



European equality law review

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

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IN THIS ISSUE

- The impact of the COVID-19 pandemic on equality in the United States
- Gendering the COVID-19 crisis: a mapping of its impact and call for action in light of EU gender equality law and policy
- Sanction systems in the light of EU Directives 2000/43/EC and 2000/78/EC: a comparative study of Slovakia, Czechia and Poland
- Some reflections on racial and ethnic statistics for anti-discrimination purposes in Europe

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Introduction on the state of play

This is the 12th issue of the biannual European equality law review, produced by the European network of legal experts in gender equality and non-discrimination (EELN). This issue provides an overview of legal and policy developments across Europe and, as far as possible, reflects the state of affairs from 1 January to 30 June 2020. The aim of the EELN is to provide the European Commission and the general public with independent information regarding gender equality and non-discrimination law and, more specifically, the transposition and implementation of the EU equality and non-discrimination directives.

In this issue

This issue opens with four in-depth analytical articles. The first article, by David Oppenheimer from the Berkley Centre on Comparative Equality and Anti-discrimination Law, discusses how the COVID-19 pandemic has disproportionately affected disadvantaged people in the US. The second article, by Birte Böök, Franka van Hoof, Linda Senden and Alexandra Timmer of the gender equality coordination team of Utrecht University, looks at how the COVID-19 pandemic has affected gender equality in the EU from a EU law perspective. The third article, by Jakub Tomšej, the non-discrimination expert for Czechia, examines the sanction systems under the Racial Equality and Employment Equality Directives, comparing legislation and practice in Slovakia, Czechia and Poland. The final article, by diversity and inclusion consultant Yamam Al-Zubaidi, provides an analytical overview of the potential uses of ethnic data and its practical effects in discrimination cases, with a particular focus on Sweden and the United Kingdom but also drawing from experiences in Finland, France and Germany. Similar to previous issues of this publication, an overview of relevant case law of the Court of Justice of the EU and of the European Court of Human Rights then follows. Finally, the section on national developments contains brief summaries of the most important developments in legislation, case law and policy at the national level in the 36 countries covered by the network.

Recent developments at the European level¹

The global outbreak of the COVID-19 pandemic at the beginning of 2020 has had a significant impact on the EU Member States as well as the EU institutions. Even though certain EU Member States were affected more gravely and suffered more casualties than others, they all had to take measures in order to combat the further spread of the virus. The measures taken by Member States varied from 'soft measures', including social distancing and recommendations to work from home, to very strict lockdowns where most public life was put on hold by closing, among other things, schools, childcare facilities, universities, public institutions, shops, restaurants, entertainment and amusement facilities, as well as other services and public transport. The economic, social and personal impact of these measures has been disproportionately felt by people who are already disadvantaged by reasons of race, ethnicity, gender, disability, age, and intersections of disfavoured identities. Although the pandemic has exacerbated already existing inequalities, at the same time it has also led to new opportunities, for example in the area of work-life balance, and a new appreciation of various (lower paid) professions, which have proven to be essential for society to function. In this issue, special attention will be paid to how the Covid pandemic has affected matters of equality, particularly in relation to ethnicity/race, disability and gender. By gaining insight into the effects of the pandemic at different levels and in different countries and reflecting on the different measures taken, we can hopefully draw lessons for the future.

1 This section, like the rest of the issue, covers the period from 1 January to 30 June 2020.

The Commission presented the new *Gender Equality Strategy 2020-2025* on 5 March 2020.² The strategy sets out the Commission's vision, policy objectives and actions to make concrete progress on gender equality in Europe and towards achieving the sustainable development goals. The vision set out in the strategy is

‘to achieve a European Union in which women and men, boys and girls in all their diversity are equal, where they are free to pursue their chosen path in life, where they have equal opportunities to thrive and where they can equally participate and lead our European society’.

The Commission adopted a dual approach to the implementation of the strategy by setting out key actions to be taken in order to achieve gender equality combined with strengthening the integration of a gender perspective in all EU policies and major initiatives. The specific actions set out in the strategy include:

1. Actions to end gender-based violence and harassment by ensuring that EU accedes to the Council of Europe Convention on preventing and combating violence against women and domestic violence, or takes alternative legal measures to achieve the objectives of the Convention – by clarifying the role of internet platforms in addressing illegal and harmful content to make the internet safe for all their users. An EU-wide awareness raising campaign will be launched to challenge gender stereotypes in society.
2. Ensure equal participation and opportunities in the labour market, by making sure that men and women receive equal pay, ensuring that EU rules on work-life balance work in practice and improving access to childcare facilities.
3. Achieve gender balance in decision-making positions, including company boards and politics, by adopting EU-wide targets on gender balance on company boards and encouraging the participation of women in the 2024 European Parliament elections.
4. To encourage a more balanced participation of women and men in all sectors of the economy, by promoting the EU platform of diversity charters in sectors, and by addressing the digital gender gap in the updated digital education plan.

