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European equality law review

European network of legal experts in
gender equality and non-discrimination

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- Implementation of positive action measures for achieving gender equality in the FYR of Macedonia, Montenegro and Serbia
- Merging mandates of equality bodies and national human rights institutions – a growing trend
- Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies

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Introduction on the state of play

This is the fourth issue of the biannual European equality law review, produced by the European network of legal experts in gender equality and non-discrimination (EELN). This issue provides an overview of legal and policy developments across Europe, and as far as possible reflects the state of affairs from 1 January to 30 June 2016. The aim of the EELN is to provide the European Commission and the general public with independent information regarding gender equality and non-discrimination law, and more specifically the transposition and implementation of the EU equality and non-discrimination directives.

These are tense times for everyone who cares about the future of Europe and the advancement of equality and non-discrimination. So far, 2016 has seen many developments that will surely have an impact on these issues. Notably the already existing risk of confusion between nationality, race and religion is being reinforced in the context of the current security situation after the terrorist attacks in several Member States and other European countries.

In this issue

This law review contains one section relating to the most recent case law of the Court of Justice of the European Union and of the European Court of Human Rights and one section detailing the most recent developments in legislation, case law and policy on the national level,¹ as well as four in-depth analytical articles. In the field of gender equality law, Ulrike Lembke, the Network's German gender equality expert, provides a conceptual analysis. Her article questions the use of sex and gender in EU law, and asks whether tackling sex discrimination actually promotes gender equality. Ivana Krstic, the Network's Serbian expert for both gender equality and non-discrimination, analyses gender equality law in three candidate countries: the Former Yugoslav Republic of Macedonia, Montenegro and Serbia. In the field of non-discrimination, Niall Crowley, consultant and former chief executive officer for the Irish equality body, provides an article examining the phenomenon of merging the mandates of equality bodies and of National Human Rights Institutions, examining the potential consequences of such mergers for non-discrimination and equality issues. The final article is authored by the Network's non-discrimination experts for Hungary, Andras Kadar, and for Romania, Romanița Iordache, together with legal scholar Istvan Haller. It analyses the judicial approaches in Hungary and Romania to hate speech, from the perspective of non-discrimination law and beyond.

Recent developments at the European Level²

The Commission has been actively engaged in the promotion of gender equality. In February 2016, the Commission concluded a public consultation on possible action addressing the challenges of work-life balance faced by working parents and caregivers. Celebrating International Women's day on 8 March 2016, the Commission highlighted its ongoing efforts to combat gender-based discrimination. Věra Jourová, Commissioner for Justice, Consumers and Gender Equality emphasized the importance of mainstreaming gender in all policies. As a means of looking at the progress already made, the 'Report on

1 On the basis of information provided by the national experts, Erin Jackson from Utrecht University drafted the sections regarding gender equality while Isabelle Chopin and Catharina Germaine from the Migration Policy Group drafted those regarding anti-discrimination and made the final compilation.

2 This section, as the rest of the Review, covers the period of 1 January to 30 June 2016.

equality between men and women’ takes stock of the achievements reached in 2015 in the six priority areas of the Strategy for Equality between men and women.³

Furthermore, in March 2016, the Commission presented two proposals to the Council on EU accession to the Istanbul Convention in order to combat violence against women.⁴ At the same time, it also published a fact sheet on gender-based violence and the Istanbul Convention to raise public awareness and foster clear understanding of the issue.⁵ On 6 June 2016, DG Justice and the Consumers’ Gender Equality Unit held a meeting entitled ‘EU Projects on Violence against Women – Learning for Meaningful Change’, which brought together managers of EU-funded campaigns against violence and Daphne projects running from 2012-2015. As part of the meeting, participants discussed how their projects delivered meaningful change in attitudes and behaviours to combat violence against women,

During this period, the Commission has equally been engaged in non-discrimination issues. On International Roma Day, 8 April 2016, the Commission reaffirmed its commitment to the inclusion and equal treatment of Roma people across the EU. This commitment was further confirmed at the end of June by the adoption of the annual report on Roma integration, assessing the implementation of the EU Framework for National Roma Integration Strategies and the 2013 Council Recommendation on effective Roma integration measures in the Member States.⁶ At this occasion, Frans Timmermans, European Commission Vice-President underlined that ‘(t)his report comes as a timely reminder for Member States to show more political determination and implement their commitments to integrate Europe’s Roma communities.’ Commissioner Věra Jourová further said that ‘In the past year, there have been some positive developments, especially in the area of education. At the same time, educational segregation of Roma children persists in some Member States and the Commission had to take action to make sure anti-discrimination legislation is enforced.’ The Commissioner here refers to the infringement proceedings initiated on 26 May 2016 by the European Commission against Hungary for failure to correctly implement the Racial Equality Directive (2000/43/EC), due to systemic discrimination of Roma children in schools. The Commission raised a number of concerns related to, on the one hand, Hungarian legislation on equal treatment and on education and, on the other, its administrative practices. The situation Roma children face in Hungary is that of disproportionate over-representation in special schools for mentally disabled children and also a considerable degree of segregation within mainstream schools. The infringement proceedings follow numerous signals by the European network of legal experts in gender equality and non-discrimination and by its predecessor the European Network of Legal Experts in the non-discrimination field through their publications. Most importantly, the highly relevant thematic report *Discrimination of Roma Children in Education*, authored by Lilla Farkas and published in 2014, provides in-depth analysis of this particular issue in a number of EU Member States.⁷

Interesting developments have also taken place with regard to the European case law on the wearing of religious symbols at the workplace. The CJEU’s Advocate General Kokott presented her opinion on the *Achbita* case in June 2016, which was followed shortly after in July 2016 by Advocate General Sharpston’s opinion in *Bougnouli*. AG Sharpston’s opinion will be analysed in the next issue of the European equality

3 *Report on equality between men and women 2015*, European Union 2016, available at: http://ec.europa.eu/justice/gender-equality/files/annual_reports/2016_annual_report_2015_web_en.pdf, accessed 15 September 2016.

4 Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence COM(2016)111; and Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence COM(2016)109 Final.

5 Istanbul Convention: combating violence against women, European Commission Fact Sheet, March 2016, available at: http://ec.europa.eu/justice/gender-equality/files/gender_based_violence/160316_factsheet_istanbul_convention_en.pdf, accessed 15 September 2016.

6 *Effective Roma integration measures in the Member States 2016*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2016) 424, 27 June 2016, available at: http://ec.europa.eu/justice/discrimination/files/roma-report-2016_en.pdf, accessed 15 September 2016.

7 L. Farkas (2014), *Report on discrimination of Roma children in education*, European Commission, available at: <http://www.equalitylaw.eu/downloads/1338-discrimination-of-roma-children-in-education-en-final>, accessed 15 September 2016.

law review, but many commentators have already noted that the two opinions are at odds with each other. AG Kokott concluded that the ban against employees wearing the Islamic headscarf, as part of a company's neutrality policy does not constitute direct discrimination within the meaning of Directive 2000/78/EC, but might constitute indirect discrimination, which might be justified, based on a number of diverse factors.⁸ It remains to be seen if the CJEU in its judgment will follow this line of reasoning or take a different approach.

Network publications and activities

In regard to work of the Network itself, we are looking forward to the annual legal seminar, which will take place in Brussels in November 2016 and which brings together the Network's experts, as well as government officials, representatives of national equality bodies and selected NGOs.

The Network has recently launched a Newsletter.⁹ The Network has also recently published a thematic report entitled 'Intersectional discrimination in EU gender equality and non-discrimination law' by Sandra Fredman. In regard to gender equality, the Network is currently preparing two thematic reports. The first report, authored by Albertine Veldman, will examine pay transparency measures in place at the national level. The second thematic report, authored by Petra Foubert, will look at the enforcement of the equal pay principle, including issues of compensation, reparation and sanctioning, and the role of equality bodies. In regard to anti-discrimination, the Network is preparing three thematic reports. The first report is authored by Olivier de Schutter and provides an update and further analysis on a previous thematic report on the links between migration and discrimination and has been published in September¹⁰. The second thematic report, authored by Lilla Farkas, looks at the meaning of racial and ethnic origin in EU law. The third thematic report, authored by Lisa Waddington and Mark Bell, aims at providing an overview of the ways in which the Employment Equality Directive can contribute to supporting those who have a psychosocial disability in participating in employment. In addition, many updated general country reports have been published. As always, please check the Network's website – <http://www.equalitylaw.eu/> – for the full text of all reports.

Isabelle Chopin
Migration Policy Group

Alexandra Timmer
Utrecht University

Marcel Zwamborn
Human European Consultancy

⁸ For an in-depth analysis of this AG Opinion, please see below, pp. 62-65.

⁹ The June 2016 Newsletter is available here: <http://www.equalitylaw.eu/downloads/3853-newsletter-eeln-june-2016-pdf-133-kb>, accessed 15 September 2016.

¹⁰ De Schutter, O. (2016) Links between migration and discrimination, European network of legal experts in gender equality and non-discrimination, available at: <http://www.equalitylaw.eu/downloads/3917-links-between-migration-and-discrimination>, last accessed 24 October 2016.

Members of the European network of legal experts in gender equality and non-discrimination

Management team

General coordinator	Marcel Zwamborn	Human European Consultancy
Specialist coordinator gender equality law	Susanne Burri	Utrecht University
Acting specialist coordinator gender equality law	Alexandra Timmer	Utrecht University
Specialist coordinator non-discrimination law	Isabelle Chopin	Migration Policy Group
Project management assistants	Ivette Groenendijk Michelle Troost-Termeeer	Human European Consultancy Human European Consultancy
Gender equality law assistant	Erin Jackson	Utrecht University
Non-discrimination assistant and research editor	Catharina Germaine	Migration Policy Group

Senior experts

Senior expert on racial or ethnic origin	Lilla Farkas
Senior expert on age	Mark Freedland
Senior expert on EU and human rights law	Christopher McCrudden
Senior expert on social security	Frans Pennings
Senior expert on religion or belief	Isabelle Rorive
Senior expert on gender equality law	Linda Senden
Senior expert on sexual orientation	Krzysztof Smiszek
Senior expert on EU law, sex, gender identity and gender expression in relation to trans and intersex people	Christa Tobler
Senior expert on disability	Lisa Waddington

National experts

	Non-discrimination	Gender
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Belgium	Emmanuelle Bribosia	Jean Jacqmain
Bulgaria	Margarita Ilieva	Genoveva Tisheva
Croatia	Lovorka Kusan*	Nada Bodiroga-Vukobrat
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Sweden	Per Norberg	Ann Numhauser-Henning
Turkey	Dilek Kurban	Nurhan Süral
United Kingdom	Lucy Vickers	Grace James***

* Please note that as of 7 June 2016, Lovorka Kusan is no longer a member of the Network.

** Please note that as of 1 August 2016, the non-discrimination expert for the Netherlands is Titia Loenen.

*** During the reporting period covered by this issue, Rachel Horton has been replacing Grace James as the gender equality expert for the United Kingdom.

Using anti-discrimination remedies for discriminatory speech – the Hungarian and Romanian experiences

István Haller, Romanița Iordache, and András Kádár*

The recent resurgence of hatred in Europe has been met with new legal and institutional tools tackling hate speech. However, the criminalisation of hate speech raises concerns regarding the need to ensure a proper balance between protecting freedom of expression and the principle of equality and non-discrimination and generates heated debates inside and outside the courts. Partly in response to such concerns, but also with the aim of securing adequate and timely remedies, courts and national equality bodies across Europe are also increasingly using administrative and civil provisions to sanction discriminatory speech. There is no universally recognised definition of hate speech. Similarly, there is no specific definition and there are no clear guidelines on what amounts to discriminatory speech and what is an adequate way to sanction it. The overlapping between the two concepts is challenging for victims, practitioners and academics alike. This article analyses legal practice in Hungary and Romania, with the aim of understanding the impact of this approach and its challenges. In Hungary this practice, though extremely limited, indicates that the application of the Equal Treatment Act to discriminatory public speech and the relevant provisions of the new Civil Code may offer a viable option for sanctioning such utterances if awareness of these possibilities is raised and a sufficient body of case law is developed. In the case of Romania, both the national equality body and the courts have had the opportunity to discuss at length the use of anti-discrimination provisions in cases of discriminatory speech, given specific legal provisions on the right to dignity and on freedom of expression. In spite of the express legal provisions and of the large number of cases, including cases with high visibility regarding numerous key political actors, in Romania practice is often contradictory, as shown by the case studies presented. Non-criminal legal tools to sanction discriminatory speech, though still in need of clear guidelines, might provide more effective remedies and gather momentum. Civil and administrative remedies to sanction discriminatory speech are more timely, more cost-effective and more accessible, might be more proportionate and have the potential to provide adequate remedies for the victims while educating the perpetrators, thus having a deterrent effect. While for Romania a challenge remains the blurred line between discriminatory speech to be sanctioned under civil and administrative provisions and hate speech sanctioned under criminal law provisions, in the case of Hungary, the threshold for a criminal investigation is so high that, in most cases, civil and administrative sanctions are the only available option.

1. Using anti-discrimination tools in response to discriminatory statements

The relation between freedom of expression and the principles of equality and non-discrimination as fundamental rights is often discussed in the context of adequate responses to discriminatory speech,

* István Haller is a former journalist, human rights activist and Steering Board member of the Romanian Equality Body. Romanița Iordache is a human rights researcher and member of the European network of legal experts in gender equality and non-discrimination. András Kádár is an attorney at law, co-Chair of the human rights watchdog NGO Hungarian Helsinki Committee and member of the European network of legal experts in gender equality and non-discrimination.

communication spreading intolerance, incitement to exclusion of persons or groups, and spreading of hostility or negative stereotypes regarding certain communities on grounds such as national or ethnic origin, religion, age, disability, sex, gender, sexual orientation or gender identity or other personal characteristics or status. Counteracting discriminatory speech through civil or administrative means is not discussed as often as the use of special provisions in the criminal legislation to address hate speech.¹ The limited attention paid to non-criminal remedies based on anti-discrimination legislation can be explained by the relative novelty of such tools – while both the UN and the Council of Europe human rights bodies have addressed hate speech since the early 1970s, the use of anti-discrimination tools targeting discriminatory speech is more recent.

As early as 1997 within the Council of Europe, the Council of Europe Committee of Ministers adopted Recommendation No. R 97(20) on “Hate Speech”.² From 2000 onwards, the European Commission against Racism and Intolerance (ECRI) addressed sanctioning discriminatory messages in its General Policy Recommendations Nos 6, 7 and 13,³ and more recently, in 2015, in ECRI General Policy Recommendation no. 15 on Combating Hate Speech.⁴

The European Court of Human Rights has repeatedly had to assess the balance between ideas that offend, shock or disturb the State or any sector of the population and which are still perceived as embedded in pluralism, tolerance and broadmindedness and without which there is no ‘democratic society’, and those forms of expression which spread, incite, promote or justify hatred based on intolerance – messages which, according to the jurisprudence of the Court, can be sanctioned or even prevented ‘provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued.’⁵ The Court gradually developed a set of principles on the application of Article 10 and of Article 17 of the ECHR, emphasising both the essential, fundamental character of the freedom of expression as well as the need to protect the victims of discrimination, including by prohibiting and sanctioning discriminatory speech.⁶ The core principle, as spelled out in *Anthony Norwood v. United Kingdom*, is that: ‘Such a general, vehement attack against a religious group (...) is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.’⁷ Furthermore, the Court asserted that national authorities have a positive obligation to protect victims of hate speech and to effectively investigate such incidents.⁸

The Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law reflects the position of the European

- 1 Weber, A. (2009), *Manual on Hate Speech*, Council of Europe Publishing, available at: <https://book.coe.int/eur/en/human-rights-and-democracy/4197-manual-on-hate-speech.html>.
- 2 Council of Europe, Committee of Ministers, Recommendation No. R (97) 20 on ‘Hate Speech’, adopted by the Committee of Ministers of the Council of Europe on 30 October 1997, available at: [http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec\(97\)20_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf).
- 3 ECRI, General Policy Recommendation no. 6 on Combating the Dissemination of Racist, Xenophobic and Antisemitic Material via the Internet, adopted by ECRI on 15 December 2000, available at: http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N6/Rec%206%20en.pdf. ECRI, General Policy Recommendation no. 7 on National Legislation to Combat Racism and Racial Discrimination, adopted by ECRI on 13 December 2002, available at: http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n7/ecri03-8%20recommendation%20nr%207.pdf. ECRI, General Policy Recommendation no. 13 on Combating Anti-Gypsyism and Discrimination against Roma, adopted by ECRI on 24 June 2011, available at: http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N13/e-RPG%2013%20-%20A4.pdf.
- 4 ECRI, General Policy Recommendation No. 15 on Combating Hate Speech, adopted by ECRI on 15 December 2015, available at: https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N15/REC-15-2016-015-ENG.pdf.
- 5 ECtHR, *Erbakan v. Turkey*, No. 59405/00, 6 July 2006, § 56. See also ECtHR, *Handyside v. the United Kingdom*, No. 4593/72, 7 December 1976, § 49.
- 6 European Court of Human Rights, Factsheet on ECtHR case law, Hate speech, June 2016, Press Unit, available at: www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf.
- 7 ECtHR, *Anthony Norwood v. the United Kingdom*, No. 23131/03, 16 November 2004.
- 8 ECtHR, *Begheluri and Others v. Georgia*, No. 28490/02, 7 October 2014, *Karaahmed v. Bulgaria*, No. 30587/13, 24 February 2015, *Identoba and Others v. Georgia*, No. 73235/12, 12 May 2015, *M.C. and A.C. v Romania*, No. 12060/12, 12 April 2016.

Union when it establishes an obligation for Member States to take various measures, which are, however, limited to combating particularly serious forms of racism and xenophobia.⁹

Respect for human dignity and protection against hate speech are expressly addressed by Article 20(2) of the UN International Covenant on Civil and Political Rights¹⁰ and by Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.¹¹ The UN Human Rights Committee discussed the legal prohibitions allowed for specific forms of expression in its General Comments 10, 11 and 34.¹² The UN Committee on the Elimination of Racial Discrimination emphasised that ‘as a minimum requirement, and without prejudice to further measures, comprehensive legislation against racial discrimination, including civil and administrative law as well as criminal law, is indispensable to combating racist hate speech effectively’, adding that ‘the rights to equality and freedom from discrimination, and the right to freedom of expression, should be fully reflected in law, policy and practice as mutually supportive human rights.’¹³

Criminalisation of hate speech is done under the caveat of less restrictive interference. This caveat was phrased by ECRI in its General Policy Recommendation no. 15 when emphasising that the use of criminal sanctions should not be the primary focus of action against the use of hate speech. ECRI underlined the need to ‘take appropriate and effective action against the use, in a public context, of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it through the use of the criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected’.¹⁴

As criminal provisions are supposed to be remedies of last resort and have proved to be insufficient in themselves to eradicate and adequately address hate speech and its forms, discriminatory messages have been increasingly sanctioned under anti-discrimination provisions as harassment, incitement to discrimination, violation of the right to dignity, or through other creative routes. The lack of clear guidance on the scope of responsibility and the blurred line between hate speech falling under criminal provisions and discriminatory speech which does not reach the threshold for a criminal penalty but still requires to be sanctioned under anti-discrimination legislation, is a challenge both for victims and for practitioners. Both criminal and administrative sanctions would still have to be scrutinised as interference with the freedom of expression, from the perspective of the legitimacy, necessity, proportionality test developed by the ECtHR under Article 10(2) of the ECHR.

9 Council of the European Union (2008), Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ 2008, L 328/55.

10 United Nations (UN), International Covenant on Civil and Political Rights (ICCPR), Article 20: ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’

11 United Nations (UN), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 4: ‘States Parties ... (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.’

12 United Nations, Human Rights Committee, *General Comment No. 34 Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34, 12 September 2011, paras. 50-52.

13 United Nations, CERD, *General Recommendation No. 35 Combating racist hate speech*, CERD/C/GC/35, 26 September 2013, paras. 9 and 45.

14 ECRI, General Policy Recommendation No. 15 on Combating Hate Speech, recommendation 10, adopted by ECRI on 15 December 2015, available at: https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N15/REC-15-2016-015-ENG.pdf.

2. The Hungarian experience of sanctioning discriminatory speech

Criminal and civil law sanctions of discriminatory speech before the ETA

Hungary had been struggling for a long time to find viable ways to sanction discriminatory speech before pass Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities (ETA)¹⁵ and Act V of 2013 on the Civil Code (New Civil Code).¹⁶

Although from a strictly literal perspective the provisions of successive Criminal Codes¹⁷ would have enabled the authorities to take action against public utterances (including discriminatory speech) capable of inciting very strong negative feelings against a specific group in society, judicial practice and the decisions of the Constitutional Court of Hungary concluded that for these to be applicable, their expression shall be not only capable of, but also *aimed at* inciting others to *take effective action* directed against the given group, and the *danger of violent acts triggered by the expression shall be clear and present*.¹⁸ This very high threshold has in practice made the criminal sanction void.

Another route tested by targeted minority groups was through the Old Civil Code (Act IV of 1959 on the Civil Code),¹⁹ which qualified discrimination as a violation of inherent personality rights²⁰ and listed several sanctions for such violations, including (i) the court declaring the occurrence of an infringement; (ii) the court imposing an obligation to issue a public apology; and (iii) the court granting moral damages.²¹

However, after a long legal debate arising from an article in a local newspaper expressly calling on readers to 'exclude' Jews from society, the Supreme Court concluded²² that, on the basis of Article 85 of the Old Civil Code (according to which inherent personality rights can only be enforced by the person whose rights have been violated), only person(s) who can be individually identified as the target(s) of a degrading, discriminatory statement have legal standing in inherent personality rights lawsuits launched with a view to sanctioning such statements. Since general discriminatory statements about whole communities or social groups are not aimed at specific, identifiable individuals, no lawsuits could be initiated against the authors of such statements.

Discriminatory speech as a form of harassment under Hungarian anti-discrimination legislation

As required by the EU's equality directives, the ETA introduced the concept of harassment into the Hungarian legal system under Article 10 (1) of Hungary's anti-discrimination legislation as follows: 'Harassment is a conduct of sexual or other nature violating human dignity related to the relevant

15 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities. In force since 27 January 2004. English translation (not fully up to date) is available at: <http://www.egyenlobanasmod.hu/data/SZMM094B.pdf>.

16 Hungary, Act V of 2013 on the Civil Code. In force since 15 March 2014. English translation is available at: https://tdziegler.files.wordpress.com/2014/06/civil_code.pdf.

17 Hungary, Act IV of 1978 on the Criminal Code (Old Criminal Code), Article 269 stipulated that 'any person who incites to hatred in public against (i) the Hungarian nation or (ii) any national, ethnic, racial or religious group or certain groups of the population, is guilty of a felony punishable with imprisonment for up to three years.' Under the new Hungarian Criminal Code in effect from 1 July 2013 (Act C of 2012, Article 332), the regulation has remained practically the same, with an exemplificative list of 'certain groups', including groups based on disability, sexual orientation and gender identity.

18 Hungary, Supreme Court, Bf. IV. 2211/1997.

19 Hungary, Old Civil Code (Act IV of 1959 on the Civil Code). The law was in force until 14 March 2014.

20 Hungary, Old Civil Code (Act IV of 1959 on the Civil Code), Articles 75-76. Article 75 of the code stipulated that so-called inherent personality rights are protected by the Civil Code, while Article 76 set forth in an exemplificative list that stated that— among others — the following instances shall be regarded as violations of inherent personality rights: discrimination on the basis of gender, race, nationality or religion, violation of the freedom of conscience, the unlawful limitation of freedom, the violation of physical integrity, health, honour and human dignity.

21 Hungary, Old Civil Code (Act IV of 1959 on the Civil Code), Article 84.

22 Hungary, Supreme Court, Pfv.E.21.020/2004/2.

person's characteristics defined in Article 8 with the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment around the particular person.'

Article 8 contains an open-ended list of protected grounds,²³ while Article 7 Paragraph (1) stipulates that – along with direct and indirect discrimination, segregation, victimisation and the instruction to discriminate – harassment is a form of violation of the requirement of equal treatment.

As discriminatory utterances made in public do violate human dignity, and have the unquestionable effect of creating an intimidating, hostile, degrading, humiliating or offensive social environment, the idea of applying the ETA's concept of harassment to discriminatory statements made in public came naturally. However, as described below, judicial interpretation has restricted the scope of the applicability of the ETA in this area.

Instances of discriminatory speech amounting to harassment are adjudicated by Hungary's equality body, the Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*, hereafter the Authority). The Authority is an independent public administrative body with overall responsibility for ensuring compliance with the principle of equal treatment. It deals with discrimination based on any of the characteristics protected under the ETA.

The Authority conducts complaint-based or ex officio investigations to establish whether the principle of equal treatment has been violated, and – if necessary – applies sanctions on the basis of the investigation. Complaints can come not only from the individuals concerned, but also from associations with a legitimate interest in engaging in procedures against discrimination. Under Article 17/A Paragraph (1) of the ETA, if the Authority has established that the provisions ensuring the principle of equal treatment have been violated, it may: (i) order that the situation constituting a violation of the law be terminated; (ii) prohibit the future continuation of the conduct constituting a violation of the law; (iii) order that its decision establishing the violation of the law be published; (iv) impose a fine ranging from EUR 160 (HUF 50 000) to EUR 19 000 (HUF 6 million); and (v) apply a legal consequence determined in a special act. These sanctions can be applied jointly.

Under Article 17/B, the decision of the Authority may not be appealed within a public administrative procedure, but its judicial review – before the Metropolitan Administrative and Labour Court – is possible. The court's decision is subject to extraordinary review by the Curia (Hungary's highest court).²⁴

Discriminatory speech in the New Civil Code

In 2013, the New Civil Code was adopted. This was formulated so as to circumvent the problem of legal standing by including Article 2:54, Paragraph (5), which stipulates the following: 'In the event of any severely injurious or unwarrantedly insulting statement made in public in relation to his/her affiliation with the Hungarian nation or a national, ethnic, racial or religious group, which is recognised as an essential part of his/her personality, any member of a community shall be entitled to enforce his/her

23 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities, Article 8: 'Direct discrimination shall be constituted by any action [including any conduct, omission, requirement, order or practice] as a result of which a person or group based on its real or assumed sex, racial affiliation, colour of skin, nationality, belonging to a national or ethnic minority, mother tongue, state of disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, sexual identity, age, social origin, financial status, part-time nature of employment legal relation or other legal relation aimed at labour, or determined period thereof, belonging to an interest representation, other situation, attribution or condition (hereinafter together: characteristics) is treated less favourably than another person or group is, has been or would be treated in a comparable situation.'

24 For a detailed description of the institutional mechanisms and the available remedies see European Commission, European network of legal experts in gender equality and non-discrimination (2015), Kádár, A. *Country report Non-discrimination, Hungary, Reporting period 1 January 2014-31 December 2014*, Luxembourg, Publications Office of the European Union (Publications Office), available at: <http://www.equalitylaw.eu/downloads/3734-2015-hu-country-report-in-fina>.

inherent personality rights within thirty days from the violation. Any member of the community shall be entitled to claim all sanctions of the violation of inherent personality rights, with the exception of laying claim to the financial advantage achieved as a result of the violation.²⁵ The sanctions for violations have remained largely the same²⁶ as in the Old Civil Code, with the exception that for moral damages to be claimed, the claimant no longer has to prove that as a result of the violation of his/her inherent rights, he/she has suffered some sort of psychological damage. The law sets up a presumption that the violation of inherent rights inevitably results in some moral damage.²⁷

Thus, there are at the moment two, partly parallel, routes which members of aggrieved minority communities can take to combat discriminatory speech: either to file a complaint with the Equal Treatment Authority under the ETA, or to initiate a civil lawsuit under the New Civil Code. However, due to the limited personal scope of the ETA the choice is not fully free. In relation to liability for discrimination (i.e. subjects who are obliged to comply with the requirement of equal treatment), the ETA primarily lists (mostly public) legal entities.²⁸ The law stipulates that these entities shall respect the requirement of equal treatment (i) when establishing legal relations, (ii) in their legal relations, and (iii) in the course of their proceedings and measures.

This means that if the discriminatory statement comes from a person who does not fall under the personal scope of the ETA (e.g. a journalist writing an article inciting discrimination), then no action can be taken under anti-discrimination law, only under the New Civil Code. (The problems raised by this restriction are illustrated below by the *Edelény* case.)

Relevant jurisprudence

Jurisprudence under the ETA

The Edelény case

In the autumn of 2009, at a meeting of the municipal council of Edelény (North-East Hungary), the town's mayor, Oszkár Molnár, made the following statement: 'In the neighbouring settlements, in settlements with a Gypsy majority, for instance in Lak, for instance in Szendrőlád, pregnant women take medication so that they would give birth to demented children so that they would be entitled to increased family allowance. Women during their pregnancy, I looked into this and it is true, keep hitting their bellies with rubber hammers so that they would give birth to disabled children.' This statement was widely covered in the national media.

The Equal Treatment Authority launched an ex officio proceeding against the mayor and established that the statement was potentially capable of creating a hostile, degrading, humiliating and offensive

25 Translation by the authors.

26 Hungary, Civil Code, Articles 2:51 and 2:52.

27 Hungary, Civil Code, Article 2:52 stipulates that:

(1) A person whose inherent rights have been violated, may claim moral compensation for the non-pecuniary damage made to him/her.

(2) The provisions pertaining to damages shall be applied to moral compensation – with special regard to the determination of the liable person and exculpation – with the difference that for moral compensation to be payable the claimant shall not be required to prove any further damage beyond the occurrence of the inherent right violation.

(3) The sum of the moral compensation shall be determined by the court in accordance with the circumstances of the case, with special regard to the severity and regularity of the violation, the degree of liability, and the violation's impact on the claimant and his/her environment.

28 Under Article 4 of ETA, these include: the Hungarian state, municipal councils and nationality self-governments and their organs, public authorities, the army, the police, prison services, border guards, public foundations and associations, organisations representing employees' and employers' interests, bodies providing public services, schools and universities, persons and institutions providing social and child protection services, museums, libraries, private pension schemes, voluntary mutual insurance schemes, health service providers, political parties and other organs funded from central budget. Besides public entities, four groups of private actors listed in Article 5 fall under the scope of the ETA.

environment for pregnant Roma women living in the two identified towns and their neighbourhood, and of exerting a negative impact on the identity, personality and future lives of these women, by contributing to their bad reputation and increasing the prejudices they face.²⁹ Hence, the mayor's statement qualified as harassment, and the Authority sanctioned it by prohibiting the mayor from future violation and ordering that its decision be made public for 90 days.

The mayor filed for a judicial review against the decision. In his petition the mayor argued – among others – that he did not fall under the personal scope of the ETA, as he made his statements as a member of the municipal council and not as mayor, and while mayors are regarded as organs of the municipal council (and therefore fall under the scope of the ETA), members of the council are not covered by the scope of the ETA.

In its decision No. 8.K.34.427/2009/3 of 22 March 2010, the Metropolitan Court rejected the mayor's claim. The Metropolitan Court stated that Oszkár Molnár's capacities as member of the municipal council and mayor can not be artificially separated: he made the statements in an official context, therefore he fell under the scope of the ETA. However, upon the mayor's request for an extraordinary review, the Supreme Court quashed the decisions of the Authority and the Metropolitan Court, and terminated the case.³⁰ The Supreme Court's argument was that Article 4 of the ETA states that mayors shall be obliged to observe the requirement of equal treatment (i) in their legal relations, (ii) in the course of establishing legal relations and (iii) in the course of their proceedings and measures. Mayors – in this capacity – may only be in legal relations (i.e. legally regulated social relations) with the residents of their respective municipalities, and they may conduct proceedings and take measures with regard to such residents. Since Oszkár Molnár is the mayor of Edelény, and his statements were made in relation to Roma women living in two other settlements (and not his own), he did not fall under the scope of the ETA in this respect, therefore he could not be called to account for his statements.

The Kiskunlacháza case

In November 2008, a young girl was raped and murdered in Kiskunlacháza (Central Hungary Region). In relation to the murder (with regard to which it was later established that it had been committed by a non-Roma person), the town's mayor, József Répás, organised a public demonstration, at which he gave a speech, stating – among other things – that 'in Kiskunlacháza, there is no room for violence, no room for criminals. Kiskunlacháza has had enough of Roma violence! (...) We shall not allow our valuables to be stolen, old people beaten and children raped. Today we are still the majority.'

In March 2009, he published an article in the local newspaper in which he wrote the following:

'More and more brutal crimes keep coming into the limelight, the perpetrators of which are of Roma origin. (...) Unfortunately we have to say that there is open and institutionalised racism against Hungarians. (...) Terrorising society and intentionally keeping it in fear must come to an end. It cannot be tolerated that some persons hiding behind the mask of belonging to a minority should enjoy more rights than the majority.' In October 2009, the mayor published an open letter to the Prime Minister stating the following: 'Do you know what the reality is in the Hungary which you govern? Gypsies kick people to death, they threaten Hungarian farmers with chainsaws, just because they want to protect the crops from thieves. Some Gypsies keep Hungarians as slaves (...). Decent old people with a life's work behind them are scared of Gypsy teenagers who attack (...) those who dare to speak up against violence (...). Millions are scared of the constant violence committed by some members of the Gypsy group.'

29 Hungary, Equal Treatment Authority, decision no. 1475/2009/6, 30 September 2009.

30 Hungary, Supreme Court, decision Kfv.II.37.551/2010/5, 16 March 2011.

On 19 October 2009, the Hungarian Helsinki Committee (HHC) filed an *actio popularis* claim with the Equal Treatment Authority concerning the statements of the mayor, claiming that by making statements capable of promoting negative attitudes towards and creating a hostile environment for the Roma community, he had committed harassment in relation to the region's Roma population.

In its decision, the Equal Treatment Authority established that harassment had been committed, forbade continuation of the violation and ordered that the decision be published.³¹ The Authority stated that, on the basis of the facts and documents, it was clear that the mayor knew that there was ethnic tension in the city and that there was in general a strong negative attitude towards the Roma members of the community. The Authority concluded that the mayor's statements were capable of creating fear among the Roma inhabitants and contributing to an environment that is hostile to them. The mayor requested judicial review of the decision.

In its decision 8.K.31.232/2010/3 of 4 October 2010 the Metropolitan Court established that a mayor may only be within the scope of the ETA if he/she is acting in his/her official capacity. In the Court's view a mayor who speaks at a demonstration or writes an article is not performing his/her official duties as set out by the law, and therefore may not be called to account under Article 4 of the ETA, which prohibits harassment, even if he/she uses the title of his/her office, since Article 4 of the ETA extends the scope to mayors (as organs of the local council) only in relation to their official duties. On this basis, the Court quashed the Authority's decision and obliged the Authority to restart the proceedings and deliver a new decision.

The Authority submitted a request for review of the Metropolitan Court's decision by the Supreme Court. In its decision Kfv.III.39.302/2010/8 of 18 October 2011, the Supreme Court upheld the Metropolitan Court's decision with an amended reasoning. The Supreme Court established that the mayor had unquestionably made the statements in an official capacity. On the issue of whether the making of such statements falls under any of the categories (legal relations, proceedings or measures) with regard to which the mayor shall respect the principle of equal treatment, the Supreme Court held that only those actions that fall under their scope of competence in terms of the relevant laws may be regarded as the proceedings or measures of the mayor (and/or the municipal council). Therefore, in the repeated proceedings, the Authority shall examine and determine whether making public statements can be regarded as falling under any of the statutorily defined tasks/competences of the mayor and whether making such statements can be regarded as external acts that create 'legally regulated social relations' between the members of the group concerned and the mayor. Furthermore, the Supreme Court instructed the Authority to examine in the repeated proceedings whether harassment can be committed against a group, as the definition of harassment is formulated in singular terms (see below).

In the repeated proceedings the Authority maintained its earlier decision and established in its decision EBH/21/17/2012 of 20 April 2012 that the mayor's statements had amounted to harassment of the local Roma community. Reacting to the guidance of the Supreme Court, the Authority pointed out that under Article 8 of Act LXV of 1990 on Municipal Councils (Municipal Councils Act), municipal councils are responsible for ensuring the exercise of the rights of national and ethnic minorities, which include the right to live in peace in the given settlement. Furthermore, the Authority referred to Decision 961/B/1993 of the Constitutional Court, which declared that mayors fulfil a certain representative role (they represent the population of their constituency at various events and ceremonies), which is part of their obligations under public law. Consequently, there are statutory functions which the mayor of Kiskunlacháza performed when speaking at a public demonstration: therefore, he falls within the scope of the ETA in relation to his statements. In addition, the Authority stated that not only direct and indirect discrimination, but also harassment can be committed in relation to groups (and not only individuals). The Authority based this stance on the explanatory memorandum attached to the Preamble to the ETA and on the fact that *actio popularis* claims (that necessarily concern groups) are not excluded in relation

31 Hungary, Equal Treatment Authority, EBH/187/1/2010, 19 January 2010.

to harassment. Based on the above, the Authority concluded that since (i) the ETA can be applied to the mayor's statements; (ii) harassment can be committed against groups; and (iii) the mayor's statements were definitely capable of creating a humiliating, threatening environment for the local Roma community, the mayor had committed harassment.

After some further rounds of proceedings,³² the case came before the Metropolitan Administrative and Labour Court (successor of the Metropolitan Court), which, in its decision no. 20.K.33988/2013/10 of 17 June 2014, upheld the Authority's conclusion that the mayor violated the requirement of equal treatment. The Court concluded that when the mayor of a settlement makes a public statement in this capacity, he/she exercises a protocol function that creates a sufficiently strong link between him/her and the residents of the settlement to make such instances fall within the scope of the ETA. Furthermore, the Court stated that although the definition of harassment refers to actions creating a hostile environment vis-à-vis a single person, it is obvious that harassment can be committed against a group of persons (see the reasoning below). Finally, quoting relevant decisions of the Hungarian Constitutional Court and the ECtHR's *Féret v. Belgium* judgment,³³ the Court concluded that the mayor's speech had contributed to the creation of a hostile, threatening environment around the Roma residents of Kiskunlacháza, especially because his special powers within the community gave special weight to his words. Considering the special responsibility of holders of public office, the Court concluded that the mayor could not rely on the right to freedom of expression to exempt him from the violation of the requirement of equal treatment. Based on the above, the Court stated that the Authority's decision establishing that the mayor had committed harassment was well-founded.

The mayor requested an extraordinary review of the decision by the Curia, the highest Hungarian court. However, in its decision no. Kfv.III.37.848/2014/6. delivered on 29 October 2014, the Curia upheld the decision of the Metropolitan Administrative and Labour Court.

Jurisprudence under the New Civil Code

The Roma deportation case

The first-ever successful case under Article 2:54 Paragraph (5) of the New Civil Code was brought by a Roma activist, Irén Szőrös, with the help of the Legal Defence Bureau for National and Ethnic Minorities (NEKI) against László Mohácsi, a representative of the extreme rightist Jobbik Party, who, at a meeting of the Hajdú-Bihar County Council on 24 April 2015, spoke about one of the towns of the county. His statement was summarised in the records of the meeting as follows: 'It is a Gypsy ghetto with third-world conditions. There are teachers whose daily work is a nightmare. This is the whole country's problem, not just the settlement's, these people are under-educated, they do not want to study or work. According to the Prime Minister the Roma are the unrecognised resources of Europe.' He then said: 'If the Gypsies are Europe's unrecognised resources, then they should be deported so that they could fulfil their potential.'

In its decision (6.P.20.750/2015/9.) of 14 September 2015, the Debrecen Regional Court concluded that the statement amounted to a violation of human dignity and the ban on discrimination, as the requirement of the equality of personalities is a central element of the concept of human personality, and any behaviour that discriminates between persons or groups of persons violates this requirement. Under Article 2:54 Paragraph (5) of the Civil Code a violation targeting a community is transferred to the individual members if it is sufficiently severe. In the case of an ethnic minority, and especially with regard to the Roma community, reference to the possibility of 'deportation' definitely reaches this threshold. The Court rejected the respondent's argument that it was an unfortunate choice of words and he simply meant to express his view that Roma should be provided with the possibility to seek jobs

32 The Metropolitan Regional Court (successor of the Metropolitan Court) again quashed the Authority's decision in a summary resolution. However, on 15 October 2013, the Curia (successor of the Supreme Court) quashed the Metropolitan Court's decision, and ordered that the court proceedings be restarted.

33 ECtHR, *Féret v. Belgium*, 15615/07, 16 July 2009.

at other geographical locations if they cannot find work in their home towns, and that the ‘principle of equitable interpretation’ requires that if an expression has more than one possible interpretation, the court shall base its decision on the one that is equitable from the point of the person allegedly suffering the rights violation.

The court obliged the politician to publish a public apology, prohibited him from committing future violations and obliged him to pay moral damages to the claimant in the amount of EUR 320 (HUF 100 000) (this was the amount the claimant originally claimed). In doing so, the Court placed emphasis on the fact that the respondent made his statement at an official forum as the representative of a national political party capable of influencing important political decisions, which enhances the statement’s ability to incite fear among the members of the targeted minority group.

Upon the respondent’s appeal, the court of second instance, the Debrecen Court of Appeal, upheld the first instance decision.³⁴ In its judgment the court of second instance added some arguments to those of the first instance decision. The Court referred to the Appendix to Recommendation No. R (97) 20 of the Committee of Ministers to Member States on “Hate Speech”,³⁵ according to which ‘the governments of the member states, public authorities and public institutions at the national, regional and local levels, as well as officials, have a special responsibility to refrain from statements, in particular to the media, which may reasonably be understood as hate speech, or as speech likely to produce the effect of legitimising, spreading or promoting racial hatred, xenophobia, anti-Semitism or other forms of discrimination or hatred based on intolerance.’

It also quoted decision No. 96/2008. (VII. 3.) AB of the Constitutional Court, which outlines the conditions under which violations caused through statements made in relation to certain communities transfer to individual members thus:

‘The violation must concern a community which fundamentally defines a person’s position in life, and affiliation with which may not be terminated by the individual or would result in the individual having to give up his/her dignity (identity), or in significant infringement of his/her dignity. Furthermore, it must be examined whether, according to perception within society, the actual violation is capable of inciting fear in the members of the community (...).’

Restrictions and extensions of application

In the two cases adjudicated so far under the ETA, some very important issues have been clarified through judicial interpretation – some restricting and some furthering the application of anti-discrimination legislation in the fight against discriminatory speech.

Personal scope of the ETA

As is obvious, the application of the concept of harassment to discriminatory speech targeting entire social groups is already restricted by the personal scope of the ETA, which, besides public actors, includes only four groups of private entities: (i) persons offering a public contract or making a public offer (e.g. putting up an apartment for rent), (ii) persons providing public services or selling goods, (iii) entrepreneurs, companies and other private legal entities provided with state funding in the legal relations they establish within the framework of using that funding and (iv) employers and contractors in regard to employment or contractual relationships aimed at performance of work. The liability of these actors for utterances of a harassing nature is tied to and limited by the specific role that brings them within the scope of the ETA. However, the most significant restriction in this regard stemming from the personal scope of the ETA is

34 Hungary, Debrecen Court of Appeal, Pf.I.20.623/2015/7, 26 November 2015.

35 Adopted by the Council of Europe Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers’ Deputies.

that media bodies and companies are not listed, and therefore may not be held liable for discriminatory content under the concept of harassment, although discriminatory statements made in the organs of such entities have serious potential for creating an intimidating, hostile, degrading, humiliating or offensive environment for a whole minority community or several members thereof.

The Supreme Court took the stance in the *Edelény* case that the formulation of the ETA (according to which public entities only fall within the scope of the ETA in their legal relations, in the course of establishing legal relations and in the course of their proceedings and measures) shall be interpreted to mean that public entities and office holders are required by law to comply with the requirement of equal treatment only vis-à-vis those persons in regard to whom they have tasks and functions prescribed by law. These tasks and functions of a mayor (and of members of a given municipal council) are set out in the Law on Municipalities,³⁶ and include issues such as local education, health and social care, maintaining local roads, and enforcing the rights of local national and ethnic minorities within their constituency.

This is a very restrictive interpretation, which does not attach the obligation to refrain from harassing statements to the position of mayor itself, or to whether the mayor takes a certain action or makes a certain statement when acting in his/her official capacity, but which requires, for harassment to be established, a further, rather artificial link between the official and the target of his/her statements capable of creating a hostile and degrading environment. To demonstrate the absurdity of this position, it would not be possible under the provisions of the ETA to sanction a mayor speaking in his/her official capacity who claimed that all Roma in Hungary, with the exception of those living in his/her town, are criminals.

In the *Kiskunlacháza* case, the mayor tried to rely on this restriction, claiming that, as the Law on Municipalities does not list any specific tasks or functions to which speaking at a demonstration or writing articles in newspaper would correspond, in regard to these activities, no legal relationship therefore existed between the mayor and the Roma population of the town. As mentioned above, the courts finally rejected this argument, and the Curia stated that the Law on Municipalities

‘obliges the municipality to guarantee that the rights of national and ethnic minorities are respected. (...) The mayor in his/her person represents the local population as a whole. It was in this representative function that the plaintiff [i.e. the mayor], in his capacity as mayor, spoke at the demonstration and wrote an article and an open letter. Hence, based on the provisions of the Law on Municipalities invoked above, the plaintiff acted within the framework of his municipal tasks and functions, a legal relationship existed between him and the members of the Gypsy ethnic minority, so his actions fell within the scope of the ETA.’

It must be pointed out that the representative function of the mayor is not expressly set out in the Law on Municipalities: this notion was introduced – in a completely different context – by the Constitutional Court. Adapting this concept to the present case, the courts in fact restored some of applicability of the ETA that they had severely curtailed with the *Edelény* decision.

Looking at the list of public actors set out in the ETA in the light of these two decisions, it still must be said that by defining ‘proceedings’ in the strict sense of conducting a legally regulated procedure instead of interpreting it as any action taken in the given person’s official capacity, the courts have restricted the applicability of the ETA in the fight against discriminatory speech. For instance, although universities fall within the scope of the ETA, they may be held liable for harassment for discriminatory statements made in relation to (for example) students belonging to certain racial or ethnic groups, but only if such statements specifically concern their own students. However, if the dean of a university makes flagrantly discriminatory statements of a general nature at an official event (e.g. a widely publicised graduation ceremony), the procedures offered by the ETA cannot be triggered.

36 Hungary, Act LXV of 1990 on Municipalities.

Applicability of harassment in relation to statements made about communities

The other issue which is crucial from the point of view of the applicability of the ETA in cases of discriminatory statements of a general nature is whether the notion of harassment can be applied in relation to groups or only in relation to individual persons. The source of the problem is the wording of the definition of harassment in the ETA.

In terms of Article 8, *direct discrimination* shall be constituted by any action as a result of which *a person or group* based on its real or assumed feature (protected ground) is treated less favourably than *another person or group* is, has been or would be treated in a comparable situation. Under Article 9, a provision not deemed as direct discrimination and ostensibly meeting the requirement of equal treatment is deemed as *indirect discrimination* if it puts *individual persons or groups* with characteristics specified in Article 8 in a situation where they at a significantly and disproportionately greater disadvantage than *a person or group* in a comparable situation is, has been or would be. When compared to the definition of harassment, it is conspicuous that these provisions all refer not only to individuals or persons, but also to groups in comparable situations, whereas harassment is defined (in Article 10) as conduct violating human dignity related to *the relevant person's* characteristics defined in Article 8.

In its decision No. 20.K.33988/2013/10 of 17 June 2014, the Metropolitan Administrative and Labour Court referred to the explanatory memorandum of the ETA, which states that 'the requirement of equal treatment obliges those within its scope to refrain from all behaviours that result in direct or indirect discrimination, victimisation, harassment or segregation committed against individuals or groups of individuals on the basis of certain characteristics'. The court was of the view that the memorandum in itself (which lists harassment as something that may be committed in relation to a group) decides the issue, but it also invoked the *Feryn* decision of the CJEU, which also interpreted a provision formulated in singular terms (Directive 2000/43/EC, Article 2(2)(a))³⁷ as applicable to a statement which refers to a whole group of persons (immigrants).

In this regard, the Curia took the stance that the Fundamental Law of Hungary has to be taken into account instead. Article IX Paragraph (5) of the Fundamental Law stipulates that freedom of expression shall not be exercised with the aim of violation of the dignity of the Hungarian nation or of national, ethnic, racial or religious groups. Furthermore, Article 1 of the ETA prescribes that, on the basis of the requirement of equal treatment, individuals, groups of persons, legal persons and organisations without legal personality residing in the territory of Hungary shall be treated with equal respect, circumspection and equal regard to their individual interests. When interpreted in the light of these provisions, it is unquestionable that the ETA shall be understood as prohibiting harassment committed not only against individuals but also against groups: any other interpretation would fly in the face of the principles set out in the ETA and the Fundamental Law, and if the mayor's statements could not be sanctioned, it would contradict the objectives defined by these laws.

37 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 2 (2)(a) '[D]irect discrimination shall be taken to occur where *one person* is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.' The *Feryn*-case (C-54/07) concerned a number of public statements made by the director of the company Feryn to the effect that his undertaking was looking to recruit fitters but that it could not employ "immigrants" because its customers were reluctant to give them access to their private residences. In its judgment delivered upon a request for preliminary ruling the CJEU observed that discrimination for the purposes of the Directive does not necessarily require that there is an identifiable complainant/victim. In addition, the Court pointed out that the fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin constitutes of itself direct discrimination in respect of recruitment, since such statements are likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market (summary based on the summary prepared by the European Commission Legal Service).

Remedies

While on paper the ETA offers a relatively wide range of sanctions, including the possibility of imposing sufficiently dissuasive fines, in the two cases where provisions on harassment have been applied to discriminatory public speech, the Authority did not avail itself of this option. Besides establishing that violation of the requirement of equal treatment had taken place, the Authority prohibited the mayors in both cases from committing future violations and ordered that its respective decisions be published.

The Authority pointed out that the violation in both cases had been ‘severe’ and concerned a ‘large number of aggrieved persons’, and emphasised that its ‘primary aim was to create a preventive effect’. However, it is not explained in either decision why refraining from imposing a fine is more suitable for achieving a preventive effect. A possible explanation for this reluctance to impose fines on municipalities and their officials is that the fine would eventually be paid from the municipal budget, which would, in effect, also sanction those residents whose rights had been violated.

In the *Szörös* case, the first instance court emphasised that moral damages have a dual function: to offer a remedy to the aggrieved party and to sanction violations of inherent personal rights through civil law means. In relation to the remedial function, the court emphasised that the capacity in which the respondent made the statement enhanced the statement’s ability to incite not only humiliation, but also fear among the members of the targeted minority group, while with regard to the second aspect, it pointed out that the objective of introducing the possibility of initiating inherent personal rights lawsuits in connection with statements targeting entire social groups was to suppress hate speech. The respondent’s position (as an influential politician of a national party) must also be taken into account in this latter respect, since politicians have an increased responsibility. In the light of these factors, the moral damages of EUR 320 claimed by the claimant may not be regarded as excessive, so it was granted in full. In fact, the court made a reference in its decision from which it may be inferred that it would have granted a higher amount had the claimant submitted a higher claim.

Future jurisprudence will show where the upper limits of the civil law sanctioning discriminatory public speech are, but litigants must bear in mind that if they claim amounts that the court considers excessive, then even if they win on the merits, they may have to pay court fees in relation to that part of the moral damages claimed which has not been granted.³⁸

Are national equality bodies and courts ready to deal with this type of case?

When we look at the readiness of courts and the Equal Treatment Authority to deal with cases of this type, the picture is mixed. The first-ever case to apply the ETA to discriminatory speech was launched by the Authority *ex officio* – although due to understaffing, among other factors, *ex officio* proceedings are quite rare in the practice of the Authority. Furthermore, in the *Kiskunlacháza* case, the Authority twice requested that the highest court undertake extraordinary review of unfavourable judicial decisions, although this is a discretionary action, i.e. the Authority could have taken the ‘easy way’, accepted the judgments of the lower courts and simply terminated the case. Thus, credit must be given to the Authority for taking a proactive approach in the *Edelény* case and for going through with the legal battle in the *Kiskunlacháza* case (which ultimately yielded the Curia’s crucial conclusion that harassment may be committed in relation to a group of persons). Where criticism may be voiced is in regard to the Authority’s reluctance, described above, to apply fines against actors making discriminatory statements amounting to harassment.

As to the courts, the very restrictive interpretation taken in the *Edelény* case seemed to suggest that the Supreme Court was not willing to allow those seeking remedies for discriminatory public utterances

³⁸ Hungary, Act III of 1952 on the Code of Civil Procedure, Article 81.

to circumvent the difficulties encountered in previous criminal and civil litigation by applying the ETA's notion of harassment to situations which might not have been originally envisaged by the legislator.

