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# Country report

## Gender equality



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# **Country report**

## **Gender equality**

How are EU rules transposed into  
national law?

### **Norway**

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Reporting period 1 January 2017 – 31 December 2017

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## 1. Introduction

### 1.1 Basic structure of the national legal system

Norway is based on a civil law system, where the Constitution is top of the hierarchy and national laws and regulations define the system in more detail. The interpretation of laws is based on both preparatory works as well as interpretations by the courts. The court system is based on three levels: the municipality courts, the courts of appeal and the Supreme Court. In addition there is the Court of Labour disputes (Labour Court) which interprets collective agreements. Judgments of the Labour Court may be appealed to the Supreme Court.

Individual complaints regarding gender equality legislation may be brought to the equality and anti-discrimination Ombud.<sup>1</sup> The Ombud provides a statement as to whether or not the provisions have been breached. Those who want to dispute the Ombud's statement may bring the complaint to the Discrimination Tribunal, which will either provide a statement or a legally binding decision (*vedtak*).<sup>2</sup> If a party disagrees with the Tribunal's decision, the case may be brought to the Courts for a full trial of the case.<sup>3</sup> The Ombud/Tribunal is a low threshold complaint system where the parties do not need the assistance of lawyers. It is not a precondition for filing a discrimination case with the courts that the issue at stake has already been through the Ombud/Tribunal system.

There is a system of free legal aid where persons who are below a certain level of income may be granted free legal aid, but discrimination cases are generally not eligible as such.

The Ministry of Children and Equality is responsible for all the equality and non-discrimination laws and has the responsibility to ensure the fulfilment of political objectives in this area.<sup>4</sup> The Ministry has delegated the Norwegian Directorate for Children, Youth and Family Affairs as also being responsible for equality and non-discrimination issues.<sup>5</sup>

The Government proposed a new Act, no. 51, relating to Equality and the prohibition against discrimination, which was enacted by Parliament on 16 June 2017.<sup>6</sup> The new Act entered into force on 1 January 2018. This Act unites all four equality and anti-discrimination acts in one common law. In addition, has there been a reorganization of the Ombud/Tribunal system, where the Ombud will focus more on proactive work thereby addressing, amongst other matters, discrimination at the structural level. The Ombud will no longer be dealing with individual complaints but instead the Tribunal will handle all complaints. A major achievement is that the Tribunal has been granted a right to award punitive damages for breaching anti-discrimination provisions.<sup>7</sup>

### 1.2 List of main legislation transposing and implementing Directives

The legal framework on gender equality/sex discrimination is defined by the national Act of Gender Equality (GEA) (*Lov om likestilling mellom kjønnene* (LOV-2013-06-21-59)). The GEA has no age limits and applies to all areas of society, both in the labour market as well as in all other areas of society. In addition the Working Environment Act (WEA) (*Lov om arbeidsmiljø, arbeidstid og stillingsvern. mv.* (LOV-2005-06-17-62) specifically refers to

<sup>1</sup> <http://www.ldo.no/>, accessed 18 May 2018.

<sup>2</sup> <http://www.diskrimineringsnemnda.no/>, accessed 18 May 2018.

<sup>3</sup> <http://www.domstol.no/no/Om-domstolene/De-alminnelige-domstolene/Lenker/>, accessed 18 May 2018.

<sup>4</sup> <https://www.regjeringen.no/no/dep/blid/id298/>, accessed on 18 May 2018. The area of responsibility for integration issues was moved to the Ministry of Justice and Public Security in 2015, and the name of the Ministry was amended from 2017.

<sup>5</sup> [http://www.bufdir.no/en/English\\_start\\_page/](http://www.bufdir.no/en/English_start_page/), accessed 18 May 2018.

<sup>6</sup> Act relating to Equality and the prohibition against discrimination:

<https://lovdata.no/pro/#document/NLE/lov/2017-06-16-51>, accessed on 18 May 2018.

<sup>7</sup> See the report on the web-page of the Ministry of Children and Equality:

<https://www.regjeringen.no/no/aktuelt/utredning-av-handhevingsapparatet-pa-diskrimineringsområdet/id2478335/>, accessed 18 May 2018.



the GEA in its chapter 13. All major Collective Agreements contain gender equality and non-discrimination clauses.

The relevant directives have been transposed in national legislation, but the actual text of the directives is not included in the text of the law as such. An incorrect implementation of a directive may be brought to the attention of the European Surveillance Authority (ESA). ESA may bring an issue to the EFTA court when a member state does not want to comply with ESA's view.

All the Directives in the area of gender equality are implemented and are assumed to be covered by the Gender Equality Act (GEA), according to statements from the Government Ministries following the decisions by the EEA Committee. After the Directives are approved by the EFTA Committee, Norway will provide an evaluation whereupon it will state that the relevant national legislation either already meets the requirements or that amendments will be required.

## 2. General legal framework

### 2.1 Constitution

#### 2.1.1 Does your national Constitution prohibit sex discrimination?

Yes, Norway's Constitution Article 98 prohibits sex discrimination. Article 98 of the Constitution is general in its wording and is assumed to cover sex discrimination according to the preparatory documents to the amendments to the Constitution. Article 98 was new to the Constitution from 27 May 2014 and has the following wording:

'All persons are equal before the law. No person must be subject to unjust or unreasonable differential treatment.'<sup>8</sup>

#### 2.1.2 Does the Constitution contain other Articles pertaining to equality between men and women?

No, the Norwegian Constitution does not contain other Articles pertaining to equality between men and women.

#### 2.1.3 Can the Article(s) mentioned in the two previous questions be invoked in horizontal relations (between private parties)?

Yes, the article may be invoked between private parties. This may be in a case heard by the regular courts in addition to complaints to the Ombud system.

### 2.2 Equal treatment legislation

#### 2.2.1 Does your country have specific equal treatment legislation?

Yes, Norway has a system of various discrimination Acts covering the various grounds. These are:

- The GEA (Gender Equality Act): *Likestillingsloven*:<sup>9</sup> Gender/Sex (*lov* no. 59, 2013). (Previous: *lov* no. 45 1978)
- The Discrimination Act: *Diskrimineringsloven* – Ethnicity, Religion and View of Life/conviction<sup>10</sup> (*lov* no. 60, 2013) (Previously: *lov* no. 33, 2005)
- The Disability Act: *Diskriminerings- og tilgjengelighetsloven*<sup>11</sup> (DTL): (*lov* no. 61, 2013) (Previously: *lov* no. 42, 2008)
- The Sexual Orientation Act: *Diskrimineringsloven*<sup>12</sup> (*lov* no. 58, 2013)

All the discrimination Acts have the same date as the amendments in 2013 and aim to introduce a similar editorial profile to enhance user-friendliness, see the preparatory works: Prop. 88 L (2012-2013).<sup>13</sup> It was not the intention to introduce material changes to the rights as such. In a recent article Blaker-Strand claims that the rights of individuals is threatened as the text of the law is less specific in order to promote a common size to fit all grounds.<sup>14</sup>

<sup>8</sup> <https://lovdata.no/dokument/NL/lov/1814-05-17?q=Grunnloven>, accessed 18 May 2018.

<sup>9</sup> <https://lovdata.no/dokument/NL/lov/2013-06-21-59?q=likestillingsloven>, accessed 18 May 2018.

<sup>10</sup> <https://lovdata.no/dokument/NL/lov/2013-06-21-60?q=Diskrimineringsloven>, accessed 18 May 2018.

<sup>11</sup> [https://lovdata.no/dokument/NL/lov/2013-06-21-61?q=Diskriminerings\\_og\\_tilgjengelighetslov](https://lovdata.no/dokument/NL/lov/2013-06-21-61?q=Diskriminerings_og_tilgjengelighetslov), accessed 18 May 2018.

<sup>12</sup> <https://lovdata.no/dokument/NL/lov/2013-06-21-58?q=Diskrimineringsloven>, accessed 18 May 2018.

<sup>13</sup> <https://www.regjeringen.no/no/dokumenter/prop-88-l-20122013/id718741/>, accessed 18 May 2018.

<sup>14</sup> See the article by Blaker-Strand, V. (2015), 'Forenklingssjuss – En trussel mot individers vern mot kjønnsdiskriminering?', *Lov og Rett*, Vol. 54. 8, p. 449-470, ISSN 1504-3061- online.

In addition to the discrimination Acts there is the WEA (Working Environment Act) Chapter 13: Age, political view, union membership, part-time work and temporary work, (lov no. 62, 2005 (2004)).<sup>15</sup> As temporary and part-time work for the majority of cases regards women, the regulations in chapter 13 of WEA plays an important role. However, in many ways, it is an increased risk that the gender perspective is lost when the WEA is applied, as there is no gender analysis included in the WEA. Previously, when cases regarding part-time work were under the GEA, the Ombud would specifically address the gender issues related to part-time work.

In October 2015 the Government proposed to compile all the discrimination grounds, including gender/sex, in one common equality and anti-discrimination law.<sup>16</sup> The new Act no. 51 relating to Equality and the prohibition against discrimination was enacted by Parliament on 16 June 2017.<sup>17</sup> The new Act entered into force on 1 January 2018.

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<sup>15</sup> <https://lovdata.no/dokument/NL/lov/2005-06-17-62>, accessed 18 May 2018. For information in English see: <http://www.arbeidstilsynet.no/working-conditions-in-norway.html>, accessed 18 May 2018.

<sup>16</sup> <https://www.regjeringen.no/no/aktuelt/bedre-vern-mot-diskriminering/id2458495/>, accessed 18 May 2018.

<sup>17</sup> Act relating to Equality and the prohibition against discrimination: <https://lovdata.no/pro/#document/NLE/lov/2017-06-16-51>, accessed on 18 May 2018.

### **3. Implementation of central concepts**

#### **3.1 Sex/gender/transgender**

3.1.1 Are the terms gender/sex defined in your national legislation?

No, the terms gender/sex are not defined in national legislation.

3.1.2 Is discrimination due to gender reassignment explicitly prohibited in your national legislation?

No, not explicitly. It could be interpreted that the existing legislation covers gender reassignment, see: Act on the prohibition against discrimination due to a person's sexual orientation,<sup>18</sup> section 5, which is quite wide in its wording: 'The prohibition against discrimination because of someone's sexual orientation applies whether it affects a person's actual, presumed, previous or future sexual orientation, identity or sexual expression.'

Discrimination on the ground of gender identity or sexual expression is covered in the text of the law, thus even if gender reassignment has taken place this should be covered by the wording of section 5.

#### **3.2 Direct sex discrimination**

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

Yes, sex discrimination is explicitly prohibited in national legislation: See the GEA section 5, 2: 'With direct differential treatment means any action or lack of action which has as its purpose or effect that a person is treated in a less favourable way than any other person would have been treated in an equivalent position, and that this is due to gender.'

One may also mention that the GEA section 5,1., first and second sentence, refers to pregnancy discrimination: Discrimination because of Gender is prohibited. Discrimination because of pregnancy and leave related to birth or adoption is regarded as discrimination because of gender. The prohibition also covers discrimination because of someone's actual, presumed, previous or possible future pregnancy or leave. The prohibition also covers discrimination because of association to a person in the aforementioned conditions.'

The author finds this definition to comply with the EU definition.

3.2.2 Are pregnancy and maternity discrimination explicitly prohibited in legislation as forms of direct sex discrimination?

Yes, pregnancy and maternity discrimination are both explicitly prohibited in legislation as forms of direct sex discrimination. The GEA section 5,1., first and second sentence, refers to pregnancy discrimination: 'Discrimination because of Gender is prohibited. Discrimination because of pregnancy and leave related to birth or adoption is regarded as discrimination because of gender. The prohibition also covers discrimination because of someone's actual, presumed, previous or possible future pregnancy or leave. The prohibition also covers discrimination because of association to a person in the aforementioned conditions.'

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<sup>18</sup> Lov om forbud mot diskriminering på grunn av seksuell orientering, kjønnsidentitet og kjønnsuttrykk (diskrimineringsloven om seksuell orientering), LOV-2013-06-21-58. See the Tribunal's case 15/2009 (hiring of a professor), case 22/2013 (net-page), case 5/2013 (renting of a flat) and case 29/2013 (harassment of an employee).

The provision complies with Article 2(2) (c) of Directive 2006/54. There remains one concern as the wording in the GEA section 5 appears to be covered, but on the other hand Norway has not implemented the Pregnant Workers Directive 92/85 in a correct manner. Women are not ensured 14 weeks' maternity leave reserved to themselves. Instead, this leave is blurred within the 'big bag' of parental leave.

Discrimination because of pregnancy is still a problem. One case from the Tribunal in 2016 is case 15/791.<sup>19</sup> A nurse was asked by her employer if she was interested in extending her position from 75 % to 100 % and, if so, to submit an application. The nurse submitted her application and was given a full-time position. In the meantime the employer had discovered that the employee was pregnant. The employer informed the employee that the extension of her position would not take place before she had returned after her leave.

The Ombud found that the woman had been a victim of direct discrimination in violation of the Gender Equality Act (1978) sections 5 and 17 because of pregnancy. The Ombud found no evidence of other reasons than the pregnancy as to why the employee had chosen to postpone the extension of her position. The employer had argued that the extension had been postponed due to difficulties involving a new rota system, but the Ombud did not believe the employer's explanation. This was partly because the employer admitted having said that the fact that the woman only stated that she was pregnant after having heard that her position had been extended and that this could be interpreted as taking advantage of the system. There was therefore no doubt that the woman had been put in a less favourable position than she would otherwise would have been in had she not been pregnant, see section 5 of the Gender Equality Act.

The employee had received a lesser parental leave allowance from the social security insurance system as she could only refer to a 75 % position, while if she had been given the extension from the intended date she would have received the full amount of the parental leave allowance.

Another case heard by the Tribunal is equally illustrative: A travel agency had announced an open position and a woman applied.<sup>20</sup> When the applicant informed her intended employer that she was pregnant, she was only offered a substitute position during certain weeks in the summer and with a direct reference to the fact that the pregnancy had made impossible to receive a permanent position. The travel agency failed to present evidence of other reasons than the pregnancy as to why she had been disqualified from even being considered as an applicant.

A unanimous Tribunal found that she had been the victim of direct discrimination in violation of the Gender Equality Act (1978) section 3 because of pregnancy. The Tribunal found no evidence of other reasons than the pregnancy as to why the employee's application was not even considered. There was therefore no doubt that the woman had been put in a less favourable position than she would otherwise would have been in had she not been pregnant, see section 3 of the Gender Equality Act.

Yet another Tribunal case is case LDN-2015-6-2: An employee on an 'expat' contract was 'compelled' to change to a Norwegian permanent contract when she became pregnant.<sup>21</sup> The employee suffered an economic loss due to the change of contract. A unanimous Tribunal found that she had been the victim of direct discrimination in violation of the Gender Equality Act (1978) section 3 because of pregnancy. The Tribunal found no evidence of other reasons than the pregnancy as to why her 'expat' contract had been withdrawn. There was therefore no doubt that the woman had been put in a less favourable

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<sup>19</sup> <http://www.diskrimineringsnemnda.no/nb/innhold/sider/vedtak/3200>, accessed on 18 May 2018.

<sup>20</sup> <http://www.diskrimineringsnemnda.no/nb/innhold/sider/vedtak/3200>, accessed on 18 May 2018.

<sup>21</sup> <http://www.diskrimineringsnemnda.no/media/1794/endelig-vedtak-i-sak-6-2015-2.pdf>, and [https://lovdata.no/pro/#document/LDN/avgjorelse/ldn-2015-6-2/KAPITTEL\\_4](https://lovdata.no/pro/#document/LDN/avgjorelse/ldn-2015-6-2/KAPITTEL_4) accessed on 18 May 2018.

position than she would otherwise have been in had she not been pregnant, see section 3 of the Gender Equality Act.

The employee had been employed by a Norwegian company (belonging to a large multinational group) in June 2007 working abroad on an 'expat' contract. She returned after her first parental leave in June 2010. In December 2010 she informed her employer that she was again pregnant and her 'due date' was at the end of June 2011. In February 2011, she received a notice of the termination of her 'expat' contract and at the same time she received a job offer for a permanent position in Norway and under Norwegian employment terms starting from 1 May 2011.

3.2.3 Are there specific difficulties in your country in applying the concept of direct sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant

No, there are no other specific difficulties in Norway in applying the concept of direct sex discrimination.

### **3.3 Indirect sex discrimination**

3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

Yes, indirect sex discrimination is explicitly prohibited in Norwegian legislation.

The GEA section 5,2. last sentence, defines indirect discrimination: 'Indirect differential treatment means any apparently neutral provision, condition, tradition, action or failure to act the result of which is that a person is placed at a less advantageous position, and this is a result of gender.'

