authority: sexual harassment***

With regard to the report of the European Union Agency for Fundamental Rights on violence against women,<sup>115</sup> the director of the FADA expressed her concerns about the extent of sexual harassment in Germany and the insufficient perception of this problem.<sup>116</sup> The FADA offers information and support for women who want to defend themselves against sexual harassment and harassment on the grounds of sex.

## **GREECE – Sophia Koukoulis-Spiliotopoulos**

### **Policy developments**

The parental leave issue has been quite topical in Greece for some time, in particular after the CJEU judgment in the *Chatzi* case<sup>117</sup> which responded to a preliminary reference by the Thessaloniki Administrative Court of Appeal (ACA) on the meaning of Clause 2.1 of the Framework Agreement (FA) on parental leave annexed to Directive 96/34.<sup>118</sup> This case concerned the entitlement to parental leave of civil servants who are parents of twins. However, it was of more general interest, as the Court interpreted the Directive in the light of Articles 33(2) and 24(1) of the Charter of Fundamental Rights of the EU (the Charter).<sup>119</sup> As the Greek legislation on parental leave for civil servants contained no specific provisions on the leave of parents of twins or triplets, several judgments of ACA and of the Council of the State (Supreme Administrative Court; CS) offered various solutions to the problem, until an additional paid leave for each child in case of multiple births was granted to civil servants by Article 6 of Act 3210/2013.<sup>120</sup>

The application of the Parental Leave Directive in the light of the Charter inspired the CS in a case concerning the parental leave of judges, a nine-month paid leave initially granted to mothers only, which was also granted to fathers, but was reduced to five months for both parents, by Article 89 of Act 4055/2012.<sup>121</sup> The CS (judgments 3590 and 3591/2013 (Plen.)) ruled that the curtailing of the leave conflicted with the Constitution and EU law. Following these judgments, Article 8 of Act 4239/2014 replaced the above provision by a provision granting the nine-month paid leave again, plus a specific leave for each child in case of multiple births.<sup>122</sup> The latter leave had been granted to civil servants.

<sup>113</sup> For an overview of legislation and measures in the Member States see *European Commission*, Report on the application of Directive 2006/54/EC, 6 December 2013, COM(2013) 861 final, [http://ec.europa.eu/justice/gender-equality/gender-pay-gap/131209\\_directive\\_en.pdf](http://ec.europa.eu/justice/gender-equality/gender-pay-gap/131209_directive_en.pdf), accessed 17 March 2014.

<sup>114</sup> See <http://www.eg-check.de/>, accessed 17 March 2014.

<sup>115</sup> See <http://fra.europa.eu/en/publication/2014/vaw-survey-main-results>, accessed 17 March 2014.

<sup>116</sup> See [http://www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/DE/2014/Alarmierende\\_EU-Studie\\_zu\\_sexueller\\_Bel%C3%A4stigung\\_20140305.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/DE/2014/Alarmierende_EU-Studie_zu_sexueller_Bel%C3%A4stigung_20140305.html), accessed 17 March 2014.

<sup>117</sup> Case C-149/10 *Zoe Chatzi v Ipourgios Ikonomikon* [Minister of Finance] [2010] ECR I-8489.

<sup>118</sup> Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and ETUC, OJ L145 19/06/1996, p. 4.

<sup>119</sup> On this case and the subsequent judgment of the Thessaloniki ACA, see European Network of Legal Experts in the Field of Gender Equality, S. Koukoulis-Spiliotopoulos ‘Greece’ in: *Law Review 1/2011*, European Commission 2011, pp. 78-83, available at: [http://ec.europa.eu/justice/gender-equality/files/egelr\\_2011-1\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/egelr_2011-1_en.pdf), accessed 12 March 2014.

<sup>120</sup> OJ A 254 of 21 November 2013.

<sup>121</sup> OJ A 51 of 12 March 2012.

<sup>122</sup> OJ A 43 of 20 February 2014.

## Legislative developments

The following developments have been inspired by Greek and CJEU case law.

### *The Civil Servants Code*

At the time of the *Chatzi* judgment, the law (Code on the Status of Civil Servants and Employees of Legal Persons Governed by Public Law; CCS) entitled civil servants to a nine-month, transferable, paid ‘child-raising leave’, which corresponded to parental leave, until the child reached the age of four,<sup>123</sup> as an alternative to a reduced working day (two hours less per day until the child reached the age of two and one hour thereafter until the child reached the age of four). Following the CJEU *Chatzi* judgment, the law was amended by Act 4210/2013 on 21 November 2013, and an additional (transferable) paid leave was granted to male and female civil servants in case of multiple births: six months for each additional child (Article 6 Act 3210/2013). Moreover, Act 4210/2013 repealed the discriminatory provision of the CCS that was applicable to male civil servants: male civil servants could not benefit of either the parental leave or the reduced working day if their spouse was not working or unemployed, while such a condition was not applicable to female civil servants. This condition is no applicable to male civil servants; they are entitled to nine months parental leave even if their wife is not working or unemployed.

### *Legislation regarding judges*

A nine-month paid transferable leave (but not a reduced working day) was also granted to female judges, by virtue of Article 44(21) of Act 1756/1988,<sup>124</sup> as added by Article 1 of Act 3258/2004.<sup>125</sup> The introduction of the latter provision followed CS judgment No. 3216/2003 (Plen.), which ruled that female judges were also entitled to the nine-month paid parental leave provided at the time by the CCS, as noted above. This judgment relied on the constitutional rules requiring family protection and measures for coping with the demographic problem (Article 21(1) and (5) of the Constitution), and on the EC principle regarding the reconciliation of family and professional life and Directive 96/34 as an expression of this principle. There was no specific provision for cases of multiple births in either the CCS or the legislation concerning judges.

Regarding Article 44(21) of Act 1756/1988, the CS ruled in 2006 that male judges were also entitled to the nine-month paid parental leave granted to female judges, on the same conditions as female judges. The CS relied on the constitutional rules on gender equality, family protection and measures for coping with the demographic problem (Articles 4(2) and 21(1) and (5) of the Constitution), on Directives 76/207/EEC<sup>126</sup> and 96/34/EC and on the EC principle regarding the reconciliation of family and professional life. This principle was stressed as a ‘natural corollary’ of the EC principle of equal treatment of men and women, as well as a means for the effective implementation of the latter principle, as ruled by the CJEU (Cases *Gomez*, *Hill*, and *Gerster*<sup>127</sup>). This case law was reaffirmed by subsequent CS judgments relying on the same constitutional and EU rules.<sup>128</sup>

Consequently, judges of both sexes were entitled, since 2006, by virtue of well-established case law, to the nine-month paid parental leave, and they were regularly receiving it in practice. However, the above Article 44(21) of Act 1756/1988, which granted the nine-month leave to mothers only, was not formally modified until 2012.

<sup>123</sup> Article 53(2) of Act 3528/2007, OJ A 26 of 09 February 2007.

<sup>124</sup> Code of Regulation for the Courts and the Status of Judges, OJ A 35 of 26 February 1988.

<sup>125</sup> OJ A 144 of 29 July 2004.

<sup>126</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ L 39 of 14 February 1976, pp. 40-42.

<sup>127</sup> Cases C-342/01 *Merino Gómez v. Continental Industries del Caucho SA* [2004] ECR I-02605; C-243/95 *Hill and Stapleton v. The Revenue Commissioners and Department of Finance* [1998] ECR I-03739; and C-1/95 *Hellen Gerster v. Freistaat Bayern* [1997] ECR I-05253 respectively.

<sup>128</sup> CS 1 and 2/2006, 2060/2011, 3074/2011.

The formal introduction of gender equality in respect of parental leave, i.e. the implementation of Directive 96/34/EC with respect to judges, was effected by Article 89 of Act 4055/2012. This modified Article 44 of Act 1756/1988, as follows: It explicitly granted the parental leave to male judges, by modifying Paragraph 21 of Article 44 of Act 1756/1988, but reduced this leave from nine to five months for both male and female judges. It also provided that if both parents are judges, they must state which one of them will make use of the leave (new Paragraph 23 of Article 44); if the judge's spouse is not employed or does not exercise any profession, then the judge is not entitled to the leave, except when the judge's spouse, due to a serious illness or handicap, is unable to look after the child (new Paragraph 24 of Article 44). If the judge's spouse is employed in the private sector and is entitled to a leave corresponding to the above parental leave, then the judge is entitled to the leave to the extent that his/her spouse is not making use of his/her own rights or to the extent that these rights are more limited than those of the judge (new Paragraph 25 of Article 44). In case of separation, divorce, widowhood or extramarital birth of the child, it is the parent who is the child's guardian who is entitled to the leave (new Paragraph 26 of Article 44). Thus, the leave was provided on a transferable basis to both parents, but it was curtailed for both of them.

It is obvious that the above provision of Act 4055/2012 reducing the parental leave was not compatible with Directive 96/34/EC, in particular with Clause 4(2) of the Framework Agreement annexed to this Directive, which stipulates that 'implementation of the provisions of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field covered by this agreement'. This is the case, however, as the provision was intended to ensure that the objective pursued by the Directive was attained, i.e. this provision was connected to the implementation of this Framework Agreement. Moreover, this reduction was not justified on any different ground.

The Introductory Report to the Bill (which became Act 4055/2012) only stated that the above Article (90 in the Bill, 89 in the Act) adapted the provisions relating to judges' parental leave to the provisions in effect concerning civil servants' parental leave.<sup>129</sup> This confirmed that Article 89 of Act 4055/2012 was connected to the implementation of Directive 96/34/EC. Moreover, it is not true that the new Paragraph 21 of Article 89 of Act 4055, which reduced the parental leave, adapted this paragraph to the provisions on civil servants' parental leave, since civil servants' parental leave was (and still is) nine months, as explained above.

This reduction of parental leave was prejudicial to parents and their families and totally unjustified. Infant and care facilities in Greece, which were already highly insufficient, are continuously reduced in the framework of the strict austerity measures. Public expenditure is continuously decreasing, in parallel with continuous drastic cuts in salaries and the dismantling of social services and social infrastructure.<sup>130</sup> The situation regarding infant and childcare facilities even before the climax of the economic crisis is reflected in judgment 1842/2010 of the Thessaloniki ACA, the judgment which applied, as mentioned above, the CJEU ruling in *Chatzi*.<sup>131</sup>

Finally, following CS 3590 and 3591/2013, below, Article 8 of Act 4239/2014 replaced the above provision of Paragraph 21 of Article 44 of Act 1756/1988, by a provision granting the nine-month paid leave again, as well as an additional leave of six months for each child in case of multiple births, to male and female judges. However, this statute did not modify Paragraphs 23-26 of the same Article of Act 1756/1988, which are mentioned above.

<sup>129</sup> See the website of the Greek Parliament: [http://www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?type=1\\_1\\_1\\_1&lawNo=4055](http://www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?type=1_1_1_1&lawNo=4055), accessed 5 February 2014.

<sup>130</sup> On this situation, see the Greek National Commission for Human Rights (GNCHR) 'Recommendation: on the imperative need to reverse the sharp decline in civil liberties and social rights'. See also GNCHR, Comments on the Bill 'Fair trial and reasonable length thereof' (which became Act 4055/2012), in particular on Article 89 of this Bill: [www.nchr.gr](http://www.nchr.gr), both accessed 5 February 2014.

<sup>131</sup> See S. Koukoulis-Spiliotopoulos 'Greece' *European Gender Equality Law Review* 1-2011, pp. 78-83.

## Case law of national courts

By judgments 3590 and 3591/2013 (Plen.), the CS ruled that the above provision of Article 89 of Act 4055/2012, which curtailed the parental leave of judges, conflicted with Article 21(1) and (5) of the Constitution. The former constitutional provision requires the protection of marriage, the family, motherhood and childhood, while the latter requires measures to be taken to cope with the demographic problem. The judgment also invoked the EU principle regarding the reconciliation of family and professional life, Directive 2010/18/EU,<sup>132</sup> as well as Articles 20 (equality before the law), 24 (the rights of the child) and 33 (family and professional life) of the Charter. In the light of these provisions it interpreted and applied the above provisions of Article 21 of the Constitution.

In the above cases, female judges requested a nine-month parental leave, but were only granted a five-month parental leave, on the basis of the aforementioned provision of Article 89 of Act 4055/2012. The claimants challenged these acts for annulment alleging that the said provision was unconstitutional, and consequently null and void *ab initio*, with the result that the impugned administrative acts lacked legal basis. The CS upheld the petitions for annulment and annulled the administrative acts.

It is interesting to note that the impugned administrative acts were issued in September and August 2012 respectively, while Directive 2010/18/EU was transposed by Articles 48-54 of Act 4075/2012 in April 2012.<sup>133</sup> However, the CS judgments relied directly on the Directive, in conjunction with the Constitution and the other EU law principles and provisions, without mentioning this Act.

## HUNGARY – Beáta Nacsá

### Policy developments

Hungary has had new parliamentary elections, held on 6 April 2014. In the campaign period Prime Minister Orbán Viktor summed up his political programme: ‘We are guided by the firm belief that we can only build a strong and successful Hungary on ... national, Christian and European traditions’.<sup>134</sup> He stressed several times that the Government approached and will continue to approach societal issues in a way that keeps families in focus. Among other examples he stressed the following policies of the coalition: tax reduction given to employers who employ or reemploy mothers of small children, in order to balance out the advantages that ‘gentlemen’ (in the Hungarian original ‘*férfiember*’) enjoy in the labour market, because they leave their work-related duties less frequently than ‘mothers’.<sup>135</sup> The introduction of ‘GYED extra and GYES extra’ (childcare fee extra and childcare benefit extra, respectively) on 1 January 2014 allows one of the parents to return to work while maintaining their right to these allowances after the child(ren) reach(es) the age of one.

These parliamentary elections drew attention to the extremely low representation of women in the Hungarian Parliament, which was 9 % before the elections. The modification of the Act on Parliamentary Elections, which reduced the number of MPs to half and also the number of MPs elected in individual districts, has created a risk of further reduction of female MPs in the Hungarian Parliament.

<sup>132</sup> Council Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L 68, 18 March 2010, pp. 13-20.

<sup>133</sup> OJ A 89 of 11 April 2012.

<sup>134</sup> Press statement of Prime Minister Viktor Orbán at the signing of the agreement with Patriarch Bartholomew I on 4 March 2014, available at the official homepage of the Prime Minister: [http://www.miniszerelnok.hu/in\\_english\\_article/prime\\_minister\\_viktor\\_orban\\_s\\_press\\_statement\\_at\\_the\\_signing\\_of\\_the\\_agreement\\_with\\_patriarch\\_bartholomew\\_i](http://www.miniszerelnok.hu/in_english_article/prime_minister_viktor_orban_s_press_statement_at_the_signing_of_the_agreement_with_patriarch_bartholomew_i), accessed 17 March 2014.

<sup>135</sup> Television interview with Prime Minister Viktor Orbán on 14 March 2014. Available at the official homepage of the Prime Minister: [http://www.miniszerelnok.hu/cikk/orszagosszolgaltato\\_szervezet\\_letrehozast\\_tervezi\\_a\\_kormanyfo](http://www.miniszerelnok.hu/cikk/orszagosszolgaltato_szervezet_letrehozast_tervezi_a_kormanyfo), accessed 17 March 2014.



## Legislative developments

In 2013, Parliament enacted 252 Acts, exceeding the legislation of all prior years. This ‘legislative fever’ began in 2011 with more than 200 Acts.<sup>136</sup> It has not lessened since then; consequently in March 2014 the Hungarian legal system has now been fundamentally transformed by the ruling coalition.

In the last quarter of 2013, four major laws were passed in relation to the new Civil Code that was established by Act V in 2013. Act CLXXVII of 2013 established the transitional rules, while Acts CCIV, CCXIII and CCLII of 2013 modified 192 major Acts in relation to the new Civil Code, some of them directly related to the field of sex discrimination.

Act CCLII of 2013 modified the definition of ‘relative’ to a small degree in Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities. The same Act also modified Act LXXII of 2009 (Restraining Order Act), regarding restraining orders to be applied in cases of domestic violence in order to establish more effective rules on interim restraining orders. The police may be required to serve the summons and the ruling of the court. The possible duration of the interim restraining order was lengthened from 30 to 60 days. For appeal cases, the procedure of second instance is accelerated by reducing the deadline to 3 days for both the filing of the appeal and the second instance ruling by the higher court.

Act CCLII of 2013 also modified Act I of 2012 of the Labour Code with regard to maternity leave (Article 127 (1)), ordering that a woman who is entitled to twenty-four weeks of maternity leave is obligated to take at least two weeks of the total maternity leave. Furthermore, the Labour Code was modified with regard to reinstatement into the original job in the event of unfair dismissal. The new Code of 2012 considerably reduced the sanctions to be imposed on the employer who unfairly dismisses an employee from his/her job. The modified new rules to a certain extent remedy this situation by ordering the employer to pay lost wages for the total period (not only for twelve months as was previously stipulated) between the unfair dismissal and the time of the reinstatement. This action brings Hungarian legislation back into line with the general principles of contract law. This rule applies to cases where the employee is reinstated into their original position due to the violation of gender antidiscrimination laws.<sup>137</sup>

The example of Act CCLII of 2013 highlights an increasing problem in the Hungarian legal system. These modifications affected 184 Acts, under the title ‘modifications of legislation in relation to the new Civil Code’. Of the three rules referred to above, only the modification of Act CXXV of 2003 was related to the new Civil Code, all others were not, in spite of their title. Act CCLII of 2013, passed on 30 December of 2013, is a typical ‘Salad Act’ which contains modifications of numerous unrelated Acts. Salad Acts fundamentally undermine the capability of observance of legislation, and therefore undermine the stability of the legal system. The number of Salad Acts exceeded 90 in 2013.

Act CCXXIII of 2013, which modified the legislation on the Ombudsman and the Constitutional Court, contains a vaguely and unclearly worded rule for preferential treatment. It stipulates that the Office of the Ombudsman aims at increasing the number of women, members of ethnic and other minorities, and as it is written in the Act, ‘disadvantaged groups’ among the employees of the Office.

## Equality body decisions/opinions

The first decision of the Equal Treatment Authority (hereinafter: ETA) in a reverse discrimination case in Hungary became final and binding on 15 January 2014.<sup>138</sup>

<sup>136</sup> The legislative activism of the newly elected Parliament has previously been discussed. See: European Network of Legal Experts in the Field of Gender Equality, B. Nacsá ‘Hungary’ in: *European Gender Equality Law Review* 2/2011; 1/2012; and 2/2012, all available via: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-9](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9), accessed 31 March 2014.

<sup>137</sup> Article 83(a) Act I of 2012 on the Labour Code.

<sup>138</sup> <http://www.egyenlobanasmod.hu/jogesetek/hu/579-2013.pdf>, accessed 15 February 2014.

A young man filed a complaint against a bar that offered free entry for women until midnight, while male customers had to pay approximately EUR 0.96 (HUF 300) to enter. He argued that he had been discriminated against because of his sex.

In its defence the bar used the following arguments: (1) it wanted to balance out the wage discrimination women suffer in the labour market; (2) it is a societal expectation that men pay for women in bars, clubs and restaurants, so the free entry for women was a gesture to both sexes; (3) the free entry for women was a business necessity for the bar.

The ETA established that the claimant had suffered direct discrimination because of his sex. The ETA dismissed all defences of the bar. The first defence was refused because the bar's pricing policy did not fulfil the legal criteria of preferential treatment stipulated in Article 11 of Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities (hereafter: Ebktv). Further arguments of the bar were dismissed by the authority because the legal criteria of lawful exemptions from antidiscrimination regulations had not been fulfilled as stated in Article 7 (2) of the Ebktv. The Authority stressed that the bar is free to decide whether it requires entrance fees from their customers, but that the rules must be the same for both sexes. Occasionally, the bar could provide free entrance to one sex or the other but it must be clearly linked to certain holidays, although no example was given in this regard in the decision.

The bar was banned from imposing this discriminatory policy, however – as proposed by the claimant – it was not fined by the authority.

In an interview given to a major Internet news site, the claimant explained that he believed that the treatment of women by most of the bars and clubs in Budapest is alarming. The women, who enter the bar seemingly free of charge, but in fact at the expense of men, seem to be treated as a 'reward', provided by the bar to male customers.

## Miscellaneous

February 2014 saw the first time in the past two decades that the number of female applicants and newly admitted female students did not reach the number of men in higher education. 3 006 men applied for a place in undergraduate education, while the number of women was 2 730. Similarly, more men than women applied for a place in a Master's programme (2 610 and 2 262 respectively). The number of newly admitted male students was 2 348, and that of women was 2 133. The successful male applicants for a Master's programme (2 085) outnumbered that of women (1 820). Similarly, the number of recipients of state scholarships was higher among men than among women (1 994 and 1 726 respectively).<sup>139</sup> In the previous few semesters, a slow change could be observed pointing into this direction. It may be too early to speak of a changing trend; nonetheless, closer attention should be paid to the next datasets in order to recognise a turning point and to prevent the disproportional drop of female participation in higher education.

According to information released by a nationwide company providing legal and business data,<sup>140</sup> the ratio of male owners and managers entitled to legally represent companies is almost twice that of women. In small companies, the ratio of male to female managers entitled to represent the company is 59 % male and 41 % female. In companies whose yearly revenue exceeds EUR 3.2 million (HUF 1 billion) the ratio disproportionately favours men, at 71 %.

<sup>139</sup> The number of applicants and newly admitted students by sex in February 2014, available at: [http://www.felvi.hu/felveteli/ponthatarok\\_rangsorok/friss\\_statistikak/!FrissStatistikak/friss\\_statistikak.php?stat=17](http://www.felvi.hu/felveteli/ponthatarok_rangsorok/friss_statistikak/!FrissStatistikak/friss_statistikak.php?stat=17); the number of applicants and newly admitted students by sex between 2001-2013, available at: [http://www.felvi.hu/felveteli/ponthatarok\\_rangsorok/elmult\\_evek/!ElmultEvek/elmult\\_evek.php?stat=23](http://www.felvi.hu/felveteli/ponthatarok_rangsorok/elmult_evek/!ElmultEvek/elmult_evek.php?stat=23), both accessed 15 February 2014.

<sup>140</sup> [www.opten.hu](http://www.opten.hu), accessed 15 March 2014.