An interesting aspect of the Supreme Court's first *Kiskunlacháza* decision (October 2011) was that while the highest judicial forum perceived and pointed out the different linguistic formulations of the definition of harassment, it refrained from deciding whether harassment can be committed against a group of persons or only against individuals, and referred this issue back to the Equal Treatment Authority, expressly obliging the Authority to examine and decide the matter in its recommenced proceedings. However, three years later, in October 2014, the Curia was fully willing to accept the Authority's stance that harassment may be committed against a group. A possible explanation for this is that in 2011 the highest court sensed that by allowing the application of the notion of harassment to public hate speech it would open up a brand new litigation route which raised a conflict between the right to freedom of expression and the right to non-discrimination, and it might have felt that the issue was not yet ripe for decision. However, in 2014, the issue was no longer as acute, as in the New Civil Code, which came into force in 2013, the legislator had already provided members of targeted minority groups with a remedial possibility, so the stakes were no longer as high.

In any case, extending the applicability of harassment through teleological interpretation was an important step toward strengthening legal protection against discriminatory speech.

The freedom of expression defence

Interestingly, the issue of freedom of expression and its conflict with the right to non-discrimination did not come up as a matter of primary importance in two of the cases quoted above: only in the *Kiskunlacháza* case did the Authority and the courts examine this aspect thoroughly. In this case, the mayor emphasised as part of his defence that he participated in the demonstration and wrote his articles as a private person, and in this capacity he enjoyed freedom of assembly and expression. In response to this, the Authority's stance (ultimately confirmed by the courts) was that the mayor's responsibility for his statements shall be examined in the context that he made his statements in an official capacity.

The European Convention on Human Rights stipulates that the exercise of freedom of expression, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of the protection of the rights of others. Similar conditions for restrictions are enshrined in the International Covenant for Civil and Political Rights. In line with these international instruments, the Hungarian Constitutional Court also declared in several decisions³⁹ that the freedom of expression shall only be exercised with due responsibility, and therefore human dignity, integrity and the right to good reputation may constitute limitations to this freedom.

As is clear from the Preamble, explanatory memorandum and provisions of the ETA, the right to non-discrimination (the requirement of equal treatment) stems from and is a form of the right to equal dignity, and therefore it may serve as the basis for the proportionate restriction of the freedom of expression.

The Authority went on to state that as the offending speeches and writings were made public, 'they were capable of creating an intimidating, hostile and humiliating environment vis-à-vis primarily the Roma of Kiskunlacháza, but also the Roma of Hungary in general, which has a long-term negative impact on their lives, causes detriment to their reputation in society, and increases the biases against them. This restriction of the right to human dignity definitely does not stand the test of necessity and proportionality as set by the Constitutional Court for cases when fundamental rights collide.'

39 Hungary, Constitutional Court, decisions 30/1992 (V. 26.) AB, 96/2008 (VII. 3.) AB, and 34/2009 (V. 27.) AB.

In arriving at the conclusion that the freedom of expression defence may not exempt the mayor from his liability, the Authority and courts also referred to the increased responsibility of holders of public office. They quoted Decision no. 95/2008 (VII. 3.) AB of the Constitutional Court, according to which ‘it also depends on the actual social context what impact an expression targeting certain groups of society will have on members of the aggrieved community. Article 8 of the Constitution obliges persons exercising public powers to carry out their tasks respecting and protecting human dignity. This obligation does not only pertain to exercising their official tasks, but to all of their public utterances.’ They also referred to the *Féret v. Belgium* case, in which the ECtHR stated that political speech that stirred up hatred based on religious, ethnic or cultural prejudices was a threat to social peace and political stability in democratic states and that it was crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance.

As outlined above, the same principle was invoked in the *Szörös* decisions (although in that case, the respondent did not raise it, and it was relied on by the courts in justifying the amount of moral damages granted).

Thus, it seems safe to conclude – at least in relation to public figures and office holders – that the freedom of expression defence is not an obstacle to applying anti-discrimination law in the fight against discriminatory public statements.

3. The Romanian experience of combating discriminatory speech

Legislative and institutional framework in Romania

While in the ECtHR jurisprudence hate speech amounts to an exception from the freedom of expression (based on Article 10 paragraph 2 of the ECHR) or to an abuse of rights (based on Article 17 of the ECHR), the Romanian legal system interprets hate speech as representing a violation of the right to dignity. Romanian legislation includes an interdiction of incitement of hatred or discrimination in Article 369 of the Criminal Code.⁴⁰ In spite of the explicit penal prohibition, it remains without any application in practice.⁴¹ On the other hand, Romanian misdemeanours provisions sanction the violation of the right to dignity as a form of discrimination. Article 15 of the Romanian anti-discrimination legislation, Governmental Ordinance no. 137/2000 (G.O. no. 137/2000), provides for the protection of the right to dignity.⁴² At the same time, Article 2 paragraph 8 of G.O. no. 137/2000 establishes that the provisions of the Ordinance ‘could be not interpreted as to lead to a limitation of the freedom of expression’. This formulation has two contradictory meanings: either the Ordinance does not ascertain the legal value of the limitation of the freedom of expression (so Article 15 is not applicable for discriminatory speech) or, when the Ordinance is applied, freedom of expression could not be invoked as a defence.

Victims of hate speech could also file a complaint before civil courts, seeking moral damages under general torts provisions of the Civil Code,⁴³ but there is no relevant jurisprudence in the field. This might

40 Romania, Law no. 286/2009 on the Criminal Code, 17 July 2009. Official translation available at: <http://www.legislationline.org/documents/section/criminal-codes/country/8>. Article 369: ‘incitement of the public, using any means, to hatred or discrimination against a category of persons is punished with prison from six months to three years or with a fine.’

41 ECRI (2014), *ECRI Report on Romania (fourth monitoring cycle)*, adopted on 19 March 2014, published on 3 June 2014, Strasbourg, Council of Europe, § 35, <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/romania/ROM-CbC-IV-2014-019-ENG.pdf>.

42 Romania, Governmental Ordinance no. 137/2000 regarding the prevention and the punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), 30 August 2000. Article 15: ‘Under the Ordinance herein, any offending public behaviour, any nationalist-chauvinist public behaviour, any incitement to racial or national hatred, or any behaviour aiming to prejudice a person’s dignity or to create a hostile, degrading, humiliating or offending atmosphere, perpetrated against a person, a group of persons or a community on account of race, nationality, ethnic group, religion, social category or belonging to a disadvantaged category, on account of beliefs, sex or sexual orientation shall constitute an offence, unless the deed falls under the incidence of criminal law.’

43 Romania, Law no. 289/2009 on the Civil Code (*Lege 289/2009 privind Codul Civil*), 17 July 2009.

be explained by the reluctance of victims to engage in a rather long process which usually entails professional support from a lawyer.

The only institution with a rich jurisprudence on discriminatory statements, analysing a rather high number of cases in the field, is the National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*, NCCD).⁴⁴ Complaints before the NCCD could be filed by victims (members of the affected communities) or NGOs. They can also be initiated ex officio by the NCCD. If discrimination is established, the perpetrators could be fined between approx. EUR 200 and EUR 20 000 (RON 1 000 and RON 100 000) and obliged to publish a summary of the decision. NCCD decisions can be challenged in the administrative court, which can retain, change or totally annul them.⁴⁵

Relevant jurisprudence

Romanian villages under 'Gypsy terror' case

The Centre for Legal Studies and Human Rights, an NGO, filed a complaint against the author of the article 'Romanian villages under Gypsy terror', published online.⁴⁶ The article begins with an idyllic presentation of Romanian villages at Christmas time, then relates that, in a village, an old woman left her door open but instead of carollers, 'a Gypsy gang' entered and emptied her house. The article presents series of crimes committed by 'Gypsy gangs'. 'The Romanians are working, as many as possible who can still carry on working, and the Gypsies stole the harvest, in an aggressive way, so the poor people, alone and old, remain only to cry, powerless.' The author criticised the authorities for taking no measures against criminality, showing that this passivity led to violence against Roma communities. 'The most notorious case is from Mureș county, but the number of similar cases is high. The supported terror and humiliation will be transformed slowly into hate and revolt, which can trigger phenomena which are difficult to control and hard to manage. Even so, the population is currently ready to vote for any political party, from any extreme, which could assure peace and security.' The article also justifies the deportation of Roma during the Second World War: 'A similar situation existed in Romania in the period of the War, when the Roma left at home attacked the homes and families of those who went to (fight on) the field of war. Antonescu took them and deported them to Transnistria.' Specifying that times have changed, the journalist proposed as a solution 'the legalisation of volunteer troops (vigilantes), to support police, equipped with assault weapons (in police custody or even in their custody, at home), who patrol at critical times and would shoot (by law) those who did not obey, did not give up, attack or run.' At the end, the article added that 'the harshness of defending the villages could not itself be interpreted as being racist. It is addressed to any kind of gang of thieves, any thieves, regardless of ethnicity, and honest Gypsies would not be harmed, they will be also protected. But leaving the Romanian villages at the mercy of Gypsy gangs is treason against this nation.'

The NCCD resolved the case in Decision no. 439/10.07.2013, establishing (with a unanimous vote) that the article represents direct discrimination on grounds of ethnicity, because it presents Romanians in positive terms and Roma in negative terms, violating the right to dignity of Roma people. The decision specifies that the article, describing Roma as criminals who terrorise Romanian villages and suggesting combating Roma criminality by measures which are contradictory to the principle of the rule of law, represents a behaviour manifested in public which incites racial hatred and aims to establish an

44 Based on the last activity report of the NCCD, from 2014, from a total of 776 registered files in 105 of these were in the field of violation of the right to dignity (not all were on use of hate speech, as the statistics are not that specific); 33 contraventions were found, with 22 fines issued. For the other 11 cases the NCCD issued warnings carrying no financial penalty (*Raport de activitate*, 2014, available at: http://cncd.org.ro/files/Raport_CNCD_2014.pdf, in Romanian).

45 For a detailed description of the institutional mechanisms and the available remedies see European Commission, European Network of Legal Experts in Gender Equality and Non-discrimination (2015), Iordache, R. *Country report Non-discrimination, Romania, Reporting period 1 January 2014 – 31 December 2014*, Luxembourg, Publications Office of the European Union, available at: <http://www.equalitylaw.eu/country/romania>.

46 The article '*Sate românești sub teroare*' was published on <http://www.crisana.ro/stiri/controversa-23/sate-romanesti-sub-teroare-tiganeasca-133318.html>, in Romanian. The text was erased from the website.

intimidating, hostile environment against persons belonging to the Roma community. In the analysis of the boundaries between freedom of expression and the right to dignity, the NCCD decision found that limitation of the freedom of expression is legal, legitimate (given the aim primarily to provide protection for the reputation or rights of others, but also to preserve public safety and morals and prevent disorder) and necessary in a democratic society. In the analysis of this last element, the NCCD based its decision inclusively on the jurisprudence of the ECtHR in the field. Among the principles addressed, the NCCD mentioned that the exercise of freedom of expression carries with it duties and responsibilities, so an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs, may legitimately be provided for. Also, statements regarding the criminal character of a community did not contribute to a real public debate.⁴⁷ The NCCD also invoked the ECtHR principle that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society, so it may be considered necessary to sanction all forms of expression which attack human dignity (*Gündüz v. Turkey*, no. 35071/97, 4 December 2003, § 40). Furthermore, the NCCD used the ECtHR approach in finding that the freedom of the press covers the possibility to use a certain level of exaggeration, even provocation, but it must not overstep certain boundaries, in particular in respect of the reputation and rights of others.⁴⁸

The NCCD decision also emphasises that the article describes certain facts, without providing evidence, not just certain opinions, and states: 'Because an atmosphere similar to that described in the article was established, in the early 1990s in Romania there was a series of incidents resulting in lynchings and arson, for which Romania was obliged to pay damages to victims (*Moldovan and others v. Romania*, *Kalanyos and others v. Romania*, *Gergely v. Romania*, *Tănase and others v. Romania*). Establishing an environment in which burning Roma houses and lynching of people could reappear could not be tolerated.'

The company owning the publication was fined approx. EUR 1 600 (RON 8 000) (with 5 votes for and 1 against) and the journalist was fined approx. EUR 1 200 (RON 6 000).⁴⁹ When providing the reasoning for the fine, the NCCD explained that firstly, the discrimination affected a community; that the fine was increased given the gravity of the facts, the legislator recognising that fines which are too small might not comply with the EU legislation in the field, so the NCCD has to apply fines higher than the legal minimum. The NCCD also noted that ethnic discrimination has to be considered an extremely serious perpetration; as the ECtHR underlined, this type of discrimination is so serious that it could be considered degrading treatment in the sense of Article 3 of the ECHR (ex. *Moldovan and others v. Romania* no. 2 of 12 July 2005). The NCCD also noted that the article could be accessed by a high number of readers and that the language used, the description of old Romanians suffering in idyllic villages at Christmas time, due to the actions of 'Gypsy criminals', and the proposed 'solution' were of a nature which serves not only to create an intimidating atmosphere but also to incite, and that prior experience of 'solutions' for problems outside the framework of rule of law creates a threat.

The persons sanctioned by the NCCD challenged the decision before the Oradea Court of Appeal, which, in its Decision no. 57/CA/2014 – P.I. of 26 March 2014, totally annulled the NCCD's decision. In doing so, the Court of Appeal based its rationale on the following considerations: the freedom of

47 ECtHR, *Otto-Preminger-Institute v. Austria*, no. 13470/87, 20 September 1994, § 49; ECtHR, *Wingrove v. United Kingdom*, no. 19/1995/525/611, 25 November 1996, § 52; ECtHR, *Gündüz v. Turkey*, no. 35071/97, 4 December 2003, § 37.

48 The NCCD decision cites: all ECtHR, *Lingens v. Austria*, no. 9815/82, 8 July 1986, § 41-42; *Castells v. Spain*, no. 11798/85, 23 April 1992, § 42; *De Haes and Gijels v. Belgium*, no. 19983/92, 24 February 1997, § 37; *Fressoz and Roire v. France* [Grand Chamber], no. 29183/95, 21 January 1999, § 45; *Sürek and Özdemir v. Turkey* no. 23927/94 and no. 24277/94, 8 July 1999, § 58; *Sürek v. Turkey* no. 1, no. 26682/95, 8 July 1999, § 59; *Sürek v. Turkey* no. 4, no. 24762/94, 8 July 1999, § 55; *Okçuoğlu v. Turkey*, no. 24246/94, 8 July 1999, § 44; *Erdoğan v. Turkey*, no. 25723/94, 15 June 2000, § 52; *Şener v. Turkey*, no. 26680/95, 18 July 2000, § 41.

49 At the time the discriminatory deed was committed, the law prescribed a fine of between approx. EUR 80 (RON 400) and approx. EUR 800 (RON 4 000) if the victim of discrimination was a person, and between approx. EUR 120 (RON 600) and approx. EUR 1 600 (RON 8 000) if the victim was a group of persons or a community; the law was later modified, so that the highest fine for discrimination against more than one person is approx. EUR 20.000 (RON 100 000).

journalists also includes the use of a certain amount of exaggeration, even provocation (citing ECtHR cause *Thor Thorgeirson v. Iceland*); the article includes public information, such as the high criminality in rural areas, the lack of reaction from authorities, ‘criminality among a certain social category’,⁵⁰ and the dissatisfaction of citizens regarding the inactivity of authorities; the goal of the article was not to humiliate Roma, but to criticise authorities which did not take proper measures against criminality; the term ‘Gypsy gang’ did not refer to an ethnic community, but to a limited group of people, who commit crimes; the solution suggested by the author of the article did not refer to Roma, but to criminals in general, regardless of their ethnicity.

In the appeal filed by the NCCD against the decision of the Oradea Court of Appeal, the High Court of Cassation and Justice, in Decision no. 300 of 9 February 2016, modified the verdict of the first court, accepting that the article represented discrimination, mentioning that in the second part of the journalistic discourse the author of the article expressed himself using exaggeration, and proposed an unreasonable solution, outside of the framework of rule of law, a message that is not protected by Article 10 of the ECHR. The High Court stated that, given the moment when the act took place, the more favourable law should be applied.⁵¹ Based on the last argument, the High Court decreased significantly the fines applied by the NCCD, to approx. EUR 160 (RON 700) for the company and to approx. EUR 120 (RON 600) for the journalist.

Facebook posting entitled ‘Fuck Transylvania’

A private person sent a complaint to the NCCD regarding an article posted on Facebook, entitled ‘Fuck Transylvania’⁵² which stated:

‘I want Romania as a principality! I did not want this filthy Transylvania in my country! I did not want those horsemen Gypsies, stateless Hungarians⁵³ from Cluj nourished from troughs in Sora shopping centre,⁵⁴ the ugly Transylvanian girls, manly looking and whore in behaviour, those giant and slack, not knowing what a fuck of race they have! This Transylvania brought us only bad things! ... Let us give it to the Hungarians and we should also give to them the Gypsies Oltenia, it is not like we leave them without wheat! I do not want to be nourished with your Hungarian products! I do not want anymore the Democratic Alliance of Hungarians in Romania in my Principality! ... Fuck Transylvania and your Hungarian, masonic and other devil originated history! I do not want you anymore! You make me sick! Take Harghita and Covasna counties and put them in your asses! Visa, brother! Take your execrable mountains, anyway Hungarians are taking your forests and resources! I do not want the Trojan horse in my country anymore! Let’s update Trianon so that we could take a breath, because you’ve stepped on our head! You want Hungarians? Take them and cleave unto them! Anyway, all of the rivers from Transylvania go in Tisza... Reflect on this! PLEASE (organise a) REFERENDUM !!!!!.’

The NCCD Decision no. 599/22.10.2014 established (by a unanimous vote) that the statements in the posting amount to direct discrimination and violate the right to dignity. The NCCD analysed only aspects regarding the public character of the posting on Facebook and the limits of freedom of expression, not the legal classification of the facts based on the provisions of the G.O. no. 137/2000. The NCCD found that limitation of the freedom of expression is legal and legitimate (having the aim of ensuring the protection of dignity). The necessity of state interference in relation to freedom of expression is supported by the

50 With this wording the court accepts the stereotype that Roma are not an ethnic community, but a social category, predisposed to commit crimes.

51 This finding of the High Court is incorrect, given that the decision of the NCCD explained that it applied the favourable law to the fined persons, mentioning that ‘Article 26 para. 1 of G.O. no. 137/2000 provides (at the date of the acts): The court did not justify why the modified fines are effective, proportionate and dissuasive.

52 The language actually used in the posting is more obscene than could be presented for the purposes of this article.

53 The author used the pejorative term ‘*bozgor*’ meaning ‘stateless’ implying that after the First World War Hungarians in Transylvania remained without their homeland.

54 The building of the shopping centre was returned to the Transylvanian Unitarian Church.

fact that the article did not have informing public opinion as goal, and did not contribute to a public debate capable of furthering progress in human affairs, but the posting is gratuitously offensive to a community, and the forms of expression used incite and promote hate based on intolerance. The NCCD noted that the allegations were made in the context of a hotly debated subject on regionalisation and calls for establishment of a so-called Szekler region and the perpetrator considered that a referendum is needed to solve the problem. The decision states that, given the way in which the article was written, a violation of the right to dignity of an entire community and of the complainant was perpetrated and this led to a feeling of inferiority. The NCCD emphasised that even a pamphlet should not infringe the right to dignity. The author of the article was fined approx. EUR 400) (RON 2 000) and the quantum of the fine was not explained in the reasoning.

The decision of the NCCD was challenged by the perpetrator before the Bucharest Court of Appeal. Decision no. 1332/2015 of 12 May 2015 of the Bucharest Court of Appeal upheld the decision, specifying that the text was not an artwork, as claimed by the author (the perpetrator is a writer), but contained exclusively opinions with content offensive to a community, which incite hate, and the message was not justified by other purposes, as in the case of pamphlets. The Court went on to find that the author affirmed his hate against a region of the country and against its inhabitants by a sequence of insulting phrases. As for the medium of the communication, the court decision finds that Facebook is not privileged in comparison with other channels of public expression, freedom of expression is not absolute even for this platform; the text was accessible not only to friends of the writer, who know his style, but to any interested person. The court reasoned that the use of insulting language was entirely gratuitously offensive, without any other outcome but to affect the right to dignity, the text did not allow identification of any true weakness of the communities, but is reduced to addressing insults and expressing disdain in an extremely vulgar form towards a community. The manifestation of hate on grounds of affiliation to a historic region cannot be protected by Article 10 of the ECHR, because it violates human dignity and creates a conflictual situation, inciting discrimination. The fine issued was considered by Bucharest Court of Appeal to be proportional with the social danger of the deed, as the language used was extremely insulting and without any justification. The verdict was not appealed and became final.

ACCEPT v Becali case

In 2010 ACCEPT Romania, a human rights NGO promoting equality for LGBTIQ people, filed a complaint with the NCCD based on the discriminatory character of the following statement made by the person publicly known as the owner of the Steaua Bucureşti Football Club: 'Even if Steaua will be disbanded, I will not take a homosexual to the team. [...] we would rather play with a player from the juniors than with a gay.' The petition was lodged both against Mr George Becali, the person presenting himself and publicly known as the owner of the club, and the football club itself, claiming both discrimination in access to employment and violation of the right to dignity, given the discriminatory speech.

The NCCD resolved the case in its Decision no. 276/13.10.2010, establishing (with 6 votes for and 1 against) that the statement represents harassment and violates the right to dignity of LGBT people, because it is a behaviour aiming to create a humiliating, offensive environment for a community, based on the criterion of sexual orientation. As its sanction the NCCD issued a warning carrying no financial penalty in relation to Mr Becali. The decision did not include any reasoning regarding the individualisation of the remedy. No finding of discrimination and no sanction was issued in relation to the football club in regard to the alleged discrimination in employment. The decision of the NCCD was challenged by ACCEPT Romania before the Bucharest Court of Appeal, seeking annulment of the NCCD decision. The Court of Appeal referred the case to the CJEU for a preliminary ruling, seeking clarifications on the application of the judgment from Case C54/07 *Feryn* [2008] ECR I5187 to this case, the interpretation of the burden of proof and the meaning of adequate remedy under Directive 2000/78/EC. The CJEU issued its

clarifications in *C-81/12 Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, its first case on discrimination in recruitment on grounds of sexual orientation.⁵⁵

When it reopened the case after the CJEU judgment, the Bucharest Court of Appeal, in its Decision no. 4180/2015 of 23 December 2012, upheld the decision of the NCCD.⁵⁶ In rejecting the appeal filed by ACCEPT, Bucharest Court of Appeal found that a warning fulfils the requirement stated by the CJEU regarding the effectiveness, proportionality and dissuasive character of the sanction. The Court further considered that the NCCD decision included a fair individualisation of the sanction,⁵⁷ and the Court found that the sanction carrying no pecuniary penalty was adequate, given the context in which the deed was perpetrated – ‘respectively, a purely journalistic initiative, the statements being provoked by the journalist with the clear purpose of obtaining the private position of the interviewee, correlative to exercising the right to free speech in relation to a subject which was in an abstract relation with the field of employment, as well as the lack of any subsequent effects, due to the fact that no effective refusal of hiring on discriminatory grounds was substantiated’. When discussing the request for adequate remedies, the Court of Appeal added that ‘the public character of the statement cannot be seen as an aggravating circumstance in establishing the sanction.’⁵⁸

The verdict of the Court of Appeal was challenged by ACCEPT Romania before the High Court of Cassation and Justice. In its Decision no. 2224 of 29 May 2015, the High Court upheld the verdict, rejecting ACCEPT’s request to quash the decision of the national equality body as ‘unfounded’. The High Court used the reasoning of the Court of Appeal, also arguing that the administrative warning carrying no penalty is an adequate remedy and the publicity given to the NCCD’s decision leads to ensuring the dissuasive character of the sanction: ‘contrary to the statements of the complainant, a warning (as sanction) is not incompatible with Article 17 of Directive 2000/78/EC and cannot be considered *de plano* as a *purely symbolic* sanction [italics used by the Court]. In applying this sanction, the NCCD has a margin of appreciation under which it assessed multiple elements, among which the context in which the deed was perpetrated, the effects or the outcome and the person of the perpetrator played an important role. Not least, the publicity generated by the decision to sanction the author of the deed of discrimination, who excessively exercised his freedom of expression, played a dissuasive role in society.’ The High Court also considered that the legitimate interests of the complainant, a human rights NGO, were not affected by applying a warning instead of a fine.⁵⁹

In the decisions in the *ACCEPT v. Becali* case, both the courts and the NCCD indicated that in cases where public persons are accused of being perpetrators, discriminatory speech could be defined as excessive exercise of freedom of expression and sanctioned leniently by administrative warnings carrying no pecuniary value. Notably, the public impact of the statements was not taken into consideration as an aggravating circumstance. More worrying is the High Court finding that an *actio popularis* case initiated by a human rights NGO in a case of discriminatory statements targeting a community, though specifically allowed by the Romanian anti-discrimination legislation, might entail proof of the legitimate interest of the NGO in having an adequate administrative remedy applied.

55 Judgment of the Court available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=136785&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=642362>.

56 This article reviews only the arguments of the parties and of the courts in relation to the discriminatory statements by Mr. Becali and the correlative warning issued as sanction, and not the debate regarding the denial of employment on grounds of sexual orientation, which is not relevant for the purposes of this article.

57 Even if the NCCD decision did not provide a reasoning for the sanction applied.

58 Romania, Bucharest Court of Appeal decision in file 12562/2/2010, *ACCEPT v. NCCD*, 23.12.2013. The summary of the decision is available at: <http://lege5.ro/Dosar/qi4dembug5pte/12562-2-2010-curtea-de-apel-bucuresti>.

59 Romania, High Court of Cassation and Justice of Romania, decision 224 in file 12562/2/2010: ‘the High Court also concludes that the complainant association cannot justify the infringement of a legitimate public interest, under the meaning of Article 2 (1) letter r of Law 554/2004 (*Legea Contenciosului Administrativ*), given the fact that the NCCD issued a warning for George Becali and not an administrative fine.’

The current jurisprudence of the Romanian national equality body and of the courts is contradictory, as shown by the sample of cases presented. The lack of coherence might be explained by several factors: (1) human rights law and anti-discrimination law in particular are complex areas of law, a limitation between different rights needing to be established; (2) human rights law is an optional subject for many law schools in Romania, therefore a solid base of knowledge in the field for magistrates and practitioners is not offered; (3) this is a relatively new field in a post-Communist country, freedom of expression being highly restricted during Communism. An additional reluctance to understand the limits to free speech when this is discriminatory stems from experience in the early 1990s, when penal sanctions were applied against those who criticised the Government, creating a strong militant mainstream movement in favour of freedom of expression; (4) lack of empathy with the victims, as hate speech usually affects vulnerable groups (e.g. Roma, LGBT people), with whom there is no solidarity in public opinion, as indicated by the annual perceptions and attitudes surveys carried out by the NCCD.

4. Concluding remarks

Anti-discrimination norms seem to offer a viable alternative for taking action against discriminatory speech in both countries, the authorities of which share a reluctance to apply the existing penal sanctions for such utterances. There are certain advantages to this approach that are characteristic for both countries, while others are only in place in one or the other.

Among the advantages of proceedings before the respective equality bodies identified both in Hungary and in Romania, the following may be pointed out:

- the investigation and the subsequent assessment is carried out by experts already familiar with and – ideally – more sensitive to the specificities of the phenomenon of discrimination as applied to a particular protected group;
- legal standing is also provided to non-governmental organisations, which spares often already disadvantaged individuals from having to take the personal risks that are sometimes entailed by initiating such legal actions;
- the procedures are faster, allowing for speedy reactions, and are free for the complainants;
- the burden of proof is shared between the victims and the perpetrators;
- administrative sanctions have the potential to discourage and have an educational impact on the perpetrators, while not triggering the strong reluctance on the part of the authorities which the criminal sanctions seem to generate.

In Hungary, some problems arise in connection with limited scope in regard to actors whose discriminatory statements may be sanctioned in this way, and also with the fact that moral damages can only be claimed by the aggrieved individuals concerned through civil lawsuits. While victims of discriminatory speech are less reluctant than their Romanian peers to use civil courts in their fight against discrimination (and the evolving jurisprudence seems to suggest that this will become a viable remedy in Hungary), this forum lacks some of the advantages that the use of the Equal Treatment Authority offers (speediness, lack of financial risks for the complainant, standing of NGOs, specialised knowledge), although still seems more effective than penal action.

In Romania, in spite of the large number of cases and the high visibility of the NCCD, due to its prior history of sanctioning for discriminatory statements the President, the Prime-Minister, the Minister of Foreign Affairs and numerous key political figures, the jurisprudence balancing protection of the principle of non-discrimination and freedom of expression is still not crystallised and is not predictable. The solid grounding in the ECtHR jurisprudence providing the principles to be used when limiting the exercise of freedom of expression when it turns into an abuse of rights is not consistently applied, thus leading to conflicting outcomes.

Implementation of positive action measures for achieving gender equality in the FYR of Macedonia, Montenegro and Serbia

Ivana Krstic*

Introduction

After the dissolution of the Socialist Federal Republic of Yugoslavia in 1991, its federal units, namely the FYR of Macedonia, Montenegro and Serbia, have embarked upon social, political and economic reform processes on a large scale. In many areas of law, new laws or major amendments to existing legislation have been adopted, in order to bring national legislation and practice into line with international and European standards as established in the jurisprudence of the European Court of Human Rights. These countries adopted new constitutions containing a broad range of guaranteed human rights and freedoms. Among other things, they have adopted a comprehensive legal framework for protection against discrimination, and they have introduced measures to promote sex/gender equality. This legal work has intensified with obtaining EU candidate status, imposing further harmonization of legal norms, as well as the adoption of completely new laws protecting against sex or gender discrimination.¹

However, it is submitted that implementation of a gender equality framework is still inadequate in all three candidate countries and requires the adoption of positive action measures in order to combat gender inequality, which measures are the focus of this paper. Positive action measures are recognised in many international instruments, particularly in Article 4 of the UN Convention on the Elimination of All Forms of Discrimination against Women, as well as in Article 23 of the Charter of Fundamental Rights of the European Union, which stipulates that 'the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex'. Positive action is also a part of EU sex equality law, stipulated, among others in Article 157, paragraph 4 of the Treaty on the Functioning of the EU (TFEU), Article 3 of the Recast Directive 2006/54/EC, and Article 6 of the Goods and Services Directive 2004/113/EC.² So far, the CJEU has found that positive action measures are allowed only in a case where two candidates are equally qualified for a certain position, and without

* Associate Professor in International Human Rights Law, Faculty of Law, University of Belgrade.

1 All three Western Balkans countries were identified as a potential EU candidate country during the Thessaloniki European Council summit in 2003. The FYR of Macedonia was granted EU candidate status in 2005, the Republic of Montenegro was granted EU candidate status in 2010, while the Republic of Serbia was granted EU candidate status in 2012.

2 Equinet, (2014), *Positive Action Measures, The Experience of Equality Bodies*, pp. 14-15; available at http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf, last accessed 14 September 2016. See also Article 5 of the Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180/1, 7.7.2010.

giving automatic preference to the under-represented sex.³ Thus, specifically designed positive measures must be exposed to careful review.⁴

This paper analyses the legal basis for the adoption of positive action measures in the FYR of Macedonia, Montenegro and Serbia, as well as their implementation in practice. It also presents the existing case law which gives some further guidelines on positive action measures and how they are understood or misunderstood in some of these countries. The paper is divided into three sections: section 1 deals with the legal basis for adopting positive action measures; section 2 deals with their implementation in three areas, namely political life, employment and representation of women on company boards; and section 3 deals with the relevant case law that casts light on the application of positive action measures in Serbia. This paper does not discuss the implementation of positive action measures in relation to access to and supply of goods and services.

1. Legal basis for positive action measures

1.1 Constitutional basis

The Constitutions of all three candidate countries, the FYR of Macedonia, Montenegro and Serbia, contain provisions providing for equality and prohibiting sex/gender discrimination, but not all of them expressly allow positive action measures. For example, the Constitution of the FYR of Macedonia, Article 9, paragraph 1, proclaims the equality of its citizens in their rights and freedoms, regardless, amongst other things, of their sex.⁵ This provision further proclaims equality of all before the Constitution and the law, promoting *de jure* equality.

On the other side, the Constitution of Montenegro,⁶ Article 8, paragraph 2, expressly allows positive action measures aimed at creating the conditions for the exercise of gender equality, imposing a restriction on the application of these measures once the aims for which they were undertaken have been achieved (Article 8, paragraph 3). It also provides in Article 18 that the state must guarantee the equality of women and men and must develop policies on equal opportunities.

The Serbian Constitution⁷ also recognizes positive action and stipulates in Article 21, paragraph 4 that these measures may be introduced with the aim of achieving full equality of individuals, or groups of individuals, in a substantially unequal position compared to other citizens. However, this provision lacks the temporal restriction which is necessary for the assessment of the proportionality of positive action measures.⁸ In addition, Article 15 of the Serbian Constitution proclaims gender equality as one of the

3 In several cases, the CJEU was supposed to rule on whether certain provisions of the national law containing binding targets for increasing the proportion of women in sectors of public employment where they were under-represented, could be so interpreted as to be consistent with the Equal Treatment Directive (Council Directive 76/207/EEC). When this question was referred to the ECJ for the first time in *Kalanke* in 1995, the ECJ held that since positive action had become an exception to the general principle of equality, it had to be interpreted restrictively: Case C-450/93, *Kalanke v. Freie Hansestadt Bremen* [1995]. See also Case C-409/95, *Marshall v. Land Nordrhein-Westfalen* [1997], Case C-158/97, *Badeck's Application* [2000], Case C-407/98, *Amrahamsson v. Forelquist* [2000] and Case C-476/99, *Lommers v. Minister van Landbouw* [2002].

4 As Howard said, 'sometimes anti-discrimination measures provide for positive action or preferential treatment of historically disadvantaged groups, but because formal equality is symmetrical, there is no room for such measures, as these would give preferential, and thus unequal, treatment to certain people'. She further emphasized that 'equalising the starting line by removing obstacles for people from disadvantaged groups does not necessarily lead to a more equal society', and, therefore, each positive action measure must be carefully designed and monitored. See Howard, E. (2008), 'The European Year of Equal Opportunities for All—2007: Is the EU Moving Away From a Formal Idea of Equality?' *European Law Journal*, No. 2, p. 170.

5 The Constitution of the FYR of Macedonia, *Official Gazette of the Republic of Macedonia*, No. 52/1991.

6 The Constitution of Montenegro, *Official Gazette of Montenegro*, No. 1/2007.

7 The Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, No. 98/2006.

8 Its predecessor, the Charter of Human and Minority Rights and Civil Liberties of the State Union of Serbia and Montenegro from 2003 (which was a composite part of the Constitutional Charter), Article 3, paragraph 4, allowed the introduction of

constitutional principles and declares that the state will guarantee the equality of women and men, and develop equal opportunities policies.

1.2 General anti-discrimination laws

Constitutional provisions are further elaborated in anti-discrimination laws. All three candidate countries have introduced general, as well as specific equality laws that prohibit sex/gender discrimination.

In 2010, 19 years after the adoption of the Constitution, the FYR of Macedonia adopted its first anti-discrimination law in the form of the Law on Prevention and Protection against Discrimination.⁹ As the Constitution does not expressly allow positive measures, it is important that Article 13 sets out exclusions for discrimination in the form of positive measures. Those measures are adopted by public bodies, state institutions or by legal persons and individuals, if the differentiation is justified and proportionate to the aim. This Law specifies that measures can be implemented until complete factual equality is achieved.

The general anti-discrimination law in the form of the Law on the Prohibition of Discrimination was adopted in Montenegro in 2010, several years after the adoption of the Constitution.¹⁰ This Law, in Article 5, also expressly allows positive measures aimed at creating conditions for, amongst other things, gender equality. Measures are designed by state bodies, state administration bodies, local government, public enterprises and other legal entities with public authority, as well as other legal entities and individuals. In addition, as Macedonian law, this provision imposes a restriction that the measure must be proportionate, and is to last only until the objective has been attained.

The Serbian Law on the Prohibition of Discrimination was adopted in 2009.¹¹ It also recognizes positive action measures, in Article 14, stating that ‘measures introduced for the purpose of achieving full equality, protection and progress of an individual or a group of persons in an unequal position shall not be considered to constitute discrimination’. This approach is very similar to Article 157, paragraph 4 of the TFEU, which allows positive action measures aiming to ensure full equality in practice. The wording of Article 14 was changed from a draft law in the final version, and the word ‘temporary’ was deleted. This solution is inadequate, especially bearing in mind that the constitutional provision also does not explicitly state that positive action measures are temporary.¹² In addition, Article 14 does not impose any restriction that the measure must be proportionate.

1.3 Specific sex/gender anti-discrimination laws

In all three countries, specific sex/gender anti-discrimination laws were adopted. These laws take different approaches to positive action measures, as some of them only allow positive measures and prescribe certain concrete provisions which presuppose positive measures in certain areas of social life (Serbia), while others define positive measures (FYR of Macedonia), provide guidelines on what positive measures are (Montenegro) and prescribe mechanisms for their adoption and supervision (FYR of Macedonia and Montenegro).

special interim measures necessary for the realization of equality, and paragraph 5 proclaimed that these measures could apply only until their purpose was achieved. See The Charter of Human and Minority Rights and Civil Liberties of the State Union of Serbia and Montenegro, *Official Gazette of the Republic of Serbia and Montenegro*, No. 6/2003.

9 Law on Prevention and Protection against Discrimination, *Official Gazette of the Republic of Macedonia*, Nos 50/10 and 31/16.

10 The Law on the Prohibition of Discrimination, *Official Gazette of Montenegro*, Nos 46/10 and 18/14.

11 The Law on the Prohibition of Discrimination, *Official Gazette of the Republic of Serbia*, No. 22/2009.

12 Article 4, paragraph 1 of CEDAW requires that positive measures are temporary. This Convention was ratified by the Republic of Serbia on 12 March 2001. Text available at http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf, last accessed 14 September 2016.

The Law on Equal Opportunities for Women and Men in the FYR of Macedonia¹³ sets as its main aim the establishment of equal opportunities for women and men in all areas of social life (Article 2).¹⁴ The Law also prescribes gender mainstreaming “in each phase of the process of building, adopting, implementing, monitoring and evaluating policies, considering the promotion and improvement of the equality of women and men” (Article 4, paragraph 10). The Law contains several provisions that differentiate between different types of measures for the implementation of the principle of equal opportunities for women and men. Article 5 defines general measures, while Article 7 covers special measures. This is the only Law, among the three candidate countries, that defines special measures, as being “temporary measures taken for the purpose of overcoming an existing unfavourable social status of women and men which results from systematic discrimination or structural gender inequality caused by historical and socio-cultural circumstances”. In addition, the Law explains that the aim of these special measures is to eliminate the barriers for, or to give special motivation to the discriminated against sex in order to secure equal starting positions for women and men, their ‘equal treatment, balanced participation or equal social status, development of individual potentials that contribute to social development and its development’. Special measures can be implemented in particular areas of social life, which include, among others, positive measures, encouraging measures,¹⁵ and programme measures.¹⁶ Positive measures give priority to persons of the under-represented gender until equal representation is reached or until the aim for which the measures are taken is achieved.

Article 8 then cover the adoption of such measures, while articles 9-16 prescribe different entities responsible for adoption and implementation of these measures.¹⁷ It is important to underline that it also includes policies and programmes aimed at changing social and cultural customs in terms of the behaviour of both women and men for the elimination of prejudices, as well as any other practice based on the inferiority or superiority of one or other gender or of the traditional social role of men or of women.¹⁸

Special measures can be adopted only after research and analyses of the current situation of gender inequality showing the adoption of special measures to be justified. The Ministry of Labour is required to give a positive opinion before a plan can be adopted for the implementation of special measures.¹⁹ Entities which have adopted special measures are obliged to submit a report on the results achieved to this Ministry. However, areas in which special measures are prescribed in the Law are unclear, and it seems that they are limited in relation to the participation of women in decision-making processes and in regard to access to economic opportunities.²⁰

The Law on Gender Equality²¹ in the Republic of Montenegro stipulates equality between women and men in all areas of public and private life and requires the development of equal opportunities policies. Like the Macedonian law, it also dedicates a significant part to general and special measures

13 Law on Equal Opportunities for Women and Men, *Official Gazette of the Republic of Macedonia*, No. 6/12.

14 Equal opportunities for women and men are defined as a ‘promotion of the principle of introduction of equal participation of women and men in all spheres of the public and private sector, equal status and treatment in the exercise of all the rights and in the development of their individual potentials through which they contribute to the social development, as well as equal benefits of the results arising from that development’ (Article 4, paragraph 1).

15 These measures are defined by the Law as ‘measures that ensure special incentives or introduce special advantages with the purpose of eliminating the circumstances that cause unequal participation of women and men, or unequal status of one gender compared with the other or unequal distribution of social goods and resources’.

16 These measures are defined as ‘measures directed at awareness-raising, organizing activities and drafting and implementing action plans for the purpose of motivating and promoting equal opportunities’.

17 The Law prescribes the role of the Parliament (Article 9), the Government (Article 10), the State administrative bodies (Article 11), the Ministry of Labour and Social Policy (Article 12), the Ombudsman (Article 13), the local self-government units (Article 14), the political parties (Article 15), and the mass media (Article 16).

18 Article 5, paragraph 2 of the Law, defining general measures.

19 Article 12, paragraph 3 of the Law.

20 Association for Emancipation, Solidarity and Equality of Women of Republic of Macedonia – ESE and Akcija Zdruzenska (2012), *Shadow Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women*, p. 14; available at http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/ESEM_for_PSWG_en.pdf, last accessed on 3 August 2016.

21 Law on Gender Equality, *Official Gazette of Montenegro*, Nos 46/07, 73/10, 40/11 and 35/15.

which implement gender equality in Montenegro. These measures are ‘adopted or undertaken for the elimination or prevention of the unequal treatment of women and men, eliminating the consequences of the unequal treatment of men and women and promoting gender equality’ (Article 5). General measures are those prescribed by this Law or other acts, which require the Parliament and the Government, as well as local authorities, to apply principles of gender equality within the framework of their competences. In addition, under Article 16, special measures are used to: (1) remove existing obstacles that bring about non-balanced representation of women and men,²² (2) remove existing obstacles that bring about their unequal status, and (3) encourage persons of the under-represented sex to use special benefits aimed at eliminating unequal representation of women or men, or unequal treatment on the basis of sex.

These special measures include positive measures,²³ encouraging measures²⁴ and programme measures.²⁵ Positive measures can be recommended by the Ministry for Human and Minority Rights. Under Article 18, positive measures can be established only with action plans, based on analysis of the status of the two sexes in the sphere for which the measures are determined, very similar to the duty stipulated in Macedonian law. This provision follows from amendments from 2014 and is broader than previously positive measures which were based on analysis of the status of the two sexes in the workforce only. The Ministry for Human and Minority Rights is required to give consent for action plans, and to monitor their implementation. Article 20 provides that encouraging and programme measures must be stipulated in some documents: namely, development documents for the implementation of a gender equality policy such as the Action Plan for Achieving Gender Equality,²⁶ and for other acts of agencies, businesses companies, political parties, non-governmental organizations.

The approach towards positive measures in the Law on Gender Equality²⁷ in the Republic of Serbia is different compared to Macedonian and Montenegrin law. Article 7 only allows positive measures in order to eliminate and prevent an unequal status of women and men and accomplish equal opportunities of both sexes. In other words, the Law does not contain several provisions defining different measures and the responsibility for their adoption and implementation. However, this is the first legal document in Serbia that prescribes, in Article 10, paragraph 3, that positive action measures are temporary.

2. Implementation of positive action measures in practice

Although the equality laws of all three candidate countries recognize positive action measures, some of them containing very detailed provisions, in practice these measures have not been successfully implemented.

2.1 Political life

During the 1980s, around 27 % of women entered parliaments in East European states, which was above the percentage in EU national parliaments.²⁸ However, during the 1990s, the participation of women

22 This non-balanced representation exists when ‘representation of one sex in a specific field of social life or in a part of such a field is lower than the percentage of representation of that sex in the total population’ (Article 15, paragraph 2), meaning 50.6 % of women and 49.4 % of men.

23 Positive measures presuppose giving priority to persons of the under-represented sex or those with a specific disadvantage due to their sex in the fields of education, employment, labour, health, social care, public or political activity, and other fields of social life (Article 16, paragraph 1; Article 17, paragraph 1).

24 These measures mean provision of special benefits or introduction of special incentives for the purpose of eliminating unequal representation of women and men or unequal treatment on the basis of sex (Article 16, paragraph 2).

25 Programme measures mean activities relating to the education about or encouragement and establishment of gender equality (Article 16, paragraph 3).

26 The current Action Plan for Achieving Gender Equality has been adopted for the period 2013-2017. The text is available at <http://faolex.fao.org/docs/pdf/mne151332.pdf>, last accessed on 11 September 2016.

27 The Law on Gender Equality, *Official Gazette of the Republic of Serbia*, No. 104/2009.

28 Ipsos Strategic Marketing (2012, June), *Women in Politics, Montenegro*, p. 30; available at https://issuu.com/undp_in_europe_cis/docs/women-in-politics1, last accessed on 11 September 2016.

significantly declined to 8.4 %, which is marked in literature as the ‘democracy of men’.²⁹ The reasons for this are numerous, such as socio-economic restructuring of these societies, strong religious affiliations that emerged in some countries, led by a predominantly paternalistic political culture.³⁰ Therefore, all three countries have introduced positive action measures in the form of quotas in order to secure better representation of women in political life.

Despite many provisions in anti-discrimination laws, it seems that the FYR of Macedonia has implemented positive measures only in the area of politics, but with limited effect.³¹ Article 4 of the Law on Political Parties stipulates that political parties are to “consider adherence to the principle of gender equality”, in order to secure a gender balance for the main functions in their own political party.³²

The Law on Elections stipulates that each sex must be represented by at least 30 % of members in the electoral bodies,³³ and in the list of candidates for MPs and for municipal councils.³⁴ Although there were some problems in the application of these provisions, in the last elections in 2013 34 % of women were elected to Parliament.³⁵ However, the situation with the executive branch is significantly different as, out of 26 members of the Government, only 4 are women (15 %).

In Montenegro, the Law on Gender Equality requires political parties to secure equal representation of women and men.³⁶ In addition, the Law on the Election of Councillors and Members of Parliament, Article 39 (a), stipulates that the electoral list must have at least 30% of candidates of the under-represented gender, in order to achieve the principle of gender equality.³⁷ However, this provision does not secure that women are elected to Parliament. As a consequence, only 18 % of MPs are women (out of 81 MPs, only 15 are women). Also, on the municipal level, 15 % of members are women.³⁸ The situation is similar in relation to the executive branch where, out of 22 members of the Government ministers, only 3 of them are women (13.6%)

In Serbia, the 2002 Law on Local Elections introduced, for the first time, positive measures for women, stipulating that they have to be included in each electoral list for local elections.³⁹ Article 20, paragraph 3 prescribes that one of every four candidates in the list must be a candidate of the under-represented sex, while the total number of the less represented sex in the list cannot be less than 30 %. It was an amendment in 2007 that prescribed that at least 30 % of candidates from the under-represented sex must be on the list.⁴⁰ In 2004, the Law on Election of MPs was amended, introducing the same provision, namely that at least 30 % of candidates of the under-represented gender must be on each electoral list.⁴¹ This provision was adopted with the aim of implementing Article 100 of the Constitution, which

29 Omanovic, A. (2015), *Zastupljenost žena u politici* (Representation of Women in Politics), p. 5; available at <http://infohouse.ba/doc/Zastupljenost-zena-u-politici.pdf#page=3&zoom=auto,-107,525>, last accessed on 11 September 2016.

30 For more on this see Fuchs, G. *Political Participation of Women in Central and Eastern Europe: a preliminary account*, Fridrich Ebert Foundation Berlin, 26 September 2003, conference ‘Access through Accession?’ See also Najcevska, E. (2014) *The Effectiveness of Gender Quotas in Politics in the new EU Member States and Accession Countries – the case of Macedonia*, pp. 3-4.

31 Najcevska, M. (2016) *Gender Equality, Country Report for the FYR of Macedonia for 2015, European Commission*, p. 12; available at <http://www.equalitylaw.eu/downloads/3777-2015-mk-country-report-gender>, last accessed on 11 September 2016.

32 The Law on Political Parties, *Gazette of the Republic of Macedonia*, Nos 76/2004, 5/2007 and 5/2008.

33 Article 4, paragraph 3 of the Law on Elections, *Official Gazette of the Republic of Macedonia*, No. 40/2006.

34 Article 64, paragraph 2 of the Law on Elections, *Official Gazette of the Republic of Macedonia*, No. 40/2006.

35 Najcevska, M. (2016), *Gender Equality, Country Report for the FYR of Macedonia for 2015, European Commission*, p. 14.

36 Under Article 12, this duty exists in relation to the bodies of the party, to the candidate lists for the election of Members of the Republic Parliament and members of local Parliaments, in elected clubs of Members of both local and Republic parliaments and the election to managing positions at all levels.

37 The Law on Elections of Councillors and Members of Parliament, *Official Gazette of the Republic of Montenegro*, Nos 4/98, 17/98, 14/00, 18/00, 9/01, 41/02, 46/02, 45/04, 48/06 and 56/06, including the 2011 amendments.

38 Najcevska, M. (2016), *Gender Equality, Country Report for the FYR of Macedonia for 2015, European Commission*, p. 19.

39 The Law on Local Elections, *Official Gazette of the Republic of Serbia*, No. 33/02.

40 Amendments to the Law on Local Elections, *Official Gazette of the Republic of Serbia*, No. 129/07.

41 The Law on Election of MPs, *Official Gazette of the Republic of Serbia*, Nos 35/2000, 57/2003 -the Constitutional Court decision, 72/2003, 75/2003, 18/2004, 101/2005, 85/2005, 104/2009, 28/2011 -the Constitutional Court decision, and 36/2011.

provides that it is necessary to ensure equality and gender representation in the Parliament. However, this provision did not impose an obligation on the party to adhere to this provision and, in practice, this provision did not secure 30 % of the under-represented gender's representation in the Parliament, although the percentage rose from 10.8 % to 20.4 %.⁴² According to amendments to the Law on Election of MPs since 2011, it is now stipulated that in the electoral list of each party at least every third candidate must be a representative of the under-represented sex, and this rule secured for the first time that 33.3 % of MPs in the Serbian Parliament were women.⁴³ Currently, there are 83 women MPs (out of 250, i.e. 33.2 %), compared with only 1.6 % of women elected to the Parliament after the 1990 elections.⁴⁴ The situation at the local level is very similar as, before 2012, the average participation of women in local Parliaments was 23.9 %, while today it is around 29.01 %.⁴⁵ However, the situation is different with the executive branch compared with the legislature, as the last Serbian Government, which was formed on 11 August 2016, has 5 female ministers, out of 19 ministers and one Prime Minister. However, this percentage of women participating in the Government (25%) is the highest thus far, as out of 20 members of the Government, 5 are women.

2.2 Employment

The EU provisions on positive action are primarily thought of as a tool for advancing women's position in the labour market.⁴⁶ The Gender Recast Directive allows the adoption of measures with a view to ensuring full equality in practice between men and women in working life.⁴⁷ However, it seems that, in this area, there are no data on the implementation of positive measures in the three candidate countries. There is no duty to adopt positive measures, and there is no recognized use of quotas, except in Serbia in some rudimentary form.

In the FYR of Macedonia, the legislative framework in relation to private employment only allows measures encouraging women to participate more proactively in the labour market. The use of quotas is expressly prohibited by the Labour Law, which prohibits an employer advertising a vacancy exclusively for one sex, except where sex is a necessary condition for performing the job.⁴⁸ In addition, an employer cannot even suggest any preference for a certain sex when advertising a vacancy. However, the measures allowed by the Law have also not been put into practice and the current measures represent only a mere declaration of the principle,⁴⁹ even though the employment rate for women is significantly less (39 %) than for men (61 %).⁵⁰ One of the main goals in the previous Action Plan was to support and implement programmes for the economic empowerment of women through concrete policies for reducing unemployment, increasing the share of female entrepreneurship and removing all forms of discrimination in the labour market and at the work place.⁵¹ The new Strategy for Gender Equality has the same approach, but does

42 Krstic, I. (2009), *Pozitivna diskriminacija žena – mera za postizanje jednakog ucesca u društvu, zbirka eseja o kolektivnim pravima i pozitivnoj diskriminaciji u ustavnopravnom sistemu Republike Srbije* (Positive Discrimination of Women – A Measure to Achieve Equal Participation in a Society), in: *The Collection of Essays on Collective Rights*, p. 155.

43 Article 40 (a) of the Law on the Election of MPs, *Official Gazette of the Republic of Serbia*, Nos 35/2000, 57/2003 -the Constitutional Court decision, 72/2003, 75/2003, 18/2004, 101/2005, 85/2005, 104/2009, 28/2011 -the Constitutional Court decision, and 36/2011. See also the Law on Local Elections, *Official Gazette of the Republic of Serbia*, Nos 129/07, 34/10–CC and 54/1; and see Autonomous Parliamentary Decision on the Election of MPs in the Parliament of the Autonomous Province of Vojvodina, *Official Gazette of the AP Vojvodina*, No. 23/14.

44 Omanovic, A. (2015) *Zastupljenost žena u politici (Representation of Women in Politics)*, p. 12: available at <http://infohouse.ba/doc/Zastupljenost-zena-u-politici.pdf#page=3&zoom=auto,-107,525>, last accessed on 11 September 2016.