The second part of the rule on the prohibition against discrimination is found in the GEA section 6, which states that: 'Differential treatment may be allowed in cases where that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.'

The Norwegian text of the section is not identical to the text of the Directive, but the content of the exemption is the same as in the EU directive. The Norwegian Supreme Court has in several cases stated that it will interpret the law in line with the EU directives as interpreted by the ECJ.<sup>22</sup>

Indirect discrimination is also defined in the national legislation. The GEA section 5,2, third Sentence, defines indirect discrimination as taking place where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

The GEA section 6 concerns 'Legal differential treatment:' 'Differential treatment is not in violation of the prohibition in section 5 when: a) the differential treatment has an objective/just cause, b) it is necessary to achieve the aim, and c) the means is proportionate to the aim achieved and the means is proportionate in relation to the person or persons who are negatively affected by the chosen means.'

The Norwegian GEA sections 5 and 6 together fulfil the wording of the Directive's Article 2 no. 1 B.

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<sup>22</sup> See for instance Rt 2012-219 Helikopterpilotenes. A case with similarities to that of C-447/09 Prigge with regard to age discrimination.

3.3.2 Is statistical evidence used in your country in order to establish a presumption of indirect sex discrimination? Please provide some examples of cases, if available.

Statistical evidence may be used in Norway in order to establish a presumption depending on the evidence available in a case. See, for instance, the equal pay cases from the Labour Court: case ARD 1990-148 (Bio-engineers) and the pension case ARD-2013-11 (part-time work and an additional pension, even though the court did not evaluate this case according to gender discrimination but according to the rules prohibiting the discrimination of part-time workers) and ARD-1997-253 (pay increases after four years of seniority for part-time cleaners at a hotel).

3.3.3 Is in your view the objective justification test applied correctly by national courts? Please provide some examples of cases, if available.

There is little case law from the Norwegian courts in general and especially on indirect discrimination regarding the Gender Equality Act. When used, the courts do apply the justification test correctly.

The Labour Court in its judgments has traditionally rarely used the GEA and protection against indirect sex discrimination. Yet, the employees' union still argues its case both on the protection against indirect sex discrimination (GEA) and according to traditional contract interpretation (i.e. what the parties have good reason to believe is the correct interpretation based on the evidence in the case) (ARD-2008-6, ARD-1997-253, ARD 2003-116). In the majority of cases the Court has issued a decision based on the facts and a reasonable interpretation of the agreement, reaching the same result as a proper use of indirect sex discrimination legislation would have provided.

More recent cases from the Labour Court rely on the court cases of the CJEU. Here the Labour Court seems to prefer the rules on protection against discrimination on the ground of part-time work to those providing protection against sex discrimination (ARD-2012-23 and the Labour Court judgment of 21 June 2013 ARD-2013-11).

As the rules on protection against discrimination of part-time (as well as fixed-term) workers were introduced in the WEA in 2006 and these cases have been channeled to the Tribunal of the WEA, the gender perspective has been lost. The evaluation criteria according to this legislation are whether the wish of the employee is too inconvenient for the needs of the enterprise. There is no connection to the evaluation of whether the action is in breach of the gender equality principle following the obligations in the GEA/EEA (EU Directives).

Before 2006, more complaints regarding indirect sex discrimination of part-time workers were submitted to the Ombud and the Equality Tribunal.<sup>23</sup> The Ombud found the internal regulation of pensions for employees in Oslo Municipality to violate the prohibition against indirect discrimination because of gender. Most of the part-time workers were women and part-time employees did not receive a pension accrued on additional work exceeding their working hours according to the contract.<sup>24</sup> Oslo Municipality has appealed the Ombuds' decision to the Tribunal.

In relation to the GEA and the protection against indirect discrimination few cases have been decided by the courts. The Labour Court has only decided seven cases where the GEA and the topic of part-time work was discussed.<sup>25</sup> The Supreme Court has only decided in one case regarding the issue of part-time workers and the GEA in particular. The Appeal Courts have only applied the rules on indirect discrimination in a total of 10 cases, not even

<sup>23</sup> See for instance LKN-1992-2, LKN-1989-7 and LKN-1987-4.

<sup>24</sup> Ombud's case 15/1299 of 18 April 2016.

<sup>25</sup> Discovered by using the search term GEA/part-time\* (*likestillingsloven, deltid\**) in the case database: Lovdata. no. on 1 November 2015.

a single one of which concerned part-time workers. The courts of first instance saw a total of 12 cases on indirect discrimination, and only one regarding part-time workers. The small number of cases should be a question of concern.<sup>26</sup> One may question whether the effectiveness of enforcing the principle of equal treatment complies with the EU *acquis* as long as the tribunals do not have the authority to grant compensation.

### *The Labour Court*

The Labour Court judgment in Case ARD-2013-11 concerned issues similar to those in the CJEU cases of *Bilka*, *Vroege* and *Dietz*.<sup>27</sup> Case ARD-2013-11 is very important to note as it is a grim example of how indirect discrimination cases seem to be never decided by the Norwegian courts, but are rather solved by means of other legal principles if possible. This case is a very good example as the factual background is so similar to that of the *Bilka* case. This Norwegian case concerned a threshold in a collective agreement requiring 14 hours of weekly work in order to participate in the additional pension scheme. It was deemed illegal and discriminatory, and in violation of the protection against discrimination against part-time workers in WEA Chapter 13 (based on the Part-Time Directive). However, the Court did not accept the employees' union claim for participation for those who had been discriminated against since the implementation of the Directive. The Court returned the case to the social partners, declaring that although the limit of 14 hours was illegal, it did not mean that 'a limit' (whatever that limit may be) might be illegal, and that this was for the parties to decide. The employees' unions stated that they believed the limit should be zero and now negotiations will need to decide on how the correction is to be carried out. This applies to those who have already retired, to those who have partly retired, and those currently working. The author believes that this Labour Court judgment must have consequences for similar thresholds of 14 hours of weekly work for participation in additional occupational pension schemes.<sup>28</sup> Because of this case, the threshold for qualifying for the additional pension was lowered from 37.33 % work on a weekly basis to less than 20 % through amendments to three acts with effect from 1 January 2015.<sup>29</sup>

### *The WEA Tribunal/Dispute Tribunal (Tvisteløsningnemnda)*

Cases following claims under the WEA Section 14-3 predominantly concern healthcare workers who want to work more hours but who find themselves 'trapped' in a part-time work pattern at their workplace.<sup>30</sup>

### *Assessment*

Protection against the discrimination of part-time workers (the Part-Time Work Directive) seems to be fairly efficient. However, protection against indirect sex discrimination in relation to part-time work is strong on paper but weak in practice. This is a serious point, as gender equality legislation is the only legislation addressing the structural level that recreates and strengthens the gender-stereotypical patterns in society. The author considers the following to be possible solutions to this problem: 1) establishing a connection between the WEA and the GEA to ensure the gender perspective in employment

<sup>26</sup> Discovered by using the search term GEA/part-time\* (*likestillingsloven, deltids\**) in the case database: *Lovdata.no*. on 1 November 2015.

<sup>27</sup> Cases 170/84 *Bilka Kaufhaus GmbH v. Karin Weber von Hartz* [1986] ECR-0060 *Vroege v. NCIV Instituut voor Volkshuisvesting BV & Stichting Pensioenfonds* [1994] ECR-I04541, and C-435/93 *Francina Johanna Maria Dietz v. Stichting Thuiszorg Rotterdam* [1996] ECR I-05223, respectively.

<sup>28</sup> Law on the State Pension Fund (*Lov om Statens Pensjonskasse*) 28 July 1949 No. 26 Paragraph 5, Pensions Act (*Foretakspensjonsloven*) 24 March 2000 No. 16 Paragraphs 3-5 and the Defined Contribution Pension Act (*Innskuddspensjonsloven*) 24 November 2000 No. 81 Paragraphs 4-2.

<sup>29</sup> The three acts which had their threshold for membership amended are: *Statens Pensjonskasse, pensjonsordning for sykepleiere og pensjonsordning for apotekvirksomhet*. The legislative amendments made 5 000 part-time workers eligible for an additional pension as well as insurance against disability. See [Lovvedtak 40 \(2013-2014\)](#).

<sup>30</sup> Cases heard by the Dispute Tribunal are available on: <http://www.arbeidstilsynet.no/fakta.html?tid=78505>, accessed 23 February 2017.



law, which works in a gender-segregated reality, and 2) strengthening the legislation on the activity and reporting duty regarding gender equality at the enterprise level, including the added level of a tripartite council of gender equality in the employment market.

- 3.3.4 Are there specific difficulties in your country in applying the concept of indirect sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

The relatively low number of cases may be explained by a variety of reasons, but one explanation may be that not enough lawyers are familiar with the discrimination legislation as such. Discrimination law is not part of the compulsory curriculum in law schools. In addition, it appears to be a difficult subject to find a proper comparator if one looks at the group perspective: which groups are comparable? A final difficult subject appears to be 'market value' – how thoroughly that requirement is tested varies.<sup>31</sup>

### 3.4 Multiple discrimination and intersectional discrimination

- 3.4.1 Is multiple discrimination – i.e. discrimination based on two or more grounds simultaneously – and/or intersectional discrimination – i.e. discrimination resulting from the interaction of grounds of discrimination which interact to produce a new and different type of discrimination - explicitly addressed in national legislation?

No, multiple discrimination is not explicitly addressed in national legislation but it is accepted in case law. The proposal recommends one common discrimination law (fusing all the discrimination Acts into one) which aims to incorporate the concept of multiple discrimination and/or the concept of intersectional discrimination in national legislation.<sup>32</sup>

- 3.4.2 Is there any case law that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake)?

Yes, there is some case law addressing multiple discrimination. In the *Opera Hotel* case, Tribunal case 1/2008, two women had been denied the right to book a room in a hotel.<sup>33</sup> The Tribunal found that the women had both been discriminated against because of their sex as well as their ethnic background and therefore both GEA section 3 and the Discrimination Act section 4 had been violated. As well as recognizing that both grounds had been violated the Tribunal also recognized the existence of multiple discrimination as such. The Tribunal cannot grant compensation and consequently no compensation was awarded. This case reveals that the equality bodies are well aware that in some cases more than one ground may exist in the very same factual case. So far, this has not resulted in any additional compensation.

### 3.5 Positive action

- 3.5.1 Is positive action explicitly allowed in national legislation?

Positive action is allowed in Norwegian law. GEA section 7 states that affirmative actions in favour of one gender is not in violation of section 5 if a) the differential treatment is suitable to enhance the aim of the GEA (to enhance equality), b) it is a fair balance between the aim pursued viewed in proportion to how negatively the measures affect the individual

<sup>31</sup> European Network of Legal Experts in the Field of Gender Equality, Burri, S., Aune, H. (2013), *Sex Discrimination in Relation to Part-Time and Fixed-Term Work: The application of EU and national law in practice in 33 European countries*, European Commission, Directorate-General For Justice, Unit JUST/D/1, available at: [http://ec.europa.eu/justice/gender-equality/files/your\\_rights/sex\\_discrimination\\_in\\_relation\\_to\\_part\\_time\\_and\\_fixed\\_term\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/your_rights/sex_discrimination_in_relation_to_part_time_and_fixed_term_final_en.pdf).

<sup>32</sup> See the proposal at page 71 in: <https://www.regjeringen.no/contentassets/5342e1dd1467426a98d4b02b7a4a79ca/horingsnotat.pdf>, accessed on 18 May 2018.

<sup>33</sup> <http://www.diskrimineringsnemnda.no/nb/innhold/side/forside> , accessed 18 May 2018.

or the group affected by the measure, and c) the differential treatment comes to an end when the objective is achieved. Section 7 introduces the possibility for the Ministry, by means of delegation from the King (i.e. the Government), to issue regulations providing further details of possible affirmative actions.

The Norwegian definition complies with the EU definition.

3.5.2 Are there specific difficulties in your country in relation to positive action? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

There are no difficulties as such in the legislation regarding positive action. However, as boys on average achieve lower grades than girls at school, female students increasingly undertake previously male-dominated higher studies at the Universities and thus one more commonly hears the request for gender points to be used in order to assist the under-represented gender's access to these studies.<sup>34</sup> If this would be introduced, I see possible conflicts with the GEA principle of non-discrimination because of gender. In order to ensure that males have equal rights to a successful outcome to their education I believe that there is a need to focus on what happens to boys and girls early on in the education system, and to ensure their equal opportunities regardless of sex and ethnic background. When boys and girls systematically have an unequal output in the education system and this can be seen in their qualifications, it is more challenging to ensure that higher education and the working environment can 'correct the difference in qualifications with study points.'<sup>35</sup>

The Gender Equality and Anti-discrimination Ombud (the Ombud) released a report in May 2015 on the use of affirmative action and explaining the legal boundaries of the measure of affirmative action as such.<sup>36</sup>

Norway has seen one EFTA court case against it regarding the use of affirmative action (E-1/02).<sup>37</sup> The Court stated that by retaining a rule which permits the reservation of a number of academic posts exclusively for members of the under-represented gender, Norway has failed to fulfil its obligations under Articles 7 and 70 of the EEA Agreement and Articles 2(1), 2(4) and 3(1) of Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as referred to in point 18 of Annex XVIII to the EEA Agreement.

3.5.3 Has your country adopted measures that aim to improve the gender balance in company boards?

Yes, rules applying to public limited liability companies were put into force by Norway on 1 January 2006 (section 6-11a). Similar rules are implemented in all the other company acts where there is partly public ownership.<sup>38</sup> Private companies have no quota requirements as there are many small companies that are owned by one or three persons only and the boards are made up of only three persons.

<sup>34</sup> See the university newspaper of Oslo University; <http://universitas.no/nyheter/60404/krever-kjonnspoeng-pa-uo>, accessed on 18 May 2018.

<sup>35</sup> See Aune, H. (2013), 'Opplæringslovens og barnehagelovens formålsbestemmelser. Utdanning, likestilling og stereotype kjønnsroller' (The Education Act and the Kindergarten Act and their sections on the purpose of the Acts. Education, Equality and gender stereotypes), *Utdanningsrettslige emner, Cappelen Damm Akademisk*, pp. 101-132.

<sup>36</sup> For more information, see: [http://www.ldo.no/globalassets/brosjyrer-handboker-rapporter/diverse-pdf1/diverse-pdf/rapporter\\_analyser/rapport-om-positiv-sarbehandling-ldo-2015\\_til\\_pdf.pdf](http://www.ldo.no/globalassets/brosjyrer-handboker-rapporter/diverse-pdf1/diverse-pdf/rapporter_analyser/rapport-om-positiv-sarbehandling-ldo-2015_til_pdf.pdf).

<sup>37</sup> <https://www.timeshighereducation.com/news/efta-court-judgment-in-case-e-1/02-failure-of-a-contracting-party-to-fulfil-its-obligations-equal-rights-directive-reservation-of-academic-positions-for-women/174225.article>, accessed 18 May 2018.

<sup>38</sup> Teigen, M. (2015), 'Virkningen av kjønnskvoltering i norsk næringsliv' (The effects of the quota rule/affirmative actions in the Norwegian employment market), *Gyldendal Akademisk*.

## *Historical background*

The legislative technique of quotas, in the sense of demanding the representation of members of both sex, has been successfully in use since 1981 when the rule was introduced in the Gender Equality Act of 9 June 1978 No. 45 regarding public boards and committees. (Examples are public-appointed boards of any kind, such as the Board of the National Museum, official delegations representing Norway at the UN, for example, and committees preparing legal reforms).

This rule inspired most of the political parties to introduce a similar rule in their work and has provided a near equal representation of men and women in national politics. It is this rule in the Gender Equality Act which has been the model for the introduction of the requirement of a balanced gender representation on company boards in company legislation. For a more detailed presentation of the legislation see 3.5.4. below.

3.5.4 Has your country adopted other positive action measures to improve the gender balance in some fields, e.g. in political candidate lists or political bodies? If so, please describe these measures.

Representation of both men and women on all public boards and in committees:

GEA section 13 (previously the Gender Equality Act of 9 June 1978 No. 45, section 21) lays down the rule regarding the representation of both men and women on all public boards and in committees. If a board has two or three members, members of both sexes shall be represented. If a board has four or five members, each sex shall be represented by a minimum of two persons. If a board has between six and eight members, each sex shall be represented by a minimum of three persons. If a board has nine members, each sex shall be represented by a minimum of four members. If a board has more than nine members, each sex shall be represented by a minimum of 40 % of all board members. The rules accordingly apply to the appointment or election of substitutes. Exceptions to the rules may only be made as far as special circumstances make it obviously unreasonable to fulfil the requirements.