**ICELAND – *Herdís Thorgeirsdóttir*****Policy developments**

The taskforce launched by the Minister of Welfare at the end of 2012 based on the co-operation of authorities and labour-market parties to eliminate the gender-based pay gap is now focusing on how to promote equal participation of women and men in various sectors of the labour market which are at present dominated by one sex. The aim is to break up the gender-segregated labour market. A meeting on 13 February focused on men in healthcare and social care jobs and teaching. A meeting of the taskforce on 27 February discussed ways to increase the number of women in traditionally male-dominated sectors of the labour market, in the engineering and technological sector and the police.<sup>141</sup> The Minister of Welfare addressing this meeting emphasised that the best way to eliminate the gender-based pay inequality was to break up the gender-dominated sectors in the labour market. She said that the time had come for positive action to change traditional gender images and work against negative stereotypes regarding the roles of women and men. Women have 62 % of men's total employment income, according to tax returns. There are social and cultural reasons for this income disparity between the sexes, but in Iceland variables such as age, education, hours worked and years of work experience are all included in the calculation of the gender-based pay gap.

The Chair of the department of engineering at the University of Iceland pointed out that in a gender-segregated labour market people's potential talent could not be fully realised. He said that in recent years the proportion of women in environmental and civil engineering had gone from 10 % to 40 % after concentrated measures to increase the number of women in the department. It was furthermore pointed out that the labour market requires a heterogeneous group of engineers from diverse areas of engineering to cater to the varied needs.

It was reported that there has been an increase of women in the police in the wake of more women entering the police academy. Finally it was concluded that women needed role models in these traditionally male-dominated areas to work against gender-based discrimination in the employment market.

In a statement by the Minister of Social Affairs at the 58<sup>th</sup> Session of the UN Commission on the Status of Women on 14 March, examining what she termed successes and challenges of the Millennium Development Goals for women and girls, she emphasised the importance of women's contribution to the Icelandic economy, both in paid and in unpaid work, pointing out that almost 80 % of Icelandic women are active in the labour force and that their contribution has been decisive in ensuring economic growth and development.<sup>142</sup>

**Equality body decisions/opinions**

In a case before the Gender Equality Complaints Committee (hereafter the Committee), the doctor-in-chief of a healthcare centre in the eastern part of the country claimed that the Gender Equality Act (GEA) had been violated as the claimant and a woman working for the same employer were not being paid equal wages in jobs of equal value. In the gathering of information before the Committee it became clear that apart from one woman all medical doctors working in this district were men. The Committee ruled that in light of the facts of the case the doctor-in-chief had not been discriminated against regarding his wages.<sup>143</sup>

In a recent case against the National University Hospital the claimant, also a man, considered that gender equality law had been violated when a woman was hired as main vascular surgeon as he maintained that he was more qualified than the woman appointed. The Committee ruled that the Medical Appointments Committee that operates in accordance with

<sup>141</sup> <http://www.velferddarraduneyti.is/frettir-vel/nr/34497>, accessed 24 March 2014.

<sup>142</sup> <http://www.velferddarraduneyti.is/frettir-vel/nr/34526>, accessed 25 April 2014.

<sup>143</sup> Case No. 5/2013, ruling rendered on 28 October 2013.

Article 35 the Health Service Act<sup>144</sup> had in its evaluation of the applicants held that the claimant was more qualified than the woman later appointed and that the National University Hospital had therefore violated the GEA.<sup>145</sup>

The Committee also ruled that the Icelandic National Broadcasting Service (RUV) had violated the GEA when dismissing a woman technician in August 2012. The claimant had been on unpaid leave for some time. The woman subsequently issued a complaint on three charges against the RUV for violation of the GEA. In the first place, she claimed that the RUV had violated the GEA by not hiring her in a temporary position in the news department in April 2012. Second, she claimed a violation for not hiring her instead of two summer replacements where two men were hired, thus not enabling her to return from her unpaid leave sooner. Third, the woman complained that the RUV had violated the GEA by dismissing her as she considered that she was at least equally competent and qualified as the three men working as sound technicians for the RUV at the time. The Committee ruled that all three complaints were admissible regarding the time factor and that the RUV had violated this woman's gender equality rights regarding employment in the three above mentioned jobs as the woman was more qualified than the three men hired. The Committee also ruled that her dismissal was a violation of the GEA as she was at least equally qualified as the three men doing the same job in the RUV news department, where women are a minority in this type of work. The Committee furthermore ordered the RUV to pay the claimant's costs of bringing the complaint before the Committee as its conclusion was in the claimant's favour.<sup>146</sup>

#### IRELAND – Frances Meenan

##### Policy developments

The Government has agreed to accept, in principle, a Private Members' Bill (draft legislation) on parental leave.<sup>147</sup> The Parental Leave Bill 2013 would allow the father of a newborn child to share in the maternity leave of women currently given under Irish law.<sup>148</sup> A woman would be allowed to transfer a portion of her maternity leave to the child's father. The Minister of State for Disability, Equality and Mental Health has stated that an impact assessment of the proposal will be carried out. It should be noted however, that the Bill was introduced and passed in the Senate (upper house) but it has not been introduced in the Dáil (lower house). The Maternity Protection Acts 1994 and 2004 (as amended) provide for 26 weeks maternity leave for the mothers of a child and 24 weeks for adoptive mothers. Only the mother is entitled to this leave (unless following the death of the mother the leave transfers to the father). The Minister for Equality on the second reading of the Bill stated that as this draft legislation refers to maternity leave, it should have been more correctly titled 'Maternity Protection (Amendment) Bill' (or similar wording). The Minister also stated that the Bill proposed to increase the maternity leave to 28 weeks; the mother would have 14 weeks and then the balance period of 14 weeks with the social welfare benefits could be assigned to the father. The Minister also noted that a pending government-sponsored Family Leave Bill would consolidate the maternity, adoptive and parental leave legislation.

<sup>144</sup> Act No. 40/2007.

<sup>145</sup> Case No. 4/2013, ruling rendered on 26 September 2013.

<sup>146</sup> Case No. 3/2014, ruling rendered on 26 September 2013.

<sup>147</sup> Speech of the Minister of State for Disability, Equality and Mental Health in the Seanad in response to the Opposition's Private Members' Bill on the sharing of maternity leave between parents and thus allowing for paternity leave. The speech is available at: <http://www.justice.ie/en/JELR/Pages/SP13000291>, accessed 3 March 2014. The speech of the Minister at second stage (10 July 2013) highlighted some of the difficulties in the draft legislation. The speech is available at <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2013071000034?opendocument>, accessed 16 March 2014.

<sup>148</sup> Available at: <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2013/7813/document1.htm>, accessed 3 March 2014.

## Legislative developments

The Social Welfare and Pensions Act 2013 provides for the standardisation of the rates of maternity and adoptive benefit at EUR 230 per week subject to tax effective from 6 January 2014.<sup>149</sup>

In the current session of Parliament, the Irish Human Rights and Equality Bill is expected to be published. The legislation proposes to merge the Equality Authority and the Irish Human Rights Commission and also make a number of amendments to the human rights and equality legislation. The Work Relations Bill is also expected and proposes to streamline the adjudication procedures for employment claims.<sup>150</sup>

One of the opposition parties has published a Bill entitled the Social Clauses in Public Procurement Bill 2013.<sup>151</sup> The purpose of the proposed legislation is to provide for the inclusion of social clauses in all public procurement contracts, to provide opportunities for unemployed persons and apprentices, to ensure equality in the workplace in the carrying out of public contracts and to provide for sustainable development.

## Case law of national courts

The duplication of proceedings was recently considered by the High Court in *Cunningham v Intel Ireland Limited*.<sup>152</sup> The claimant brought a claim before the Equality Tribunal under the Employment Equality Acts 1998 – 2011, claiming that following her return from maternity leave she had been discriminated against in relation to access to employment, promotion/re-grading, conditions of employment, and harassment. She was unsuccessful and appealed this decision to the Labour Court. In addition to the equality proceedings, the claimant issued a personal injury summons seeking compensation for stress and health problems arising from the same incidents. The respondent issued a motion seeking to strike out the claimant's personal injury summons on the basis that the summons was a duplication of the equality claim and an abuse of process. Both claims related to the claimant's 'health and wellbeing' arising out of the conduct of the respondent when the claimant returned to work following her maternity leave. In her submissions to the Equality Tribunal, the claimant stated that the respondent caused her considerable health difficulties including stress, anxiety, depression, and panic attacks. Section 101(2)(a) of the Employment Equality Act 1998 provides that when the Equality Tribunal commences investigation of a claim, the claimant shall not be entitled to recover damages at common law. In this instance the claimant was bringing a statutory claim under the employment equality legislation and was also seeking damages at common law for personal injury.

In Ireland, given the large number and variance of employment statutes and the entitlement to take common law actions, frequently equal treatment claims proceed with both a statutory equality claim and also by bringing personal injury proceedings for stress. Usually, the reason for bringing such proceedings is that if a claimant chooses to bring an employment equality claim on the gender ground to the Equality Tribunal, the statutory compensation remedy has a maximum of two years' remuneration or EUR 40 000 (whichever is the greater) or EUR 13 000 where the claimant is not an employee.<sup>153</sup> Furthermore, if a person brings a claim on a number of grounds and if they succeed on more than one ground, they are still only entitled to this level of compensation. Therefore, in order to maximise any compensation for the claimant, employment lawyers have brought not only statutory claims but also personal

<sup>149</sup> Available at: [www.oireachtas.ie](http://www.oireachtas.ie), accessed 10 March 2014.

<sup>150</sup> [http://www.taoiseach.gov.ie/eng/Taoiseach\\_and\\_Government/Government\\_Legislation\\_Programme/](http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/), accessed 3 March 2014.

<sup>151</sup> Available at: <http://www.oireachtas.ie/viewdoc.asp?DocID=25172&&CatID=59>, accessed 3 March 2014.

<sup>152</sup> *Cunningham v Intel Ireland Limited*, available at: <http://www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/e9789b15fd980e4480257b7500599a21?OpenDocument&Highlight=0,intel>, accessed 3 March 2014; and [2013] ELR 233, available via: [www.westlaw.ie](http://www.westlaw.ie) (subscription only).

<sup>153</sup> It should be noted, however, that in the event of alleged victimisation, such a claim is a stand-alone claim and if successful, the claimant may be entitled to compensation, as above (i.e. the successful claimant would be entitled to two sets of compensation).

injury proceedings. In this case the High Court held that the bringing of two sets of proceedings on the same grounds was an abuse of process. In making the decision, the High Court referred to some Labour Court determinations where the Labour Court decided that as part of the remedy for discrimination, compensation may be awarded for stress and health problems. The Labour Court also took into account the claimant's medical report in assessing compensation to be awarded. However, the claimant had the same wording in both claims, namely that they related to her 'health and wellbeing'. If the employment equality claim had simply relied on the statutory provisions in respect of discrimination and if the personal injury claim simply dealt with personal injuries arising from stress at work, there might possibly have been a different set of proceedings. Therefore, this case has effectively warned employment lawyers to choose to bring either statutory or common law proceedings. It should be noted that if a claimant brings a gender employment equality claim at first instance to the Circuit Court, the claimant may effectively be awarded open-ended compensation.<sup>154</sup>

In relation to equal pay, the Labour Court recently determined that gender discrimination is binary in nature and where grades of pay are involved, a predominantly female grade must be compared with a predominantly male grade in order to establish a prima facie case of discrimination.<sup>155</sup> The employment equality legislation has no effect where the pay of a woman is compared with the pay of another woman or the pay of a predominantly female grade is compared with that of a grade that is gender neutral.

### ITALY – Simonetta Renga

#### Policy developments

##### *Renzi's Government and equal opportunities between men and women*

The Renzi Government came into office at the end of February. There are two striking novelties about this new Italian Government: the gender balance and the members' age. Half of the new Italian Cabinet Ministers are women and the average age is low (48), something that had never happened before. However, as was the case for many other governments (including the Letta Government, after the Josefa Idem resignation following a fiscal scandal), no Ministry of Equal Opportunities has been created, which is not a good political signal, even in a slimmed-down Cabinet. Equal opportunities tasks have not been delegated to other ministries (in the Letta Government, the Ministry of Labour also had a mandate for equal opportunities). Moreover, among the vice-ministers and the under-secretaries, only 9 out of 44 are women. Indeed, the only real yardstick against which the Renzi Government's success is to be measured is whether they can manage to decrease women's and young people's unemployment rate and to turn around the situation of a country whose economic development has stagnated for a long time. Indeed, Italy's national institute of statistics (Istat) has registered the highest unemployment rate since 1977: 12.9 % (12.2 % for men and 13.8 % for women), where 42.4 % is the rate among young people aged 15-24 years. Unemployment among men aged 15-24 years is 40.3 %, while among women it is 47.7 %.<sup>156</sup> Istat calculated that the lifetime earnings of Italian women are half those of men: this is the result of lower

<sup>154</sup> This open-ended compensation (i.e. subject to a backdating of six years but without a financial limit) is effectively how the legislature has avoided conflict with the ruling in *Marshall II*, which held that an upper limit to compensation is contrary to EU law: Case C-271/91 *M.H. Marshall v. Southampton and South West Hampshire Area Health Authority* [1993] ECR I-4367.

<sup>155</sup> *Health Services Executive v 248 Named Complainants*, Labour Court Determination EDA32 [2013] ELR 206, available at: <http://www.labourcourt.ie/en/Cases/2013/February/EDA132.html> (subscription only), accessed 3 March 2014.

<sup>156</sup> *Statistiche Flash Istat*, 28 February 2014, available at: [http://www.google.it/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0CGEQFjAH&url=http%3A%2F%2Fwww.istat.it%2Ffile%2F2014%2F02%2FOccupati-e-disoccupati\\_28\\_febbraio\\_2014.pdf%3Ftitle%3DOccupati%2Be%2Bdisoccupati%2B%28mensili%29%2B-%2B28%252Ffeb%252F2014%2B-%2BTesto%2BIntegrale.pdf&ei=sUEjUrgAcqN0AXbvIDgBQ&usq=AFQjCNE8KvLbLLpzXBuaflZOTdnookEXPw&bvm=bv.62922401,d.d2k](http://www.google.it/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0CGEQFjAH&url=http%3A%2F%2Fwww.istat.it%2Ffile%2F2014%2F02%2FOccupati-e-disoccupati_28_febbraio_2014.pdf%3Ftitle%3DOccupati%2Be%2Bdisoccupati%2B%28mensili%29%2B-%2B28%252Ffeb%252F2014%2B-%2BTesto%2BIntegrale.pdf&ei=sUEjUrgAcqN0AXbvIDgBQ&usq=AFQjCNE8KvLbLLpzXBuaflZOTdnookEXPw&bvm=bv.62922401,d.d2k), accessed 14 March 2014.

earnings and of lower employment rates.<sup>157</sup> This in a situation where birth rates are also falling.<sup>158</sup> Renzi's Jobs Act, which should be the answer to the need for growth and job opportunities, is at present available only as a summary,<sup>159</sup> but includes no specific references to equal opportunities for men and women. Furthermore, the Jobs Act is still just in a sketchy stage and its contents have not been fully elaborated, so it is understandable that – as has been said – we are waiting to measure the spread between words and facts.

## Legislative developments

### *Children's right to take the mother's surname from birth*

A married couple recently brought a case to the European Court for Human Rights claiming the right for children to take their mother's surname at birth, and the Court ruled that Italy was obliged to amend the then-current legislation in order to accommodate this.<sup>160</sup> Before this case, children at birth automatically received their father's surname, and the surname could be changed into the mother's surname, also simply for sentimental reasons, but only on request. On 10 January 2014 the Government promptly submitted a Bill amending Article 143*bis* of the Civil Code, providing that: 'the children of married parents receive the father's surname or, in case of agreement in the declaration of birth, the mother's name'.<sup>161</sup> The same rule is extended to children born to unmarried and adoptive parents. These new provisions will be enforceable for children born after the issue of the Decree, without any retroactive effect.

The Decree represents a quick response to the European judgment rejecting the Italian rule that previously only allowed for the possibility to change the child's name into the mother's surname (in a quite complex procedure), but not to receive her surname from birth. Nevertheless, the new provisions have also sparked some criticism, as allowing the double surname, which is common in many European countries, has not been taken into consideration as an option. Furthermore, the new provisions, although allowing adopting the mother's surname, continue to prioritise the father: the father's surname is automatically assigned unless the parents explicitly request otherwise.

The text of the Decree has been presented by the press as quite well-equipped, but the Vice-Minister of Labour Cecilia Guerra said that an Equal Opportunities-Justice-Interior think-tank has been appointed to assess its impact and solve some critical aspects, such as the possibility of brothers and sisters receiving different surnames, and the possible lack of agreement between parents.

Actually, although the timeliness of the intervention can be appreciated, it does not seem to fully satisfy the request of non-discrimination coming from the Court. In fact, the provisions should not give any advantage to either of the parents. In addition, the rights of parents whose children were born before the enforcement of the law should also be protected, for instance by entitling them to add the mother's surname. At the same time, in line with the *ratio* of this Bill, an amendment of the provision which states that the husband's surname is automatically added to his spouse's, is necessary: each spouse should be allowed to add the other's surname and they should also be allowed to choose the family name at the time of marriage.

<sup>157</sup> *Annuario Statistico Italiano 2013*, available at: <http://www.istat.it/it/archivio/107568>, accessed 14 March 2014.

<sup>158</sup> *Annuario Statistico Italiano 2013*, available at: <http://www.istat.it/it/archivio/107568>, accessed 14 March 2014.

<sup>159</sup> Jobs Act, available at: <http://www.partitodemocratico.it/doc/263807/jobs-act.htm>, accessed 14 March 2014.

<sup>160</sup> European Court for Human Rights of Strasbourg Judgment No. 77/07 of 7 January 2014, available at:

<http://www.altalex.com/index.php?idnot=65948>, accessed 14 March 2014.

<sup>161</sup> The Bill is published at: <http://www.senatoripd.it/doc/3815/modifiche-al-codice-civile-in-materia-di-cognome-dei-coniugi-e-dei-figli.htm>, accessed 14 March 2014.



## Miscellaneous

### *Test-Achats and Italian car insurance premiums for young drivers*

After the decision in *Test-Achats*,<sup>162</sup> Italian insurance companies in the car insurance sector introduced equal prices for men and women. Previously, women had more favourable insurance premiums; they were considered less risk-prone for companies as they were involved in fewer car accidents than men. The increase in women's premiums was revealed by research carried out from July 2012 to January 2013 among newly qualified and expert drivers.<sup>163</sup> The scope of research included men and women, both young and middle-aged, in 12 professional categories. The research collected about 2 500 estimates. The premiums of middle-aged female expert drivers were higher (3 %) than those of men in the same situation before December 2012; with the introduction of the unisex premium after December 2012, men and women were subject to the same premiums. As a result, women's premiums slightly decreased. The picture is quite different for young drivers: before December 2012 women paid 18 % less than men for car insurance, and since that date, an increase of women's premiums of up to 18 % has corresponded with a decrease of men's premiums of 10 %. Additionally, the data released by the Institute for Insurance Vigilance (Ivass) indicated that even before December 2012 (i.e. between July 2011 and July 2012) insurance companies had started to charge young women higher premiums: their premiums increases were twice as high as those of men.<sup>164</sup> Thanks to unisex premiums, therefore, young women pay for the higher risks of young men as regards car accidents.

What happened in Italy in the car insurance sector could have been foreseen. With regard to other insurance sectors, which are not subject to the same obligations as the car insurance sector, an adverse selection risk might be possible: persons with lower risk tend not to conclude insurance contracts if the premiums are higher than before because the price has to be unisex; as a consequence, the portfolio of insurance companies covers higher risks (because the less risk-prone persons do not take out insurances) and in turn the premiums increase for those insured.

Another effect is foreseen in relation to the number of car accidents: as premiums are now lower, young men can buy more powerful cars and therefore the number of accidents may increase. However, this second effect has not turned out to be significant in studies carried out in the United States.<sup>165</sup> Moreover, in Italy there is a limitation on the power of cars that young people can drive.

It is likely that insurance companies will differentiate premiums on the basis of other factors, such as the occupation of the driver. This involves a risk of indirect sex discrimination (probably against men) if premiums are differentiated by professions typically carried out by women or by men.

<sup>162</sup> Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

<sup>163</sup> G. Cipriani, *Tariffe unisex, una stangata per giovani automobiliste*, available at: <http://www.lavoce.info/tariffe-unisex-una-stangata-per-giovani-automobiliste/>, accessed 14 March 2014.

<sup>164</sup> Istituto per la vigilanza sulle assicurazioni-Ivass, *Indagine sui prezzi Rca al 1 luglio 2012*, Roma, 12 November 2012, accessed 14 March 2014.

<sup>165</sup> A. J. Stanislawski & K. J. Meier 'Gender-neutral automobile-insurance rates: have they made a difference?', *Environment and Planning C: Government and Policy*, 1998, pp. 505-516.

## LATVIA – Kristine Dupate

**Legislative developments**

On 19 December 2013, Parliament adopted amendments to the Civil Procedure Law.<sup>166</sup> Among various amendments Article 82 was modified.<sup>167</sup> This particular provision stipulates which persons may represent parties in litigation before the courts. For a long time any natural or legal person was allowed to act as representative for any natural or legal person before all courts. The new amendments, which entered into force on 4 January 2014, restrict the persons who may be representatives at the instance of cassation. Now either the person it/him/herself may act as representative before the Senate of the Supreme Court or a sworn attorney at law (advocate).

The amendments have been subject to public debate. In particular, the problem lies in the fact that the services of advocates are more expensive than those of ordinary lawyers and the level of average income in Latvia is still too low to afford the services of sworn attorneys.<sup>168</sup> This was one of the basic arguments for the Constitutional Court to find unconstitutional the previous attempt<sup>169</sup> to give the exclusive right of representation before the courts to advocates.<sup>170</sup> In general the amendments are seen as the result of good lobbying of the advocates. They insist that such a restriction of representation is necessary to make cassation proceedings more effective. However, this argument is at odds with the fact that the law still allows a person (litigant) to represent it/him/herself before the Senate of the Supreme Court.

The new provision of the Civil Procedure Law is particularly problematic for NGOs, because they frequently represent victims of discrimination before the courts, including the Supreme Court, but NGOs do not have the financial resources to hire a sworn advocate.<sup>171</sup> In this light, the amendments may even be considered as incompatible with Article 17(2) of Directive 2006/54/EU.<sup>172</sup>

On 13 February 2014 Parliament adopted further amendments to the Civil Procedure Law,<sup>173</sup> for the first time in the history of Latvia providing a civil interim measure in case of domestic violence.<sup>174</sup> They will enter into effect on 30 March 2014. Such amendments are seen as a huge step towards the protection of women's rights in Latvia since according to unofficial data the phenomenon of domestic violence is widespread 'culture'. At the same time it is generally known that the next important step is to ensure effective enforcement of the legal provisions. The most influential women's NGO, the Centre for Resources for Women 'Marta' is going to monitor the implementation.<sup>175</sup>

**Case law of national courts**

On 6 December 2013 the Senate of the Civil Department of the Supreme Court delivered a decision in a case on sexual harassment.<sup>176</sup> The court confirmed two important principles regarding the interpretation of the non-discrimination provisions. The first is that although in cases of dismissal during a probation period an employer is not under an the obligation to

<sup>166</sup> *Civilprocesa likums*, OG No.326/330, 3 November 1998.