45 Omanovic, A. (2015) *Zastupljenost žena u politici (Representation of Women in Politics)*, p. 15.

46 European Network of Legal Experts in the Field of Gender Equality (2011, September), *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards*, p. 27.

47 Article 157 of the TFEU; Article 3, Recast Directive 2006/54/EC on equal opportunities and equal treatment of women and men in employment and occupation, OJ L 204, 26.7.2006.

48 Article 24 of the Labour Relations Law, *Official Gazette of the Republic of Macedonia*, Nos 106/2008, 161/2008, 114/2009, 16/2010, 50/2010, 52/2010, 158/2010, 47/2011, 11/2012, 39/2012, 52/2012, 13/2013 and 25/2013.

49 Najcevska, M. (2016), *Gender Equality, Country Report for the FYR of Macedonia for 2015, European Commission*, p. 15.

50 International Finance Corporation (2013, May), *Women on Corporate Boards in Bosnia and Herzegovina, FYR Macedonia and Serbia*, p. 17.

51 National Action Plan on Gender Equality (2007-2012), Skopje, May 2007, p. 9.

not identify clear measures that must be implemented in order to achieve greater inclusion of women in the labour market.⁵² However, the Strategy clearly indicates that the activity rate for women is 44.7 % compared to that for men which is 68.8 %.⁵³ Gender segregation on both vertical and horizontal levels also exists in Macedonian society.⁵⁴ Thus, in order to strengthen and improve the position of women in the labour market, it is necessary to conduct research on their participation in the labour market, especially within the private sector. However, thus far only a few projects have been conducted with the aim of encouraging women's entrepreneurship.

In Montenegro, the law itself does not expressly recognize positive action measures for the improvement of the economic position of women. However, an Action Plan for Achieving Gender Equality underlines that women in Montenegro are exposed to different barriers that result in horizontal and vertical occupational, gender-based segregation due to the influence of stereotypes in the selection of career choices.⁵⁵ There is still a predominant division of 'male' and 'female' occupations, as in the FYR of Macedonia, and women are usually employed in jobs that require patience and attention (so-called 'caring sectors'). It is emphasized that women are traditionally referred to jobs which are not highly rated, since prestigious jobs generally require long working hours, frequent travel and lengthy absences from home, and women are not considered to be willing to deal with entrepreneurship. In addition, the unemployment rate is higher for women than for men.⁵⁶ Unfortunately, the Strategy does not concretize measures that should be implemented, but only refers to the need to improve the position of women in the labour market, and to encourage entrepreneurship among women.⁵⁷

The Law on Gender Equality in Serbia is the only gender discrimination law which contains provisions that oblige an employer to provide equal opportunities for and equal treatment to all employees. It means that an employer can introduce special measures to increase the participation of the under-represented sex, and must keep records on the representation of both sexes in the organization. Also, under Article 13, employers employing more than 50 employees have to adopt a plan to prevent uneven gender representation among employees, and the plan must be submitted to the ministry in charge of issues concerning gender equality. The Law also prescribes special measures to eliminate gender-based discrimination and to provide legal protection for those subject to discrimination. In addition, under Article 21, trade unions and employers' associations must be represented by at least 30 % of the members of the under-represented sex on negotiation committees, during the formation of negotiation committees. However, these provisions are not implemented in practice.⁵⁸

There is also a good strategic framework for the implementation of positive action measures in Serbia. The new National Strategy for Gender Equality and the Action Plan for its implementation sets, as one of its main goals, increased gender equality between women and men through implementation of policies and measures of equal opportunities.⁵⁹ Stimulation of women's entrepreneurship and better use of their economic potential means, amongst other things, encouraging girls and women to choose areas of education that are traditionally dominated by men, the promotion of achievements of women in the sciences and education in IT skills. However, while some measures have been adopted in the

52 The Strategy for Gender Equality (2013-2020), Skopje, January 2013, p. 20.

53 The Strategy for Gender Equality (2013-2020), Skopje, January 2013, p. 20.

54 The Strategy for Gender Equality (2013-2020), Skopje, January 2013, p. 21.

55 Action Plan for Achieving Gender Equality (2013-2017), Podgorica, January 2013.

56 Action Plan for Achieving Gender Equality (2013-2017), Podgorica, January 2013.

57 Action Plan for Achieving Gender Equality (2013-2017), Podgorica, January 2013, p. 21.

58 For example, among 120 members sitting in the presidential council, 20 are women, while among 9 members sitting in the presidency (president, 7 vice presidents and secretary), only one member (vice-president) is a woman. See <http://sindikats.rs/ENG/presidency.html>, last accessed on 14 September 2016. Thus, the National Strategy for Gender Equality stresses the importance of including measures to ensure unionization of women employees, to support women's sections in trade unions and to ensure their active and equal participation in collective bargaining; text available at <http://socijalnoukljucivanje.gov.rs/en/the-national-strategy-for-gender-equality-until-2020-adopted/>, last accessed on 11 September 2016.

59 The Strategy was adopted on 14 January 2016 for the period 2016-2020.

Autonomous Province of Vojvodina, their implementation in other areas is still insignificant.⁶⁰ Thus, the general participation rate of women in the Serbian labour market lies at 38.3 %, which is below the EU average (58.5 %).⁶¹ There is also a partial horizontal segregation. The sector of ‘agriculture, forestry and fishing’, ‘manufacturing’, and ‘wholesale and retail’ are represented by both sexes. However, the two remaining, top five sectors for women are ‘education’ and ‘health and social work’, while for men they are ‘construction’ and ‘transportation and storage’. There are no implemented measures to motivate members of both sexes to enter other sectors. In the first report on the EU Index of Gender Equality in Serbia, which has been introduced for the first time in a country outside the EU, it was found that women are less frequently employed in full-time positions than men, and their total working life is five years shorter than that of men. In addition, women work less often in jobs with non-fixed working hours, mostly due to the fact that there is still an unbalanced division of household work and family care which relies more on women.⁶²

2.3 Company boards

In these three countries, apart from Serbia, there is no explicit provision that requires an improvement in the gender balance on company boards. Nevertheless, there are strategic documents aimed at an improvement in women’s participation in decision-making processes.⁶³ However, only in the Serbian National Strategy for Gender Equality is it a clear requirement to identify and take steps to create conditions of greater participation of women in decision-making positions. This measure is limited to public bodies, agencies and enterprises.⁶⁴

However, despite the fact that there is no explicit provision on securing a gender balance on company boards, some statistics show that the participation of women on company boards in the FYR of Macedonia, Montenegro and Serbia is higher than the EU average of 14 %.⁶⁵

In Macedonia, according to research conducted in 2013, in a sample of 36 companies, women represented 22.7 % of all board members in 2011, which is similar to 2009 when they constituted 23.7 % of board members.⁶⁶ There is no provision expressly requiring positive measures in relation to the participation of women on company boards, nor are there any implemented measures that aim to improve the gender balance on company boards. Article 6 of the Law on Equal Opportunities for Women and Men only stipulates that priority is to be given to the under-represented sex when there is no equal participation of women and men on the bodies of power in all spheres of public life, including public institutions. However, this provision is not applicable to women on private and state-owned company boards.⁶⁷

The situation is also the same in Montenegro, where there is no express provision requiring an improvement in the gender balance on company boards. However, Article 7, paragraph 3 of the Law on the Prohibition of Discrimination stipulates that the policy of equal opportunities requires the absence of restrictions on

60 Marija Babovic (2016), Gender Equality Index 2016, Measuring gender equality in Serbia 2014, Coordination Body for Gender Equality, Social Inclusion and Poverty Reduction Unit, , p. 26; available at http://socijalnoukljucivanje.gov.rs/wp-content/uploads/2016/02/Izvestaj_Indeks_rodne_ravnopravnosti_2016_EN.pdf, last accessed on 11 September 2016.

61 European Commission (2012), *The current situation of gender equality in Serbia – country profile 2012*, pp. 4, 8.

62 Marija Babovic (2016), Gender Equality Index 2016, Measuring Gender Equality in Serbia 2014, Coordination Body for Gender Equality, Social Inclusion and Poverty Reduction Unit, p. 23; available at http://socijalnoukljucivanje.gov.rs/wp-content/uploads/2016/02/Izvestaj_Indeks_rodne_ravnopravnosti_2016_EN.pdf, last accessed on 11 September 2016.

63 In the FYR of Macedonia, it is the National Strategy for Gender Equality, while in Montenegro it is an Action Plan for the Realization of Gender Equality and Guidelines for creating a favorable environment for female entrepreneurship, adopted in August 2015. See Jelic, I. (2016), *Country Report on Gender Equality, Country Report for Montenegro, 2015*, p. 16; available at <http://www.equalitylaw.eu/downloads/3792-montenegro-country-report-gender-pdf-987-kb>, last accessed on 11 September 2016.

64 (2016, January), *The National Strategy for Gender Equality (2016-2020)*, with Action Plan for 2016-2018, p. 47.

65 European Commission (2012), *The current situation of gender equality in Serbia – country profile 2012*, p. 4.

66 International Finance Corporation (2013, May), *Women on Corporate Boards in Bosnia and Herzegovina, FYR Macedonia and Serbia*, p. 18.

67 (2016, January), *The National Strategy for Gender Equality (2016-2020)*, with Action Plan for 2016-2018, p. 47.

the grounds of sex for male and female participation in all spheres of life. According to some data, the average representation of women on company boards is 28.2 %.⁶⁸

In Serbia, there is an explicit provision that, if the under-represented sex in an organizational unit in managerial positions and within the management and supervisory bodies is under 30 %, state and non-state authorities with public powers should implement positive measures to correct this. Despite that, the rate of women on boards lies at only 16 %, which is considerably lower than in the FYR of Macedonia and Montenegro, but is still slightly higher than the EU average of 14 %.

3. Case law

Although there are several provisions in Montenegrin and Macedonian law dealing with positive measures, and despite the fact that these measures are not implemented in practice as the law provides, it is important to underline that there is no case law dealing with this matter.⁶⁹ However, in Serbia, there are several cases that further clarify the role and meaning of positive measures.

In one case, the judge of a First Basic Court in Serbia demonstrated a lack of understanding of the concept of positive measures.⁷⁰ The judge found that it was not discrimination if an employer in an advertisement only sought to hire female workers in retail stores preparing and selling food. The judge reasoned that it was permissible to give preference to female workers as it was a well-known fact that men have greater access to available jobs due to women's natural reproductive functions, which prevent them from undertaking employment. Fortunately, the higher courts revoked this decision, emphasizing that employers cannot apply positive measures at their discretion, but only in accordance with a concrete public act (laws, by-laws or decisions) which defines the sex ratio and relevant recruitment in particular workplaces.⁷¹ The Appellate Court concluded that otherwise, without such an act, the implementation of positive measures would constitute arbitrary treatment by the employer, imposed without a serious analysis of the situation in the labour market. The judgment was upheld by the Supreme Court of Cassation, which also relied on international law (the UN Convention on the Elimination of All Forms of Discrimination against Women and the International Covenant on Economic, Social and Cultural Rights) that requires positive measures in order to protect, among others, women.⁷² However, the Supreme Court explained that individual employers must implement those measures only by applying regulations adopted by the competent authority.

The Commissioner for the Protection of Equality also dealt with positive measures in several cases. She pointed out that positive measures can be adopted only with the aim of achieving full equality of members of social groups whose social position is less favourable.⁷³ In addition, the Commissioner did not find discrimination in one case, relying on the reasoning that the implemented measures were justified and proportionate to the aim.⁷⁴ In another complaint before the Commissioner, a woman claimed to have been discriminated against as her opportunities for promotion were not equal to those of her male

68 Montenegrin Employers' Federation, *Information related to Employers' Meeting*, London, 29 April 2015; available at http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/gender/EN/_2015-07-16_Montenegrin_Employers_Federation_Intervention_CBI_Meeting_Women_in_Business_and_Management_2015.pdf, last accessed on 11 September 2016.

69 Jelic, I. (2016), *Country Report on Gender Equality, Country Report for Montenegro, 2015*, European Commission, p. 14; Najcevska, M. (2016), *Gender Equality, Country Report for the FYR of Macedonia for 2015*, European Commission, pp. 11-14.

70 The First Basic Court in Belgrade, 63. P. 16956-12, 7 March 2013.

71 The Appellate Court in Belgrade, GŽ. No. 5012/13, 19 July 2013. Supreme Court of Cassation, Rev 872/2014, 11 February 2015.

72 Supreme Court of Cassation, Rev 872/2014, 11 February 2015.

73 The Commissioner for the Protection of Equality, *M.B. v. GU City of Belgrade*, complaint No. 07-00-357/2013-02, opinion of 23 July 2013; available at <http://ravnopravnost.gov.rs/prituzba-m-v-protiv-gu-grada-beograda-zbog-diskriminacije-na-osnovu-starosnog-doba-u-oblasti-pruzanja-usluga/>, last accessed on 11 September 2016.

74 The Commissioner for the Protection of Equality, *T.K. v. GO Vracar*, complaint No. 07-00-114/2013-02, opinion of 21 June 2013; available at <http://ravnopravnost.gov.rs/prituzba-t-k-protiv-go-vracar-zbog-diskriminacije-po-osnovu-starosnog-doba-u-oblasti-obrazovanja-i-strucnog-usavravanja/>, last accessed on 11 September 2016.

colleagues.⁷⁵ She claimed that, despite her PhD and thus very high qualifications, she was employed only as a coordinator. In contrast, her male colleagues with the same academic credentials had managerial positions, and as a consequence a higher monthly income. The Commissioner requested information on the total number of employees, as well as on the gender structure for managerial positions. It was found that the company employed 18 596 persons, 15 151 men and 3 445 women. Of the 54 management positions, men were employed in 45 and women in 9 posts, which constituted only 16.5 % of women in managerial positions. The Commissioner found that the number of women in managerial positions (16.5 %) was almost the same as the number of women employed in the company (18.5 %), but underlined that Article 14 of the Law on Gender Equality prescribes that the percentage of women in managerial positions needs to be at least 30 % as a positive action measure. Therefore, the Commissioner found discrimination and recommended that the employer should adopt a plan of measures to eliminate or mitigate unequal gender representation in managerial positions in the company.

In another case, in a competition for enrolment in the first year of undergraduate studies in a police academy, it was stated that out of 60 places covered by the Government scholarships, 15 would be reserved for female candidates. The complaint was submitted to the Commissioner as it was perceived that setting an upper limit for the admission of candidates constituted discriminatory practice which was not in accordance with the legislative framework of the Republic of Serbia, nor with strategic documents in the field of gender equality and security. Bearing in mind that women make up 11.6 % of the police, this quota (i.e. of 15 % of places) should only be used to secure the minimum number of trainees at the Academy, and not their maximum number. In reviewing the facts of the case, the Commissioner found that, by determining the upper limit for women candidates, they were denied enrolment even if they fulfilled the required conditions. She found that ‘although this is a specific educational programme, which is subject to special requirements that are imposed by a job in the police, including the possibility of setting specific requirements in terms of e.g. psychological and physical abilities of the candidate/men and women, it is necessary to clearly indicate that belonging to a particular gender, by itself, cannot be the basis for admission to the school’.⁷⁶ Therefore, all applicants must take an entrance exam, and the results must be evaluated individually, and not according to sex.

Conclusion

The use of positive action reflects the understanding that the prohibition of discrimination by itself is not sufficient to obtain substantive equality. The FYR of Macedonia, Montenegro and Serbia have several provisions in their legislation allowing special measures in order to achieve gender equality. Apart from the FYR of Macedonia, the other two countries allow deviation from formal equality as a constitutional principle. However, while the Constitution of Montenegro insists that these measures are temporary, the Serbian constitutional provision lacks such a restriction.

All three systems see positive action measures to refer to equality of results, although they all mention the promotion of equality of opportunity as well. While Macedonian and Montenegrin law imposes the restriction that positive action measures must be proportionate, this requirement is not expressly included in Serbian general non-discrimination law, but is interpreted as such by the Commissioner for the Protection of Equality. In addition, Serbian general non-discrimination law does not explicitly require that positive action measures are temporary, but this requirement is enshrined in Article 4 of the UN Convention on the Elimination of All Forms of Discrimination against Women that is binding on Serbia, and a temporal restriction is also included in Serbian gender discrimination law.

75 The Commissioner for the Protection of Equality, *S.S. v. Public Company Z*, complaint No. 1378/2011, opinion of 3 November 2011; available at <http://ravnopravnost.gov.rs/rs/pritužba-s-s-protiv-javnog-preduzeća-z-s-povodom-diskriminacije-na-osnovu-pola-u-oblasti-radnih-odnosa/>, last accessed on 11 September 2016.

76 The Commissioner for the Protection of Equality, *B. c. z. b. n. v. K.a.*, complaint No. 07-00-148/2013-02, opinion of 21 June 2013; available at <http://ravnopravnost.gov.rs/pritužba-b-c-z-b-n-v-k-a-protiv-k-a-zbog-diskriminacije-po-osnovu-pola-u-oblasti-obrazovanja-i-vaspitanja/>, last accessed on 11 September 2016.

Serbian law contains several provisions recognizing positive action measures mainly in the area of employment. However, the law does not define positive measures as such, in contrast to the sex discrimination law in the FYR of Macedonia, which does define such positive measures. From this definition it can be concluded that positive actions allow priority to persons of the under-represented gender. However, automatic preference and the use of a quota system in the area of employment is expressly prohibited in the Labour law of the FYR of Macedonia. The Law on Equal Opportunities for Women and Men in the FYR of Macedonia provides a special duty on adopting and monitoring plans for the implementation of special measures. Unfortunately, this provision is not applied in practice.⁷⁷ The Law on Gender Equality in the Republic of Montenegro also dedicates a significant part to general and special measures which implement gender equality in this country. The law defines these measures, and prescribes that positive action measures can only be established in action plans. Although this provision is not included in Serbian legislation, it is interpreted as such in Serbian jurisprudence.

Despite the fact that different provisions in these three countries provide a very solid legal basis for the implementation of different measures in practice, it seems that they have not been implemented, with the exception of the use of a quota system in political life. This is rather different from other EU states which are not so keen on imposing mandatory positive action in political life. The Republic of Montenegro and the FYR of Macedonia almost attained 30 % of women in their Parliaments, while the Republic of Serbia already exceeded 30%. However, the situation is quite different regarding their participation within the executive power. The Serbian Strategy for Gender Equality, adopted in January 2016, prescribes mandatory quotas to ensure equal participation of women and men in all bodies of executive power at the national, provincial and local levels.⁷⁸ It goes even further and prescribes a mandatory quota of 40 % for women in elections for representative bodies at all levels.⁷⁹

Although there is no explicit provision that requires an improvement in the gender balance on company boards, except in Serbia, the percentage of women on boards is higher than the EU average in all three states. However, the most problematic area of concern is the area of employment. Notwithstanding that some provisions give an automatic preference to the under-represented sex in the area of employment, which is contrary to the jurisprudence of the CJEU, these provisions are not implemented in practice. Other stimulating and supportive measures are also not implemented, and neither is the mechanism for supervising their implementation. Thus, all three countries need to implement further supportive measures capable of providing a more balanced representation of both sexes in the area of employment.

77 Nacevska, M. (2016), *Gender Equality, Country Report for the FYR of Macedonia for 2015, European Commission*, p. 12.

78 (2016, January), *The Strategy for Gender Equality, with Action Plan for 2016-2018*, p. 47.

79 (2016, January), *The Strategy for Gender Equality, with Action Plan for 2016-2018*, p. 47..

Merging mandates of equality bodies and national human rights institutions – a growing trend

Niall Crowley*

Introduction

The issue

A period of growth in the numbers of equality bodies and national human rights institutions across the European Union has come to a close. Member States over the past two decades had invested in establishing a diversity of statutory bodies to deal with issues of human rights and equality. As the economic and financial crisis took hold, the public sector came under increased scrutiny and its scope, resources and role began to diminish. Equality bodies and national human rights institutions have not been immune to this reality.

The growing trend is now one of merger. The mandates of equality bodies and national human rights institutions increasingly come under the responsibility of a single body, either through merger or the addition of new functions to an existing body. This has happened most recently in Ireland, Britain,¹ and the Netherlands. In the past this had happened in Denmark and Poland. Poland represented a particular trend that is evident in some Balkan and Eastern European countries where Ombudsman offices, with human rights functions, were accorded new responsibilities arising on foot of transposition of the EU equal treatment Directives. A similar, more recent, approach is evident in France with the incorporation of the existing equality body into an Ombudsman's office. Another approach is evident in the current Belgian proposal to bring two equality bodies under the umbrella of a human rights body.

This article will first set out an understanding of equality bodies, national human rights institutions and their work to assess the starting point for such mergers. It will explore the different aspirations evident in policy for equality and for human rights to assess the logic informing these mergers. It will look to the limited literature available to examine the experience gained in merged equality and human rights bodies. Finally, it will draw some conclusions, raise the need for innovation, and take a perspective on what could usefully be done to address the issues around such mergers.

* Niall Crowley is an independent equality and diversity expert who was formally chief executive officer of the Equality Authority, the Irish equality body, for ten years from its establishment in 1999.

1 Whereas Northern Ireland has retained a separate equality body and national human rights institution.

Two types of institution

Equality Bodies

Equality bodies, according to the EU equal treatment Directives, are established for the “promotion of equal treatment”² or for the “promotion, analysis, monitoring, and support of equal treatment”.³ These Directives provide a minimum standard for the establishment of equality bodies. Research conducted for the European Commission in 2010 has identified that the purpose of equality bodies has been framed more broadly than this in practice at Member State level. It is set out in terms of both promoting equality and combating discrimination.⁴

Equinet, the European network of equality bodies, reports a diversity of equality bodies across the Member States, identifying three types:⁵

- Predominantly tribunal type equality bodies that spend the bulk of their time and resources on hearing, investigating and deciding on individual instances of discrimination brought before them, while in some cases also performing a number of tasks identified for predominantly promotional type equality bodies.
- Predominantly promotion type equality bodies that spend the bulk of their time and resources on supporting good practice, raising awareness of rights, developing a knowledge base on equality and providing legal advice and assistance to victims of discrimination.
- Combined tribunal and promotion type equality bodies that hear, investigate and decide on cases of discrimination and engage in a range of activities to raise awareness, support good practice, and conduct research.

The EU equal treatment Directives require equality bodies to have powers to provide independent advice to victims of discrimination in pursuing a complaint; conduct independent surveys concerning discrimination, and publish independent reports; and make recommendations on issues related to discrimination. A fourth area of activity has been added in a 2020 Directive of “exchanging, at the appropriate level, the information available with the corresponding European bodies such as the European Institute for Gender Equality”.⁶ Equinet has identified that equality bodies have a role and remit that goes far beyond these functions.

Equinet has consistently pointed to five types of intervention taken by equality bodies:⁷ enforcement, either in supporting casework or hearing and mediating cases; promotion, in supporting good equality practice in employment and in the provision of goods and services; policy intervention, in contributing an equality and non-discrimination focus to public policy making; communication, to inform people of their rights, build a culture of compliance with the legislation, and stimulate a societal welcome for diversity; and research, to further develop the knowledge base on equality and discrimination.

2 Article 13 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment of persons irrespective of racial or ethnic origin.

3 Article 12 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal Treatment between men and women in access to and supply of goods and services, and Article 20 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 between men and women in matters of employment and occupation (Recast).

4 Ammer et al., Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC, European Commission, Brussels, 2010, page 14.

5 The Bigger Picture: Equality Bodies as Part of the National Institutional Architecture for Equality, Equinet, Brussels, 2014, page 13.

6 Article 11 Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between women and men engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

7 For example: A Growing Agenda: Work of Equality Bodies on the Ground of Religion or Belief, Equinet, Brussels, 2015, pages 18-29.

The research published by the European Commission identified equality bodies as “necessary and valuable institutions for social change”, with the potential to progress change in:⁸

- Improving the situation of individuals who experience discrimination.
- Enabling change in the policies, procedures and practices of workplaces and service providers, and in governmental policy-making processes.
- Improving the quality of public policy and legislation.
- Improving stakeholder action on issues of discrimination and equality.
- Improving public attitudes to equality, diversity and non-discrimination through realising a culture of compliance and a culture of rights.

National Human Rights Institutions

National human rights institutions have the purpose of protecting and promoting human rights according to the Paris Principles, the standard for such bodies. This standard requires that these bodies have “as broad a mandate as possible”.⁹ Research by the EU Agency for Fundamental Rights (FRA) notes that, while “being *national* human rights institutions, the NHRIs’ mandate and function devolve in many cases from their state’s *international* obligation to ‘respect’, ‘protect’ and ‘fulfil’ human rights”.¹⁰

This FRA research found a diversity of national human rights institutions including:

- Commissions: being multi-member institutions with a broad set of powers covering promotion and protection of human rights.
- Advisory Commissions: being advisory in function and especially active in promotion of human rights.
- Ombudsman Institutions: being typically single member institutions, charged more generally with oversight of the public administration.
- Institutes: being entities developing and providing evidence based advice on human rights.

The Paris Principles set out the functions for national human rights institutions as including: to advise Government on legislation, administrative provisions and situations where human rights are being violated; to promote harmonisation of legislation with international human rights instruments, encourage ratification of these, and contribute to reporting on their implementation; to assist in the teaching of and research into human rights; and to increase public awareness of human rights.

The FRA research established that most national human rights institutions have a broad mandate or have interpreted their mandates to include either all human rights or all human rights in treaties to which the country in question is a state party. The work done by national human rights institutions was found to include: monitoring and data collection; individual complaints procedures; reporting; advice to Government; research; cooperation with civil society; promotion of international treaties; and human rights education and awareness.

But

Despite these evident differences in the role and approach of equality bodies and national human rights institutions, the FRA research argued for merging these bodies: “[...] there is a need for a stronger fundamental rights architecture, that can offer a ‘one-stop-shop’ or at least a portal to a set of

8 Ammer et al., Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC, European Commission, Brussels, 2010, page 14 and 15.

9 Article 2 Principles relating to the Status of National Institutions (The Paris Principles), adopted by the General Assembly Resolution 48/134 of 20 December 1993, United Nations.

10 National Human Rights Institutions in the EU Member States: Strengthening the Fundamental Rights Infrastructure in the EU I, European Union Agency for Fundamental Rights, Vienna, 2010, page 19.

institutions and mechanisms, that is sufficiently independent and empowered, and that can make a genuine difference on the ground”.¹¹

Crowther and O’Cinneide in their study of bodies that have merged equality and human rights mandates identified a range of potential benefits from such a merger including: conceptual coherence from common foundations for both mandates; the potential for synergy between both areas of work; and operational advantages.¹² However, they also identified stark differences in the role of and the approach taken to their work by equality bodies and national human rights institutions. They found that:

- National human rights institutions are more oriented towards providing expert advice and recommendations to public bodies, are less likely to support individual complaints, have limited involvement with private and non-state actors, and have a more individualist focus to their work.
- Equality Bodies are more engaged with individual complaints, engage regularly with public and private sector actors in their promotion and enforcement work, and have more of a group focus to their work.

This reflects fundamental differences of approach, in particular, the more limited focus on enforcement by many national human rights institutions, many of which do not have functions to take and support cases, in comparison to equality bodies; and the focus on both the public and private sector by equality bodies while national human rights institutions are more likely to be focused solely on the public sector. There are further fundamental differences in the nature of cooperation with civil society. Equality bodies emphasise partnership and joint work to advance shared equality objectives, while national human rights institutions favour consultation and liaison in order to have access to the information held by civil society so as to improve their monitoring work.

Crowther and O’Cinneide identified a series of risks in any merger process including the difficulties in making strategic choices on how to deploy their powers, develop a work programme and establish a cohesive, effective, and coherent mode of functioning. They noted: “integrated bodies must not alone link together their promotional and enforcement work in an effective manner, but must also ensure that the balance they strike between these different functions works well for both the equality and human rights aspects of their remit”.¹³

Equinet identified potential gains in such merged institutions as including: enabling equality bodies to benefit from the protection of international standards for human rights bodies; being able to act beyond the limitations of equal treatment legislation with its requirement for a comparator; strengthening the status of the equality body; achieving cost reductions; and offering a one-stop shop for citizens.¹⁴

However, the same report emphasised that any merger process must afford “parity of esteem” for work on equality and work on human rights within merged bodies. This suggests some concern to ensure that the different approaches in each area of work are respected and sustained. It stated that “any form of linkage developed between the promotion of equality and the promotion of human rights should make the work in each field more effective and efficient. Cost considerations should not be the sole factor in devising any such linkages”.¹⁵

It is not impossible that these different approaches by equality bodies and national human rights institutions could be addressed in a well-managed merger situation, but it must be understood that these fundamental differences are not just an operational matter. They reflect differences in the nature of the

11 Ibid, page 8.

12 Crowther N. & O’Cinneide C., *Bridging the Divide? Integrating the functions of national equality bodies and national human rights institutions in the European Union*, UCL Faculty of Laws, London, 2013, page vii-viii.

13 Ibid, page ix.

14 Equality Bodies and National Human Rights Institutions *Making the Link to Maximise Impact* (An Equinet Perspective), Equinet, Brussels, November 2011, page 11.

15 Ibid, page 11.

change sought by equality bodies and national human rights institutions and in their understanding of how change happens. This suggests the need for a much more cautious approach to mergers.

Equality bodies have been identified as “institutions for social change”. Inequality is understood as something more than the individual act of discrimination. The individual act of discrimination has roots in stereotypes and false assumptions, institutional systems and procedures, and the manner in which society is organised. This understanding of equality explains why the work of equality bodies is focused on achieving social change.

Social change is pursued by equality bodies through a specific mix of activities. Enforcement work assists the individual, but the level of casework engaged in by equality bodies aims to secure a culture of compliance among employers and service providers so that they implement new procedures and practices to prevent discrimination and promote equality. Promotion work is pursued to engage employers and service providers in changing the way they do their business. Policy work goes beyond specific policy proposals to include a focus on changing the way policy is made through processes such as equality mainstreaming. Communication work is not just concerned with people knowing their rights but also with shaping a new value base in society where people are motivated by a commitment to equality, diversity and non-discrimination.

National human rights institutions are concerned that there should be no violation of the standards set in international human rights instruments. They seek corrective change. The administrative system is found to have a fault and the change required is to correct that fault. Corrective change is pursued through a specific mix of activities. Emphasis is placed on monitoring for violations of the standards. After that, advice to Government or the preparation of reports for international bodies to stimulate international pressure are pursued. Sometimes the violations become a focus for strategic litigation, but usually only where new legal ground has to be broken.

The approach implemented to protect and promote human rights, therefore, will not be adequate to combat discrimination and achieve equality, and vice versa. Any merger process has to recognise and respond to this, with some evident innovation of approach needed by the new merged body. It is not clear that this has been a concern in any of the merger processes to date. As a result, the approach to the equality and human rights mandate pursued by these merged bodies is not integrated and is unlikely to serve both human rights and equality objectives. The strategy of the merged body ends up being dominated either by an approach adequate for social change or one adequate for corrective change. Anecdotally, it would appear that the human rights approach has dominated in the merged bodies established to date. This could be due to the greater status enjoyed by human rights and is to the detriment of achieving equality objectives.

Two types of aspiration

Equality

The EU equal treatment Directives protect formal equality in prohibiting direct and indirect discrimination. Formal equality is rooted in fairness. Everyone should have access to some minimum provision and the competition for advantage after that is governed by non-discrimination. This aspiration is limited in that it can co-exist with significant levels of inequality. The EU equal treatment Directives, however, allow specific measures to ensure the achievement of “full equality in practice”. This reflects an aspiration for substantive equality, rooted in securing outcomes for groups experiencing inequality.

Mainstreaming, as promoted at EU level, reflects a commitment to substantive equality. This is set out in terms of achieving or advancing equality. Gender mainstreaming is defined as, “mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into

account at the planning stage their possible effects on the respective situations of men and women”.¹⁶ One objective for multi-ground equality mainstreaming has been identified to “advance equality for groups experiencing inequality in the area covered by the policy” and another to “adapt the policy to the specific experience, situation and identity of different groups experiencing inequality”.¹⁷

Substantive equality is concerned with achieving new outcomes for groups experiencing inequality in access to and enjoyment of resources, including jobs and income and public goods such as education, accommodation and health; influence and decision-making positions in all fields; status and standing for their difference; and relationships of love, solidarity and care. It is about closing gaps between the situation of these groups and that of the wider population. Inequalities for these groups are to be eliminated or significantly reduced.

Human Rights

Human rights establish minimum standards to be respected, protected and fulfilled. They encompass civil, political, economic, social and cultural rights and seek to ensure people are treated with dignity, in particular by the state. One of these standards is non-discrimination. The international human rights instruments make provision that the rights contained are to be enjoyed without discrimination on a broad and open set of grounds. However, discrimination is not set out as it is in equal treatment legislation with definitions for direct and indirect discrimination. While casework on indirect discrimination is well developed for equality,¹⁸ the same is not true for human rights.

The European Commission in implementing the Charter on Fundamental Rights has committed to “being systematic and thorough in checking that all the fundamental rights concerned have been respected in all draft proposals”.¹⁹ The checklist deployed is largely focused on compliance and does not address substantive outcomes or take diversity into account. It acknowledges that limitations on human rights are allowed where these are “necessary to achieve an objective of general interest or to protect the rights and freedoms of others” and that human rights can be in tension with each other.²⁰

There are international human rights instruments directly concerned with addressing discrimination against women, Black and minority ethnic groups, children, and people with disability. While the text of these instruments predominantly reflects the goal of formal equality, the work of some of the relevant UN committees has developed interpretations of the provisions that reflect an aspiration for substantive equality. However, academic work has found a lack of application of such interpretations.²¹

But

The FRA research argued that “when adding specific mandates under various EU directives, consideration should also be given to promoting existing NHRIs as an alternative to the establishment of new specialised bodies, while ensuring that enlarged mandates are matched with enhanced capacity” on the basis of the need for “a visible and effective overarching NHRI that can act as a hub to ensure that gaps are covered

16 European Commission, ‘Incorporating Equal Opportunities for Women and Men into all Community Policies’, COM(1996)67, page 2.

17 Compendium of Practice on Non-Discrimination/Equality Mainstreaming, European Commission, Luxembourg, 2011, page 4.

18 See: Tobler C., Limits and Potential of the Concept of Indirect Discrimination, European network of legal experts in the non-discrimination field, European Commission, 2008 pages 55-65.

19 European Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union Communication from the Commission COM(2010) 573 final, page 5.

20 Ibid, page 5.

21 Baker J., in The Essential Guide to Human Rights, edited by Christien Van Den Anker and Rhona Smith, Hodder Arnold, London, 2005 and Fredman S. & Goldblatt B., Gender Equality and Human Rights, UN Women, 2015.

and that all human rights are given due attention”.²² Crowther and O’Cinneide have made a similar case in stating, “both types of body are expected to promote respect for fundamental rights, with (equality bodies) focusing on the right to equality and non-discrimination and NHRIs on a broader human rights remit”.²³

This rationale for merger is based on the assumption that equality is a human right. However, equality is only a human right where the aspiration is for formal equality. Once the aspiration for equality stretches to substantive equality such a claim is no longer valid. This gap of aspiration needs to be addressed with some innovation in the merger of equality bodies and national human rights institutions.

If it is not addressed, choices will be made by the merged body between aspirations rooted in securing minimum standards, including non-discrimination, and those rooted in securing substantive equality. The choice of the human rights aspiration over the equality aspiration poses the danger of limiting the aspiration for equality pursued by the merged body. It is almost inevitable that a choice for human rights aspirations will be made where human rights are established as the overarching umbrella in such a merger. There is also a significant challenge to the innovative capacity of any merged body to find a way of integrating such divergent aspirations.

Merged mandates

General studies

Equinet has identified two operational strategies being taken by merged bodies.²⁴ The dominant approach is a ‘two pillar approach’ with human rights work and equality work assigned to distinct sections in the organisation. The distribution of resources between each pillar can be an issue. In some instances, departments of a cross cutting nature, like research or communication, have responsibility for both mandates. An ‘integration approach’ is less common and less developed. This involves “a single vision or conceptual framework that embraces both mandates and a multi-disciplinary competence among the leadership and staff across the two mandates”.

Alongside clear benefits, Equinet identified that tensions in these merged bodies arise if: each area of work is based on a different legal base; stakeholders aligned to each area have different viewpoints and are mistrustful of each other; and there is a fragmentation of responsibility for each area across Government departments. It also noted tensions “due to different traditions in relation to equality and human rights and different methods of work evolved in relation to each area”.²⁵

Specific studies

Crowther and O’Cinneide’s study draws on six separate published studies of merged bodies.²⁶ Most of these studies were done during the merger process and could not explore the experience of the merged body. However, each provides insights into the challenges of merging equality bodies with national human rights institutions.

22 National Human Rights Institutions in the EU Member States: Strengthening the Fundamental Rights Infrastructure in the EU I, European Union Agency for Fundamental Rights, Vienna, 2010, page 9.

23 Crowther N. & O’Cinneide C., Bridging the Divide? Integrating the functions of national equality bodies and national human rights institutions in the European Union, UCL Faculty of Laws, London, 2013, page iv.

24 Equality Bodies and National Human Rights Institutions; Making the Link to Maximise Impact (An Equinet Perspective), Equinet, Brussels, 2011, page 11.

25 Ibid, page 12.

26 Crowther N. & O’Cinneide C., Bridging the Divide? Integrating the functions of national equality bodies and national human rights institutions in the European Union, UCL Faculty of Laws, London, 2013.

Denmark²⁷

The Danish Institute for Human Rights was established in 2003 along with the closure of the Board for Ethnic Equality and the transfer of responsibility for the tasks of an equality body on the ground of racial or ethnic origin to the institute. In 2011 the institute was further given the tasks of an equality body on the gender ground. The primary rationale identified in the study as being behind the merger was both financial and political.

The lack of integration of human rights and non-discrimination in Danish law and practice was identified as a barrier to an integrated approach. A two-pillar approach is evident – with separate departments in the institute with responsibility for human rights initiatives and for equality initiatives. There are integrated departments that work on crosscutting tasks of communication and research.

The study found that the area of non-discrimination and equality is low status in comparison with human rights protection at the institute. There is an imbalance between the resources applied to human rights work and to equality work. The merger resulted in tensions and a clash of traditions and approaches that may have undermined the effectiveness of the equality work of the institute in its early years.

Belgium²⁸

This study examined what was and continues to be an unfinished project. This project reflects a particular model of integration under a human rights umbrella. In 2012, a governmental working group was set up to advance a proposal of a national human rights institution to serve as an “arc-institution” consisting of the (Inter-federal) Centre for Equal Opportunities and Opposition to Racism, the (Inter-federal) Institute for Equality of Women and Men and the new Federal Centre for Migration Monitoring, Protecting the Basic Rights of Foreigners and Combating Human Trafficking. This proposal had been agreed by the federal government and the regional governments. It will bring together different bodies, two of which are equality bodies, and provide a new human rights mandate. How far these bodies would integrate and the role of the “arc-institution” are still to be determined as of the current date.

France²⁹

In 2011, the French Equal Opportunities and Anti-Discrimination Commission (Haute Autorité de Lutte contre les Discriminations et pour l'Égalité), was integrated into an ombudsman-style institution with responsibility for promoting the rights of citizens, the “Defender of Rights” (Défenseur des Droits). The merger met with hostility from within the equality body and from civil society. The study points to the rationale for merger being in part a search for savings in a time of crisis but being mainly a political push against the former equality body's strategy of combating discrimination. The new body, the study stated, is expected to function in a less confrontational manner.

Britain³⁰

The Equality and Human Rights Commission was established in Britain in 2007 to incorporate the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission

27 Justesen P., Bridging the divide – matters to be taken into account regarding the integration of the functions of national equality bodies and national human rights institutions, Case study: Denmark, 2013.

28 De Beco G., Bridging the divide – matters to be taken into account regarding the integration of the functions of national equality bodies and national human rights institutions, Case study: Belgium, 2013.

29 Borrillo D., Bridging the divide – matters to be taken into account regarding the integration of the functions of national equality bodies and national human rights institutions, Case study: France, 2013.

30 Crowther N., Bridging the divide – matters to be taken into account regarding the integration of the functions of national equality bodies and national human rights institutions, Case study: Britain, 2013.

and to include coverage of further discrimination grounds and a human rights mandate. The primary spur for its establishment was to manage the risk of a proliferation of strand specific equality bodies. The inclusion of a human rights mandate came in response to separate demands. One barrier to an integrated approach found by the study was the lack of symmetry the Equality Act 2010 and the Human Rights Act 1998, along with the new commission's different duties and powers in respect of its equality and human rights mandates.

The study emphasised the need for parity of esteem to be accorded to both equality and human rights in the new commission. It found that human rights struggled to secure a place in the commission's early priorities. It was only after the publication of a critical report by the Joint Parliamentary Committee for Human Rights that human rights enjoyed greater profile, priority and resources in the commission.

The commission, the study found, has struggled to develop a common conceptual framework or approach which integrates its equality and human rights remit. The study suggested the need to attend to how, in conceptual, practical and operational terms, integrated bodies will work across and integrate both mandates. It further noted that if the potential benefits of a merger are to be realised, attention needs to be given to how best to define organisational purpose, identify priorities, or measure impact of the merged body.

Ireland³¹

This study noted that “combined mandate bodies now exist in jurisdictions around the world, although principally in Europe, and international agencies increasingly promote a comprehensive approach to the protection of equality and human rights. However, as yet, it is difficult to identify a bona fide success story”. The Irish Human Rights and Equality Commission was established out of the merger of the Equality Authority and the Irish Human Rights Commission in 2014. The motives for the merger were identified in the study as part financial and part political with Government keen to increase its influence over the bodies.

The study emphasized that parity of focus on equality and human rights has to be actively sought, through both design of the merged body and transition management. It noted concern about “whether the IHREC will be more oriented towards promotion or enforcement and how the merger might impact on the ‘change agenda’, especially in the areas of equality and elimination of discrimination”. The danger that a merger would lead to a de-prioritizing of legal action was raised.

The study critiqued the absence of discussion of how to integrate equality and human rights and the development of unified understanding of both concepts in the report of the working group established to assist in setting up the new body. It noted that “the fundamental compatibility of these related but distinct concepts was not probed in a substantial manner, the focus falling instead on the practical task of fusing structures”.

Concern about the definition of equality in the draft legislation was raised. Equality had been defined in the draft Heads of Bill as meaning “that all persons are equal in dignity, rights and responsibilities without regard to gender, civil status, family status, sexual orientation, religion or ultimate beliefs, age, disability, race (including colour, nationality, ethnic or national origin or membership of the Traveller community”. This limited the aspiration for equality to that of formal equality. However, it was subsequently removed from the final legislation.

31 Pegram T., *Bridging the divide – the merger of the Irish Equality Authority and Human Rights Commission*, Trinity College Dublin, 2013.

The Netherlands³²

The new Netherlands Institute for Human Rights (College voor de Rechten van de Mens) was established with the integration of the Dutch Equal Treatment Commission (Commissie Gelijke Behandeling) in 2012. The study suggested some lack of clarity as to what led to this decision. There was a sense of moving quickly to seize political momentum, an understanding that the creation of a new national human rights institution was out of the question due to economic and financial constraints, and the impression that the majority of politicians wanted fewer rather than more advisory organisations or bodies.

The study emphasised the under-development of debate on the substantive dimension of merging equality and human rights compared to the more technical, procedural or organisational aspects. It noted that most of those interviewed for the study acknowledged that 'of course' non-discrimination is part of the human rights normative framework, but there was hardly any elaboration of what this might mean for the practice of the new body. The study emphasized the need for "much more work / thinking and theorising about equality, non-discrimination and human rights protection in general".

The study highlighted challenges for the new body to: address possible obstacles that could result from the fact that it has a commission structure; deal with complaints of discrimination more efficiently in order to have sufficient time for the promotion and protection of human rights; safeguard its expertise and knowledge about equal treatment legislation; and find its place in the human rights landscape.

Looking forward

Challenge

Equality bodies and national human rights institutions are different types of organisation. This can reflect a different legal basis as well as distinct traditions. The core difference rests in the change that is sought by each of these two types of bodies, social change by equality bodies and corrective change by national human rights institutions. It lies in the manner in which each of these two types of bodies pursues change and the specific mix of activities they choose to deploy in seeking change. This needs to be addressed prior to any successful merger or it will have implications for the effectiveness of the body in making progress on both equality and human rights.

There is a significant issue at stake where the rationale for merger is posed in terms of equality being a human right or where a merger is pursued on the basis of human rights being the overarching field of action. This reduces the aspiration for equality to that of formal equality and ignores the well-established aspiration for substantive equality. An effective merger cannot proceed on the basis of such an inadequate conceptual analysis. The goals set by the merged body in relation to equality will be compromised.

The experience of merged equality and human rights bodies raises issues. Possible incompatibilities between these two fields of action are reflected in the silo based approach to each mandate within many of these bodies. There are tensions in relation to the level of attention and resources afforded to each field of action and a demand for parity of esteem between the two. There is a sense that human rights is the field of action enjoying higher status and, therefore, more likely to dominate in a merged setting. There is a challenge to innovate conceptually and operationally if any such merger is to benefit both fields of action and realise its full potential from an integrated approach.

32 Holtmaat R., Bridging the divide – matters to be taken into account regarding the integration of the functions of national equality bodies and national human rights institutions, Case study: Netherlands, 2013.

Innovation

The Equality and Rights Alliance in Ireland, drawing together equality and human rights civil society organisations, opened up some new thinking in relation to the conceptual and operational challenges facing merged bodies.³³ In particular, it explored the role values could play in integrating equality and human rights, and the potential in values-based approaches to promoting equality, protecting human rights, and eliminating discrimination in an integrated manner.

The study published by the Equality and Rights Alliance is based on an understanding that equality and human rights traditions, while different, are based on shared values. It reflects the importance of values as motivators for people and organisations in bringing about social change. It starts from the identification of the values that are common to the equality and human rights traditions as being:

- “Autonomy: encompassing choice, agency, freedom, self-determination and the absence of coercion.
- Democracy: encompassing participation, voice, empowerment and accountability from those in positions of power.
- Dignity: encompassing respect, relationships of care and love, human worth and the absence of inhumane and degrading treatment, harassment and discrimination.
- Inclusion: encompassing a sense of belonging and community, interdependence, collective responsibility and a valuing of diversity.
- Social Justice: encompassing redistribution of wealth, income, jobs and social goods and the absence of privilege and entitlement”.³⁴

The Equality and Rights Alliance has demonstrated how this framework of values could be applied in practice in an integrated approach to the implementation of a new statutory duty on public bodies.³⁵ Public bodies in Ireland, since 2014, are legally obliged to have regard to the need to eliminate discrimination, promote equality and protect human rights in carrying out their functions. However, further work is needed to trace out and test the practical implications of such a values-based approach by equality and human rights bodies in terms of establishing their purpose, priorities, practices and impact indicators.

Future perspectives

The assumptions made about the purpose, value and ease of merging equality bodies and national human rights institutions need to be further tested and explored. A sustained debate is required about the challenges of integrating equality and human rights work. The conceptual framework that might underpin this, the gains to be made in any such integration, and the innovation required to make it work need to be discussed and evolved. The rush to merge these bodies has precluded this necessary precondition for any merger to be successful.

The experience and effectiveness of bodies that have both an equality mandate and a human rights mandate need to be documented and analysed. The work of Crowther and O’Cinneide was mainly limited to a focus on the merger process.³⁶ A follow up study is required to assess the actual practice of merged bodies, the potential of such bodies, the pitfalls in such mergers, and what is needed to make them work for both equality and human rights.

There is a longstanding demand, through Equinet, for the development of European standards for equality bodies that would match the standards already established for national human rights institutions and

33 Crowley N., *Equality and Human Rights: An Integrated Approach*, Equality and Rights Alliance, Dublin, 2015.

34 Ibid, page 27.

35 Mullen R., *A New Public Sector Equality and Human Rights Duty*, Equality and Rights Alliance, Dublin, 2015.

36 Crowther N. & O’Cinneide C., *Bridging the Divide? Integrating the functions of national equality bodies and national human rights institutions in the European Union*, UCL Faculty of Laws, London, 2013.

would address the particular role, situation and experience of equality bodies. The trend of merging equality bodies and national human rights institutions adds further urgency to this demand. Any such standards will have to address what is required in the establishment and operations of such merged bodies to ensure an adequate and effective focus on equality issues.

Equinet has published a working paper that makes the case for a European standard for equality bodies and establishes a framework for such a standard.³⁷ The framework identifies that a standard would need to address the mandate, complete independence, effectiveness and wider institutional architecture for equality bodies. The issue of merged mandates is specifically addressed in this latter section on institutional architecture.

This reflects the challenges in merged mandates in identifying that where equality bodies have their mandates combined with national human rights institutions or ombudsman offices they should have: “A coherent legal basis and powers for all parts of the mandate; An adequacy of resources to implement all parts of the mandate and to secure an appropriate balancing of resources to ensure parity of focus across all parts of the mandate; An internal structure capable of ensuring a parity of focus across all parts of the mandate; A capacity to develop an integrated approach to all parts of the mandate, to the extent that this is possible and appropriate; and A multi-disciplinary competence across its staff”.³⁸

37 Developing Standards for Equality Bodies (An Equinet Working Paper), Equinet, Brussels, 2016.

38 Developing Standards for Equality Bodies (An Equinet Working Paper), Equinet, Brussels, 2016, page 7.

Tackling sex discrimination to achieve *gender* equality?

Conceptions of sex and gender in EU non-discrimination law and policies

Ulrike Lembke*

1. Introduction

The EU gender equality directives employ the terms ‘sex discrimination’ or ‘discrimination on the grounds of sex’ to identify prohibited attitudes, conduct, and structures, while their recitals, as well as the Commission and the CJEU,¹ speak of ‘gender equality’ when highlighting the aim of corresponding non-discrimination measures. Sex discrimination can be based upon gender stereotypes or gender reassignment surgery, and EU law employs measures such as Gender Mainstreaming to achieve sex equality.

The indiscriminate use of ‘sex’ and ‘gender’ in the field of non-discrimination law and policies might be of no significance. After all, it may be easily explained in terms of the history of International Law: the prohibition of discrimination on the grounds of sex was covered by the first international human rights documents, while the term gender entered the realm of international law some decades later, accompanied by questions concerning the naturalness of sex as well as the importance of gender identities, roles and stereotypes. Another explanation would be that terminological uncertainties reflect the perpetual importance of these questions.

As briefly as is appropriately possible, this article seeks to present some key insights from sex and gender research and to review the EU’s legal approach to sex discrimination in the light thereof. The introduction of ‘gender’ into equality law discourse represented a great advance in tackling sex discrimination by questioning natural sex differences and highlighting societal processes of creating (doing) gender. Equality between women and men, however, still remains a desirable goal at a great distance which will not be significantly reduced without substantive equality approaches. Moreover, biological sex is no longer what it used to be, and current equality law has to develop approaches to sex discrimination that can also protect persons outside the dominating binary sex model. By perceiving biological sex as diversity and societal constructions of gender as maintaining hierarchies, the author suggests moving on from ‘the equal treatment of men and women’ to a more comprehensive, two-dimensional understanding of sex discrimination.

* Ulrike Lembke works as a Senior Assistant at the Law Faculty, Greifswald University, Germany, in the fields of Public Law and Legal Gender Studies, and she is the German country expert on gender equality for the European network of legal experts in gender equality and non-discrimination. Ulrike Lembke owes great thanks to Alexandra Timmer for her constructive comments on this article.

1 In this article the term ‘CJEU’ also includes the European Court of Justice.

2. Sex trouble and gender orders – current concepts, research and debates

Since the 1970s, feminist scholars and activists have distinguished between biological sex and social gender. Gender describes the social attitudes, expectations, self-representation, and practices performed to become² and be³ a man or a woman. Feminists introduced gender to tackle the naturalness of sex and gender roles and to highlight the social construction of feminine beauty and masculine aggression, female care and male work and, thus, the changeability of hierarchical gender relations.

2.1 The biological truth is sex diversity

The sex/gender approach, however, did not question the naturalness of the sexed body nor the assumptions about two (and only two) sexes and their corresponding genders. Judith Butler⁴ and many other queer and post-modern feminist scholars and activists suggest that the idea of (only two) biological sex(es) and the sexed body itself is a social construct developed by societal interpretation of what can be seen in a dichotomous mindset – in other words, with a binary classification system, one will never discover a third or fourth sex. Thus, they argue, sex and gender are deeply interwoven.⁵ The theory of constructed sex and performative gender has always been strongly contested, recently by some neuroscientists and evolutionary behavioural researchers with quite deterministic and naturalising concepts of gender differences. For some years now, however, biologists and other natural scientists have started to wonder whether our ideas about two dichotomous sexes might be all wrong:

Very often sex is identified with genitalia and procreative functions, but in recent scientific research, biological sex is constituted by a broader set of criteria including hormones, gonads, chromosomes, genes, and maybe the brain structure. With growing possibilities of a closer look, sex is much more complicated than it has seemed hitherto, the number of persons with at least one non-consistent criterion is significantly higher than expected and, taking into account its diversity, biological sex might be in need of being redefined as a continuum.⁶ Moreover, meta-studies question the belief in dichotomous categories of two sexes/genders by revealing the dimensional character of gender differences, excluding any diagnosis of gender-typical psychological variables on the basis of (already fragile) sex.⁷ In addition, neuroscientists attack the current 'neurosexism' that tries to explain different gender roles by brain structures.⁸

2.2 The overwhelming significance of sex/gender norms and expectations

Natural sciences and the humanities have been quarrelling for some time about the extent to which biological sex or social gender might determine one's personality, missing the point that the main question is about the social and cultural *significance* of the sex/gender assignment. To be identified as male or female influences the entire life of a person, as also do not fitting into the sex dichotomy or testing the boundaries of gender order.⁹ The biological sex, however identified, is accompanied by a huge overhead of internalized gender norms and external gender expectations covering nearly everything from economic status to relationships and marriage, sex life, health and food, experiences of violence,

2 Famously: de Beauvoir, S. (1949), *Le deuxième sexe*, p. 285: 'On ne naît pas femme: on le devient.' (One is not born, one rather becomes, a woman).