A regulation regarding enhancing the employment of men in the kindergarten sector allows for positive action allowing for the hiring men where the applicants in question have an equal or almost equal level of qualifications.<sup>39</sup>

## **3.6 Harassment and sexual harassment**

3.6.1 Is harassment explicitly prohibited in national legislation?

Yes, in section 8 of all the Discrimination Acts, the WEA chapters 4 and 13 as well as the GEA section 8, the prohibition is positively stated and has the following wording:

'Harassment and harassment because of gender and sexual harassment are prohibited. The term harassment because of gender refers to all actions, the avoidance of an act or statements which have, or have as their purpose, the effect of being degrading, frightening, intimidating or humiliating. Sexual harassment refers to unwanted sexual attention which is undesirable for the person receiving the attention.'

This definition complies with the EU definition found in Article 2(1) (c) of Directive 2006/54.

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<sup>39</sup> Regulation regarding differential treatment in the hiring of men to work in kindergartens, FOR-1998-07-17-622 (*Forskrift om særbehandling av men*), <https://lovdata.no/dokument/SF/forskrift/1998-07-17-622?q=menn+i+barnehager>, accessed on 18 May 2018.

3.6.2 Please specify the scope of the prohibition on harassment (e.g. does it cover employment and access to goods and services; is it broader?).

The GEA applies to all areas of society and is not limited to employment and access to goods and services.

3.6.3 Is sexual harassment explicitly prohibited in national law.

Yes, sexual harassment is explicitly prohibited in Norwegian legislation. See section 8 of the GEA quoted above under 3.6.1.

In my view the definition in GEA section 8 does comply with the EU definition in Article 2(1) (d) of Directive 2006/54.

3.6.4 Please specify the scope of the prohibition on harassment (e.g. does it cover employment and access to goods and services; is it broader?).

*The Gender Equality Act applies to all areas of society.*

3.6.5 Does national legislation specify that harassment and sexual harassment as well as any less favourable treatment based on the person's rejection of or submission to such conduct amounts to discrimination (see Article 2(2)(a) of Directive 2006/54)?

Yes, Norwegian law covers Article 2 (2) (a) of Directive 2006/54 in the GEA section 8 and the WEA section 13-1, (7) as well as the Criminal Code sections 298 and 305.

In case 14/1434, the Ombud found that a police district had proper and sufficient procedures in place to prevent sexual harassment as well as procedures for handling such complaints. The police district, regardless of its proper procedures, had nonetheless not succeeded in protecting the female police officer from retaliation as a result of her complaints. The police district had thus violated section 9 of the Gender Equality Act (2013).

In case 20/2083 the Ombud heard a complaint from a person who had accompanied her spouse to a Christmas party at his workplace.<sup>40</sup> One of her husband's colleagues grabbed the woman by her breasts. She defended herself. The following day she complained to the company where her spouse worked as well as to the police. She also brought a complaint to the Ombud. The Ombud found that the woman had been sexually harassed and it also found in particular that the employer had violated its duty to actively work in order to ensure that no discrimination and harassment takes place at the workplace, see section 25.

### **3.7 Instruction to discriminate**

3.7.1 Is an instruction to discriminate explicitly prohibited in national legislation?

Yes, an instruction to discriminate is explicitly prohibited in national legislation. Section 10 of all the discrimination Acts 10 and the WEA section 13-1 (2) prohibit this.

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<sup>40</sup> See the Ombud's decision <http://www.ldo.no/nyheiter-og-fag/klagesaker/2014/132083/>, accessed 18 May 2018. See also LA-2009-189015-2 where a notice of dismissal issued to a team leader in a sales company was deemed to be valid as he had sexually harassed two younger employees during a social gathering arranged by the employer but outside regular working hours. See also the Ombud's decision in Case 10/2014 where the obligation to proactively work to ensure that no harassment takes place is stricter for an employer if there have been previous incidents of harassment.

The WEA section 13-1 (2) has the following wording: 'Harassment and an instruction to discriminate against persons on the basis of the various protected grounds are defined as discrimination.' The WEA specifically refers to the rules in the GEA.

3.7.2 Are there specific difficulties in your country in relation to the concept of instruction to discriminate? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

No, the author is not familiar with specific difficulties in relation to the concept of an instruction to discriminate.

### **3.8 Other forms of discrimination**

Are any other forms of discrimination prohibited in national law, such as discrimination by association or assumed discrimination?

Yes, discrimination by association or assumed discrimination is prohibited. This is explicitly stated in section 6 of all the Discrimination Acts and these acts apply in employment, see the WEA section 13-1.<sup>41</sup>

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<sup>41</sup> These acts are:

- The GEA (Gender Equality Act): *Likestillingsloven*: Gender/Sex (lov no. 59, 2013). (Previously: lov no. 45 1978);
- The Discrimination Act: *Diskrimineringsloven* – Ethnicity, Religion and View of Life/conviction (lov no. 60, 2013) (Previously: lov no. 33, 2005);
- The Disability Act: *Diskriminerings- og tilgjengelighetsloven* (DTL): (lov no. 61, 2013) (Previously: lov no. 42, 2008);
- The Sexual Orientation Act: *Diskrimineringsloven* (lov no. 58, 2013);
- In addition to the discrimination Acts there is the WEA (The Working Environment Act) Chapter 13: Age, political view, union membership, part-time work and temporary work, (lov no. 62, 2005 (2004)).

#### **4. Equal pay and equal treatment at work (Article 157 TFEU and Recast Directive 2006/54)**

##### **4.1 Equal pay**

###### **4.1.1 Is the principle of equal pay for equal work or work of equal value implemented in national legislation?**

Yes, the principle of equal pay for equal work or work of equal value is implemented in GEA sections 21 and 5 and in the WEA section 13-2, 1, paragraph c. The WEA section 13-2 states that the provisions of chapter 13, which also include discrimination based on gender, shall include c) pay and working conditions.

###### **4.1.2 Is the concept of pay defined in national legislation?**

Yes, the concept of pay itself is defined in GEA, section 21, fourth paragraph: 'The term pay refers to the usual salary in addition to all other extras or advantages or other goods offered by the employer.'

The WEA does not define pay as such, but the concept is further defined by the case law.

###### **4.1.3 Does national law explicitly implement Article 4 of Recast Directive 2006/54 (prohibition of direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration)?**

Yes, GEA section 5, in connection with the WEA section 13-2, implements Article 4 of Recast Directive 2006/54. GEA section 5 states that discrimination because of gender is prohibited. Any action or lack of action which has as its purpose or effect that a person is treated in a lesser way than any other person would have been treated in an equivalent position, and that this is due to gender, is prohibited. This covers all aspects of society and all conditions.

###### **4.1.4 Is a comparator required in national law as regards equal pay?**

No, a comparator is not required according to the law, see GEA section 21. However, a comparator is very often referred to, but this may be a hypothetical comparator. This is not perceived as problematic in practice and may be regarded as a necessity as the Norwegian employment market is highly gender segregated. If it were a requirement that it should be a comparator of the opposite sex, it would be almost impossible to bring an equal pay claim.<sup>42</sup>

###### **4.1.5 Does national law lay down parameters for establishing the equato enforce an equal pay claim. I value of the work performed, such as the nature of the work, training and working conditions?**

Yes, GEA section 21, third paragraph establishes that whether or not the work/positions are of equal value is decided after an overall evaluation where. For example, the need for the necessary competence/qualifications to perform the job is relevant as well as other relevant factors such as effort, responsibility and other working conditions. The parties can in principle raise all aspects/parameters that they deem to be relevant.

###### **4.1.6 Does national (case) law address wage transparency in any way?**

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<sup>42</sup> For more on proving unequal pay and the use of a comparator or a hypothetical comparator see the Equal Pay Commission's discussion in NOU 2008: 6 *Kjønn og lønn*, chapter 7.1.2 as well as the Preparatory works of the White Paper on amendments to the GEA: *Ot. prp.* no. 77 (2000-2001) p. 37.

Yes, national law addresses wage transparency. GEA section 18 lays down the employer's duty to provide information regarding pay:

- 1) 'An employee who suspects pay discrimination may demand that the employer provides in writing: information about the pay level and the criteria for defining the pay level for those person(s) with whom the employee is comparing herself/himself.'
- 2) 'The person who receives information about pay according to this provision has an obligation of secrecy and shall sign a statement of secrecy. This does not cover situations covered by the Act regarding Public Information (*offentleglova*).'
- 3) 'The person who is the subject of a comparison and the pay information, as revealed by the colleague, shall be informed that such information is being shared.'

In addition to section 18 of the GEA, one may also mention GEA section 23, which states that the employer is obliged to actively try to fulfil the purpose of the act. GEA section 24 states that the employer shall account for how and whether it is fulfilling these obligations.

4.1.7 Is the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency applied in your country? If so, how?

See the reply to 4.1.6 as specified in GEA section 18. There is no information about any actions in response to the Recommendation on the Government's website.

4.1.8 Which justifications for pay differences are allowed in legislation and/or case law?

According to GEA section 6, differential treatment may be allowed in cases where that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and proportionate. This provision applies to all areas of society, including pay.

4.1.9 Are there specific difficulties related to the application of the principle of equal pay for equal work and work of equal value in practice? For example in case of out-sourcing?

There are no cases on equal pay because of gender related to out-sourcing.

A landmark case came from the Labour Court, ARD-1990-148, regarding an equal pay claim by female bio-engineers as compared to other types of engineers who were all male. The bio-engineers were paid less per hour than the other engineers. The court found after a thorough and specific evaluation of the various elements of the job tasks that it was indeed work of equal value and that the equal pay rule had been violated. The Court found that the clause collectively negotiated was invalid as such while the remaining part of the collective agreement remained valid. Another landmark case is Tribunal Case 42/2009 where a municipality was ordered to remedy the error of not paying equal pay to women working in afterschool care compared to men in equivalent positions as 'work leaders'.<sup>43</sup> The Tribunal undertook a specific evaluation of the job tasks at the two workplaces.

A recurring topic under equal pay discussions is the issue of to what degree the argument of market value may justify unequal pay. See in this respect an article by Hege Brækhus.<sup>44</sup>

## 4.2 Access to work and working conditions

<sup>43</sup> <http://www.diskrimineringsnemnda.no/nb/innhold/side/vedtak>, accessed 18 May 2018.

<sup>44</sup> Brækhus, H. (2009), 'Likelønn - markedslønn: I hvilken utstrekning kan markedslønn begrunne lønnsdifferensiering etter likestillingslovens § 5?', *Cappelen Damm Akademisk*, ISBN 978-82-02-30235-1.s 93 - 111.

4.2.1 Is the personal scope in relation to access to employment, vocational training, working conditions etc. defined in national law (see Article 14 of Directive 2006/54)?

No. GEA section 2 however states that the law applies to all areas of society.

A worker is not defined as such in the WEA, but is defined by analysing the characteristic of the relationship between an employer and an employee; see section 1-8 and 1-9 of the WEA. However, it follows from the EEA and the Norwegian Supreme Court's decisions in other areas of employment law that Norwegian law seeks to be compliant with the rulings of the CJEU.<sup>45</sup> This includes the fact that the term employee includes all persons moving around on the employment market including job seekers. This is also reflected in the GEA and the WEA, referring to the GEA, in section 16 on the prohibition against asking job seekers about various matters.

4.2.2 Is the material scope in relation to (access to) employment defined in national law (see Article 14(1) of the Recast Directive 2006/54)?

No, the scope is not directly defined as in the Directive. GEA section 2 however states that the law applies to all areas of society and the definition as such may be described as being even broader.

4.2.3 Has the exception on occupational activities been implemented into national law (see Article 14(2) of Recast Directive 2006/54)?

No, Norway has not implemented an exception in occupational activities and there is no case law to refer to. GEA section 7 provides a general opportunity for the use of affirmative actions, but Norway has not made use of the opportunity provided by Article 14(2) of Recast Directive 2006/54. Section 7 states that affirmative action in favour of one gender does not violate the prohibition of sex discrimination if the terms in a) to c) are fulfilled.

4.2.4 Has the exception on protection for women, in particular as regards pregnancy and maternity, been implemented in national law (see Article 28(1) of Recast Directive 2006/54)?

Yes, protection for women, in particular as regards pregnancy and maternity, follows from GEA sections 5 and 6.

4.2.5 Are there particular difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment, working conditions etc.?

No, there are no particular difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment, and working conditions.

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<sup>45</sup> See for instance the following cases relating to age discrimination: Rt-2011-609 and Rt-2012-219.



## **5. Pregnancy, maternity, and leave related to work-life balance (Directive 92/85, relevant provisions of the Directives 2006/54 and 2010/18)**

### **5.1 Pregnancy and maternity protection**

#### **5.1.1 Does national law define a pregnant worker?**

No. The Norwegian protection of pregnant employees applies to any employee who is pregnant, not only an employee who has informed her employer about her condition. GEA section 5, third sentence states: 'The prohibition against discrimination applies in relation to a person's actual, presumed, former or future pregnancy or pregnancy leave. GEA section 18 states that it is illegal for an employer to ask about a person's plans regarding pregnancy or family plans. In this respect Norwegian law appears to be broader than the wording of Article 2 of Directive 92/85.

#### **5.1.2 Are the protective measures mentioned in the Articles 4-7 of Directive 92/85 implemented in national law?**

The protective measures mentioned in Articles 4-7 of Directive 92/85 are not explicitly implemented in national law, but the legislation provides broad protection against health hazards for all employees both in relation to the rules on the general working environment, the working hours, the information and consultation obligation and the entitlement to leave. Pregnant workers are protected under these general provisions, see the WEA sections 8-1, 4-6 (1), 10-2 (1) and 12-8:

The WEA section 8-1 has the following wording: 'In undertakings that regularly employ at least 50 employees, the employer shall provide information concerning issues which are of importance to the employees' working conditions and discuss such issues with the employees' elected representatives.'

The WEA section 4-6 (1) applies to employees with reduced capacity for work because of an accident, sickness, fatigue or the like. This is a general provision, which can also apply to some pregnant workers. It obliges the employer to make adjustments in the working environment in these situations. The wording of the section is: 'If an employee suffers from a reduced capacity for work as a result of an accident, sickness, fatigue or the like, the employer shall implement, as far as possible, the necessary measures to enable the employee to retain his or her work or to be given suitable work. The employee shall preferably be given the opportunity to continue his or her normal work ...'

The WEA section 10-2 (1) on 'working hour arrangements' is general in its wording: 'working hours shall be arranged in such a way that employees are not exposed to adverse physical or mental strain, and that they shall be able to observe safety considerations.'

Section 12-8 has the following wording: 'A nursing mother is entitled to request the amount of time off which is necessary for breastfeeding. At least 30 minutes' time off may for example be taken twice daily or as a reduction in working hours by up to one hour per day.'

All the provisions are general in their wording and do not protect pregnant workers in particular. The provisions cover all workers in relation to the articles mentioned in Directive 92/85 (4-7). As long as the strong protection of pregnant workers and the prohibition of discrimination against pregnant workers and workers who are on parental leave is so clearly stated in the GEA which is directly referred to in the WEA, the Norwegian law implements the EU provisions in a sufficient manner.

5.1.3 Is dismissal prohibited in national law from the beginning of the pregnancy until the end of the maternity leave (see Article 10(1) of Directive 92/85)?

Yes, dismissal is prohibited in national law from the beginning of the pregnancy until the end of the maternity leave according to the WEA section 15-9 and this is in line with the requirements of Article 10(1) of Directive 92/85.

The WEA section 15-9 (1) has the following wording: 'An employee who is pregnant may not be dismissed on grounds of pregnancy. Pregnancy shall be deemed to be the reason for the dismissal of a pregnant employee unless other grounds are shown to be highly probable.'

A dismissal is thus permitted in exceptional cases as defined in the Directive's Article 10(1). This is if the employer can show that it is highly probable that the dismissal during pregnancy is grounded on general terms, which justify a dismissal according to the Norwegian WEA. This will typically be instances where an enterprise is forced to downsize due to economic conditions and a lack of sufficient work to maintain the business.

When an employee is made redundant during her maternity leave, the paid maternity leave does not cease. The WEA section 15-9 (2) states that if the employee is lawfully dismissed during her maternity leave, the notice is still valid but shall be extended by a corresponding period.

5.1.4 In cases of dismissal from the beginning of pregnancy until the end of maternity leave, is the employer obliged to indicate substantiated grounds for the dismissal in writing (see Article 10(2) of Directive 92/85)?

Yes, the WEA section 15-4 (1) states that a dismissal shall be given in writing. Further, section 15-4 (3) states that when the dismissed worker so requests, the employer shall state the circumstances claimed as the grounds for dismissal. The employee may demand that such information be provided in writing.