<sup>167</sup> *Grozījumi Civilprocesa likumā*, OG No. 2, 3 January 2014.

<sup>168</sup> It is interesting that the Latvian State itself, for the provision of state-paid legal aid also hires ordinary lawyers, see the Law on State Legal Aid (*Valsts nodrošinātās juridiskās palīdzības likums*), OG No. 52, 1 April 2005.

<sup>169</sup> The same amendments were adopted by Parliament on 14 October 1998.

<sup>170</sup> Decision in case No. 2003-04-01, 27 June 2003, available in English at <http://www.satv.tiesa.gov.lv/?lang=2&mid=19>, accessed 28 February 2014.

<sup>171</sup> Interviews conducted by the expert with lawyers of the Confederation of the Free Trade Unions of Latvia (social partner) and NGO Centre for Resources for Women 'Marta', 6 February 2014.

<sup>172</sup> Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

<sup>173</sup> *Civilprocesa likums*, OG No. 326/330, 3 November 1998.

<sup>174</sup> *Grozījumi Civilprocesa likumā*, OG No. 41, 26 February 2014.

<sup>175</sup> Interview with the president of the Centre for Resources for Women 'Marta', 28 February 2014.

<sup>176</sup> Case no. SKC-2504/2013, not published.



state the reasons of such dismissal, in a situation where an employee indicates that dismissal during a probation period is based on discriminatory reasons, it is for the employer to prove that there has not been a breach of the non-discrimination principle. The second is that in cases of harassment, the intent of the accused is irrelevant. What is relevant is how the persons harassed perceived the actions, i.e. that the person experienced the actions as harassment.

The claimant was recruited by the respondent (a business) on 28 August 2012, under the terms that the probation period would last until 27 November 2012. On 22 September 2012 the respondent organised a sports event in a guest house in the countryside for all employees. All employees received an invitation to this via e-mail. As stated by the claimant, the event started with a game of 'who gets drunk first' which was followed by a visit to a sauna and swimming pool. When visiting the sauna, the director of the business told the claimant that the sauna may be attended without any clothes (naked). The claimant refused. On 24 September 2012 (the first working day after the weekend), the director refused to speak with the claimant and on 27 September 2012 the claimant was given notice of dismissal stating that the employment relationship was to be terminated as from 2 October 2012. The claimant brought the claim on unlawful dismissal on account of discrimination (harassment on the basis of sex/sexual harassment).

The Senate found that the first instance and appeal instance courts had failed to assess the evidence submitted by the applicant and the respondent from the perspective of the obligation of the reversed burden of proof, as required in discrimination claims. In addition, the Senate held that both instances failed to analyse anything relating to the very basis of the claim, in particular, the fact of harassment on the basis of sex/sexual harassment. Taking into account such findings the Supreme Court was compelled to 'call to mind' and re-emphasise the interpretation of Article 47 of the Labour Law, in particular, the fact that in cases of dismissal during a probation period an employer is not obliged to provide the reasons unless an employee indicates the possibility of discrimination as the reason for such dismissal.<sup>177</sup> However the second finding of the Senate is important because it established for the first time the interpretation of the norms prohibiting harassment/sexual harassment, in particular, the Senate held that in cases of harassment, the main indicator is how the situation is perceived by the addressee of the harassing actions/treatment. The latter finding is very important in harassment cases, otherwise in such cases a claimant would have to prove that actions are not acceptable to society in general to enforce his/her rights.

## LIECHTENSTEIN – Nicole Mathé

### Policy developments

#### *Domestic violence*

For the second time a project organised by the women's refuge, the Gender Equality Office, the organisation Safe Liechtenstein, in cooperation with many bakeries and shops in Liechtenstein has addressed the whole general public. 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.<sup>178</sup>

The project lasted from 25 November until 10 December 2013. 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 homes, where violence mostly takes

<sup>177</sup> OG No. 105, 6 July 2001.

<sup>178</sup> Press release by the Liechtenstein Information Office, dated 22 November 2013, <http://www.llv.li/amtstellen/llv-ikr-pressemitteilungen/pressemitteilungen-alt.htm?pmid=189442&lpid=3789&imainpos=2165>, accessed 3 March 2014.

place. Furthermore very important emergency telephone codes were also printed on the bags, which victims of domestic violence can call to find help. This awareness-raising campaign aims to empower women to call the helplines if they suffer from domestic violence. In addition, public awareness was to be raised regarding this topic.

### ***Training course in politics (Politiklehrgang)***

On 30 November 2013 the tenth interregional training course in politics for women ended for 20 women from Vorarlberg (Austria) and Liechtenstein by the awarding of certificates. The current course started on 14 March 2014.<sup>179</sup>

Since 2004 more than 200 participating women have successfully completed the training course. The participants took the opportunity to empower themselves to actively communicate, decide and get involved in politics. The course emphasised the imparting of specific knowledge and practical experience. It covers the following topics in six modules: political engagement – a challenge for me?; positioning; the political systems of Liechtenstein and Vorarlberg; rhetoric and reasoning; political structures; conflict management; public relations; and media training. Since 2008 three modules usually take place in Liechtenstein and three in Feldkirch, Austria. The course has also served to develop a network that functions as information pool, source of contacts and support for each participant. This course is to encourage women to have a positive view on a political career.

## **Legislative developments**

### ***Report on CEDAW Convention***

On 29 October 2013 the Government published the follow-up report on the recommendations relating to the fourth country report of Liechtenstein on the implementation of the CEDAW Convention.<sup>180</sup> The Committee on the Elimination of Discrimination against Women considered the fourth periodic report of Liechtenstein on 20 January 2011. In its concluding observations from 8 February 2013 the Committee requested Liechtenstein to provide, within two years, written information on the steps taken to implement the recommendations contained in Paragraph 25 concerning sexual or gender-based violence in the context of asylum applications, and Paragraph 29 on the representation of women in political and public life. As a matter of principle, it is of special importance to the Government to advance the de facto equality of women and men in society and to eliminate discrimination. Over the past few years, significant progress has been made in this regard.

Gender-specific grounds for asylum have been explicitly set out as a basis for granting refugee status in the Liechtenstein Asylum Act,<sup>181</sup> which entered into force on 1 June 2012 (Article 2 (1)(a) and (2)) – as they were already included in the Refugee Act, the predecessor to the Asylum Act. Liechtenstein is fully aware of its responsibility in this regard – especially as a member of the Schengen/Dublin area – and deals with the issue of gender-specific violence with the necessary diligence. The Immigration and Passport Office has staff members working in all-women teams who are trained and sensitised to take on such cases at the first sign of gender-specific violence. Female asylum seekers are given the opportunity already during their questioning upon entering the country to indicate any such grounds for seeking asylum. During the procedure, asylum seekers also receive medical care for any physical consequences of gender-specific violence as well as access to professional psychological or psychiatric care; for minors, this care is provided by specialists of the

<sup>179</sup> Press release by the Liechtenstein Information Office, dated 6 December 2013, <http://www.llv.li/amtsstellen/llv-ikr-pressemitteilungen/pressemitteilungen-alt.htm?pmid=190623&lpid=3789&imainpos=2165>, <http://www.frauenwahl.li/aktuelle-projekte/Fit%20fuer%20die%20Politik-2014-web%20-3.pdf>, accessed 3 March 2014.

<sup>180</sup> Press release by the Liechtenstein Information Office, dated 8 November 2013, [http://www.llv.li/txt-llv-aaa-frauen\\_uno\\_follow\\_up\\_bericht\\_cedaw\\_2013\\_en.pdf](http://www.llv.li/txt-llv-aaa-frauen_uno_follow_up_bericht_cedaw_2013_en.pdf), accessed 3 March 2014.

<sup>181</sup> Official Gazette 2012/29, <https://www.gesetze.li/Seite1.jsp?LGBI=2012029.xml&Searchstring=Asylgesetz&showLGBI=true>, accessed 10 March 2014.

Children and Youth Division of the Office of Social Affairs and/or generally by practising female psychiatrists or psychologists from Liechtenstein and the region.

In February 2013, parliamentary elections were held in Liechtenstein. The new Government was appointed in March 2013. During the current term of office (2013-2017), two of the five Ministers are women. They are responsible for the Ministry for Foreign Affairs, Education and Culture and for the Ministry for Infrastructure, Environment and Sport. In the current term of Parliament (2013-2017), women hold 5 out of 25 seats.<sup>182</sup> In the run-up to parliamentary and municipal council elections, the Gender Equality Commission supports women by providing a platform where all female candidates can present themselves.<sup>183</sup> Exchanges between the female candidates are also organised. At these meetings, information is provided to the candidates on opportunities offered by the Commission and the Office of Equal Opportunity, such as the politics course and the mentoring programme. As mandated by the Gender Equality Commission and the Office of Equal Opportunity, the Liechtenstein Institute<sup>184</sup> prepared a study entitled 'The 2013 Parliamentary Elections – A Focus on Women'. This report describes the results achieved by women in the parliamentary elections from 1986-2013, the impact of political mandates on election success, and support for women from the perspective of voters. The report considers possible causes of the underrepresentation of women and strategies to improve their election chances. The report was presented to the general public in October 2013.<sup>185</sup>

However, the Government is aware that additional measures are still necessary to achieve de facto equality.

## Miscellaneous

### *Hospital closes maternity clinic*

The Government has accepted the request of the hospital in Liechtenstein to close the maternity clinic in the spring of 2014.<sup>186</sup> After intense efforts to maintain the maternity clinic in Liechtenstein it resulted in having to be closed because of a lack of funds. In the future women will have to give birth abroad, in hospitals in Austria or Switzerland. These are relatively close alternatives, which can be reached in 15 to 25 minutes, 10 to 40 kilometres away from the Liechtenstein hospital.

### *Reconciliation of work and family life*

The Government cancelled the moratorium on financing new childcare facilities.<sup>187</sup> In its session of 17 December 2013 the Government installed a new working group to create a new model for the development and financing of external childcare services. The aim of the members of the working group – consisting of representatives of the trade associations, the union for childcare facilities, the communities and the Government and administration – is to work out a proposal for new regulations regarding the financing of external childcare services.

<sup>182</sup> See: *Follow-up report on the recommendations relating to the fourth country report of the Principality of Liechtenstein on the implementation of the CEDAW Convention*, available at: [http://www.llv.li/txt-llv-aaa-frauen\\_uno\\_follow\\_up\\_bericht\\_cedaw\\_2013\\_en.pdf](http://www.llv.li/txt-llv-aaa-frauen_uno_follow_up_bericht_cedaw_2013_en.pdf), accessed 3 March 2014.

<sup>183</sup> [www.frauenwahl.li](http://www.frauenwahl.li), accessed 10 March 2014.

<sup>184</sup> <http://www.liechtenstein-institut.li/>, accessed 10 March 2014.

<sup>185</sup> Arbeitspapiere Liechtenstein-Institut, W. Marxer, *Landtagswahlen 2013 – Frauen im Fokus* 2013.

<sup>186</sup> Press release by the Liechtenstein Information Office, dated 15 January 2014, <http://www.llv.li/amtstellen/llv-ikr-pressemitteilungen/pressemitteilungen-alt.htm?pmid=205320&lpid=3789&imainpos=2165>, accessed 3 March 2014.

<sup>187</sup> Press release by the Liechtenstein Information Office, dated 18 December 2013, <http://www.llv.li/amtstellen/llv-ikr-pressemitteilungen/pressemitteilungen-alt.htm?pmid=190838&lpid=3789&imainpos=2165>, accessed 3 March 2014.

**LITHUANIA – Tomas Davulis****Miscellaneous**

Two interesting private studies on women in executive posts have recently been conducted in Lithuania.

The study of HR company ‘Hay Group’ analysed the data on the salaries of male and female executives.<sup>188</sup> After analysing the data of more than 83 000 employees from 280 Lithuanian companies, the study revealed that most female executives work in consumer goods companies (35 % of all executives), insurance (38 %), public utilities companies (29 %) and banks (23 %). The smallest representation of women in executive posts was found in the construction industry and industrial machinery industries. The study concluded that, although underrepresented, the female executives on average earn 5 % more compared with men in the same positions. At other levels, women’s average wages are lower than men’s. Male senior professionals and men in middle management earn 6 % more than female in the same positions. The gender wage gap among professionals is 9 % and among associate professionals and workers it is 15 %. The study suggests that overall the lower salaries of female early-stage professionals and ordinary workers is largely due to the lower salaries in the large retail sector, which employs a large number of women. In this sector, wages are generally 15 % lower than in other Lithuanian companies. The study concludes that women are mainly engaged in professions related to human resources (94 % of all employees), service and retail businesses (91 %) and banks (86 %), financial accounting (86 %), office administration (71 %) and contact and call centres (69 %). Women are underrepresented in posts related to production (30 %), IT (25 %) and engineering (13 %).

Another interesting study on women in top management was conducted by the private company ‘Creditreform Lithuania’.<sup>189</sup> It showed that 27 % of all 13 449 registered Lithuanian companies were led by women. Almost the same percentage of women was registered as heads of newly established companies. The statistics for 2011 and 2012 indicate that the female percentage in top level management of newly registered companies in 2013 remained almost unchanged (26-27 %). Women-led companies are rather small, with lower turnovers, smaller numbers of employees and lower salaries. The activities of those companies are related to education, social care, catering, medicine, accounting, the beauty industry, consulting etc. However, the women-led businesses also have fewer debts and operate more cautiously than those of men, the study concludes. The study was conducted on the basis of officially available statistical data from the Department of Statistics and the Centre of Registers.

The results of these two studies do not seem surprising, as women are less represented and paid less in Lithuania. However, they may once again contribute to the overall acceptance of positive measures to promote women’s participation in leading executive positions.

**LUXEMBOURG – Anik Raskin****Policy developments**

On 20 October 2013, national elections took place in Luxembourg. The underrepresentation of women in political decision-making remains after these latest elections. In Parliament, 14 out of the 60 elected members were women (15 in 2009). Now, with the new Government in place, there are 17 female Members of Parliament. The Government counts 5 female members out of 18 (4 out of 15 in 2009).

<sup>188</sup> Press release (in Lithuanian) available at: <http://www.haygroup.com/lt/press/details.aspx?id=43508>, accessed 14 March 2014.

<sup>189</sup> Press release (in Lithuanian) available at: <http://creditreform.lt/skolu/prevencija/?object=news&action=view&id=334&print=1>, accessed 14 March 2014.

Recently, the new Government presented the government programme.<sup>190</sup> The Government includes a specific ministry for gender issues: the Ministry of Equal Opportunities. The main legislative projects in the area of gender equality are:

- implementation of gender quotas in politics and the economy;
- specific criminalisation of genital mutilation;
- revision of the law on domestic violence; and
- institution of a legal framework on prostitution.

The coalition programme does not present any details on the different projects. So far, it has been impossible to analyse how these different legislative changes will be implemented.

## Legislative developments

### *Goods and services*

On 5 July 2012 the content of media and advertising as well as education within the scope of the law that implemented Directive 2004/113/EC<sup>191</sup> was included in the field of protection.

On 25 July Bill No. 6454,<sup>192</sup> which aims to amend the law transposing Directive 2004/113/EC in order to comply with the judgment in *Test-Achats* from the Court of Justice of the European Union was presented to Parliament.<sup>193</sup> The legislative process is still ongoing.

### *Domestic violence*

The law on domestic violence was amended on 30 July 2013.<sup>194</sup> The aim of the amendment was to increase protection for victims and children in cases of domestic violence. The period for which the perpetrator has to leave the common home was increased from 10 to 14 days and a protective perimeter was introduced regarding the victim. The rights of the perpetrator have been strengthened by introducing an appeal to the measure.

### *Pension reform*

A reform on pension rights was adopted in December 2012. The reform does not include mandatory individualisation of pension rights, although mandatory individualisation was proposed by the Women's Labour Committee.<sup>195</sup>

### *Social dialogue*

On 25 February 2013, the Minister in charge of Employment presented Bill No. 6545 to Parliament in order to reform the 'social dialogue'.<sup>196</sup> This is meant to change employees' delegation rules. Regarding gender equality one change has to be highlighted. At present, there is a specific employees' representative in charge of gender equality in firms with a certain minimum number of employees. According to the Bill, the competence of this 'equality representative' will be extended to other grounds of discrimination. In October 2013, the opinion of the Women's Labour Committee was published.<sup>197</sup> The Committee is asking for lists of candidates for the delegation, which should be balanced regarding gender.

<sup>190</sup> <http://www.gouvernement.lu/3322796/Programme-gouvernemental.pdf>, accessed 28 February 2014.

<sup>191</sup> OJ L 373/37 of 21 December 2004.

<sup>192</sup> [http://www.chd.lu/wps/PA\\_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexdpata/Mag/133/165/113624.pdf](http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexdpata/Mag/133/165/113624.pdf), accessed 28 February 2014.

<sup>193</sup> Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-00773.

<sup>194</sup> <http://www.legilux.public.lu/leg/a/archives/2013/0195/a195.pdf#page=2>, accessed 28 February 2014.

<sup>195</sup> See European Network of Legal Experts in the Field of Gender Equality, A. Raskin 'Luxembourg' in: *Law Review* 2/2012, p. 106, European Commission 2012, available at [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelnr\\_2012-2\\_web\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelnr_2012-2_web_final_en.pdf), accessed 10 March 2014.

<sup>196</sup> <http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&backto=/wps/portal/public&id=6545>, accessed 1 March 2014.

<sup>197</sup> [http://www.chd.lu/wps/PA\\_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexdpata/Mag/160/248/125497.pdf](http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexdpata/Mag/160/248/125497.pdf), accessed 1 March 2014.



They also stated that equality between women and men should be addressed in a consistent way by delegations and society committees.

## FYR of MACEDONIA – *Mirjana Najcevska*

### Policy developments

On 1 February 2014, new elections for President of the Republic of Macedonia were announced by the President of Parliament, to be held on 13 April 2014.<sup>198</sup> The candidates of the largest political parties still have not been announced. However, one woman is collecting the required signatures for running as an independent candidate for President. So far gender equality issues have not been included in the electoral activities.

The first report on the work of the Club of Women Parliamentarians was submitted on 2 January 2014.<sup>199</sup> According to the report, the Law on Abortion was on the agenda of the Club. However, the report includes no conclusions or comments that were adopted as a general position of women parliamentarians related to the proposed and adopted law.<sup>200</sup> Economic empowerment and domestic violence were subjects of discussion initiated by the Club, as well.

The Parliamentary Commission on Equal Opportunities of Women and Men did not react to the changes to the Abortion Law<sup>201</sup> or the changes to the Labour Law, related to the newly introduced possibility of prolonged maternity leave of a maximum of three months until the child reaches the age of three.<sup>202</sup> However, the brochure presented in December 2013 claims that in most fields the position of women in Macedonia is close to or even better than that of women in EU countries. For example: 'The percentage of women in Parliament is currently 34.14 % (42 out of 123 MPs) which ranks 23<sup>rd</sup> in the world, with a higher percentage than the European average (24.3 %). The percentage of female managers of large companies is 29 % and 15% in boards (EU 33 % and 14 %). The gender gap is 17.9 %<sup>203</sup> (16.2 % in the EU)'.<sup>204</sup>

As the main topics of strategic planning, the women parliamentarians consider the following: combating gender stereotypes, implementing social rights of women, enabling a good balance between private and professional life of women (men are not mentioned), strengthening the political position of women, implementing gender budgeting, and strengthening women's economic position.<sup>205</sup> There is no information about how these topics are to be achieved.

Gender-based budgeting is part of the Strategy for Gender Equality 2013-2020.<sup>206</sup> So far it has been implemented as a pilot activity in several ministries, which should submit a budget statement at the beginning of 2014. However, NGOs claim a lack of transparency of the whole process, a lack of monitoring tools, and a lack of visibility of budget changes in pilot institutions.<sup>207</sup> A specific challenge will be the requirement for mandatory use of the methodology by budget users if the document is adopted by the Ministry of Labour and Social

<sup>198</sup> <http://www.sobranie.mk/default.asp?ItemID=234CA14766C7B24FBAB8429DC3B982FD>, accessed 2 March 2014.

<sup>199</sup> <http://www.sobranie.mk/?ItemID=E4A8451287E633408AE6161A066D76BF>, accessed 2 March 2014.

<sup>200</sup> Law on Termination of Pregnancy (revised), Official Gazette, No. 87/2013.

<sup>201</sup> Law on Termination of Pregnancy (revised), Official Gazette, No. 87/2013.

<sup>202</sup> Law amending the law on labour relations, Official Gazette, No. 187/2013.

<sup>203</sup> This is not the real gender gap according to the World Bank research, available at: [http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2013/11/14/000456286\\_20131114142058/Rendered/INDEX/777440WPOMACED0Box0379792B00PUBLIC0.txt](http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2013/11/14/000456286_20131114142058/Rendered/INDEX/777440WPOMACED0Box0379792B00PUBLIC0.txt), accessed 11 March 2014. There is still ongoing debate, stating that as much as 82.6 % of the gender gap in the country is unexplained (by any observable factor) pointing to strong discrimination against female workers.

<sup>204</sup> <http://www.sobranie.mk/WBStorage/Files/KEMBroschura.pdf>, accessed 2 March 2014.

<sup>205</sup> <http://www.sobranie.mk/?ItemID=2AB0E7FAD811434B90249AD973052D60>, accessed 2 March 2014.

<sup>206</sup> <http://www.slvesnik.com.mk/Issues/9d01686c914343d28b15b2605b82272b.pdf>, accessed 2 March 2014.

<sup>207</sup> Akcija zdruzenska (<http://www.zdruzenska.org.mk/default.asp>), 'Assessment of the Implementation of Strategy Introducing Gender Responsible Budgeting for 2012-2013', Skopje, 2014.

Politics instead of the Governmental Cabinet (as the other ministries have no responsibility to answer or respond to the claims of the Ministry).

The main interest of the Commission on Equal Opportunities of Women and Men is domestic violence. The only meeting actually held by the Commission was on the idea of adopting a law against family violence,<sup>208</sup> and instigating the process of ratification of the so-called Istanbul Convention (CETS 210), which Macedonia signed on 8 July 2011.<sup>209</sup>

Some specific measures have been taken by the Government as part of the implementation of the action plans related to gender equality (Programme for Social Protection Development 2011-2021). For example, the specific project 'Education, employment and equality for ethnic minority women' was conducted within the wider programme 'Improvement of Employment Potentials (employability) of women in the labour market'.<sup>210</sup> However, among the results presented of the project activities, there are no data on new employment of women, but only participants who finished the capacity building programme.