3 See Moran, C. (2011), *How To Be a Woman*; and Connell, R. (1995), *Masculinities*.

4 Butler, J. (1990), *Gender Trouble. Feminism and the Subversion of Identity*.

5 Cowan, S. (2005), "Gender is no substitute for sex!": A comparative human rights analysis of the legal regulation of sexual identity' *Feminist Legal Studies*, vol. 13, pp. 67-96 at p. 72.

6 See Ainsworth, C. (2015), 'Sex redefined' *Nature* vol. 518, pp. 288-291, with further references.

7 Carothers, B. J. & Reis, H. T. (2012), 'Men and Women Are From Earth: Examining the Latent Structure of Gender' *Journal of Personality and Social Psychology*. doi: 10.1037/a0030437.

8 Fine, C. (2010), *Delusions of Gender. The Real Science Behind Sex Differences*.

9 Bornstein, K. & Bear Bergman, S. (eds.) (2010). *Gender Outlaws. The Next Generation*.

free time activities, fashion, manners, social responsibility etc. Gendered living conditions and gendered lives are historically and socially contingent but have one thing in common: they are justified by ideas of dichotomous biological sexes.

Laura Adamietz introduced the concept of gender/sex as expectation in order to better understand and fight discrimination.¹⁰ One expectation is that there are only two sexes and that the birth sex will not change. Another expectation is that the sexual desire of one sex is generally directed towards the other. Further expectations are about natural male leadership and natural female caring. When drafting or applying of or otherwise dealing with non-discrimination law on the grounds of sex, one should be aware that sex discrimination is caused by perceptions of natural sex dichotomy as well as ‘sex-based preferences, assumptions, expectations, stereotypes, or norms’.¹¹ Whether this is called gender or something else, it has to be taken into account. Discrimination can occur as a sanction for disappointing gender/sex expectations or as a consequence of complying with *female* gender norms.

2.3 Equality law and the hierarchy of ‘differences’

Thus, when tackling sex discrimination, non-discrimination law has to cover both detrimental conformist gender roles and disadvantageous non-conformist sexes or gender performances. Both dimensions of sex discrimination are rooted in the binary sex model. LGBTI*¹² persons are discriminated against because they do not fit into the model. This external hierarchy maintains the naturalness and superiority of dichotomous sexes. Moreover, the relationship between these dichotomous sexes is unequal too, and this internal hierarchy maintains the superiority of male sex and masculine gender.

The introduction of gender into non-discrimination law and policies was rejected, among other reasons, due to the fear that the familiar concept of sex discrimination with women and men as natural comparators might be confused or even destroyed. It is true that the binary sex model itself is part of the problem. Moreover, symmetrical approaches to men and women in ‘comparable situations’ and considerations of the differences between the two given sexes without answering the central question as to whether these differences indicate – legally relevant – hierarchies and thus, incomparable situations, can be very misleading. Gender/sex equality law should not be interested in differences between people as long as these ‘differences’ do not indicate or constitute gendered hierarchies, unequal power relations or general social disadvantages on the grounds of sex/gender.¹³

Living in a society with a strong belief in dichotomous sexes, being an intersex person is not a difference but a grave disadvantage. The same is true for transsexual and transgender persons confronted with powerful expectations of a stable birth sex and conforming behaviour, let alone for same-sex love and relationships in a heteronormative environment. Many LGBTI* persons are confronted with all kinds of discrimination in the workplace, especially harassment (on the grounds of sex/gender), they face further discrimination when trying to found a family, and they are victims of transphobic or homophobic violence time and again.¹⁴

10 Adamietz, L. (2011), *Geschlecht als Erwartung. Das Geschlechtsdiskriminierungsverbot als Recht gegen Diskriminierung wegen der sexuellen Orientierung und der Geschlechtsidentität* ('Sex/Gender as Expectation. The prohibition of gender discrimination as a legal means against discrimination on the grounds of sexual orientation and gender identity').

11 Equal Employment Opportunity Commission (EEOC), 15 July 2015, No. 0120133080, p. 6.

12 LGBTI* stands for lesbian, gay, bisexual, trans* and intersex. Especially trans* and inter* activists and advocates use the asterisk (*) to visualize multiple gender identities outside the binary sex/gender model and the openness of corresponding conceptions.

13 Foundational for the legal concept of sex discrimination as gendered hierarchization resp. domination: Baer, S. (1995), *Würde oder Gleichheit? Zur angemessenen grundrechtlichen Konzeption von Recht gegen Diskriminierung am Beispiel sexueller Belästigung am Arbeitsplatz in der Bundesrepublik Deutschland und den USA* ('Dignity or Equality?'); and Sacksofsky, U. (1991), *Das Grundrecht auf Gleichberechtigung. Eine rechtsdogmatische Untersuchung zu Artikel 3 Absatz 2 des Grundgesetzes* ('The Fundamental Right to Equality').

14 EU Agency for Fundamental Rights (2014). *European Union lesbian, gay, bisexual and transgender survey. Main results.*

Gender equality law is not about differences between men and women, either. Women (or female identified persons) form a traditionally disadvantaged group, being denied autonomy, integrity, creativity, economic independence, leadership, scholarship, control over their bodies etc. Thus, equality law has to focus on disadvantages, exclusion, hierarchies and power relations,¹⁵ not differences: 'Gender might not even code as difference, might not mean distinction epistemologically, were it not for its consequences for social power. (...) Difference is the velvet glove on the iron fist of domination.'¹⁶ A widespread example of a hierarchy disguised as difference is the 'natural female preference' for care work, however morally valued, which is severely detrimental to women's economic well-being and their participation in public life and politics.¹⁷

In conclusion, sex and gender research provides key insights for discrimination law. The first is that, biologically speaking, sex is diverse rather than dichotomous. The second is that gender expectations based upon the binary sex model profoundly shape people's lives. And the third is that gender equality law is not about differences between men and women but about hierarchies, dominance and unequal distribution of resources and participation on the grounds of sex/gender.

3. Sex and gender in EU non-discrimination law

Equality between men and women is a general principle of EU law.¹⁸ As early as 1957, Article 119 EEC dealt with the prohibition of 'discrimination based on sex' obliging the Member States to apply the 'principle of equal remuneration for equal work as between men and women workers'. The subsequent Articles 141 TEC and 157 TFEU changed some of the wording to 'equal pay for male and female workers' but stuck to the prohibition of 'discrimination based on sex'. Articles 2 and 3(3) TEU emphasize the equality of women and men, but the Treaty employs neither the term 'sex' nor 'gender'. Under Articles 10 and 19 TFEU, the EU combats discrimination based on sex and sexual orientation. Article 21 CFR prohibits any discrimination on the grounds of sex or sexual orientation, Article 23 ensures equality 'between men and women' and covers special measures 'in favour of the under-represented sex'. Neither the TFEU nor the CFR speak about gender.

3.1 Indiscriminate terms and new approaches

In the application of Article 141(3) TEC, several gender equality directives have been adopted. Following the Treaties, they do not employ 'gender' as a legal term.¹⁹ Starting in 2004, however, their recitals contain the term 'gender equality' both when referring to European policies²⁰ and to the aims of the respective directive.²¹ Moreover, commonly used compounds such as 'gender reassignment', 'gender-based wage differentials', 'gender segregation on the labour market', 'gender gap', 'Gender Mainstreaming' and 'European Institute for Gender Equality' appear within the preambles as well as in the norms of the directives.²² These wordings are influenced by International Law, European gender equality policies and case law of the CJEU.

Although one of the most important publications on the issue used the title 'gender discrimination law'²³ as early as 1990, European institutions took some more time before introducing gender into the legal

15 Fredman, S. (2016), *Intersectional discrimination in EU gender equality and non-discrimination law*, pp. 30ff and passim.

16 MacKinnon, C. (1989), *Toward a Feminist Theory of the State*, p. 219.

17 See CEDAW (2013), General Recommendation No. 29, C/GC/29; CEDAW (1997), General Recommendation No. 23, A/52/38, paragraphs 8ff.; CEDAW (1991), General Recommendation No. 17, A/46/38.

18 See Burri, S. (2013), 'Towards More Synergy in the Interpretation of the Prohibition of Sex Discrimination in European Law?' *Utrecht Law Review* vol. 9, pp. 80-103.

19 The key terms are 'sex discrimination', 'discrimination on the grounds of sex', and 'equal treatment for men and women'.

20 No. 6 of Directive 2004/113/EC; No. 6 of Directive 2010/18/EU; No. 2 of Directive 2010/41/EU.

21 Nos 7 and 16 of Directive 2004/113/EC; No. 8 of Directive 2010/18/EU; No. 15 of Directive 2010/41/EU.

22 Nos 3 and 11, Articles 20 and 29 of Directive 2006/54/EC; No. 6, Articles 11 and 12 of Directive 2010/41/EU.

23 Prechal, S. & Burrows, N. (1990), *Gender discrimination law of the European community*.

and policy discourse. In 1996, the Commission adopted the gender mainstreaming approach introduced by the Global Platform for Action of the Fourth World Conference on Women in Beijing 1995, integrating the gender equality objective into all politics and measures concerning the lives of men and women.²⁴ In the programmes, frameworks and actions following since, gender equality has been a central concept.²⁵

The CJEU used the term ‘gender’ for the first time in 1996, in the case of *P. v. S.*, concerning the dismissal of a transsexual person.²⁶ From 1997, the CJEU employed the term ‘gender’ as an indiscriminate substitute for the term ‘sex’, e.g. ‘it is for the national court (...) to determine in the light of all the circumstances whether, and to what extent, a legislative provision which, although applying irrespective of *gender*, actually affects a greater number of *women than men*, is justified by objective reasons unrelated to any *discrimination on grounds of sex*’ (emphases added).²⁷ Sometimes, gender is used as a part of compound technical terms.²⁸ The first more conceptual use concerns the gender-segregated labour market and arose from the contribution of Member States: ‘The Finnish, Swedish and Norwegian Governments add that the national rule in question promotes access by women to posts of responsibility and thus helps to restore balance to labour markets which, in their present state, are still broadly partitioned on the basis of gender in that they concentrate female labour in lower positions in the occupational hierarchy.’²⁹

3.2 Sex/gender equality law beyond the sex dichotomy

As mentioned above, the CJEU first employed the term ‘gender’ when considering discrimination based on ‘gender reassignment’. In a way, it would have been much more appropriate to use the terms ‘sex’ and ‘sex reassignment surgery’ because the claimant had had her physical sex adjusted but, as we can see in many dealings with the matter, as soon as sex is not stable or dichotomous enough it becomes gender. The court stated that the dismissal of a transsexual person for a reason arising from his/her gender reassignment constitutes prohibited sex discrimination under Article 5(1) of Directive 76/207/EEC.³⁰ This outcome was welcomed but the approach was surprising. What puzzled the legal community most was the question of the right comparator.³¹ In the court’s basically Aristotelian understanding of equality³² the comparability is of utmost importance and the choosing of the comparator might well decide the case. In sex discrimination cases, the natural comparator is ‘the other sex’ – but this will not work when sex reassignment is involved.³³

In his opinion on *P. v. S.*, Advocate General Tesouro thoroughly criticised ‘the idea that the law should take into consideration, and protect, a woman who has suffered discrimination in comparison with a man, or vice versa, but denies that protection to those who are also *discriminated against*, again by reason of sex,

24 Commission Communication of 21 February 1996, ‘Incorporating equal opportunities for women and men into all Community policies and activities’ COM(96) 67 final.

25 E.g. Commission Communication of 7 June 2000, ‘Towards a Community Framework Strategy on Gender Equality (2001-2005)’ COM(2000) 335 final; Commission Communication of 21 September 2010, ‘Strategy for equality between women and men (2010-2015)’ COM(2010) 491 final.

26 CJEU, judgment of 30 April 1996, C-13/94, *P. v. S.*

27 CJEU, judgments of 2 October 1997, C-100/95, *Kording*, paragraph 20, and C-1/95, *Gerster*, paragraph 35; recently: CJEU, judgment of 11 April 2013, C-401/11, *Soukupova*, judgment of 28 February 2013, C-427/11, *Kenny and Others* (‘gender discrimination’). Most remarkable is CJEU, judgment of 10 May 2011, C-147/08, *Römer*, where the use of the term ‘sex’ would seem much more appropriate.

28 E.g. CJEU, judgment of 17 February 1998, C-249/96, *Grant*; judgment of 7 January 2004, C-117/01, *K.B.*; judgment of 27 April 2006, C-423/04, *Richards*: ‘gender reassignment’ and ‘gender recognition’.

29 See in CJEU, judgment of 11 November 1997, C-409/95, *Marschall*, paragraph 16.

30 CJEU, judgment of 30 April 1996, C-13/94, *P. v. S.*

31 Agius, S. & Tobler, C. (2012), *Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression*, pp. 35ff. with further references.

32 Tobler, C. (2014), ‘Equality and Non-Discrimination under the ECHR and EU law. A Comparison Focusing on Discrimination of LGBTI Persons’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* vol. 3, pp. 521-561 at p. 529.

33 Bell, M. (1999), ‘Shifting Conceptions of Sexual Discrimination at the Court of Justice: from *P v S* to *Grant v SWT*’, *European Law Journal* vol. 1, pp. 63-81, highlights the inconsistencies and questionable assumptions of the CJEU rulings in *P. v. S.* and *Grant*.

merely because they fall outside the traditional man/woman classification'.³⁴ The court adhered to the necessity of a male or female comparator and stated that there had been an unfavourable treatment of the claimant 'by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment'.³⁵ (Thus, the comparator was the claimant's former male self.) This cannot be found to be convincing because the claimant had not been discriminated against because s/he wanted to and had become a *woman*, but because s/he wanted to and had *become* a woman. In its 1989 resolution on the topic,³⁶ the European Parliament had stated that the unemployment rate among transsexuals undergoing a change of sex was between 60 % and 80 % – undoubtedly higher than any rate among male or female 'comparators'. The claimant suffered discrimination because of changing sex and not because of being a man or a woman.

It is very often suggested that Judith Butler³⁷ declared biological sex to be a social construct, thus usurping what is left of sex by gender. However, she only pointed out that our conception, understanding and experience of sex is a social process. We think of sex as dichotomous and complementary, congenital and unchangeable – although proven wrong on every point. In his opinion on *P. v S.*, Advocate General Tesauro suggested understanding 'sex itself as a continuum' and therefore protecting those who are treated unfavourably precisely because of their sex and/or sexual identity – but he assumed that this would require 'a redefinition of sex which merits deeper consideration in more appropriate circles'.³⁸ As discussed above, twenty years later scientific research has indeed shown that biological sex is a continuum.³⁹ Even legal discourse gets accustomed to the possibility of sex reassignment surgery, but there is still a lack of adequate approaches for all people who reject the binary sex/gender model or who do not fit into it from the start.

Dichotomous sex is a working hypothesis increasingly challenged by scientific progress. Today's medical and biological research uses more criteria to determine sex and identify more people with at least one non-consistent criterion. Generally, however, persons of a biological sex outside the binary model were (and are) ignored⁴⁰ or pathologized⁴¹ to maintain the 'naturalness' of a culturally preferred sex dichotomy and denied legal and social recognition⁴² and, thus, full citizenship. Without legal recognition, intersex persons⁴³ are not protected against harmful sex reassignment surgery in early childhood, do not enjoy unequivocal legal capacity regarding marriage, partnership and parenthood and cannot claim sex discrimination because they are either not of a potentially disadvantaged sex in the eyes of the law or they lack a suitable comparator of the 'opposite' sex. In this respect, it might be true that discrimination against intersex people 'is a particularly complex form of sex discrimination'.⁴⁴ From another perspective, it is very simple: when intersex people face disadvantages *because* they are neither male nor female, they are discriminated against on the grounds of sex – and the denial of legal recognition of their (third) sex is such a disadvantage. However, when prohibiting sex discrimination, not only national laws but also European gender equality law refers to 'men and women'⁴⁵ or 'persons of one sex' in comparison to 'persons of the other sex'⁴⁶ and, thus, to the sometimes detrimental sex dichotomy. In *P. v S.*, the court

34 Opinion of Advocate General Tesauro in *P. v S.*, 14 December 1995, paragraph 17.

35 CJEU, judgment of 30 April 1996, C-13/94, *P. v S.*, paragraph 21.

36 European Parliament (1989). *Resolution on discrimination against transsexuals*. Doc A 3-16/89.

37 Butler, J. (1990), *Gender Trouble. Feminism and the Subversion of Identity*.

38 Opinion of Advocate General Tesauro in *P. v S.*, 14 December 1995, paragraph 17.

39 See Ainsworth, C. (2015), 'Sex redefined' *Nature* vol. 518, pp. 288-291.

40 The questionnaire for the general report on equality law contains questions about discrimination based on sex reassignment but no further questions concerning discrimination against intersex and transgender persons.

41 E.g. Palazzani, L. (2012), *Gender in Philosophy and Law*, pp. 85ff. who understands intersex as an 'anomaly' that must be rectified by early surgical intervention – a most harmful approach which ignores basic human rights such as dignity, equality, physical integrity and autonomy.

42 For sex registration practices in EU Member States, see van den Brink, M. & Tigchelaar, J. (2015), 'Gender identity and registration of sex by public authorities'. *European Equality Law Review* vol. 2, pp. 29-40.

43 German Ethics Council (2012). *Statement on Intersexuality*, www.ethikrat.org/intersexualitaet.

44 Agius, S. & Tobler, C. (2012), *Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression*, p. 82.

45 E.g. Articles 2, 3(3), 157 TFEU; Directive 2006/54/EC; Directive 2004/113/EC.

46 E.g. the definition of indirect discrimination in Article 2(b) of Directive 2006/54/EC and Directive 2004/113/EC.

explained that the principle of equal treatment for men and women meant that there should be no discrimination on grounds of sex: 'Thus, the directive is simply the expression of the principle of equality which is one of the fundamental principles of Community law.'⁴⁷ Such a more comprehensive approach is not about a totally new legal understanding of sex discrimination – there are still many problems concerning women and men and we will come to some of them – but about necessary amendments.

In its decisions on discrimination related to sex reassignment surgery, the CJEU had successfully dealt with discrepancies of biological sex, gender identity and legal recognition. The court consequently accepted the asserted sex/gender of the claimant irrespective of legal recognition. Moreover, as early as *P. v S.*, it rejected the 'equal misery'⁴⁸ argument, and in *K.B.* it identified the denial of legal recognition as the main source of discrimination: although the restriction of a survivor's pension to married couples did not in itself constitute sex discrimination, it did affect a precondition for the grant of a right, and the claimant's inability to fulfil this precondition resulted from the law's refusal to recognize the legal status of his/her transsexual partner.⁴⁹ There is no reason⁵⁰ why the court should not apply this argument to cases where the claimant's inability to fulfil requirements for equal pay is based upon the denial of legal recognition of his/her own or partner's intersex. Some commentators suggest that the court did not hesitate to offer legal protection because transsexuals undergoing sex reassignment surgery do not call into question the binary sex model as such.⁵¹ However, the fact that the law takes no account of life outside the binary sex model in itself constitutes a sex discrimination: the lack of legal recognition of a change of sex (transsexual), the denial of a legal sex status when a person is born outside the sex dichotomy (intersex), or the suffering of disadvantages because of being born with or developing the 'wrong' sex for a legally recognized partnership (same-sex couples).⁵²

In some cases, the discrimination against LGBTI* persons is discrimination based upon (biological) sex; in some cases, it is discrimination because of sex-based assumptions, expectations, stereotypes, or norms (gender); and, in many cases, the boundaries are blurring. The CJEU should consequently apply its approach of sex discrimination developed in *P. v S.* and *K.B.* to disadvantageous non-conformist sexes as well as to gender performances. It is not by chance, however, that 'negative attitudes towards trans and intersex people are directly correlated to the importance that a determinate society places on the binary gender model and the level of gender stereotypes, sexism and gender inequalities that exist within it'.⁵³ The binary sex/gender model as the essential basis for sex discrimination works in two dimensions by producing an external hierarchy between persons fitting into the binary model and persons not fitting into it and by including an internal hierarchy between men and women. Gender equality law has to cover both.

47 CJEU, judgment of 30 April 1996, C-13/94, *P. v S.*, paragraphs 17-18.

48 Term introduced by Denys, C. (1999), 'Homosexuality: a non-issue in Community law?' *European Law Review* vol. 24(4), pp. 419-425 at pp. 422ff., meaning the (inapt) arguments that a male to female transsexual would have been dismissed just as a female to male transsexual would have been, or that female and male homosexuals are equally disadvantaged.

49 CJEU, judgment of 7 January 2004, C-117/01, *K.B.*

50 The author is well aware of the fact that the decision was strongly influenced by the ECtHR's judgment on the right to marry for transsexual persons (*Goodwin*), but is optimistic that the CJEU can develop an adequate concept of sex discrimination on its own. Concerning the CJEU's reductive approach to fundamental rights and moralistic policy considerations in *Grant*, see Bell, M. (1999), 'Shifting Conceptions of Sexual Discrimination at the Court of Justice: from *P v S* to *Grant v SWT*', *European Law Journal* vol. 1, pp. 63-81.

51 See Denys, C. (1999), 'Homosexuality: a non-issue in Community law?' *European Law Review* vol. 24(4), pp. 419-425 at p. 424; Stychin, C. F. (1997), 'Troubling Genders. A comment on *P. v S.*' *International Journal of Discrimination and the Law* vol. 2, pp. 217-222 at pp. 219 and 222; for the ECtHR case law, see Gonzalez-Salzberg, D. A. (2014), 'The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender', *American University International Law Review* vol. 29(4), pp. 797-829.

52 For a comprehensive approach, see Adamietz, L. (2011), *Geschlecht als Erwartung. Das Geschlechtsdiskriminierungsverbot als Recht gegen Diskriminierung wegen der sexuellen Orientierung und der Geschlechtsidentität* ('Sex/Gender as Expectation. The prohibition of gender discrimination as a legal means against discrimination on the grounds of sexual orientation and gender identity').

53 Agius, S. & Tobler, C. (2012), *Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression*, p. 13. See CEDAW (2010), General Recommendation No. 28, C/GC/28, paragraphs 5, 18: sexual orientation and gender identity is inextricably linked with sex and gender as grounds for discrimination.

3.3 Female, mother, care – equality law and detrimental gender roles

While the previous paragraph dealt with the shortcomings as well as some promising approaches concerning discrimination because of non-conformity with the binary sex model (external dimension), this paragraph examines legal approaches to the internal hierarchy between men and women. While discrimination against LGBTI* persons is too often unconvincingly described in terms of gender, conversely it is hard to identify discrimination between men and women which is *not* gender-based. Even pregnancy and maternity discrimination forms no exception. Since *Dekker*, the CJEU considers pregnancy discrimination to constitute direct discrimination on the grounds of sex irrespective of a male comparator.⁵⁴ However, more often than not, pregnancy and maternity protection itself contributes to the construction of the female sex⁵⁵ in ways of harmful ‘othering’ of female workers when referring to special biological disadvantages of women.⁵⁶

On a closer look, pregnancy and maternity discrimination are the peak of discrimination on the grounds of female gender. Young female job applicants are discriminated against because they might become pregnant and, much more important, the expectation is that they will take the main responsibility for child care, stay at home for a long time and will generally be less reliable and committed to their work – gender expectations far beyond any problems of being pregnant. Irrespective of the fact as to whether they are, have been or will ever be pregnant, women are stuck in the role of potential mothers and natural carers detrimental to, *inter alia*, their whole working life.⁵⁷ Neither ‘men’s failure to share the tasks associated with the organization of the household and with the care and raising of children’⁵⁸ nor the confinement to low-paid and part-time work⁵⁹ is connected to biological female sex. Women are overrepresented in any kind of work associated with care, facing irregular working hours, low pay (and pensions), harassment and social disregard.

The detrimental chain of association from female sex to motherhood and care work shapes a vertically and horizontally gender-segregated labour market and explains the feminization of part-time work as well as greater parts of the gender pay and pension gap. Despite many efforts and measures aiming at a better reconciliation of working and family life introduced by European institutions, change is not about to occur anytime soon. One reason is the withdrawal from gender equality as an ambitious and far-reaching European policy: most progressive measures such as legally binding norms beyond lowest national standards and positive action programmes are in retreat.⁶⁰ For example, despite the identification of main obstacles to gender equality in parental childcare, the Parental Leave Directive 2010 is not legally binding in these crucial areas, e.g. payment of leave, strict non-transferability, necessary flexibility.⁶¹ In addition, although the case law of the CJEU concerning pregnancy and maternity protection has changed considerably,⁶² its persistent employment of a symmetrical approach to gender discrimination hinders

54 CJEU, judgment of 8 November 1990, C-177/88, *Dekker*.

55 In times of legal recognition of transgender without surgery as well as intersex, pregnancy protection does not necessarily require the female sex. Consequently, the German draft on the new regulation of maternity protection of 28 June 2016 (<http://dip21.bundestag.de/dip21/btd/18/089/1808963.pdf>) makes it clear that, ‘Woman in the sense of this statute is any person who is pregnant or has recently given birth or is breastfeeding, irrespective of the legal sex/gender status in his*her birth registration.’

56 The concrete realization of protection measures is therefore of utmost importance, e.g. the burden of financing or the measures chosen from working ban to appropriate accommodation at the workplace, see Directorate General for Internal Policies (ed.) (2010), *Costs and benefits of maternity and paternity leave*.

57 See Masselot, A., Caracciolo Di Torella, E. & Burri, S. (2012), *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood*.

58 CEDAW (1997), General Recommendation No. 23, A/52/38, paragraph 10.

59 See Burri, S. & Aune, H. (2013), *Sex Discrimination in Relation to Part-Time and Fixed-Term Work*.

60 Jacquot, S. (2015), *Transformations in EU Gender Equality*.

61 Weldon-Johns, M. (2013), ‘EU Work-Family Policies – Challenging Parental Roles or Reinforcing Gendered Stereotypes?’ *European Law Journal* vol. 5, pp. 662–681 at pp. 671ff. For national practices, see do Rosario Palma Ramalho, M., Foubert, P. & Burri, S. (2015), *The Implementation of Parental Leave Directive 2010/18 in 33 European Countries*.

62 See Timmer, A. (2016), ‘Gender Stereotyping in the case law of the EU Court of Justice.’ *European Equality Law Review* vol. 1, pp. 37–46 at pp. 40ff. For the court’s highly problematic reasoning until 1998, see McGlynn, C. (2000), ‘Ideologies of Motherhood in European Community Sex Equality Law.’ *European Law Journal* vol. 1, pp. 29–44.

substantial changes. It is true that in questions of discrimination against men or women, the CJEU's case law itself suggests referring to a female or male comparator. Unfortunately, the binary model is part of the problem because its internal structure is hierarchical,⁶³ and just using a comparator of 'the other sex' to tackle a hierarchy between both is not too promising. The question is whether and how a policy or legal measure leads to or reinforces hierarchical gender structures and unequal power relations and redistribution of resources.⁶⁴

The CJEU explicitly confines substantive equality to positive action measures instead of understanding it as a guiding principle and a general aim when dealing with gender hierarchies. Its granting of parental leave to fathers⁶⁵ is definitely in compliance with a substantive approach by encouraging a more equal distribution of parental responsibility and by de-gendering childcare, but its reasoning shows a most remarkable and detrimental understanding of gender equality law. In *Roca Alvarez* the defendant national authority had argued that the exclusive entitlement of mothers to a special parental leave after childbirth was to compensate for genuine disadvantages suffered by women in keeping their jobs following the birth of a child.⁶⁶ This rather bizarre and obviously self-serving 'substantive-equality-concept' would have offered the possibility for the CJEU to introduce a comprehensive substantive equality approach and to explain the detriments of exclusive attributions of childcare to mothers who try to earn their living and working women in general. Instead, the court emphasized the rights of fathers to family life and the comparability of male and female working parents. Such an approach leads to the dictum in *Maistrellis* that 'the situation of a male employee parent and that of a female employee parent are comparable as regards the bringing-up of children'⁶⁷ which is on the verge of satire in the gender equality context.

Even in its best-known positive action cases, the CJEU fails to employ a comprehensive substantive equality approach. The court generally justifies gender quota with the finding that, due to (gender) prejudices and stereotypes, male applicants are preferred in promotion and recruitment,⁶⁸ but it insists upon a plain underrepresentation approach as well as the requirement of equal qualification.⁶⁹ Two decades of almost non-effective gender quota and other special measures might indicate a need for change.

The underrepresentation of men in childcare facilities is not comparable to the underrepresentation of women in higher management. Both are manifestations of hierarchical gender structures in employing strong stereotypes about male leadership and female care, but it might be helpful not to ignore that higher management work is well-paid and approved while childcare work is underpaid and devaluated. And although the icon of women as natural carers is widespread, men applying to become kindergarten teachers/carers will not face comparable problems concerning their equal qualification as women face when applying for leading positions in male dominated workplaces because the concept of 'equal qualification' itself is strongly gendered – to the detriment of women, at least concerning economically desirable jobs. Moreover, the CJEU reasoning falls short of the approach of international human rights law. The CEDAW committee aims at both 'overcoming underrepresentation of women and a redistribution of resources and power between men and women', identifies special measures as a central means rather than an exception to non-discrimination and points out that 'questions of qualification and merit,

63 CEDAW (1994). General Recommendation No. 21, paragraph 12: 'Even where de jure equality exists, all societies assign different roles, which are regarded as inferior, to women.'

64 See Kannabiran, K. (2014), *Judicial Meanderings in Patriarchal Thickets*, in: Kannabiran, K. (ed.), *Women and Law. Critical Feminist Perspectives*, pp. 172-205 at p.177; Radacic, I. (2008), 'Gender Equality Jurisprudence of the European Court of Human Rights', *European Journal of International Law* vol. 19, pp. 841-857 at pp. 850ff.

65 CJEU, judgment of 30 September 2010, C-104/09, *Roca Alvarez*; judgment of 16 July 2015, C-222/14, *Maistrellis*; dissenting CJEU, judgment of 19 September 2013, C-5/12, *Betriu Montull*, due to different regulations for self-employed parents.

66 See CJEU, judgment of 30 September 2010, C-104/09, *Roca Alvarez*, paragraph 32.

67 CJEU, judgment of 16 July 2015, C-222/14, *Maistrellis*, paragraph 47.

68 CJEU, judgment of 28 March 2000, C-158/97, *Badeck*; judgment of 11 November 1997, C-409/95, *Marschall*.

69 CJEU, judgment of 6 July 2000, C-407/98, *Abrahamsson*.

in particular in the area of employment, need to be reviewed carefully for gender bias as they are normatively and culturally determined'.⁷⁰

Neither formal equality in childcare nor closely restricted gender quotas show potential to create the structural and systemic framework that will lead to women's long-term participation in the labour force based upon equality with men. However, especially when uncovering the nature of the symmetrical sex dichotomy as an asymmetrical gender hierarchy, gender equality must mean more than allowing women into a male-defined world: transformative equality requires the redistribution of power and resources and structural change dismantling the public-private divide and reinventing the meaning and gender of care.⁷¹

4. Conclusion

In its judgments on discrimination related to sex reassignment, the CJEU has stated that sex discrimination cannot be confined simply to discrimination based on the fact that a person is of one or other sex.⁷² This is a very important recognition for both the discrimination against LGBTI* and against female persons. European equality law has to realize that the proposed sex dichotomy constitutes an external hierarchy to the detriment of persons whose sex does not fit into it and an internal hierarchy to the detriment of persons of female gender. When developing new approaches to fight both dimensions of intertwined sex/gender discrimination, it should be noted that 'the other sex' as comparator is as unsuitable for LGBTI* discrimination cases as is the employment of a symmetrical approach to tackle gender hierarchies between men and women. Separated discourses on gender equality law and LGBTI* rights, as well as the introduction of 'sexual orientation' as a separate ground of discrimination, have muddied the waters. It is now time for a comprehensive, two-dimensional⁷³ approach to sex discrimination, and the CJEU is not the only possible actor in this field. This does not imply the depreciation or even abandonment of actual sex/gender equality law and policies but, on the contrary, their further development. We have to understand sex, gender and equality law not in a manner that waters down the focus on women, but in a manner that deepens, enriches and improves our understanding of discrimination based on gender/sex⁷⁴ including and protecting those who suffer from being outside the hierarchical binary model as well as those who suffer from being within.

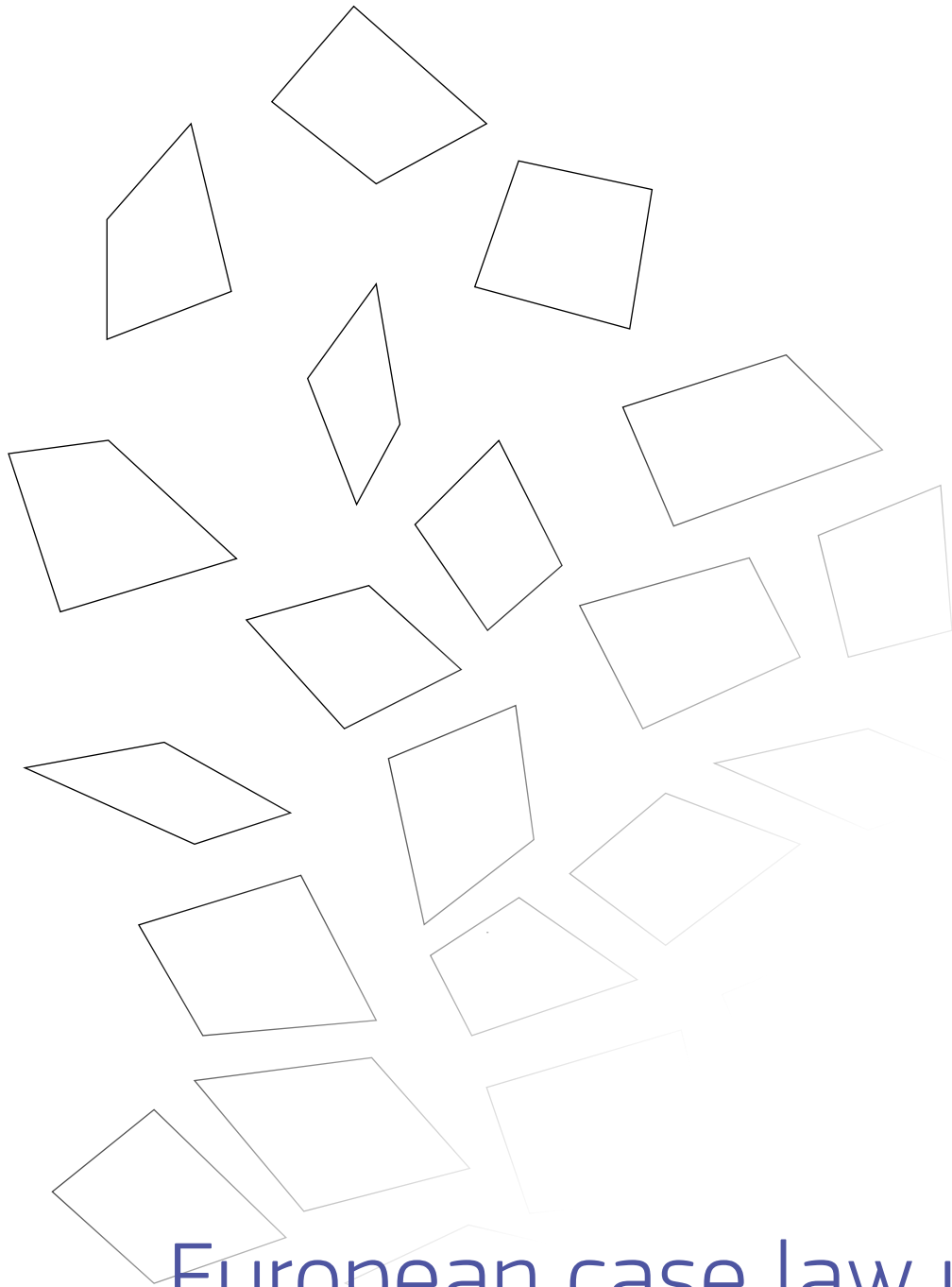
70 CEDAW (2004), General Recommendation No. 25, paragraphs 8, 14, 23.

71 See Fredman, S. (2003), *Beyond the Dichotomy of Formal and Substantive Equality*, in: Boerefijn et al. (eds.), *Temporary Special Measures*, pp. 111-118 at p.115. For a most instructive and recent debate on substantive equality see Fredman, S. (2016), 'Substantive equality revisited' *I&CON* vol. 14, pp. 712-738; MacKinnon, C. A. (2016), 'Substantive equality revisited: A reply to Sandra Fredman' *I&CON* vol. 14, pp. 739-746; Fredman, S. (2016), 'Substantive equality revisited: A rejoinder to Catharine MacKinnon' *I&CON* vol. 14, pp. 747-751.

72 CJEU, judgment of 30 April 1996, C-13/94, *P. v. S.*, paragraph 20; judgment of 27 April 2006, C-423/04, *Richards*, paragraph 24.

73 Which in many cases has to develop into a multi-dimensional approach, see Fredman, S. (2016), *Intersectional discrimination in EU gender equality and non-discrimination law*, passim.

74 Kannabiran, K. (2014), *Introduction*, in: Kannabiran, K. (ed.), *Women and Law. Critical Feminist Perspectives*, p. xv.



European case law update

This section provides, as far as possible, an overview of the latest main developments in gender equality and non-discrimination cases pending or decided by the Court of Justice of the EU and the European Court of Human Rights, from 1 January to 30 June 2016.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE GENERAL OPINIONS

Case C-122/15, C, Opinion of Advocate General Kokott delivered on 28 January 2016, ECLI:EU:C:2016:65¹



Age

The dispute in the main proceedings was related to the assessment of C's income tax. He received approximately 460.000 euros from a retirement pension paid by a Finnish company, based on his last 10 years of employment when he worked both in Sweden and Finland. Based on the Finnish Law on income tax, he was requested to pay a supplementary tax of 6 %. He disputed this decision, as in his view the supplementary tax constituted discrimination on the ground of age.

The Finnish Supreme Administrative Court referred three questions for preliminary ruling. It sought to know (1) whether Directive 2000/78 or Article 21(1) of the Charter of Fundamental Rights of the EU is applicable in the case of the dispute, and if so, whether the relevant Finnish legislation constitutes (2) direct or (3) indirect age discrimination.

Concerning the first question AG Kokott firstly examined the scope of Directive 2000/78. In line with the Court's previous case law, the AG found that the retirement pension in the present case, paid under an occupational social security scheme, constitutes pay within the meaning of Article 3(1)(c) of Directive 2000/78 and therefore falls within its scope.

Then, the AG turned to the question whether the taxation of this pension can also be regarded as relating to pay within the meaning of Article 3(1)(c). She analyses five main issues: the wording of the Directive, the comparison with other prohibitions of discrimination, the spirit and the purpose of the Directive, the Community competences and the intention of the legislature. According to the wording of Directive 2000/78, Member States are required to abolish any discriminatory legislation in relation to pay. Such connection clearly exists when national legislation taxes such pay. Furthermore, in the context of both freedom of movement for workers and the prohibition of discrimination on the ground of sex, the Court has extended the scope of working conditions to the taxation of pay. Extending the scope of the Directive would also be in line with its objectives, as defined by Recitals 5, 9 and 11. However, Article 3(1) clarifies that the Directive can only be applied 'within the limits of the areas of competence conferred on the Community'. Although there are some exceptions, the Court held repeatedly that direct taxation falls within the competence of the Member States. Throughout the Treaty, the EU has certain special competences with regard to direct taxation. However, these do not create a general power to adopt legislative acts concerning the taxation of pension income or the general rate of tax. Therefore, they are irrelevant in the present case. Based on Article 115 TFEU, the EU has a general competence to issue directives in matters directly affecting the internal market. The EU introduced several directives governing aspects of direct taxes on the basis of this Article, but not on the taxation of pensions. This Article confers competence on the EU only to a limited extent and, as was found in the *CHEZ Razpredelenie Bulgaria AD* judgment, the question is whether the competence was also exercised in practice. As there is no directive in the field of the taxation of pensions, it cannot be considered as an area of EU competence under Article 3(1) of Directive 2000/78 and cannot be included in the scope of this Directive. As it is apparent from the Directive's title, preamble, explanatory notes and legislative procedure resulting in its adoption,

¹ For an analysis of the judgment of the Court in this case, see below, p. 68.

the legislature did not even intend to prohibit discrimination in the area of tax law. Therefore, Directive 2000/78 does not apply to the taxation of pension income in the present case.

The AG then analysed whether Article 21(1) of the Charter of Fundamental Rights of the EU is directly applicable. Member States are required to apply the provisions of the Charter in all situations governed by EU law, but not in any other situations. The *Pfleger* judgment found that these situations include cases when national legislation restricts the EU fundamental freedoms. However, in the present case, the national legislation does not distinguish between domestic and cross-border activity and the direct tax is applicable to both domestic and cross-border situations. Therefore, the national legislation does not restrict fundamental freedoms. Consequently, Finland is not implementing EU law in this present case and the Charter is not directly applicable.

As neither Directive 2000/78, nor the Charter are applicable, the AG noted it was not necessary to examine questions 2 and 3, i.e. whether the relevant national legislation constitutes direct or indirect discrimination.

Case C-159/15, *Franz Lesar v. Telekom Austria AG*, Opinion of Advocate General Bot delivered on 25 February 2016, ECLI:EU:C:2016:121²

In the analysis, AG Bot referred to the Court's *Felber* judgment,³ which concerned the crediting of a civil servant's school education periods which were completed before the age of 18 for the purpose of granting a pension entitlement and calculate the amount of the retirement pension. The AG noted that in that judgment the Court found that by excluding, for the purposes of calculating their retirement pension, some civil servants from the benefit of taking periods of their study into account which they completed before the age of 18, the national legislation affected their conditions of pay and Directive 2000/78 applied to the situation. Even though social security schemes are excluded from the scope of this Directive, in this case the retirement pension constituted a future cash payment paid by the employer to the employees as a direct consequence of their employment relationship, and therefore this pension must be seen as pay. The Court took the view that the national legislation established a difference in treatment based on age, but this difference could be justified under Article 6(1) of the Directive 2000/78. The aim of the national legislation was not to disadvantage civil servants who achieved a higher level of education prior to entering the federal civil service, compared to those whose appointment requires no higher education and who could enter civil service from the age of 18. As this aim ensured compliance with the principle of equal treatment for all persons in a specific sector and relates to an essential element of relationship, the Court found that it was legitimate as well. As the age for entering the civil service is 18, the exclusion of the education periods before that age is appropriate for achieving this aim. It did not go beyond what is necessary to achieve those objectives, as only the periods were excluded during which the person does not pay contributions to the pension scheme.

In the main proceedings of this case, the claimant asked for his apprenticeship and work periods which he completed before his 18th birthday to be credited for the purposes of calculating the amount of his retirement pension.

AG Bot suggested examining the case in light of Article 6(2) rather than Article 6(1), as the national legislation is designed to achieve exactly the same objective as Article 6(2): the fixing of ages for admission or entitlement to retirement or invalidity benefits for occupational social security schemes. As this Article provides for exceptions, it must be interpreted restrictively. In this case, the civil service retirement scheme provides members of an occupation sector with benefits designed to replace the benefits provided by a statutory social security scheme and therefore it must be treated in the same way

² For an analysis of the judgment of the Court in this case, see below, p. 69.

³ Case C-529/13, Judgment of 21 January 2015.

as an occupational social security scheme within the meaning of the Equal Treatment Directive (Directive 2000/54/EC), which provides for a definition of this concept. The national legislation is also designed to fix a uniform age for admission and for entitlement to retirement pensions. For this reason, Articles 2(1), 2(2)(a) and 6(2) of the Directive 2000/78 must be interpreted as not precluding national legislation, which excludes the periods of apprenticeship and employment completed before the age of 18 for the purposes of granting pension rights and calculating the amount of the retirement pension.

Case C351/14, *Estrella Rodríguez Sánchez v. Consum Sociedad Cooperativa Valenciana*, Opinion of Advocate General Szpunar delivered on 3 March 2016, ECLI:EU:C:2016:141

The reference to the Court of Justice from the Juzgado de lo Social No. 33 de Barcelona (Social Court No. 33, Barcelona, Spain) for a preliminary ruling concerned the interpretation of Directive 2010/18/EU implementing the revised Framework Agreement on parental leave (revised Framework Agreement).

Gender

Mrs Rodríguez Sánchez is a worker member of Consum SCV, a multi-purpose cooperative, assigned to the cashier/stacking unit of a shopping centre. She signed a membership contract on 25 June 2012 with Consum SCV, which was subject to the statutes of the cooperative and the internal rules, and she worked on rotating weekly shifts. On 19 August 2013, Mrs Rodríguez Sánchez gave birth to a child. At the end of her maternity leave she made a request on 27 December 2013, amended on 15 January 2014, for a reduction of her working hours to 30 hours per week and a change of her work schedule, citing legal custody of her child and relying on Article 37(5) and (6) of the Workers' Statute. On 24 January 2014, Consum SCV recognized the right to a reduction in working hours, but did not grant the hours requested (morning shifts). Consum SCV said to do so would result in a surplus of staff in the morning shift.

In February 2014, Mrs Rodríguez Sánchez brought an action before the Social Court No. 33 in Barcelona challenging the decision. The Social Court No. 33 of Barcelona decided by order of 15 July 2014 to stay the proceedings and to refer four questions to the Court of Justice for a preliminary ruling. The referring court sought to establish whether the relationship between a worker member in a cooperative and that cooperative constitutes an employment contract within the meaning of Clause 1(2) of the revised Framework Agreement and if so, whether a worker member is entitled, when returning from a period of maternity leave, to benefit from changes to working hours and patterns within the meaning of Clause 6(1) of the Agreement.

In his opinion, Advocate General Szpunar first noted the question of admissibility of the questions referred to the Court. He noted that Clause 6(1) of the revised Framework Agreement provides for possible changing of working hours when returning from parental leave, not from maternity leave as requested by Mrs Rodríguez Sánchez. When asked by the CJEU to state its reasoning as to why an answer to the questions would have bearing on the outcome of the main proceedings, the referring court asserted that maternity leave is the name given in Spain to the parental leave mentioned in Clause 2 of the revised Framework Agreement. The referring court thus stated that the issue in the main proceedings was consistent with a return to work after the 'parental leave' in Clause 6(1) of the Agreement.

In his assessment, AG Szpunar first examined whether Mrs Rodríguez Sánchez's case falls within the material scope of the revised Framework Agreement. Consum SCV, the Spanish Government and the Commission concurred that she was returning from a period of maternity leave and not parental leave. AG Szpunar pointed to the case giving rise to the *Betriu Montull* judgment, which held in particular that Article 48(4) of the Workers' Statute 'does not concern parental leave within the meaning of Directive 96/34'. The AG considered that Mrs Rodríguez Sánchez made her request to change working hours following a period of leave granted on account of the birth of her child, which corresponded with maternity leave under Directive 92/85 and not parental leave. He concluded that the situation falls outside the scope of the revised Framework Agreement.

In regard to the applicability of other clauses of the Agreement, the AG noted the confirmation by the Spanish Government that a reduction in Mrs Rodríguez Sánchez's working hours granted under Article 37(5) of the Worker's Statute corresponded to one of the forms of parental leave in Spanish law that allows working parents to take care of children under the age of 12. In the AG's view, if indeed Mrs Rodríguez Sánchez were to benefit from a form of parental leave consisting in a reduction of working hours, then the first and second question should be examined. He opined that the third question should be reworded in light of Clauses 2 and 3 of the revised Framework Agreement, as opposed to Clause 6(1).

AG Szpunar studied the first three questions (the second question arising only from a negative answer to the first question and the third arising only if the first or second question was in the affirmative) raised by the referring court:

The first question asked the Court whether the relationship between a worker member of a cooperative and that cooperative constitutes an employment contract or relationship within the meaning of Clause 1(2) of the revised Framework Agreement. In regard to this question, AG Szpunar considered the scope *ratione personae* of the Agreement and the relevant case law. With regard to applicability, he noted that the terms 'workers', 'employment contract' and 'employment relationship' are not defined in specific terms in the Agreement. He noted, however, that the general considerations of the agreement refer to 'minimum requirements and provisions for parental leave, distinct from maternity leave'. He referred to the case of *O'Brien*, in which the judgment stated there was no single definition of 'worker' in EU law and that 'certain words used in that agreement may be defined in accordance with the national law and practices on condition that they respect the effectiveness of the directive and the general principles of EU law'. He noted that it was clear from the order for reference, when transposing the first framework agreement on parental leave annexed to Directive 96/34 into Spanish national law, that the Spanish legislature had extended the application of the new rights for reconciling work and family life to 'the worker members of cooperative societies'. He therefore concluded that an exclusion from the protection afforded by Directive 2010/18 and the revised Framework Agreement may be allowed only if the relationship between the worker members and the cooperative is, by its nature, substantially different from that between employers and their employees falling, according to national law, into the category of workers.

In view of the answer to the first question, the AG considered it unnecessary to reply to the second question, namely:

2. Must Clause 8(2) of the [revised Framework Agreement] and, more specifically, the provision in accordance with which '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', be interpreted as meaning that, should a Member State fail to implement Directive 2010/18 expressly, the scope of the protection which that State itself defined in transposing the earlier Directive 96/34 may not be reduced?

The third question referred to the court asked:

3. Must Clause 6 of the new [revised Framework Agreement], incorporated in Directive 2010/18, be interpreted as meaning that the national implementing provision or agreement must incorporate and make explicit the obligations of employers to 'consider' and 'respond to' the requests of its workers for 'changes to their working hours and/or patterns', when returning from parental leave, taking into account both employers' and workers' needs, and that the implementing mandate cannot be understood to have been complied with by means of national rules — legislative or those of cooperatives — which make the effectiveness of such a right conditional solely upon the mere discretion of the employer as to whether or not to grant such requests?

Considering this question, the AG noted that if the Court saw reason to answer the third question, the question must be reformulated to be considered in light of Clauses 2 and 3 of the revised Framework Agreement. The AG noted it is apparent from Clause 2(1) that the purpose of parental leave is to enable parents to take care of their child and the clause expressly provides that an individual right to parental leave is granted to ‘men and women workers’. He pointed to the fact that Clause 3(1) of the Agreement provides that ‘the conditions of access and detailed rules for applying parental leave shall be defined by law and/or collective agreements in the Member States, as long as the minimum requirements of this agreement are respected’. However, the discretion of the Member States is not unlimited. He therefore proposed that the answer to the third question referred should be that Clauses 2 and 3 of the revised Framework Agreement do not preclude national legislation, such as that at issue, which provides for parental leave in the form of a reduction in working hours coupled with a right to adapt hours of work within normal working hours but which subjects the implementation of changes outside normal working hours to the arrangements laid down in the terms of the collective negotiation.

Summarizing the above, AG Szpunar proposed that the Court answer the question of whether the relationship between a worker member of a cooperative and that cooperative constitutes an employment contract or employment relationship within the meaning of Clause 1(2) of the revised Framework Agreement. He reiterated that Clauses 2 and 3 of the revised Framework Agreement do not preclude national legislation such as that at issue in the main proceedings.

Case C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, Advocate General Kokott’s opinion of 31 May 2016

In this case together with Case C-188/15,⁴ as AG Kokott pointed out in the introduction, the Court is expected to deliver a landmark decision.

Ms Samira Achbita started working as a receptionist at G4S in 2003. During three years, she abided by and did not object to the company’s unwritten, but commonly known, rule which did not permit the wearing of any religious, political or philosophical symbols while on duty. She first signalled that she intended to wear a headscarf during working hours for religious reasons in April 2006. The company management pointed out that this was not permitted under the neutrality rule of G4S. After a period of sickness, she informed the employer that she would be returning to work, wearing her headscarf. Consequently, she was dismissed and received severance allowance. She brought an action against G4S for wrongful dismissal before the Antwerp Labour Court, which was dismissed. She appealed to the Antwerp Labour Tribunal, which also dismissed her claims. She finally appealed to the Belgian Court of Appeal, which sent a question for a preliminary ruling to the Court.

The national court sought to know whether Article 2(2)(a) of Directive 2000/78 should be interpreted as meaning that the prohibition against wearing a headscarf at the workplace does not constitute direct discrimination where the employer’s rule prohibits all employees from wearing visible signs of political, philosophical and religious beliefs at the workplace.