In the case of an illegal dismissal/notice of termination because of pregnancy /parental leave, the employee/job seeker may receive full compensation for his or her economic loss in addition to punitive damages.<sup>46</sup>

## 5.2 Maternity leave

5.2.1 How long (in days or weeks) is maternity leave? Please specify the relevant legislation and Article(s).

The total minimum of maternity leave is 9 weeks, see the WEA section 12-4 and 12-5 (which prescribes the right to leave) and the NIA section 14-9 (which prescribes pay while on leave). According to the WEA section 12-5, the total parental leave is 12 months. However, under Norwegian law, maternity leave is counted as part of the parental leave and is not treated differently than parental leave. This bulk treatment of the two different types of leaves is problematic according to the Maternity Leave Directive 92/85 as well as the ECJ cases C-519/03<sup>47</sup> para 32 and C-342/01<sup>48</sup> para 41.

5.2.2 Is there an obligatory period of maternity leave before and/or after birth?

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<sup>46</sup> See TOSLO-2006-52718 and TALTA-2007-74733.

<sup>47</sup> Case C-519/03 Commission of the European Communities v. Grand Duchy of Luxembourg, judgment of the Court of 14 April 2005.

<sup>48</sup> Case C-342/01, María Paz Merino Gómez v. Continental Industrias del Caucho SA, judgment of the Court of 18 March 2004.

Yes, the obligatory period of maternity leave before and/or after birth consists of three weeks before the birth; see section 14-9 of the National Insurance Act.<sup>49</sup> The WEA section 12-4 has the following wording: 'After giving birth, the mother shall have a leave of absence for the first six weeks unless she produces a medical certificate stating that it is better for her to resume work.' The mother is obliged, unless she has a medical statement providing an exception, to take maternity leave for the first six weeks after confinement. In total, the maternity leave is therefore for nine weeks.

Maternity leave is specifically defined as being included in and a part of the parental leave which is defined as the quota. The Norwegian solution thus blurs the two different types of leave. As from 1 July 2018 the parental quotas have been extended from 10 to 15 weeks reserved for each of the parents and the remaining period of the parental leave may be shared between both parents as they so wish. Just as before, the maternity leave period is included in the quota reserved for the mother, which in the author's opinion is in violation of Directive 92/86.

5.2.3 Is there a legal provision insuring that the employment rights relating to the employment contract are ensured in the cases referred to in Articles 5, 6 and 7 of Directive 92/85?

The WEA sections 1-1, 4-9, 10-12 and 12-8 ensure that all employees, including pregnant workers, are entitled to the rights referred to in Articles 5, 6 and 7 of Directive 92/85, see also section 5.1.2.

The WEA section 1-1 describes 'the purpose of the act' including the fact that its purposes are to secure a healthy and meaningful working situation, to ensure equality of treatment at work, and to facilitate adaptations of the individual employee's working situation in relation to her capabilities and circumstances. The WEA chapter 13 specifically refers to the GEA.

5.2.4 Is there a legal provision that ensures the employment rights relating to the employment contract (including pay or an adequate allowance) during the pregnancy and maternity leave?

Yes, the National Insurance Act (NIA) sections 14-4 and 14-5 ensure the rights to maternity benefits and parental benefits paid by National Insurance.

5.2.5 Is pay or an allowance during the pregnancy and maternity leave at the same level as sick leave or is it higher?

Pay during maternity/parental leave is on the same level as sick pay, which is based on one's normal full pay. Full pay as well as the maternity leave cannot exceed six times the social security base (calculation) amount, subject to an annual regulation. Six times the social security base amount is EUR 58 807. 28. The NIA section 14-7 states that pay during the pregnancy and maternity leave shall be based on the same rules as sick leave.

5.2.6 Are statutory maternity benefits supplemented by some employers up to the normal remuneration?

Yes, some employers provide for pay superseding the salary level provided by the NIA. This may occur in some work relations. In that case it will follow from the contract of employment as a benefit in the agreement between the employer and employee or it may

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<sup>49</sup> See NIA section 14-9, fifth paragraph: <https://lovdata.no/pro/#document/NL/lov/1997-02-28-19/§14-9?searchResultContext=1274>, accessed 18 May 2018. As from 1 July 2018 the parental quotas have been extended from 10 to 15 weeks reserved for each of the parents and the remaining period of the parental leave may be shared between both parents as they so wish. The length of the parental leave as such remains unchanged. Just as before, the maternity leave period is included in the quota reserved for the mother, which in the author's opinion is in violation of Directive 92/86.

be described as a right in the Employee Handbook, which is common in most enterprises in Norway. The Handbook provides employees with all rules and regulations and internal procedures and practical information that may be useful for them.

5.2.7 Are there conditions for eligibility for benefits applicable in national legislation (see Article 11(4) of Directive 92/85)?

Yes, the conditions for being eligible for the applicable benefits follow from the National Insurance Act section 14-6 which meet the requirements of section Article 11(4) of Directive 92/85. Section 14-6 states that parental benefits are due to the work-related activity and having had paid work for six of the last ten months before the birth. However, if the parents are receiving other benefits from the National Insurance fund instead of a salary at the time of the birth, they are still entitled to parental benefits from the National Insurance fund. The amount of parental benefits received depends on the income of the person in question.

5.2.8 In national law, is there a provision that guarantees the right of a woman to return after maternity leave to her job or to an equivalent job, on terms and conditions that are no less favourable to her, and to benefit from any improvement in working conditions to which she would have been entitled during her absence (see Article 15 of Directive 2006/54)?

Yes, GEA section 20 (1) a-c ensures that the requirements in Article 15 of Directive 2006/54 are fulfilled. Section 20 (1) a-c states that a person who has had maternity/parental leave is entitled to return to his or her job or to an equivalent job on terms and conditions that are the same or better than before the maternity/parental leave and to demand wages and to be considered in collective bargaining in the same manner as the other workers in the undertaking.

Despite this strong legal protection, the Ombud reports that 55 % of all women have experienced discrimination because of pregnancy or the use of parental leave and 22 % of men who have been on parental leave report a case of discrimination because of taking leave.<sup>50</sup> A large proportion of the cases concern pregnant women being bypassed in hiring processes including non-renewed temporary contracts which would otherwise have been renewed.

### 5.3 Adoption leave

5.3.1 Does national legislation provide for adoption leave?

Yes, national legislation provides for adoption leave in the WEA section 12-5 (4). In connection with adoption, the adoptive parents are entitled to leave with pay for a period of 46 weeks (at the full daily rate) or 56 weeks (at a reduced daily rate) if the child is under 15 years of age.

5.3.2 Does national legislation provide for protection against dismissal of workers who take adoption leave and/or specify their rights after the end of adoption leave (see Article 16 of Directive 2006/54)?

Yes, the WEA section 15-9 provides for protection against dismissal for workers who take adoption leave and secure their rights after the end of adoption leave. Section 15-9 states that: 'an employee who has leave of absence pursuant to section(s) ... 12-5, first paragraph, for up to one year shall not be given a notice of dismissal that becomes effective

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<sup>50</sup> <http://www.ldo.no/nyheiter-og-fag/nyheiter/nyheiter-2015/gravide-diskrimineres/>, accessed 18 May 2018. The LDO's report confirms the findings in the report from 2008 by the AFI: *Erfaringer med og konsekvenser av graviditet og uttak av foreldrepermisjon i norsk arbeidsliv*, [http://www.hioa.no/var/ezflow\\_site/storage/afi/files/r%202008-2.pdf](http://www.hioa.no/var/ezflow_site/storage/afi/files/r%202008-2.pdf), accessed on 18 May 2018.

during the period of absence if the employer is aware that the absence is due to such reasons or the employee notifies the employer without undue delay that the absence is due to such reasons. If the employee is lawfully dismissed at a time falling within this period, the notice is valid but shall be extended by a corresponding period.

## **5.4 Parental leave**

5.4.1 Has Directive 2010/18 been explicitly implemented in your country?

Yes, Directive 2010/18 has been explicitly implemented through a decision by Parliament's EEA Committee. It is assumed that the existing legislation is in line with the requirements of the Directive. The requirements of the Directive follow from provisions in the GEA, WEA and NIA.

5.4.2 Is the national legislation applicable to both the public and the private sector (see Clause 1 of Directive 2010/18)?

Yes, the legislation applies equally to the public and the private sector.

5.4.3 Does the scope of the national transposing legislation include contracts of employment or employment relationships related to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency?

Yes, national legislation applies equally to all types of employment contracts.

5.4.4 What is the total duration of parental leave? If the provisions regarding duration differ between the public and the private sector, please address the two sectors separately.

The provisions regarding the duration of parental leave do not differ between the public and the private sector.

The parental leave is laid down in the WEA section 12-5. Parents are entitled to 12 months of leave, see WEA section 12-5, 1. Pay is regulated by the National Insurance Act. An employee who has been gainfully employed for at least six of the last 10 months prior to the birth of a child is entitled to leave with pay for 46 weeks (at the full daily rate) or 56 weeks (at a reduced daily rate) in connection with the birth of a child.

In addition to the first year of paid leave each of the parents has a right to 12 months of leave, see WEA section 12-5, 2. This makes the total period of leave three years altogether, but the last two years are not linked to any right to be paid.

5.4.5 Is the right of parental leave individual for each of the parents, a family entitlement or a combination of the two? How many months are reserved for each parent on a take-it or leave it basis?

Both parents have an individual right to leave according to the WEA. However, the pay awarded during parental leave is limited to the 46/56 weeks following the NIA section 14-9. With regard to this paid leave, both parents have a right to their 'quota': ten weeks of the leave is reserved for each of the parents. The remaining part of the leave may be shared between the parents as they deem fit. As the mother's defined period of maternity leave includes the mother's parental leave quota, the question is whether this fulfils the requirements according to Directive 92/85/ECC. The Directive states that 14 weeks in total, two weeks before birth and 12 weeks after birth, shall be reserved leave for the mother in order to recover from pregnancy and giving birth, and this is purely for reconvalence reasons. This maternity leave has a different purpose than the parental leave whose aim

is to ensure necessary time for the parents to care for their child. Since the two forms of leave serve different purposes, they shall be treated separately and not be mixed as has been done in Norwegian legislation.<sup>51</sup> In order to comply with the EU/EEA Directives Norwegian mothers should be awarded a maternity leave period of 14 weeks in addition to the parental leave. According to ECJ case law, one type of leave may not be minimized as a consequence of the arrangement of other types of leave following from other Directives, see ECJ case C-116/06, *Sari Kiiski mot Temperean Kaupunki*.

- 5.4.6 What form can parental leave take (full-time or part-time, piecemeal, or in the form of a time-credit system)? Do the various available options allow taking into account the needs of both employers and workers and if so, how is that done (see Clause 3 of Directive 2010/18)?

According to the NIA sections 14-9 and 14-16, parental leave can be full time (at the full daily rate) or part time (at a reduced daily rate), see the WEA section 12-6. An employee may also apply to his/her employer to be allowed to combine parental leave with reduced working hours ('time account') and one may also use the right to an extended care leave. These are provisions in the WEA entitling the employee to a leave of absence from work, but not to paid leave.

- 5.4.7 Is there a notice period and if so, how long is it? Does the national legislation take sufficient account of the interests of workers and of employers in specifying the length of such notice periods and how is that done? (see Clause 3 of Directive 2010/18)?

According to the WEA section 12-7, the employee is under an obligation to notify the employer about the leave as soon as possible and no later than one week in advance in the case of leave lasting for more than two weeks, at least four weeks in advance in the case of leave lasting for more than twelve weeks and no later than twelve weeks in advance for leave lasting for more than one year. If an employee does not meet these periods of notice, the consequence may be that the leave may be postponed so that the notice period is met. This is not the case for instances when the leave is necessary for reasons that the employee had no knowledge of at the end of the notice period.

- 5.4.8 Did the Government take measures to address the specific needs of adoptive parents (see Clause 4 of Directive 2010/18)?

Yes, the needs of adoptive parents are met as they are provided with the same rights as other parents under the rights as described in the WEA and GEA. The rights of adoptive parents start from the day that they take over the care of the child which is adopted. The right to leave does not apply if the child is older than 15 years of age, see the WEA 12-5 (4).

- 5.4.9 Is there a work and/or length of service requirement in order to benefit from parental leave?

Yes, according to section 14-6 (1) the required period of service is at least six of the last ten months before starting the parental leave. In the case of successive fixed-term contracts with the same employer (as defined in Council Directive 1999/70/EC on fixed-term work), the sum of these contracts is taken into account for the purpose of calculating the qualifying period.

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<sup>51</sup> The Parental Leave Directive 2010/18/EU declares in Preamble no. 15 that parental leave is '*distinct from maternity leave*'. Maternity leave and parental leave are thus two different and distinct types of leave. In addition, it was clearly stated by the ECJ in case C-519/03 *EC v. Luxembourg*, that maternity leave following Directive 92/85 may not be included in the parental leave, see para. 32.

5.4.10 Are there situations where the granting of parental leave may be postponed for justifiable reasons related to the operation of the organisation?

No, parental leave may never be postponed for justifiable reasons related to the operation of the organisation.

5.4.11 Are there special arrangements for small firms?

No, there are no special arrangements for small firms.

5.4.12 Are there any special rules/exceptional conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness?

Yes, Section 12-9 (3) states that 'If the child has a chronic or long-term illness or disability and there is therefore a markedly greater risk of the employee being absent from work, the employee is entitled to a maximum of 20 days' leave of absence ... per calendar year.'

5.4.13 Are there provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave (see Clause 5 of Directive 2010/18)?

Yes, provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave are laid down in the WEA section 15-9 (2) and in GEA section 20. It states that a person who has taken parental leave is entitled to return to his or her job or to an equivalent job, on terms and conditions that are the same or better than before the maternity/parental leave and to demand wages and to be considered in collective bargaining in the same manner as the other workers in the undertaking. GEA section 20 includes both maternity leave and parental leave.

The WEA section 15-9 (2) states that 'an employee who has leave of absence ... for up to one year, shall not be given notice of dismissal that becomes effective during the period of absence ...'

5.4.14 Do workers benefitting from parental leave have the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship?

Yes, see GEA section 20.

5.4.15 Are rights acquired or in the process of being acquired by the worker on the date on which parental leave starts maintained as they stand until the end of the parental leave?

Yes, rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are maintained as they stand until the end of the parental leave.

5.4.16 What is the status of the employment contract or employment relationship for the period of the parental leave?

The employment relationship is maintained during parental leave.

5.4.17 Is there continuity of the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave?

Yes, there is continuity between the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave.

5.4.18 Is parental leave remunerated by the employer? If so, how much and in which sectors?

No, parental leave is not in principle remunerated by the employer. Parental leave benefits are paid by the Norwegian Labour and Welfare Service (NAV). If the employment contract entitles the employee to his or her full salary during the leave, and this exceeds the maximum amount of six times the social security base, the employer is obliged to cover the difference if this is stated in the individual employment contract or as part of a company's Personnel Handbook.

5.4.19 Does the social security system in your country provide for an allowance during parental leave? If so, how much and in which sectors?

No, the social security system in Norway does not provide for an allowance during parental leave in addition to the parental leave benefits. For persons who have had no connection with the employment market (never been employed or self-employed) the NAV grants an allowance of one lump-sum payment upon the birth of a child, see NIA section 14-17.

5.4.20 In your view, regarding which issues does the national legislation apply or introduce more favourable provisions (see Clause 8 of Directive 2010/18)?

A paid father's quota of ten weeks has stimulated both men and employers to accept parental leave as something that is natural for both men and women. In addition, the quota system has taught women that the leave is not theirs alone, but is a joint project between the parents.<sup>52</sup>

## 5.5 Paternity leave

5.5.1 Does national legislation provide for paternity leave?

Yes, Norwegian legislation provides for paternity leave in the WEA section 12-3, which prescribes a right to two weeks 'care' leave for the father in relation to a spouse or co-habitant giving birth. This right to leave is unpaid, but some employers offer pay during the leave on a voluntary basis. Pay can also be a right due to collective agreements. In addition to the paternity leave exists the 'father's quota', a part of the parental leave which is reserved for the fathers, see 12-5 (2): Parents are in total entitled to a leave of absence with pay of 12 months. Ten weeks of this benefit period are reserved for the father (the father's quota); see the NIA section 15-9. If the father wholly or partly refrains from taking the father's quota, the benefit period will be correspondingly shorter. The parental benefit is paid by the national insurance (NAV) fund.

5.5.2 Does national legislation provide for protection against dismissal of workers who take paternity leave and/or specify their rights after the end of paternity leave (see Article 16 of Directive 2006/54)?

