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NEWS REPORT

Country:	Greece
Title:	Re-transposition of Directives 2000/43/EC, 2000/78/EC and transposition of Directive 2014/54/EU
Date:	21 April 2017
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Context	
Issue at stake:	Extension of the scope of the equal treatment principle: addition of grounds and fields; extension of the Ombudsman's powers; procedural provisions not improved nor incorporated into procedural codes; inadequate transposition of Directive 2014/54/EU
Grounds of discrimination:	All Article 19 TFEU grounds, except sex, plus 'gender identity or gender characteristics' and other grounds
Source:	Legislation
Field:	Employment; vocational training; social protection; (occupational) social security and health care; social benefits; tax advantages; goods and services; education; housing; self-employment; professional organisations
Applicable law:	Act 4443/2016 (OJ A 232/09.12.2016)

Content

Law development:

a) Extension of the scope of the principle of equal treatment

Directives 2000/43/EC and 2000/78/EC¹ (the anti-discrimination Directives) were initially transposed by Act 3304/2005,² each in a separate chapter of this Act. This Act was replaced by Part A of Act 4443/2016, which re-transposes the anti-discrimination Directives and transposes Directive 2014/54/EE.³ Reflecting a single equality approach, the new Act merges the grounds of the anti-discrimination Directives, it adds new grounds and extends the protection afforded by Directive 2000/78 to all the grounds; it also adds new fields and extends the Ombudsman's powers to the private sector. 'Sex' or 'gender' is not among the grounds, but it may be deemed to be concerned *via* the new ground of 'gender identity or gender characteristics' (see Article 2, below).

b) Problems created by the simultaneous transposition of Directive 2014/54

Mixing the transposition of the three Directives may well create confusion, as the legal basis, the aim and the scope of Directive 2014/54 differ from those of the anti-discrimination Directives. The legal basis of the latter was Article 13 TEC (now Article 19

¹ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp. 22-26; Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2/12/2000, pp. 16-22.

² OJ A 16/27.1.2005.

³ Directive 2014/54/EU of the European Parliament and of the Council on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, OJ L 128, 30.4.2014. pp. 8-14.

TFEU), which enables the competent EU institutions to take measures to combat discrimination on the grounds that it lists; the legal basis of Directive 2014/54 is Article 46 TFEU, which provides for the taking of measures for achieving freedom of movement of workers within the EU. The Preamble to Directive 2014/54 stipulates that 'enforcement of that fundamental freedom should take into consideration the principle of equality between women and men'.

The anti-discrimination Directives apply to 'all persons' in the public and private sectors. Directive 2014/54 applies to 'Union workers and members of their family'. It covers the fields listed in both anti-discrimination Directives, plus 'tax advantages', 'access to education, apprenticeship and vocational training for the children of Union workers', 'assistance afforded by the employment offices'. The transposition of Directive 2014/54 is inadequate; 'EU nationality' is not a protected ground, while several provisions of this Directive are not transposed.

Article 1: Aim

The aim of Part A is to promote the equal treatment principle by combating discrimination on the grounds listed in the anti-discrimination Directives, plus 'colour', 'genetic features', 'chronic illness', 'family or social status' and 'gender identity or characteristics', and to implement Directive 2014/54. The grounds of 'colour' and 'genetic features' are copied from Article 21(1) of the Charter. The Explanatory Report clarifies the above additional grounds.⁴

Article 2: Concept of discrimination

Paragraph 1: 'Any discrimination' on the above grounds is prohibited, but the terms 'direct or indirect' are missing. *Paragraph 2:* The definitions of direct and indirect discrimination, harassment and instruction to discriminate are copied from the anti-discrimination Directives and further concepts are defined: 'discrimination due to relationship', 'discrimination due to perceived characteristics'. Moreover, 'refusal of reasonable accommodation' for persons with a handicap or chronic illness constitutes discrimination. 'Multiple discrimination' is prohibited and defined by reference to the grounds covered by the Act. While 'sex' or 'gender' is not among these grounds, it may be deemed to be covered *via* 'gender identity or gender characteristics'; however, it would be more conform to the Treaty obligation to mainstream gender equality and to the purpose of the prohibition of multiple discrimination to add 'sex' or 'gender' for the purposes of 'multiple discrimination'. The following should also be added at the end of the definition: 'in particular when it affects women' and it should be recalled that, in its report to the Commission on the application of the Directives, the Government must give information on the impact of the measures taken on women and men.⁵

Article 3: Scope of application

Paragraph 1 mentions the fields listed in Article 3 of Directive 2000/78. *Paragraph 2* mentions the additional fields listed in Article 3 of Directive 2000/43, plus 'tax facilitations or advantages'. 'Tax advantages' appear in Article 2 of Directive 2014/54; however, other fields listed in that Article ('access to education, apprenticeship and vocational training for the children of Union workers', 'assistance afforded by employment offices') are missing. Article 24 enables the competent ministers to extend the scope of the Act by Decree. *Paragraph 5* states that the Act does not apply to the armed forces regarding different treatment on grounds of age, disability or chronic illness related to their service.