A. The scope of Directive 2000/78

AG Kokott first considered the scope of the Directive 2000/78 according to Article 3(1)(c). As the ban on wearing headscarves at the workplace was instrumental in the dismissal of Ms Achbita, it is a condition within the meaning of this Article and brings the present case under the scope of the Directive.

⁴ AG Sharpston delivered the opinion for this request for a preliminary ruling on 13 July 2016, which will be included in the following issue of the Equality Law Review.

In its observations, the French Government put forward that such a situation concerns the national identities of the Member States and it should fall outside of the competences of the EU and consequently also outside of the scope of the Directive. However, the AG replied that Article 4(2) TEU does not suggest that the respect for national identities would mean that certain subject or activity areas are entirely removed from the Directive's scope. The EU's obligation under this article is to ensure that the application of the Directive must not adversely affect Member States' national identities.

B. The concept of discrimination based on religion

1. The religious significance of the present case

The AG pointed out that the term 'religion' needs to be interpreted in a broad sense under Directive 2000/78, particularly as the Directive puts into practice one of the founding principles of EU law. This does not mean that a person's actions or behaviours are automatically protected by law if they originate from religious convictions. However, in the present case, it is apparent that Ms Achbita wears her headscarf for religious reasons and – following the jurisprudence of the ECtHR and many national courts – this is sufficient to bring the case within the substantive scope of the prohibition on religious discrimination under EU law.

2. The distinction between direct and indirect discrimination

The AG found on closer examination that although the company ban is directly linked to religion it cannot be classified as direct discrimination. In this regard, the AG distinguished the present case from measures that are inseparably linked to individuals' immutable physical features or personal characteristics. Wearing a headscarf on the other hand rather constitutes, according to the AG, a behaviour based on a subjective decision or conviction. The ban in the present case applies to all visible religious symbols as well as to visible signs of political and philosophical beliefs, and is therefore an expression of a general company policy which is religiously and ideologically neutral. Therefore, this indicates that Ms Achbita was not treated less favourably on account of religion. The difference of treatment between employees who wish to express a particular belief and those who do not does not constitute less favourable treatment directly linked to religion. The presence of direct discrimination could be assumed for example, if the ban were based on stereotypes or prejudice regarding one or several specific religions, but this is not the situation in the present case.

However, the AG found that such a general ban might put individuals of a certain religion or belief at a particular disadvantage by comparison with other employees and may therefore constitute indirect discrimination.

C. Possible justifications

Such an indirect difference in treatment can be justified by a legitimate aim, provided that the measure is appropriate and necessary for achieving that aim. The AG pointed out that without any doubt Articles 4(1) – genuine and determining occupational requirements – and 2(5) – protection of the rights and freedoms of others – are aims expressly recognised by the EU legislature.

1. The ban at issue as a genuine and determining occupational requirement

First, the AG examined whether the ban at issue falls under the exception for genuine and determining occupational requirements.

The AG recalled that Article 4(1) is a derogation from the prohibition of discrimination and as such, it must be interpreted strictly. However, the wording suggests that this derogation cannot only be linked to the operational processes associated with the work, but it also takes into account the context in which the work is carried out and therefore leaves some scope to give consideration to dress codes.

The Opinion then underlined that the fundamental right of freedom to conduct a business allows a degree of discretion for the employer in the pursuit of its business, which includes the organisation of the roles within the business and the form of its products and services. Employers can therefore request employees to abide by a company policy and behave or dress in a particular way at work, particularly if they are in regular face-to-face contact with customers. Against this background, the AG found that it is not unreasonable to require a receptionist, such as Ms Achbita to carry out her work in compliance with a dress code.

However, if such a ban qualified as a genuine and determining occupational requirement, it would necessarily have to pursue a legitimate objective. In this regard, the AG underlined that the code and the corporate image to which it gives expression need to be legitimate and compliant with EU law. This is also true for an undertaking's consideration of the wishes of third parties and consumers' demands. As the headscarf ban is part of the religious and ideological neutrality of G4S, it does not exceed the bounds of its discretion in the pursuit of its business. G4S also offers reception services to a broad range of customers and the fact that its employees are in constant face-to-face contact with external individuals has an impact on the undertaking's public image towards its customers. In these circumstances, a policy of neutrality is crucial.

The AG then examined the different elements of the proportionality test. Having easily found that a dress code banning any signs expressing political, philosophical or religious beliefs is appropriate for achieving the objective of neutrality pursued, the AG went on to analyse whether it was necessary for that purpose. In this regard, the French Government and the European Commission both noted that the ban at hand is too general and indiscriminate. However, the AG found that the possible alternative solutions were either not appropriate to achieve the aim pursued – such as a special uniform with an optional headscarf – or would place a substantial additional organisational burden on the employer. In this regard, the AG noted that EU law requires Member States to provide reasonable accommodation only with regard to persons with disabilities. This does not mean that employers cannot seek similar arrangements with regard to religion, but one should not impose such a significant organisational burden on them. Therefore, the AG found that less intrusive but equally suitable alternatives for achieving the neutrality principle of G4S could not be identified.

The AG then turned to examine proportionality in the strict sense and analysed the elements of the case which could help for the national court to strike a fair balance between the interests of Ms Achbita and the interests of G4S. The Opinion underlined that religion is an important part of many people's personal identity and that the freedom of religion is a fundamental right and an expression of the system of values on which the EU is founded. It noted however that unlike sex, skin colour, ethnic origin, sexual orientation, age or disability, the practice of religion is an aspect of an individual's private life and not an 'unalterable fact'. Employees can therefore be expected to moderate the exercise of their religion in the workplace, where the level of required restraint needs to be assessed based on all the relevant circumstances of the case. This includes elements such as the size and visibility of the religious symbol in question in relation to the overall appearance of the employee and the nature of the employee's activity. In addition, the AG noted that the neutrality requirement is much more acceptable than to oblige employees to actively adopt a certain position. It is also relevant to take into account, according to the AG, whether a ban only puts employees of a particular religion at disadvantage, or whether also employees of a particular sex, colour or ethnic background are affected, as this can be a sign that it is disproportionate. However, this was not the case of the ban at hand. AG Kokott also took into account the broader context of the conflict, noting that a headscarf ban does not make it unduly difficult for Muslim women to integrate into work and society, and that Ms Achbita herself had been working for three years and was fully integrated into work life, despite the ban, when she decided to wear her headscarf at work. Finally, national identities of Member States can play a role in interpreting and applying the principle of equal treatment. For example, in France, where secularism has a constitutional status and plays an instrumental role in social cohesion, stricter restrictions may apply to the wearing of religious symbols, than in other Member States with different constitutional provisions.

The AG concluded that these arguments suggest that the ban in the present case does not unduly prejudice the legitimate interest of the employees concerned and should be seen as proportionate. However, it is for the referring court to strike a fair balance between the conflicting interests.

2. *The ban at issue as analysed from the point of view of the protection of rights and freedoms of others*

The AG first pointed out that wearing visible religious signs may be prejudicial to the rights and freedoms of others from two perspectives: it may impact the freedoms of colleagues and clients/customers, and it may affect the employer's freedom to conduct business. In the present case, the focus is on the second aspect. The importance of the freedom to conduct business should not be underestimated, as it constitutes a general principle of EU law and is enshrined in a prominent position in the Charter of Fundamental Rights. Therefore, it cannot be ruled out that Article 2(5) tolerates a derogation from the prohibition of discrimination in this regard.

She also underlined however that Article 2(5) rather presupposes the existence of specific measures for the protection of rights and freedoms of others, emanating from or at least authorised by a public authority. However, the company rule in the present case cannot be seen as a measure that emanates from a public authority or one which is based on a sufficiently precise authorisation issued by a public authority. The statutory provisions passed at national level to transpose Article 4(1) of Directive 2000/78 could be regarded as authorising measures within the meaning of Article 2(5). However, in this context, Article 4(1) needs to be regarded as a *lex specialis* in relation to Article 2(5). Therefore, the AG concluded that Article 2(5) carries no significance independent from Article 4(1) as a ground for justifying a difference of treatment based on religion and that the present case must be assessed only by reference to Article 4(1).

In conclusion, the AG suggested that the answer to the request for a preliminary ruling should be the following:

- 1) The fact that a female employee of the Muslim faith is prohibited from wearing an Islamic headscarf at work does not constitute direct discrimination based on religion within the meaning of Article 2(2) (a) of Directive 2000/78/EC if this ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols at the workplace and not on stereotypes or prejudice against one or more particular religions or against religious beliefs in general. This ban may, however, constitute indirect discrimination based on religion under Article 2(2)(b) of that directive.
- 2) Such discrimination may be justified in order to enforce a policy of religious and ideological neutrality pursued by the employer in the company concerned, in so far as the principle of proportionality is observed in this regard.

In that connection, the following factors in particular must be taken into account:

- the size and conspicuousness of the religious symbol,
- the nature of the employee's activity,
- the context in which she has to perform this activity, and
- the national identity of the Member State concerned.

REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

Case C-441/14, *Dansk Industri (DI)*, acting on behalf of *Ajos A/S v. Estate of Kartsen Eigil Rasmussen*, Judgment of 19 April 2016, ECLI:EU:C:2016:278

The referring court's questions concerned the interpretation of Articles 2(2), 2(a) and 6(1) of Council Directive 2000/78/EC and of the principles of prohibiting discrimination on grounds of age, legal certainty and the protection of legitimate expectations.

Mr Rasmussen had been working for almost 25 years for Ajos, when he was dismissed at the age of 60. After leaving his job, he was employed again by another undertaking.

Based on the Danish Law on salaried employees, in principle, he was entitled to a severance allowance amounting to three months' salary. However, according to the same legislation, as he was already 60 at the date of dismissal and he was entitled to an old-age pension payable by the employer under a scheme he had joined before he was 50, his entitlement to the severance allowance was barred.

Following the CJEU's judgment in *Ingeniørforeningen i Danmark* on 12 October 2010, the *Dansk Formands Forening* trade union brought an action on behalf of Mr Rasmussen claiming payment of the severance allowance. The Maritime and Commercial Court upheld his claim, against which decision Ajos appealed to the Supreme Court. It reasoned that any interpretation of the relevant domestic law that was consistent with the judgment would be *contra legem* and that the principles of legal certainty and the protection of legitimate expectations would be jeopardised, if the application of a clear and unambiguous national law could be precluded on the basis of the general principle of EU law prohibiting discrimination on grounds of age.

The Danish Supreme Court referred two questions for preliminary ruling.

Firstly, the referring court asked if the general principle of prohibiting discrimination on grounds of age should be interpreted to preclude national legislation, such as the Danish Law on salaried employees, which bars in the above-mentioned case an employee's entitlement to severance allowance regardless of whether he or she chooses to remain on the employment market or to retire.

With regard to this question, having found that the relevant national provision clearly fell within the scope of the Directive, the Court noted that it had already in its previous judgment in *Ingeniørforeningen i Danmark* found that Articles 2 and 6(1) are to be interpreted as precluding national legislation, such as in the present case. Thus, this finding also applies with regard to the general principle prohibiting discrimination on grounds of age, as it is merely a specific expression of the fundamental principle of equal treatment.

With the second question, the referring court asked whether EU law is to be interpreted as permitting a national court addressing a dispute between private persons to balance the principle prohibiting discrimination on grounds of age against the principle of legal certainty and the protection of legitimate expectations, when it established that the relevant national legislation is at odds with this earlier principle, and to conclude that the latter principle should take precedence.

The Court recalled that it is for national courts to provide the legal protection which individuals derive from EU law provisions and to ensure that those provisions are fully effective. It also consistently held that a directive cannot itself impose obligations on an individual and cannot be relied upon as such against an individual. However, the Court has also consistently held that the Member States' obligation to achieve the result of a directive and to ensure the fulfilment of that obligation are binding on all authorities of the Member State, including courts. The obligation to interpret national law is limited by

the general principles of law and it cannot serve as a basis for an interpretation for national law *contra legem*.

However, the Court added that the national court is still under the obligation to provide the legal protection which individuals derive from EU law and to ensure the effectiveness of that law, even if it finds that it is impossible to arrive at an interpretation of national law that is consistent with the Directive in a dispute that calls into question the general principle prohibiting discrimination on grounds of age. If it is necessary, the court needs to disapply any national provision contrary to this principle, even in disputes between private persons, as it confers on private persons an individual right which they may invoke as such. Therefore, if in the present case the court finds that it is impossible to interpret national law in a consistent manner with EU law, it needs to disapply that provision.

The Court finally recalled that in the exercise of its jurisdiction, the interpretation which it gives to EU law defines the meaning and scope of that law as it must be or ought to have been applied from the entry into force. Hence, EU law interpreted in this way must be applied by courts even to legal relationships which arose and were established before the Court's judgment, unless there are truly exceptional circumstances – which is not claimed to be the situation in this present case.

Consequently, the obligation to interpret national law in a consistent manner with EU law, or, when this is impossible, the obligation to disapply provisions of national law contrary to the principle prohibiting discrimination on grounds of age cannot be altered by the principles of legal certainty and the protection of legitimate expectations or by the fact that under national law Denmark has the obligation to compensate for any harm suffered by private persons as a result of the incorrect transposition of an EU directive.

Case C-198/15, *Invamed Group LTD, Invacare UK Ltd, Days Healthcare Ltd, Electric Mobility Euro Ltd, Medicare Technology Ltd, Sunrise Medical Ltd, Invacare International SARL v. Commissioners for Her Majesty's Revenue & Customs*, Judgment of 26 May 2016, ECLI:EU:C:2016:362

This case does not concern an alleged discrimination on the ground of disability, but the questions referred for preliminary ruling touch on the definition of disabled persons in a context outside of Directive 2000/78. The dispute in the main proceedings concerned the classification of mobility scooters for tax purposes and required the interpretation of Heading 8713 of the Combined Nomenclature set out in Annex I to Council Regulation (EEC) No. 2658/87. In this context, the Court ruled that the words 'for disabled persons' mean that the product is designed solely for disabled persons and the fact that a vehicle may be used by non-disabled persons is irrelevant to its classification. The words 'disabled persons' under Heading 8713 must be interpreted as meaning that they refer to persons affected by a non-marginal limit on their ability to walk and the duration of that limitation and the existence of other limitations relating to the capacities of those persons are irrelevant.



Disability

Case C-351/14, *Estrella Rodríguez Sánchez v. Consum Sociedad Cooperativa Valenciana*, Judgment of the Court (Second Chamber) of 16 June 2016, ECLI:EU:C:2016:447

In line with the above-mentioned Opinion the Court rendered its judgment on 16 June 2016. The request for a preliminary ruling in the case was declared inadmissible.

In its judgment, the Court noted from the outset that Clause 6(1) of the revised Framework Agreement concerns situations in which a worker 'returning from parental leave' wishes to change his or her working hours and/or patterns. It noted that in the case in the main proceedings, Mrs Rodríguez Sánchez made her request on return from maternity leave. The Court further noted that EU law makes a distinction between the notion of 'maternity leave', as referred to in Directive 92/5, and that of 'parental leave', as used in the



Gender

revised Framework Agreement, and that Paragraph 15 of the general considerations of that agreement expressly states that the agreement sets out minimum requirements and provisions for parental leave, ‘distinct from maternity leave’. The Court also referred to the *Betriu Montull* case in which the Court had already found that leave taken on the basis of Article 48(4) of the Workers’ Statute did not concern ‘parental leave’ within the meaning of Directive 96/34. It therefore stated that Clause 6(1) of the revised Framework Agreement, which relates to situations in which a worker returns to work following ‘parental leave’, cannot be interpreted as also covering a situation in which a worker returns from ‘maternity leave’ within the meaning of Directive 92/85. Since the first and second questions referred to Clauses 1(2) and 8(2), respectively, of the revised Framework Agreement, and were referred to by the national court only from the perspective of a possible application of Clause 6(1) of that Agreement, the Court no longer found it necessary to provide an answer to these questions.

Given that the situation of the applicant in the main proceedings was seen by the Court to fall outside the scope of Clause 6(1) of the revised Framework Agreement, the Court stated it was not apparent how an answer from the CJEU to the third question referred would have any bearing on the outcome of the dispute in the main proceedings.

The Court noted that an interpretation by the Court of provisions of EU law in situations outside its scope is justified where those provisions have been made applicable to such situations by national law in a direct and unconditional way in order to ensure that internal situations and situations governed by EU law are treated in the same way. However, it found that this was not apparent in the present case. Since the third question related to Clause 6(1) of the revised Framework Agreement, it was deemed inadmissible. As to the fourth question referred, which sought to ascertain whether EU law must be interpreted to the effect that, in the absence of national measures transposing Clause 6(1), this clause could acquire so-called ‘horizontal’ direct effect, the Court found that it was not of relevance for the resolution of the dispute in the main proceedings. The question was deemed to be inadmissible.

Case C-122/15, C, Judgment of 2 June 2016, ECLI:EU:C:2016:391

This case concerned the interpretation of the scope of Council Directive 2000/78/EC. The claimant before the referring court argued that the supplementary tax on pension income which he was to pay in accordance with the Finnish law on income tax, amounted to discrimination on the ground of age.⁵

The Supreme Administrative Court referred three questions for preliminary ruling, seeking to know firstly whether the national legislation at hand falls within the scope of EU law (and therefore, whether Directive 2000/78 and the Charter of Fundamental Rights are applicable). Secondly, if the legislation does fall within the scope, the referring court asked whether this legislation constitutes direct or indirect discrimination on the grounds of age.

The CJEU thus examined if the national legislation relating to the supplementary tax on retirement pension falls within the scope of Directive 2000/78 and whether the principle of non-discrimination on grounds of age laid down in the Charter is applicable.

The Court pointed out that the scope of Directive 2000/78 should be interpreted as excluding social security or social protection schemes, as the benefits under these schemes are not equivalent to ‘pay’ within the meaning of Article 157(2) TFEU. It recalled that the meaning of pay should be interpreted broadly within the scope of Directive 2000/78 and made references to its previous judgments to show that the meaning of pay covers any consideration that the employee receives in respect of his or her employment and it might include benefits that are paid after the termination of employment or are paid

⁵ For a detailed summary of the facts of the case, of the questions referred by the national court and of the Opinion of the Advocate General, please see above, p. 58.

to ensure that a worker receives income even where they are not performing any work. The Court also recalled that it previously found that benefits under a pension scheme can form part of the pay and come within the scope of Article 157(2) TFEU, if this pension scheme is essentially related to the employment of the person concerned.

However, as the Court pointed out, this present case concerns the rate of tax on retirement pension income and not the procedure or the conditions of determining the amount of benefits paid to the worker on the basis of his relationship with the former employer. The present provision on the supplementary tax on retirement pension income is without any link to the employment contract and derives directly and exclusively from national tax legislation applicable to all natural persons. Therefore, it does not fall within the scope of Directive 2000/78.

The Court also found that the Charter is not applicable to the dispute in question. Its provisions can be applied when Member States are implementing EU law, while in the present case, the Finnish law on income tax does not implement any EU law provision and there is no EU directive on taxation applicable.

Given the answer to the first question of the preliminary ruling, the court did not address the second and third questions in its judgment.

Case C159/15, *Franz Lesar v. Telekom Austria AG*, Judgment of 16 June, ECLI:EU:C:2016:451

The request for a preliminary ruling concerned the interpretation of Council Directive 2000/78/EC and its provisions on the principle of equal treatment (Article 2(1)), direct discrimination (Article 2(2)(a)) and justification of differences of treatment on the grounds of age (Article 6). The claimant before the referring court is a retired civil servant who argued that his periods of work prior to reaching the age of 18 should have been taken into account for the calculation of his pension benefits.⁶



Age

By its question, the Austrian Administrative Court asked if the interpretation of Directive 2000/78 precludes a national provision which allows for the exclusion of apprenticeship and work periods completed before the age of 18 from the qualifying periods for calculating the amount of pension.

The Court firstly noted that Directive 2000/78 indeed should be applied to this situation, as the national provision in question affects civil servants' conditions of pay. Secondly, it acknowledged that the national provision establishes a difference in treatment that is based on the age at which they acquired their professional experience. Persons who acquired their professional experience partly before the age of 18 are treated in a less favourable manner than persons who gained this experience after reaching this age.

It then turned to examine, if this difference in treatment can be justified under Article 6(2) of Directive 2000/78. By referring back to its previous case law, the Court recalled that this article needs to be interpreted restrictively, as it provides for an exception to the principle of non-discrimination.

Therefore, in this particular case, the Court examined if the national legislation is part of an occupational social security scheme covering the risk of old age or invalidity and if the legislation seeks to ensure the 'fixing ... of ages for admission or entitlement to retirement and invalidity benefits'.

Directive 2000/78 does not define 'occupational social security', but a definition of this concept can be found in Article 2(1) of the Equal Treatment Directive (2006/54/EC). In agreement with the Advocate General's opinion, the Court found that the Austrian retirement scheme for federal civil servants qualifies

⁶ For a detailed summary of the facts of the case, of the questions referred by the national court and of the Opinion of the Advocate General, please see above, p. 59.

as occupational social security scheme, as it provides workers of a given occupational sector with benefits designed to replace the benefits provided for by the statutory social security schemes within the meaning of the Equal Treatment Directive.

Then the Court noted that the wording of Article 6(2) of Directive 2000/78 allows not only to fix different ages for employees, but also to fix an age for admission or entitlement to retirement benefits within an occupational social security scheme.

Therefore, the Court concluded that the interpretation of Directive 2000/78 does not preclude such a national provision, in so far as this legislation seeks to guarantee a uniform age for admission to the retirement scheme and a uniform age for the entitlement to the retirement benefits, within a civil service retirement scheme.

European Court of Human Rights

***di Trizio v. Switzerland*, Application No. 7186/09, Judgment of 2 February 2016**

The applicant, Vita Maria di Trizio, worked in a full-time sales job until she resigned in June 2002 due to back problems. Ms di Trizio, an Italian national living in Switzerland, applied for assistance in 2003 to the Disability Insurance Office and was granted a 50-percent disability allowance. In February 2004, the applicant gave birth to twins, and she resumed work on a half-time basis in June the same year. The Disability Insurance Office discontinued her allowance in August 2004, taking the view that the applicant would have chosen not to return to full-time work after the birth of her children, even if she did not suffer from a disability, in order to do household tasks. This was based on a 'combined method' of assessment.



Gender

Ms di Trizio lodged an unsuccessful complaint with the Disability Insurance Office, which she then appealed to the Insurance Court of the Canton of St. Gall. The court allowed her claims in part and referred the case back to the Office for further investigation. The Office then appealed the decision to the Federal Court. The Federal Court reasoned that the aim of the disability insurance was not to provide compensation in respect to activities that the insured individual would not have carried out even if he or she had not had a disability. The Court determined that the 'combined method' of assessment did not give rise to discrimination and therefore held Ms di Trizio was not entitled to an allowance.

The applicant lodged a complaint with the European Court of Human Rights on 3 February 2009. Relying on Article 8, she complained that the use of the 'combined method' of assessment resulted in her allowance being discontinued due to her part-time work. Relying on Article 14, taken in conjunction with Article 6 and Article 8, she further complained of sex discrimination.

The Court accepted the Government's argument that the aim of disability insurance was to protect individuals against the risk of becoming unable to engage in paid employment or perform routine tasks that they would have been able to carry out if not for medical reasons. However, the Court stated that the aim had to be considered in light of gender equality. The Court observed that the applicant probably would have received partial disability allowance if she had worked full time or had devoted her time entirely to household tasks (i.e. not working at all). It was clear that the decision regarding her entitlement to the allowance was based on the fact that she wanted to reduce her working hours to part-time following the birth of her children. The Court noted that of the cases where the 'combined method' of assessment applied, 98 percent concerned women. It further noted that the Swiss Federal Council, in its report of 1 July 2015, acknowledged that the 'combined method' could result in a lower degree of disability recognized and that questions might arise regarding sex discrimination, at least of an indirect nature. In the Court's view, this was indicative of growing awareness that the method was no longer consistent with efforts to achieve gender equality in society, through which women sought to reconcile family and working life.

The Court was not convinced that the difference in treatment to which the applicant had been subjected had any reasonable justification. It held by four votes to three that there had been a violation of Article 14 taken in conjunction with Article 8 of the Convention.

The Court held that it was not necessary to separately examine the applicant's complaint alleging a violation of Article 14 together with Article 6 or the complaint under Article 8 alone. The Court held Switzerland was to pay Ms di Trizio EUR 5 000 in non-pecuniary damage and EUR 24 000 in respect of costs and expenses.

Three judges (Keller, Spano, and Kjølbrot) expressed a separate opinion in the case regarding the application of Article 8, noting that most monetary complaints regarding discrimination are not based on Article 8 but rather on Article 1 of Protocol No. 1.

Çam v. Turkey, Application No. 51500/08, Judgment of 23 February 2016

Ms Çam, who is blind, successfully passed the entrance examination for the Turkish National Music Academy in 2004. Following the enrolment requirements of the school, she submitted to the school a medical report from the Bakırköy hospital, stating that she could attend classes in the sections of the music academy where eyesight was not required. On the same day, the director of the music academy wrote a letter to the chief medical officer of the hospital, declaring that eyesight is required in all of the sections of the academy and asking him to draw up a new report taking into account this information. Ms Çam's enrolment was refused, while a new medical report modified the conclusions of the original at the end of November 2004, stating that she was unfit to attend classes. Ms Çam's parents turned to the Istanbul Administrative Tribunal, who rejected the complaint. They appealed to the Istanbul Regional Administrative Court, who dismissed this appeal. They also unsuccessfully complained against the hospital for abuse of power. They then filed an application with the European Court of Human Rights.

The Court firstly underlined that Article 2 of Protocol 1 is applicable in the present case. It does not oblige States to establish or support special educational institutions, such as music academies, but once a State established such an institution, they are under the obligation to ensure effective access to these institutions.

The Court then recalled that it had already established that the scope of Article 14 includes the prohibition of discrimination on grounds of disability. At the time when Ms Çam would have liked to enrol for the music academy, the Turkish legislation in force laid down that children with disabilities were entitled to education without discrimination. The reason for Ms Çam's exclusion from the school was not originated in law, but from the school's rules of procedure requiring a medical report.

It is true that these procedural rules required all candidates to submit a medical report, but the Court found that it cannot ignore the effects of this requirement on persons with a physical disability, also in the light of the school's interpretation of this requirement. Ms Çam fulfilled this requirement and submitted a medical report, but the musical academy rejected it, demanded the hospital to change its conclusions and tried to justify its refusal with administrative formalities. Consequently, the Court held that Ms Çam's blindness was the sole reason for her refusal. In any case, the interpretation of this requirement seemed to solely be in the school's discretion, considering how easily the director could achieve the modification of the medical report, and the fact that Ms Çam could never have fulfilled this requirement.

Even though national authorities have a margin of appreciation to define the requirements for entering a music academy, this argument cannot be accepted in the present case. The music academy was open to the students with a certain level of talent, and by passing the examination, Ms Çam proved she was qualified for enrolment.

The Court recalled that the objective of the ECHR is to guarantee concrete and effective rights and that it should take into account and react to the development of international and European law. It noted the importance of inclusive education as the best way to guarantee the principles of universality and non-discrimination in the field of education. The ECHR should be read in the light of the reasonable accommodation requirements of the European Social Charter and the Convention on the Rights of Persons with Disabilities, which allows for the correction of factual inequalities that cannot be justified. Reasonable accommodation can take different forms in the field of education. However, in the present case, national authorities did not even try to identify the applicant's needs or to foresee any accommodation for these

Disability

specific needs. Since 1976, the music academy has not made any attempt to adapt its education so that it can also be made accessible for blind students.

Therefore, the Court concluded that there had been a violation of Article 14 of the Convention in conjunction with Article 2 of Protocol No. 1. Due to this conclusion, the Court found that it was not necessary to examine separately the complaint under Article 2 of Protocol No. 1.

The Court held that Ms Çam must receive EUR 10 000 in respect of non-pecuniary damage and EUR 3 000 in respect of costs and expenses.

***M.G. v. Turkey*, application No. 646/10, Judgment of 22 March 2016**

This case concerned the domestic violence experienced by the applicant during her marriage, threats made against her following her divorce and the subsequent criminal proceedings.

Gender

The applicant, M.G., is a Turkish national who lives in Istanbul. On 18 July 2006, M.G. lodged a complaint with the public prosecutor, stating that she fled from her home due to domestic violence, which her husband had subjected her to since the beginning of their marriage in 1997. The institute for forensic medicine drew up a report detailing her injuries and the Medical Faculty of Istanbul University also submitted a report to the prosecutor stating M.G. was suffering from depressive disorder and chronic post-traumatic stress disorder as a result of her experiences. Her husband denied all accusations against him. He was questioned in 2006 and on 22 February 2012 charged with injuring his wife. Furthermore, in 2006 M.G. started divorce proceedings in the family affairs court, which granted protection measures as she had requested. The divorce was finalized on 24 September 2007, and parental responsibility awarded to M.G. However, the children were placed under the protection of social services.

M.G. applied again to the family affairs court on 1 November 2012, 10 October 2013, and 19 June 2014 for preventative measures in respect to her former husband. She alleged he constantly threatened her with violence and death. The Court granted her request, and ordered her ex-husband not to approach her home or to communicate with her. The foundation Purple Roof, in a report of 6 March 2014, stated that M.G. was living under continual threat.

The applicant lodged a complaint with the European Court of Human Rights on 15 December 2009. Relying on Article 3 of the Convention, M.G. criticized domestic authorities in Turkey for failure to prevent the violence to which she had been subjected. Relying on Articles 8, 13, 1, and 5, she further complained in regard to the fact that she had been unable to live in peace and safety due to the threats against her, the fact that she had not been protected from violence and the excessive length and lack of effectiveness of the pending criminal proceedings. The Court examined these under Article 3 of the Convention. Relying on Article 14, taken in conjunction with Article 3, the applicant complained about the permanent and systematic discrimination with regard to violence against women in Turkey.

In regard to Article 3, the Court noted that although M.G. lodged a complaint with the public prosecutor on 18 July 2006, with reports from the relevant bodies concerning her psychological state as a result of the violence filed soon after, a warrant was only issued for her husband's arrest on 23 November 2006. In addition, he was not questioned by the prosecutor's office until 15 December 2006, nearly five months after M.G. lodged the complaint. Furthermore, the criminal proceedings, which were still pending, were opened on 22 February 2012, more than five years and six months after M.G.'s complaint. The Court underlined the diligence needed in dealing with domestic violence complaints, emphasizing that the Istanbul Convention requires States Parties to ensure investigations and judicial proceedings are carried out without undue delay. Moreover, the Court stated that the national authorities had the duty to take into account the victim's particular state of psychological, physical and/or financial insecurity and

vulnerability. In the view of the Court, there was no justification for the long period of time prior to the prosecutor opening criminal proceedings or the length of the procedure.

The applicant stated that after her divorce proceedings and prior to the entry into force of a new law (Law No. 6284), she did not have access to protective measures due to the legislative framework in place and as such had been forced to live in hiding for many years. The Court reiterated that psychological impact was a major part in domestic violence that should be taken into account in its assessment. Due to the wording of the former law (Law No. 4320), the question of whether the measures provided by the law were applicable to unmarried or divorced couples was subject to interpretation by the domestic courts.

In regard to Article 14, in conjunction with Article 3, the Court reiterated that a State's failure to protect women against domestic violence breached their right to equal protection under the law, even in such cases where the failure was unintentional. The Court emphasized that under Article 3 of the Istanbul Convention, violence against women was to be understood as a form of discrimination against women. In Turkey, it noted that the general and discriminatory judicial passivity created a climate conducive to domestic violence.

The Court held that there had been a violation of Article 3 of the Convention, finding that the manner in which the domestic authorities had conducted the criminal proceedings could not be considered as satisfying the requirements of the Article. It held that there had also been a violation of Article 14 taken in conjunction with Article 3, finding that after the divorce was pronounced (on 24 September 2007) and until the entry into force of a new law (Law No. 6284) on 20 March 2012, the legislative framework did not guarantee that the applicant could benefit from protection measures. It noted that for many years after applying to the national courts, the applicant had been forced to live in fear of her ex-husband's conduct. The Court ordered Turkey to pay EUR 19 500 to the applicant in respect to non-pecuniary damage and EUR 4000 in respect to costs and expenses.

***Guberina v. Croatia*, application no. 23682/13, Judgment of 22 March 2016**

Mr Guberina, the applicant, was the owner of a flat in Zagreb, which was on the third floor of a residential building without elevator. Three years after the purchase of this flat, his third child was born, who had multiple physical and mental disabilities. As the flat no longer met the needs of the family and it was particularly difficult to take his child out to the doctor, physiotherapy and to kindergarten or school, the applicant in September 2006 bought a house in Samobor and sold his flat in October 2008.

Following the purchase of the house, the applicant submitted a tax exemption request. According to the Croatian Real Property Transfer Tax Act, a citizen is exempted from paying the real property transfer tax if he or she buys his or her first real property by which he or she meets his or her housing needs, as long as the property does not exceed 100m² for five persons and unless he or she owns another real property which meets those housing needs. Real property is considered to meet housing needs if it has basic infrastructure and satisfies hygiene and technical requirements.

The Samobor Tax Office dismissed the applicant's request, as it found that the Zagreb flat met the surface, hygiene, technical and basic infrastructure (electricity, water and access to other public utilities) requirements for the housing needs of his family. The applicant firstly appealed to the Finance Ministry, which dismissed his appeal by the same reasoning. The applicant then lodged an administrative action with the High Administrative Court, arguing that the lower bodies had ignored his specific family situation. Relying on the reasoning of the lower bodies, the High Administrative court also dismissed his appeal. The applicant then turned to the Constitutional Court and argued that he had been discriminated against by unfair application of the relevant tax legislation. His constitutional complaint was also dismissed.

Disability

The applicant then turned to the ECtHR, arguing that he had been discriminated against, in breach of Article 8 of the Convention and Article 1 of Protocol No. 1 taken alone and in conjunction with Article 14 of the Convention, and Article 1 of Protocol No. 12.

The Court firstly examined the alleged violation of Article 1 of Protocol No. 1 taken alone and in conjunction with Article 14 of the Convention.

It firstly assessed if the complaint was admissible, as the Croatian Government argued that the applicant had failed to exhaust domestic remedies by not raising his discrimination complaint before the administrative bodies and by failing to use the opportunity of launching separate civil proceedings for damages under the Prevention of Discrimination Act. The Court recalled that the obligation to exhaust domestic remedies requires the applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention complaints and that the individual is entitled to choose a remedy which addresses the complaint, if there are more domestic remedies available. In the present case, the applicant argued before the administrative bodies that the tax authorities had failed to treat his situation differently, thereby the Court found that he had submitted in substance his discrimination complaint related to his property rights and was not required to pursue another remedy with essentially the same objective under the Prevention of Discrimination Act. The fact that he expressly relied on the Croatian Constitution's article guaranteeing protection from discrimination, which was in substance also related to his property rights, meant that he did not have to cite the exact Constitution provision on the right to property and that the Constitutional Court and thereby Croatia had the opportunity to rectify the violations it had allegedly committed.

The Court then continued by assessing the merits of the case. As it was undisputed between the parties that the complaint fell within the scope of Article 1 of Protocol No. 1, the Court noted the applicability in this case of Article 14 of the Convention.

Secondly, the Court examined if the disability of the applicant's child brought his situation within the term 'other status' under Article 14. By making reference to a number of earlier cases, it recalled that a person's health status, including disability, was already found to fall within this term. This term has generally been given a wide meaning, including also characteristics that are innate or inherent. The Court referred back to the case *Efe v. Austria* and recalled that discrimination can also arise in cases where the status of the applicant is determined in relation to their family situation. Consequently, the Court found that Article 14 also covers cases where an individual is treated less favourably on the basis of another person's status or protected characteristics and that the applicant's treatment is a form of disability based discrimination under Article 14.

Thirdly, the Court analysed if there was a difference of treatment between persons in relevantly similar situations or there had been a failure to treat differently persons in relevantly similar situations. It found that the absence of a lift severely reduced the child's mobility and threatened his personal development, and must therefore have impeded the family's quality of living to an extent similar to that which an able-bodied person would experience by not having appropriate access to public utilities. Therefore, when the applicant was seeking an alternative housing solution, he was in a comparable situation to any other person replacing a flat with another real property equipped with basic infrastructure and hygienic and technical requirements. His situation was different with regard to the meaning of 'basic infrastructure requirements'. He was excluded from the tax exemption without any consideration to his arguments concerning the specific needs of his family relating to the disability of his child. Therefore, the Court found that the Croatian authorities had taken an over-restrictive position and failed to recognise the factual specificity of the applicant's situation.

Fourthly, the Court examined if the failure to treat the applicant differently had an objective and reasonable justification. It noted that the Croatian Government's reasoning, that domestic law provided for objective criteria and that the domestic authorities had no discretion for interpretation, showed that

domestic authorities were unable to provide an objective and reasonable justification for their failure to correct the factual inequality in the present case, which was contrary to the requirements of Article 14. The legislation was applied in such a manner that it failed to sufficiently accommodate the specific situation of the applicant and his family, while domestic authorities could have given consideration to the domestic By-law on accessibility for persons with disabilities and the relevant principles of the CRPD. The Croatian Government further argued that the objective of the legislation was to protect financially disadvantaged persons and that the applicant could not benefit from the tax exemption due to his better financial situation. The Court noted that the protection of financially disadvantaged persons in principle could be considered as an objective justification for discrimination. However, in the present case, the domestic authorities based their decisions on the fact that the Zagreb flat met the basic infrastructure requirements for the housing of the family and there was only one reference to the financial element, without the concrete assessment of the applicant's situation, which is a well-established practice in other cases. Accepting this argument would imply the Court's speculation about the relevance of the applicant's financial situation for his tax exemption request. Therefore, the court found that there was no objective and reasonable justification for the failure to take into account the inequality in the applicant's case.

The Court found that there had been a violation of Article 14 of the Convention in Conjunction with Article 1 of Protocol No.1.

As the inequality of treatment had been sufficiently taken into account in this assessment, the Court did not examine separately the alleged violation of Article 8 and 14 of the Convention and of Article 1 of Protocol No. 12.

The applicant claimed EUR 11 010 in pecuniary damage considering the amount of tax he needed to pay and EUR 10 000 of non-pecuniary damage. The Court noted that it could not speculate on the amount of the applicant's tax obligations and referred to the applicant's possibility to request the reopening of the proceedings under the Croatian Administrative Disputes Act to allow for a fresh examination at domestic level. As to non-pecuniary damage, it awarded EUR 5000 to the applicant. The applicant also claimed EUR 11 652.49 and approx. EUR 6.800 (GBP 4 900) in costs and expenses. The Court recalled in this regard that an applicant is entitled to the reimbursement of his or her costs and expenses only if it has been shown that these have been actually and necessarily incurred and are reasonable as to the quantum. In the present case, based on the documents, the Court decided that it was reasonable to award EUR 11 500 to the applicant.

***Izzettin Doğan and Others v. Turkey*, application no. 62649/10, Judgment of 26 April 2016**

The applicants were Turkish nationals who had the Alevi faith. In 2005, they submitted a petition to the Prime Minister complaining that the Religious Affairs Department (RAD) confined itself to cases concerning only one theological school of thought regarding Islam and disregarded all other faiths, including the Alevi faith. They particularly requested that the Alevi community be provided with religious services in the form of public services, that the Alevi religious leaders be recognized as such and recruited as civil servants, that the *cemevis* be granted the status of places of worship and that state subsidies be made available to their community. This request was refused, as was the application for judicial review with the Ankara Administrative Court and the appeal with the Supreme Administrative Court.

The Court examined first if there had been a breach of Article 9, before turning to the consideration of Article 14 in conjunction with Article 9.

It found that the assessment of the domestic authorities of the Alevi faith, refusing in practice to recognize the religious nature of this faith, had several possibly negative effects. Therefore, it found that there had been an interference with the right to freedom of religion.

The Court accepted that this interference was prescribed by law and made the assumption based on the case file that the legitimate aim of the interference was the protection of public order. When assessing if this interference was necessary in a democratic society, the Court examined if the reasons put forward by the Turkish Government for the refusal were relevant and sufficient and if the refusal was proportionate to the legitimate aim pursued. Concerning the State's duty of neutrality and impartiality towards the Alevi faith, the Court recalled that only the highest spiritual authorities of a religious community, and not the State, may determine to which faith this community belongs. The Turkish Government asserted that the Alevi faith was simply a Sufi order and fell under a different law entailing a number of significant prohibitions, even though it seemed undisputed from the facts that a large Alevi community exists in Turkey and that this faith has significant characteristics distinguishing it from other faiths. Therefore, the Court found that this attitude was incompatible with the State's duty of neutrality and impartiality. Concerning the free practice of Alevis of their faith, the Court pointed out that it depended primarily on the good will of administrative officials and therefore, leaves serious doubts about the ability of Alevis to fully exercise this right. With regard to the State's margin of appreciation, the Court referred back to its earlier case law and held that the right to freedom of religion would be highly theoretical and illusory if States had such a wide discretion that would allow them to interpret the notion of religious denomination in such restrictive manner as to deprive non-traditional and minority forms of religion, such as the Alevi faith, of legal protection. Lastly, the fact that there is an internal debate within the Alevi community on the forms of cooperation with the State cannot constitute grounds for refusing recognition to this community. Accordingly, the Court found that there had been a violation of Article 9.

The Court then noted that in theory everyone could benefit from religious public service, but in practice, it was aimed at the followers of the understanding of Islam adopted by the Religious Affairs Department. The needs of Alevis with regard to recognition and the provision of religious public services seemed to be comparable to the needs of those for whom religious services are regarded as public services, but still, the applicants were treated in a less favourable manner than the beneficiaries of such religious services.

With regard to the existence of objective and reasonable justification for the difference in treatment, the Court underlined that the legal recognition of religious denominations in Turkey included substantial advantages and certainly facilitated the exercise of the right to freedom of religion. However, these advantages were almost wholly taken away from Alevis, when national authorities classified them as a Sufi order. By failing to take into account the specific needs of the Alevi community, the State considerably restricted the scope of religious pluralism. The Court also noted that the legitimate aim invoked by national courts (the preservation of the secular nature of the State) did not necessitate denying the religious nature of the Alevi faith. Furthermore, the legal regime applicable to religious denominations in Turkey seemed to lack neutral criteria and in practice was inaccessible to the Alevi faith, as it offered no effective safeguards to ensure that it did not become a source of discrimination towards the adherents of other religions and beliefs. The establishment of such objective and non-discriminatory criteria is the duty of the State. Hence, the Court found that the choice made by the State was manifestly disproportionate and that the difference in treatment had no objective and reasonable justification and held that there had been a violation of Article 14 in conjunction with Article 9.

***Halime Kılıç v. Turkey*, application No. 63034/11, Judgment of 28 June 2016**

This case concerned the death of the applicant's daughter, Fatma Babatlı, who was killed by her husband despite her having lodged multiple complaints with domestic authorities and obtaining three protection orders and injunctions.

The applicant, Halime Kılıç, is a Turkish national living in Diyarbakir, Turkey. Ms Kılıç is the mother of Fatma Babatlı, who suffered domestic violence and death threats on the part of her husband.

Gender

On 16 July 2008, Fatma Babatlı lodged a complaint against her husband, S.B., stating that her husband had assaulted her and her seven children and requesting protection measures provided for in the Family Protection Law (Law No. 4320). She requested an order removing her husband from the home for the protection of her and her children. On 18 July 2008, the Family Court issued an initial protection measure. The measure ordered that S.B. be removed from home and placed an injunction against any violent behaviour towards Ms Babatlı. The decision was served on 6 August 2008, with the provision that failure to comply with the order would give rise to a custodial sentence. On 7 October 2008, S.B. was charged with inflicting simple injuries.

In July and October 2008, Ms Babatlı lodged a further complaint of domestic violence and the Family Court issued two more injunctions. The prosecutor committed S.B. for trial and requested his pre-trial detention but this request was rejected. Ms Babatlı sought urgent assistance from the prosecutor on the basis that her husband had abducted two of her children and made death threats against her. She lodged a fourth complaint. On 7 November 2008, Ms Babatlı was killed by her husband, who also killed himself.

Ms Kılıç lodged a complaint in January 2009 with the prosecution alleging breach of duties and requesting the identification and prosecution of authorities that had allegedly failed to carry out an effective investigation into the complaints, and whose shortcomings had resulted in her daughter's death. The prosecutor issued a decision discontinuing the proceedings and Ms Kılıç's challenge of the decision was unsuccessful.

The applicant lodged a complaint with the European Court of Human Rights on 5 August 2011 under Article 2 and Article 14 taken together with Article 2 of the Convention. Relying on Article 2, the applicant complained that domestic authorities had failed to protect her daughter's life and failed to carry out an effective investigation. She further alleged the proceedings in her daughter's case had been unfair and that there had been a lack of effective remedies. Relying on Article 14, the applicant alleged that the acts complained of under Article 2 had occurred because her daughter was a woman, and that S.B. had not been arrested because it was a case of domestic violence.

In regard to Article 2, the Court noted that the applicant's daughter had applied to authorities four times requesting protection, stating her fear for her life and the lives of her children. Though the Family Court had ordered three protection orders and injunctions, these had been ineffective. Furthermore, it took 19 days for the first order to be served and eight weeks for the second and these delays deprived Ms Babatlı of the immediate protection she needed as well as of the effectiveness of the orders. Between the issuance of the first order and the date it was served, Ms Babatlı had been assaulted by her husband. The Court found the effectiveness of the protection measures could only be guaranteed by appropriate control mechanisms. However, it was not until S.B.'s arrest on 8 October 2008 that the public prosecutor had ordered that he be placed in police custody. Furthermore, the criminal court had refused to grant the prosecutor's request that he be placed in pre-trial detention despite the fact that he had been clearly shown to represent a danger. Thus, S.B. had been released without practical measures taken to protect the life of Ms Babatlı. The Court considered that the failure to enforce the custodial penalty provided by Law No. 4320 for failure to comply with injunctions meant that authorities had deprived them of any effectiveness, allowing S.B. to assault his wife with impunity.

The Court also noted conflicting accounts of Ms Babatlı's ability to seek refuge in a shelter with her seven children, and observed the failure of authorities to direct her to a facility adapted to her needs. The Court noted that national authorities had had a duty to take into account the vulnerable psychological, physical, and material situation of Ms Babatlı, to assess it accordingly and to offer appropriate support. The authorities had not done so. Regarding the applicant's claim that the criminal responsibility of the public officials had not been established, the Court reiterated the nature of her complaint under the substantive aspect of Article 2 and its findings in that respect.

In regard to Article 14, the Court noted that the domestic authorities had been informed of the repeated assaults and death threats to which the applicant's daughter had been subjected. The impunity afforded to S.B. reflected wilful denial by the national authorities regarding serious incidences of domestic violence, which were particularly worrying given the vulnerability of the victims of this violence. The Court found it unacceptable that the victim had been left with no resources or protection against her husband's violence. The Court found that the findings of *Opuz v. Turkey* (Application No. 33401/02) were valid in the circumstances of this case.

The Court concluded that there had been a violation of Article 2 of the Convention because domestic proceedings had failed to meet the requirements of the Article. The Court also concluded that there had been a violation of Article 14 taken together with Article 2. The Court held that Turkey was to pay the applicant EUR 65 000 in respect of non-pecuniary damage.



Key developments at national level in legislation, case law and policy

This section provides, as far as possible, an overview of the latest main developments in gender equality and non-discrimination law (including case law) and policy on the national level in the 28 EU Member States, the Former Yugoslav Republic of Macedonia, Liechtenstein, Norway, Serbia and Turkey, from 1 January to 30 June 2016.

LEGISLATIVE DEVELOPMENTS

Austria eliminates last remaining gender-based element for the calculation of statutory pension

Gender

Following the ECJ's ruling C-318/13, *X v. Finland*, European Union Member States are obliged to eliminate gender-specific actuarial factors in all social security systems. Thus, the competent Ministry for Labour, Social Security and Consumer Protection (*Bundesministerium für Arbeit, Soziales und Konsumentenschutz, BMASK*) in Austria has eliminated the last gender-based differentiation of benefit calculation in its social security system. A new ordinance entered into force on 1 April 2016 and applies to all voluntary contributions paid after this date.

Austria has a contribution-based statutory social security system that covers occupational accidents and diseases, health insurance, unemployment insurance, disability benefits, and retirement pensions. The amount of actual pensions depends on the individual sum of contributions and on the duration of contribution payments during a working life.

Individual pension amounts can be increased by paying voluntary annual contributions into the social security system, which result in an additional pension amount (*Höherversicherung*) based on special actuarial tables. Previous to the ordinance, the resulting additional amounts were calculated according to actuarial factors that were different for men and women and that led to slightly higher additional pension amounts for women.

The actuarial tables for the additional pension amount (*Höherversicherung*) represented the last gender-based factor for the calculation of benefits. These have now been replaced by unisex tables that do not differentiate between the sexes.

New legislation introduces paternity leave and connected benefit and new system for the Small Children's Benefit

Gender

In February 2016, a new legislative initiative emerged, following a policy initiative presented by the Federal Ministry for Family and Youth (*Bundesministerium für Familie und Jugend, BMFJ*) in the autumn of 2015, which both includes systematic changes to the Small Children's Benefit and new regulations for paternity leave at the time of a child's birth and a connected benefit.

The legislative initiative passed both the committee hearing and both chambers of the parliamentary plenum. It was published in the official legislative bulletin on 8 July 2016. The new legislation will enter into effect on 1 March 2017 and be applicable to births from this date onward without a transition period.

The legislation introduces a paternity leave period of up to 31 days for fathers of new-born babies in combination with a benefit of EU 22.60 per day. The paternity leave period or 'father's month' (*Papamonat*) has to be based on an explicit agreement between fathers and their employers. In addition, the legislation will change the Small Children's Benefit system from lump-sum entitlements (based on varying amounts corresponding to the benefit periods that parents apply for) to an 'account system'. From March 2017 onwards, parents of new-born babies will be entitled to 365 days of Small Children's Benefit at a rate of EU 33.88 per day from the date of the birth, reduced by the days for which maternity or paternity benefits are collected. The new legislation gives parents the possibility to extend the duration of the benefit to up to 851 days, which leads to a proportionately lower benefit rate per day. In cases where parents have decided to use approximately equal benefit periods of a collective maximum of 365

days, they can claim an additional 'partnership bonus' of EU 500, which is deducted from the overall benefit sum.

Internet sources:

https://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00181/index.shtml, accessed 18 June 2016;

https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2016_I_53/BGBLA_2016_I_53.pdf, accessed 26 August 2016.

Belgium

BE

POLICY DEVELOPMENTS

Royal Decree of 13 March 2016 extends maternity leave for the self-employed and increases flexibility

A Royal Decree of 13 March 2016¹ amended the Royal Decree of 20 July 1971 concerning the Sickness and Maternity Insurance Scheme for Self-employed Workers, the personal scope of which includes all self-employed workers and their assistants, as well as assisting spouses and registered partners (common-law partners are simply included as assistants). The amendments will come into force on 1 January 2017 and apply to any maternity leave beginning by that date.

Gender

Currently, the duration of maternity leave is 8 weeks (9 for a multiple pregnancy), of which 3 (1 immediately before and 2 immediately after giving birth) are obligatory (i.e. a condition of entitlement to the social security benefits) and the remainder is optional and may be used over a period of 21 weeks following the obligatory leave.

As amended by the R.D. of 13 May 2016, the maximum duration of the leave will be 12 weeks (13 for a multiple pregnancy), including the obligatory 3 weeks; the optional part of the leave will be usable over a period of 36 weeks; and during the optional part of the leave, a worker will be allowed to resume her activities half-time. In that case, the optional part of the leave will amount to a maximum of 18 (or 20) weeks, and the flat-rate weekly benefit of EUR 449.32 will be halved.

Internet source:

www.juridat.be, accessed 31 May 2016.

Ratification of the Istanbul Convention

On 1 March 2016, the Sovereign promulgated the Act which ratified the Council of Europe's Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention). The Belgian ratification by the Federal Parliament required the previous assent of every one of the federate authorities, a process which started in 2013 and was completed in 2015. This ratification took place without any reservation as it will not entail any legislative changes. The Act of 1 March 2016 was published in the *Moniteur belge/Belgisch Staatsblad* of 9 June 2016.

Gender

The Istanbul Convention, seen as the most comprehensive tool to combat all forms of gender-based violence, was taken as the frame of reference for Belgium's fifth National Action Plan concerning gender-based violence, which was adopted in 2015 (NAP 2015-2019). Given the federal structure of Belgium, the federal Institute for Equality of Women and Men ('Gender Institute') was designated officially on

¹ *Moniteur belge/Belgisch Staatsblad*, 23 May 2016.

11 April 2016 as the agency responsible for the coordination, implementation, follow-up and evaluation of measures and policies adopted throughout the country within the Convention's framework. The Gender Institute will be supported by an inter-departmental group comprising representatives of the different executive authorities concerned (federal, regional and community governments) in the process of implementation, monitoring and reporting as required by the Convention.