Yes, the WEA section 15-9 (2) and the GEA section 20 provide for protection against dismissal for workers who take paternity leave. The WEA section 15-9 (2) states that 'an

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<sup>52</sup> See the research by the Institute of Social Research, with reference to the following research papers: *Publikasjoner* 2015:003 *Fathers' Career and Parental Leave in Norwegian Elite Professions* 2014:050 *Endringer i fedres deltakelse hjemme* 2014:049 *New fathering practices and work-family reconciliation in Norway* 2014:048 *New fathering practices and work-family reconciliation in Norway* 2014:040 *Does more involved fathering imply a double burden for fathers?* 2013:014 *Paternity leave in Norwegian elite professions* - See more at: <http://www.samfunnsforskning.no/>, accessed on 18 May 2018. See also two articles where the NHO strongly opposed the Government's reduction of the father's quota (paternity leave) from 14 to 10 weeks. The NHO is the main representative organisation for Norwegian employers with companies ranging from small family-owned businesses to multi-national companies: <https://www.nho.no/Sok/?query=-Vi+trenger+fedrekvoten%21> and <https://www.nho.no/Politikk-og-analyse/Arbeidslivspolitik/hva-slags-familiepolitikk-trenger-norge/>, accessed on 18 May 2018.



employee who has a leave of absence ... for up to one year, shall not be given notice of dismissal that becomes effective during the period of absence ...'

GEA section 20 states that a person who has taken parental leave is entitled to return to his or her job or to an equivalent job, on terms and conditions that are the same or better than before the parental leave and to demand wages and to be considered in collective bargaining in the same manner as the other workers in the undertaking.

The EFTA Surveillance Authority (the Authority) informed the Norwegian Government that the Authority has opened a formal investigation in relation to the Norwegian provisions concerning the right to parental leave in its letter dated 13 July 2016.<sup>53</sup> The Norwegian Ministry of Children and Equality (the Ministry) has informed the Authority that the Ministry finds the Norwegian provisions on parental leave to be compatible with EEA law. In the letter of formal notice the Authority refers to three provisions in Norwegian legislation on parental benefits that are less advantageous for fathers than for mothers. The main issue is that a father's right to paid parental leave depends on the mother being qualified for paid parental leave based on previous paid work during six of the last ten months before the birth. The Authority's preliminary conclusion is that this constitutes unequal treatment of men and women in breach of the EEA Agreement, as the provisions in the Norwegian legislation do not seem to comply with Directive 2010/18/EU (Parental Leave Directive) and Directive 2006/54/EC (Equal Treatment Directive). The Norwegian Government has submitted its observations and concludes that the Norwegian law regarding the right to parental leave in its view is compatible with EEA law.

## **5.6 Time off/care leave**

5.6.1 Does national legislation entitle workers to time off from work on grounds of force majeure for urgent family reasons in case of sickness or accident (see Clause 7 of Directive 2010/18)?

Yes, Norwegian legislation entitles workers to time off from work on grounds of force majeure for urgent family reasons in case of sickness or an accident. The WEA section 12-9 (2) provides for a right to leave with pay in the case of the sickness of a child below the age of 12 years; this is 10 days per calendar year and a maximum 15 days if the employee has more than two children. Single parents are entitled to double the amount of leave, see section 12-9 (5). In case of a hospital stay or rehabilitation where the child is at home after such a hospital stay or the child has a life-threatening condition, the parent is entitled to leave, see section 12-9 (4). In this latter case the parent will receive pay from the NAV and thus the employer does not pay anything.

Section 12-10 (2) has the following wording: 'Employees shall be entitled to a maximum of 10 days' leave of absence per calendar year to care for parents, a spouse, a cohabitant or a registered partner...'

## **5.7 Leave in relation to surrogacy**

5.7.1 Is parental leave available in case of surrogacy?

No, surrogacy is illegal in Norway.

## **5.8 Leave sharing arrangements**

5.8.1 Does national law provide a legal right to share (part of) maternity leave?

Yes, if the questionnaire refers to parental leave.

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<sup>53</sup> <https://www.stortinget.no/no/Hva-skjer-pa-Stortinget/EU-EOS-informasjon/EU-EOS-nytt/2016/eueos-nytt--19.-oktober-2016/#fedrekvote>, accessed on 18 May 2018.

No, the answer is negative if the question strictly refers to maternity leave following Directive 92/85/ECC. The maternity leave (described as birth leave) is defined as a total of six weeks after birth and these weeks may not be shared, see WEA section 12-4.

In addition, a pregnant woman has the right to 12 weeks of leave during her pregnancy, this being a right to leave and not a right to receive pay, see WEA section 12-2. The right to 12 weeks unpaid leave is a right to leave that is old and stems from years back when the social security rules and paid leave was not as advanced as today. Originally, the right to leave was negotiated in collective agreements and only later it was enacted as a right for all in the Working Environment Act. This right to leave due to pregnancy is not accompanied by a right to pay. Most pregnant workers with health issues will for all practical issues receive a doctor's note of sick leave and thus the women will be entitled to pay during sick leave through the National Insurance System. The right to leave, even though unpaid was quite practical in the past as it protected pregnant women from losing their job when they no longer could work because of the pregnancy.

Maternity leave is defined in the NIA sections 14-9 (5) and 14-16. The mother is entitled to maternity leave for the last three weeks prior to the date of confinement and the following six weeks after the birth of the child. Ten weeks of the leave are reserved for the father, and ten weeks are reserved for the mother. The first six weeks after the birth, which the mother is obliged to take, are included in these ten weeks.

According to the NIA sections 14-16, the employee can apply to his or her employer to be allowed to combine parental or adoption leave with reduced working hours. The law imposes the basis on which leave is taken. The first six weeks after the birth of a child is leave which is reserved for the mother. The size of the employer does not play any role as a qualifying condition. The entitlement is not modulated according to the size of the employer.

Concerning the question regarding the sharing arrangement for maternity leave and whether or not it operates in addition to a separate paternity leave, assuming that the question now refers to the Parental Leave Directive and not to the Maternity Leave Directive. In Norway ten weeks of the benefit period called parental leave are reserved for the father (the father's quota). If the father wholly or partly refrains from taking his quota, the benefit period will be correspondingly shorter. The mother and father are free to share the remainder of the leave (the part of the parental leave which is not defined as a quota) as they see fit.

5.8.2 Is there a possibility for one parent to transfer part of the parental leave to the other parent?

No, it is not possible for one parent to transfer part of the parental leave to the other parent as regards the mother's or the father's quota. The remaining third part of the leave may be shared between the parents as they see fit. See the description in 5.8.1 above.

## **5.9 Flexible working time arrangements**

5.9.1 Does national law provide workers with a legal right (temporarily or otherwise) to reduce working time on request?

Yes, subject to some conditions, see WEA section 10-2 (3) and (4).

5.9.2 Does national law provide workers with a legal right to adjust working time patterns (temporarily or otherwise) on request?

Yes, subject to some conditions, see WEA section 10-2 (3) and (4).

5.9.3 Does national law provide workers with a legal right to work from home or remotely (temporarily or otherwise) on request?

No, this has to be arranged in the employment contract.

The WEA section 10-2 (3) and (4) apply to 'an employee.' According to section 10-2 (3), the employee shall be entitled to flexible working hours if this may be arranged without any major inconvenience for the undertaking.

According to section 10-2 (4), the employee shall have the right to a reduction of his or her normal working hours if this reduction in working hours can be arranged without any major inconvenience for the undertaking, and if the employee has reached the age of 62 or who requires this reduction for health, social or other weighty welfare reasons.

The right to flexible working hours can be exercised for any purpose, as long as it can be arranged without any major inconvenience for the undertaking.

The right to a reduction of the employees' working hours can be exercised if the employee has reached either the age of 62, or he / she requires such a reduction for health, social or other weighty welfare reasons. There is no time limit for requesting such a right. The size of the employer is not a qualifying condition.

Employers are not obliged to comply with requests to work remotely, but this may be agreed between the employer and the employee.

Employers can refuse to comply with requests to work remotely, depending on the needs of the enterprise and what is laid down in the employment contract.

According to section 10-2 (4) second paragraph, the employee, when the agreed period of reducing working hours has expired, has the right to resume previous working hours. There are no measures in place specifically to encourage men to make use of such a legal right.

5.9.4 Are there any other legal rights to flexible working arrangements, such as arrangements by which workers can 'bank' hours to take time off in the future?

Yes/no - the WEA section 10-6 (12) provides for some legal rights to flexible working arrangements whereby workers can 'bank' hours to take time off in the future. These rights are in connection with the overtime rules. Section 10-6 (12) states that the employer and the employee may agree in writing that overtime hours shall be wholly or partly taken out as off-duty time on agreed dates. Some Collective Basic Agreements provide for 'banking/hour/accounts' where overtime may be taken out as time off instead.

## **6. Occupational social security schemes (Chapter 2 of Directive 2006/54)**

### **6.1 Is direct and indirect discrimination on grounds of sex in occupational social security schemes prohibited in national law?**

Yes, direct and indirect discrimination on grounds of sex in occupational social security schemes is prohibited in national law. This is not explicitly stated with regard to occupational pension schemes, but the GEA section 2 states that the law applies to all areas of society and case law has interpreted this as applying to occupational social security schemes.

### **6.2 Is the personal scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 6 of Directive 2006/54? Please explain and refer to relevant case law, if any.**

The personal scope of Norwegian law relating to occupational social security schemes is the same as that specified in Article 6 of Directive 2006/54.

### **6.3 Is the material scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 7 of Directive 2006/54? Please explain and refer to relevant case law, if any.**

The material scope of Norwegian law relating to occupational social security schemes is the same as that as specified in Article 7 of Directive 2006/54.

### **6.4 Has national law applied the exclusions from the material scope as specified in Article 8 of Directive 2006/54?**

No. Norway has implemented no exclusions from the material scope as specified in Article 8 of Directive 2006/54 in national law. This may be explained by the fact that the GEA since 1978 is generally applicable to all areas of society and is not limited to the employment market. In addition, there has not been any tradition of providing men and women with different age limits or different services in the social security system.

### **6.5 Are there laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54?**

No. There are no laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54.

### **6.6 Is sex used as an actuarial factor in occupational social security schemes?**

No, sex is not used as an actuarial factor in occupational social security schemes to this author's knowledge.

### **6.7 Are there specific difficulties in your country in relation to occupational social security schemes, for example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.**

No, to this author's knowledge there are no difficulties.

## **7. Statutory schemes of social security (Directive 79/7)**

### **7.1 Is the principle of equal treatment for men and women in matters of social security implemented in national legislation?**

Yes. GEA section 2 states that the law applies to all areas of society. This includes matters of social security.

### **7.2 Is the personal scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 2 of Directive 79/7? Please explain and refer to relevant case law, if any.**

The personal scope of national law relating to statutory social security schemes is the same as that in Article 2 of Directive 79/7.

### **7.3 Is the material scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 3 par. 1 and 2 of Directive 79/7? Please explain and refer to relevant case law, if any.**

The material scope of national law relating to statutory social security schemes is the same as that in Article 3 paras 1 and 2 of Directive 79/7.

### **7.4 Has national law applied the exclusions from the material scope as specified in Article 7 of Directive 79/7? Please explain (specifying to what extent the exclusions apply) and refer to relevant case law, if any.**

Norway has not implemented any exclusions from the material scope as specified in Article 7 of Directive 79/7.

### **7.5 Is sex used as an actuarial factor in statutory social security schemes?**

No. Case C-318/13 (*Korkein hallinto-oikeus v. Finland*) concerning the prohibition on the use of gender-based actuarial factors in statutory pension schemes has no direct implication as the use of gender-based actuarial factors is illegal according to the GEA.

### **7.6 Are there specific difficulties in your country in relation to implementing Directive 79/7? For example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.**

No, there are no specific difficulties in Norway in relation to implementing Directive 79/7.

**8. Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)**

**8.1 Has Directive 2010/41/EU been explicitly implemented in national law?**

No. The National Insurance Act and the GEA contain the rights ensured in Directive 2010/41/EU.

**8.2 What is the personal scope related to self-employment in national legislation? Has your national law defined self-employed or self-employment? Please discuss relevant legislation and national case law (see Article 2 Directive 2010/41/EU)**

Self-employment is defined in the National Insurance Act section 1-10. Whether or not a person is self-employed will depend on an overall evaluation of various factors such as: does the person run an activity at his or her own cost and risk and is this activity likely to create an income, does the activity have a certain volume, does the person employ freelancers or employees, does the business have its own office/workshop, and does the person own his/her own tools and is economically responsible for the entity?

**8.3 Related to the personal scope, please specify whether all self-employed workers are considered part of the same category and whether national legislation recognises life partners.**

All self-employed workers are considered to be part of the same category, including agricultural workers. The personal scope does not include the spouses and life partners of self-employed workers. National legislation recognises life partners but only as regards the possibility to purchase additional insurance from the NIA as being employed in the farm. In this regard, life partners are registered as employees. Life partners do not automatically receive any status as such.

**8.4 How has national law implemented Article 4 Directive 2010/41/EU? Is the material scope of national law relating to equal treatment in self-employment the same, more restricted, or broader than specified in Article 4 Directive 2010/41/EU?**

The principle of equal treatment under Article 4 Directive 2010/41/EU is implemented in the equal treatment legislation. Norwegian legislation is more restricted as it does not include spouses and life partners and does not ensure that they have the same rights as employees. However, it is possible to purchase additional insurance from the NAV when life spouses work, for instance, in the agricultural business.

**8.5 Has your State taken advantage of the power to take positive action (see Article 5 Directive 2010/41/EU)? If so, what positive action has your country taken? In your view, how effective has this been?**

No, Norway has not taken advantage of the authority to take positive action.

**8.6 Does your country have a system for social protection of self-employed workers (see Article 7 (Directive 2010/41/EU)?**

Yes. Norway has a system for social protection for self-employed workers.

The National Insurance Act covers self-employed workers. According to sections 23-6 and 8-35, the self-employed may receive sickness benefit of up to 65 % of the sickness allowance scheme. The Norwegian system relies on the National Insurance Act as a base platform for all inhabitants. In addition, people are free to purchase additional insurance

in the NI system as a supplement. The requirement to ensure that spouses and life partners can benefit from social protection in accordance with national law has been implemented in a voluntary system where it is possible to buy social protection (health/sickness, a pension) according to the NIA sections 3-13 and 23-6 and under a specific regulation.<sup>54</sup> Working spouses of self-employed workers thus need to purchase specific insurance.

#### **8.7 Has Article 8 Directive 2010/41/EU regarding maternity benefits for self-employed been implemented in national law?**

Yes, Article 8 Directive 2010/41/EU regarding maternity benefits for the self-employed is implemented in Norwegian law, see the National Insurance Act section 14-4 (5).

The maternity allowance is the same for employees as well as the self-employed; the payment is either 80 % or 100 % of the salary level depending on the length of the leave to be taken. The maximum pay is 6 G. One G is the base amount for calculations for the NI and is subject to annual regulations.<sup>55</sup>

Female self-employed workers and female spouses and life partners are entitled to maternity benefits if they have fulfilled the base requirement of having been at work during six of the last ten months before the birth of the child, see NIA section 14-6 and 14-7. The amount of the benefit is calculated according to the average income during the last three years.<sup>56</sup> Spouses or any person who does not work will receive a cash benefit in relation to a birth; see NIA section 14-17.

#### **8.8 Has national law implemented the provisions regarding occupational social security for self-employed persons (see Article 10 of Recast Directive 2006/54)?**

Yes, Article 10 of Directive 2006/54 regarding occupational social security for self-employed persons is implemented in the NIA. It is a voluntary system where it is possible to buy social protection (health/sickness, a pension) according to the NIA sections 3-13 and 23-6 and under a specific regulation.<sup>57</sup>

#### **8.9 Has national law made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54? Please describe relevant law and case law.**

No. Norway has not made use of the exceptions for self-employed persons regarding matters of occupational social security under Article 11 of Directive 2006/54.

#### **8.10 Is Article 14(1)(a) of Recast Directive 2006/54 implemented in national law as regards self-employment?**

Yes, Article 14(1)(a) of Recast Directive 2006/54 is implemented in national law as regards self-employment, both under the general wording of the GEA as well as specific declarations in sections of the WEA, see for instance Section 13-2 (2). Section 13-2 (2) states that the rules as described in the WEA chapter 13 apply equally for an employer's

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<sup>54</sup> See Regulation F11.03.1997 No. 210 *Forskrift om frivillig yrkesskadetrygd for selvstendig næringsdrivende og frilansere* <https://www.nav.no/rettskildene/forskrift/F19970311-210>, accessed on 18 May 2018.