In the second half of 2013, the Ministry of Labour launched several other projects related to gender equality. For example: 'Education, employment and equality of women from ethnic communities'; 'Support for Roma women on the labour market in the Republic of Macedonia'; and 'Supporting women from minority communities affected by conflict'.<sup>211</sup>

### Legislative developments

On 30 December 2013, without any broader and/or public debates, Parliament adopted amendments to the Labour Law concerning prolonged, unpaid parental leave of a maximum of three months until the child reaches the age of three. In spite of the title including the term 'parental', this leave only relates to women. The newly added Article 170-a of the Labour Law, entitled 'Unpaid Parental Leave', states that only 'the female worker' has the right to use this additional parental leave. This formulation therefore prevents the father from using this prolonged leave despite the general title of the new article. The prolonged leave could be up to three months and the mother cannot be dismissed from her job for using this opportunity. Also, an amendment to the Law on Health Insurance was adopted. The financial means for this prolonged leave would fall under a specific programme of the Ministry of Health.

In February 2013, amendments to the Law on social protection were adopted by Parliament. These changes are related to domestic violence. The victim of domestic violence is entitled to one-off financial assistance 'for urgent protection and care' and/or 'healthcare and medical treatment'.<sup>212</sup>

In October 2013, the Ministry of Labour announced its proposal to the Government Cabinet to amend the Family Law.<sup>213</sup> With the proposed changes, *inter alia*, mediation is promoted as obligatory in divorce procedures. This is a positive change from the gender perspective, as mediation will be less expensive and more flexible, and could provide a much more gender-sensitive atmosphere than court procedures. However, the proposal as submitted to Parliament included no changes related to mediation.<sup>214</sup> In January 2014, the amendments to the Family Law (without any stipulations related to mediation) were adopted by Parliament.

With the amendments to the Law on Minimum Wage, adopted in February 2014, the difference has still remained between the minimum wage in the textile industry and all other

<sup>208</sup> <http://www.sobranie.mk/ext/sessiondetails1.aspx?Id=09a69905-6c19-4df5-b134-87586ec5f85a>, accessed 2 March 2014.

<sup>209</sup> <http://www.pravdiko.mk/wp-content/uploads/2013/12/semjino-nasilstvo-vo-rm.pdf>, accessed 2 March 2014.

<sup>210</sup> <http://www.mtsp.gov.mk/?ItemID=8173CA55ADBB9B4A922D4ED2E2EEFB3E>, accessed 2 March 2014.

<sup>211</sup> [http://www.mtsp.gov.mk/WBStorage/Files/proekti\\_vrabotuvanje\\_vklucuvanje.pdf](http://www.mtsp.gov.mk/WBStorage/Files/proekti_vrabotuvanje_vklucuvanje.pdf), accessed 2 March 2014.

<sup>212</sup> Official Gazette No. 38/2014.

<sup>213</sup> <http://www.mtsp.gov.mk/?ItemID=EFF297E3DAE1A84698B89ED7BCA2A0A3> and

<http://www.akademik.mk/se-voveduva-medijatsija-vo-semejnite-sporovi>, both accessed 2 March 2014.

<sup>214</sup> <http://www.sobranie.mk/ext/materialdetails.aspx?Id=7b4a3750-9807-458b-b369-11f6d8c70f83>, accessed 2 March 2014.



sectors.<sup>215</sup> Employees in the textile industry (mainly women) will continue to receive 10 % less than all other workers.<sup>216</sup>

None of these numerous amendments, in some cases directly affecting women, was subject of debate in the Parliamentary Commission on Equal Opportunities between Women and Men. Neither were they discussed in the Club of Women Parliamentarians, and they were not the subject of any wider public debate.

### Case law of national courts

The Macedonian courts have different approaches to issues of equality and discrimination. On the one hand, there are verdicts clearly in favour of protecting maternity leave (verdict of the Stip Appellate Court<sup>217</sup>) and against the long duration of a procedure in a case of mobbing (verdict of the Supreme Court<sup>218</sup>).

The line of interpretation of the protection against discrimination of the Appellate Court of Bitola raises concerns. This is because in two cases this Court based its verdicts on the belief that the victim of discrimination cannot initiate proceedings against the legal person of her/his employer, but only against the physical person (who committed the discriminating acts). It is worth mentioning that in the second case the alleged victim was a man, and the alleged perpetrator is a woman (the Head of the local Office of the Ombudsperson);<sup>219</sup> the case is still pending. In the first case, the alleged victim was a woman, and she lost the case.<sup>220</sup> It will be a matter of consistency whether the Court will take the same position, although insisting on sole *legitimitio pasiva* of the physical person is not the spirit of the Law.

Maybe more disconcerting is the verdict<sup>221</sup> of the Supreme Court where it finds that there has been no discrimination because the cases brought by the alleged victim were not part of the same disciplinary procedure, the disciplinary breaches were committed in different periods, and they produced different levels of damage for the employer. However, all other perpetrators (all of them men) received a fine, while this female worker was dismissed. Since these criteria (same procedure, same period, same level) are not embedded in the Law, the issue at stake is whether the Court insisted on them in order to justify the decision of the employer to dismiss the only female worker that committed the same type of disciplinary breach.

### Equality body decisions/opinions

The annual reports of the Ombudsperson and Commission for protection of human rights are expected to be submitted to Parliament at the end of March. There are still concerns about the independent character of the equality body (notably regarding the fact that its members perform their duties only on a part-time basis and that some of them also are affiliated with the Ministry of Labour). The Government has committed to resolve this issue following the legislative elections.

### Miscellaneous

In January 2014 a public call was announced for NGOs to submit applications for the City of Skopje's funds. One of the topics for programme activities is related to gender equality.

<sup>215</sup> For further information see: European Network of Legal Experts in the Field of Gender Equality, M. Najcevska 'FYR of Macedonia' in: *Law Review 1/2013* pp. 89-91, European Commission 2013, available at: [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelr\\_2013-1\\_final\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2013-1_final_web_en.pdf), accessed 11 March 2014.

<sup>216</sup> <http://www.sobranie.mk/ext/materialdetails.aspx?Id=96b1d379-55d9-4207-8dc5-aaef5d5d0f8c>, accessed 2 March 2014.

<sup>217</sup> [ПОЖ-405/13](#), accessed 2 March 2014.

<sup>218</sup> [ИЦПФ.6п.164/2013](#), accessed 2 March 2014.

<sup>219</sup> [85-13](#), accessed 2 March 2014.

<sup>220</sup> [580-13](#), accessed 2 March 2014.

<sup>221</sup> [PEB3.6п.6/2013](#), accessed 2 March 2014.

NGOs still oppose the spending of money from the state budget on campaigns against abortion. Under the title ‘Yes to funds for the promotion of women's health, No to campaigns that discriminate’,<sup>222</sup> the Association for solidarity and equality of the women in RM – ESE, made a calculation of the funds spent on anti-abortion campaigns and proposed better alternatives to spend the money. According to NGO and media sources, at least EUR 600 000 has been spent on these campaigns.<sup>223</sup>

Despite the fact that the Ministry of Labour is formally recognised as the Ministry responsible for gender equality, the data on the Ministry's website is not desegregated on the basis of sex.<sup>224</sup>

## MALTA – Peter G. Xuereb

### Policy developments

The Labour Government took office in March 2013. It has since confirmed most of the priorities that had been the subject of policy. It was immediately announced by the Government that the law would be amended to permit a transsexual to marry after gender reassignment surgery, as part of a wider policy on civil rights and equality. The necessary legislation has now been passed. Also, the Government has presented to Parliament a Bill for a Civil Unions Act, which will provide for the registration of civil unions for couples, including same-sex couples. This is a much debated question, not surprisingly after the highly controversial introduction of divorce two years ago following a hard-fought referendum. The Civil Unions Bill proposes to give the same rights to couples, including same-sex couples, who qualify and register their partnership as a civil union as are enjoyed by married couples today.<sup>225</sup> Malta remains divided on such matters between the more religious conservatives and the more liberal younger generations.

The Government has also moved to implement an election promise to provide childcare for all. It recently declared that free childcare services will be available to all as from April 2014. The plan is to boost significantly the number of women in employment (and further education). All working parents will be given the choice of a public or private childcare centre for their child and in both cases will be entitled to a state childcare benefit to help offset the costs. The childcare benefit will be calculated on the basis of the working hours of the mother, with further leeway for particular circumstances, up to an extra hour daily and 10 % over the total amount. Childcare services will be available on any day of the week. This scheme will have an initial cost of EUR 4 million.<sup>226</sup>

<sup>222</sup> <http://www.esem.org.mk/pdf/Sto%20rabotime/2013/%D0%A0%D0%B5%D0%B7%D1%83%D0%BB%D1%82%D0%B0%D1%82%D0%B8%20-%20%D0%95%D0%A1%D0%95%20%D0%90%D0%B1%D0%BE%D1%80%D1%82%D1%83%D1%81%2010.2013.pdf>, accessed 4 March 2014.

<sup>223</sup> <http://www.time.mk/c/bfe68c8ccb/vladata-so-tri-milioni-evra-protiv-abortus.html>, accessed 11 March 2014.

<sup>224</sup> <http://www.mtsp.gov.mk/?ItemID=B18F3390FCA6AC46B301792947033615> and <http://www.mtsp.gov.mk/?ItemID=EB5D928F6E419441B181D7F7CE0F1315>, both accessed 4 March 2014.

<sup>225</sup> A Bill entitled An Act to regulate Civil Unions and to provide for matters connected therewith or ancillary thereto, Bill No. XX of 2013, available at: [http://www.google.com.mk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.justiceservices.gov.mk%2FDownloadDocument.aspx%3Fapp%3Dlp%26itemid%3D25586%26l%3D1&ei=-CwLU8zmA-nY7AaT64D4DA&usg=AFQjCNFiKsIMSkB1Sw7kPb\\_guNrQIwMnQ&bvm=bv.61725948,d.ZGU](http://www.google.com.mk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.justiceservices.gov.mk%2FDownloadDocument.aspx%3Fapp%3Dlp%26itemid%3D25586%26l%3D1&ei=-CwLU8zmA-nY7AaT64D4DA&usg=AFQjCNFiKsIMSkB1Sw7kPb_guNrQIwMnQ&bvm=bv.61725948,d.ZGU), accessed 24 February 2014; *Civil Unions law will Give Same Sex Couples same Rights, Duties as Married Couples*, Times of Malta, 14 October 2013, available at: <http://www.timesofmalta.com/articles/view/20131014/local/civil-liberties-bill-will-give-gay-couples-same-rights-duties-as-married-couples.490275#.Ul-rnRBOiSw>, accessed 24 February 2014.

<sup>226</sup> S. Carabott, *Free childcare to start in April*, Times of Malta, 20 February 2014, available at: <http://www.timesofmalta.com/articles/view/20140220/local/Free-childcare-to-start-in-April.507494>, accessed 26 February 2014.

## Legislative developments

In 2013 a Bill was presented to Parliament whose stated aim was ‘to remove the legal obstacles for persons who have undergone a legally recognised change in the sex into which they were born from being considered as pertaining to the acquired sex for all intents and purposes of civil status, including marriage, and from obtaining copies of their full birth certificate showing appurtenance to the acquired sex...’.<sup>227</sup> This has become the Civil Code Amendment Act, 2013.<sup>228</sup> The new law heralds a fundamental shift in the position as taken by the Maltese courts in the *Joanne Cassar* case, which had declared that the Civil Code did not permit such marriage.<sup>229</sup> In this, the most celebrated case before these courts in recent years, the Constitutional Court had declared that there was no remedy at law for the applicant who was seeking the right to marry.<sup>230</sup> The applicant had brought proceedings in the European Court of Human Rights in Strasbourg, which she withdrew once the Government agreed to pay the applicant compensation.

Parliament has also adopted the Criminal Code (Amendment No. 2) Act 2013, which amends the Criminal Code and other related legislation in order to bring Malta into line with her international obligations as concerns human trafficking.<sup>231</sup>

Finally, Act No. 1 of 2014 amends the Criminal Code by criminalising female genital mutilation and related harm in express terms. The law also covers forced sterilisation and forced marriage.<sup>232</sup>

## Equality body decisions/opinions

The main equality body in Malta, the National Commission for the Promotion of Equality (NCPE), does not issue binding decisions. It deals with complaints by seeking an amicable solution. The NCPE’s Annual Report for 2012 was presented at a Conference launching the report in May of last year.<sup>233</sup> The number of complaints relating to gender discrimination totalled 12.<sup>234</sup> This is considered by many a small number of complaints for the NCPE to be reporting. The next NCPE annual report is due in March or April of 2014.

<sup>227</sup> Bill No. 5 of 2013, Government Gazette No. 19 075, of 16 April 2013, available at: <http://www.justiceservices.gov.mt/LegalPublications.aspx?pageid=31&type=2>, accessed 4 September 2013.

<sup>228</sup> Act No. VII of 2013, amending the Civil Code (Laws of Malta, Chapter 16), available at: <http://www.google.com.mt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&sqi=2&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.justiceservices.gov.mt%2FDownloadDocument.aspx%3Fapp%3Dlom%26itemid%3D8580&ei=ESILU8DUdD4gTThIG4Ag&usq=AFQjCNEADMh6SDSDHTs6OkwG55Cliqu0TA&bvm=bv.61725948,d.bGE>, accessed 24 February 2014.

<sup>229</sup> *Joanne Cassar Loses Transsexual Marriage Case*, Times of Malta, 23 May 2011, available at: <http://www.timesofmalta.com/articles/view/20110523/local/joanne-cassar-loses.366791>; *Settlement between Joanne Cassar and the Government Signed*, The Independent, 16 April 2013, available at: <http://www.independent.com.mt/articles/2013-04-16/news/settlement-between-joanne-cassar-and-government-signed-1402109962/>; *Updated: Malta and Cassar reach out of court settlement*, di-ve.com, 3 May 2013, at <http://www.di-ve.com/news/updated-malta-and-cassar-reach-out-of-court-settlement>. See also: Constitution of Malta, available at: <http://justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono>; the Marriage Act, Chapter 255 of the Laws of Malta, available at: <http://justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono>; and the Civil Code, Chapter 16 Laws of Malta, available at: <http://justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono>, all webpages accessed 4 September 2013.

<sup>230</sup> *Joanne Cassar v Direttur tar-Registru Pubbliku u l-Avukat Generali*, 23 May 2011, Case Civil Appeal Number 43/2008/1.

<sup>231</sup> Act No. XVIII of 2013, amending Chapter 9 of the Laws of Malta, the latter available at: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574>, accessed 24 February 2014.

<sup>232</sup> Act No. 1 of 2014 Criminal Code (Amendment) Act, Government Gazette No. 19, 204 of 31 January 2014, available at: <http://www.justiceservices.gov.mt/LegalPublications.aspx?pageid=30&type=1>, amending Chapter 9 of the Laws of Malta. The new provisions are Articles 251E to 251I of the Criminal Code. The Criminal Code is available at: <http://www.justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chronoboth>. Both webpages accessed 24 February 2014.

<sup>233</sup> NCPE reports can be viewed at [www.equality.gov.mt](http://www.equality.gov.mt), accessed 2 September 2013.

<sup>234</sup> Brief summaries of some cases are given on page 27 of the 2012 Annual Report.

## Miscellaneous

### *Important equality body project*

The main gender equality body, the National Commission for the Promotion of Equality (the NCPE) is currently in the middle of Project ESF 319.6.<sup>235</sup> The project title is ‘Gender Balance in Decision-Making’. The main activities comprise two research projects, one on gender-based representation in decision-making and the second on gender quotas and other measures. It also comprises a mentoring programme intended to provide women aspiring to decision-making positions with mentoring, and the development of a Directory of Maltese and Gozitan professional women. The project runs until March 2015.

### *NCPE Newsletter*

The National Commission for the Promotion of Equality (NCPE), Malta’s primary equality body, has launched an e-Newsletter with the aim of promoting equality-related issues in Malta. The Editor writes that awareness-raising is one of the pivots of NCPE and that the Newsletter, which is titled ‘Equality Matters’, is intended to ‘keep interested stakeholders up to date with NCPE’s continuous work and any other matters related to equality’. The Newsletter can be accessed at the NCPE’s website.<sup>236</sup>

### *Equal pay*

It was reported in December 2013 that Maltese women had once again narrowed the pay gap, citing European Commission statistics. Referring to hourly earnings, they put Malta’s gender pay gap at the third-lowest in the European Union, at just 6 %, a ‘lowering of the gap by 3.2 % since 2008’, so it has been reported in the Times of Malta.<sup>237</sup> However, a 2013 Commission Report had put the figure for 2011 at 12.9 %.<sup>238</sup> There remains some doubt about these statistics. It was reported in November that the Employment and Training Corporation – the main public body working on increasing employment opportunities in the country – does not in fact collect statistics on the gender pay gap even though it is well placed to do so.<sup>239</sup> In their 2006 study, the National Commission for the Promotion of Equality had pointed out that the statistics were not fully transparent and that aggregate figures could be hiding deep discrepancies in particular sectors.<sup>240</sup> This is indicative perhaps of a need to commission a more detailed study than has been carried out. A fuller picture of the phenomenon would be the target and aim of this study.

<sup>235</sup> See the NCPE website, available at: [http://msdc.gov.mt/en/NCPE/Pages/Projects\\_and\\_Specific\\_Initiatives/Gender\\_Balance\\_in\\_Decision\\_Making.aspx](http://msdc.gov.mt/en/NCPE/Pages/Projects_and_Specific_Initiatives/Gender_Balance_in_Decision_Making.aspx), accessed 25 February 2014.

<sup>236</sup> [http://msdc.gov.mt/en/NCPE/Pages/News\\_and\\_Events/Newsletter.aspx](http://msdc.gov.mt/en/NCPE/Pages/News_and_Events/Newsletter.aspx), accessed 25 February 2014.

<sup>237</sup> I. Camilleri, *Maltese women narrow gender pay gap*, The Times of Malta, 10 December 2013, available at: <http://www.timesofmalta.com/articles/view/20131210/local/Maltese-women-narrow-gender-pay-gap.498322#.Uufl6LQ1gdU>, accessed 27 February 2014.

<sup>238</sup> *Tackling the Gender Pay Gap in the European Union*, European Commission 2013, available at: <http://ec.europa.eu/justice/gender-equality/document/#h2-7>, accessed 27 February 2014.

<sup>239</sup> *ETC does not retain information on gender pay gap*, Malta Today, 5 November 2013, available at: <http://www.maltatoday.com.mt/en/newsdetails/news/national/ETC-does-not-retain-information-on-gender-pay-gap-20131105>, accessed 27 February 2014.

<sup>240</sup> Discrepancies caused, for example, by the phenomenon of ‘averaging out’ figures. See: *Gender Pay Review: Research Report for the NCPE*, September 2006, available at: [www.eurofound.europa.eu/eiro/studies/tn0912018s/mt0912019q.htm](http://www.eurofound.europa.eu/eiro/studies/tn0912018s/mt0912019q.htm), accessed 27 February 2014.

**THE NETHERLANDS – Rikki Holtmaat****Legislative developments*****New law strengthening the legal position of co-mothers adopted by Senate***

In December 2013, a Bill was adopted by the Dutch Senate that strengthens the legal position of co-mothers.<sup>241</sup> In the past, lesbian co-parents experienced great problems when wishing to have the co-mother recognised as a legal parent. To obtain this recognition, a costly and lengthy procedure had to be followed. The adoption of this Bill simplifies this considerably, as the legal definition of ‘mother’ is changed in such a way that the co-mother no longer needs to follow such a procedure.

With the adoption of the Bill, co-mothers will enjoy the same rights as those that are already enjoyed by non-biological fathers (i.e. men whose partner has become pregnant with donor sperm). The Bill provides that a co-mother automatically becomes a legal parent when the sperm donor is anonymous. If the sperm donor is known, the co-mother can legally recognise her child by using a relatively simple and inexpensive procedure that can already be completed before the birth of the child. The law will enter into force on 1 April 2014.

***New law amending gender registration***

In December 2013, the Dutch Senate adopted a Bill that amends gender registration, following the positive vote in the House of Representatives in April 2013.<sup>242</sup> The Bill includes some important changes, which will make it easier for transgender persons to change the registered sex designation in their identity documents and in the official population database.<sup>243</sup>

***Protection against dismissal extended to flexi-workers***

In April 2013, a tripartite Social Accord between trade unions, employers’ organisations and the Dutch Coalition Government postponed and amended a number of austerity measures previously announced by the Government, and offered a blueprint of the country’s social policy for the next decade.<sup>244</sup> Many of the measures that were agreed upon in the Accord are now incorporated into Bills that are submitted to Parliament, one notable example being the adjustment of dismissal procedures.<sup>245</sup> Employees with a permanent employment contract have always been well-protected in the Netherlands with respect to dismissal, whereas flexi-workers did not enjoy a comparable protection against dismissal.

The proposed Bill will simplify and streamline dismissal procedures, making it easier for employers to dismiss employees with a permanent contract, but the other side of the coin is that the Bill will extend the protection against dismissal to flexi-workers. This is a major step forward for this often-overlooked group, whose large majority are women. The Government aims to have the Bill enter into force in 2015. From then onward flexi-workers who meet certain criteria will receive a transition allowance upon dismissal with the aim to make it easier for them to find a new job.

<sup>241</sup> Eerste Kamer, 2012-2013, Kamerstukken 33514, no. 2. See: [http://www.eerstekamer.nl/behandeling/20130114/voorstel\\_van\\_rijkswet/f=/vj6cn4qmxdyv.pdf](http://www.eerstekamer.nl/behandeling/20130114/voorstel_van_rijkswet/f=/vj6cn4qmxdyv.pdf), accessed 10 December 2013.

<sup>242</sup> Eerste Kamer 2012-2013, Kamerstukken 33351, no. 1. [http://www.eerstekamer.nl/behandeling/20130409/gewijzigd\\_voorstel\\_van\\_wet/f=/vj8ob4xh6dv2.pdf](http://www.eerstekamer.nl/behandeling/20130409/gewijzigd_voorstel_van_wet/f=/vj8ob4xh6dv2.pdf), accessed 16 December 2013.

<sup>243</sup> For a short description of the content of this law, please see European Network of Legal Experts in the Field of Gender Equality, R. Holtmaat ‘Netherlands’ in: *Law Review 2/2013*, pp.83-87, European Commission 2013, available at [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelr\\_2013\\_2\\_final\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2013_2_final_web_en.pdf), accessed 7 March 2014.

<sup>244</sup> The full text of the Social Accord is available at: [http://www.stvda.nl/~media/Files/Stvda/Convenanten\\_Verklaringen/2010\\_2019/2013/20130411-sociaal-akkoord.ashx](http://www.stvda.nl/~media/Files/Stvda/Convenanten_Verklaringen/2010_2019/2013/20130411-sociaal-akkoord.ashx), accessed 18 December 2013.