Internet source:

www.juridat.be, accessed on 23 June 2016.

BG

Bulgaria

LEGISLATIVE DEVELOPMENTS

Adoption of Law on Gender Equality and signing of the Istanbul Convention

In April 2016 the National Assembly adopted the Law on Gender Equality, which was proposed by the Ministry of Labour and Social Policy and then approved by the Council of Ministers.

The Law was adopted and promulgated in S.G. 33/26 April 2016.² The Law regulates state policy on gender equality, the main principles of this policy, and the positive measures for promoting gender equality, namely the institutional structure, respective bodies, and the mechanisms of state policy on gender equality. The law affirms the competency of the Minister of Labour and Social Policy as the body that will manage, coordinate and control gender equality policy in Bulgaria. State policy in the field will also be implemented by specialized units in the different ministries, in the regional administration and at the level of bodies of local self-governance. The main principles of the state policy are: equal opportunities of women and men, equal access to resources, equal treatment and non-discrimination, elimination of gender-based violence, balanced representation of women and men in decision-making bodies, and elimination of stereotypes based on sex. The National Council on Gender Equality at the Council of Ministers is the consultative body. The Law envisions the adoption of temporary special measures to promote gender equality. Such measures will be adopted in the national plans for the implementation of the Gender Equality Strategy.

In addition, on 21 April 2016 the Bulgarian Government signed the Council of Europe Convention No. 210 – the so-called Istanbul Convention.³ This was based on a decision of the Council of Ministers in favour of signing the Convention 'in view of forthcoming ratification'. Following this act, the Minister of Justice with an Order of 25 May 2016 formed a Working Group for the incorporation into the Bulgarian legislation of the principles and requirements of the Istanbul Convention. The group is composed of government and civil-society representatives, and of magistrates. It is tasked to suggest by the end of 2016 the changes needed in Bulgarian legislation.

Internet source:

<http://lex.bg/bg/laws/ldoc/2136803101>, accessed on 11 August 2016.

2 The Bulgarian version of the law is available at: <http://lex.bg/bg/laws/ldoc/2136803101>, accessed 12 July 2016.

3 The Chart of signatures and ratifications: <http://www.coe.int/en/web/Conventions/full-list/>, accessed 15 September 2016.

Croatia

HR

LEGISLATIVE DEVELOPMENTS

Draft legislation proposes change to the definition of victimisation in the Gender Equality Act

In May 2016, the final draft of the Act on Amendments to the Gender Equality Act was tabled in the Croatian Parliament, with a proposal to adopt the Act in urgent procedure. The main objective of the proposed amendment is to align the definition of victimisation from Article 2 of the Gender Equality Act (Official Gazette *Narodne novine* No. 82/08) with the broader definition of victimisation from the Anti-Discrimination Act (Official Gazette *Narodne novine* Nos 85/08 and 112/12). The Draft Act also contains several minor methodological adjustments.

Gender

As part of its activities regarding the monitoring of compliance of national legislation in Member States with Directive 2006/54 (5570/13/JUST), the European Commission expressed doubt as to whether the standard of protection against victimisation is the same in the Anti-Discrimination Act (as *lex generalis*) and the Gender Equality Act (as *lex specialis*) and gave specific recommendations to adapt this provision. The first proposal was to completely delete this provision from the Gender Equality Act, and to rely on the provision of victimisation from the horizontal act (Anti-Discrimination Act). However, this intention was abandoned in favour of adopting a comprehensive definition of victimisation for the purposes of the Gender Equality Act, which now goes beyond the scope of definition from the Anti-Discrimination Act. The amended provision of Article 2 Gender Equality Act should have two subparagraphs and read as follows:

‘(1) No person shall be placed in a less favourable position or suffer adverse consequences, nor shall be subject to a legal action or other legal proceedings, for having in good faith officially or unofficially reported discrimination, witnessed discrimination, refused an instruction to discriminate, or for having testified in any manner in proceedings for the protection against discrimination based on sex, or in any manner participated in any procedure instituted because of discrimination based on sex.

(2) No person shall be placed in a less favourable position or suffer adverse consequences, nor shall be subject to a legal action or other legal proceedings, for having in good faith alerted the public about a case of sexual discrimination.’

The new provision is much broader than Article 24 of Directive 2006/54, not only in the definition of victimisation (it specifically lists actions which will be deemed as victimisation), but also because the Gender Equality Act is much broader in scope than Directive 2006/54.


Given the lack of domestic case law on victimisation and the tendency of the Croatian judiciary for overly formalistic interpretations of the laws, the amendment might bring about more legal certainty. The legislative procedure is still pending in the Croatian Parliament. However, since the Government was repealed on 16 June 2016 and Croatia is faced with the dissolution of Parliament and new elections, the fate and the adoption of the draft Act is uncertain.

Internet source:

<http://www.sabor.hr/prijedlog-zakona-o-izmjenama-i-dopunama-zakona0108>, accessed 20 June 2016.

POLICY DEVELOPMENT

New Croatian Register of Business Women established to promote gender-balanced company boards



The Ombudsperson for Gender Equality and the Croatian Association of Employers have established the first Croatian Register of Business Women, within the PROGRESS Programme of the European Union project 'Dismantling the Glass Labyrinth – Equal Opportunity Access to Economic Decision-making in Croatia' (No. JUST/2012/PROG/AG/4157/GE). The Register of Business Women represents an electronic database of women in Croatia who are qualified and able to assume the highest management positions in companies. It is managed by the Ombudsperson for Gender Equality, and will be updated two or three times per year.

The Register contains personal profiles of women who satisfy certain objective criteria, defined and published in advance. It is public, accessible and can be searched. Inclusion in the Register can be automatic (candidates with at least 5 years of experience in management positions, according to defined conditions) or based on a selection process, with recommendations. The first call for inclusion in the Register was closed in January 2016, and the Register was published in March 2016. The board consisting of the Ombudsperson for Gender Equality, representatives of the Croatian Association of Employers and other representatives decides whether the criteria for inclusion have been fulfilled. The Register, according to its creators, has been designed in accordance with other similar databases, such as the Global Board-Ready Women initiative or the European Network for Women in Leadership. The objective of the project is to raise awareness and promote the need for gender-balanced company boards and equal opportunity in economic decision-making in the Croatian labour market. The project was implemented in the period from October 2013 to October 2015. Current activities include public presentation of the Register at municipal and county levels in Croatia. The success of the Register will have to be assessed in the upcoming period, for example by means of a survey whether employers find it useful to consult when recruiting new management staff and whether it has any impact on the number of women in company boards and other positions of economic decision-making.

Internet source:


http://staklenilabirint.prs.hr/wp-content/uploads/2014/09/Baza-zena_final.pdf, accessed 20 July 2016.

CY

Cyprus

LEGISLATIVE DEVELOPMENT

National Guard (Amendment) Law No. 82(I) 2016 removes barrier for women in the selection procedure for Cypriot army



Recent vacancy postings in the Cypriot National Guard have prompted an amendment to the National Guard Law to prevent discriminatory recruitment practices. The Ministry of Defence published 3000 vacancies for the recruitment of soldiers in the National Guard on a contractual basis under the provisions of the Law relating to the Employment of Persons for an Indefinite or for a Definite Period of Time in the Public Service (Law No. 70(I)/2016). Among the requirements for the position was to have done military service, which precluded women from applying. Thus, approximately 5000 applications were submitted for the 3000 posts, only by male candidates.

The Commissioner for Administration (Ombudswoman) studied on her own accord the contents of the announcement of the Ministry of Defence for the 3000 posts and addressed a letter dated 6 June 2016 to the Minister of Defence. In the letter, the Ombudswoman expressed the opinion that there had been discrimination on the ground of sex and on the ground of age in the field of access to employment on the basis of Directives 2000/78/EC and 2006/54/EC and of Law No. 58(I)/2004, which prohibits discrimination in conditions relating to access of work on the ground of sex and on the ground of age. The Ombudswoman argued that discrimination is apparent in the Ministry's announcement of the vacant posts because the requirement that applicants must have completed military service disqualifies women from applying, since women do not do military service.

As a result, the Government submitted a Bill to amend the National Guard Law. The Law was voted on by Parliament and will be published in the Official Gazette of the Republic of Cyprus No. 4572 Part I on 25 July 2016, as the National Guard (Amendment) Law No. 82(I) 2016. The Law provides that because the fulfilment of military service is not obligatory for women, this criterion is not mandatory, so women can apply for employment for these specific vacant positions in the Army Service. Furthermore, another amendment was made, providing that men who have not served in the National Guard for special reasons provided in the Law, can also apply for these specific vacant positions in the Army Service.

CASE LAW

Supreme Court decision on age discrimination in the access to a disability benefit⁴

In 2012 the claimant applied for a grant from the Department for Social Integration of Persons with Disabilities under a welfare scheme for severe kinetic disability. The application was rejected however due to an age limit excluding applicants who were aged over 65 when they became eligible for the grant, which was the case of the claimant. The claimant submitted requests to the Department and to the Labour Minister, requesting that the age limit be removed, but received the response that although the authorities were aware that some of their schemes needed modifications they were currently unable to proceed due to restrictions in finances as a result of the economic crisis. The claimant had also submitted a complaint to the Equality Body,⁵ which established that the age restriction amounted to age discrimination prohibited by law and that the issue would be referred to the Department when the state of public finances improves.⁶ The claimant applied to the Supreme Court for judicial review seeking to set aside the Minister's decision, claiming age discrimination in violation of Article 28 of the Constitution, of the law setting up the Equality Body⁷ and of the CRPD.

Having rejected preliminary objections of the respondents regarding the procedure, the Supreme Court rejected the respondent's argument that no discrimination occurred because the claimant was treated in the same way as other persons in his position and his age group; the Court found that the claimant was obviously eligible for the grant but was excluded because of his age, adding that the age restriction in the scheme violated the Law on Persons with Disabilities No. 127(I)/2000. The Court added that the age criterion was not connected with an objective and reasonable assessment justifying the differential treatment and was therefore unlawful. The Court also rejected the respondent's argument that the age restriction was intended to limit the number of applicants at a time of economic crisis, adding that the fiscal interests of the State cannot be described as or equated with a general public interest, especially if this is done in a manner which attempts to justify exclusions of individual rights. The Court stated that deviations are only allowed to the extent that the constitutional provisions themselves allow and subject

4 *Petros Michaelides v. The Republic of Cyprus through the Minister of Labour and Social Insurance*, Supreme Court, Review Jurisdiction, Case No. 2005/2012, 27 January 2016.

5 The Equality Body had in the meantime also been appointed as monitoring body for the implementation of the UN CRPD.

6 Report of the Anti-Discrimination Authority regarding the provision of public benefits to a person who was rendered disabled after the age of 65, File No. AKR 34/2008, 10 April 2009. Not available online.

7 The combating of racial and other forms of discrimination (Commissioner) Law No. 42(I)/2004.

to the proportionality principle. The Minister's rejection of the claimant's application was annulled. The judicial review procedure does not foresee the issue of orders for corrective measures to be taken in order for the scheme to be revised or the claimant's application to be satisfied.

Neither party invoked the law transposing Directive 78/2000 as regards the ground of disability,⁸ preferring the better-known judicial review procedure; as a result, the decision of the Court could only cancel the administrative act. The judicial review process does not provide for compensation or for a revision of the discriminatory provision in the scheme. Nevertheless, the decision is still ground-breaking, as it marks a new trend in judicial practice that is more rights-based and better informed on the equality *acquis* than previous court decisions.

Internet source:

http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2016/4-201601-2005-2012.htm&qstring=%E4%E9%E1%EA%F1%E9%F3%2A%20and%202016, last accessed 13 July 2016.

Equality Body decision on restrictions in access to self-employment for third-country nationals amounting to unlawful discrimination

The claimant was a Ukrainian national residing in Cyprus since 1998 who was granted the Cypriot nationality in 2003, who had been removed from the official registry of assistant estate agents by a decision of the Council for the Registration of Estate Agents. The Council informed the claimant in 2015 that her registration as an assistant estate agent in 2011 had been a 'mistake', as she did not meet the legal requirements of the profession. The Council specifically invoked the requirement to hold a secondary education degree obtained in a school recognised in Cyprus or in any other EU Member State.⁹ The claimant objected to this decision, presenting proof that she was a holder of a university degree which had been recognised by the competent body of the Cypriot Ministry of Education. The Equality Body's investigation revealed that the Council for the Registration of Estate Agents had informed at least another 28 persons of its intention to strike them off the Registry because they were holders of certificates from schools in third countries.

The Equality Body had previously found that other provisions of the law regulating the profession of estate agents amounted to discrimination of third-country nationals.

Citing the law transposing the employment component of the two Equality Directives,¹⁰ the Equality Body interpreted the term 'racial or ethnic origin' as complemented by the terms 'language', 'race', 'colour' and 'national origin'. The prerequisites as regards certified educational attainment, when there is no procedure for such certification, leads to indirect discrimination on the ground of national origin, in breach of the law transposing the equality *acquis*. The exclusion of spouses and children of Cypriot and Union nationals from the profession of assistant estate agent amounts to direct discrimination on the ground of national origin. In light of the principle of supremacy of EU law and of the law transposing EU law, the mandatory power of the law on estate agents is suspended. The Equality Body referred this law to the Attorney General requiring its revision.

Although not explicitly stated by the Equality Body, what transpires from this reasoning is that it considers that the grounds of language, colour, and race may be used in order to interpret 'race and ethnic origin'. The interchangeable use of the terms 'national origin' and 'ethnic origin' may be accounted for by the

⁸ Law on Persons with Disabilities No. 127(I)/2000.

⁹ Law on estate agents No. 71(I)/ 2010, available at http://cylaw.org/nomoi/enop/non-ind/2010_1_71/index.html, accessed 23 September 2016.

¹⁰ Law on equal treatment in employment and occupation No. 58(I)/2004, available at http://cylaw.org/nomoi/enop/non-ind/2004_1_58/full.html, accessed 23 September 2016.

proximity of these terms in the Greek language (‘εθνικο’, ‘εθνοτικό’) but may also suggest that the strict distinction between the two terms is artificial and does not correspond to contemporary realities.

The decision is significant not only because of the wide interpretation given to ‘racial or ethnic origin’ but also because this interpretation is used to protect third-country nationals from discrimination in accessing certain professions.

Internet source:

[www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/53D3360817C8E5BAC2257FA30030AF25/\\$file/%CE%91%CE%9A%CE%9922_2016_15042016.doc?OpenElement](http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/53D3360817C8E5BAC2257FA30030AF25/$file/%CE%91%CE%9A%CE%9922_2016_15042016.doc?OpenElement), accessed 13 July 2016.

Czech Republic

CZ

LEGISLATIVE DEVELOPMENT

Proposed legislation could give parents faster access to parental allowance

In June 2016, the Government approved a proposal for amendment of Act No. 117/1995 Coll., on State Social Support, presented by the Ministry of Labour and Social Affairs, according to which parents could draw parental allowance in a faster way. The Bill follows promises made by the Ministry in January 2016 to introduce legislation to help harmonise professional and family life.

Gender

Currently, parents have a maximum of CZK 220 000 at their disposal until the child reaches the age of 4. However, the monthly benefit is CZK 11 500. This means that the fastest way of drawing the total amount of parental leave is 19 months (the parental leave can be claimed only after the maternity benefit has been used – for 22 weeks after the child is born). The proposed legislation envisages a maximum monthly benefit that would reach CZK 32 640 and parents who wish to return to work sooner could do so after six months, without losing their right to draw the whole benefit. The amendment, if approved by the Parliament, will enter into force on 1 January 2017.

Internet source:

http://www.mpsv.cz/files/clanky/26956/TZ_MPSV_-_Cerpani_rodicovskeho_prispevku_bude_flexibilnejsi__2_.pdf, accessed 20 July 2016.

CASE LAW

Court decision on direct discrimination on the ground of disability in the access to education¹¹

The claimant was diagnosed with autism spectrum disorders and moderate mental disability according to the neurological and psychological examination that was performed in preschool, and was therefore educated at a ‘special school’. The claimant felt out of place in this school, his skills surpassed most of those of his classmates and he could not fully develop his skills and education. The Special Educational Centre in Brno recommended that he be integrated in the mainstream elementary school and provided with an individual education plan and educational assistance.

Disability

11 Vyškov District Court judgment No. 10 C 250/2014 – 124 of 18 March 2016.

The mother of the claimant asked the local elementary school in Milešovice to enrol the claimant in the mainstream education programme in January 2012. The director of the school explained that the school and the teachers could not handle the tasks associated with the integration of the claimant. The director also stated that she had to take into account the manifested negative reactions of the parents of some children attending the school. The official decision of the school stated that the claimant could not be integrated due to capacity reasons. The claimant's mother then unsuccessfully asked for the integration of the child at 11 other schools in the Brno region.

In June 2012 the application was sent again to the Milešovice school and after its rejection the claimant brought an appeal to the regional authority. The appeal was rejected. Since March 2012 the claimant had been attending classes at the elementary school in Šaratice, his skills were developing and his integration into the mainstream education was successful.

The claimant brought an antidiscrimination action against the Municipality of Milešovice in October 2014, which was heard by the Vyškov District Court in March 2016.

The Court found that the claimant's rights to education and non-discrimination and the principle of equal treatment had been breached. Evidence showed that the Municipality was guilty of direct discrimination against the applicant, as prohibited by Paragraphs 1 and 2 of Act No. 198/2009. The Court found that the refusal to integrate the claimant into the mainstream school was based on his disability. According to the Court the Municipality had failed to take the necessary steps to provide the conditions for a possible integration of the claimant at the local school. Consequently, the Court held that the Municipality was responsible for the violation of the claimant's fundamental rights guaranteed by the Charter of Fundamental Rights and Freedoms,¹² the right to education, the right to non-discrimination and the principle of equal access to education for every citizen. The Municipality was ordered to send an apology to the claimant and to pay damages as compensation for the non-pecuniary damage in the amount of 1.850 EUR (CZK 50 000).

Source:

The Vyškov District Court judgment No. 10 C 250/2014 – 124 of 18 March 2016. Not available online.

DK

Denmark

LEGISLATIVE DEVELOPMENT

Legislative amendment removing barriers for senior employees to remain in employment

According to Act No. 1489 of 23 December 2014, neither individual employment contracts nor collective agreements including automatic termination of employment by the age of 70 can be entered into as of 1 January 2016. It also follows from the Act that existing individual contracts including automatic termination cannot be enforced after this date. Collective agreements including automatic termination are, however, valid until the time when the collective agreement in question can be denounced.

The objective of the amendment is to promote the participation in the labour market and to limit barriers that hinder senior employees from staying in the labour market.

12 Czech Republic, Resolution of the Czech National Council on the Declaration of the Charter of Fundamental Rights and Freedoms (2/1993 Sb., *usnesení předsednictva České národní rady o vyhlášení Listiny základních práv a svobod*) 1 January 1993.

Internet source:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=167206>, accessed 13 July 2016.

CASE LAW

Is obesity a disability covered by the prohibition of discrimination in employment?

The claimant worked as a child minder for 15 years in the Municipality of Billund. During that period, he was obese within the meaning of the definition of the World Health Organization (WHO), despite several attempts to lose weight.

Disability

Owing to the decrease in the number of children in the Municipality of Billund, in 2010 the claimant had only three children to take care of instead of four. He was informed by telephone that the Municipality intended to dismiss him, which resulted in a hearing procedure for the dismissal of public-sector employees. The claimant was eventually dismissed and the trade union FOA, acting on his behalf, brought an action before the City Court of Kolding claiming that the claimant had been discriminated against on the basis of obesity and that he ought to receive compensation for that discrimination.

The City Court requested a preliminary ruling from the Court of Justice of the European Union. A judgment was issued in Case C-354/13 on 18 December 2014, holding that EU law cannot be interpreted to lay down a general principle of non-discrimination on grounds of obesity in employment and occupation, and that obesity in itself does not constitute a disability within the meaning of Directive 2000/78, although it can amount to a disability in certain concrete cases.

On 31 March 2016, the City Court delivered its ruling, referring to that of the CJEU. The City Court argued that according to medical information, the claimant's obesity did not constitute a disability because it did not entail a limitation which in interaction with various barriers hindered the full and effective participation of the claimant in his professional life on an equal basis with other child minders. In that regard the court underlined that an employee can be protected by the Act on Prohibition of Discrimination in the Labour Market etc. if the employer perceives the employee as having a disability – whether or not the individual in question is encompassed by the group of people or not. On that basis the Municipality of Billund was acquitted.

Internet source:

<http://www.domstol.dk/kolding/nyheder/Pressemeddelelser/Pages/Domafsagtden31marts2016.aspx>, accessed 13 July 2016.

The use of the word 'Negro' by a public social worker does not amount to harassment

The claimant was the mother of a 3-year-old child who was hospitalised because of anxiety, and who was to be placed in a 24-hour care centre after his hospitalisation. The claimant did not agree with the placement of her son, and met with a social worker from the care centre.

Racial or ethnic origin

In her notes the social worker wrote the following: 'In the US the complainant works as a prison guard. [...] The father is a Negro and she does not live with him. [...] She seems very American in her statements and thoughts, which I understand from her opinions about the services of the Danish society being independent of whether you have money or not.'

The claimant argued that the social worker had acted in a racist way, which was disputed by the care centre, and the case was brought before the Board of Equal Treatment. The Board stated that the

claimant had established facts of possible discrimination. The reasoning was that the word ‘Negro’ after a subjective assessment could be regarded as insulting towards the complainant.

However, the use of the term ‘Negro’ in the context in question was not found to have either the purpose or the effect of violating the dignity of the complainant and of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. In this regard, the Board emphasized that there was no evidence to suggest that the social worker’s notes influenced the proceedings of the case. Thus, the Board stated that the complainant was not treated differently because of her own or her child’s ethnic origin. Against this background the Board concluded that no discrimination or harassment had taken place. The Board also concluded that the description of the complainant as ‘American’ did not constitute discrimination or harassment on the ground of race or ethnic origin.¹³

It is noteworthy that when the Board evaluated whether harassment had taken place or not, it argued as if it was necessary for the social worker’s use of the word ‘Negro’ to have actually influenced the proceedings of the case. However, to constitute harassment a statement must (only) violate the dignity of the complainant in both a subjective and objective way.

Supreme Court ruling on the extent of the employer’s obligation to provide reasonable accommodation

The claimant was an engineer at a municipality, who shortly after she was appointed had an accident and injured her right arm. She was later diagnosed with Complex Regional Pain Syndrome for which she was partly absent owing to illness for more than a year. Her request for a part-time position was rejected by the municipality because of a general practice not to employ engineers in her kind of job in part-time positions. She was dismissed due to her sickness absence and argued that she had been discriminated against because of disability.

In April 2015, the Danish Maritime and Commercial Court had awarded compensation for indirect discrimination because of disability.¹⁴ The municipality appealed the judgment before the Supreme Court.

The Supreme Court argued that the claimant at the time of the dismissal had an impairment, which in combination with various types of working tasks hindered her full and effective participation in working life on an equal basis with other employees. The Court concluded that the impairment at the time of the dismissal constituted a disability covered by the Act on the Prohibition of Discrimination in the Labour Market etc.

With regard to reasonable accommodation, the Court stated that the employer did not have an obligation to provide for a part-time position of 20 hours a week, which would have met the claimant’s needs for accommodation. The Court argued that for the municipality to provide for such a position, it would have had to divide a current full-time position into two part-time positions. The Court stated that for objective reasons this organisational change in a small department consisting of 3 employees would constitute a disproportionate burden on the employer. The Court acquitted the municipality.¹⁵

13 Board of Equal Treatment, decision delivered on 6 April 2016 in Case No. 55/2016.

14 Maritime and Commercial Court, judgment of 29 April 2015, Case F-9-12.

15 Supreme Court, judgment delivered on 13 April 2016 in Case HR-98/2015.

Supreme Court ruling on indirect discrimination by association

The claimant was dismissed from her position as a child minder when she had been on leave for 14 months to care for her son who had Asperger's syndrome. While the employer claimed that the dismissal was solely based on necessary budget cuts in the municipality, the claimant argued that she had been discriminated against because of the disability of her son. The employer also argued that the son did not have a disability.

Disability

The Board of Equal Treatment had previously found that the son did not have a disability in the meaning of the Act on Prohibition of Discrimination in the Labour Market etc.¹⁶

In April 2016, the Supreme Court concluded that the son 'suffered from Asperger's syndrome to such a degree that he was covered by the concept of disability' in the Act on Prohibition of Discrimination in the Labour Market etc.¹⁷ The Court stated that the son had a 'significant impairment with regard to among other things his social capabilities and the ability to handle changes in everyday life.' The Court also stated, that 'the impairment hindered a normal school attendance.'

The Court held however that the claimant had not been dismissed because of the disability of her son but because of her long absence from work. Thus, the dismissal did not constitute direct discrimination because of disability.

The Court then assessed whether the dismissal had constituted indirect discrimination. The municipality had to cut the budget because of a declining number of children, and it was both objective and proportional not to move children to a child minder whom the children did not know because of the fact that she had been away from her work for a long period of time. On that basis the Supreme Court concluded that the dismissal of the child minder in question did not constitute indirect discrimination in violation of the Act on Prohibition of Discrimination in the Labour Market etc.

The Court underlined that it did not need to discuss whether the prohibition of indirect discrimination covered a situation where an employee does not have a disability herself but is affected by an action because of a disability of her child or another close relative. The Court referred to rulings from the Court of Justice of the European Union in Case C-303/06 of 17 July 2006 (*Coleman*) and in Case C-83/14 of 16 July 2015 (*CHEZ Razpredelenie Bulgaria*) and argued that the correct interpretation of the Employment Equality Directive in this regard is neither clear nor settled. As the question of whether indirect discrimination because of the association of an employee to a child with a disability is covered by non-discrimination legislation was not decisive in the case at hand, the Supreme Court concluded that it did not need to ask for a preliminary ruling on the issue from the Court of Justice of the European Union. On this basis the Court acquitted the municipality.

Internet source:

<http://domstol.fe1.tangora.com/New-Søgeside.31488.aspx?recordid31488=1214>, accessed 13 July 2016.

¹⁶ See *European Anti-Discrimination Law Review*, Issue 15 (2012), pp. 52-53.

¹⁷ Supreme Court, judgment delivered on 27 April 2016 in Case HR-151/2015.

EE

Estonia

LEGISLATIVE DEVELOPMENT

Proposals to extend the scope of the anti-discrimination law

Article 2(1) of the Equal Treatment Act¹⁸ bans discrimination on the grounds of ethnic origin, race or colour in the areas covered by the material scope of Directive 2000/43/EC.

On 7 March 2016 the Government presented Bill No. 189 to amend Article 2(1) of the Equal Treatment Act with a new ground of prohibited discrimination – ‘citizenship of an EU Member State’. This protection will also be extended to family members of EU citizens. The bill is related to the transposition of Directive 2014/54/EU¹⁹ on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers. The first reading of the bill took place on 6 April 2016.

On 9 March 2016 a group of Estonian MPs from various political groups initiated another bill, also with the aim of amending the Equal Treatment Act to the extent of removing all limits as regards the material scope of the Act. If adopted, the amended Article 2(1) of the Act will read as follows:

‘Discrimination of persons on grounds of ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation is prohibited.’

The bill does not include any further details on the scope of application of the Equal Treatment Act.

Internet sources:

Bill No. 189: <http://www.riigikogu.ee/tegevus/eelnoud/eelnou/48b33a89-0846-4f6a-adeb-2fc41314cbd4/V%C3%B5rdse%20kohtlemise%20seaduse%20muutmise%20seadus/> (in Estonian);

Bill No. 196: <http://www.riigikogu.ee/tegevus/eelnoud/eelnou/64ae9c3f-5192-44b7-9496-de257be81db7/V%C3%B5rdse%20kohtlemise%20seaduse%20muutmise%20seadus/> (in Estonian);

both accessed 11 August 2016.

FI

Finland

LEGISLATIVE DEVELOPMENT

Finland ratifies the Convention on the Rights of Persons with Disabilities and its Optional Protocol

On 11 May 2016, Finland deposited its instrument of ratification concerning the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol with the Secretary General of the United Nations.²⁰ The Convention and its Optional Protocol thus entered into force for Finland on 10 June 2016.

The day before, on 10 May, Parliament had passed amendments to the ‘Act on Special Care for Mentally Handicapped Persons’, modifying the conditions for involuntary treatment and for using force in treatment,

¹⁸ Estonia, Equal Treatment Act, Riigi Teataja I 2008, 56, 315.

¹⁹ Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers Text with EEA relevance. Official Journal L 128, 30/4/2014, pp. 8–14.

²⁰ Already on 3 March 2015 the Finnish Parliament passed the Act on the Ratification of the Convention on the Rights of Persons with Disabilities and its Optional Protocol but Finland decided not to deposit its instrument of ratification until all necessary legislative changes were passed in Parliament.

as these were previously of a very general nature. Because of these provisions the Act was considered to violate the CRPD. The government proposal for amendments of the Act was heavily criticised in the Constitutional Committee of the Parliament for allowing too widely formulated preconditions for involuntary treatment. Because of the concerns of the Constitutional Committee the Social Affairs and Health Committee changed the wording of the proposed Act after which the Parliament accepted the amendments to the Act on Special Care for the Mentally Handicapped. The Parliament had previously amended the Municipality of Residence Act and the Social Welfare Act.

Internet source:

<http://www.formin.fi/public/default.aspx?contentid=346204&nodeid=15146&contentlan=2&culture=en-US>, accessed 14 July 2016.

CASE LAW

Discrimination by a bank not providing reasonable accommodation to a blind customer²¹

The National Non-Discrimination and Equality Tribunal of Finland prohibited a bank from continuing discrimination against a blind customer.

The claimant had asked her bank to provide the list of changing password codes needed to use the bank account electronically through the Internet, while at the same time admitting that she could not see the passwords herself due to her blindness and would therefore need the help of others to use the bank account. The bank had responded that according to the Act on Strong Electronic Identification and Electronic Signatures²² a person cannot divulge the codes needed to use electronic banking to anyone. On the basis of security reasons, the bank therefore refused to provide the service to the claimant.

The National Non-Discrimination and Equality Tribunal stated that the Non-Discrimination Act has a primacy status in relation to other legislation and that simply referring to other legislation does not justify a discriminatory treatment. The Tribunal referred to the provision of the Non-Discrimination Act imposing the obligation to provide reasonable accommodation in providing services to persons with disabilities. The Tribunal stated that according to the research information it had requested, many banks provide the codes also in Braille to customers who otherwise cannot use the services and the costs of this to the banks are minimal. The Tribunal prohibited the bank from continuing the discrimination against the claimant and imposed a conditional fine of EUR 50 000 in order to enforce compliance with its injunction. The conditional fine was not intended to be enforced if the discrimination was not continued.

The decision reflects the principles of the new Non-Discrimination Act that differential treatment based on legislation also needs to have an acceptable objective and proportionate measures and that other existing legislation does not justify failure to provide reasonable accommodation. The conditional fine imposed takes into consideration the importance of access to electronic services in today's society and also the strong financial position of the bank.

Internet source:

http://yvtltk.fi/material/attachments/ytaltk/tapausselosteet/tapausselosteet2015/tTdYps85n/TS_14_12_2015_kohtuulliset_mukautukset-verkkopankkitunnukset.pdf, accessed 14 July 2016.

21 Non-Discrimination and Equality Tribunal, 14 December 2015, 31/2015, published online 28 January 2016.

22 Act on Strong Electronic Identification and Electronic Signatures (7 August 2009/617), <http://www.finlex.fi/fi/laki/ajantasa/2009/20090617> accessed 14 July 2016.

Discrimination by public employment authorities not providing reasonable accommodation to a disabled student


 Disability

The claimant was a student with a disability who applied for an unemployment benefit when starting to study at University. Her application was rejected by the local office of public employment and business authorities, applying a regulation which sets as a requirement for granting the benefit that 'Unless otherwise provided for a specific reason' the studies for which the benefit is applied have been interrupted for at least one year.²³ The claimant brought a claim before the National Non-Discrimination and Equality Tribunal, which held that the employment office should have considered the disability of the claimant to be a 'specific reason' under the relevant legislation and should have allowed her to use the unemployment benefit for studying as a reasonable accommodation measure.²⁴ The Tribunal also considered that the employment office had thus neglected its duty to promote equality required by the Non-Discrimination Act.

The Tribunal thus considered that the Non-Discrimination Act and the requirement for making reasonable accommodation are applicable also when an authority interprets other legislation in granting benefits.

Internet source:

http://yvtltk.fi/material/attachments/ytaltk/tapausselosteet/tapausselosteet2015/GA3RXRkL/YVTltk-tapausseloste-_14_12_2015-kohtuulliset_mukautukset-TE_toimisto.pdf, accessed 14 July 2016.

Design school convicted for discrimination of a deaf student²⁵


 Disability

The claimant was a deaf student who was accepted for enrolment in a design school but was then refused to start the studies when the school was informed that the claimant was deaf and would bring a sign language interpreter to the classes. The school claimed that the student had not informed them sufficiently in advance and that there was not enough room in the classrooms to allow the interpreter to be present.

The Helsinki District Court convicted the school for breaching the prohibition of discrimination in the Penal Code, ordering the director of the school to pay a fine amounting to EUR 1280 and EUR 8000 as compensation to the student. It is noteworthy that when interpreting the 'acceptable reasons' for differential treatment provided in the Penal Code, the Court referred to the duty to make reasonable accommodation as contained in the Non-Discrimination Act.

FR

France

LEGISLATIVE DEVELOPMENT

Law of 14 June 2016 to fight against discrimination based on social precariousness


 Other ground

A parliamentary legislative proposal of the socialist group to create a prohibited ground of discrimination regarding social precariousness (*précarité sociale*) was discussed in first reading before the Senate on 18 June 2015, and was then voted on in identical terms on 14 June 2016 by the National Assembly.

²³ The Act on Public Employment and Business Service 28 December 2012/916, <http://www.finlex.fi/fi/laki/ajantasa/2012/20120916>, accessed 14 July 2016.

²⁴ Non-Discrimination and Equality Tribunal, 14 December 2015, 21/2015, published online 28 January 2016.

²⁵ National court decision, Helsinki District Court 1 February 2016, R15/8331.

The text as adopted does not use the terms 'social precariousness', but decided on the expression 'specific vulnerability resulting from a person's economic situation, whether apparent or known by the author [of discrimination]'. This new ground is to be added to the Penal Code, the Labour Code and Article 2 Paragraph 2 of the law of 27 May 2008. It will therefore be applicable to public and private employment, to independent occupation or employment and to penal prohibition of discrimination in employment and goods and services covered by Articles 225-1 *et seq.* of the Penal code.

This new ground targets direct discrimination against the poor. The future interpretation of the choice of words that was made remains uncertain and may further limit the scope of the protection.

Internet source:

[http://www2.assemblee-nationale.fr/documents/notice/14/ta/ta0757/\(index\)/ta](http://www2.assemblee-nationale.fr/documents/notice/14/ta/ta0757/(index)/ta), accessed 18 July 2016.

Former Yugoslav Republic of Macedonia

MK

CASE LAW

Court decision on discrimination due to pregnancy (Primary court II Skopje case I RO No. 618/15)

Over a period of nine months, a woman worked for an employer (Prosvetno delo AD Skopje) based on a contract for a limited period of time, first for a one-month period and then on three-month extensions to the contract. Once it was discovered that the woman was pregnant, the employer fired her by way of not extending the contract or concluding a new contract. On 17 April 2015, the woman lodged a suit against her employer.

Gender

The First Level Civic Court of Skopje, after four hearings, reached a verdict on 3 March 2016 accepting the woman's arguments. The Court concluded that there had been discrimination based on social status / pregnancy, and decided on damages to be paid to the woman. The Court, however, did not order that the woman be rehired. The verdict was based on the European Convention on Human Rights and on the Macedonian Law on Prevention and Protection from Discrimination. It does not mention the Law on Labour Relations.

Internet source:

<http://www.akademik.mk/wp-content/uploads/2016/04/Presuda-diskriminacija-OSS2-bremenost.pdf>, accessed 17 May 2016.

Constitutional Court decides on discrimination due to different retirement ages of women and men

On 29 June 2016 the Constitutional Court of the Republic of Macedonia adopted a decision for the derogation of parts of the relevant articles of the Law on Labour Relations stipulating different ages as condition for obligatory retirement for different genders. Thus, the Court equalized both the age for retirement as well as the possibility of prolongation of the working contract by will only of the worker up to the age of 67 for men and women.

Gender

In 2014, the introduction of the possibility of the increase of the retirement age made discriminatory amendments to the Law on Labour Relations according to which women could continue working until the age of 65, while men could continue working until the age of 67, by submitting a written statement to the

employer before August 31 of the current calendar year. In 2015, a number of university professors and NGOs lodged a complaint before the Constitutional Court. Notably, a group of administrative executives, later in the same year, lodged a complaint regarding a similar provision concerning the retirement age in the Law on Administrative Servants (Article 98).

Although the complaint was lodged in April 2015, the Constitutional Court delayed its decision for quite some time. The verdict was adopted without any public hearing of the Court. However, it is an important decision that opens up opportunities for introducing a gender perspective in law-making on a general level. Importantly, in its decision the Constitutional Court clearly distinguished the law stipulations related to gender in the social laws (on health, retirement insurance etc.), which it found to be positive discrimination.

The Constitutional Court did not relate the two complaints and therefore did not decide on the similar related provision contained in the Law on Administrative Servants. Nevertheless, the Law on Administrative Servants covers a vast number of workers and there are no apparent, justifiable reasons for different treatment of male and female administrative servants regarding their retirement age. It is to be expected that the Constitutional Court will eliminate the different retirement ages for administrative servants in a separate decision.

Internet source:

<http://www.ustavensud.mk/domino/WEBSUD.nsf>, accessed 26 July 2016.

POLICY DEVELOPMENTS

The appointment of new members of the equality body by Parliament raises concerns regarding its independence²⁶

In 2011, when the first members of the Commission for Protection against Discrimination (the equality body) were appointed, civil society organisations and the parliamentary opposition raised serious concerns regarding the (lack of) fulfilment of the prescribed criteria for membership, the failure to select much better qualified candidates, and the failure to meet the Paris Principles (appointment of persons from the executive branch in a decision-making role and composition which does not reflect the society at large).

After the mandate of the first composition of the Commission expired, on 11 January 2016, the Assembly appointed the seven new members (including one reappointment). Among the newly appointed members there are persons who are publicly known as supporters of the ruling party, have publicly voiced homophobic statements and placed discrimination as well as hate crime and hate speech into 'perspective'. The appointments have again raised similar concerns among Members of Parliament from the opposition as well as human rights activists and civil society organisations. The largest network of organizations working on the equality and non-discrimination 'Network for Protection against Discrimination' published a statement, calling into question the competence of the members and stating that this will further complicate the access to justice of the victims since this body will not be independent as long as it is formed by known government supporters.²⁷

Internet source:

Parliament website, 'Proposal for a decision for appointment of the members of the Commission for protection against discrimination': <http://www.sobranie.mk/materialdetails.nsp?materialId=631e99a8-f038-41d6-ae48-1589f8985e41>, accessed 14 July 2016.

26 Decision on Appointing Members of the Commission for Protection against Discrimination, adopted by the Assembly of the Republic of Macedonia, No. 08-183/1, 11 January 2016.

27 'Incompetent Composition of the Commission for Protection against Discrimination', Macedonian Helsinki Committee Website, <http://www.mhc.org.mk/announcements/357#.Vssc28cj0wB>, accessed 11 August 2016.

Study on concerns and needs of LGBTI persons

The LGBT Centre of the Helsinki Committee of the Republic of Macedonia published the first study on the concerns and needs of LGBTI persons in the country.²⁸ The study focuses on the areas of social protection, legal services and police conduct.

Sexual
orientation

The study found that 39 % of the surveyed persons consider that they have been victims of discrimination, although 75 % of them did not report the discrimination anywhere. Some 38 % of interviewees consider that they have been discriminated against at the workplace because of their sexual orientation and/or gender identity, with one quarter considering that their sexual orientation was the reason behind the lack of any promotion. Also one quarter of persons consider that they have been fired because of this, whereas 27.7 % did not get the job they applied for because of this. Out of these, a high 90 % did not report the discrimination to any of the competent institutions.

Even more alarming are the findings that 66 % of the surveyed persons reported being subjected to violence due to their sexual orientation and/or gender identity. Out of these, 18 % responded having been subjected to more than one type of violence (physical, verbal, mental, sexual). Out of these 18 %, some 71 % did not report the case. Finally, one of every three persons who reported having been subjected to violence were victims of domestic violence.

The Study further underlines the gravity of the situation arising from the very low reporting rates of both discrimination and violence. The main reasons for underreporting are fear of victimisation and lack of trust in state institutions.

The authors issue a set of recommendations for each of the concerned fields. Common recommendations across fields include the need for sensitisation and awareness raising among state employees and informing citizens of their rights as well as informing the LGBTI persons on how to exercise their own rights. There is also a call for greater cooperation of the state institutions with civil society organisations, but also a call to bring to a halt the scapegoating of CSOs and the setting-up of a negative campaign which causes mistrust in these organizations among the citizens.

The study was conducted in six major urban areas across the country and targeted participants who were selected via convenience sampling.

Internet source:

<http://lgbti.mk/uploads/3b7076e5-dc63-4b58-8bb6-ae2a46d91bc4.pdf>, accessed 14 July 2016.

Annual Reports of the two NHRIs with equality competences note a drop in reported cases

The two national Human Rights Institutions with competences on equality and protection against discrimination – the Commission for Protection against Discrimination (CPAD) and the Ombudsperson – published their annual reports for 2015.

All
grounds

28 Kocho Andonovski et al., 'Analysis of the problems and needs of LGBT persons in Republic of Macedonia in the area of social protection, legal services and police conduct' <http://lgbti.mk/uploads/3b7076e5-dc63-4b58-8bb6-ae2a46d91bc4.pdf>, accessed 11 August 2016.

Both institutions received fewer complaints than the previous year, although the CPAD experienced a drop in cases which was far more significant than the drop noted by the Ombudsperson. In its annual report, the CPAD attributes the drop in reporting rates to its 'low technical capacities'.²⁹

The cases filed with the CPAD in 2015 presented claims on the following discrimination grounds: 9 on ethnicity, 8 on personal or social status, 8 on mental or physical disability, 8 on age, 8 on health status, 5 on political affiliation, 4 on family or marital status, 4 on social origin, 3 on language, 3 on education, 2 on sex, 2 on race, 2 on citizenship, 2 on religion or religious belief, 2 on other beliefs, 2 on property status, 1 on colour of skin, 1 on gender, 1 on belonging to a marginalised group, 17 cases where no ground was claimed, and 14 under 'any other ground'. The cases concerned the following fields: 30 in employment and labour relationships; 4 in access to goods and services; 14 in social security; 4 in judiciary and administration; 3 in public information and media; 3 in education, science and sports; 4 in housing; 13 in which no field was claimed by the applicant; and 3 in 'other fields' as provided for under the law. Like previous years, the numbers provided by the CPAD regarding cases filed, initiated and closed do not add up and therefore do not provide useful information.

Both of these two bodies did certain research, of which two studies are more notable in relation to gender equality: the CPAD analysed the differences in wages between men and women, while the Ombudsperson focused on the ratio between the genders in the employment in government services, including the ratio at management level. In addition, the CPAD has completed, but not yet published, an analysis of the harmonization of the national equality legislation across fields and grounds against international standards. It has also completed but not yet published an analysis on stereotypes, prejudice and discrimination in primary school education text books.

The Ombudsperson's Report was presented to and discussed by the Parliament in June 2016. The MPs of the ruling coalition expressed the opinion that the report does not enable them as Parliament to act upon its findings. Hence, the report was accepted solely as information, not as a recommendation. Furthermore, MPs of the ruling coalition also criticized the Ombudsperson's report for failing to mention the Government's successes in the field.³⁰

Internet sources:

2015 Annual Report of the Ombudsperson: http://ombudsman.mk/upload/Godisni%20izvestai/GI-2015/GI_2015-za_pecat.pdf;

2015 Annual Report of the Commission for Protection against Discrimination: <http://www.akademik.mk/wp-content/uploads/2016/04/diskriminacija.pdf>; both accessed 14 July 2016.

DE

Germany

LEGISLATIVE DEVELOPMENTS

Law on participation

The German Parliament passed a reform bill on 12 May 2016 intending to transpose the UN Convention on the Rights of Persons with Disabilities. The law sets a substantially amended framework for disability law in Germany, aiming to improve the integration of persons with disabilities and including, among others, provisions on:

29 Annual Report for 2015 of the Commission for Protection against Discrimination (2015) <http://www.akademik.mk/wp-content/uploads/2016/04/diskriminacija.pdf>, accessed 14 July 2016.

30 Report from Session 73 of the Committee on Political System and Inter-Ethnic Relations held on 30 May 2016.

- the adaptation of the concept of disability as provided by the UN Convention. The terms ‘interaction with various barriers’ of Art. 1 of the Convention are framed as ‘interaction with barriers caused by attitudes and the environment’; the terms ‘long term’ are defined as ‘most probably longer than 6 months’, Section 3;
- discrimination by failure to provide reasonable accommodation being explicitly recognised, Section 7;
- improved barrier-free access to public institutions and buildings: in 2021 Federal authorities have to report about their measures in this respect;
- mandatory simple language texts of public authorities;
- a dispute resolution mechanism of the Federal Government Commissioner for matters relating to persons with disabilities between public authorities and individuals;
- gender aspects, especially multiple discrimination of women with disabilities. An explicit reference to multiple discrimination of women with a disability is included in the duty of public authorities to eliminate all forms of discrimination, Section 2; improved public participation of organisations of persons with disabilities;
- a higher personal allowance for persons with disabilities relying on public monetary support for integration;
- better coordination of the activities of the Länder, including simplified access to support;
- monetary subsidies for employers to integrate disabled persons.

The additional costs of the measures of the law amount to 1.5 billion Euros for the Federation and 350 million for the Länder. The law will enter into force one day after its promulgation in the Federal Gazette.

A major criticism voiced by political parties and NGOs is that private parties, e.g. enterprises are not obliged to provide for barrier-free access. The bill relies on voluntary action in this respect. The responsible Minister commented that she would have preferred to include such a regulation on mandatory barrier-free access in the private sphere in the law but had not found enough political support in the German coalition Government.

Internet source:

<http://www.bundestag.de/dokumente/textarchiv/2016/kw19-angenommen-abgelehnt/422562>, accessed 12 August 2016.

Draft on the new regulation of maternity protection proposes substantial amendments to the current Statute on Maternity Protection

On 28 June 2016, the Federal Ministry for Family, Seniors, Women and Youth presented a draft law on the new regulation of maternity protection. The draft law follows a previous draft from March 2016 that covered special working protection rules, dispensation and several employment prohibitions, which was heavily criticized by The German Women Lawyers Association.

Gender

The draft of 28 June 2016 abolishes any employment prohibition against the will of the pregnant or breastfeeding person. In a paradigmatic change, it requires the substantial reshaping of the work environment to meet the needs of pregnant or breastfeeding persons and the requirements of health protection for them. The possibilities for voluntary Sunday work are to be extended. In addition, the new regulations shall be applied to civil servants, judges and soldiers.

The draft law extends the postnatal protection period from eight to twelve weeks after the birth of a child with disabilities. It also covers protection against dismissal for women who suffer a miscarriage after the twelfth week of pregnancy. The personal scope of maternity protection is extended and now covers any person who is employed, working as an intern/trainee (including pupils and students), public volunteers, those working in a sheltered workshop for persons with disabilities, workers in special ecclesiastical service, home-working or quasi-subordinate workers.

Although the draft employs the term pregnant or breastfeeding woman, its personal scope is much broader by stating in Section 2(1): ‘Woman in the sense of this statute is any person who is pregnant or has recently given birth or is breastfeeding, irrespective of the legal gender status in his*her³¹ birth registration.’ This extension is the consequence of other legal changes. As transgender persons can claim legal recognition of their new gender status without surgery since 2011, ‘pregnant men’ may occur (although there are fierce discussions after giving birth about the question of whether they can be recognized as mothers or fathers in the birth certificate). Moreover, since intersex* children are no longer to be appointed one of two genders after birth (since 2013), persons without a female or male gender status may become pregnant in the future.

Internet source:

<http://dip21.bundestag.de/dip21/btd/18/089/1808963.pdf>, accessed 30 June 2016.

New legislation to increase the number of women in higher positions in the civil service of North Rhine-Westphalia

On 26 June 2016, the Statute on the Modernization of the Civil Service Law of North Rhine-Westphalia of 14 June 2016 entered into force. Among other issues, the law aims to promote the position of women in the state’s civil service. Although women account for the majority in many areas of the civil service, their proportion in higher positions and wage groups is much smaller and they are clearly underrepresented in leading positions. Section 20 of the new Statute clearly states that pregnancy, maternity protection, parental leave, childcare and care for dependent relatives must never lead to disadvantages concerning the appointment or promotion in the civil service.

Concerning the first appointment for the civil service, female applicants are to be given preference in areas in which women are underrepresented in the event of equal qualification, aptitude and professional performance, unless specific hardships occur in the person of a male applicant. This is the well-known formula for preferential treatment of female applicants in case of underrepresentation of women and consistent with ECJ case law on this topic.

Under Section 19(6) of the Statute concerning promotion, female civil servants are to be given preference in the event of *substantially* equal qualification, aptitude and professional performance, unless specific hardships occur in the person of a male applicant. The preferential promotion of women applies to all higher positions with a proportion of female civil servants that is lower than the corresponding lower positions as long as the proportion of women in the higher position applied for has not reached 50 %. Thus, women are to be given preference in promotion in the event of *essentially* equal qualification, after a 2014 legal study showed that gender quotas are unsuccessful in practice due to the sophisticated assessment procedures leading to the result that it is nearly impossible for women to be equally qualified.

Internet source:

Statute on the Modernization of the Civil Service Law of North Rhine-Westphalia of 14 June 2016; https://recht.nrw.de/lmi/owa/br_vbl_detail_text?anw_nr=6&vd_id=15674&ver=8&val=15674&sg=0&menu=1&vd_back=N, accessed 30 June 2016.

31 Person is a female term in German thus avoiding the question how to address these persons by way of using a gendered possessive pronoun. As an exact translation is not possible, the asterisk is used here to include transgender as well as intersex* persons.

CASE LAW

Religious exceptions in German employment law

This case concerns an employer who is affiliated with the Protestant Church in Germany and bound by the internal regulations of the Protestant Church in Germany on employment. The employer published a job advertisement for a limited-term contract to write a shadow report on the International Convention on the Elimination of All Forms of Racial Discrimination. The advertisement contained a passage that a precondition for an application was the membership of the Protestant Church or a church associated with the Working Group of Christian Churches in Germany. The claimant, who is not a member of a religious community, remained in the first round of candidate assessment but was not invited for an interview. She argued that she was not considered for the position because of her religious beliefs.

Religion
or belief

After two lower instance decisions (the first instance finding the complaint in part well-founded, the second instance dismissing the claim), the Federal Labour Court formulated a preliminary reference to the CJEU.³²

The first question is whether an employer can determine himself whether a certain religious orientation is a genuine, legitimate and justified requirement for a certain professional activity. The second question is whether the following provision (Article 9.1 General Act on Equal Treatment) is applicable in this case: 'A difference of treatment on the grounds of religion or belief of employees of a religious community, facilities affiliated to it (regardless of their legal form) or organisations which have undertaken conjointly to practice a religion or belief, shall not constitute discrimination where such grounds constitute a justified occupational requirement for a particular religion or belief, having regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination'. The third question concerns a clarification of the content of Article 4.2 Directive 2000/78/EC dealing with occupational requirements.

This preliminary reference is of crucial importance for clarifying the legal framework in which organisations with a religious ethos can rely on religious exceptions in employment. Given the importance of the Christian Churches as employers in Germany, this is of great practical significance. So far, religious organisations enjoy a wide discretion as to the application of religious exceptions to equal treatment.

Internet source:

http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2016&nr=18549&pos=0&anz=15&titel=Ber%FCcksichtigung_der_Konfession_bei_der_Einstellung, accessed 14 July 2016.

Federal Constitutional Court rules that a decision of the Federal Labour Court violated the constitutional prohibition of sex discrimination under Article 3(2) of the German Basic Law

The female claimant was employed by an airline that cancelled all flights from, to and in Germany and therefore dismissed all of its employees in Germany in December 2009 and January 2010. Not meeting the requirements of a collective redundancies procedure, these dismissals were invalid. The claimant was on parental leave at the time of the collective redundancies. Therefore, the competent authority decided that her dismissal was not subject to the special collective redundancies protection but was covered by the regulations of the Federal Statute on Parental Leave and Parental Allowances. After the necessary permission by the highest state authority, the dismissal of the claimant became valid in March

Gender

32 Federal Labour Court, 17 March 2016 – 8 AZR 501/14 (A).

2010 under the regulations on dismissal protection during parental leave, while the collective dismissals of her colleagues entered into effect much later after extensive court proceedings. The woman brought a dismissal protection complaint before the Federal Labour Court, which was rejected.