Article 8. Protection

Paragraph 1: 'In case of non-observance of the equal treatment principle in the context of administrative action, the wronged person is afforded, besides judicial protection,

⁴ See Explanatory Report, available at: http://www.parliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law_id=246e2286-a8e1-4283-95c0-a6b901169a95 (in Greek), accessed 18 January 2017.

⁵ See Directive 2000/43, Preamble, Paragraph 14, Article 17; Directive 2000/78, Preamble, Paragraph 3, Article 19.

protection under the Code of Administrative Proceedings' (CAP):⁶ remedies by administrative authorities). The following wording would be conform to the Directives and CJEU case law: 'In case of non-observance of the equal treatment principle, *the wronged person has a right to access to justice and to effective judicial protection, after eventual recourse to a competent administrative authority. If the violation results from administrative action [...]*'.⁷

Paragraph 3 provides that legal entities, including trade unions, 'may represent the wronged person before the courts and any administrative authority or body, subject to this person's prior consent given by notarized act [...], or by private deed bearing a certified signature'. As the wronged persons, in particular in the current crucial socio-economic context, do not dare to bring cases to court, for fear of victimisation, the protection thus provided is illusory. The legal entities should act in their own name. This system is provided in the Code of Civil Procedure (CCP) for persons or legal entities who/which, though not holders of the right affected, may become litigants in their own name. For example, *locus standi* is granted to workers' and employers' organisations to exercise in their own name before the courts some rights of their members and intervene in their favour in a trial initiated by them. The personal and material scope of the relevant provision is narrower than the scope of the provision of the Directives, but the *ratio* is the same. This provision was not extended in line with the Directives; the EU rule is thus not applied, as it is unknown to litigants and judges. There is no such provision for administrative trials. According to the CAP, it is only when a legal entity is wronged itself that it can have recourse to the courts.

The requirement of '*prior consent*' of the wronged person is incompatible with the Directives which require an 'approval' that may be given after the legal entity has lodged the proceedings.⁸ Moreover, this may well make the protection illusory, as until the consent is given, the time period for lodging the remedy may well have expired. Such time periods are often quite short. Thus, e.g., a civil action seeking a declaration of invalidity of a dismissal must be lodged within three months of the dismissal; an action before administrative courts for the annulment of an unlawful administrative act, such as a dismissal or a refusal to hire, must be lodged within 60 days from the date on which the wronged person learnt the act.

Paragraph 4 provides that the legal entities 'may intervene in favour of the wronged person in a trial initiated by this person in accordance with Articles 80 et seq. [CCP] and 113 et seq. [CAP]'. The litigation costs are reduced when the entities intervene, but not when they take cases to court themselves. Under the CCP, interventions are allowed at all stages of the civil trial, including the final appeal trial before the Supreme Civil Court, but under the CAP, interventions are only allowed in first instance and appeal administrative trials. There is no provision in Greek procedural law granting *locus standi* to legal entities to intervene before the Council of State (Supreme Administrative Court; CS) in favour of a claimant. The procedural legislation prohibits interventions before the CS at the final appeal trial (Article 55 Presidential Decree (PD) 18/1989),⁹ and it only allows interventions in annulment trials in the CS in favour of the administrative act challenged, not in favour of the claimant (Article 49 PD 18/1989). Act 4443/2016 has thus inadequately transposed the Directives.

Article 9: Burden of proof

Paragraph 1: 'When the wronged person alleges that the principle of equal treatment has not been complied with and establishes before a court or a competent administrative authority facts from which direct or indirect discrimination may be inferred, the adverse

⁶ Act 2690/1999, OJ A' 45/1999.

⁷ This wording was suggested by the Greek League for Women's Rights: 'Comments and Suggestions' on the bill that became Act 4443/2016, available at: <http://leagueforwomenrights.gr/anakoinwseis-deltia-typou/anakoinwseis> (in Greek), accessed 8 January 2017.