<sup>245</sup> The Bill concerning dismissal is available at: <http://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail.jsp?id=2013Z23566&dossier=33818>, accessed 18 December 2013.



## Case law of national courts

### *Court allows insurance company to pay lower amount in damages to Turkish woman*

A Turkish woman, who as a 10-year old had become disabled as a result of a traffic accident, received a lower insurance benefit than what was claimed by her lawyer, partly on the ground of her sex and ethnicity. Where EUR 430 000 was claimed, only EUR 70 000 EUR was granted by the District Court of The Hague.<sup>246</sup> This amount was estimated by an independent centre for bodily injury, the NRL ('*Nederlands Rekencentrum Letselschade*'). It was based on expectations concerning the girl's level of education. In its calculations, the insurance company, on the basis of actuarial statistics, took into account that the majority of Turkish women stop working after they have their first child, which is around the age of 26. After ten years, they re-enter employment, but still work on half-time basis. On the basis of all of these averages, the insurance company estimated that the harm caused by the accident did not exceed the sum of EUR 70 000 EUR.

This line of reasoning was accepted by the District Court. The Court found that using actuarial statistics with regard to the victim's cultural background and gender did not run counter to the principle of equality (as enshrined in the first Article of the Dutch Constitution), as it remains possible for a court to deviate from these statistics, if personal circumstances give reason to do so. In this particular case however, the Court found that there was no reason to deviate from the statistics. The family of the victim decided to bring the case to the Court of Appeal. The decision in appeal is still pending, and is not expected before the end of 2014.

The case is a clear example of how gender and ethnic stereotypes still play a role in the practice of many insurance companies in the Netherlands. When damages cannot be calculated on the basis of an actual yearly wage, insurance companies resort to statistics and averages, taking various features into account, including sex, cultural background, age, level of education, job expectations, and so forth.

Discrimination on the ground of sex or race/ethnicity in the area of goods and services is prohibited under European and national equal treatment law. The Netherlands Institute for Human Rights (NIHR) has reported on the use of statistics in estimating insurance benefits, only focusing on distinctions made on the ground of sex.<sup>247</sup> The NIHR's predecessor, the Equal Treatment Commission, decided on the practice in three cases, thrice establishing discrimination on the ground of sex, twice of which indirect and once direct discrimination.<sup>248</sup>

The Dutch Government has always interpreted the grounds of exception under Article 5 Section 2 of Directive 2004/113/EC<sup>249</sup> such that the use of gender-related statistics to determine insurance premiums and benefits is allowed, as long as it concerns trustworthy and accurate data. The NIHR agrees with the Government on this point in the conclusions of the (aforementioned) report, although it includes a warning regarding out-dated stereotypes.<sup>250</sup> This report was also taken into account by the District Court in its decision in the case at hand.

The large difference with this practice is that the Court not only distinguished between men and women, but also took ethnicity-related statistics into account. The Minister of Social Affairs and Employment answered parliamentary questions about this case. He stressed the importance of judicial independence, but did express his hope that a higher court would render a judgment in this case.<sup>251</sup> The Minister was unable to provide Parliament with statistics on the prevalence of this kind of damage calculation, as most insurance

<sup>246</sup> Den Haag District Court 26 July 2013, ECLI:NL:RBDHA:2013:9276. The judgment can be found at [www.uitspraken.rechtspraak.nl](http://www.uitspraken.rechtspraak.nl), using the case's ECLI number (accessed 29 December 2013).

<sup>247</sup> The report was published in 2012 under the name *Verkennd onderzoek letselschade* and can be found at <https://mensenrechten.nl/publicaties/detail/17392>, accessed 6 February 2014.

<sup>248</sup> ETC 1996-90, 2004-37 and 2009-117. Available at [www.mensenrechten.nl/publicaties/oordelen](http://www.mensenrechten.nl/publicaties/oordelen), accessed 7 March 2014.

<sup>249</sup> OJ L 373 of 21 December 2004.

<sup>250</sup> See the conclusion of the report.

<sup>251</sup> See *Aanhangsel Handelingen II* 2013/14, 1001 for the Minister's response (available at <https://www.officiëlebekeendmakingen.nl/> accessed 10 March 2014).

compensation is based on (undisclosed) negotiations between the insurance company and (the relatives of) the victim(s). In any case, it remains to be seen whether this judgment will be upheld by the Court of Appeal.

***Domestic workers working for a homecare organisation enjoy ordinary right to sick pay***

A recent judgment has shed new light on the problematic legal position of a particular group of domestic workers, the so-called ‘alpha-workers’.<sup>252</sup> This group performs domestic work in private households, for example for the elderly and/or sick persons, through the mediation of a professional homecare organisation. Nevertheless, they are considered not to be working under a normal labour contract, because they formally work for the private households, not for the homecare organisation.

This construction has severe consequences for the level of social protection this group enjoys, as only part of Dutch labour law applies to domestic workers when they work for private households. Their social security rights differ considerably from other employees’ rights, one example being that they have the right to be paid during 6 weeks of illness while other employees have this right for 104 weeks.<sup>253</sup> The social security position of this vulnerable group of (generally female) workers is precarious, which is even more striking when considering that the homecare organisations normally operate on the basis of a contract with a municipality (in other words, a part of the Government).

In the case at hand, a homecare organisation refused to pay one of its workers during the weeks that she was not able to work due to a wrist fracture. She decided to bring the case to court, where it was decided that the organisation had to pay her during the period of illness, but only for six weeks.<sup>254</sup> The domestic worker decided to lodge an appeal.

The Court of Appeal found that the domestic worker did have an employment relationship with the homecare organisation, inter alia because the organisation had recruited her, paid her salary, and bore responsibility for her work. Based on these criteria, the Court decided that she was working under a normal employment contract and that she was therefore eligible for all social security schemes, including the prolonged period of sick pay. This judgment can be considered a big victory for all alpha-workers in the Netherlands.

Nevertheless, the legal situation of domestic workers remains problematic. Earlier in 2013, it was announced that the Minister of Social Affairs and Employment (Mr Asscher) had appointed a special committee to examine ways to improve the position of domestic workers in private households, which is a sign that the Government is aware of the severe problems experienced by this group.

***Dismissal of a pregnant woman during trial period judged lawful***

The definitions of direct sex discrimination in Dutch equal treatment legislation explicitly include discrimination on the grounds of pregnancy, giving birth and maternity. In addition, the Civil Code includes special provisions that protect women against dismissal on the ground of their pregnancy or during pregnancy and maternity. An exception to this prohibition does exist, however, as employers can terminate the employment contract of any employee during a trial period, pregnant employees included (although the reasons for a termination may never be discriminatory). Almost all Dutch labour contracts include such a trial period, usually of one or two months.

<sup>252</sup> Arnhem Court of Appeal, 5 November 2013, ECLI:NL:GHARL:2013:8304. The case is available at: <http://uitspraken.rechtspraak.nl/>, and can be found using its ECLI number (accessed 29 December 2013).

<sup>253</sup> The minimum rights of domestic workers, such as minimum wages, holiday pay and the period of sick pay have been defined in the ministerial regulation Services at Home (*‘Regeling dienstverlening aan huis’*).

<sup>254</sup> We reported on this case law in EGELR 2012-1. See: European Network of Legal Experts in the Field of Gender Equality, R. Holtmaat ‘The Netherlands’ in: *Law Review 1/2012*, pp. 88-93, European Commission 2012, available at: [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelr\\_2012-1\\_final\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2012-1_final_web_en.pdf), accessed 10 March 2014.



A recent judgment of a Cantonal Court has shed more light on this exception regarding the protection of pregnant women.<sup>255</sup> A woman had concluded a fixed-term employment contract with a company, but the employer felt compelled to cancel her contract (before she had even started working), due to economic reasons. She subsequently pointed out that she was willing to carry out other work and, in the same conversation, mentioned that she was pregnant. Still, the employer refused to give her another position in the company. The employer stated that the termination of the contract fell within the trial period and that therefore the woman could not invoke the clauses prohibiting dismissal during pregnancy.

The employee decided to bring the case to court, stating that she had been discriminated against on the ground of sex (pregnancy). She therefore requested the annulment of the cancellation of her employment contract. The Court rejected this claim, as she could not prove that a link existed between the employer's refusal to give her another position and her pregnancy.

After this judgment it is still possible to cancel or terminate an employment contract during the trial period, as long as the employer can prove that the cancellation or termination is not due to discriminatory reasons. The claimant, apparently, has to provide the proof that the dismissal was on the ground of her pregnancy. One may, however, argue that the burden of proof, i.e. to prove that the cancellation is pregnancy-related, is very heavy, rendering the position of pregnant women in a trial period weaker than may be desirable.

### Equality body decisions/opinions

The main Dutch equality body, the Netherlands Institute for Human Rights (NIHR) has issued a remarkable opinion on sexual harassment in a case filed by a freelance female graphic designer.<sup>256</sup> The case concerns a freelance worker who was denied the renewal of her annual contract with a magazine, after she had made it clear to its chief editor that she did not want to have a sexual relationship with him. The director, who commissioned the publication of the magazine, stated that the freelancer had not won the new contract, because someone else had offered to do the work for a lower price. Thereafter the woman filed a complaint at the NIHR, stating that this was a case of sexual harassment.

The NIHR distinguished five legal questions in the complaint that was made by the freelance graphic designer: (1) whether the behaviour of the chief editor constituted sex discrimination in the form of sexual harassment as defined in equal treatment legislation; (2) whether the behaviour of the chief editor constituted discriminatory treatment of the woman on grounds of her sex;<sup>257</sup> (3) whether the refusal to give her a new contract constituted unequal treatment on the ground of sex; (4) whether the director of the Association had correctly dealt with the complaint about sexual harassment; and (5) whether there was a case of victimisation.

On all five counts, the NIHR decided in favour of the defendant. The Dutch definition of sexual harassment closely corresponds to that in the EU Directives.<sup>258</sup> The NIHR in this case found that, although the behaviour of the chief editor did have a sexual connotation, it did not violate the dignity of the claimant because they had both participated on a basis of equality in a very intensive exchange of messages. For the second claim, the woman needed to provide *prima facie* proof that there was a causal connection between the way she was treated by the chief editor and the fact that she was a woman. According to the NIHR the claimant did not succeed in submitting this proof. The NIHR then concluded that the refusal to grant the

<sup>255</sup> District Court of Noord-Holland, 2 October 2013 (published 20 November 2013), ECLI:NL:RBNHO:2013:10555. The full text can be retrieved using the case's ECLI number at <http://uitspraken.rechtspraak.nl/>, accessed 29 December 2013.

<sup>256</sup> NIHR 30/7/2013, Opinion 2013-99. Available in Dutch at: <https://mensenrechten.nl/publicaties/oordelen/2013-99/detail>, accessed 4 December 2013. See the annotations to this Opinion by R. Holtmaat in *Jurisprudentie Arbeidsrecht* (JAR) 2013, 286 and in the NTM-NJCM-bulletin of 2014 (forthcoming).

<sup>257</sup> In Dutch: '*discriminatoire bejegening*'. Discriminatory treatment is seen as different from *unequal* treatment and from (discriminatory) harassment on a prohibited ground ('*intimidatie*'). Unequal treatment is at stake in the third question.

<sup>258</sup> The only difference being that the word 'unwanted' is not included in the Dutch definition.

claimant a new annual contract was also not discriminatory because the claimant again had not provided *prima facie* proof of the fact that her gender played a role. As to the fourth question, the NIHR concluded that the director of the Association had dealt with her complaint in a correct way and that the editor had been sanctioned appropriately for his behaviour. With no evidence found as to sexual harassment, discriminatory treatment, or discriminatory non-renewal of the contract, the claimant could not be a victim of victimisation.

This Opinion of the NIHR demonstrates the difficulties that surround the application of the norm that sexual harassment constitutes a form of sex discrimination<sup>259</sup> as well as the difficulties in applying the definition of sexual harassment as laid down in the EU directives (which was copied into the Dutch equal treatment legislation).<sup>260</sup>

## Miscellaneous

### *Committee appointed to examine whether it is possible to leave out gender designation in identity documents*

The State Secretary of Security and Justice has appointed a research committee to investigate (at the request of the House of Commons) whether it is possible for people who feel neither male nor female or who feel to be both, to leave out any gender designation when registering at the civil administration offices and in their identity documents.<sup>261</sup> The research committee, presided by Marjolein van den Brink, lecturer in law at the University of Utrecht, is expected to publish its report August 2014.<sup>262</sup>

## NORWAY – Helga Aune

### Legislative developments

There have been two major legislative changes: in the Working Environment Act<sup>263</sup> (WEA) Chapter 14 regarding part-time work and the new Gender Equality Act of 2014.<sup>264</sup> Changes were enacted by Parliament in June 2013 and the new Act/provisions came into force on 1 January 2014.

There are two proposed amendments to existing laws, both affecting gender equality issues. One concerns the right to abortion and the other introduces equal obligations for men and women regarding military service, which until today was only a right but not an obligation for women. Both proposals are out for public consultations with 30 April 2014 as their closing date for comments. The likely timespan for both amendments is that they will be discussed in Parliament during the spring of 2014 and be enacted in June 2014.

<sup>259</sup> See R. Holtmaat 'Sexual Harassment and Harassment on the Ground of Sex in EU Law: a Conceptual Clarification', *European Gender Equality Law Review* No. 2/2011, pp. 4-13, available at: [http://ec.europa.eu/justice/gender-equality/files/egelr\\_2011-2\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/egelr_2011-2_en.pdf), accessed 10 March 2014.

<sup>260</sup> See R. Holtmaat 'Sexual Harassment as Sex Discrimination: A Logical Step in the Evolution of EU Sex Discrimination Law or a Step Too Far?' In: Mielle Bulterman et al. (eds.): *Views of European law from the Mountain*; Liber Amicorum Piet Jan Slot. Kluwer – Law International 2009, pp. 27-40.

<sup>261</sup> In 2007 the Dutch Supreme Court ruled that this is impossible under current legislation. See <http://www.volkskrant.nl/vk/nl/2686/Binnenland/article/detail/865047/2007/04/03/Hoge-Raad-wijst-eis-geslachtsloze-af.dhtml>, accessed 16 December 2013.

<sup>262</sup> The State Secretary's letter, dated 4 December 2013 is available at: [http://www.eerstekamer.nl/behandeling/20131204/brief\\_van\\_de\\_staatssecretaris\\_van/document3/f=vjfajimgz3gc.pdf](http://www.eerstekamer.nl/behandeling/20131204/brief_van_de_staatssecretaris_van/document3/f=vjfajimgz3gc.pdf), accessed 16 December 2013.

<sup>263</sup> *Lov om arbeidsmiljø, arbeidstid og stillingsvern mv.* (LOV-2005-06-17-62).

<sup>264</sup> *Lov om likestilling mellom kjønnene* (LOV-2013-06-21-59).

***Equal treatment in access to health services for men and women, abortion***

The Government submitted its proposed amendments to acts and regulations<sup>265</sup> in the health sector for public consultation on 21 January 2014. The aim of the proposal is to provide medical doctors (first and foremost general practitioners) with the right to personally register their right to reserve against forwarding papers filing for abortion to the specialist level in the health service. The fundamental reason for demanding such a reservation is that such action contravenes with the individual doctor's conscience. It is stated in the letter of consultation that such a right is only to be granted as long as the doctor is able to forward the patient to a doctor who will continue the paper work. The woman is to be secured a new appointment within the next day. Consultation deadline is 30 April 2014.<sup>266</sup>

This proposed amendments to the Act and its regulations<sup>267</sup> are a result of agreement between the political parties in the Government (The Conservatives (Høyre, H) and the Progress Party (Fremskrittspartiet, FrP) in exchange for support in Parliament from the political party Christian Democrats (KrF). The proposal has caused a media frenzy and feminists, doctors, and even comedians opposing the amendment have entered the discussion. Several conservative politicians have protested against this proposal. So far the debate has not focused on the fact that the proposal creates a differential treatment of women's and men's access to health services. There are currently no reservation rights, i.e. a right for doctors to reserve against forwarding papers filing for certain health services to the specialist level in the health service concerning men's health issues.

The fear is that this principle of reservation right will become 'contagious' and will be of parallel use for other professions where employees might want to reserve against performing certain tasks based on a person's private conscience and beliefs.

***Equal obligations for men and women regarding military service***

The Government submitted its proposed amendments to acts and regulations<sup>268</sup> in the defence sector for public consultation on 21 January 2014. The proposal provides women and men with equal rights and obligations regarding the obligatory military service. The consultation deadline is 30 April 2014. According to information in the newspapers, it is most likely that the first gender-equal class will start in the fall of 2016, affecting girls born 1 January 1997 and later. By then, the defence sector should be prepared for the new requirements, sufficient housing and bathrooms, equipment and uniforms for both men and women. This also includes a review of physical requirements. It is interesting to note that the Ministry of Defence for many years has worked to promote and enhance the number of female employees in the military, but the Gender Equality Act or the prohibition against discrimination has not been a tool in this work. Rather, the language of multitude and variety- and a defence sector representing the multitude and variety of the society it is to serve have been the arguments to promote gender equality. This entails that the defence sector should reflect the society it is to protect, in gender, colour and ethnic backgrounds.

***Legislative amendments to the WEA***

The new Gender Equality Act as well as amendments to the Working Environment Act (new sections in Chapter 14 regarding part-time work) entered into force on 1 January 2014.

<sup>265</sup> Acts: *Helse- og omsorgstjenesteloven* (LOV-2011-06-24-30) and *Pasient- og brukerrettighetsloven* (LOV-1999-07-02-63). Regulations: *Forskrift om fastlegeordningen i kommunene* (FOR-2012-08-29-842) and *Forskrift om pasient- og brukerrettigheter i fastlegeordningen* (FOR-2012-08-29-843).

<sup>266</sup> See further: <http://www.regjeringen.no/en/dep/hod/press-center/pressemeldinger/2014/kvinnens-rettigheter-viktigst-i-reservas.html?id=749551>, accessed 27 February 2014.

<sup>267</sup> Acts: *Helse- og omsorgstjenesteloven* (LOV-2011-06-24-30) and *Pasient- og brukerrettighetsloven* (LOV-1999-07-02-63). Regulations: *Forskrift om fastlegeordningen i kommunene* (FOR-2012-08-29-842) and *Forskrift om pasient- og brukerrettigheter i fastlegeordningen* (FOR-2012-08-29-843). See further: <http://www.regjeringen.no/en/dep/hod/press-center/pressemeldinger/2014/kvinnens-rettigheter-viktigst-i-reservas.html?id=749551>, accessed 27 February 2014.

<sup>268</sup> Acts: *Helse- og omsorgstjenesteloven* (LOV-2011-06-24-30) and *Pasient- og brukerrettighetsloven* (LOV-1999-07-02-63). Regulations: *Forskrift om fastlegeordningen i kommunene* (FOR-2012-08-29-842) and *og Forskrift om pasient- og brukerrettigheter i fastlegeordningen* (FOR-2012-08-29-843).

## Case law of national courts

### *Au-pairs' right to pay for work exceeding their au-pair contract*

The Oslo Municipal Court presented its unanimous judgment on 31 January 2014 in a case regarding two au pairs who demanded pay for all hours worked exceeding the au-pair contract.<sup>269</sup> The two au-pairs were awarded compensation in the amounts of approx. EUR 113 702 (NOK 950 000) and approx. EUR 14 960 (NOK 125 000). The largest sum was awarded for work performed over a 4-year period. The work had taken place at the host family's home as well as in their family-owned store. The judgment is part of a criminal case due to violations of sections in the Immigration Law, see judgment of 5 November 2013.<sup>270</sup> Both cases have been appealed. The judgment of 31 January 2014 is the first court case regarding a pay claim for au pairs in the Norwegian labour-law context. It has been claimed that au pairs are a legal hybrid, not employees nor students, but this new case clearly positioned their status as employees and their right to a salary equivalent to the national collective agreements on cleaning and domestic work. Since the judgment is not yet final it is not available in the case collection of the *Lovdata*.

## Miscellaneous

A report drawn up by the Norwegian Centre for Violence and Traumatic Stress Studies, a prevalence study of violence in Norway, concludes that 10 % of all women in a lifetime perspective have been victim of rape or other serious violence.<sup>271</sup> 49 % of the rapes took place before the age of 18. One third had never reported the rape to police or medical care.

## POLAND – Eleonora Zielińska

## Policy developments

In Parliament several draft laws are currently pending which that – if they become acts of law – could significantly contribute to the elimination of discrimination with regard to sex in various spheres of life. These drafts firstly regard the amendment of the so-called Anti-Discrimination Act,<sup>272</sup> secondly the amendment of the Electoral Law and thirdly the sphere of employment (see 'Legislative developments'). In addition, the Government Plenipotentiary for Equal Treatment presented to the Council of Ministers a document called the National Programme for the Promotion of Equal Treatment 2013-2016,<sup>273</sup> which is coherent with the priorities and directions defined in the European Strategy for Equality between Women and Men 2010-2015 and the European Pact for Gender Equality 2011-2010 (see 'Miscellaneous'). Also, further supportive steps have been taken with regard to families, aimed at lowering the costs of education of children. The Government assigned a sum of EUR 3 million (PLN 12 million) to provide free textbooks for first-grade students, already in 2014 approximately EUR 34 million (PLN 137 million) which the parents would otherwise be forced to spend on complete sets of commercially available textbooks for their children.<sup>274</sup>

During this reporting period, however, there have been some disturbing events, which could not be effectively prevented by the Government. Emphasis should be especially placed

<sup>269</sup> 13-063097MED-OTIR/04.

<sup>270</sup> 13-063097MED-OTIR/04.

<sup>271</sup> See the report with a summary of findings in English at: [http://www.nkvts.no/biblioteket/Publikasjoner/Vold\\_og\\_voldtekt\\_i\\_Norge.pdf](http://www.nkvts.no/biblioteket/Publikasjoner/Vold_og_voldtekt_i_Norge.pdf), accessed 12 March 2014.

<sup>272</sup> *Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania* (JoL no 254 pos.1700).

<sup>273</sup> *Pełnomocnik Rządu do spraw równego Traktowania. Krajowy program działań na rzecz równego traktowania na lata 2013-2016*, Warszawa, 10 December 2013, available at: <https://rownetraktowanie.gov.pl/aktualnosci/krajowy-program-dzialan-na-rzecz-rownego-traktowania-na-lata-2013-2016>, accessed 4 February 2014.