<sup>55</sup> In 2017 the G (*grunnbeløp*) is NOK 93 634 (EUR 9 801.63), at an exchange rate of EUR 0.1047 for 1 NOK (DNB BANK exchange rate on 18 May 2018). The G is a calculation figure for the NAV calculating every person's right to benefits from the National insurance system (Folketrygden).

<sup>56</sup> See the information about maternity/parental leave benefits on the NAV website; <https://www.nav.no/no/Person/Familie/Venter+du+barn/Foreldrepenger.347653.cms>, accessed 18 May 2018.

<sup>57</sup> See Regulation F11.03.1997 No. 210 *Forskrift om frivillig yrkesskadetrygd for selvstendig næringsdrivende og frilansere* <https://www.nav.no/rettskildene/forskrift/F19970311-210>, accessed 18 May 2018.

choice of and treatment of independent/self-employed workers and employees hired in an enterprise.



## **9. Goods and services (Directive 2004/113)**

### **9.1 Does national law prohibit direct and indirect discrimination on grounds of sex in access to goods and services?**

Yes, one cannot assert this explicitly, but GEA section 2 states that the law applies to all areas of society. This includes access to goods and services.

### **9.2 Is the material scope of national law relating to access to goods and services more restricted or broader than specified in Article 3 of Directive 2004/113? Please explain and refer to relevant case law, if any.**

The material scope of the national law relating to access to goods and services fulfils the requirements according to Article 3 of Directive 2004/113. As far as the Directive's Article 3 no. 3 is concerned, GEA Section 16 prescribes that all teaching materials in schools and education shall emphasise gender equality and non-discrimination because of gender. The GEA is in this respect broader than the Directive.

### **9.3 Has national law applied the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education?**

As far as the Directive's Article 3 no. 3 is concerned, GEA Section 16 prescribes that all teaching materials in schools and education shall emphasise gender equality and non-discrimination because of gender. The GEA is in this respect broader than the Directive. As regards media and advertising, Norwegian law appears to be broader than the Directive as well. There is protection against discrimination because of gender in the Marketing Act section 2<sup>58</sup> which has the following wording: Advertisements and the person producing a commercial/advertisement shall ensure that the advertisement is not in violation of the principle of equality between men and women, and ensure that the advertisement does not take advantage of one of the two gender's body or image or provide an understanding of one of the sexes in an offensive or degrading manner.<sup>59</sup>

### **9.4 Have differences in treatment in the provision of the goods and services been justified in national law (see Article 4(5) of Directive 2004/113)? Please provide references to relevant law and case law.**

There are no examples of justified practices in line with Article 4 (5).

### **9.5 Does national law ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits (see Article 5(1) of Directive 2004/113)?**

Yes, with the general prohibition on discrimination in the GEA national law ensures that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services does not result in differences in individual premiums and benefits, see Article 5(1) of Directive 2004/113. There are a few older cases from the Tribunal.<sup>60</sup> In case LKN-2004-1 the issue at stake was sex as an actuary calculation factor for the premium for insurance against accidents and sickness. The Tribunal found this to be direct discrimination because of sex and that it violated section 3 according to the GEA (1978); it granted the insurance companies a two-year limit to correct their practice. Another case from LKN-2001-11 concerned banks/money-lending

<sup>58</sup> See the Marketing Act (*Lov om markedsføring og avtalevilkår m.v.* LOV -2009-01-09-2).

<sup>59</sup> Unofficial translation.

<sup>60</sup> <https://lovdata.no/pro/#document/LDN/avgjorelse/lkn-2004-1?searchResultContext=2117>, accessed on 18 May 2018.

institutions which used sex as a calculation factor in the credit rating of persons. This practice was found to be illegal and in violation of the prohibition against direct discrimination because of gender in the GEA (1978) section 3.

**9.6 How has the exception of Article 5(2) of Directive 2004/113 been interpreted in your country? Please report on the implementation of the C-236/09 *Test-Achats* ruling in national legislation.**

Norway has not made any exceptions according to Article 5 (2) of Directive 2004/113. Even though it is clear according to the Tribunal's early practice and the text of the law that sex discrimination is not legal in collective pensions, the Labour Disputes Court's judgment in case ARD-2013-11 (see chapter 3.3.3) implies that sex may still be used as an actuarial factor in some cases. The *Test-Achats* ruling has therefore not resulted in any changes to national legislation as Norway presumes that national law is in compliance.

**9.7 Has your country adopted positive action measures in relation to access to and the supply of goods and services (see Article 6 of Directive 2004/113)?**

Norway has not adopted positive action measures in relation to access to and the supply of goods and services.

**9.8 Are there specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in your country in relation to access to and the supply of goods and services? Please briefly describe relevant case law.**

There are no specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in Norway in relation to access to and the supply of goods and services.

## **10. Violence against women and domestic violence in relation to the Istanbul Convention**

### **10.1 Has your country ratified the Istanbul Convention?**

No, Norway has signed the Istanbul Convention, but has not yet ratified it.<sup>61</sup> Norway lacks a penalty provision on stalking, which the Convention requires and this has to be amended through legislation before Norway can ratify it. Norway does not have any concerns regarding the possible financial impact as a reason for not ratifying. According to representatives from the Ministry of Children, Equality and Social Inclusion, the plan is to have the necessary legislative amendments in place in 2015 and this will enable Norway to ratify the Convention shortly thereafter.<sup>62</sup> As of 1 January 2018 this ratification has not yet occurred.<sup>63</sup>

Norway, together with the other Nordic countries, is part of a cooperation project that aims to define best practices in various areas to ensure that the aims of the Convention are achieved. The findings of the cooperation project were presented at a Conference on 8 March 2018.<sup>64</sup>

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<sup>61</sup> See the Government's White Paper: *Meld. St. 15 (2012-2013) Forebygging og bekjempelse av vold i nære relasjoner* (Combating violence in near relations), page 40: <https://www.regjeringen.no/contentassets/1cea841363e2436b8eb91aa6b3b2d48e/no/pdfs/stm201220130015000dddpdfs.pdf>, accessed 23 February 2017.

<sup>62</sup> See the comments by State Secretary Ingvild Stub, representative of the Ministry of Foreign Affairs, at the Conference on 19 September 2014 in Rome: <https://www.youtube.com/watch?v=eYjX4aoYuNg>, accessed on 18 May 2018.  
<http://sok.stortinget.no/?querytext=istanbul+konvensjonen&aid=160&sortby=&groups=&l=no>, accessed on 18 May 2018.

<sup>64</sup> <http://likestillingen2017.regjeringen.no/arbeidet-med-vold/>, accessed on 18 May 2018.

## **11. Enforcement and compliance aspects (horizontal provisions of all directives)**

### **11.1 Victimisation**

#### **11.1.1 Are the provisions on victimisation implemented in national legislation and interpreted in case law?**

Yes, in Norway protection against retaliation/acts of reprisals/victimisation is implemented through GEA section 9 and WEA section 2-5. In all discrimination cases, if there are circumstances that give reasons to believe that there has been direct or indirect differential treatment in contravention of the discrimination legislation, such differential treatment shall be assumed to have taken place unless the person responsible proves, on the balance of probabilities, that such differential treatment did not take place. This applies equally to situations of reprisals and victimisation. It is not permitted to retaliate against any person who has submitted a complaint regarding a breach of provisions of the discrimination legislation, or who has stated that a complaint may be submitted. There is a limitation to this right, and that is in instances where the complainant has acted with gross negligence. The protection against victimisation applies correspondingly to witnesses or someone who helps the victim of discrimination to bring a complaint, for example a workers' representative.

As the regulation on victimisation is relatively new, both the Ombud and the Equality Tribunal have dealt with a limited number of cases in which victimisation has been alleged. The Equality Tribunal has dealt with nine cases where victimisation was one of the issues raised.<sup>65</sup> Tribunal case 27/2008 was subsequently taken to the Oslo municipal court by the body accused of the reprisal, the municipality of Oslo, where the decision of the Tribunal in its case 27/2008 was overruled by the court. The court found that a refusal to employ a male nurse was due to his personal abilities, and that he had not been subject to reprisals or victimisation by his former employer, as the decision to refuse to make use of his services as a nurse was taken before he brought the case to the Ombud and the Tribunal.<sup>66</sup> In a case on discrimination because of age and gender, the female complainant was subjected to victimisation in breach of the GEA and WEA section 2-5 and 13-8, respectively.<sup>67</sup> In 2013 the Ombud dealt with a case in which a witness to harassment claimed that he was subjected to reprisals from his employer for having supported the victim of harassment. Immediately afterwards he was deprived of his position as a shift supervisor. The Ombud found that there was a causal link between the deprivation and his support for the harassed victim.<sup>68</sup> The Ombud has furthermore dealt with an interesting case concerning reprisals regarding an instance of notification about sexual harassment.<sup>69</sup> Reference is also made to case 14/1434, which is described above where the Ombud found that despite having proper and sufficient procedures in place to prevent sexual harassment, the police district in question had not succeeded in protecting a female police officer from retaliation as a result of her complaints.

### **11.2 Burden of proof**

#### **11.2.1 Does national legislation and/or case law provide for a shift of the burden of proof in sex discrimination cases?**

Yes, in Norway national law permits a shift of the burden of proof from the complainant to the respondent

<sup>65</sup> See Tribunal cases 27/2008 (gender) and 21/2013 (gender). The remaining cases concerned ethnicity and disability.

<sup>66</sup> Oslo municipal court, first instance judgment of 27 October 2009 (TOSLO-2009-72697).

<sup>67</sup> See the judgment of the *Øst-Finnmark tingrett* of 17 March 2010, case No. TOSFI-2009-136827.

<sup>68</sup> Case No. 12/314 of 6 May 2013 (in Norwegian) at <http://www.ldo.no/no/Klagesaker/Arkiv/2013/12314-Vitne-utsatt-for-gjengjeldelse-grunnet-bistand-i-en-trakasseringssak-/>.

<sup>69</sup> Case No. 08/1177 of 6 January 2009 as referred to in the annual report of the Ombud (in Norwegian), Praxis 2008.

The rule of a shared burden of proof applies to all grounds of discrimination, including harassment, victimisation and instructions to discriminate, see GEA section 27 and WEA section 13-8.

In cases concerning dismissals according to the labour law procedural rules, it is a general principle that the employer must substantiate that the dismissal is based upon the correct facts. Other than this, in civil cases - as a general rule - the burden of proof rests with the claimant. This is why the shifting of the burden of proof as implemented in the discrimination legislation is thus important. In all discrimination cases, if there are circumstances that give '*reason to believe*' that there has been direct or indirect differential treatment in contravention of the said legislation, such differential treatment shall be assumed to have taken place unless the person responsible proves, on the balance of probabilities, that such differential treatment nevertheless did not take place. The GEA states: '*Discrimination shall be assumed to have occurred if circumstances apply that provide grounds for believing that discrimination has occurred, and the person responsible fails to substantiate that discrimination did not in fact occur.*' If the claimant provides a '*reason to believe*' that discrimination has occurred, the burden of proof shifts to the employer/ discriminator. If the employer/ discriminator fails to fulfil the burden of proof, discrimination is assumed to have occurred.

What is meant by '*reason to believe*' for the burden of proof to be reversed is interpreted by the Equality Tribunal to mean that the allegation must be '*supported by the chain of events and the external circumstances of the case which necessitate an assessment of the specifics of that case.*'<sup>70</sup>

In an article by the previous head of the Equality Tribunal and the head of its Secretariat, the conclusion was drawn that the current rules on the reversal on the burden of proof are useful and fulfil the EU requirements.<sup>71</sup> This conclusion is shared by the author of this report. As the practice of the Ombud and the Tribunal has not changed based on the new wording of the legislation, the revised text is also in line with the EU requirements including that of ECJ case C-415/10, *Kelly and Meister*.

### 11.3 Remedies and Sanctions

#### 11.3.1 What types of remedies and sanctions (e.g. compensation, reinstatement, criminal sanctions, administrative fines etc.) exist in your country for breaches of EU gender equality law? Please specify the applicable legislation.

Sanctions according to the GEA section 28 and WEA section 13-9 that are enforced by the civil courts consist of liability for damages/ compensation/ redress awarded to the claimant of discrimination. Sanctions according to criminal law consist of penalties. Sanctions are in general equally applicable in private and public employment. Sanctions cover in general all discrimination grounds in all fields, except age, which is only covered in the field of employment.

There are a number of general rules on compensation in Norwegian legislation which are applicable in discrimination cases. Compensation in Norwegian law is awarded either for fault-based liability (*culpa*) or for liability without fault. These ordinary rules are the rules on compensation laid down mainly by the Act relating to Compensation,<sup>72</sup> as well as by the

<sup>70</sup> See Equality Tribunal case 26/2006, in which the said quote was used by the dissenting member of the Tribunal. Although the remainder of the Tribunal in this particular case did not agree with the dissenting member, the said quote has later been referred to by the Ombud and the Tribunal in a number of subsequent cases.

<sup>71</sup> See Syse, A. (2009), 'Og Geir Helgeland: Reglene om delt bevisbyrde i norsk diskrimineringsrett' ('The rules on the shared burden of proof in Norwegian discrimination law'), in Aune, Fauchald, Lilleholt and Michalsen (eds), *Arbeid og Rett, Festskrift til Henning Jakhellns 70-årsdag*, Cappelen DAMM.

<sup>72</sup> Act relating to Compensation of 13 June 1969 No. 26.

non-statutory customary rules on compensatory damages. These also include a number of general rules to limit liability.

The rules on compensation in discrimination cases were revised and harmonized in 2013 so that liability is similar in all legislative acts.<sup>73</sup> The reasons for these changes were to make Norwegian legislation more in line with the requirements of the EU directives in relation to compensation irrespective of whether the employer can be blamed for the discrimination in employment.

Access to compensation differs slightly in the various acts depending on whether the discrimination takes place within or outside employment. According to GEA section 28(1) and 2, a person who is discriminated against may claim compensation for non-economic loss and compensation for economic loss. In an employment relationship, liability exists irrespective of whether the employer can be blamed for the discrimination; see WEA section 13-9. Liability rests with the employer. In other sectors of society, liability only exists if the person who has committed the discriminatory act can be blamed for this act. This is stated in a similar fashion in GEA section 28 (2).

According to GEA section 28(1), a job applicant or employee may demand redress for non-economic loss for a contravention of the general rule on the prohibition of discrimination irrespective of the employer's culpability.

Regarding damages for non-economic loss, the GEA as well as all the other discrimination acts contain the general rule that compensation shall be set at an amount that is reasonable in view of the scope and nature of the harm, the relationship between the parties and the circumstances which otherwise pertain, see GEA section 28 (3).

The acts contain a right to claim compensation for non-economic loss and compensation for economic loss under the general principles of the law of damages, see GEA section 28 (4).

*A preliminary injunction to ensure the right to remain in a position:* A practical type of 'sanction' which is often claimed by victims of discrimination in employment is the right to remain in one's position until the case has been finally decided by the Court. This was granted on one occasion related to age discrimination in the context of interlocutory judgments,<sup>74</sup> but on another occasion it was refused by Supreme Court,<sup>75</sup> and in later cases by the Appellate Court.<sup>76</sup> The cases referred to concerned age discrimination, but the same legal rule applies to gender discrimination.

*Sanctions according to the GEA and WEA that are enforced by the Equality Ombud and Equality Tribunal:* The Equality Tribunal has limited competence to issue an administrative order - that is to order an act to be halted or remedied or other measures that are necessary to ensure that discrimination, harassment, instructions to discriminate or reprisals cease and to prevent their repetition, see AOT<sup>77</sup> section 7. The Equality Tribunal may set a time limit for compliance with the order. The Tribunal shall state the grounds for an administrative decision at the time the decision is made. Furthermore, the Equality Tribunal may make an administrative decision to impose a coercive fine to ensure the implementation of orders pursuant to section 7 if the time limit for complying with the

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<sup>73</sup> See Proposition to Parliament, Prop. 88 L (2012-2013) page 97.

<sup>74</sup> For example, the decision of 19 November 2009 by the Oslo municipal court at first instance in case No. 09-143503TVI-OTIR/02.

<sup>75</sup> In decision Rt.2011-974/ HR-2011-1294-A of 29 June 2011 the Supreme Court did not give the plaintiff the right to remain in her position when addressing the possible discriminatory aspects of a retirement age set unilaterally by the company at the age of 67. The Supreme Court stated that allowing the claimant the preliminary right to remain in her position in these kinds of litigation would reduce the content of these age limits.

<sup>76</sup> Borgarting Appellate court verdict of 18 June 2014 in case No. LB-2014-56188 (*Mediaas-saken*).