On 8 June 2016, the Federal Constitutional Court decided that the decision of the Federal Labour Court violated the constitutional prohibition of sex discrimination under Article 3(2) of the German Basic Law. The application of the Federal Statute on Parental Leave and Parental Allowances instead of the regulations on special dismissal protection in the case of collective redundancies put the claimant at a disadvantage. While the regulations on parental leave are gender neutral, an evidently greater proportion of mothers than fathers takes parental leave (2014: 41.5 % of working mothers but only 2 % of working fathers). Thus, the non-application of the regulations on special dismissal protection detrimental to parents taking parental leave in fact put female parents at a disadvantage compared to male parents and constituted indirect sex discrimination. This discrimination was not compatible with the German Basic Law. The competent authorities were obliged to apply the advantageous dismissal protection.

Internet source:

Federal Constitutional Court, judgment of 8 June 2016, 1 BvR 3634/13 http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/06/rk20160608_1bvr363413.html, accessed 30 June 2016.

POLICY DEVELOPMENT

Federal Antidiscrimination Body publishes guidelines on preventing and tackling sexual harassment in the workplace

On 20 June 2016, the Federal Antidiscrimination Body published guidelines on preventing and tackling sexual harassment in the workplace. The guidelines were developed in close cooperation with research projects on sexual harassment developed and performed in one of the biggest German hospitals, the Charité Berlin. The publication contains empirical data on sexual harassment in hospitals and on the general knowledge about legal means against sexual harassment in the workplace as well as the evaluation of several work agreements concerning the prevention of and fight against sexual harassment. Causes and consequences of sexual harassment in the workplace are outlined. Moreover, statutory and case law against sexual harassment in the workplace are provided as well as best practices against sexual harassment by three undertakings employing more than 800 000 persons.

Internet source:

http://www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/DE/2016/20160620_Fachtag_sexuelle_Belaestigung.html, accessed 30 June 2016.

Gender

EL

Greece

POLICY DEVELOPMENTS

Ratification of the Revised European Social Charter by the Greek Parliament

On 14 January 2016, the Greek Parliament approved Law 4358/2016³³ on the ratification of the Revised European Social Charter, signed by Greece on 3 May 1996.

33 Greece, Law 4358/2016 'on ratification of the Revised European Social Charter' (OJ 5 A/20 January 2016).

In addition to certain provisions aiming at providing particular protection for children and young people as well as for elderly people, Article 15 seeks to ensure persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community. For this reason, Greece commits to introducing measures to provide persons with disabilities with guidance and vocational training, public or private, to promote their access to employment and to promote their full social integration and participation in the life of the community.

Disability

Internet source:

<https://www.e-nomothesia.gr/diethneis-sunthekes/nomos-4358-2016.html>, accessed 23 September 2016.

Ombudsman's special Annual Report 2015 on discrimination

The Ombudsman Report, which was published on 22 March 2016, describes the actions that the Ombudsman took during 2015 as a body charged through Law 3304/2005 with the promotion of equal treatment irrespective of racial or ethnic descent, religious or other beliefs, disability, age or sexual orientation. During 2015, the Ombudsman investigated 224 cases of alleged discrimination, out of which 109 were unresolved cases of previous years. Some 42 cases were archived, as they were found to fall beyond the scope of the Ombudsman's jurisdiction, to be insubstantial or because the applicants failed to provide the necessary information for further investigation. In 22 cases, the Ombudsman found that no discrimination had occurred. In 48 cases however, the Ombudsman found that some form of breach of the principle of equality had taken place. In 32 of these cases the administrative authorities complied with the decision, while in 16 cases they did not.³⁴

Racial or ethnic origin

Religion or belief

Age

Disability

Sexual orientation

With reference to discrimination based on ethnic origin and the access to public office, the Ombudsman repeated in its 2015 Report that the particularities of specific offices (such as the police and the army) initially lead to an exclusion of foreigners from holding positions in public offices. However, she emphasised that differences amongst Greek citizens based on their ethnic origin should not be considered a fair criterion for discrimination. The report noted a stagnation in government actions or initiatives to improve living conditions and address the acute problems that the Roma face in relation to housing. The investigation of referrals in 2015 that related to the education of Roma children demonstrated that the issue of the educational exclusion of Roma children still remains unresolved and complicated, even though the State has carried out educational and support programmes in order to attract and maintain Roma children in school.

As for the section on disability, the issue of reasonable accommodation and definition of its content has frequently been addressed by the Ombudsman. In 2015, it examined whether employees with a contract for an unlimited period of time at Citizen Services Centres, who have been appointed due to points awarded for locality, may ask to be transferred elsewhere; if they are disabled, prior to the established ten-year mark (even if they have vowed to remain in their position for ten years). The Ombudsman stated that the Government, as an employer, had failed to take the necessary measures for reasonable accommodation as stipulated by Article 10 Law 3304/2010, by refusing to relocate employees with disabilities. According to the 2015 Ombudsman Report, non-discrimination in the field of disability is ensured through the establishment and application of special measures which eliminate or minimize those conditions which obstruct the equal enjoyment or rights and lead to a de facto discrimination. The incomplete or non-existent establishment of such measures and especially their incomplete materialization, even when they are required by law, has constantly been addressed by the Ombudsman, as can be seen by the cases that were examined in 2015. As for discrimination on grounds of religion in the field of education, the Report supported that in order to respect religious freedom, a student that has

³⁴ Please note that the recommendations of the Greek Equality body are not binding.

been excused from a course of religion should not be sanctioned in any way, nor should he/she be forced to undergo an onerous precondition, such as being forced to reveal his/her religious beliefs.

The 2015 Report used all positive aspects of anti-discrimination legislation, which are mostly related to the establishment of new institutional tools. On the other hand, it also highlights the shortcomings of the relevant legislative framework concerning both its regulatory range as well as the fragmentation of responsibilities caused by the existence of three distinct equality bodies.

Internet source:

<http://www.synigoros.gr/resources/docs/ee2015-17-nomoth-protaseis.pdf>, accessed 14 July 2016.

HU

Hungary

CASE LAW

Court upholds Equal Treatment Authority's decision on failure to adequately plan and prepare the winding up of segregated Roma neighbourhood

Racial or
ethnic origin

The municipality of Miskolc (North-East Hungary) started to systematically terminate the social-housing tenancies of persons living in a highly segregated, low-comfort part of the town, called the 'Numbered Streets' without taking any measures to provide the tenants with alternative housing and thus exposing them to the threat of homelessness. In its decision of 15 July 2015 (No. EBH/67/22/2015) the Equal Treatment Authority (the Authority) established that the municipality of Miskolc subjected the residents of the Numbered Streets to the threat of homelessness or having to move to other segregated areas, and by doing so, discriminated against them on the basis of their social status, financial situation and Roma origin.³⁵ The Authority ordered the municipality to put an end to the discriminative situation by developing an action plan detailing where in Miskolc, and how and from what sources it can provide the tenants of the Numbered Streets with adequate housing. The Authority also called on the municipality to stop its ongoing discriminative practice until the action plan was prepared. Furthermore, the Authority ordered the municipality to prepare a separate action plan on how it will provide adequate housing to those who have already become homeless or face a direct threat to that effect because of the discriminative practices. Finally, the Authority imposed a fine of EUR 1 670 (HUF 500 000) on the municipality. The municipality requested a judicial review of the decision – among other things – on the basis of the following arguments:

- the Authority does not have the authorisation to examine a practice, only the particular contractual relationships between the municipality and individual tenants;
- the elimination of the segregated areas concerns all the tenants irrespective of their ethnicity, social status or financial situation, so no discrimination can arise in this case;
- the Authority is not authorised to oblige the municipality to take certain positive measures (such as the adoption of an action plan);
- the Authority did not specify the contents of the action plan, so the decision is impossible to carry out.

In its decision of 25 January 2016, the Metropolitan Administrative and Labour Court rejected the municipality's request for review and upheld the Authority's decision in every aspect.³⁶ The Court recalled that under Article 4 of the ETA, public entities falling under the law's scope are obliged to respect the

³⁵ See: http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/295e60ba47402526d5e682f8eeb465f8/67_2015_hat.pdf, accessed 23 September 2016, as well as *European Equality Law Review* Issue 2016/1, pp. 95-96.

³⁶ National court decision No. 6.K.33.048/2015/17 of the Metropolitan Administrative and Labour Court of 25 January 2016.

requirement of equal treatment in all their legal relationships, measures and procedures. The elimination of the segregated areas (as all practices) is a series of measures, therefore the Authority did have the authorisation to examine the municipality's actions related to the elimination of the neighbourhood and its aggregated effects.

Quoting the CJEU's judgment delivered in Case C-83/14,³⁷ the Court pointed out that for indirect discrimination to be established, 'it is sufficient that, although using neutral criteria not based on the protected characteristic, it has the effect of placing particularly persons possessing that characteristic at a disadvantage'. In the Court's view the declared objective of the series of measures by the municipality – the realisation of urban planning and the exercise of the municipality's ownership rights – was – at least apparently – neutral, so it had to be established whether it had the effect of placing particularly persons possessing that characteristic at a disadvantage. The Court's conclusion was that due to the composition of the population in the Numbered Streets, the municipality's actions clearly affected persons belonging to a number of protected groups (Roma, indigent, disadvantageous social status) at a disadvantage, and therefore the alleged background motives of the municipality were irrelevant.

The Court pointed out that the municipality may not be exempted from its responsibility on the basis of its ownership rights, as in relation to tenants in social housing, it performs a dual function of the owner and the entity responsible for the social welfare of its residents. The parties (the municipality on the one hand and the tenants on the other) are in a situation of structural imbalance, which fully substantiates the restrictions of property rights necessitated by the principle of equal treatment.

The Court also established that the municipality was guilty of indirect discrimination through its failure to take measures to protect from homelessness those who were evicted from the houses in the Numbered Streets (although – among other things – its own integrated town development strategy contained the obligation to do so).

The Court emphasised that since almost all the tenants in the Numbered Streets fall into one (or more) of the three protected groups listed by the Authority, the comparator in this case is necessarily hypothetical.

Finally, the Court pointed out that the statutory possibility of obliging the discriminator to terminate the injurious situation, when the violation manifests itself in the form of an omission would be devoid of any meaning if the Authority could not oblige the violator to take specific action. Therefore, the Authority was authorised to oblige the municipality to draft action plans. At the same time, taking into consideration the specific knowledge that the municipality has, and also the municipality's scope of authority, it was justified that the Authority did not provide a detailed action plan itself, but only set the goals and trusted the municipality to come up with the details.

The Court established a number of important principles with its judgment, including:

- the application of the hypothetical comparator to a situation where practically all persons affected by the practice fall into the protected categories and therefore, the comparison is problematic, and
- the approval of the Authority's approach of prescribing the preparation of an action plan to remedy the violation.

Internet source:

<http://dev.neki.hu/miskolci-szamoszott-utcak-mar-minden-letezo-forumon-elmarasztaltak-a-magyar-hatosagok-miskolc-onkormanyzatat/>, accessed 17 August 2016.

37 Case C-83/14, Judgment of the Court (Grand Chamber) of 16 July 2015 (request for a preliminary ruling from the *Administrativen sad Sofia-grad* — Bulgaria) — *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*.

LEGISLATIVE DEVELOPMENT

Paternity Leave and Benefit Act passed

New legislation regarding paternity leave was debated in the Irish Parliament and passed. The Paternity Leave and Benefit Act 2016 will enter into effect on 1 September 2016.

Gender

The legislation provides for paternity leave of two weeks and for state benefit for the said two weeks. The legislation is drafted using the term 'relevant parent'. The relevant parent is the father of the child, the spouse, civil partner or cohabitant of the mother of the child or a parent of a child where the child is a donor-conceived child; in the case of an adopted child where the child is to be adopted jointly by a married couple then the spouse chosen by that couple to be the relevant parent for the purposes of paternity leave or in any other case the spouse or civil partner or cohabitant (as the case may be) of the adopting mother or sole male adopter of the child. This legislation is applicable to employees and the self-employed provided they have the relevant social insurance contributions.

Only one parent can take such leave. There are also special provisions where the natural father can take paternity leave and the subsequent adoptive father can take such leave (if applicable). The leave can be taken at any stage of the mother's 26-week maternity leave or at any stage of the mother's 24-week adoptive leave commencing on the placement of the child. This means that a couple can choose to avail of the leave at the time of the birth or at the end of the period of paid maternity leave; thus, if they choose they can have 28 weeks of continuous paid maternity/paternity leave. A mother must take two weeks of maternity leave prior to the date of confinement.

There are specific detailed rules for notification of the intention to take paternity leave but there is provision for the relaxation of these rules where the date of confinement occurs more than four weeks before the expected date of confinement. There are provisions for late confinement, delay in taking paternity leave in the event of the illness of a parent, the hospitalisation of the child, and the transfer of any balance leave on the death of a parent to the other parent (i.e. at the end of the mother's maternity leave); and there is a similar provision on the death of the other parent. There are mirror provisions for adoptive leave.

The legislation also includes provisions for the protection of the father or the relevant parent in respect of their employment and an entitlement to their job post-paternity leave or to suitable alternative employment. Furthermore, there are provisions for protecting the relevant parent from penalisation for the taking of leave. Parents on paternity leave shall be entitled to the greater of EUR 230 gross per week or the amount of illness benefit (including any increases in that benefit). The commencement date for such leave is 1 September 2016.

In addition to this legislation, the Prime Minister (Taoiseach) of Ireland announced on 10 June 2016 that there is to be an extension of parental leave in 2017.

Internet source:

<http://www.oireachtas.ie/viewdoc.asp?DocID=33534&CatID=87>, accessed 26 August 2016.

CASE LAW

***Mohan v. Ireland and The Attorney General* [2016] IEHC 35 (on appeal)**

This case was brought before the High Court in January 2016 within the context of the Irish general election, which was held on 26 February 2016. The claimant sought to challenge the constitutional validity of the Electoral (Amendment) (Political Funding) Act 2012. This legislation provided that at least half of the future funding of political parties was linked to certain gender quotas being reached in relation to candidates at the next (and the next following) general election. This legislation came into operation in respect of the 2016 general election. The legislation provides that certain state funding to registered political parties shall be reduced by 50 % unless at least 30 % of the candidates whose candidatures were authenticated by the political party at the next general election were women and at least 30 % were men. This provision is to remain in force for the next seven years. After seven years, the gender quota becomes 40 % women and 40 % men.

Gender

The claimant is a member of the *Fianna Fáil* party (the main opposition party) and was nominated to contest the party's convention to select a candidate(s) to contest the impending general election in the Dublin Central constituency. The claimant was told that a female candidate had to be selected at the convention and a woman was selected. The claimant did not challenge that direction from the party. Instead the claimant challenged the constitutionality of the relevant section of the legislation. Among other things, he claimed that the law contravened the requirement under Article 16.1.1 of the Constitution that 'every citizen, without distinction of sex, ... shall be eligible for membership of *Dáil Éireann* ...'. He also argued that the only way to achieve the party's gender quota was to exclude him from the selection convention for the party in the Dublin Central constituency.

Given that this was a constitutional action against Ireland and the Attorney General, the claimant had to show that he had been adversely affected by the particular section of legislation. In a judgment delivered on 2 February 2016, the High Court decided, among others, that the claimant's rights to equal treatment had not been adversely affected by the legislation because he had failed to establish any causal connection between the direction of the party excluding his nomination from consideration at the candidate selection convention and the operation of that provision. The claimant had no standing to bring such an action as he could not show that he had been adversely affected by the legislation, and the case was dismissed. Therefore, the constitutionality of the legislation was not fully considered.

The judgment is on appeal with the Court of Appeal.

Internet source:

<http://www.courts.ie/Judgments.nsf/0/C9788FB8B228680580257F4F0037B507>, accessed 25 February 2016.

Italy

IT

LEGISLATIVE DEVELOPMENTS

Decree changes sanctions for infringement of the ban on gender discrimination

Changes from criminal to administrative sanctions provided by Decree No. 8 of 15 January 2016 involved some changes in the sanctions for infringement of the ban on gender discrimination in work relationships. Minor criminal sanctions (fines from EUR 250 to 1500) have been substituted by administrative monetary

Gender

sanctions from EUR 5000 to 10 000. The change regards all cases of discrimination covered by the Code of Equal Opportunities (Decree No. 198/2006), i.e. all sectors, both public and private, and all aspects of the work relationship: access to work, equal pay, equal working conditions etc.

On the whole, the reform aimed at reducing the work of the overburdened criminal courts. However, although the new sanctions are higher than the previous ones, they have lost both the greater deterring effect of criminal sanctions and the enforceability of the special procedure of Article 15 of Decree No. 124/2004. The procedure allowed the employer to avoid a criminal trial by the restoration of a lawful condition and payment of a quarter of the maximum fine. As yet, no published cases of enforcement of these provisions have been recorded.

Internet source:

Decree No. 8 of 15 January 2016, published in OJ No. 17 of 22 January 2016: <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2016-01-22&atto.codiceRedazionale=16G00011¤tPage=1>, accessed 12 April 2016.

Reform of the Constitution approved regarding equality between men and women

A wide reform of the Italian Constitution, which mainly regards Parliament and Local Bodies, was approved and will be submitted to a confirmative referendum. Among other amendments, the Constitutional Act of 15 April 2016 provides an amendment to Article 55 of the Constitution, stating that, 'The rules regarding the elections of the two Chambers of Parliament shall promote gender balance in political representation'. Another amendment, to Article 122, entitles national legislation to fix the framework aimed at ensuring gender balance in political representation at a regional level. Currently, the whole reform is still 'on condition' as it will soon be submitted to a confirmative referendum requested by at least one fifth of the Members of Parliament.

Recent legislation, both at national and regional level, already provides for the promotion of the principle of gender equality in politics. Nevertheless, the express acknowledgment of this principle as a fundamental one would mark an important step forward in the achievement of substantial equality in this field.

Internet source:

Constitutional Act of 15 April 2016, published in OJ No. 88 of 15 April 2016,

Lawful interpretation of the rules regarding parental leave issued by Ministry of Labour

On 11 April 2016, the Ministry of Labour issued a lawful interpretation (under Article 9 of Decree No. 124/2004, a so-called 'interpello') of Article 32 of Decree No. 151/2001. In regard to an amendment provided by Decree No. 80/2015, which cut the notice to take up parental leave from fifteen to five days, it stated in Interpello No. 13 that clauses of collective agreements signed before the issue of the amendment and providing for a longer period of notice of fifteen days (by reference to the previous text of the Decree) are still enforceable. Moreover, as regards the possibility for the employer to postpone parental leave, it reminded employers that the workers' interest has priority, although monthly agreements with the worker or union representatives aimed at reconciling this right with the needs of the enterprise are possible.

This interpretation allows different rules regarding the period of notice depending on the enforceable collective agreement. Moreover, although it clarifies that the use of this right does not require the employer's consent, it also seems to prepare for lawful postponements of the parental leave, on the condition that they are regulated by collective agreements

Internet source:

Interpello No. 13/2016 of the Minister of Labour <http://www.lavoro.gov.it/notizie/Documents/13-2016.pdf>, accessed 28 April 2016.

CASE LAW

European Court of Human Rights order against forced eviction of Roma

The Municipality of Rome had ordered the forced eviction of a woman with a disability of Roma origin and her daughter. The two women were living, together with 322 other people, in a former factory, converted into a reception centre. The Municipality of Rome had notified several families that they had to leave the centre by 28 March, without providing alternative housing, thereby exposing them to the risk of homelessness, thus contributing to their social exclusion and to the children dropping out of school.

Racial or ethnic origin

Two NGOs submitted an application in support of the victims before the European Court of Human Rights. Before examining the merits of the application, the ECtHR adopted an interim measure, according to Article 39 of the Rules of Court, ordering Italy to refrain from executing the forced eviction of the two women. The interim measure is not a public document but it is likely that the right alleged to be infringed is the right to respect for private and family life (Article 8 ECHR). The proceedings continue for the purposes of reviewing the merits of the application.

This is probably the first time that the ECtHR adopts an interim measure against Italy regarding forced evictions of persons. Following a judgment of the Tribunal of Rome adopted in May 2015,³⁸ this is another important step that could shed some light onto a consolidated pattern of Roma segregation in housing.

Internet source:

<http://www.21luglio.org/la-corte-europea-ferma-litalia>, accessed 14 July 2016.

Latvia

LV

POLICY DEVELOPMENTS

Comprehensive survey on Roma in Latvia

A comprehensive survey on 'Roma in Latvia' commissioned by the Society Integration Fund and conducted by the market and social research centre 'Latvijas fakti' assesses the situation and barriers for Roma to access education, employment, healthcare and housing in Latvia.³⁹ The report includes the results of a quantitative survey of 365 Roma, five focus-group discussions and in-depth interviews with 200 decision makers, representatives of public-sector organisations, human rights and Roma experts. There are between 8 000 and 12 000 Roma in Latvia.

Racial or ethnic origin

Education

The survey shows that almost all Roma respondents want their children to learn to read and write (98.8 %), to receive primary education (97.5 %) and secondary education (88.5 %), and to attend kindergarten (81.5 %). In practice, 70.6 % of Roma children (aged 3-7) attend kindergarten, with parents

³⁸ See *European Equality Law Review* Issue 2015/2, p. 108.

³⁹ Market and Social Research Centre 'Latvijas Fakti' (2015). Roma in Latvia (Romi Latvijā), p. 44. The research was conducted within the project 'Different people. Diverse experience. One Latvia II' No. JUST/2013/PROG/AG/4978/AD.

citing lack of finances, long waiting lists and the language barrier as key obstacles for enrolment in kindergartens. Although the proportion of Roma children enrolled in school has been increasing in recent years, according to the Ministry of Education and Science a significant proportion of them (almost 16 %) drop out of primary school before its completion. In the survey, lack of motivation to continue studies, early pregnancy/family, emigration or moving to another place of residence in Latvia, low educational attainment (including language barriers), economic and financial aspects are cited as key barriers.

Employment

The survey reveals a much higher unofficial unemployment rate than the official one; 67.6 % of the surveyed Roma of working age do not work, while the labour force survey conducted by the Central Statistical Board shows an unemployment rate of 9.7 % as regards Roma.⁴⁰ 82.3 % of the surveyed Roma confirmed that they themselves or their closest family members have allegedly been discriminated on the ground of their ethnic origin while attempting to access employment.

Healthcare

According to the survey, 98.2 % of Roma have a family doctor, of those close to 90 % had visited this family doctor during the last 12 months. The survey also shows that there is a disproportionate share of officially registered persons with disability among Roma (16.6 %) as opposed to the national average (8.5 %).⁴¹ Although the economic advantage of being attributed the status of 'disabled person' can account for part of this difference, higher disability risk among Roma due to congenital diseases and poor living conditions are cited as key reasons.

Housing

According to the survey, fewer Roma (42.5 %) own a dwelling than the national average (58.8 %),⁴² rental dwelling is used by 18.6 % Roma (national average 12.6 %); and 35.6 % of Roma reside in municipal or state housing. A range of factors restrict Roma access to better housing, including low and irregular income, as well as absence of savings – according to the survey, only 9.4 % have savings exceeding EUR 250. Prejudice against Roma as tenants and neighbours and various other factors also play a role. Roma housing is of poorer standard than that of the rest of Latvian residents. The majority of Roma live in households which lack one of the basic amenities (e.g. water pipe, a flushing toilet, a shower or a bathroom) and the state of the dwelling is poor, sanitation being the key problem. At the same time, Roma actively use the support offered by municipalities and NGOs, predominantly municipal housing benefits.

The survey also lists examples of good practices (Roma teacher assistants, resource centres in four cities in 2014 for Roma children and parents to facilitate Roma inclusion in the mainstream education system, Roma mediator regional network) and presents a range of recommendations in all areas covered.

The survey concludes that low education level, illiteracy and negative stereotypes dramatically restrict Roma access to employment and perpetuate their long-term social isolation.

Latvia signs the Istanbul Convention

After heated debates on 10 May 2016, the Cabinet of Ministers adopted a positive decision on the signing of the Istanbul Convention and it was signed by the Minister of Welfare on 18 May 2016. However, the Ministry of Justice (*Dzintars Rasnačs*) after the respective decision of the Cabinet of Ministers announced that the Parliament (*Saeima*) will nevertheless not ratify it.

40 Central Statistical Board (2015). Latvijas nepārtrauktās Darbaspēka izlases veida apsekojums, at: <http://www.csb.gov.lv/statistikas-temas/metodologija/nodarbinatiba-un-bezdarbs-36895.html>, accessed 23 September 2016.

41 The calculation is based on 2015 CSB data and information on the number of disabled people in 2015 published on the homepage of the Ministry of Employment at <http://www.lm.gov.lv/news/id/6627>.

42 Housing Europe (2015), The State of Housing in the EU 2015. A Housing Europe Review, at <http://www.housingeurope.eu/resource-468/the-state-of-housing-in-the-eu-2015>, accessed 23 September 2016, p. 19.

Prior to the meeting of the Cabinet of Ministers, the Ministry of Justice on 30 April 2016 presented its legal analysis on the possible impact of the Istanbul Convention on the Latvian legal system. The legal research presented the opinion that the Istanbul Convention runs contrary to the Constitution (*Satversme*). Among other things, the analysis stated that the definition of 'gender' is provided separately from 'sex', and therefore the Convention introduces the social concept of gender and ideas of 'genderism'. It argued that this endangers the concept of 'family' provided by the Constitution as a unity between male and female. The study was sharply criticized by many authoritative lawyers and other professionals as well as NGOs representing liberal views on the basis that it lacked legal argumentation. Such position was fully supported by the Ministry of Welfare and Ministry of Foreign Affairs. In addition, the procedure under which the lawyer to conduct the legal study was chosen was sharply criticized.

On 10 May 2016, the President of the State criticized the actions of the Minister of Justice, the primary reasoning being that the Ministry should represent legally argued and objective positions and should not only represent the views of one group of society when conducting legal research. Several NGOs submitted a request to the Prime Minister to call for the resignation of the Minister of Justice. However, the Prime Minister stated there is no sufficiently serious ground for such action.

Therefore, although the Cabinet of Ministers adopted a positive decision on the signing of Istanbul Convention and on 18 May 2016 the Minister of Welfare signed it, the Minister of Justice announced that the Istanbul Convention would not be ratified by the current Parliament or by the following one.

Internet sources:

Decision of the Cabinet of Ministers, project No.TA-895; TA-926, 10 May 2016: <http://tap.mk.gov.lv/mk/mksedes/saraksts/darbakartiba/?sede=869>, accessed 16 May 2016;

The Parliament will not ratify Istanbul Convention (*Rasnačs: Saeima neratificēs Stambulas konvenciju*), portal delfi.lv, 10 May 2016:

<http://www.delfi.lv/news/national/politics/rasnacs-saeima-neratifices-stambulas-konvenciju.d?id=47420095>, accessed 16 May 2016.

UN Committee on the Rights of the Child recommendations for Latvia to improve measures to combat discrimination of vulnerable groups of children

In March 2016, the UN Committee on the Rights of the Child (UNCRC) published its report on Latvia, expressing concern about continuing discrimination against children with disabilities, children belonging to minorities, including Roma children, and children living in rural areas, with regard to their access to adequate health and education facilities.⁴³ It also expressed concern about the lack of data on discrimination faced by LGBTI children and on reported incidents of bullying of those children in schools.

The UNCRC urged Latvia to pay particular attention to these groups, and to ensure the application, in practice, of the different laws prohibiting discrimination; to conduct awareness-raising programmes on non-discrimination and studies on discrimination against LGBTI children and to strengthen its efforts to combat negative attitudes and eliminate discrimination against children on the basis of their sexual orientation, gender identity and sex characteristics.

The UNCRC welcomed the adoption of guidelines for the implementation of the Convention on the Rights of Persons with Disabilities and the measures taken to improve accessibility in public infrastructure and living conditions and to promote inclusive education for children with disabilities.⁴⁴

Disability

Racial or ethnic origin

Sexual orientation

⁴³ UN Committee on the Rights of the Child, Concluding observations on the third to fifth periodic reports of Latvia, published on 14 March 2016.

⁴⁴ Latvia, Ministry of Welfare (2013). Basic Guidelines on the Implementation of the UN Convention on the Rights of Persons with Disabilities 2014-2020, available in Latvian at http://www.lm.gov.lv/upload/2013junijs/Impamn_040613_inv.pdf, accessed 23 September 2016.

However, the Committee expressed concern about the lack of specific legislation to protect the rights of children with disabilities; the lack of detailed information on the number of children in inclusive education; and the stigma and prejudice still endured by children with disabilities.

The UNCRC urged Latvia to adopt a human rights-based approach to disability, recommending the adoption of specific legislation to protect the rights of children with disabilities, to set up comprehensive measures to develop inclusive education and ensure that inclusive education is given priority over the placement of children in specialized institutions and classes, and to train and assign specialized teachers and professionals in integrated classes to provide individual support and attention to children with learning difficulties; and to organize data collection on children with disabilities and develop an efficient system for diagnosing disabilities, necessary for putting in place appropriate policies and programmes for children with disabilities. It also urged Latvia to conduct awareness-raising campaigns targeting government officials, the public and families to combat the stigmatization of and prejudice against children with disabilities.

Internet source:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fLVA%2fCO%2f3-5&Lang=en, accessed 14 July 2016.

LI

Liechtenstein

POLICY DEVELOPMENT

Government approves new national centre for human rights

Since 2005, the Office for Equal Opportunities, which operates under the authority of the Ministry of Society, has been designated to deal with issues relating to disability, gender, migration and integration (including race and ethnicity), sexual orientation and social disadvantage.⁴⁵ In parallel, the Commission for Equal Opportunities was set up in the same year as a consultative body to coordinate activities related to equal opportunities and to implement an interdepartmental anti-discrimination policy. Both organisations are closely linked to the Government, which has triggered quite some criticism and calls for the creation of a truly independent human rights institution.

The Government has therefore proposed to establish a new, independent non-profit organisation for human rights and to reorganise the duties of some government Offices. Thus, the Office for Equal Opportunities, the Commission for Equal Opportunities and the Gender Equality Commission will all be part of the new centre for human rights, as will the former integration department of the Immigration and Passport Office and the Ombudsman Office for Children and Young Persons. On the other hand, some state services which were previously offered by the Office for Equal Opportunities or by other institutions will be transferred onto the Office of Social Services. The new organisation will have its own section in the national budget and the competence to decide on the use of its financial resources.

Internet source:

Government report for consultation: http://www.regierung.li/files/attachments/Vernehmlassungsbericht_SCG.pdf?t=635858688162124450, accessed 17 August 2016.

45 The Office was created in 1996. Between 1996 and 2005 it was solely active as an 'office for equal treatment between men and women'.

Malta

MT

LEGISLATIVE DEVELOPMENT

Equal Opportunities for Persons with a Disability

Act XXIV of 2016 ('the amending Act')⁴⁶ amended the Equal Opportunities (Persons with Disability) Act ('the Disability Act') to increase the equal opportunities of persons with a disability by clearly listing their rights, especially those in relation to the right to family life, and rendering them enforceable before the competent authorities. The 14 rights listed are as follows:

Disability

1. Every person with a disability has a right to life, dignity, respect and mental reproductive and physical integrity. This also includes a duty on the State to guarantee these rights before and after the birth of such persons.
2. Every person has a right to know whether he or she has a disability at the first possible opportunity. The State also has a duty to provide information and early and comprehensive intervention as well as services and help to children with a disability and their families.
3. Persons who abandon, hide, segregate, persecute and exploit such persons will be guilty of an offence under the Disability Act. The law does not seem to provide any sanctions, however, when such an infringement takes place.
4. Every person with a disability has the right to family life and upbringing as any other person.
5. This Act also establishes that the fundamental rights and freedoms found in the Constitution of Malta will be enjoyed by persons with a disability. The State must ensure that the exercise of these rights is also guaranteed when together with the disability there are other factors of discrimination *inter alia*, gender, race and age.
6. Every person with a disability also has the right to freedom of expression, opinion and association. This includes the freedom to search, receive and provide information and ideas on an equal basis with others and by any means of communication of their choosing.
7. Every person with a disability has the right to reach his or her maximum physical, sexual, reproductive, emotional, social, artistic and intellectual capacities.
8. Persons with a disability have the right to take those decisions which affect their life and which they deem to be good for them after being aided to do so if help was requested.
9. Persons with a disability have the right to form a family or a civil union as any other person.
10. The State must ensure that persons with a disability are not discriminated against with regard to marriage, family, their responsibilities as parents and relationships. No person with a disability may be separated from her/his child due to her/his disability.
11. A person with a disability has the right to freely decide with whom to live.
12. Every person with a disability must have at his or her disposal the access to a range of tools of support, community services and facilities including but not limited to personal assistants, technological equipment and any equipment to ensure effective inclusion.
13. Every person with a disability must have access to mobility and orientation training, the use of technological equipment and Maltese Sign Language.
14. The assessment of a person with a disability must be multi-disciplinary and trans-disciplinary and should reflect the actual needs and qualities of the person.

The amending Act provides that the rights of a person with a disability, as defined in Chapter 413, must reflect those listed in the United Nations Convention on the Rights of Persons with Disabilities adopted by the General Assembly of the United Nations on 13 December 2006.

⁴⁶ Act XXIV of 2016 – Equal Opportunities (Persons with Disability) (Amendment) Act 2016, which came into force on 4 May 2016.

The amending Act also provides for a definition of multiple discrimination against persons with a disability which includes, inter alia, discrimination based on a person's gender, age, civil status, sexual orientation, race and ethnicity including the refusal to provide health services of the same standard and quality as that provided to other persons.

The amending Act also creates the new position of 'Commissioner for the Rights of Persons with Disabilities', who shall be appointed by the Prime Minister following consultation with the Minister responsible for disability. The Commissioner has the responsibility to carry out the functions of the Commission. The Commissioner may also pursue all actions, including legal actions, to ensure that the provisions of the Disability Act are adhered to.


Internet sources:

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=27685&l=1>;

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8879&l=1>, accessed 15 July 2016.

CASE LAW

National Commission for the Promotion of Equality (NCPE) decision regarding alleged discrimination in wage on the ground of sex




A complaint was decided on by the National Commission for the Promotion of Equality (NCPE), the national equality body in Malta, in 2015 and published in April 2016 regarding alleged discrimination on the ground of sex in pay/wage and other work-related benefits. The complainant asserted that she received a lower wage than the male employees who had a similar or same rank and responsibilities. She stated that she was the only female manager and her colleagues who were managers and who were in the same scale with the same responsibilities, had a private office and a higher wage, even though she had seniority and more experience. The employer argued that the complainant's job position and role were not comparable with those of the other two managers who happened to be men and there was therefore no discrimination. The employer further stated that the company had treated the complainant fairly and favourably when it complied with her request for flexi-time, even though the company was under no legal obligation to do so. After analysing the evidence collected, the Commissioner of the National Commission for the Promotion of Equality noted that while all the managers' wages differed in amount, the gap between the male managers' wages was smaller than the one between the average male manager's wage and the complainant's wage. The Commissioner found that the company's arguments that there was no set salary scale for managers should not act as a detriment towards the company's employees and that the company should strive for more transparency in the manner in which wages are set.

Internet source:

https://ncpe.gov.mt/en/Documents/Our_Publications_and_Resources/Annual_Reports/NCPE%20AR%202015.pdf, accessed 26 July 2016.

POLICY DEVELOPMENT

Maternity leave fund claims forms for reimbursement of maternity leave made available online



In July 2016, the application form for reimbursement of maternity leave was made available online. In July 2015, the Government set up the Maternity Leave Trust Fund in which employers contributed towards maternity leave but had as yet not been able to claim any reimbursements of maternity leave contributions, giving rise to complaints by employers. The Maternity Leave Trust Fund Board stated that

the process had taken longer than anticipated due to the fact that the system had to be created from scratch in its entirety and many concerns needed to be addressed in order for the system to function fairly and accurately. The refunds should be payable every four months but the first batch would be issued 'as soon as possible' according to the Board. The Board stated that employers who had paid the maternity leave contribution after 6 July 2015 qualified for the refund, which included the payment of the gross basic wage, pro-rata statutory bonuses and allowances as well as the employer's portion of the employee's social security contributions paid during the 14 weeks of maternity leave.

Internet source:

<https://socialdialogue.gov.mt/en/Documents/Press%20Releases/257%20-%202015%20-%20E.pdf>, accessed 27 July 2016.

The Netherlands

NL

LEGISLATIVE DEVELOPMENTS

Ratification of the UN Convention on the Rights of Persons with Disabilities

The Netherlands became a signatory to the International Convention on the Rights of Persons with Disabilities (UNCRPD) in 2007, but the subsequent ratification process was very slow. Ratification met with resistance from associations of entrepreneurs and the liberal party, fearing bureaucratic rules and increased costs for businesses. In January 2016, the Second Chamber finally adopted the Convention, followed by the First Chamber in April 2016, thus paving the way for ratification of the Convention on 14 June 2016. However, the Netherlands has not accepted the Optional Protocol to the Convention yet.

Disability

The Dutch Government now has to take concrete steps to ensure that accessibility truly becomes the norm in the Netherlands. When adopting the Convention, the First Chamber also adopted a bill that concerns the actual implementation of the Convention, amending a number of statutory acts, for example the Disability Discrimination Act. Most changes however will be implemented by means of orders in council. The new norm requiring buildings to be accessible for all will apply both to the public and the private sector.

Internet sources:

Act concerning the adoption of the International Convention on the Rights of Persons with Disabilities, *Staatsblad* (Law Gazette) 2016, 82: <https://zoek.officielebekendmakingen.nl/stb-2016-182.html>;

Implementation of the International Convention on the Rights of Persons with Disabilities, *Eerste Kamer*, 2015-2016, 33 990 A: https://www.eerstekamer.nl/behandeling/20160121/gewijzigd_voorstel_van_wet; both accessed 15 July 2016.

CASE LAW

Conviction of employer for discriminatory rejection of an internship applicant

The applicant was a student who had been rejected for an internship because of his sexual orientation. The company's owner stated to be unable to offer him the internship, since he had seen pictures on the applicant's Facebook profile indicating that he was homosexual. According to the owner, this was incompatible with his Christian belief. The applicant complained to the national equality body, the Netherlands Institute for Human Rights (NIHR), and reported the case to the police.

Sexual orientation

In February 2016, the NIHR found that a forbidden distinction had been made on the ground of sexual orientation.⁴⁷ In addition, the Public Prosecution Service announced its intention to prosecute the firm's owner for forbidden discrimination, on the basis of Article 429quater of the Dutch Criminal Code.

In April 2016, the Noord-Nederland District Court (cantonal section of Leeuwarden) found that the owner of the company had indeed discriminated against the applicant on the ground of sexual orientation and ordered him to pay a fine of EUR 1600. The owner was also ordered to pay compensation amounting to more than EUR 1500 to the applicant.

Internet sources:

NIHR Opinion 2016-10: <https://www.mensenrechten.nl/publicaties/oordelen/2016-10/detail>;
press release on the site of the Public Prosecution Office: <https://www.om.nl/actueel/nieuwsberichten/@94162/geldboete-1-600/>; both accessed 15 July 2016.

District Court Zwolle awards damages for pregnancy discrimination

On 26 April 2016, the District Court Zwolle rendered a decision on pregnancy discrimination. The case concerned an employee whose temporary contract was not extended after she had informed her employer that she was pregnant. If the contract had been extended, it would have become an employment contract for an indefinite period of time. The woman claimed damages on the basis of unlawful conduct by the employer.

The District Court ruled that the employee had established sufficient facts from which it could be presumed that her contract had not been extended because of her pregnancy. A week before the contract was due to end, the parties had had a conversation about the continuation of the employment agreement. The employee then informed her employer about her pregnancy. Subsequently a discussion took place about the length of the pregnancy leave, after which the meeting was ended. Two days later the employer informed the employee that her contract would not be extended because her performance had not been good enough. However, the employer had never before been critical about the employee's performance and there was no written or oral evidence of poor performance. The Court therefore concluded that the employer had not refuted the presumption of discrimination.

The Court ruled that if the employment had become a permanent one it would have lasted five years, and thus the employer had to pay compensation for the loss of income of the employee during these five years (minus the unemployment benefits she was entitled to after the expiry of her employment agreement). This amounted to a sum of EUR 21 000. The employer also had to pay EUR 5 000 for non-pecuniary damages. In the Netherlands, there have not been many judgments granting compensation due to discrimination, and therefore even though the judgment is from a lower court this is seen as a step in the right direction.

Court upholds dismissal of marriage registrar for refusal to conclude same-sex marriages

Since the introduction in the Netherlands of the right of same-sex couples to register a civil partnership (1998) and to enter into marriage (2001), there has been continuous debate about the existence of a right of marriage registrars to raise conscientious objections against concluding such partnerships or marriages on the ground of their Christian belief. In 2014, after several bills and advice from the Council of State, an amendment was adopted to Article 1:16 of the Civil Code which made it impossible to appoint new civil servants who refuse to serve as registrars to same-sex couples.⁴⁸

47 NIHR 2016-10, decision of 16 February 2016, available at <https://www.mensenrechten.nl/publicaties/oordelen/2016-10>, accessed 30 April 2016.

48 See Law Gazette (*Staatsblad*) 2014, 260.

Recently, this issue received new attention after a marriage registrar, who on religious grounds refused to marry same-sex couples, lost a final appeal against his dismissal. The applicant had served as a marriage registrar in The Hague, whilst also being a member of The Hague city council between 2000 and 2010. After leaving the city council in 2010, he was again appointed as marriage registrar in January 2011.

In October 2011, the applicant gave an interview to a daily newspaper, explaining his conscientious objections against same-sex marriages and stating that he would refuse to conclude same-sex marriages. This refusal went against the policy established by the municipality in 2007, of which the applicant was doubtlessly aware. Following the interview, and after two further meetings with the municipality, the applicant was dismissed.

The applicant first objected to the dismissal decision, after which he brought a case before the District Court of The Hague. This Court, in 2013, upheld the dismissal, following which an appeal was lodged with the Administrative High Court, which is the final court of appeal for most issues involving civil servants' law.

In February 2016, the Administrative High Court dismissed the appeal brought by the applicant. The Court rejected the argument that the dismissal was unlawful because the applicant was already employed as a marriage registrar prior to the adoption of the municipality's policy in 2007. The Court, in reaching this conclusion, also referred to the amendment to the Civil Code that entered into force in 2014 and referred to the judgment of the European Court of Human Rights (ECtHR) in *Eweida and others v. United Kingdom*, in which the ECtHR ruled that the dismissal of an English marriage registrar did not violate Article 9 in conjunction with Article 14 of the Convention.⁴⁹

Internet sources:

District Court The Hague, 23 October 2013, ECLI:NL:RBDHA:2013:14133: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2013:14133>;

Administrative High Court, 29 February 2016, ECLI:NL:CRVB:2016:606: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CRVB:2016:606>; both accessed 15 July 2016.

POLICY DEVELOPMENT

Government criticised for lack of progress in addressing labour-market discrimination

In 2014, the Dutch Government published a comprehensive action plan against labour market discrimination on the grounds of age, disability, race/ethnic origin, sex and sexual orientation. The plan comprised dozens of measures, ranging from pre-existing government policies and already proposed legislative changes to new policy proposals. In September 2015, a report on the progress made in the implementation of the action plan's measures was published. In March 2016, the report was finally debated in Parliament. The Minister of Social Affairs and Employment was severely criticised for the lack of progress made in the last two years.

The action plan included the intention to draw up a so-called 'black list' of companies found guilty of discrimination, which would subsequently be excluded from public tenders. This intention has not been realised, however, as no company has been excluded over the last two years. According to the Minister, this is due to the fact that a court verdict is necessary for the Government to exclude companies, and that discrimination is very difficult to prove. Members of Parliament, in this respect, reproached the Minister for failing to enforce the existing anti-discrimination law.

Racial or ethnic origin

Age

Disability

Sexual orientation

Gender

⁴⁹ European Court of Human Rights, 15 January 2013, *Eweida and others v. United Kingdom*, No. 48420/10, 59842/10, 51671/10 and 36516/10.

Another measure that was part of the action plan, to include a non-discrimination clause in all government contracts with private companies, was first implemented in February 2016 (in a contract with an employment agency). Contract-compliance clauses are developed in cooperation with private-sector companies, and are thought to make it easier for the government body to rescind the contract when the private company is found guilty of discrimination. The clause stipulates that the contract will be terminated if the company has been convicted for discrimination (if no appeal is possible against the verdict).

A special labour-market discrimination team, consisting of one team leader and five inspectors, has been created at the Labour Inspectorate. The inspectors will visit companies in order to check whether they have an effective anti-discrimination policy in place. A proposal to start a policy of naming and shaming companies found guilty of discrimination, for example in press releases, has not yet been implemented. This measure is intended to deter companies from violating anti-discrimination law. In the parliamentary debate, the Minister promised again that the Act on Working Conditions will be amended in order to render it possible to publish inspection results.

Internet sources:

The 2014 Action plan against labour market discrimination can be found at:

<http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2014/05/16/kamerbrief-actieplan-arbeidsmarktdiscriminatie-en-kabinetsreactie-ser-advies.html> (*Tweede Kamer*, 2013-2014, 29 544, No. 523);

the report on progress as regards the Action plan is available at:

<http://www.tweedekamer.nl/kamerstukken/detail?id=2015D31436&did=2015D31436>

(*Tweede Kamer*, 2014-2015, 29 544, No. 649); both accessed 17 August 2016.

Ethnic minority students face discrimination in finding an internship

In March 2016, a government-funded research programme⁵⁰ published a report on the discrimination that vocational training students face in finding an internship. Internships are an obligatory part of virtually all vocational training courses in the Netherlands. The report, on the basis of the experiences of 50 professionals and over 70 students, found that ethnic minority students – in particular girls wearing a headscarf and ethnic minority boys – face severe discrimination in finding an internship. The researchers conclude that schools avoid confronting employers, as they are afraid that employers will refuse to offer internships altogether. The report nonetheless recommends schools to take a stand and report discrimination.

The national equality body, the Netherlands Institute for Human Rights (NIHR), has ruled in its case law that internships are included under Article 5(1)(a) General Equal Treatment Act (GETA), which prohibits unlawful distinctions in the context of employment.

Internet source:

<http://www.kis.nl/publicatie/mbo-en-de-stagemarkt-wat-de-rol-van-discriminatie>, accessed 17 August 2016.

Racial or
ethnic origin

50 Platform Integration & Society (*Kennisplatform Integratie & Samenleving*, KIS), hosted by social science research institutes Verwey-Jonker and Movisie.

Norway

NO

CASE LAW

Supreme Court judgment on costs incurred following breach of ESCR on age discrimination

The Supreme Court on 8 February 2016 delivered its judgment in a case between the trade union the Federation of Seafarers (*Fellesforbundet for sjøfolk*) and the State. This case raised the fundamental question whether the State could be liable for lack of implementation of the European Social Charter, a convention Norway has ratified.

Age

The issue raised was whether the State is responsible for costs the Federation had incurred by providing legal assistance to two members. The background were two court cases concerning the dismissals of two sailors with reference to the Seamen's Act of 1975 Paragraph 19 No. 1, where employment protection for seafarers ceased at the age of 62. Anti-discrimination protection against discrimination had been included in the Seamen's act in 2007, but the mandatory age limit of 62 had not been assessed in relation to the inclusion. The sailors sued the State, claiming that their dismissals were invalid because of unlawful age discrimination. One case ended in the Supreme Court, which held that the dismissal was valid.⁵¹ The Federation subsequently lodged an appeal to the European Committee of Social Rights, which held unanimously in 2013 that the Norwegian rule in the Seamen's Act was contrary to the Social Charter Article 1 Paragraph 2 and Article 24.⁵² The State had meanwhile appointed a committee to consider changes to the Seamen's Act. The age limit for sailors' employment protection was subsequently changed to 70 by the adoption of the Ship Labour Act Paragraphs 5-12 on 21 June 2013.⁵³

The Federation of Seafarers thus brought an action before Norwegian courts, claiming compensation for their legal expenses in the *Kystlink* judgment as well as their appeal to the Committee of Social Rights, given that the rule in the Seamen's Act was contrary to the Social Charter.

In February 2016, the Supreme Court found that the age limit of the Seamen's Act was not contrary to the Social Charter when the Seamen's Act was revised in 2007. In any event, the continuation of the allegedly discriminatory provision would in no way entail state liability. The appeal was thus rejected.⁵⁴

Sami language requirement a genuine and determining occupational requirement

A two-year temporary position as a project manager at the department of technical services in a municipality was announced in June 2014. Knowledge of the Sami language, both in spoken and written presentation skills, was a qualification requirement for the position. Six candidates applied and the municipality conducted interviews with three of them, including the claimant who was 60 years old. A 31-year old candidate was ranked number one for the position and then hired, based on his command of the Sami language. The candidate ranked in second place was 41 years old and had a good command of spoken Sami. The claimant was ranked as number three. In his application he had stated that he understands Sami and can make himself understood verbally. The municipality's ranking of the candidates was based on the assumption that the claimant did not know Sami at all.

Racial or ethnic origin

51 Supreme Court Judgment of 18 February 2010, *A v. Nye Kystlink*, Rt 2010 s 202, HR-2010-00303-A.

52 Council of Europe Committee of Ministers 16 October 2013, Collective Complaint No. 74/2011.

53 The Act of 21 June 2013 No. 102 relating to employment protection etc. for employees on board ships (the Ship Labour Act) Chapter 10, in force as of 1 January 2014. The rest of the Act came into force on 20 August 2013. See <https://www.sjofartsdir.no/en/shipping/legislation/laws/ship-labour-act/>, accessed 23 September 2016.

54 Supreme Court judgment of 8 February 2016, HR-2016-296-A.

The claimant argued that he had been discriminated against on the ground of his age, and in addition he claimed that the Sami language requirement was discriminatory to non-Sami speakers. He filed a complaint with the Gender Equality and Anti-Discrimination Ombud. The Ombud concluded that the claimant had been subjected to direct discrimination because of his age and because the municipality had illegally weighted the knowledge of Sami as a qualification for the position, although language is an element of possible ethnic discrimination.⁵⁵

The Ombud found that the claimant appeared to be better qualified than the person who had been offered the position, and the burden of proof therefore shifted to the employer. The employer, however, could not sufficiently explain the reasoning behind the language requirement for the position. Subsequently, the Ombudsman found reason to believe that the applicant's age was considered in the application process. The claimant subsequently brought the case before the court to claim compensation, as the Ombud does not award compensation.

In March 2016, the Court⁵⁶ rejected the opinion of the Ombud. Sami is an official language in Norway and for this reason, the Court concluded that the Sami language requirement in this case had a legitimate aim and that it was necessary to fulfil the position. The language requirement was not disproportionately emphasized in the recruitment process. Age was not seen as the reason for choosing the other applicant, as this choice was related to the language requirement.

POLICY DEVELOPMENTS

Report examining avenues for reform of the national equality bodies

The Minister of Children and Family Affairs in 2015 initiated an assessment of the current set-up and structure of the national equality bodies – the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal – as regulated in the specific Act governing these bodies. The mandate of the study was to outline possible changes in the structure of the equality bodies to better distinguish between the political and the legal aspects of the work of the Ombud, with the aim to strengthen the legal-enforcement role of the equality bodies. In addition, the aim was also to outline which changes are necessary if the equality bodies are to be given powers to award redress/compensation for non-monetary damage in cases where a breach of the anti-discrimination legislation is found. Currently, neither the Ombud nor the Equality Tribunal has the authority to determine redress. The study was specifically asked not to conclude or make recommendations regarding the proposed models.

The report was published in March 2016 and outlines two 'models' for a new organization of the equality bodies, as well as several possibilities in which the Tribunal is granted expanded authority, i.e. the right to determine compensation for non-monetary damage. The report proposed possible amendments to the Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal of 10 June 2005 No. 40 (*Diskrimineringsombudsloven*) in line with the various suggestions made in the report.

The mandate of the equality bodies is part of a wider discussion in Norway concerning whether or not to adopt one new comprehensive Act against discrimination on all grounds, which the current Government has proposed.

Internet source:

<https://www.regjeringen.no/no/aktuelt/utredning-av-handhevingsapparatet-pa-diskrimineringsomradet/id2478335/> (in Norwegian); accessed 18 July 2016.

55 Gender Equality and Anti-Discrimination Ombud, Opinion of 16 December 2014 in Case No. 14/1450.

56 National court decision: Judgment of 1 March 2016, the *Sis-Finnmárkku diggegoddí - Indre Finnmark tingrett* (court of first instance) between A and X county in Case No. TINFI-2015-113573.

New Action Plan on LGBTI rights 2017-2020

The Government's new action plan on LGBTI rights covering the period 2017-2020 was presented by the Minister of Children and Equality during Oslo Pride on 22 June 2016. The action plan contains 40 specific measures to be implemented over the next three years, aiming at ensuring safe neighbourhoods and public spaces, equal access to public services and employment for these particularly vulnerable groups. The action plan contains few concrete legal steps, apart from a clear focus to increase police efforts to handle hate crimes both regarding investigation and prosecution. There is a focused effort in the action plan to target the immigrant population, as there is a high degree of harassment, discrimination and violence directed toward LGBTI immigrants both within and outside their closest family circle.

Sexual orientation

Internet source:

<https://www.regjeringen.no/no/dokumenter/trygghet-mangfold-apenhet/id2505393/>; accessed 18 July 2016.