<sup>274</sup> <http://www.men.gov.pl/index.php/wyjasnienia-i-sprostowania>, accessed 5 March 2014.

on the crusade against the so-called ‘gender ideology’ which has been initiated by the Catholic Church, describing it as ‘the highest threat’ and ‘more dangerous than Marxism.’<sup>275</sup> Eventually this may lead to the social depreciation of the term ‘gender equality’. According to church sources, society needs to be protected from this ideology because it ‘undermines the basis of the family’ and ‘excludes salvation’. The so-called ‘gender ideology’ was also indicated as one of the causes, in addition to pornography and divorce, of child abuse by adults. Gender mainstreaming was also criticised by Church officials.<sup>276</sup> Unfortunately, these statements have met strong social resonance, and they have already generated visible negative effects, including actions of state bodies (e.g. the creation of a parliamentary group ‘Stop Gender Ideology’<sup>277</sup>) and of local authorities, condemning the ‘gender ideology’ in special announcements and refusing financial support to all local initiatives which include gender in their title or programme. The lack of general understanding of the term gender’ is connected with the fact that it is a foreign word, which does not have a simple equivalent in the Polish language. Attempts to explain that gender concerns a broader understanding of the term sex – not an ideology but a scientific discipline – made by the Government Plenipotentiary for Equal Treatment, the Ministry of Higher Education and Science and various groups of scientists, have remained ineffective. The problem requires more radical preventive actions, especially given the fact that it concerns the hypocrisy of the main actors attempting to combat the ‘gender ideology’. Studies performed by one NGO, *Feminoteka*, show that the Catholic Church collected EUR 15 million (PLN 61.5 million) in EU subsidies for projects which were supposed to support ‘gender equality’. *Feminoteka* addressed the Supreme Audit Office questioning whether those funds were spent in accordance with the recommendations of the European Union. Similarly, self-governments are often beneficiaries of EU funds, granted (among other things) on the condition that they act in accordance with the principle of gender mainstreaming.<sup>278</sup>

Another point of criticism concerns the lack of effective response from the Government to the draft amendments of the Criminal Code, proposed by the Codification Committee, part of the Ministry of Justice.<sup>279</sup> The proposed changes aim at further criminalisation of abortion, introducing punishment for pregnant women for unlawful abortion and equalisation of protection of the foetus (described as the conceived child) from the moment of its viability to the protection of a born human, by criminal law. In reaction to criticism from public opinion, the Prime Minister announced that the draft law will not be presented to Parliament as a governmental draft. However, it is highly probable, in view of the coming elections for the European Parliament (in 2014), for local self-government (in 2015) and for the Sejm and Senate (in 2016), that this draft will still be presented to Parliament by a group of members of Parliament (representatives). Previous elections have shown that the attitude towards the problematic issue of abortion has effectively been used by the Catholic Church as a litmus test for diagnosing the personal ability and willingness of future deputies to create laws in accordance with its teachings.

<sup>275</sup> See further: <http://www.pch24.pl/biskupi-o-gender---list-pasterski-na-niedziele-sw--rodziny,20006.i.html>; <http://www.polskieradio.pl/5/3/Artykul/1012461,Biskupi-o-gender-Ma-charakter-destrukcyjny-wobec-czlowieka>; and <http://www.frona.pl/blogi/contra-gentiles/genderyzm-jest-jak-komunizm-i-trzeba-sie-szykowac-na-dluga-wojne,36951.html>, all accessed 1 February 2014.

<sup>276</sup> See: <http://www.polskieradio.pl/5/3/Artykul/1012461,Biskupi-o-gender-Ma-charakter-destrukcyjny-wobec-czlowieka>; <http://ny.pl/index.php?o=news/kolart/6/75509> and <http://www.frona.pl/blogi/contra-gentiles/genderyzm-jest-jak-komunizm-i-trzeba-sie-szykowac-na-dluga-wojne,36951.html>, both accessed 4 February 2014. See also: <http://wpolityce.pl/wydarzenia/63106-ideologia-gender-po-przedszkolach-wciska-sie-do-szkol-podstawowych-my-rodzice-musimy-sie-jakos-temu-przeciwstawic>, all accessed 1 February 2014.

<sup>277</sup> See: <http://www.sejm.gov.pl/sejm7.nsf/agent.xsp?symbol=ZESPOL&Zesp=270m> and <http://www.fakt.pl/beata-kempa-zdradza-swoje-plany-co-do-walki-z-ideologia-gender,artykuly,437837,1.html>, both accessed 23 March 2014.

<sup>278</sup> See: <http://www.feminoteka.pl/news.php?readmore=9466>, accessed 1 February 2014.

<sup>279</sup> See: <http://bip.ms.gov.pl/pl/projekty-aktow-prawnych/prawo-karne/> and <http://www.lex.pl/czytaj/-/artykul/zoll-propozycje-zmian-przepisow-o-aborcji-przyjeto-jednoglosnie>, both accessed 11 April 2014.



## Legislative developments

### *Draft amendments to the Anti-Discrimination Act*

After the first reading in the Sejm, the draft amendments to the Anti-Discrimination Act<sup>280</sup> have been sent to an extraordinary subcommittee, which was created especially to evaluate them. The proposed amendments in some places exceed the standards required by EU provisions for equal treatment with regard to sex. For example, they provide for protection against discrimination with regard to sex in the sector of educational services (in the broad meaning of this term), as well as in the media. They also provide for an open list of grounds of discrimination, while at the same time explicitly mentioning discrimination with regard to gender identity and sexual expression. The proposed changes include new definitions of forms of discrimination, such as discrimination through association, discrimination by assumption and multiple discrimination

### *Draft changes of Electoral Law*

After the first reading in the Sejm, also the draft amendments to the Electoral Law have been sent to an extraordinary committee.<sup>281</sup> These drafts, which are examined collectively, propose the introduction of an obligation to present electoral lists where 50 % of the candidates are women and 50 % are men (currently a quota of 35 % for each sex applies); the introduction of the obligation to place female and male candidates on these lists consecutively (the so-called zipper system); and to abolish sexist language in the Electoral Law, e.g. terms that use masculine forms to refer to women, despite the fact that these words also have feminine counterparts in the Polish language.

### *Covering so-called 'trash contracts' with the obligation to pay social care contributions*

The Prime Minister announced the introduction of a 19.52 % pension contribution for Poles employed under so-called 'trash contracts' (contracts for specific work (*umowa o dzieło*), regulated by the Civil Code).<sup>282</sup> The contribution would be introduced only in the case of for Poles for whom such contracts are their only source of income. These provisions are to be applied to persons regardless of their sex. However, they are expected to greatly contribute to the elimination of discrimination against women, who are more often employed on the basis of contracts regulated outside the Labour Code.

## Case law of national courts

### *Judgment on sexual harassment, correcting the ruling of a court of first instance*<sup>283</sup>

Claimant WJ had been working at company SA (defendant) since its inception in various positions. MJ, a female employee, was recently hired. She worked in another room, separate from that of WJ. On one occasion WJ entered the room where MJ worked and, in the presence of a few of her colleagues, mentioned that MJ was young and was wearing a wedding ring. He strongly implied that she had the right age for marital and extramarital sex. One week later, WJ was fired for his reprehensible and socially unacceptable behaviour towards a female colleague, thus exposing the company to reputational damage and disruption

<sup>280</sup> Representatives' draft law on amendment of the Law on implementation of certain provisions of the European Union with regard to equal treatment, and some other laws. Parliamentary document no. 1051, available at: <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=1051>, accessed 4 March 2014.

<sup>281</sup> Representatives' draft law on amendment of the Law on the procedure before administrative courts and some other laws (document no. 1351), Representatives' draft law on amendment of the Code on criminal procedure of 5 January 2011 (document no. 1146) and Representatives' draft law on amendment of the Electoral Code (document no. 1151), all available at: <http://www.sejm.gov.pl/SQL2.nsf/poskomprocall?OpenAgent&7&1146>, accessed 4 March 2014.

<sup>282</sup> Announcement made on 5 February 2014, available at: <http://www.warsawvoice.pl/WVpage/pages/article.php/27220/news>, accessed 2 March 2014.

<sup>283</sup> Ruling of the District Court of Wrocław, of 10 July 2013, II Ca 493/13, available at: [http://orzeczenia.ms.gov.pl/details/\\$N/155025000001003\\_II\\_Ca\\_000493\\_2013\\_Uz\\_2013-07-24\\_001](http://orzeczenia.ms.gov.pl/details/$N/155025000001003_II_Ca_000493_2013_Uz_2013-07-24_001), accessed 10 November 2013.



of work. A few months later the company fired several other members of the management. Following this action, WJ decided that his dismissal was unjustified and had been planned in advance. He complained that the incident with MJ was used by the company as an excuse to fire him immediately and filed a claim for compensation. Despite the testimony of two witnesses, the Regional Court did not find sexual harassment and instead found an action for wrongful dismissal justified. The District Court (hearing the case on appeal filed by the company) disagreed and changed the contested judgment, thereby dismissing WJ's claim. In its reasoning the District Court stressed that the decision of the Regional Court demonstrated a clear lack of understanding of the nature of sexual harassment, and underestimated its negative impact on the working environment. Justifying its decision, the Regional Court stated that it can be subject to discussion whether his conversation with MJ exceeded the limits of an acceptable joke. Furthermore, the Regional Court remarked that according to the witnesses, there was an atmosphere of familiarity in the company, and a conversation between employees in a company with a high degree of formality and subordination should be assessed differently from that in a company where collegial relations prevail. In the opinion of the Regional Court, the singular conduct of WJ, despite being reprehensible, did not constitute sufficient reason to terminate his contract. This opinion was not shared by the District Court in Wrocław: considering an appeal in this case the District Court decided that the company had acted appropriately in response to the behaviour of WJ. The employer is obliged to prevent this kind of behaviour, in particular with respect to employees who, like WJ, represented senior management. It was also found irrelevant whether the conduct of WJ was a singular occurrence and whether he or other persons who were not directly involved treated it as a joke. The Court agreed with the company: collegial relationships cannot in any way justify this kind of behaviour, in particular because WJ saw MJ for the first time when the event took place. The District Court also found the question of whether MJ filed a sexual harassment complaint against the employer or not to be insignificant, even though it noted that under Article 18<sup>3d</sup> LC she was entitled to damages in an amount not less than the monthly minimum wage. According to the District Court, the Regional Court did not thoroughly consider the evidence, and in failing to do so drew incorrect conclusions.

## Miscellaneous

### *National action plan for equal treatment*

The national action plan for equal treatment presents legal provisions and standards regarding equal treatment regulations in Poland, indicates fields, goals and main actions of the programme and describes the instruments for its realisation and monitoring. With regard to the last of the above points, the Plan proposes to establish local plenipotentiaries for equal treatment (in the *voivodeship* offices<sup>284</sup>), and coordinators for equal treatment in ministries and selected subordinated entities. This programme also incorporates a diagnosis and evaluation of the actions already performed with respect to equal treatment in such areas as employment and social care, preventing violence, including family violence as well as equal treatment in education, the healthcare system and access to services.

### *Results of audit performed by the Supreme Audit Office (NIK) regarding the pay gap*

The Government Plenipotentiary for Equal Treatment asked the Supreme Audit Office at the beginning of 2013 to conduct an audit of companies owned by the State and local self-government with regard to fulfilling the requirement of providing equal pay for men and women for equal work or work of equal value.<sup>285</sup>

A statistical analysis of the remuneration of over 120 000 persons working on the basis of employment contracts in entities of the public sector (approximately half of which were women), in comparable groups, has shown that men earn more than women in most of the

<sup>284</sup> Voivodeship offices (*urzędy wojewódzkie*) are offices that implement the functions of governmental administration at the local level.

<sup>285</sup> See: <http://www.nik.gov.pl/aktualnosci/nik-o-wynagrodzeniu-kobiet-i-mezczyzn.html>, accessed 4 March 2014.

examined entities of public administration as well as in state-owned and community-owned companies.<sup>286</sup>

A detailed analysis of the remuneration of 891 persons (including 499 women, constituting 56 % of the whole group) indicated however that the pay differences for posts with the same job title (e.g. comparator (specialist) or older comparators) were not caused by the fact that employers violate the law regarding equal treatment of men and women. The pay differentiation in comparable groups resulted mainly from the role that the particular organisational unit, where the examined persons were employed, played for the whole institution and thus resulted from the scope of obligations and responsibilities that were entrusted to them. Women were mostly employed in organisational units responsible for the administration of the institutions, whereas men – mainly because of their specialised education – more often found employment in specialised units connected with the performance of the main tasks of the institution. The differences between the remuneration of women and men were also largely caused by greater participation of men in management posts. This is particularly visible in state-owned and community-owned companies, as well as in some of the central administration offices.

Within the detailed analysis of the remuneration of 891 persons, a direct comparative analysis of 59 pairs of men and women was also performed, where the scope of the performed work, the qualifications, service years or competence were comparable. This direct analysis showed that the employers did not violate the requirement of equal treatment of men and women with regard to remuneration. Only in two cases (3.4 % of the examined group) was a difference in remuneration to the benefit of men detected that could result from unequal treatment of employers with regard to sex.

This report additionally showed that the unfavourable situation of women, connected inter alia with their education, may also result from indirect factors of a sociocultural nature (e.g. influencing the choice of studies). It is worth mentioning that gender stereotypes regarding men and women and their social roles may also influence the fact that they are more often employed in administrative positions and less frequently in managerial positions, less often promoted and sent on vocational training etc. The report also states that Poland continues to fail to provide the tools necessary to monitor the level of gender-related pay differentiation, as well as to take objective measures, allowing to determine the influence of various factors on the level of remuneration. Out of 31 of the public sector entities that were subjected to the analysis, only 5 had a job evaluation system in place.

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<sup>286</sup> The statistical difference between the remuneration of women and men in the public sector is a fact. Men's basic remuneration is 10-82 % higher than that of women. The difference is unfavourable to women in as many as 80 % of the cases, amongst 109 kinds of positions in Ministries, central and *voivodeship* offices, entities of the local self-government and state-owned and community-owned companies. The differences in remuneration in case of men earning more than woman even amount to up to 30 %, and for women earning more than men it is only 15 %. Men also tend to have higher overall remuneration, which is the basic pay with all supplements: for years of service, functional, special, task-related and civil servants' supplements (in 73 % of the examined positions). Significant differences in pay (from a few to more than 10 %) in favour of men exist in 43 % of the examined positions. For example in ministries, male comparators earn more than 6 % more than female comparators. In central offices, where specialised education is crucial in order to be employed in specialised units, men in the position of specialist earn 15 % more than women in the position of specialists, employed in the administrative units, mainly due to their education. Men can also count on higher bonuses from the employers. They receive more awards which additionally are of higher value. In community companies this difference amounts to 18 %, in ministries 7 % and in organs of local self-government 2 %. Only in *voivodeship* offices women receive awards which are higher, by 10 %. Men are also much more frequently entitled to additional benefits, such as a company phone, laptop, fuel expenses, and education. Only in local self-government more often use company laptops (55 %), and take advantage of education or studies (76 %).

**PORTUGAL – Maria do Rosário Palma Ramalho****Legislative developments*****National Gender Equality Programme***

Following previous programmes, the Government has approved the 5th National Programme on Gender Equality, Citizenship and Non-Discrimination (V PNI), covering the period between 2014 and 2017.<sup>287</sup> This Programme aims to reinforce the mainstreaming principle as regards gender, including the dimensions of sexual orientation and gender assignment in all government policies and, at the same time, to reinforce action in the fields of education, health and the labour market.

The National Agency for Citizenship and Gender Equality (CIG) is responsible for the coordination of the Programme (including a specific cooperation with the NGOs in the area), and invites all Ministries, as well as central and local public administration services to integrate the gender dimension into their regulations, policies and actions.

As regards the reinforced action in the areas mentioned above, the following measures have been announced:

- for education: specific actions on gender equality for young people, the introduction of the subject of gender equality as a subject of study in primary and secondary schools, and specific professional training in this area for teachers;
- for health: measures like studies on disease patterns by sex, and the introduction of a gender dimension in health programmes related to sexually transmitted diseases;
- for the labour market: measures designed to promote a more balanced reconciliation between professional and family life by men and women, measures to reinforce the practical implementation of gender equality plans in public and private companies and in collective agreements, and the social responsibility of companies, and measures intended to promote feminine entrepreneurship; and
- for sexual orientation and gender assignment: information campaigns on the subject and an assessment of the practical implementation of the international and national legal provisions in this area.

***National Programme on Gender and Domestic Violence***

The Government has also approved the 5th National Programme against Domestic Violence and Violence against Women (V PNPCVDG) for the period between 2014 and 2017.<sup>288</sup>

When compared to the previous version, this Programme enlarges its field, because it is extended not only to address domestic violence but also other forms of violence against women explicitly linked to gender discrimination (e.g. genital mutilation and sexual aggression outside the family context).

***Miscellaneous: Gender equality in practice: the persistence of the salary gap between men and women***

Despite the developments in gender equality law and the high level of protection granted to working women in the area of gender equality, in practice the situation of women as regards employment conditions, including the core issue of the salary gap, has not seen significant progress.

A recent study performed by the CITE – the National Agency for Gender Equality in Employment – has concluded that the wage gap between men and women has risen to 18 % (when considering the remuneration tables only), going up to 20.9 % (when considering earning capacity), in favour of men for the same work or work of equal value. This study also concludes that the wage gap increases in highly qualified jobs, and that discrimination due to

<sup>287</sup> Council of Ministers Resolution No. 103/2013, of 31 December 2013, [www.dre.pt](http://www.dre.pt), accessed 31 December 2013.

<sup>288</sup> Council of Ministers Resolution No. 102/2013, of 31 December 2013, [www.dre.pt](http://www.dre.pt), accessed 31 December 2013.

the segregation of the labour market is also noticeable, since predominantly feminine professions are less valued than predominantly masculine professions. Finally, this survey indicates that the number of leaves of absence taken by women is twice as high as those taken by men, and the reason indicated for the absence of women is the need to assist family members while men indicate other personal reasons for their absence, which indicates that care responsibilities are still predominantly assumed by the women.<sup>289</sup>

## ROMANIA – Iustina Ionescu

### Policy developments

The resources and political significance awarded to equal opportunities for women and men have severely diminished in recent years after Romania's joining the European Union. The adoption of the gender equality law, along with the Anti-Discrimination Law was considered as a formal requirement to transpose the *acquis communautaire* rather than as a necessity to address important issues in Romanian society. Shortly after the accession to the European Union, the state initiatives in the field of promoting equal opportunities for women and men diminished. A good example is the status of the institution mandated to address this issue in Romania, the National Agency for Equal Opportunities (*Agenția Națională pentru Egalitate de Șanse, ANES*); after a short life, ANES was one of the first institutions to be closed down because of the economic crisis.

The ANES was established in 2005 as an agency under the control of the Ministry of Labour.<sup>290</sup> In July 2010, it was closed down due to budget cuts.<sup>291</sup> The Government assigned part of its competences and staff to a newly created department within the Ministry of Labour, Family and Social Protection: the Department for Equal Opportunities between Women and Men ( *Direcția Egalitate de Șanse între Femei și Bărbați, DESFB*).<sup>292</sup> In September 2013, the Government closed down DESFB and assigned its competences to the Division on Equal Opportunities between Women and Men of the Department on Occupation and Equal Opportunities within the Ministry of Labour.<sup>293</sup>

The continuous downsizing (and downgrading) mentioned above implies serious regress in the budget, personnel, and mandate of the assigned institution to address equal opportunities on the ground of sex in Romania. First, the mandate of the former ANES was not completely transferred to the new structure. For example, the Division on Equal Opportunities between Women and Men is no longer legally mandated to represent victims of sex discrimination in court, draft plans for research and analysis in the field of equal opportunities and equal treatment between men and women, train public officials and other

<sup>289</sup> CITE study, mentioned at: [www.cite.pt](http://www.cite.pt), accessed 6 March 2014. At the time of writing, even though this study was officially presented, it has not yet been published.

<sup>290</sup> Government Decision No. 412/2005 on the organisation and functioning of the Ministry of Labour, Social Solidarity and Family, published in the Official Journal, No. 427 of 20 May 2005, Annex 2.A.I.4.

<sup>291</sup> Government Emergency Ordinance 68/2010 (*Ordonanța de Urgență privind unele măsuri de reorganizare a Ministerului Muncii, Familiei și Protecției Sociale și a activității instituțiilor aflate în subordinea, în coordonarea sau sub autoritatea sa*), published in Official Journal, Part I, No. 446/1.VII.2010, Art. 2(1).

<sup>292</sup> Government Decision No. 728/2010 (*Hotărârea Guvernului nr.728/2010 pentru modificarea și completarea Hotărârii Guvernului nr.11 din 2009 privind organizarea și funcționarea Ministerului Muncii, Familiei și Protecției Sociale*).

<sup>293</sup> Emergency Government Ordinance No. 77/2013 regarding the adoption of measures for ensuring the functioning of the local administration, the number of positions and the diminution of expenses of the public institutions and public authorities placed under the decision, authority or coordination of the Government (*Ordonanța de Urgență a Guvernului nr.77/2013 pentru stabilirea unor măsuri privind asigurarea funcționalității administrației publice locale, a numărului de posturi și reducerea cheltuielilor la instituțiile și autoritățile publice din subordinea, sub autoritatea sau în coordonarea Guvernului*), published in Official Journal No. 393 of 29 June 2013 and Government Decision No. 517/2013 regarding the amendment of certain laws in the field of labour, family, social protection and the elderly (*Hotărârea Guvernului nr.517/2013 pentru modificarea unor acte normative în domeniul muncii, familiei, protecției sociale și persoanelor vârstnice*), published in Official Journal No. 488 of 2 August 2013.

employees, or coordinate the promotion of equal opportunities and equal treatment between men and women at the local level. Second, it is doubtful whether the resources and the power of a division will be able to ensure the implementation of the same mandate as an agency or even a department, especially with regard to the adoption and implementation of the National Strategy for Equal Opportunities between Women and Men, and its general action plan. Third, although responsible for drafting Romania's reports to the UN Committee on the Elimination of Discrimination against Women, the Division on Equal Opportunities between Women and Men is not a member of the delegation of Romania reporting to the UN CEDAW Committee.

### Case law of national courts

In March 2013, a first instance court in Bucharest found discrimination on the ground of HIV status and ordered the payment of EUR 10 000 in compensation for moral damages in a case regarding access to maternal healthcare of a woman living with HIV.<sup>294</sup>

Madam 'X' (her identity remained confidential during the procedures) complained that for eight days she was refused hospitalisation for a caesarean section by the head of the Obstetrics and Gynaecology Department of a public hospital in Bucharest, because she was HIV positive. She had previously been recommended to give birth by Caesarean section to prevent mother-to-child HIV transmission. In Civil Court, the woman complained against the hospital and the head of department for direct discrimination on the grounds of sex and her HIV status in access to public services, and for the violation of personal dignity.<sup>295</sup> The defence argued that the refusal was because there was no special equipment available to protect against transmissions between HIV positive women and staff in the maternity ward. They specifically referred to the lack of surgical gloves, protection masks, sterile fields, etc. Another justification claimed there was not enough room and equipment available in the Neonatology Department to accommodate a child who was potentially HIV infected.