<sup>77</sup> The Anti-Discrimination Ombud's Act (AOT)/*Diskrimineringsombudsloven* of 10 June 2005 No. 40.

order has been exceeded, see AOT section 8 (1). The coercive fine begins to run if a new time limit for complying with the order is exceeded. The coercive fine shall normally run until the order has been complied with. The Tribunal may reduce or waive a fine that has been imposed when special reasons warrant doing so. The coercive fine shall accrue to the State. An administrative decision to impose a coercive fine constitutes grounds for enforcement. The Tribunal shall state the grounds for an administrative decision to impose a coercive fine at the time the decision is made. So far, the Tribunal has not made use of its mandate to impose a coercive fine, although it has been discussed in two instances of illegal employment announcements made by the same company. A coercive fine has therefore not yet been issued, not even in cases of repetitive offences.

The Tribunal's decision in case 44/2009 of 12 March 2010, which was a follow-up to its case 10/2006, is an illustration of this: In the latter case, a position at a Dry Cleaners in Oslo was announced as being vacant in the Norwegian national newspaper *Aftenposten* which stated: 'A mature female aged 30-50 years is encouraged to apply for the vacancy in our Dry Cleaners at Røa.' Both the Ombud and the Tribunal found the announcement to be in breach of the prohibition against age and gender discrimination. As the company had used a similar announcement previously, and the firm is a large, professional employer with 17 branch offices in the Oslo area, the Tribunal ordered that similar advertisements should no longer appear. The Tribunal issued an order with a specific time limit for compliance to ensure that a similar advertisement would not be used again. Thereafter the Tribunal received a notice from the firm confirming that the advertisement would not again be used. In its recent case, the dry cleaners' announcement in 2009 was for a 'mature woman.' The case was brought to the Tribunal from the Ombud on her own initiative, asking whether the current announcement was a breach of the 2006 order of the Tribunal. The Tribunal also discussed if a breach of the order should result in a fine in accordance with the Anti-discrimination Ombud's Act section 13, or whether another form of sanction would be appropriate. The Tribunal again ordered the announcement to be withdrawn, and that the company should collaborate with the Ombud in finding the wording for future announcements, but it did not issue a fine.

In practice, therefore, the mandate to make use of fines is more a coercive tool, as this sanction has never been used.<sup>78</sup> This lack of its use is a problem. The efficiency and effectiveness of this sanction may thus be questioned.

#### a) Ceiling and amount of compensation

There are no upper limits for compensation, nor are there rules for its calculation provided in the national legal framework. Compensation shall as a rule be compensation for actual loss.

In the sparse court cases that do exist, compensation has only been awarded in two Supreme Court cases, both concerning discrimination because of membership of trade unions.<sup>79</sup>

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<sup>78</sup> In its case 7/2012, the Tribunal warned a hotel that if it did not follow up the order given within the deadline of 1 January 2014, a coercive fine might be issued.

<sup>79</sup> In its judgment of 28 March 2014, the Eidsivating Appellate Court in case number LE-2013-113570 awarded 'Gate Gourmet 2' compensation for real economic loss because of discrimination resulting from membership of a trade union. In case Rt-2011-1755 *Gate Gourmet*, the Supreme Court found that these employees had been discriminated against in violation of the general rule in the Working Environment Act § 13-1 first paragraph because jobseekers who were members of another union had received preferential hiring. The 50 complainants were awarded NOK 5 000 (EUR 625) in non-monetary damages for the discrimination incurred. In subsequent cases at the Øvre Romerike district court (12-073184TVI-OVRO of 23 April 2013) and the Eidsivating appellate court, the claimants were awarded compensation for the loss incurred. The compensation for all claimants totalled more than NOK 8 000 000 (approximately EUR 1 000 000). In the other case where compensation was awarded, Rt 2001-248 *Olderdalen*, NOK 100 000 (approximately EUR 12 000) was awarded to the claimants as economic loss because of discrimination due to their political affiliation. The WEA in force at that time did not contain a clause specifically on liability for economic loss, thus the sanctions used for gender discrimination were referred to as being comparable.

In other cases before the Supreme Court, compensation has either not been claimed, or the case was lost and compensation was thus not awarded.

Apart from these judgments, compensation has been awarded in only four lower court cases: three concerning discrimination because of gender/ pregnancy,<sup>80</sup> and one concerning age and gender. All concern employment relations.<sup>81</sup> Interestingly, the non-pecuniary compensation for the discrimination has been set above NOK 100 000 (approx. EUR 12 000) in three recent cases. This is considered to be a high level of compensation when compared, for example, with the level of compensation in cases of unjustified dismissals within employment.

There is no statistical information available concerning the average amount of compensation available to victims.

The fact that the Equality Ombud and the Equality Tribunal cannot award compensation has been criticised. In an in-depth study, in which victims of discrimination were interviewed, the victims expressed disappointment that despite the Ombud's assessment that discrimination had taken place, the Ombud had no powers to award compensation. The victims themselves had the impression that the sanctions enforced by the Ombud were more encompassing than they are in reality.<sup>82</sup>

A state-appointed committee proposed in 2011 that the Equality Tribunal should be given powers to award damages for non-economic loss in cases concerning a breach of the prohibition against discrimination.<sup>83</sup> This was not followed up in the 2013 revision of the anti-discrimination legislation. The Parliamentary Committee enacting the legislation specifically asked the government to study alternative possibilities to establish a low-threshold structure for compensation for non-economic loss within the framework of the anti-discrimination legislation. In this regard, the Committee asked the Government to assess how the Equality Tribunal functions as a complaint mechanism, and which changes in the Tribunal's modus operandi, composition and resources might be necessary to ensure the rule of law should the Tribunal's mandate be extended to include powers to award compensation for non-pecuniary losses in discrimination cases.<sup>84</sup> The Ministry of Children, Equality and Social Inclusion asked the PwC law firm to provide an analysis of how to possibly amend the current Ombud and Tribunal system including the issue of powers to award compensation. The report was delivered on 1 March 2016.<sup>85</sup> The mandate to the group performing the evaluation was to describe two options for designing a more efficient ombud and tribunal system where it would in addition be possible for the Ombud and the Tribunal to award non-pecuniary compensation.

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<sup>80</sup> These are: Court of Second Instance/ Hålogaland Appellate Court, Judgment of 21 January 2009 LH-2008-99829 (*Bang-saken*), Oslo municipal court judgment of 17 November 2006 case No. TOSLO-2006-52718 and Court of second instance/ Eidsivating Appellate court 12 December 1994, case No. LE 1994-892 (*Lufthansa*).

<sup>81</sup> Judgment of Øst-Finnmark Court of first instance - judgment of 17 March 2010 in case No. 09-136827TVI-OSFI (age and gender).

<sup>82</sup> Fjordholm, F.S.k.2015, 'Er det meg, er det han, eller hva er det? - Opplevelse og rettsregler i diskriminertes møte med Likestillingsombudet' ('Is it me, is it him, or what's the problem? Rules and experiences from encounters with the Equality Ombud', *Kvinnerettslig skriftserie* No. 69/2007, Universitetet i Oslo, accessible at:

[http://www.jus.uio.no/ior/forskning/omrader/kvinnerett/publikasjoner/skriftserien/dokumenter/69\\_Fjordholm.pdf](http://www.jus.uio.no/ior/forskning/omrader/kvinnerett/publikasjoner/skriftserien/dokumenter/69_Fjordholm.pdf) (accessed on 18 May 2018).

<sup>83</sup> See (in Norwegian) NOU 2011:18 Structure for Equality <http://www.regjeringen.no/nb/dep/bld/dok/nouer/2011/nou-2011-18.html?id=663064> (accessed on 18 May 2018).

<sup>84</sup> See Innst. 441 L (2012-2013) to Parliament from the Parliamentary Committee on family and culture, p. 21 (in Norwegian).

<sup>85</sup> See the Government's Gender Equality Report 2015, page 10: <https://www.regjeringen.no/no/aktuelt/likestilling-i-praksis--like-muligheter-for-kvinner-og-menn/id2457671/>, accessed on 18 May 2018. See the report from Advokatfirmaet PricewaterhouseCoopers AS at <https://www.regjeringen.no/no/aktuelt/utredning-av-handhevingsapparatet-pa-diskrimineringsområdet/id2478335/>, accessed on 18 May 2018.



## b) Assessment of the sanctions

The sanctions as formulated in the legislation and adopted in Norway are formally satisfactory in addressing problems of discrimination in relation to EU directives *per se*. A challenge for the Norwegian system as described above is not the sanctions alone, but the enforcement system. The Ombud alone handles more than 90 % of all discrimination cases each year. This is with the inherent limitation that she is not able to award damages for breaches of the act; persons who are discriminated against are not awarded compensation for discriminatory treatment unless they take their case to the ordinary court system. This is both very expensive and cumbersome. Access to legal aid is sparse for this group, thus not giving them efficient access to justice in discrimination cases.

The oral hearing in court may also provide a different result, as the court will hear the case again in full, and not use the findings of the Ombud and Tribunal alone.

Furthermore, current legislation contains sanctions: liability for damages/ compensation/ redress, penalties and administrative orders - that is to order an act to be halted or remedied or other measures that are necessary to ensure that discrimination, harassment, instructions to discriminate or reprisals cease and to prevent their repetition - but these are rarely used. This makes sanctions in practice less effective than their legislative potential.

11.3.2 In your opinion, do the remedies and sanctions meet the standards of being effective, proportionate and dissuasive? Please explain, if possible referring to relevant legislation or case law.

Yes existing sanctions are effective when used, but as only a very limited number of cases are brought before the ordinary courts, and the ordinary courts are the only ones that may award the payment of compensation, the sanctions in practice are much less effective than their legislative potential is and should be.

One interesting development in 2016 is the report written by Kjetil Mujezinović Larsen at the Norwegian Centre for Human Rights/Norsk senter for Menneskerettigheter for the Ministry of Children and Equality /Barne- og likestillingsdepartementet, exploring discrimination protection within the Criminal Code. The recommendation is to include protection against discrimination because of sex in the Criminal Code.<sup>86</sup> The Ministry is currently evaluating the report.

## 11.4 Access to courts

11.4.1 In your opinion, is the access to courts safeguarded for alleged victims of sex discrimination? Please explain and discuss particular difficulties and barriers victims of sex discrimination have encountered. Refer to relevant legislation and case law.

Yes, access to the courts is legally ensured for alleged victims of sex discrimination. A challenge is that in practice too few cases make it to the courts as most cases end with the Ombud/Tribunal system. The Ombud/Tribunal may not award compensation for discrimination.

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<sup>86</sup> See the report at: <https://www.regjeringen.no/no/dokumenter/utredning-om-det-straafferettslige-diskrimineringsvernet/id2520561/>, and <https://www.regjeringen.no/contentassets/c376779b24384202a4abf97e931454e2/utredning-av-det-straafferettslige-diskrimineringsvernet.pdf>, both accessed on 18 May 2018.

11.4.2 In your opinion, is the access to courts safeguarded for anti-discrimination/gender equality interest groups or other legal entities? Please explain and refer to relevant legislation and case law.

Access to the courts is ensured for anyone. In practice, interest groups will be financially or practically supporting claims from individuals. 'Anyone' may bring a case before the Ombud. Trade unions, NGOs or other similar bodies are included within 'anyone'. These parties may also file claims in class actions.

11.4.3 What kind of legal aid is available for alleged victims of gender discrimination?

Legal Aid is offered to individuals below a certain income level.<sup>87</sup> In 2015 the rates for being eligible for free legal aid are NOK 246 000 for single households and NOK 369 000 for spouses/co-habitants. Discrimination as a ground for free legal aid does not exist.

## 11.5 Equality body

11.5.1 Does your country have an equality body that seeks to implement the requirements of EU gender equality law?

Yes, a specialised body exists for the promotion of equal treatment irrespective of sex and the other discrimination grounds: the Equality and Anti-discrimination Ombud<sup>88</sup> with its appeal instance the Equality Tribunal.<sup>89</sup> The Ombud enforces the prohibition of discrimination based on all grounds covered by legislation as mentioned above. The appointment, organisational methods and authority of these bodies are detailed in the Anti-Discrimination Ombud Act - AOT.<sup>90</sup>

### *Status of the designated body/bodies – general independence*

The Equality Ombud and the Equality Tribunal are alternative dispute mechanisms, outside the judicial system, which address cases of discrimination. The Ombud and the Tribunal are a free low-threshold complaint system.

The Equality Ombud and the Tribunal are professionally independent central government bodies. The competencies of the Ombud and the Tribunal are derived from the AOT. The independence of the bodies are stipulated by law, and they are independent in their functions.<sup>91</sup>

The Equality Ombud has a dual role in working for equality by enforcing the law as well as proactively promoting equality and combating discrimination. As a law enforcer, the Equality Ombud issues opinions on complaints concerning breaches of statutes and provisions within the Ombud's sphere of activity, and provides advice and guidance with regard to the legislation within its mandate. The Equality Ombud is funded by annual grants financed by the Ministry of Children, Equality and Social Inclusion, but cannot be instructed by the Ministry. The Equality Ombud herself is appointed by the Ministry. The employees of the Equality Ombud are public officials. Even though the Ombud is nominated by the Ministry and the Ombud's staff are public officials, the Ombud's and her employees'

<sup>87</sup> See Regulation concerning free legal aid FOR-2005-12-12-1443 (*Forskrift til lov om fri rettshjelp*), [https://lovdata.no/dokument/SF/forskrift/2005-12-12-1443?q=fri\\_rettshjelp](https://lovdata.no/dokument/SF/forskrift/2005-12-12-1443?q=fri_rettshjelp), accessed on 18 May 2018.

<sup>88</sup> <http://www.ido.no/en/>.

<sup>89</sup> <http://www.diskrimineringsnemnda.no/nb/innhold/side/vedtak>, accessed on 18 May 2018.

<sup>90</sup> The AOT - Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal of 10 June 2005 No. 40 (*Diskrimineringsombudsloven*).

<sup>91</sup> See AOT - Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (the Anti-Discrimination Ombud Act) of 10 June 2005 No. 40, <http://www.regjeringen.no/en/doc/Laws/Acts/The-Act-on-the-Equality-and-Anti-Discrim.html?id=451952> accessed on 18 May 2018.

independence is not questioned in Norway, as the law clarifies her mandate, and she is not to be instructed by the Ministry.

The funds allocated through the State budget for 2016 as income for the Ombud for 2016 were NOK 52 856 000 (approximately EUR 5 604 377), slightly lower than the final expenditure in 2012.<sup>92</sup> There are 62 employees at the Ombud's office, including the Ombud herself.

The Equality Tribunal is the appeal body of the Equality Ombud. The Ministry of Children and Equality appoint its members for a term of four years, with the possibility for reappointment. When the members and deputy members are appointed for the first time, half of them shall be appointed for a term of two years. The chairperson and deputy chairperson shall fulfil the requirements prescribed for judges. The members are appointed after suggestions from different stakeholders and are chosen because of their academic skills in discrimination issues. When handling the cases the members are divided into two divisions with five members each. The chair and the deputy chair of the tribunal participate in both divisions to ensure consistency in the Tribunal's practice. The Equality Tribunal has a secretariat of four persons. The secretariat staff are public employees, as per the AOT regulations section 9.

#### *Grounds covered by the designated body/bodies*

The Equality Ombud and the Tribunal monitor and contribute to ensure compliance with the provisions in the anti-discrimination legislation. The Ombud's mandate covers all legislative discrimination grounds covered by the GEA, as well as the ADA (ethnicity, religion and belief), AAA (disability), SOA (sexual orientation), and WEA (age and political view). The rules in the select housing legislation and the Ship Labour Act chapter 10 are relevant, see AOT section 1(2). The mandate of the Ombud also involves ensuring that Norwegian legislation and administration practice are in accordance with Norway's obligations according to the UN Convention on the Elimination of All Forms of Discrimination against Women, the UN Convention on the Elimination of Racial Discrimination and the UN Convention on the Rights of People with Disabilities (CRPD), see AOT section 1(3).