As one of the first actions in light of the equality strategy, on 5 March 2020, the Commission launched a public consultation on a proposal for a directive on pay transparency.³ This public consultation aimed to collect information, views and experiences on gender-based pay discrimination and pay transparency measures as a tool to support awareness and enforcement of the principle of ‘equal pay for equal work or work of equal value between women and men’. The information collected will feed into an impact assessment accompanying an initiative on pay transparency measures. Unfortunately, women still earn, on average, 16 % less than men in the EU.

Several initiatives are planned by the European Commission in the area of non-discrimination law. On 24 June, the Commission held a structured debate, ‘Against racism and for more diversity and equity in the EU’. The Commission reviewed the existing legal framework to fight racism as well as dedicated policies and programmes, noting that racism persists and that more action is needed at all levels. Commission President, Ursula von der Leyen, emphasised that this was just the beginning of the debate, and that specific actions would be announced in the autumn. Various forms of such action were

2 European Commission (2020) *Striving for a Union of Equality, The Gender Equality Strategy 2020-2025*, 5 March 2020, available at: https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/gender_equality_strategy_factsheet_en.pdf.

3 European Commission (2020) ‘Gender pay gap-transparency on pay for men and women public consultation’, 5 March 2020 (ended 29 May 2020), available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12098-Strengthening-the-principle-of-equal-pay-between-men-and-women-through-pay-transparency/public-consultation>.

discussed, including the development of an action plan or a framework for the equality of racial and ethnic minorities in Europe.⁴

Similarly, preparations are under way for the adoption of the new LGBTI equality strategy, which was already included in the Commission's 2020 work programme adopted on 29 January 2020 and adjusted on 27 May due to the COVID-19 pandemic.⁵ This strategy will follow and build upon the 'List of actions to advance LGBTI equality' published by the Commission in 2015. The final report 2015-2019 on the list of actions was published on 15 May 2020, for the international day against homophobia, transphobia and biphobia.⁶ It provided a detailed overview of measures and developments at EU as well as national level with regard to the specific actions provided in the list.

On 13 March 2020, the European Court of Human Rights published a new guide analysing its case law on Article 14 of the Convention and on Article 1 of Protocol No. 12 (on the prohibition of discrimination) to the European Convention on Human Rights.⁷ The key principles in the area of non-discrimination and relevant precedents are set out in the guide, providing an analysis of discrimination by ground ('sex, race, colour, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth or other status'). 'Other status' includes age, gender identity, sexual orientation, disability, parental and marital status, immigration and employment status. The guide also examines discrimination by topic, and further discusses case law on direct and indirect discrimination, discrimination by association, positive action and other forms of discrimination.

Finally, 29 June 2020 marked the 20th anniversary of the adoption of the landmark Racial Equality Directive, which imposed on Member States the obligation to implement the principle of equal treatment irrespective of racial or ethnic origin in the areas of employment, education, social protection, social advantages and access to goods and services available to the public, including housing. While the impact of the adoption of the Directive on non-discrimination law in Europe is unmistakeable and merits celebration as such, it was widely recognised⁸ on the occasion of this anniversary that much work is still needed to achieve the aims of the Directive, 20 years later.

Network publications and activities

During the first half of 2020, the network published two thematic reports. The first report by Lilla Farkas, the senior expert on racial and ethnic origin for the network, and Dezideriu Gegely, independent researcher and former executive director of the European Roma Rights Centre, explores racial discrimination in education with a particular focus on the segregation of Roma children. Secondly, a thematic report by Marion Guerrero, from the Vienna Academy of Education, examines strategic litigation in the area of sex discrimination law, at both the national and EU levels. In addition to these thematic reports, the network also published its annual comparative analyses of non-discrimination law in Europe 2019 and gender equality law in Europe 2019, as well as the first issue of the European equality law review for 2020.

4 On 18 September 2020, after the reporting period for this publication, the Commission adopted its anti-racism action plan 2020-2025, *A Union of equality*. See European Commission (2020), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Union of equality: EU anti-racism action plan 2020-2025, COM(2020) 565 final, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-anti-racism-action-plan-2020-2025_en.

5 European Commission, 2020 Commission Work Programme – key documents, available at: https://ec.europa.eu/info/publications/2020-commission-work-programme-key-documents_en.

6 European Commission (2020), *Final report 2015-2019 on the List of actions to advance LGBTI equality*, available at: https://ec.europa.eu/info/sites/info/files/report_list_of_actions_2015-19.pdf.

7 European Court of Human Rights (2020) *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention*, 13 March 2020, available at: https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf.

8 See notably the interventions at the #equality2020 conference organised by Equinet on 29.06.2020, available at: <https://equality2020.eu/#agenda>.

As always, please check the network's website – www.equalitylaw.eu – for the full text of all reports.