The Civil Court found the healthcare unit responsible for failing to treat persons living with HIV equally, which includes taking special measures to address their specific health needs (such as providing a caesarean section at 38 weeks of pregnancy). The Court also found the hospital accountable for the decisions and behaviour of one of its heads of department (one of its governing bodies) and for not taking all necessary measures to prevent discrimination in such cases – for example, not having the necessary supplies for protecting staff from HIV and other infections transmission.

The case is also noteworthy for the level of civil compensation for non-pecuniary damages awarded by the Court, given that the levels of civil compensation for fundamental rights breaches in Romania are generally low. The Court stated that in this case the non-pecuniary damages are to cover the intense mental suffering experienced by the claimant. Specifically, the Court found that the claimant was refused a caesarean section and for eight days she did not know how her situation would develop, her dignity had been violated because she had to humiliate herself and beg the doctor to admit her to hospital. Moreover, the Court stated that all this time the claimant legitimately worried that the child would be infected due to the hospital not taking the preventive measures to prevent mother-to-child HIV transmission.

### Equality body decisions/opinions

On 4 December 2013, the national equality body, the *Consiliul Național pentru Combaterea Discriminării* (CNCD), issued a decision imposing a sanction for indirect discrimination on a private company that dismissed 11 persons, out of whom 9 women, after conducting an

<sup>294</sup> First Instance Court of the Second District Bucharest (*Judecătoria Sectorului 2 București*), civil judgment of 27 March 2013. The decision was communicated in October 2013.

<sup>295</sup> Government Ordinance No. 137/2000 regarding the prevention and sanctioning of all forms of discrimination (*Ordonanța Guvernului nr.137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), republished in Official Journal No. 99 of 8 February 2007, Articles 2(1), 2(5), 10(b) and 15.

evaluation on an equal number of women and men – 18 women and 18 men. According to the CNCD, the company did not succeed in proving that the evaluation of the 36 employees considered for dismissal due to reorganisation had applied objective criteria. CNCD sanctioned the private company imposing an administrative fine of approximately EUR 1 800 (RON 8 000).<sup>296</sup> This is one of the few decisions of indirect discrimination found by the CNCD in recent years.<sup>297</sup> Indirect discrimination is a topic that does not appear often in case law in Romania because it is harder to prove and less common.

The reasoning in this decision shows a better understanding of what constitutes indirect discrimination compared to previous cases, where only intention was considered as an element to differentiate between direct and indirect discrimination.<sup>298</sup> The CNCD followed two steps in its examination. First, it compared the number of women proposed for evaluation and the number of women dismissed with the number of men in the same situation. Specifically, the CNCD found that the number of women and men proposed for evaluation was equal (18 women and 18 men), but afterwards the number of women dismissed was disproportionate compared to men (9 women and 2 men – where one of the two men asked for termination of his contract). Second, the CNCD looked at the evaluations that the employer argued to have been the basis of the collective dismissal. The CNCD discovered that the employer could not show what the criteria for evaluation were or that they were objective criteria. Therefore, the CNCD accepted the arguments advanced by the complainant that the criteria were subjective. She argued that the employer preferred men regardless of their professional competence because the employer thought that ‘in oil extraction industry, women are not suitable employees’. Consequently, the CNCD found that the ‘preponderant dismissal of women based on subjective values’ represented indirect discrimination and was in breach of the principle of equality in employment, in violation of Articles 2(3) and 6(a) of the Government Ordinance No. 137/2000 regarding the prevention and sanctioning of all forms of discrimination.<sup>299</sup>

This decision is significant for all employers because it stresses the importance of having objective criteria and procedures for the evaluation of employees. This is a general obligation of employers prescribed in several articles of the Labour Code.<sup>300</sup> Such measures are not only good human resources management, but also a means for employers to protect themselves in a discrimination charge.

## SLOVAKIA – Zuzana Magurová

### Policy developments

#### *Nationwide Strategy to Protect and Support Human Rights in the Slovak Republic*

A plan to develop and adopt a Nationwide Strategy to Protect and Support Human Rights in the Slovak Republic (the Strategy) was initiated by the former Government in November 2010. The main objective of the Strategy would be ‘comprehensive analysis and revision of the policy in the area of human rights and improvement of law enforcement and more effective prevention of any form of discrimination’. The deadline for submission of the strategy was initially set at 30 September 2012.

However, a change of Government occurred in the meantime and works on the strategy were resumed as late as the spring of 2013. In June 2013 the drafting team prepared a text which was published before finalisation so that participants in public discussions, so-called

<sup>296</sup> CNCD, Decision of 4 December 2013.

<sup>297</sup> CNCD, *2012 Annual Report* and *2011 Annual Report*.

<sup>298</sup> CNCD, Decision No. 240 of 23 November 2010.

<sup>299</sup> Government Ordinance No.137/2000 regarding the prevention and sanctioning of all forms of discrimination (*Ordonanța Guvernului nr.137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), republished in Official Journal No. 99 of 8 February 2007.

<sup>300</sup> Law No. 53/2003 regarding the Labour Code (*Codul muncii*), published in Official Journal No. 72 of 5 February 2003, Articles 17(3).e, 40(1).f, 61.d and 63(2).



workshops, could familiarise themselves with it.<sup>301</sup> The public was mainly represented in these workshops by representatives of ‘pro-life’, Christian conservative and national societies who urgently requested the removal of all elements of ‘gender ideology’ and ‘LGBTI ideology’ from the text. The prepared Strategy should be submitted to Government for approval in June 2014. According to the Minister of Foreign Affairs, who as Chairman of the Council for Human Rights, National Minorities and Gender Equality is responsible for the Strategy’s final version, this postponement will allow more time for an expert and public dialogue which is of significance for this hotly debated document.

In reaction to the attacks against the whole idea of the Strategy from some Christian societies and the Conference of Bishops, as well as in reaction to the slowdown of the preparation process of the Strategy by the Government, the coalition of human rights NGOs issued an opinion entitled *For Slovakia to become a country for all* in October 2013.<sup>302</sup> NGOs emphasised the importance of this Strategy being adopted. According to this opinion ‘We need a strategy that will clarify the mutual conditionality of the principles of democracy, the legal state and respect for human rights, a strategy that will unambiguously determine the framework of protection of all vulnerable groups in society, a document that will identify obstacles to better fulfilment and enforcement of human rights and will create political commitment determining the instruments, means and ways to improve the current situation’ (quote).

### ***National Action Plan for Prevention and Elimination of Violence against Women***

On 18 December 2013 the Government approved the third National Action Plan for Prevention and Elimination of Violence against Women 2014 – 2019 (hereinafter ‘NAP’) by Resolution No. 730. The explanatory memorandum states that ‘in spite of the interim fulfilment of tasks resulting from preceding action plans and the undisputable progress made in the elimination of violence against women in recent years it must still be stated that Slovakia lacks a systematic approach and coordinated provision of help to women experiencing violence as well as systematic primary prevention of violence. The purpose of the submitted NAP is therefore to develop, implement and coordinate a comprehensive national policy for the area of prevention and elimination of violence against women’.

## **Legislative developments**

### ***Act on Assistance Provided to Those in Need***

The Act on the Assistance Provided to Those in Need (*Zákon o hmotnej núdzi*) was adopted in November 2013.<sup>303</sup> This Act provides that the Government will only pay basic benefits to cover material needs (EUR 61.60 per month) to adult persons in need who do 32 hours of voluntary work or work as part of small communal services (if the community offers such opportunity) per month. The recipients who refuse this offer will lose the entitlement to activation contributions and the basic benefits to cover material needs (the family will only receive housing allowance and children’s allowance). The President vetoed this Act, reasoning that it was contrary to the Constitution which includes the right to state assistance for those in material need and that the Act violated the principle of equality between those who had been offered to carry out community work and others. However, Parliament did not accept the objections of the President and approved the Act in its initial wording. In January 2014 the Ombudsman lodged a complaint with the Constitutional Court, reasoning that the Act created conditions of direct and indirect discrimination. It directly discriminated against persons in material need who, through no fault of their own, were unable to participate in activation works. It indirectly discriminated against the target group which, regarding the

<sup>301</sup> Text available at: <http://www.radavladyp.gov.sk/celostatna-strategia-ochrany-a-podpory-ludskych-prav-v-sr/>, accessed 26 March 2014.

<sup>302</sup> Opinion available at: <http://diskriminacia.sk/aby-slovensko-bolo-krajinou-pre-vsetkych-vyhlasenie-mvo-k-situacii-v-oblasti-ludskych-prav/>, accessed 26 March 2014.

<sup>303</sup> Act available at: [http://www.upsvar.sk/ga/oznamy/pomoc-v-hmotnej-nudzi-novy-zakon-ucinný-od-1.-januara-2014.html?page\\_id=363029](http://www.upsvar.sk/ga/oznamy/pomoc-v-hmotnej-nudzi-novy-zakon-ucinný-od-1.-januara-2014.html?page_id=363029), accessed 26 March 2014.

measures envisaged by the Act, comprises recipients of benefits from marginalised Roma communities. In the expert's opinion, in particular Roma women will be affected by this Act because women are more strongly threatened by unemployment than men.

### Case law of national courts

#### *Findings of the Constitutional Court regarding Act No. 62/2012*

Recently the Constitutional Court issued its findings on the motion of the general prosecutor's first secretary to review the constitutionality of Act No. 62/2012 Coll. on minimum wages for nurses and birth assistants and amending and supplementing Act No. 553/2003 Coll. on remuneration of performance of work in the public sector.<sup>304</sup> The General Prosecutor's Office submitted the proposal to the Constitutional Court in response to an effort by the Slovak Doctor's Chamber and Association of Private Physicians to strike down the law that established higher minimum salaries for nurses and midwives beginning in April 2012.<sup>305</sup> The Prosecutor's Office argued that the law was unconstitutional and discriminatory because it only covered certain healthcare workers, nurses and midwives. Moreover the Prosecutor's Office stated that there was a lack of authorised funds available to pay the higher minimum salaries.

The disputed Act was adopted in February 2012 in reaction to a petition of nurses and midwives.<sup>306</sup> In 2011, nurses and midwives campaigned for an increase in their salaries leading to new pay scales being agreed by the Government. In February 2012, the Parliament adopted the Act on minimum wage claims for nurses and midwives. The Act was prepared by the Ministry of Healthcare in cooperation with the Chamber of Nurses and Midwives, whose recommendations were incorporated into the Act.

The disputed Act singled out two groups of persons: nurses and midwives. According to the Constitutional Court, discrimination would take place if different groups of persons finding themselves in the same or comparable situation were treated differently on the basis of a qualified criterion (prohibited reason), although no objective or reasonable ground existed for such different treatment. For the establishment of discrimination it was necessary, first of all, to determine the comparator, for example a non-doctor employee. However, the Constitutional Court expressed the doubt whether nurses could be compared to non-doctor employees of healthcare facilities (male and female), in view of the traditionally specific position of nurses (only female).

In addition, the Constitutional Court pointed out – beyond the case at issue – that it had taken note of the gender context of the disputed Act, which was reflected in the names of professions whose wages had been adjusted – nurses and midwives. However it believed that the disputed Act did not violate the constitutional principle of equality, but quite the contrary, especially in relation to the wage level of some doctors. The Act does not discriminate against men, either as a sex or as a gender.

The Constitutional Court stated that in view of the objection of discrimination of non-doctor employees the disputed provision of the Act is in accordance with the Constitution. It is not even constitutionally disturbing in the broader sense of the perceived principle of equality, specifically in relation to doctors. In its findings the Constitutional Court rejected the

<sup>304</sup> *Zákon o minimálnych mzdových nárokoch sestier a pôrodných asistentiek, ktorým sa dopĺňa zákon o odmeňovaní niektorých zamestnancov pri výkone práce vo verejnom záujme*, PLÚS 13/2012-90 of 19 June 2013.

<sup>305</sup> The President of the Association of Private Physicians maintained that only about 25 % of medical polyclinics would be able to afford to increase the salaries in accordance with the law.

<sup>306</sup> Just before the adoption of the disputed Act, in December 2011, following the strike of doctors (organised by the Slovak Doctor's Chamber), Parliament relatively quickly adopted Act No. 512/2011 Coll. amending Act No. 578/2004 Coll. on providers of healthcare services, health workers and professional organisations in the health sector, which determines the minimum wages for an exactly specified group of workers – doctors and dentists (employees working agreed weekly working hours in a healthcare facility, who have the qualifications for performance of professional work and who carry out professional work within the scope of the relevant qualification). Nobody objected that this Act was in contradiction with the Constitution of the Slovak Republic.

motion concerning the discrimination, but decided that the disputed Act is not in compliance with Article 20 Section 1<sup>307</sup> in conjunction with Article 1 Section 1<sup>308</sup> of the Constitution of the Slovak Republic.

## Miscellaneous

### *Ratification of the Istanbul Convention*

At the end of 2013 the Slovak Republic planned to finalise the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). In October 2013, during the interministerial amendment procedure, the representatives of the public, especially members of Christian organisations and societies, raised fundamental collective objections against the alleged introduction of 'gender ideology', 'LGBTI ideology' and sexual education at schools, which caused the Ministry of Justice to *de facto* suspend the ratification process of the Convention.

The Minister of Labour responded to one of these objections in a letter, stressing that the Ministry of Labour, Social Affairs and Family was monitoring the issue of violence against women and supported the adoption of the Istanbul Convention on the part of the Slovak Republic in 2014.<sup>309</sup> The Minister himself regarded this Convention as a unique instrument in the provision of help to women as part of the formidable effort of our society to eliminate violence against women and domestic violence. The Ministry of Labour, Social Affairs and Family of the Slovak Republic, being the body to monitor the issue of violence against women, insisted on the ratification of the Convention, because it was clearly supported by the Council of the Government for Human Rights and the Committee for Gender Equality, and because this requirement also results from the National Action Plan for Prevention and Elimination of Violence Against Women.

## SLOVENIA – Tanja Koderman Sever

## Policy developments

### *Activities of Ministry of Labour, Family and Social Affairs*

The Ministry of Labour, Family and Social Affairs has prepared a new draft of the Act on Equal Opportunities for Women and Men.<sup>310</sup> The draft Act represents a fundamental framework for the policy of equal treatment of men and women. It includes a clearer definition of discrimination on grounds of sex, rules on penalties in the event of a breach of the prohibition of discrimination, and prohibits sexual harassment, harassment, and discrimination based on sex. Furthermore, since the Office for Equal Opportunities was abolished in March 2012 due to budget cuts, the draft Act provides that it is no longer a competent body in this area.<sup>311</sup> The area of equal opportunities was transferred to the Ministry of Labour, Family and Social Affairs, which is and will be, according to the draft, the body responsible for equality between women and men.

At the beginning of September 2013 the Minister of Labour, Family, Social Affairs and Equal Opportunities had a meeting with Slovenian mayors. This was their sixth work meeting. As pointed out by the Minister, one of the aims of these meetings is to encourage

<sup>307</sup> Article 20(1): Everyone has the right to own property. The ownership right of all owners has the same legal content and protection. Inheritance is guaranteed.

<sup>308</sup> Article (1): The Slovak Republic is a sovereign, democratic State governed by the rule of law. It is not linked to any ideology or religion.

<sup>309</sup> See: <http://fvo.sk/wp/wp-content/uploads/2014/03/OdpovedIstanbulRichter.pdf>, accessed 26 March 2014.

<sup>310</sup> Draft available at: [http://www.mddsz.gov.si/si/zakonodaja\\_in\\_dokumenti/predpisi\\_v\\_pripravi/](http://www.mddsz.gov.si/si/zakonodaja_in_dokumenti/predpisi_v_pripravi/), accessed 25 March 2014.

<sup>311</sup> For further information on the effect of the financial crisis in Slovenia, see European Network of Legal Experts In the Field of Gender Equality, T. Koderman Sever 'Slovenia' in *Law Review 2/2012* pp. 137-139, European Commission 2012, available at: [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelr\\_2012-2\\_web\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2012-2_web_final_en.pdf), accessed 7 April 2014.

women to enter the world of politics and economy because women are still underrepresented in management bodies and government bodies.<sup>312</sup>

### ***Government activities***

The Government has approved an amended draft of the Parental Protection and Family Benefits Act.<sup>313</sup> It includes several proposals and, above all, the deletion of the measure of 30 days of non-transferable parental leave for fathers. The draft establishes a new system of leaves regarding childbirth and introduces the terms 'maternity leave' and 'parental leave'. In addition, it aims to enhance equal opportunities for men and women in the labour market by encouraging more fathers to take paternity and parental leave. The main reason for its adoption is the implementation of the EU *acquis* in Slovenian legislation. According to the Ministry, parental care and parental leave play an important role in reducing inequalities between women and men in the labour market since they allow women to remain active in the labour market after giving birth. In addition, the Ministry aims to promote a more equal distribution of obligations and care responsibilities between women and men.

### ***Activities of Commission for Petitions, Human Rights and Equal Opportunities***

Members of the Parliamentary Commission for Petitions, Human Rights and Equal Opportunities have accepted the Ombudsman's recommendations, which Parliament will discuss when reading the Annual Report for the year 2012. One of their recommendations requires the Government to suggest legislative changes after examining the current problems in the judicial system. According to the Ombudsman, the rule of law is currently being tested due to the judicial backlogs and the quality of the judicial adjudication.<sup>314</sup>

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

Although gender discrimination is not so rare in Slovenia, victims of discrimination rarely decide to bring a gender equality case before court. This is why there has been no case law worth mentioning in the area of gender equality in the past six months.

One of the reasons may lie in the existing system of legal protection against discrimination, which is not as effective as it should be. Legal remedies mainly exist on paper and are not effective, user-friendly or dissuasive. Furthermore, assistance to victims of discrimination is not independent due to the abolition of the Office for Equal Opportunities, which was an independent specialised body for protection against discrimination and non-existence of the independent Advocate of the Principle of Equality who would have some competences for the investigation in the cases of the violation of the prohibition against discrimination. Namely, the Advocate of the Principle of Equality works as one of the employees at the Ministry of Labour, Family and Social Affairs. There is no special budget for the Advocate's work, activities, or projects. The Ministry also covers the salary of the Advocate.

### **Miscellaneous**

#### ***Press release of National Statistical Office***

According to the data of the National Statistical Office on structural statistics on earnings,<sup>315</sup> women in Slovenia earn less than men, although they are better educated. The average gross earnings of women amounted to 94.9 % of the average monthly gross earnings of their male colleagues; the difference on average was therefore EUR 84. The most important difference was identified in the area of healthcare and social care.

<sup>312</sup> [http://www.mddsz.gov.si/nc/si/medijsko\\_sredisce/novica/article/1966/7211/](http://www.mddsz.gov.si/nc/si/medijsko_sredisce/novica/article/1966/7211/), accessed 25 March 2014.

<sup>313</sup> [http://www.mddsz.gov.si/si/zakonodaja\\_in\\_dokumenti/predpisi\\_v\\_pripravi/](http://www.mddsz.gov.si/si/zakonodaja_in_dokumenti/predpisi_v_pripravi/), accessed 25 March 2014.

<sup>314</sup> <http://www.dzrs.si/wps/portal/Home/deloDZ/seje/evidenca?mandat=VI&type=pmagdt&uid=A42862C1F840FFDBC1257BFD00490505>, accessed 25 March 2014.

<sup>315</sup> Statistics available at: <http://www.iusinfo.si/DnevneVsebine/Novice.aspx?id=104557>, accessed 25 March 2014.

***NGO draws attention to economic violence as cause of gender inequality***

The legal information centre for NGOs Slovenia (hereinafter LIC) has prepared a project<sup>316</sup> entitled 'Have you already paid this month's maintenance?' which aims to draw attention to economic violence as a cause of gender inequality.<sup>317</sup> The LIC established that the amount of maintenance and its non-payment have a negative impact on women's position in society. Since in more than 90 % of cases fathers are the debtors, mothers are often forced to find additional work and therefore do not have time to concentrate on their careers, additional education or hobbies. Thus, the amount of maintenance or fathers' failure to pay have a negative impact on the position of women in society.

***Conference on Gender Equality***

In January 2014, the Ministry of Labour, Family and Social Affairs organised a conference entitled 'Equal Opportunities pays off' in the scope of the project 'Let's balance the powers between the sexes'.<sup>318</sup> At the conference, the Slovene Prime Minister, who is a woman, pointed out that key challenges remain in the areas of balanced representation in decision-making positions in politics and economics, segregation in education and employment and reconciliation between work, family and private life. The gender equality perspective shall therefore be incorporated in all policies at all levels. In addition, she pointed out that this is particularly important in times of economic crisis since austerity measures may affect women more acutely than men.

***Project 'Include All'***

The Managers' Association of Slovenia, the most prominent managers' association in Slovenia, has pointed out the importance of balanced representation of women and men in decision-making processes in the economy. Following some international research, the Director stated that companies with more balanced representation of women in leading positions are more successful. Together with the Ministry of Labour, Family and Social Affairs and the Commission for Prevention of Corruption they are running a project entitled 'Include All', whose aim is to emphasise the importance of gender-balanced representation in decision-making processes in the economy.<sup>319</sup>

**SPAIN – María Amparo Ballester Pastor****Policy developments*****Draft law for the protection of the life of the unborn child and of the rights of the pregnant woman***

Law 2/2010 of 3 March 2010 on sexual and reproductive health and voluntary interruption of pregnancy<sup>320</sup> currently regulates the possibility of voluntary interruption of a pregnancy. According to this law the mother can freely induce abortion during the first fourteen weeks of pregnancy. On 20 December 2013, the Spanish Council of Ministers approved a draft law called 'for the protection of the life of the unborn child'.<sup>321</sup> The text has not yet entered into force because it needs the approval of Parliament, but is expected to continue to move forward since the party in government holds a majority in Parliament. The project has raised

<sup>316</sup> [http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti\\_pdf/enake\\_moznosti/NVO2013Pic.pdf](http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti_pdf/enake_moznosti/NVO2013Pic.pdf), accessed 25 March 2014.

<sup>317</sup> Reported at: <http://www.iusinfo.si/DnevneVsebine/Novice.aspx?id=106225>, accessed 25 March 2014.

<sup>318</sup> [http://www.mddsz.gov.si/nc/si/medijsko\\_sredisce/novica/article/1966/7329/](http://www.mddsz.gov.si/nc/si/medijsko_sredisce/novica/article/1966/7329/), accessed 25 March 2014.

<sup>319</sup> <http://www.iusinfo.si/DnevneVsebine/Novice.aspx?id=110737>, accessed 25 March 2014.