⁸ For the difference, in Greek law, between 'consent' (to be given prior to the action concerned) and 'approval' (which may follow the action), see Articles 236-238 of the Greek Civil Code.

⁹ OJ A 8/9.1.1989.

party or the administrative authority bears the burden to prove before the court that the facts which constitute a violation of this principle have not occurred'. This provision introduces an exception to the traditional procedural rules that the claimant must invoke and prove all the facts on which he/she bases his/her claim (Articles 338 CCP, 145 CAP). However, it confuses the respondent with the authority before which a claim is brought. It must therefore be urgently corrected.

Article 10. Protection against victimisation

This Article stipulates that the protection afforded by Article 8 of the Act 'includes dismissal and any adverse treatment as a reaction to a complaint aimed at obtaining legal protection for ensuring compliance with the equal treatment principle'. We recall that 'EU citizenship' is not a protected ground under Article 8.

Article 11. Sanctions

Paragraph 1 provides for penal sanctions for violations of the Act in the provision of goods and services. No penal sanctions for other fields are provided, although they are otherwise common, in particular in the field of labour law. The only sanctions for violations of the Act in the field of employment are administrative.¹⁰ As 'EU citizenship' is not a protected ground, neither the penal nor the administrative sanctions apply to violations of Directive 2014/54.

No civil sanctions are provided. However, the traditional remedies and sanctions, which are effective, proportionate and dissuasive and are also applied in gender equality cases, are not affected. The claimant is put in the position in which she/he would have been in had the illegal act or omission not occurred: civil courts declare an unlawful refusal to hire or promote null and void; the hiring or promotion is deemed to exist from the time it should have occurred. Administrative courts annul such a refusal and order a retroactive hiring or promotion.¹¹ Civil courts declare an unlawful dismissal null and void; administrative courts annul it;¹² the dismissal is deemed never to have occurred; the worker retains his/her post, reinstatement not being necessary. Full back pay is awarded, plus legal interest and eventually moral damages.¹³ In pay¹⁴ and social security¹⁵ cases, levelling-up is applied. Yet, procedural and socio-economic problems deter recourse to the courts, thus limiting the use of the remedies

Article 14. Body for the promotion of the principle of equal treatment

The Ombudsman whose independence is constitutionally guaranteed was already the Equality Body, albeit in the public sector only. The private sector came under the Labour Inspectorate, a government service, not an independent body. Article 14 extends the Ombudsman's powers to the private sector. As 'EU citizenship' is absent from the new Act, these powers are illusory regarding Directive 2014/54.

Key points of analysis: The main positive features of Act 4443/2016 are the addition of grounds and fields to those of the anti-discrimination Directives and the extension of the Ombudsman's powers to the private sector. Yet, some of the procedural provisions are incorrectly worded and none of them is incorporated in the procedural codes. There is thus a clear risk that Act 4443/2016, like Act 3304/ 2005, its predecessor, be rarely applied. The simultaneous transposition of Directive 2014/54 is inadequate and likely to

¹⁰ By reference to Article 24 of Act 3996/2011J A 170/05.08.2011, as amended by Article 23 (6) of Act 4144/2013, OJ A 88/18.04.2013.

¹¹ Refusals to hire due to maximum quotas for women: SCPC (Civil Section) 1360/1992 (nullity of refusal; retroactive effects); CS 1229/2008 (annulment of refusal; retroactive effects); CS 13/2015 (annulment of the exclusion of a pregnant candidate from the fire corps because she could not take the fitness tests).

¹² SCPC (Civil Section) 85/1995, 593/2006, 496/2011 (dismissal of women at pensionable age which was at the time lower than men's pensionable age); 2035/2002 (dismissal of a pregnant woman; knowledge of the pregnancy by the employer is irrelevant); 1591/2010 (dismissal of a mother during the period for which she was entitled to reduced working time).

¹³ SCPC (Civil Section) 2069/2013 (moral damages – principle of proportionality).

¹⁴ SCPC (Civil Section) landmark judgment 35/1995 (Plen.); 75/2009; CS 890/2006.

¹⁵ Court of Audit 44 and 3157/200 (Plen.); CS 3088/2007 (Plen.).

create confusion, as its legal basis aim and scope differ from those of the anti-discrimination Directives.

Internet link sources: Explanatory Report; text of the Bill that became Act 4443/2016; debate in the Permanent Parliamentary Committee for Public Administration, Public Order and Justice; debate in the Parliament Plenum and other relevant parliamentary documents, available at: http://www.parliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law_id=246e2286-a8e1-4283-95c0-a6b901169a95, accessed 18 January 2017.