Poland

PL

LEGISLATIVE DEVELOPMENTS

Parliament adopts 'Family 500 Plus' law with new family benefit

On 17 February 2016, after an exceptionally fast legislative process (the draft law was submitted to Parliament on 1 February 2016), the Polish Parliament adopted the Law of 11 February 2016 on state aid in the upbringing of children, introducing a new child-upbringing benefit (*świadczenie wychowawcze*), amounting to EUR 125 (PLZ 500) monthly for every second and following child. The parents of a single child or others (multiple children) for the first child are entitled to the aid if the monthly income per capita in the family does not exceed EUR 200 (PLZ 800). The benefit is therefore mainly directed at families with at least two children. Its primary goal is to aid families, especially those with multiple children, in covering the expenses related to satisfying existential needs of children and their upbringing. The Law entered into force on 1 April 2016.

Gender

In the case of low-income or single-income families, these criteria might be relatively easy to meet if the family is formed by two partners. The same criterion applies, however, for single parents. For single parents, it will be harder to meet the income criteria for obtaining the child-upbringing benefit for the first child, since there are fewer persons to divide the income. As a consequence, for example, a family of two adults and one child will qualify for the benefit if their total monthly income is PLN 2400 or less, while a single parent with one child will qualify only when earning PLN 1600 or less (that means below the minimum pay, which in 2015 amounted to EUR 437, or PLZ 1750). Such regulations will mostly affect single mothers, as the majority of single parents in Poland are women. They may have problems obtaining this benefit and in some cases end up getting less or no benefit at all for their children. The new benefit may also cause reduction of alimonies paid to single parents by the other parent, who does not take care of the child. This means that this new family benefit fails to differentiate the income minimum in the case of single parents.

Internet source:

Law of 11 February 2016 on state aid in the upbringing of children,

<http://isap.sejm.gov.pl/DetailsServlet?id=WDU20160000195>; accessed 20 February 2016.

<http://prawo.gazetaprawna.pl/artykuly/937886,500-zlotych-na-dziecko-program-500-plus-alimenty.html>; accessed 27 August 2016.

Amendments to the Labour Code changes provision relating to jobs prohibited for women

Gender

A new Law introduced in Poland limits the scope of the general prohibition to employ women for work that is particularly burdensome and detrimental to their health to only pregnant women and breastfeeding mothers. The Law of 22 June 2016 amending the Labour Code and some other laws (JoL of 19 June 2016, Item 1053) transposes Directive 2006/54/EC (Recast Directive). The European Commission in 2014 had raised objections to the wording of Article 176, claiming that a prohibition referring to all women constituted an obstacle in equal treatment of women and men, particularly with respect to access to employment. The Law will enter into force on 3 August 2016.

The provision of Article 176 of the Labour Code, which previously provided for a general prohibition to employ women for work that is particularly burdensome and detrimental to their health, now applies only to women who are pregnant or breastfeeding. It also applies to work that may negatively influence women's health, pregnancy or the breastfeeding process (Section 1). The amended provision in Section 2 also includes a legal competence for the Council of Ministers to issue an Ordinance, specifying which types of work are to be covered by the prohibition, with specific instructions in this regard (the former wording of Article 176 did not include any instructions at all).

Recognizing the new division of Article 176 into two sections, Article 179 of the Labour Code was modified, as well as Article 48 Section 9 of the Law of 21 November 1967 on the general obligation to protect the Republic of Poland (Unified text: JoL of 2015, Item 827, with later amendments) and Article 65 Section 2 of the law of 11 September 2003 on professional military service (Unified text: JoL of 2014, Item 1414 with later amendments).

Internet source:

<http://isip.sejm.gov.pl/DetailsServlet?id=WDU20160001053>, accessed 20 July 2016.

CASE LAW

Supreme Court issues landmark decision regarding rights of same-sex partners in criminal law

Gender

The Supreme Court (SC) in Resolution of 25 February 2016 decided that ‘the term person “in common cohabitation”, included in the definition of the next of kin in Article 115 11 (of the Penal Code), refers to a person who is in such actual relationship with another person, where at the same time spiritual (emotional), physical and economic bonds (common domestic household) exist between them. The existence of such relationship is also possible when the lack of a particular bond is objectively justified. The difference in sex of persons remaining in such relationship does not constitute a condition for determining their living in common cohabitation in the understanding of Article 115 11 PC’. This Resolution resulted from a procedure triggered by the motion of the First President of the Supreme Court which was not related to any particular case, but was lodged within its competence for referring to the 7-judge panel matters raising doubts in jurisprudential practice (Article 60 of the Law on the Supreme Court of 23 November 2002, JoL 2013 Item 499).

While justifying the motion, the First President of the Supreme Court stressed that the term ‘common cohabitation’ does not have a well-embedded meaning in the legal language, while linguistic interpretative rules of the common language do not allow one to assume that this term refers exclusively to persons of different sexes. Additionally, the motion underlined that the existence of enduring relationships of two persons of the same sex constituted a social fact, which could not be ignored on a juridical level. It was also noted that the answer by the Supreme Court to the questions included in the motion created the possibility for unification of the understanding of the analysed term in a broader, systemic context. The term ‘common cohabitation’, as well as the broader term ‘next of kin’ functions not only in criminal law

but also in the Family and Guardianship Code, the Civil Code and other legal regulations. For this reason, the practical significance of these terms is to be considered as quite substantive.

One of the judges filed a *votum separatum* with this ruling in favour of the opinion that 'persons remaining in common cohabitation' means a partnership of two persons of different sex. The significance of the Resolution both with respect to criminal law and with respect to the results of systemic interpretation of provisions of other branches of Polish law is great. Although rulings of a panel of 7 Supreme Court judges are not formally binding for courts of lower instances, such rulings are usually followed by lower courts in practice.

Internet source:

<http://www.tvn24.pl/sad-najwyzszy-osoby-tej-samej-plci-pozostaja-we-wspolnym-pozyciu,622418,s.html>, accessed 28 February 2016.

POLICY DEVELOPMENT

New Government appoints new Plenipotentiary for Equal Treatment changing its mandate; problems with the budget of the Ombud – Polish Equality Body during the parliamentary procedure

According to Article 18 of the 2010 Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (ETA), 'Performance of tasks related to the implementation of the principle of equal treatment shall be entrusted with the Commissioner for Civil Rights Protection (Ombudsman) and the Government Plenipotentiary for Equal Treatment.'

All grounds

While the Ombud is an independent body, the Plenipotentiary is in charge of the coordination of government efforts and non-discrimination policies. He/she has several important competences, including preparing and presenting to the Council of Ministers the National Programme of Activities for Equal Treatment and then reporting annually on its execution. He/she is also competent to prepare draft laws related to equal treatment and opinions about such drafts; to exercise a number of analytical and monitoring competences; to promote equal treatment; to oversee international cooperation; and to implement projects that support equal treatment and counteract discrimination. The Plenipotentiary may establish special research teams, call for specific research or expert analysis and provide reports based on this research, and may also issue recommendations.

After parliamentary elections that took place in October 2015, a new parliamentary majority elected the new Government and the President of the Republic appointed the Council of Ministers in November 2015. The previous Plenipotentiary for Equal Treatment subsequently resigned, but the new Prime Minister did not immediately appoint her successor. On 8 January 2016, when the new Plenipotentiary was finally appointed, it was announced that he would also exercise the role of Plenipotentiary for Civil Society. The day before however, a new regulation had been announced, which terminated the office of the Plenipotentiary for Equal Treatment. Staff of the office which continues to work for the Plenipotentiary was reduced and tasked with new responsibilities, not relevant for equal treatment.

In parallel, the budget of the Ombud was debated, following its request for an 18 % budget increase, to cover for *inter alia* the renovation of two buildings and adaptations for persons with disabilities. During the parliamentary debates, MPs from the Law and Justice Party expressed their concerns regarding the policy of the Ombud, and their dissatisfaction with the appointment of a deputy responsible for equality issues. Finally, by decision of Parliament, the budget was not increased and the adaptations could not take place (in fact the budget was reduced as compared with 2015).

Internet sources:

Appointment of the New Government by the President: <http://www.prezydent.pl/aktualnosci/nominacje/art,3,prezydent-powolal-rzad.html>;

Announcement of the press conference of the representatives of the Equal Opportunities Coalition of 60 NGOs, on 19 November calling on the new Government for cooperation on equal treatment issues and appointment of the new Plenipotentiary: <http://ptpa.org.pl/aktualnosci/archiwum/rok-2015/nowy-rzad-jaka-polityka-rownego-traktowania-konferencja-prasowa-w-ptpa/>; both accessed 18 July 2016.

PT

Portugal

LEGISLATIVE DEVELOPMENT

Changes to the Labour Code and civil servants legislation

Gender

The socialist Government in place in Portugal since November 2015 has introduced a number of changes to the Labour Code (LC) and to the civil servants legislation that go in the opposite direction when compared to legal measures adopted by the previous Government under the Financial Assistance Programme to Portugal imposed by the IMF, the EC and the ECB, in the period 2011–2015. These measures regard pay, national holidays and working time and may have a positive impact on women in employment.

The Labour Code was amended by Law No. 8/2016 of 1 April 2016, which reinstated four national holidays that had been removed by Law No. 23/2012 of 25 June 2012. Furthermore, for the first time since the start of the economic crisis, the amount of the minimum national wage was increased (Decree-Law No. 254-A/2015 of 31 December 2015) from EUR 505 to EUR 530 per month.

In relation to public servants, the Government introduced two main changes in legislation. First, the reversion of the pay cuts imposed on public servants under the Assistance Programme, which was already implemented in 2015, will be implemented more rapidly in 2016. Second, reinstatement of the maximum working hours of 35 hours per week, as it used to be before 2012, when it was increased to 40 hours (as in the private sector), also as a consequence of the Assistance Programme. This reduction was already approved in general by Parliament in January⁵⁷ but some doubts remain about its implementation.

Internet source:

www.dre.pt, accessed 1 April 2016.

RO

Romania

LEGISLATIVE DEVELOPMENT

Proposal of a bill imposing Romanian as the only official language of the Romanian State

Racial or ethnic origin

In September 2015, a bill was submitted ‘on respecting the use of the Romanian language as official language of the Romanian State.’ The bill was tacitly adopted by the Chamber of Deputies (lower chamber) on 17 February 2016 and it was rejected on 8 June 2016 by the Senate, which is the decision-making

⁵⁷ DAR, I S. No. 26/XIII/1 1 January 2016 (p. 32).

chamber.⁵⁸ The draft aimed to 'prohibit the use in any form of any other language except Romanian in official capacities... in public institutions of any type, by central and local public authorities, public institutions in their subordination as well as in decentralized public services and by the employees of any type of the Romanian state.'⁵⁹

The draft proposed that all official meetings will be held in Romanian; all the names of public institutions, cities, streets and public places will be in Romanian only and that these names in other languages will be deleted; that advertisements and announcements of public interest will be in Romanian only; that official communication, and websites of public institutions of any types will be only in Romanian.

The draft prohibited establishing as a genuine occupational requirement the knowledge of a minority language for civil servant positions paid by the Romanian State. In a radical attempt to ensure the effective enforcement of its provisions, the draft proposed that 'employees, elected persons, high-ranking officials or civil servants of the Romanian State infringing the present law will lose their mandate and/or position and/or job in the institutions of the Romanian State without the possibility of being hired or elected again in an institution of the Romanian State.'

The spirit of the bill is clearly anti-Hungarian, with the explanatory memorandum alleging that 'Romanian had been chased out by the Hungarian community', and the bill aiming to reintroduce Romanian in local administration 'in the places where it gradually disappeared, in areas controlled by Hungarian politicians which do not hide their autonomist and separatist intentions.' The Hungarian minority is one of the principal minorities in Romania, representing up to 8.6 % of the total population of Romania.⁶⁰ Ethnic Hungarians live especially in Transylvania, where they make up more than 20 % of the population in some areas, a percentage which entitles them to access public services in Hungarian according to Romanian legislation.⁶¹ In three counties, the Hungarian population represents the majority.

The bill went against the commitments made by Romania in 1995 when ratifying the Framework Convention for the Protection of National Minorities and in 2007 when ratifying the European Charter of Regional and Minority Languages. The bill also violated Article 120(2) of the Romanian Constitution allowing the use of national minority languages in local administration and Article 128(2) on the right to use one's mother tongue before the courts.

Serbia

RS

CASE LAW

Opinion of the Commissioner for the Protection of Equality on different amounts of premium for voluntary health insurance

An Opinion of the Commissioner for the Protection of Equality, issued on 10 June 2016, is the first decision dealing with the use of sex as a factor in the calculation of premiums for the purposes of insurance which results in differences in individuals' premiums for men and women. In this case, the claimant, M.J., claimed that a premium for the voluntary health insurance designed for persons between the ages of

Gender

58 Article 75(2) of the Romanian Constitution provides for tacit adoption of a bill if the notified Chamber of the Parliament does not issue a pronouncement within 45 days of the notification.

59 Article 1 of the draft law – PL-x 776/2015.

60 According to the 2011 census, 10.5 % of the Romanian population consists of national minorities including Hungarians, Roma, Germans, Poles, Serbs, Croats, Czechs, Slovaks, Bulgarians, Ukrainians, Greeks, Italians, Jews, Turks and Tatars, Armenians, Russians/Lipovans and others.

61 Articles 19 and 76 of Law 215/2001 on local public administration, which establishes the framework for the rights of national minorities to use their mother tongue when communicating with local public authorities.

26 and 30 differed for men and women (EUR 276.84 for women and EUR 168.72 for men). The claimant accidentally discovered that the insurance company prescribed different amounts of premium for men and women when she was first offered a premium in the amount of EUR 168.72 and when she accepted the offer was surprised to see a higher amount in her contract. She was subsequently informed that the problem occurred due to the insurance employee calculating the premium offer on the basis that she was a man. The health insurance company explained that there is no law which prohibits the use of sex as a factor in the calculation of premiums and that the amount of premiums depends on statistical data on received requests for compensation in the previous reporting period. It also stated that it applied the life insurance mortality table, which is different for men and women, and demonstrates that the level of insured risk may be different for the two sexes. Finally, it explained that women are covered at a higher insurance rate as they have more benefits in the provision of medical services.

In its decision, the Commissioner for the Protection of Equality (CPE) relied on Article 21 of the Constitution which prohibits discrimination, as well as on the following articles of the Law on the Prohibition of Discrimination: Article 2 Paragraph 1 that defines and prohibits discrimination, Article 6 that prohibits direct discrimination, Article 17 Paragraph 1 that prohibits discrimination in the provision of public services, and Article 20 Paragraph 2 that prohibits the denial of rights or granting of privileges, be it overtly or covertly, pertaining to sex. Finally, the CPE referred to the Law on Gender Equality, which prohibits direct discrimination.

In its analyses, the CPE first found discrimination, as it was undisputable that the monthly insurance premium for men was EUR 14.06 and for women EUR 23.07. The CPE further found that women do not receive any additional health services which are covered by their premium, as all insured persons regardless of their sex are covered by the following services: examination of the general practitioner, examination of the specialist, diagnosis and laboratory analyses (basic coverage), and annual physical examination, ophthalmic examination and physical therapy (supplementary coverage). Thus, the CPE found no reasonable justification for differences in the amount of premium, which is based on sex. The CPE particularly underlined that the ‘sex’ of policy holders does not say anything about his or her state of health, or type and frequency of medical examinations covered by voluntary health insurance. It concluded that the different life expectancy for men and women does not depend only on the sex of a particular person but is also determined by economic and social environment, life habits, diet, consumption of alcohol or tobacco, the practice of leisure activities, etc. The CPE agreed that in creating particular insurance packages an insurance company is allowed to assess the amount of the sum insured, relying on professional rules and insurance regulations, as it has a legitimate interest in securing its profit. However, for this assessment, the sex of the client is not in itself a risk as it does not indicate, in any way, how often he or she will use the health services covered by voluntary health insurance.

Opinion of the Commissioner for the Protection of Equality on the prescription of free medication

This case concerned a complaint submitted against the Republic Fund for Health Insurance. In the complaint, among other things, it was stated that the complainant, D.R., suffered from severe osteoporosis. The doctor prescribed him the drug ‘Forteo’ in order to treat him. The drug was on the list of medicines that can be obtained at the expense of mandatory health insurance by the Republic Fund for Health Insurance, but only by persons who are in post-menopause. In other words, it was accessible to women, and not to men, although they suffer from the same disease.

On 26 May 2016, the Commission for the Protection of Equality (CPE) issued an Opinion on the case. In its decision, the CPE relied on Article 21 of the Constitution, Article 14 of the European Convention on Human Rights, Article 2 Paragraph 1 of the Law on the Prohibition of Discrimination, Article 20 of the Gender Equality Act (prohibits gender discrimination in the area of social protection), as well as on Article 5 Paragraph 2 of the Law on Health Insurance and Article 20 of the Law on Health Protection. The

CPE first found that there was no direct discrimination in the case, as the condition to obtain the above-mentioned drug was not based on sex. However, as the drug can be obtained free of charge only by those persons who are in post-menopause, it was important to examine if it was a case of indirect discrimination.

The CPE noted that the Republic Fund for Health Insurance in its regulations did not explicitly state that only women can obtain the medicine 'Forteo' at the expense of mandatory health insurance. However, the requirement for prescribing and dispensing of this drug linked to being in post-menopause clearly indicates that no man, if they meet all other requirements, can obtain this medicine. Post-menopause indicates the gender of the person going through this process, and completely excludes men from obtaining the drug at the expense of the compulsory health insurance. The CPE concluded that by the denial of the right of D.R. to obtain the prescribed drug 'Forteo' at the expense of the compulsory health insurance, the national health insurance fund was guilty of indirect sex discrimination, which is prohibited by Article 7 of the Law on the Prohibition of Discrimination.

Internet source:

<http://ravnopravnost.gov.rs/prituzba-s-r-protiv-rfzo-zbog-diskriminacije-po-osnovu-pola-u-oblasti-pruzanja-zdravstvenih-usluga/>, accessed 11 August 2016.

POLICY DEVELOPMENT

New national strategy on Gender Equality

On 14 January 2016, the Government of the Republic of Serbia adopted the new National Strategy for Gender Equality for the period 2016-2020, as well as an Action Plan for its implementation for the period 2016-2018.

Gender

The Strategy was adopted based on an evaluation of the previous Action Plan, which was adopted in October 2015. The evaluation indicated that some progress in achieving gender equality has been made in various areas, especially in the improvement of the legislative framework of equal participation of women and men in political life, anti-discrimination, employment, establishment of institutional mechanisms of gender equality, improvement of gender-sensitive statistics, and increase in visibility of domestic violence against women. However, in many key areas the desired effects have not been achieved, for example: the participation of women in public authorities outside of the legislature is still very low, their economic status is still poor, violence against women, including femicide, is widespread, and media content is still characterized by sexism and misogyny.

The Strategy contains relevant international and domestic legal standards on gender equality, as well as the strategic framework. It provides information on the current state of gender equality in different areas of life: partner and family relations, participation in public and political life, gender equality in economy (labour market, entrepreneurship, as well as in agriculture and rural areas), gender equality in the formal system of education and upbringing, violence against women, gender equality in the media, the introduction of gender equality in public policies and programmes, institutional mechanisms of gender equality, multiple discrimination and vulnerable groups.

The Strategy includes the SWOT analyses, with key strengths and weaknesses that are addressed by this Strategy. Three main aims of this Strategy are as follows:

- to change the gender patterns and improve the culture of gender equality;
- to increase equality between women and men applying the policies and measures of equal opportunities; and
- to systematically introduce gender perspective in the adoption, implementation and monitoring of public policies.

Internet source:

<http://www.mgsi.gov.rs/lat/dokumenti/nacionalna-strategija-za-rodnu-ravnopravnost-za-period-od-2016-do-2020-godine-sa-akcionim>; accessed 28 August 2016.

Gender Equality Index 2016

The Republic of Serbia is the first country outside of the European Union which has introduced the EU Index of Gender Equality, and it published its first report in February 2016. The initiative for calculating the Gender Equality Index in the Republic of Serbia was launched by the Coordination Body for Gender Equality of the Government of the Republic of Serbia, the Social Inclusion and Poverty Reduction Unit of the Government and the Statistical Office of the Republic of Serbia, with the support of the European Institute for Gender Equality in Vilnius. For the purposes of measuring the Gender Equality Index, a Working Group of the Government of the Republic of Serbia was established, comprising representatives of all relevant public institutions, civil society organizations, and the professional and academic community.

In the report, the Gender Equality Index for Serbia is calculated for 2014, while the Gender Equality Index for the EU refers to 2012. The Gender Equality Index is calculated for Serbia using the EIGE's methodology with minor adjustments.

According to the Report, the gender equality index in the Republic of Serbia is 40.6 %, whereas the index of the EU Member States is 52.9 %. The smallest gap is recorded in the domain of health, while the greatest success has been achieved in the domain of power at the national level, mainly due to the relatively higher representation of women in the Central Bank, and due to the introduction of quotas for women's political participation in the National Assembly. However, the biggest shortcomings exist in the domain of work and money.

Internet source:

http://socijalnoukljucivanje.gov.rs/wp-content/uploads/2016/02/Izvestaj_Indeks_rodne_ravnopravnosti_2016_EN.pdf; accessed 28 August 2016.

SK

Slovakia

CASE LAW

Constitutional Court clarifying issues related to proving discrimination in civil proceedings

The claimant was a Roma woman who had unsuccessfully applied for one of three vacant positions of social field workers advertised by the town of Spišská Nová Ves ('the town'). Compared with the claimant, the persons selected for the positions were less qualified, had less experience with social field work and less training, did not speak the Roma language, and were not of Roma origin. Experience with social field work, speaking the Roma language and being of Roma origin were deemed to be advantages in the selection process. The claimant sued the town for discrimination in the access to employment.

In 2012, the District Court dismissed the case at first instance, reasoning, inter alia, that the claimant did not submit any relevant evidence proving that she had been discriminated against on the ground of her ethnicity.⁶²

62 Judgment of the District Court in Spišská Nová Ves of 18 April 2012, No 11 C 137/2011-390, in conjunction with the Supplementary Judgment of the District Court in Spišská Nová Ves of 25 April 2012, No. 11 C 137/2011-406.

The claimant appealed against the district court decision, arguing, *inter alia*, that the first instance court required proof of a racial motive of the respondent's actions, which went beyond the legislative requirements of proving discrimination. The claimant also argued that the district court did not deal with some of her allegations concerning the circumstances of the selection process, such as doubts about independence of the selection committee members, interference of the committee's secretary with the decision-making process, or ties of the selected applicants with some of the committee members.

In 2013, the second-instance Regional Court in Košice upheld the first-instance court decision.⁶³ The Regional Court emphasised that the claimant was required to prove that she was disadvantaged due to her ethnicity, and that the respondent was then required to prove that the motive of the disadvantageous treatment was based on non-discriminatory grounds. The Regional Court held that the respondent managed to rebut the claimant's allegations by proving that the claimant was not selected because she ended up in fourth place in the competition for the three vacancies. The Court further argued that all applicants were asked the same questions and that the knowledge of the Roma language was an advantage only, and not a decisive criterion. Subsequently, the claimant lodged a complaint with the Constitutional Court.

In December 2015, the Constitutional Court held that the Regional Court had violated the claimant's right to a fair trial as well as her right to an effective remedy. It quashed the Regional Court's decision and ordered it to continue conducting proceedings in the case.⁶⁴

The Constitutional Court emphasised the specificities of anti-discrimination proceedings which are very demanding in terms of evidence assessment. The Court pointed to the specific distribution of the burden of proof where the claimant needs to communicate to the Court 'the facts which give rise to a reasonable assumption (i.e. not an unquestionable settlement) that a violation of the principle of equal treatment occurred',⁶⁵ thereby shifting the burden of proof on to the respondent. According to the Court, whether the burden of proof is shifted or not depends on the quality of the assessment of the evidence available – from the point of view of whether the deciding Court has thoroughly considered all facts that emerged in the proceedings.

The Court, referring to case law of the Czech Constitutional Court,⁶⁶ held that 'the requirement for the claimant to prove that their discrimination has taken place because of their racial (ethnic) origin and not for another reason can apparently not be fulfilled since proving the motive (incentive) of the defendant is simply impossible, due to the nature of the issue itself'.

The Constitutional Court held that both the first and the second instance courts had been selective in assessing the evidence submitted in the proceedings, prioritising the facts acting in favour of the respondent and ignoring the facts acting in favour of the claimant. The Court emphasised that the right to a fair trial requires assessment of evidence to be carried out on a non-selective basis.

In the context of employment-related discrimination, the Constitutional Court held that the alleged discrimination could not be judged formalistically only against the job-selection process and its results, without taking into consideration the related circumstances. With regard to the selection criteria set by the town, the Court noted that the Regional Court did not assess the criteria as such, although the prohibited discriminatory treatment could already be applied by the town in the stage of determining the criteria in the selection process – which were subsequently formally met at the stage of evaluation and actual selection of the candidates.

63 Judgment of the Regional Court in Košice of 18 June 2013, No. 6 Co 165/2012-434.

64 Finding of the Constitutional Court of the Slovak Republic of 1 December 2015, No. III. ÚS 90/2015-40.

65 This wording (except for the words in the brackets) is contained in Section 11(2) of the Anti-Discrimination Act.

66 Finding of the Constitutional Court of the Czech Republic of 26 April 2006, No. Pl. ÚS 37/04.

The decision is in principle applicable to all other prohibited grounds of discrimination contained in the Anti-discrimination Act and to all other fields that fall under the material scope of the act.

Internet source:

<https://www.poradna-prava.sk/sk/aktuality/ustavny-sud-sr-rozhodol-o-poruseni-prav-romskej-zeny-ktora-sa-marne-domahala-spravodlivosti-za-diskriminaciu/>, accessed 18 July 2016.

POLICY DEVELOPMENT

New Government postpones ratification of the Istanbul Convention

On 8 June 2016, the Ministry of Justice (by letter No. 43773/2016/13) requested that the Prime Minister postpone the ratification of the Istanbul Convention until 30 June 2017. The draft Act on Prevention and Elimination of Gender-Based Violence and Domestic Violence was not included in the Plan of Legislative Tasks of the Government for June to December 2016, adopted by the Government on 16 June 2016. This means that its adoption has again been postponed by at least one year. Although the previous Government declared the intention to ratify the Convention in 2012 and the task to ratify the Istanbul Convention was incorporated into the National Action Plan to prevent and eliminate violence against women for 2014-2019 (NAP), the ratification has been postponed several times. The reason given for the postponement is the Manifesto of the Government of the Slovak Republic 2016-2020, indicating the need for society-wide discussion on international documents that address violence against women and children.

Internet source:

<http://www.rokovanie.sk/Rokovanie.aspx/BodRokovaniaDetail?idMaterial=25633>, accessed 27 July 2016.

SI

Slovenia

LEGISLATIVE DEVELOPMENT

New legislation transposing Directives 2000/78/EC and 2000/43/EC⁶⁷

On 21 April 2016, the National Assembly passed a new Protection from Discrimination Act. The new Act, which entered into force on 24 May 2016, replaced the previous Implementing the Principle of Equal Treatment Act of 22 April 2004. The new Act covers an extended list of protected grounds which includes, in addition to the grounds protected by EU law (gender, race, ethnicity, religion, belief, age, disability and sexual orientation), gender identity, gender expression, social standing, health and other grounds. The personal and material scopes have not changed; thus, the law imposes the duty not to discriminate on private and public bodies, in all fields, in particular retraining, practical work experience; employment and working conditions, dismissals and pay; membership of and involvement in an organisation of workers or employers, or other professional organisation, including associated benefits; social protection, social security and healthcare; social advantages; education; and access to and supply of goods and services which are available to the public, including housing.

Incitement to discriminate is now specifically defined as a prohibited form of discrimination, in addition to the forms that were defined as such before (direct and indirect discrimination, harassment, victimisation, and instruction to discriminate). The Act further defines more serious forms of discrimination which

67 Protection from Discrimination Act, Official gazette of the Republic of Slovenia, No. 33/2016, 9 May 2016.

include multiple discrimination (when a person is discriminated against on multiple grounds at the same time), mass discrimination, long-term or repetitive discrimination, and discrimination that could cause consequences that are difficult to eliminate in particular if it is directed at a child or other weak persons. The Act also contains a provision on the duty to collect data which is imposed on the equality body and the competent inspectorates. They have to collect data on the number of cases of discrimination dealt with, personal ground and field, and forms of discrimination.

The Act also provides for a new organisational structure of the equality body (Advocate of the Principle of Equality). Articles 19 and 20 of the Act state that the Advocate is set up as an autonomous state body that may not receive binding instructions related to its work. The competencies and tasks of the Advocate are: to conduct independent research on the situation of people with specific protected characteristics; to publish independent reports and issue recommendations to state bodies, local government bodies and other institutions with public authority, employers, companies, and other subjects; to carry out inspection tasks; to provide independent assistance to discriminated persons such as counselling and legal aid; to raise awareness of the general public on issues of discrimination; to monitor discrimination in Slovenia; to recommend positive action measures; to participate in judicial proceedings in cases of discrimination; and to exchange information on discrimination with European Union bodies.

The Act also regulates a new procedure on the appointment of the Advocate, which foresees that he/she is appointed by the National Assembly upon the proposal of the President of the Republic (under the previous Act he/she was appointed by the Minister). Under the new Act the function of the Advocate is a public state function (while under the previous Act the Advocate was a civil servant). The Act also states that the Advocate has a team composed of civil servants who carry out professional and administrative tasks. The complaints procedure is also regulated in a different way and the Advocate has some new powers, such as the right to lodge a claim for constitutional review of laws that are discriminatory and the abovementioned inspection tasks.

The Act introduces new provisions in the field of the adjudication of discrimination cases. The right to compensation in cases of discrimination is now specifically provided for and the compensation for the sole fact that a person has been exposed to discrimination is set at 500 to 5000 EUR. The right of (the employee working at) the Advocate and NGOs to represent alleged victims of discrimination in judicial proceedings is now specifically defined in the Act, without prejudice to the general rules on representation in judicial proceedings. As regards natural persons, the representative has to have passed a state legal exam (bar exam). As regards legal persons such as NGOs, they need to have the status of 'public interest' organisation in the field of protection from discrimination or protection of human rights which is granted to NGOs by the Ministry of Labour, Family, Social Affairs and Equal Opportunities. The Act also defines higher fines for discrimination.

The main reason why the new Act was adopted now is the pending infringement proceedings initiated against Slovenia by the European Commission, due to failure to correctly implement Directives 2000/78/EC and 2000/43/EC. The main reason for the infringement proceedings was the insufficient powers allocated to the equality body, the lack of its independence, and the lack of effectiveness of the protection system as a whole.

Internet source:

<http://www.uradni-list.si/1/objava.jsp?sop=2016-01-1427>, accessed 18 July 2016.

New legislation affecting employment rights in line with Directive 2000/78/EC

Sexual orientation

On 21 April 2016 the National Assembly passed a new Civil Unions Act.⁶⁸ The new Act, which entered into force on 24 May 2016, replaced the previous Registration of Same-Sex Partnership Act of 22 June 2005. The new Civil Unions Act introduced the institution of same-sex 'partnership union' which will replace 'same-sex registered partnership'. Also, almost all the rights enjoyed by opposite-sex couples will now be granted to same-sex couples, regardless of whether same-sex partners have formally concluded their partnership or not. The system is introduced for same-sex partners only and will exist in parallel with the institution of marriage which remains available only for opposite-sex couples.

The first important implication of the new law is that, with the exception of the rights to joint adoption, conclusion of marriage and assisted reproduction services, same-sex couples who enter into a civil union will now enjoy the same rights as married opposite-sex couples. Thus, partners in a civil union will have equal rights in the area of work and employment, including the right to sick leave to care for a sick partner and additional days of leave awarded to couples for the conclusion of a civil union.

Secondly, the new law also provides legal recognition of cohabiting same-sex partners in a way comparable to cohabiting opposite-sex partners. Under Slovenian law, cohabiting opposite-sex partners are granted some of the rights of spouses when and insofar as it is specifically provided by law, including in the field of employment.

Internet source:

<http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4335>, accessed 18 July 2016.

ES

Spain

CASE LAW

Judgment of the Supreme Court of 18 May 2016 confirms that collective agreements can be more advantageous than legislation on the reduction of working hours for parental reasons

Gender

A Judgment of the Supreme Court of 18 May 2016 confirmed that collective agreements can be more advantageous than legislation on the reduction of working hours for parental reasons. The judgment concerned a conflict that arose when a company intended to apply the working-time reduction for parental reasons in the terms established in Article 37.5 after a 2012 legal reform.

Article 37.5 of the Workers' Statute regulates the right to reduced working hours for parental reasons.⁶⁹ According to this Article, parents, including adopting and fostering parents, of children younger than twelve can ask for a reduction in working time, in which case their salary is reduced proportionally. This parental right has existed in Spanish legislation, with only minor changes, since the beginning of its democracy. However, the labour-law reform that took place with Law 3/2012, of 6 July 2012, substantially altered Article 37.5 of the Workers' Statute. Since the reform, the unremunerated reduction of working time that can be asked for based on parental reasons has to be done on a daily basis, which means that the article

⁶⁸ Civil Unions Act, Official Gazette of the Republic of Slovenia, No. 33/2016, 21 April 2016.

⁶⁹ For a detailed analysis of the changes in Spanish regulation on working-time reduction for parental reasons after the labour-law reform of 2012 see Ballester Pastor, 'Legal Effects of the Economic Crisis on Gender Equality in Spain: Effects on the Right to Reconcile Work and Family after the 2012 Labour-Law Reform', *European Gender Equality Law Review*, 2, 2012, 20-29, http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2012-2_web_final_en.pdf, accessed 19 July 2016.

no longer allows the reduction to be made when related to longer periods of time. This means that the worker does not have the right to accumulate the daily reduction of time over a week and apply it all to only one day (or several days) of that week. The 2012 legislation has thus reduced the workers' right to reduced working hours for parental reasons.

This is the first time that the Supreme Court has ruled on the application of Article 37.5 of the Workers' Statute following the legal reform of 2012. The worker submitted a claim against the company, requesting the application of the collective agreement, which granted the right to working-time reduction for parental reasons in the terms established before the 2012 legal reform. The company alleged that the collective agreement was not applicable here since it simply reproduced the applicable legislation. As a consequence, according to the company's argumentation, the features of the working-time reduction for parental reasons should always be understood to reflect the regulations as established by the applicable law. The Supreme Court ruled against the company and recognized the right to the working-time reduction for parental reasons in the terms established in the collective agreement.

Internet source:

Judgment of the Supreme Court of 18 July 2016, appeal number 198/2015: <http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=7726389&links=%22198%2F2015%22&optimize=20160704&publicinterface=true>, accessed 19 July 2016.

Sweden

SE

CASE LAW

Discrimination in access to housing without an identified victim

Reporters of a regional TV programme performed situation testing in the field of housing, with regard to one specific landlord owning a great number of apartments. The reporters who telephoned the landlord speaking in a foreign accent when asking about apartments were questioned about their employment situation, and asked to provide references from previous landlords. The reporters who telephoned and spoke perfect Swedish however were invited to apply without any further questions. The reporters were then sent a form to be filled in, which contained a direct question about ethnicity and, if the ethnicity was 'Non-Swedish', a follow-up question about length of stay in Sweden.

Racial or
ethnic origin

On the basis of information provided by the tax authorities, the reporters could also demonstrate that the percentage of tenants with 'Swedish sounding names' living in the area was between 10-20 %. However, in the apartments owned by the tested landlord, 72 % of the tenants had 'Swedish sounding names'.

Following the media reports, the Tenant Union brought the case before the Equality Ombudsman, who decided to open a case of supervision (*tillsyn*).⁷⁰ Within this framework, the Ombudsman can declare a violation of the Discrimination Act. Such a declaration is non-binding, and there is no possibility for the Ombudsman to apply sanctions unless an individual victim steps forward. Although there is abundant evidence of a discriminatory general practice, the violation cannot be sanctioned under Swedish law without an individual victim.

Internet source:

<http://www.do.se/om-do/pressrum/aktuellt/aktuellt-under-2016/do-inleder-tillsyn-mot-bostadsbolag/>, accessed 18 July 2016.

⁷⁰ <http://www.do.se/om-do/pressrum/aktuellt/aktuellt-under-2016/do-inleder-tillsyn-mot-bostadsbolag/>, accessed 23 September 2016, GRA (case of supervision) 2016/11.

Police Roma registration found to constitute discrimination

Racial or
ethnic origin

In September 2013 it was revealed that the police were keeping a register of more than 4000 Roma persons or persons having a relationship with a Roma person. Although the police claimed that the register had been set up in the context of criminal investigations, it was impossible to see whether a registered person was suspected of any crime, and it was also impossible to remove a person once he/she was registered.

Several procedures were initiated before different authorities, on different legal bases, but none of them found that any discrimination or ethnic registration *per se* had taken place.⁷¹ In May 2014 the Chancellor of Justice found a violation of the Data Protection Act, unrelated to the ethnic origin of the victims, and awarded EUR 550 (SEK 5000) each to the majority of the registered persons as compensation.⁷² In addition, eleven of the registered persons received assistance from an NGO, the Civil Right Defenders, to bring a case before the Stockholm Municipal Court. The decision of the Court was delivered on 10 June 2016.⁷³

The Court awarded EUR 3 000 (SEK 30 000 SEK) each to the claimants, in addition to the damages already awarded by the Chancellor of Justice. The crucial importance of this recent decision is that the Stockholm Municipal Court found that the only reason for the registration was the ethnicity, and determined that discrimination had taken place.

The Court applied a shared burden of proof. Given that the eleven claimants had proved the existence of the register and that people were registered because they were friends or relatives of three criminal Roma families or friends of friends, it was obvious that these eleven persons were registered because they were Roma (ten persons) or married to a Roma (one person). It was then up to the State to prove that there were also other valid reasons not connected to ethnicity to register the persons. As no reasons could be given for the registration of these specific 11 persons, the State failed to prove there was any valid reason not connected to ethnicity.

The amount of EUR 3 000 (SEK 30 000) was set in relation to a violation of Article 14 of the European Convention on Human Rights. The Municipal Court referred to the long history of discrimination of Roma persons as a reason to set the amount higher than it would have done if the registration had concerned another group with no history of discrimination.

Internet source:

Summary of the court decision: <http://www.stockholmstingsratt.se/Om-tingsratten/Nyheter-och-pressmeddelanden/Staten-far-betala-ytterligare-skadestand-for-Kringresanderegistret/>, accessed 18 July 2016.

71 Commission on Security and Integrity Protection (decision in December 2014) <http://www.sakint.se/dokument/rapporter-och-uttalanden/Uttalande-PM-Skaane-Uppfoeljning-Kringresande.pdf>, accessed 23 September 2016; Equality Ombudsman (decision in February 2014) <http://www.do.se/globalassets/stallningstaganden/stallningstagande-beslut-med-rekommendationer-till-polismyndigheten-gra-2013617.pdf>, accessed 28 September 2016; Public prosecutor decision of 20 December 2013 (not available online); the Parliamentary Ombudsman (decision in March 2015) <http://www.jo.se/PageFiles/6353/5205-2013.pdf>, accessed 23 September 2016.

72 Chancellor of Justice, decision of 7 May 2014 dnr 1441-14-47.

73 Stockholm Municipal Court, Case T 2978 (and ten more cases), *Fred Taikon* (and ten more claimants) v. *Swedish State* through the Chancellor of Justice (judgment 2016-06-10).

Turkey

TR

LEGISLATIVE DEVELOPMENTS

Law No. 6663 amends Income Tax Law and other laws

A new law in Turkey, Law No. 6663 amending Income Tax Law and Some Other Laws (*Gelir Vergisi Kanunu ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun*), was published in the Official Gazette of 10 February 2016 and became effective on its publication date. The Law amends the Civil Servants Law (Law No. 657), the Labour Law (Law No. 4857) and the Unemployment Fund Law (Law No. 4447) and introduces new legal measures to facilitate the reconciliation of work, private, and family life. The new legal measures include:

Gender

- Part-time work as an option for female civil servants: A female civil servant may opt for part-time work following the end of fully-paid maternity leave. This will be in the amount of two months for the first child, four months for the second child, and six months for the third child. The duration of part-time work will be longer in case of multiple births (specified periods plus one month) or if the child is disabled (12 months) (Law No. 657, Art. 104/F). She will receive full salary from the public employer as if she works full time. The periods are the same for adoptive female civil servant parents. A female civil servant may commence her two-year unpaid maternity leave after the paid maternity/adoptive leave, or after the expiration of part-time work (Law No. 657, Art. 104/F).
- Part-time work as an option for civil servant mother and/or father: A female civil servant who has given birth and/or her civil servant husband have/has the option of working part time until the first day of the month following the compulsory school age of the child. The compulsory school age starts at the end of the September in the year that the child turns five. A civil servant who opts for a time reduction of 50 % will be paid half the regular salary (Law No. 657, Additional Art. 43).
- Leave for adoptive civil servant parent(s): This applies if a child is adopted when he or she is less than 3 years old. There will be eight weeks' paid leave (same as post-natal leave) for adoptive civil servant parent(s) (Law No. 657, Art. 104/A). Upon request, adoptive civil servant parents will be granted an unpaid leave of 24 months after paid adoption leave, or after the expiration of part-time work (Law No. 657, Art. 108/C).
- Promotions are to continue during the unpaid maternity leave of 24 months: A civil servant is entitled to an 'upgrade (degree)' (also meaning an increase in salary) following each year of service (horizontal upgrade, '*kademe ilerlemesi*') and following 3 years of service (vertical upgrade, '*derece ilerlemesi*'). A civil servant on her unpaid maternity/adoption leave will have these entitlements (Law No. 657, Art. 36/C/8; Additional Art. 42).
- Death of a female worker at birth or maternity leave: If a female worker dies during birth or during maternity leave, the unused period of post-natal leave will be granted to the worker father. This was previously only available for civil servant fathers, and now it is also granted to all worker fathers (Law No. 4857, Art. 74/1).
- Leave for adoptive worker parent(s): This applies if a child is adopted when he or she is less than 3 years old. There will be eight weeks' paid leave (same as post-natal leave) for the adoptive worker parent(s). Adoptive worker parents will also be entitled to the 6-month unpaid leave upon request (Law No. 4857, Art. 74/2, 6).
- Part-time work as an option for female workers: A female worker may opt for part-time work (half of statutory working time, which is 45 hours per week) following the end of paid maternity leave. This will be in the amount of 60 days for the first child, 120 days for the second child, and 180 days for the third child. The duration of part-time work will be longer in case of multiple births (specified periods plus 30 days) or if the child is disabled (360 days). The periods are the same for adoptive parents (Law No. 4857, Art. 74). If she opts for a time reduction of 50 %, she will receive half of her regular wage from her employer. For the remaining period she will be paid from the Unemployment

Fund. The daily amount of this payment (allowance) will be the daily gross minimum wage (Law No. 4447, 53/B/g; Additional Art. 5).

- Part-time work as an option for female worker and/or her husband: A female worker who has given birth and/or her (worker) husband have/has the option of working part time until the first day of the month following the compulsory school age of the child. She/he will be paid half of her/his regular wage for a time reduction of 50 %. A request for this option cannot constitute a valid reason for an employer to terminate his/her contract (Law No. 4857, Art. 13).

The new legal measures have lessened the wide gap between the female civil servants and female workers. These measures may work well in the public sector and in big private enterprises. However, there are doubts as to whether these rules will be equally applicable in small enterprises.

Internet source:

<http://www.resmigazete.gov.tr>, accessed 20 February 2016.

Adoption of an anti-discrimination law and establishment of a national equality body

On 6 April 2016, the Turkish Parliament adopted the Law on the Human Rights and Equality Institution of Turkey,⁷⁴ replacing the previous Human Rights Institution of Turkey which had been established in 2012. The newly created Human Rights and Equality Institution is a public legal entity with financial and administrative autonomy, attached to the Prime Minister. It will consist of 11 members, eight of whom will be appointed by the Cabinet and three by the President. It will have three main functions:

- protection and enhancement of human rights;
- ensuring the right to equal treatment and preventing discrimination in using rights and freedoms;
- serving as national prevention mechanism in the framework of the Optional Protocol to the UN Convention against Torture.

In addition, the law introduces new elements to the equality and anti-discrimination legal framework, partly on the basis of a draft law which has been pending since 2009. The law contains the following list of protected grounds: sex, race, colour, language, religion, belief, denomination, philosophical and political opinion, ethnic origin, wealth, birth, marital status, health, disability and age. This list fails to include sexual orientation and contrary to the draft law of 2009, it is not open-ended.

The law defines the following forms of discrimination: direct and indirect discrimination, mobbing, multiple discrimination, segregation, instruction to discriminate and compliance with such an instruction, failure to provide reasonable accommodation, harassment, and discrimination by assumption. It fails to include victimisation and discrimination by association as well as, contrary to the draft law of 2009, hate speech.

Article 2(1)(d) of the new law defines direct discrimination as ‘any differential treatment, based on one of the grounds enumerated in this law, which prevents or obstructs any natural or legal entity from the enjoyment of legally recognized rights and freedoms on equal footing with others in comparable situations.’ Article 2(1)(e) defines indirect discrimination as: ‘[a] real or legal person being put in a disadvantageous situation in exercising his/her legally recognized rights and liberties on the grounds prohibited under this law in such a way that cannot be objectively justified as a result of any action, procedure or practice which does not appear discriminatory.’ The following additional sentence which existed under the corresponding article of the 2009 draft law has been removed: ‘In order for an action, procedure or practice to be objectively justified, it must have a legitimate aim and be proportionate.’ Article 2(1)(j) defines harassment as ‘any intimidating, degrading, humiliating or embarrassing conduct,

⁷⁴ Law No. 6701, Official Gazette of 20 April 2016, No. 29690.

including psychological and sexual, which seeks to violate human dignity or results in such outcome, related to any of the grounds referred to in this Law.'

The only ground which is defined by the new law is disability, and the definition is the same as the one contained in the existing Law on Persons with Disabilities. In addition, the new law defines reasonable accommodation as 'necessary and appropriate changes and precautions, to the extent that financial resources permit, needed in a certain situation in order to ensure that persons with disabilities exercise or benefit from their rights and freedoms fully and on equal footing with others.' Compared to the Law on Persons with Disabilities, which requires reasonable accommodation unless it imposes 'a disproportionate and excessive burden', the new law imposes less stringent obligations on employers.

The announcement of the new law has been strongly criticized by human rights groups in Turkey for its failure to comply with the UN Paris Principles with regard to the establishment of the Human Rights and Equality Institution.⁷⁵ The hasty preparation and adoption of the law, without the active participation of civil society, has also been severely criticised.

Internet source:

Law on the Human Rights and Equality Institution of Turkey, No. 6701, 6 April 2016, Official Gazette, No. 29690, 20 April 2016:

<http://www.resmigazete.gov.tr/eskiler/2016/04/20160420.htm>, accessed 18 July 2016.

POLICY DEVELOPMENT

Parliament rejects motion for parliamentary inquiry into the housing conditions of the Roma minority

The Urban Renewal Law of 2005 has had a disparate impact on Roma people, stimulating urban transformation projects, most of which resulted in massive destruction and relocation of Roma neighbourhoods throughout Turkey.⁷⁶ According to a joint report submitted by the Habitat International Coalition and its national partners for Turkey's Universal Periodic Review by the UN Human Rights Council, the number of Roma displaced due to the Government's urban transformation projects by 2014 was about 10 000.⁷⁷ In its feedback for the 2014 Universal Periodic Review of Turkey by the UN Human Rights Council, the Committee on Economic, Social and Cultural Rights 'noted with concern that forced evictions had taken place in Istanbul, without adequate compensation or alternative accommodation' and emphasised their adverse effects on the schooling of children. The Committee urged the Government to review the legal framework governing urbanisation projects 'to ensure those affected received adequate compensation and/or relocation'.⁷⁸

Racial or ethnic origin

75 'Government Statement regarding the Establishment of the Human Rights and Equality Institution of Turkey: The Issue of the Institutionalization of Human Rights is Perceived Fully from an Instrumental Perspective', joint statement of the Human Rights Foundation of Turkey, Human Rights Association, Association of Human Rights and Solidarity with the Oppressed, Helsinki Citizens Assembly, Human Rights Agenda Association, Human Rights Studies Association and Amnesty International Turkey Branch, 18 January 2016.

76 European Roma Rights Centre and the Edirne Roma Association, Written Comments Concerning Turkey for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 74th Session, available at: http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRC_Turkey_CERD74.pdf, accessed 27 September 2016.

77 United Nations (UN), Office of the UN High Commissioner for Human Rights (2014), Summary prepared in accordance with Paragraph 15(c) of the annex to Human Rights of the annex to Human Rights Council Resolution 5/1 and Paragraph 5 of the annex to Council Resolution 16/21: Turkey, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 9.

78 United Nations (UN), Office of the UN High Commissioner for Human Rights (2014), Compilation prepared in accordance with Paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and Paragraph 5 of the annex to Council Resolution 16/21: Turkey, submitted to the UN Human Rights Council Working Group on the Universal Periodic Review twenty-first session: 19-30 January 2015, p. 12.

On 7 January 2016, the Turkish Parliament debated a motion submitted by 23 MPs from the main opposition party for a parliamentary inquiry into the housing conditions of the Roma minority in Turkey.⁷⁹ The proposal was rejected by the majority MPs from the governing Justice and Development Party.

The motion emphasized the importance of the right to housing as a fundamental human right necessary for the exercise of other fundamental rights. Pointing to the close link between the right to housing and the right to be free from discrimination, the motion referred to the Roma neighbourhoods in Turkey as ‘the personification of discrimination in urban settings.’ The motion then problematized ongoing urban renewal projects carried out across Turkey from the perspective of the right to housing of the Roma community. Pointing out that these projects have been carried out in neighbourhoods where the Roma and other socially marginalized and impoverished communities lived, the motion laid out the following problems with these projects: lack of information available to the public as to the number, location and nature of urban renewal projects; lack of transparency; the exclusion of the Roma residents from the decision-making processes which are exclusively carried out between private companies and local municipalities; the low amounts of compensation paid to the Roma individuals who had been forced to move out of their homes due to urban renewal projects; the lack of affordable, alternative housing for the displaced Roma; the fact that many Roma citizens had become homeless or have to live in poor conditions in their new residences; and that the legal framework in which these projects are carried out virtually deprive the Roma of their right to seek legal remedy in courts and cause their forced displacement. The motion also pointed out that there are still Roma neighbourhoods where residents live in tents in extremely poor conditions, without access to water, electricity and sewage infrastructure.

Internet source:

<http://www2.tbmm.gov.tr/d26/10/10-9206gen.pdf>, accessed 18 August 2016.

UK

United Kingdom

CASE LAW

Abuse of vulnerable migrant domestic workers does not amount to unlawful nationality discrimination

The claimants were both migrant domestic workers who were subjected to abuse and mistreatment by their employers (they were required to work for very low pay without breaks and subjected to physical and mental abuse). They were able to claim successfully for breaches of the National Minimum Wage Act 1998, unlawful deductions from wages and breach of Working Time Regulations 1998. The first claimant was unsuccessful in her Employment Tribunal claims for nationality discrimination, on the basis that the adverse treatment was because of her vulnerable immigration status, rather than on the basis of nationality. Those of the same nationality who had a different immigration status would not have been subjected to the same treatment. As regards her indirect discrimination claims, no ‘provision, criterion or practice’ had been identified which put the group to which the claimants belonged at a disadvantage, and so the indirect discrimination claim also failed. The second claimant was successful in her claim for race discrimination before the Employment Tribunal, on the basis that her status as a migrant worker was clearly linked to her race. The Employment Appeal Tribunal upheld the first-instance decision in the first claimant’s case, and overturned the first-instance decision in the second claimant’s case. The Court

Racial or
ethnic origin

79 Motion for the Opening of a Parliamentary Inquiry for the Purpose of Inquiring into the Housing Needs of Roma Citizens and Identifying the Measures that Need to be Taken, No. 10/50, submitted by Izmir deputy Özcan Purçu and his 22 friends, submitted to the Parliament on 8 December 2015.

of Appeal heard the two appeals and held that immigration status could not be equated with nationality for the purposes of the Equality Act 2010. The cases were then appealed to the Supreme Court.

In June 2016, the Supreme Court ruled in the two cases. The question for the Supreme Court was whether discrimination because of immigration status amounted to discrimination because of nationality. Nationality is protected as part of the protection against race discrimination under Section 9 of the Equality Act 2010, along with ethnic or national origins. A subsidiary question was whether the employers' conduct amounted to indirect discrimination against those who shared that nationality. The Supreme Court upheld the decision of the Court of Appeal, and confirmed that this was not discrimination because of race or nationality, but instead discrimination because of vulnerable immigration status. Such a status is not a protected characteristic under the Equality Act 2010.⁸⁰

Internet source:

<https://www.supremecourt.uk/cases/docs/uksc-2014-0105-judgment.pdf>, accessed 18 July 2016.

80 National Court Decision of 22 June 2016, Supreme Court [2016] UKSC 31.

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