#### *Competences of the designated body/bodies – and their independent exercise*

The Ombud's function of promoting equality and developing expertise entails the following tasks in accordance with the AOT regulations section 1:<sup>93</sup>

- a. *A proactive role:* The Ombud shall play a proactive role in promoting equality and combating discrimination, and shall monitor developments in society with a view to exposing and calling attention to matters that counteract equality and equal treatment.
- b. *Influencing attitudes and behaviour:* The Ombud shall help to raise awareness of equality and equal treatment and actively promote changes in attitudes and behaviour. The Ombud shall play an active part in giving the general public information about status and challenges.
- c. *Support and guidance:* The Ombud shall provide information, support and guidance in efforts to promote equality and counteract discrimination in the public, private and voluntary sectors.
- d. *Advisory service on ethnic diversity in working life:* The Ombud shall provide advice and guidance on ethnic diversity in working life to employers in the public and private

<sup>92</sup> As per the letter from the Ministry informing about the allocation dated 14 January 2014 published at: (in Norwegian): [http://www.ldo.no/globalassets/brosjyrer-handboker-rapporter/rapporter\\_analyser/rapporter\\_diverse/tildellingsbrev-2014-2.pdf](http://www.ldo.no/globalassets/brosjyrer-handboker-rapporter/rapporter_analyser/rapporter_diverse/tildellingsbrev-2014-2.pdf). Further figures are given in the Ombud's annual report for 2013 (in Norwegian) at: [http://www.ldo.no/globalassets/brosjyrer-handboker-rapporter/rapporter\\_analyser/2013arsrapport.pdf](http://www.ldo.no/globalassets/brosjyrer-handboker-rapporter/rapporter_analyser/2013arsrapport.pdf).

<sup>93</sup> Forskrift om organisasjon og virksomhet for Likestillings- og diskrimineringsombudet og Likestillings- og diskrimineringsnemnda, FOR-2013-12-18-1613 (in Norwegian), in force 1 January 2014.

sectors. The service shall be provided free of charge and be adapted to the needs of the individual employer. Furthermore, the Ombud shall help to disseminate examples of good practices and to increase knowledge of methods for promoting ethnic diversity in working life.

- e. *Expertise*: The Ombud shall have an overview of and provide knowledge and help to develop expertise in and documentation on equality and equal treatment, as well as monitoring the nature and extent of discrimination.
- f. *Forum*: The Ombud shall serve as a meeting place and information centre for a broad public and facilitate collaboration between actors who work to combat discrimination and promote equality.

The key characteristic of the Ombud is her independent and impartial role as a law enforcer: she provides free legal advice on equality and anti-discrimination legislation to victims of discrimination and anyone else who contacts the Ombud, such as employers, employee organizations, interest groups, government agencies and the general public. This function implies that the Ombud can carry out independent surveys and issue reports and recommendations. This guidance includes information about how the legislation should be interpreted and what possibilities victims have if they experience discrimination, according to the AOT regulations section 2 and the Public Administration Act.<sup>94</sup> The duty to provide guidance encompasses all relevant matters related to the case, including guidance on the current statutes and regulations and common practice in the administrative sphere in question, and rules of procedure, especially those concerning rights and duties pursuant to the Public Administration Act. If possible, the Ombud should also draw attention to circumstances that may be of particular importance for the result in a specific case. In addition, the Ombud also has the duty to provide guidance in discrimination cases that are not within the Ombud's scope, see AOT section 3. The Ombud conducts independent surveys, publishes independent reports and makes recommendations on issues relating to discrimination. Every year the Ombud publishes annual reports and relevant reports on the status of equality.

A person who claims to be a victim of discrimination because of any of the discrimination grounds covered by law may bring the complaint to the Equality Ombud, who will investigate the complaint by demanding information and documentation from the responsible party, see the AOT section 3, fourth paragraph. The Ombud will provide counsel and guidance to the victim, but not provide independent assistance in the sense of being the spokesperson of the victim. The Ombud will undertake a legal assessment of whether or not discrimination has occurred if the victim brings a complaint forward. The work of the Equality Ombud is based on written statements, and on the principle of contradiction between the parties involved in the case, in which each party is allowed to hear the arguments of the other party and be given opportunity to refute the information. The Ombud may, in addition to handling complaints, take up cases on her own initiative, or based on an application from other persons. 'Anyone' may bring a case before the Ombud. Trade unions, NGOs or other similar bodies are regarded as being 'anyone'. These parties may also file claims in class actions.

The great weakness of the Equality Ombud in relation to the task listed in Directive 2000/43 is that neither she nor anyone else have the specific role of providing independent assistance to victims of discrimination that will enable them to have access to remedies in accordance with Directive 2000/43 Article 15. As the Equality Ombud has the role of a law enforcer, she will not provide individual independent assistance to each victim – she will decide on the merits of the case. Until 2006, the Centre against Ethnic Discrimination (SMED) provided legal aid to victims of ethnic discrimination, but when the Centre became a part of the new Equality Ombud, the legal aid scheme was revoked. The Ombud is impartial when dealing with complaints and is an alternative to filing a lawsuit in discrimination cases. According to the Anti-Discrimination Ombud Act, the Ombud shall not

<sup>94</sup> The Public Administration Act is available in English at: <http://www.ub.uio.no/ujur/ulovdata/lov-19670210-000-eng.pdf>, accessed on 18 May 2018.

represent the party in external proceedings. Therefore, the Ombud does not act as a legal representative or a legal practitioner for victims. Neither the Ombud nor the Tribunal is entitled to take cases to court independently of a person individually complaining. The fact that there is no legal aid scheme offered specifically to address discrimination because of ethnicity is a flaw in the current system with one holistic Equality Ombud covering all grounds. This has been reported earlier, and the author agrees with this observation.<sup>95</sup>

#### *Legal standing of the designated body/bodies*

In Norway, designated bodies in theory have legal standing to bring discrimination complaints on behalf of identified victim(s) or to intervene in legal cases concerning discrimination.

According to the general Dispute Resolution Act section 1-4(2), also public bodies charged with promoting specific interests may in the same manner bring an action in order to safeguard the interests that fall within their purpose and normal scope. This, in theory, should open the possibility for the Equality Ombud and Equality Tribunal to bring cases to court, although this has never been done in practice, as the Equality Ombud considers her role to be that of an impartial legal enforcer, not as an agent for litigation.

The Equality Ombud has however provided co-counsel in court on two occasions, in accordance with the mandate given in the Dispute Resolution Act section 3-7.<sup>96</sup> There are no fixed rules or regulations deciding when the Equality Ombud may provide co-counsel in court – this is decided on a case-by-case basis.

#### *Quasi-judicial competences*

In Norway, the Equality Ombud and Tribunal are quasi-judicial institutions.

In individual complaints to the Equality Ombud, a victim must be identified. However, complaints can also be handled where no individual is identified. The Ombud shall only deal with cases brought before the Ombud by a person who is not a party to the case if the party whose rights were infringed consents to this. If special considerations warrant doing so, the Ombud may nonetheless deal with such a case, even if consent has not been given.

Following written investigations, the Equality Ombud will evaluate whether or not the prohibition against discrimination has been violated after having received the parties' arguments in writing and will conclude whether a breach is found or not. Where a breach of legislation is found, the Ombud will often recommend the party who has been in breach of the law to correct the wrong, for example by making a recommendation to the employer/the person responsible to pay compensation. In many cases, the employers will follow the Ombud's recommendation and obey her suggestion for redress in order to avoid the case being taken to the Equality Tribunal or the courts. As agreements on compensation following such procedures are private, neither statistics as to the level of compensation nor the number of agreements exist.

The decision of the Equality Ombud is not a legally binding administrative decision, but is a statement as to how the Ombud evaluates the case in relation to the discrimination legislation. However, a party which is not satisfied with the Ombud's statement may appeal to the Equality Tribunal.<sup>97</sup> In addition, if one of the parties does not comply with the

<sup>95</sup> Sortebekk, A.T. (2010), *Country Fiche Norway for Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC*, Human European Consultancy in partnership with the Ludwig Boltzmann Institute of Human Rights, point 55.

<sup>96</sup> Co-counsel by the Ombudsman was carried out in the case of the Hålogaland Appellate Court LH-2008-99829 (*Bang-saken* – non-employment because of pregnancy) and in the case decided by Øst-Finnmark Court of first instance - judgment of 17 March 2010 in case No. 09-136827TVI-OSFI (age and gender).

<sup>97</sup> The Parliamentary Ombud stated in a landmark decision in 1993 that public authorities which do not wish to comply with the statements of the Ombud have a duty to appeal the case to the Tribunal for a final decision.

Ombud's recommendation, the dispute may be referred to the Equality Tribunal by either of the parties or by the Ombud herself. This is a mechanism/ sanction which is being increasingly applied by the Ombud to ensure that her statement is complied with. The Equality Tribunal may also demand that certain cases, which have been handled by the Ombud, may be brought before the Tribunal, see AOT section 6 second paragraph. This opportunity has almost never been used.

The Equality Tribunal is a permanent body, which has been entrusted by law to exercise its functions. Its composition is defined by law, see AOT section 5. It must apply the law and is an independent body, as its members are external appointees, selected on personal merit. Furthermore, its procedure is adversarial and similar to the procedure in the courts in that, *inter alia*, there is normally both a written procedure and an oral hearing before a decision is made. Finally, its decisions are binding upon the private parties before it, as per the AOT section 7.

Neither the Equality Ombud nor the Tribunal has the right, according to the law, to award damages or financial compensation. Where a party does not pay compensation voluntarily, the victim may bring an ordinary complaint before the courts, as described above.

The Ombud and the Tribunal may not, subject to the exceptions provided below, bring cases before the courts. The equality bodies' powers of investigation are wide. Public authorities are under an obligation to provide all necessary information to fulfil its obligation to ensure the fulfilment of the discrimination legislation, see AOT section 11. The obligation of the public authorities to provide information overrides their obligation of secrecy. Both the Ombud and the Tribunal are entitled to make the necessary investigations to fulfil their obligations in ensuring the Act's fulfilment. If necessary they may also require assistance from the police, and an evidence meeting at the courts may be ordered.

Sanctions may be imposed, as described above, but are seldom used. The decision of the Tribunal may not be appealed, but the case may be taken to court for a full hearing of the case, in which the statements/ decisions of the Ombud/ Tribunal are used. The decisions of the Ombud/Tribunal are in general respected, although it is only recently that the Ombud has systematically started to monitor her own work in terms of the parties' compliance with her decisions.

A specific issue for Norway as an EEA country is that Norway can only refer prejudicial questions regarding cases on equal treatment and discrimination to the EFTA court, and not to the CJEU. A question that has arisen – but not yet tried in practice - is to what extent national anti-discrimination bodies/equality bodies can be seen as a 'court or tribunal' and thus be able to request advisory opinions/preliminary rulings regarding cases on equal treatment and discrimination from the EFTA court. There has been an assumption that the Equality Tribunal would be considered to be a 'court' according to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. Both the Norwegian Labour Court<sup>98</sup> and the Norwegian Market Council<sup>99</sup> have been accepted by the EFTA court as requesting parties.

#### *Registration by the body/bodies of complaints and decisions*

In Norway, both the Ombud and the Tribunal register the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are available to the public. The Tribunal publishes all of its cases – anonymised - on its webpage, see [www.diskrimineringsnemnda.no](http://www.diskrimineringsnemnda.no). The Ombud publishes all cases in which she gives a

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A non-appeal to the Tribunal by public authorities is seen as an implicit acceptance of the Ombud's conclusions.

<sup>98</sup> See EFTA court case E 02/2000.

<sup>99</sup> See EFTA court case E-8/94 and 9/94.



reasoned opinion. These opinions are published on her webpage in an anonymous form, see [www.ldo.no](http://www.ldo.no). The opinions are all published in Norwegian.

In 2016 the Equality Ombud received 613 inquiries for guidance on how to solve a particular matter regarding sex. Guidance cases are to be distinguished from explicit complaints of a breach of the law. Of these complaints 43 cases were related to sex.<sup>100</sup>

## 11.6 Social partners

### 11.6.1 What kind of role do the social partners in your country play in ensuring compliance with and enforcement of gender equality law? Are there any legislative provisions in this respect?

The Ombud has a specific duty to disseminate information about legal protection against discrimination, see AOT regulations section 1. Additionally, public authorities have a general proactive duty according to the ADA sections 13-15, AAA sections 18-20 and SOA sections 12-14 to make active, targeted and systematic efforts to promote non-discrimination policies and measures regarding ethnicity, sexual orientation and disability in all sectors of society. This includes the dissemination of information. A similar proactive duty is also required from employers with more than 50 employees.

Although there are no formal rules in the anti-discrimination legislation on the dissemination of information, social dialogue or dialogue with NGOs by the authorities, there is a long tradition in Norway in regularly undertaking public consultations with NGOs and the social partners. NGOs and the social partners are in general invited to participate in referee groups when new legal proposals are being drafted, and are recipients of White Papers and law proposals for consultative purposes before an Act is enacted. The various action plans initiated are usually drafted and implemented in close collaboration with NGOs and the social partners.

A number of initiatives have been taken in relation to promoting dialogue between the social partners to give effect to the principle of equal treatment through workplace practices, codes of practice, and workforce monitoring. This is done through initiatives by the Ministry, the Equality Ombud as well as the trade unions. Their real effect in terms of effectiveness in relation to the principle of equal treatment have however been questioned, most recently in the official report NOU 2011:18 Structure for Equality, chapter 7.<sup>101</sup> While it is acknowledged that Norwegian working life has a long tradition of institutionalised cooperation between the labour market organisations, this established cooperation is limited when it comes to gender equality, thus the establishment of a forum to discuss equality in working life is proposed. One of the forum's main goals will be to help follow up the duty to make active efforts and the report stipulated in the anti-discrimination legislation.<sup>102</sup>

## 11.7 Collective agreements

<sup>100</sup> <http://www.ldo.no/nyheiter-og-faq/klagesaker/> for figures on 2016, and the Ombuds annual report 2016: <http://www.ldo.no/nyheiter-og-faq/brosjyrar-og-publikasjonar/Arsrapporter/arsmelding-2016/> accessed on 18 May 2018. See the Equality Ombud's annual report for 2015 regarding cases on all the grounds of discrimination (in Norwegian) at <http://www.ldo.no/nyheiter-og-faq/brosjyrar-og-publikasjonar/Arsrapporter/arsmelding-2015/>, accessed on 18 May 2018.

<sup>101</sup> See <http://www.regjeringen.no/nb/dep/bld/dok/nouer/2011/nou-2011-18.html?id=663064> (in Norwegian). For an English summary of the report, see [https://www.regjeringen.no/globalassets/upload/bld/nou18\\_ts.pdf](https://www.regjeringen.no/globalassets/upload/bld/nou18_ts.pdf), accessed 18 May 2018.

<sup>102</sup> See the Committee for working-life and pension-political issues, where members from the largest unions and the employers' organisations meet with the Minister of Labour as well as the Minister for Children and Equality and Social Inclusion and where the topic of gender equality is on the agenda: <https://www.regjeringen.no/no/dep/asd/org/nemnder-styrer-rad-og-utvalg/permanente-nemnder-rad-og-utvalg/arbeidslivs--og-pensjonspolitisk-rad/id574613/>, accessed 18 May 2018.

11.7.1 To what extent does your country have collective agreements that are used as means to implement EU gender equality law? Please indicate the legal status of collective agreements in your country (binding/non-binding, usually declared to be generally applicable or not).

Collective agreements are binding for the parties to the agreement. Only eight collective agreements have been made nationally applicable to secure equal pay in certain sectors. Gender equality has not been an issue in these instances. All the main agreements and collective agreements make reference to gender equality as a specific target.



## 12. Overall assessment

The Norwegian legislation is generally in line with the EU gender equality *acquis*. I see three areas of concern, however. Firstly, I question whether or not the Norwegian Ombud/Tribunal system is sufficiently efficient, as the Tribunal, according to the legislation, is not given the right to award compensation. The Ombud and the Tribunal are merely able to provide a statement on whether or not the provisions of the law have been violated. This statement may be used to request voluntary compensation. As such agreements are voluntary, there exist no statistics regarding the numbers of such agreements nor on the amount of the compensation paid.

Secondly, I see it as a grave sign that the GEA itself is relied upon in so very few cases before the courts. This may be a result of a combination of reasons:

- 1) Most discrimination cases are brought to the Ombud/Tribunal system as this is low threshold and free of charge;
- 2) Lawyers are not particularly trained in discrimination law;
- 3) There is no extraordinary support such as free legal aid in discrimination cases.

Thirdly, one area that is not satisfactory is the Pregnant Workers Directive 92/85/ECC, which is not correctly implemented, as mothers are not ensured a specific 14 weeks of independent maternity leave.<sup>103</sup> In Norway, women are entitled to three weeks' leave before the birth and six weeks thereafter as leave which is specifically for women who are pregnant or have recently given birth. However, these weeks are deemed to be part of the parental leave under what is called a 'mother's quota.' With reference to the very two different purposes of the two types of leave, the Norwegian solution is problematic.

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<sup>103</sup> See the article where this situation is described: Aune, H., Nylander, G. (2015), 'Barseltid et faktum. Barseltid en rettslig sannhet', *Nordisk tidsskrift for Sosialrett*, 20 September. See ECJ cases C-519/03 para. 32 and C-342/01 para. 41 and the Maternity Leave Directive 92/85.

## Annexes

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