<sup>320</sup> [http://noticias.juridicas.com/base\\_datos/Admin/lo2-2010.t2.html#a14](http://noticias.juridicas.com/base_datos/Admin/lo2-2010.t2.html#a14), accessed 24 February 2014.

<sup>321</sup> Resolution of the Spanish Council of Ministers of 20 December 2013 that approves the Draft 'for the protection of the life of the unborn child and of the rights of the pregnant woman', <http://www.lamoncloa.gob.es/ConsejodeMinistros/Enlaces/201213EnlaceAborto.htm>, accessed 24 February 2014.



numerous negative reactions.<sup>322</sup> It has been pointed out that the new legislation could encourage clandestine abortions. It could also lead to women being forced to travel abroad for termination ('abortion tourism') or to risk their health in illegal clinics. It has also been noted that the approval of the new law would be a setback in the rights of women, given that the interruption of pregnancy would not be configured as a woman's right.

The main characteristics of the new legislation, if the current draft adopted by the Council of Ministers is approved, would be the following: (i) in the case of rape the woman would be able to interrupt her pregnancy in the first twelve weeks; (ii) the woman would be able to interrupt her pregnancy until week 22 if serious danger exists for her life or for her physical or mental health; and (iii) there would be no possibility for voluntary interruption of pregnancy in cases other than the two described above, which means that there would be no right to abortion in the case of foetal malformations, nor even in case of limited possibilities for the baby's survival. In this case the only possibility of voluntary interruption of the pregnancy would be to prove that the foetal malformation would endanger the mother's mental health.

## Legislative developments

### *New regulation for part-time work*

Several important modifications in the legal treatment given to part-time work have taken place recently in Spain. The last legal modification regarding part-time work occurred by means of the Royal Legislative Decree 16/2013, of 20 December 2013.<sup>323</sup> The changes following the new 2013 legislation in relation to part-time work are the following:

1. The possibility of general overtime for part-time workers that had been introduced by the 2012 legal reform disappears, and instead the possibility of 'voluntary' supplementary hours is allowed. The new 'voluntary' supplementary hours are more or less the same as the general overtime established by the 2012 legal reform, so part-time workers are just as much at the disposal of the employer as they were before.
2. The ordinary supplementary hours can reach a maximum of 30 % of the ordinary working time of the part-time worker. Before the 2013 law, the maximum amount of supplementary hours was 15 %. The percentage can even be increased to 60 % by collective agreement.
3. The part-time worker must be notified three days before the actual time when the supplementary hours will have to be worked. Before the 2013 law the notification had to be made at least seven days in advance. Under the 2013 legislation collective agreements will not be able to increase the legal time of forewarning, as was allowed before.
4. The new 2013 legislation has also removed the obligation to maintain a preference for part-time (previously full-time) workers to return to full-time work should a suitable vacancy arise. It has also eliminated the right of any part-time worker with at least three years of seniority to occupy a full-time job.

The new legislation has potentially detrimental effects. The high availability required of part-time workers may prevent workers who have to take care of dependants from entering the workforce. In addition, labour conditions of part-time workers have deteriorated with the new legislation. The differences between part-time workers' conditions and full-time workers' conditions have increased, which may indicate indirect discrimination on grounds of sex. Also, legislation before the 2013 reform established the preference of (previously full-time) part-time workers to occupy the available full-time vacancies. This preference has disappeared, so the situation of part-time workers (mostly women) could gradually worsen, making it increasingly difficult to promote part-time workers in a company. This could have a negative effect on the wage gap.

<sup>322</sup> <http://www.theguardian.com/world/2013/dec/18/spain-reform-abortion-fury>, accessed 24 February 2014.

<sup>323</sup> <http://www.boe.es/boe/dias/2013/08/03/pdfs/BOE-A-2013-8556.pdf>, accessed 25 February 2014.



## Case law of national courts

A long time ago the Constitutional Court established that a dismissal during pregnancy is automatically null and void if there is no just cause for dismissal, even if the employer has no knowledge of the pregnancy.<sup>324</sup> Later, in April 2011, the Supreme Court ruled that this doctrine of the Constitutional Court did not apply in the event of a termination of the employment contract during the trial period, given that the legal provision which contains the automatic nullity of the termination of employment during pregnancy explicitly refers to the dismissal and, strictly speaking, the termination of employment during the trial period is not a dismissal.<sup>325</sup> Recently, the Constitutional Court has rendered another judgment on the same issue that originally led to the judgment of the Supreme Court in April 2011.<sup>326</sup> In this new case, the Constitutional Court had to decide if the termination of the contract of a pregnant woman during the trial period deserved the same qualification of automatic nullity, regardless of the knowledge of the pregnancy by the employer. The Constitutional Court in its judgment of 2013 ruled in the same way as the Supreme Court did in 2011. The Constitutional Court considered that the protection of automatic nullity afforded by Spanish law only refers to dismissals, not to termination of employment during the trial period. Accordingly, the Constitutional Court established that the termination of employment during the trial period of the labour contract of a pregnant woman will be null and void only when the pregnancy was the determining cause of the termination of employment, for which the knowledge of the pregnancy by the employer will be decisive. The main problem that this interpretation of the Constitutional Court can cause is that the claim of lack of knowledge on the part of the entrepreneur in the cases in which there has been no communication on the part of the pregnant worker about their state, could be virtually incontestable. This could imply a lack of effective protection against the termination of contracts of pregnant women during the trial period, which could be contrary to the Recast Directive.<sup>327</sup>

### SWEDEN – Ann Numhauser-Henning

## Legislative developments

On 1 January 2014 amendments made to the Swedish Parental Benefit Scheme, regulated in the Social Security Code, came into effect.<sup>328</sup> The amendment is mainly aimed at decreasing the length of parental benefit following the moment that the child reaches the age of four. Small children are regarded as more dependent on the care of their parents. Before, all benefit days – 480 in total – could be taken out without any special limitations until the child reached the age of eight. Now, all but 96 days must be taken out before the child reaches the age of four. However, at the same time the limit for taking out these 96 days is extended to the child's 12<sup>th</sup> birthday.

Moreover, on 1 March 2014 the rules in Chapter 16 of the 2010 Social Security Code regarding the monthly general child benefit (*barnbidrag*) were changed so that, as the main rule, when parents have shared custody of a child, 50 % of the benefit is paid out to each of the parents if they have not (unanimously) claimed otherwise. Earlier, the benefit was paid in its entirety to the mother if the parents had shared custody.

<sup>324</sup> Judgment of the Constitutional Court 92/2008 of 21 July 2008, <http://www.tribunalconstitucional.es/fr/jurisprudencia/Pages/Sentencia.aspx?cod=15771>, accessed 4 March 2014.

<sup>325</sup> Judgment of the Supreme Court of 18 April 2011, appeal number 2893/2010 (*recurso* 2893/2010).

<sup>326</sup> Judgment of the Constitutional Court 173/2013 of 10 October 2013, [http://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2013-11684](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-11684), accessed 4 March 2014.

<sup>327</sup> Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

<sup>328</sup> 2010:110.

Parental benefits/child benefits are always important for gender stereotypes and differentials and the reconciliation of work life and family life at societal level.

## Miscellaneous

A Government Inquiry has been initiated with the task to assess the efficiency of the current rules in the Discrimination Act,<sup>329</sup> concerning non-discrimination work with regard to the competences of NGOs and of the Equality Ombudsman. One of its tasks is to analyse the competences of the Equality Ombudsman, to assess the use of current state support for activities at regional and local levels in the area of non-discrimination, to analyse the application of the rule on the reversed burden of proof, and to consider the institutional organisation of non-discrimination work from other perspectives as well. The Inquiry is to present its findings by 13 June 2015.

According to the Equality Ombudsman's 2013 Activity Report the impact of non-discrimination regulation is growing.<sup>330</sup> A total of 1 828 complaints was submitted to the Ombudsman compared to 1 559 in 2012, 591 investigations were opened compared to 84 in 2012 and 800 individuals (employers, etc.) participated in the training opportunities offered compared to 550 in 2012. The number of visits to the Ombudsman's website increased by 12 %. One reason for these developments may be the consolidation of the Equality Ombudsman's Office after a somewhat shaky start in 2009.

## TURKEY – Nurhan Süral

### Policy developments

#### *Training rural security forces to prevent violence on women*

In November 2013, the Turkish Government in cooperation with the EU launched a project called 'Prevention of Domestic Violence against Women' aiming at training 10 000 rural security forces (gendarmerie) on the issue.<sup>331</sup> This co-financed project will be carried out by Turkey's Ministry of Family and Social Policies and Gendarmerie General Command.

#### *Equal treatment of women with headscarves and bareheaded women in the public domain*

Since its foundation Turkey has known a militantly secularist establishment, a group that included the military, high judiciary, high civil bureaucracy and its political extension, CHP (Republican People's Party). The so-called 'Kemalist elites' treat secularism as the bedrock principle of the Republic. For them, democracy can/should be sacrificed from time to time for the sake of secularism equated with westernisation and modernity but never with democracy. Staunch secularists transformed into fundamentalists themselves; and secular fundamentalism is, as Turkey has experienced, as oppressive to liberty as religious fundamentalism. The headscarf issue that has sparked political tension in Turkey for more than thirty years seems to be nearing an amicable end following the weakening of the military/judicial tutelage by reformatory democratisation packages. The democratisation package unveiled on 30 September 2013 envisaged the removal of legal barriers for women with headscarves to take up public posts. Now, women with headscarves may hold public offices. Those who have to wear formal suits (uniforms), military personnel, police officers and judges and prosecutors, are excluded. For the excluded public services, the issue is left to the discretion of these organisations as the headscarf ban is a result of their own internal regulations/practices. On 30 October 2013, the General Directorate of Prison and Detention Houses of the Ministry of Justice issued a statement stating that female employees may wear headscarves without caps

<sup>329</sup> 2008:567.

<sup>330</sup> See: <http://www.do.se/sv/Press/Pressmeddelanden-och-aktuellt/2014/Okat-intresse-att-ta-ansvar-for-diskrimineringsfragorna/>, accessed 16 April 2014.

<sup>331</sup> 'Turkey to train security forces to prevent violence on women', <http://www.aa.com.tr/en/world/253701--a>, accessed 25 November 2013.

in the premises of penal institutions and probation offices.<sup>332</sup> However, when they are outside their institutions they have to wear their caps on their headscarves. The headscarves have to be plain, devoid of designs, one colour, and of the same colour tone with the t-shirt worn inside the uniform.

Opposition parties criticised the package on the grounds that these reforms might open Turkey to the divisive issues, such as Islamic fundamentalism and Kurdish separatism. The democratisation package was received positively by the European Commission in its 16 October 2013 Progress Report.<sup>333</sup>

### ***Political life, participatory politics, and equal representation redefined***

Fourteen years ago, on 3 May 1999, the newly elected deputy of the Fazilet Party, Merve Kavakçı (Virtue Party), arrived in Parliament wearing a headscarf for the first time for her swearing-in (oath of office) ceremony. Merve Kavakçı was jeered and booed out of Parliament by the then Prime Minister Bülent Ecevit and the Kemalist deputies.<sup>334</sup> The Fazilet Party was abolished in June 2001 by the Constitutional Court on the basis of pursuing anti-secular activities; one of the main indicators being the Kavakçı incident.

The government party's (AKP) four women deputies decided to wear headscarves after they made the hajj (pilgrimage to Mecca) in October 2013. On 31 October 2013, they attended Parliament wearing headscarves,<sup>335</sup> breaking the (not legally but emphatically imposed) ban (on 2 November, this number increased to five). The main opposition party (CHP) representing the Kemalist bloc could/did not resist this development.

## **Legislative developments**

### ***Direct and indirect discrimination defined***

The terms 'direct and indirect discrimination' were used but not defined in Turkish legislation. Law no. 6518<sup>336</sup> amending the Law on the Disabled<sup>337</sup> defines these terms with regard to the disabled (Article 63 amending Article 3 of the Law on the Disabled). Another amendment is that in the conduct of services provided in the Law on the Disabled, attempts will be made to prevent disabled females from suffering dual discrimination (Article 64 amending Article 4 of the Law on the Disabled).

### ***Paid leave for family-related reasons***

Article 7 of Law no. 6525<sup>338</sup> amending Article 104 of the Civil Servants Law envisages a paid leave of up to ten days for the civil servant mother or father in case of illness of a child with at least 70 % disability (if the child is married then if the child's spouse is also at least 70 % disabled) or a child with a permanent illness. This will be considered a type of 'excuse leave' (leave for a valid/justified reason) and be used wholly or partially in a period of one year.

### ***Surname of married women***

Article 187 of the Civil Code states: 'Married women shall bear their husband's name. However, they can make a written declaration to the Registrar of Births, Marriages and

<sup>332</sup> <http://www.cte.adalet.gov.tr/>, official website of the General Directorate of Prison and Detention Houses of the Ministry of Justice, accessed 20 November 2013.

<sup>333</sup> *Turkey 2013 Progress Report* accompanying the Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2013-2014 {COM(2013) 700 final}, [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/tr\\_rapport\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/tr_rapport_2013.pdf), accessed 2 November 2013.

<sup>334</sup> R. Peres 'The Day Turkey Stood Still – Merve Kavakçı's Walk into the Turkish Parliament', <http://www.ithacapress.co.uk/review/introduction-day-turkey-stood-still-merve-kavakci%E2%80%99s-walk-turkish-parliament>, accessed 1 November 2013.

<sup>335</sup> 'Four Turkey MPs wear headscarves in parliament', <http://www.bbc.co.uk/news/world-europe-24761548>, accessed 20 November 2013.

<sup>336</sup> Official Gazette 19 February 2014, no. 28918.

<sup>337</sup> Law no. 5378, Official Gazette 07 July 2005, no. 25868.

<sup>338</sup> Official Gazette 27 February 2014, no. 28926.

Deaths on signing the marriage deed, or at the Registry of Births, Marriages and Deaths after the marriage, if they wish to keep their maiden name in front of their surname'. Therefore, married women cannot *only* be known by their maiden name after they marry whereas the married men keep the surname they had before they married.

The fact that married women may maintain their maiden name by using it before their husband's surname was challenged before the European Court of Human Rights (ECtHR) by Ayten Ünal Tekeli,<sup>339</sup> Bahar Leventoğlu Abdülkadiroğlu,<sup>340</sup> Gülizar Tuncer Güneş,<sup>341</sup> and Betül Tanbay Tüten,<sup>342</sup> who wanted to continue using their maiden names following their marriages. The Court decided that the fact that married women could not bear their maiden name alone after they married, whereas married men kept their surname, undoubtedly amounted to a 'difference in treatment' on grounds of sex between persons in an analogous situation and held unanimously that there had been a violation of Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR).

The constitutional reform package introducing, *inter alia*, the right of an individual application to the Constitutional Court following exhaustion of all national legal procedures was adopted through a referendum on 12 September 2010. Subsequently, the new Law on the Organisation and Trial Procedures of the Constitutional Court was introduced.<sup>343</sup> The implementation of its rules on individual applications started on 24 September 2012. An individual application made by Sevim Akat Eşki to be able to use only her maiden surname after she got married was accepted by the Court.<sup>344</sup> The Constitutional Court has ruled that preventing women from using only their maiden name after marriage is a violation of Article 17 of the Turkish Constitution on the personal inviolability and corporeal and psychological existence of the individual. The decision made references to the decisions of the ECtHR and Article 90 of the Turkish Constitution<sup>345</sup> and considered Article 17 within the framework of Articles 8 and 14 of the ECHR.

Now, married women who want to use only their maiden names as their surname have to make individual applications to the lower courts referencing the Constitutional Court decision until Article 187 of the Civil Code is amended. The reason is that the request for annulment of Article 187 of the Civil Code was rejected by the Constitutional Court in March 2011 with a majority decision (8/17).<sup>346</sup> No allegation of unconstitutionality can be made with regard to the same legal provision until ten years elapse after publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits (substance) (Constitution, Article 152/4).

<sup>339</sup> *Ünal Tekeli v. Turkey*, 16 November 2004, application no. 29865/96, [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-1190332-1236514#{"itemid":\["003-1190332-1236514"\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-1190332-1236514#{), accessed 4 March 2014.

<sup>340</sup> *Leventoğlu Abdülkadiroğlu v. Turkey*, 28 August 2013, application no. 7971/07, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119957#{"itemid":\["001-119957"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119957#{), accessed 4 March 2014.

<sup>341</sup> *Tuncer Güneş v. Turkey*, 03 December 2013, application no. 26268/08, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-126133#{"itemid":\["001-126133"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-126133#{), accessed 4 March 2014.

<sup>342</sup> *Tanbay Tüten v. Turkey*, 10 December 2013, application no. 38249/09, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-138892#{"itemid":\["001-138892"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-138892#{), accessed 4 March 2014.

<sup>343</sup> Official Gazette 3 April 2011, no. 27894.

<sup>344</sup> Constitutional Court decision 2013/2187, Official Gazette 07 January 2014, no. 28875.

<sup>345</sup> According to the said article, in the event of a conflict between international treaties on fundamental rights and freedoms and the domestic laws on the same issue, the provisions of international treaties shall prevail.

<sup>346</sup> Constitutional Court decision, E. 2009/85, K. 2011/49, 10 March 2011, Official Gazette 21 October 2011, no. 28091.

## UNITED KINGDOM – Aileen McColgan

### Policy developments

The Criminal Justice and Courts Bill 2013-14,<sup>347</sup> introduced in the House of Commons in February 2014, aims to tighten the scope of judicial review by, *inter alia*, restricting the standing of claimants still further (to those for whom an outcome would or may have been substantially different had the unlawfulness alleged not occurred). This, if passed, may have significant implications for litigation of the Public Sector Equality Duty and public interest cases more generally, and follows upon successive decisions reducing public funding of litigation.

### Legislative developments

As of 6 April 2014 the questionnaire procedure for discrimination claimants (and prospective claimants) will no longer be available. This change, brought about by the Enterprise and Regulatory Reform Act 2013,<sup>348</sup> will apply in relation to acts of discrimination alleged to have taken place after that date. The Order removes an extremely valuable tool in the kit of discrimination claimants which has existed for almost 40 years, and will thereby create yet further hurdles in the path of those who seek to challenge unlawful discrimination. Currently, and since the mid-1970s, potential and actual claimants have been entitled to obtain information from alleged discriminators by means of a prescribed procedure and tribunals and courts have been entitled to draw adverse inferences from alleged discriminators' failure to answer, or to answer satisfactorily. The decision to remove this procedure followed consultation in which 83 % of those responding opposed the then proposal. It remains the case, however, that potential and actual claimants may ask questions and a court or tribunal may draw adverse inferences from a failure to answer, or to answer satisfactorily. In addition, courts and tribunals may order that an alleged discriminator answer questions put by a claimant. The abolition of the procedure may, however, result in an increase in litigation as a result of claimants being less likely to put questions in advance of litigation the answers to which might have resulted in such litigation not being initiated.

The Welfare Benefits Up-rating Order 2014 increased the rates for statutory sick pay and statutory maternity, paternity and adoption pay from 6 April 2014 from GBP 136.78 to GBP 138.18 per week.<sup>349</sup>

### Case law of national courts

In *R (Unison) v Lord Chancellor* the High Court rejected the challenge brought by UNISON (a trade union) regarding the introduction of employment tribunal and Employment Appeal Tribunal (EAT) fees in 29 July 2013.<sup>350</sup> UNISON argued that the fees breached the principles of effectiveness and equivalence, also that their introduction breached the public sector equality duty and amounted to indirect discrimination against minority groups such as women, ethnic minorities and disabled people. The High Court rejected the argument that the fees made it 'virtually impossible, or excessively difficult' to exercise rights conferred by EU law, and that it was more appropriate to 'wait and see' whether UNISON was correct to say that this was the case. Applications to Employment Tribunals appear to have fallen dramatically since the fees were introduced, and the Court indicated that it expected that the

<sup>347</sup> <http://services.parliament.uk/bills/2013-14/criminaljusticeandcourts.html>, accessed 3 April 2014.

<sup>348</sup> Commencement No. 6, Transitional Provisions and Savings, Order 2014 SI 2014/416, which removes Section 138 of the Equality Act 2010.

<sup>349</sup> SI 2014/147.

<sup>350</sup> [2014] EWHC 218 (Admin). See also: European Network of Legal Experts in the Field of Gender Equality, A. McColgan 'United Kingdom' in: *Law Review 2/2013*, pp. 108-110, European Commission 2013, available at: [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelr\\_2013\\_2\\_final\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2013_2_final_web_en.pdf), accessed 10 March 2014.



Lord Chancellor would change the system if this apparent fall proved to be the case, particularly as regards discrimination claims. As regards the principle of equivalence, the Court ruled that the appropriate comparator cases were ordinary breach of contract claims rather than (as UNISON argued) small claims, the costs of the latter being very limited. This being the case, the fees were comparable save that tribunal claimants were (largely) protected from the threat of having to bear the costs of the other side if the claim failed, whereas successful Tribunal Claimants would normally be able to recover the costs of the fees paid from the employer. The Court also accepted that sufficient regard had been given by the Lord Chancellor to the equality implication of the fees and was not satisfied on the available evidence that the fees discriminated against women, black and ethnic minority persons, and/or the disabled (UNISON's argument was that discrimination fees were higher than those in some other categories of case).

In *South Lanarkshire Council v Scottish Information Commissioner*,<sup>351</sup> the Supreme Court ruled that an employer was not entitled to refuse to disclose statistical details relating to male employment and pay to an equal pay activist not employed by the Council. The legal question which arose was whether the applicant had a legitimate interest in obtaining the data and whether its disclosure was 'necessary' to establish whether there had been pay discrimination against women. The Supreme Court ruled that the disclosure of the information, which did not include employees' names, did not breach the Article 8 rights of those involved.

The decisions of the EAT in *Rowstock Ltd v Jessemey* and *Onu v Akwiwu*, which concerned whether or not post-employment victimisation fell within the scope of the Equality Act 2010, were mentioned in a previous edition of this Law Review.<sup>352</sup> The Court of Appeal recently gave its decision in these joined cases, preferring the approach of the EAT in *Onu v Akwiwu* and ruling that the Equality Act 2010 applied to post-employment victimisation despite the wording of the relevant legislative provision, which suggests the opposite.<sup>353</sup>

<sup>351</sup> [2013] UKSC 55 [2013] IRLR 899.

<sup>352</sup> [2013] IRLR 439 and [2013] IRLR 523 respectively. See also: European Network of Legal Experts in the Field of Gender Equality, A. McColgan 'United Kingdom' in: *Law Review 2/2013*, pp. 108-110, European Commission 2013, available at: [http://ec.europa.eu/justice/gender-equality/files/law\\_reviews/egelr\\_2013\\_2\\_final\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2013_2_final_web_en.pdf), accessed 10 March 2014.

<sup>353</sup> [2014] EWCA 185.





# European Gender Equality Law Review



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