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The impact of the COVID-19 pandemic on equality in the United States

David B. Oppenheimer*

Introduction

Some have said that a virus does not discriminate, and that we're all in this together; we're not. In the United States, those persons already most at risk of discrimination and inequality are at far greater risk of falling ill and dying from the COVID-19 virus.¹ It has been particularly deadly for older persons, persons with disabilities, people of color, low wage workers, and home care and healthcare workers.² Because of systemic racism, which operates intersectionally to compound disadvantage, within the groups most affected by discrimination the death rates have been disproportionately high,³ as the pandemic surges among older people of color and persons with disabilities living in nursing homes,⁴ and women of color working in low wage home care and healthcare jobs.⁵ Moreover, the members of these groups are also the people most harmed by the economic consequences of the pandemic.⁶ Thus, the pandemic has exacerbated the inequalities of American society like a 'perfect storm'.

As of 10 October 2020, the virus has killed over 210 000 people in the United States.⁷ We have 4 % of the world's population, but over 20 % of the world's COVID-19 deaths.⁸ The per capita death rate in the US is 61.4 per 100 000, compared with 25.06 per 100 000 in Canada, our closest neighbor, 11.34 per 100 000 in Germany, 1.2 per 100 000 in Japan and 0.75 per 100 000 in South Korea.⁹ As discussed below, the death rate in the US for Black Americans is 97.9 per 100 000; for Indigenous Americans, 81.9

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1 Centers for Disease Control and Prevention (2020), 'Health Equity Considerations and Racial and Ethnic Minority Groups,' available at: <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

2 AMP Research Lab Staff (2020), 'The Color Of Coronavirus: COVID-19 Deaths By Race And Ethnicity In The U.S.,' *APM Research Lab*, available at: <https://www.apmresearchlab.org/covid/deaths-by-race>.

3 Centers for Disease Control and Prevention (2020), 'Health Equity Considerations and Racial and Ethnic Minority Groups,' available at: <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

4 Taylor, J., Mishory, J., Chan, O. (2020), 'Even in Nursing Homes, COVID-19 Racial Disparities Persist,' *The Century Foundation*, available at: <https://tcf.org/content/commentary/even-nursing-homes-covid-19-racial-disparities-persist/?agreed=1&agreed=1>.

5 Machledt, D. (2020), 'Disability, Race, and Structural Inequity: COVID-19 and the Long-term Care Workforce,' *National Health Law Program*, available at: <https://healthlaw.org/disability-race-and-structural-inequity-covid-19-and-the-long-term-care-workforce/>.

6 Knowles, H. (2020), 'Number of working black business owners falls 40 %, far more than other groups amid coronavirus,' *The Washington Post*, available at: <https://www.washingtonpost.com/business/2020/05/25/black-minority-business-owners-coronavirus/>.

7 Coronavirus Resource Center (2020), 'COVID-19 Map,' *Johns Hopkins University of Medicine*, available at: <https://coronavirus.jhu.edu/map.html>.

8 Lopez, G. (2020) 'If the US had Canada's Covid-19 death rate, 100,000 more Americans would likely be alive today,' *Vox*, available at: <https://www.vox.com/future-perfect/2020/9/9/21428769/covid-19-coronavirus-deaths-statistics-us-canada-europe>.

9 Coronavirus Resource Center (2020), 'COVID-19 Map,' *Johns Hopkins University of Medicine*, available at: <https://coronavirus.jhu.edu/map.html>.

per 100 000; for Latinx Americans, 64.7 per 100 000; for Pacific Islander Americans, 71.5 per 100 000; for Asian Americans, 40.4 per 100 000; and for white Americans, 46.6 per 100 000.¹⁰

Although there have been numerous policy initiatives intended to help reduce the human and economic toll of the pandemic, they have for the most part been ineffective. In part the problem has been the failure to recognize that the victims of the pandemic have largely been members of outsider groups, with an especially disastrous impact at the intersection of race and gender. In addition, in many cases, potentially effective policies were undermined by President Trump's erratic behavior or plagued by inefficiency and corruption.

The elderly

The pandemic has had its greatest impact on elderly infirm persons living in nursing homes and the low-wage workers who care for them. Although they represent a very small part of the total US population (less than 1 %), approximately 45 % of the COVID-19 deaths have been among those living in, recently discharged from (to be admitted to hospital), and working at nursing homes.¹¹ What's more, the impact on nursing home residents has hardly been 'color-blind'. As is true of nearly every aspect of American life, nursing homes are largely segregated by race, and the infection fatality rate in homes populated by people of color has been far higher than in largely white nursing homes.¹²

The hospitalization and death rates of older persons, whether living in nursing homes or not, must be understood intersectionally. Although the disparities among Americans 75 years old and older are less pronounced, they grow higher in each subsequent age bracket.¹³ For example, the overall infection fatality rate for Black Americans and Hispanic/Latinx Americans from 75 to 84 years old is 'merely' 2 to 3 times higher than for white Americans, but for those in the 35-44 year-old age bracket it is 9 times higher.¹⁴

Caregivers in nursing homes typically earn low wages, and low-wage jobs in the US are disproportionately filled by people of color, with care-giving jobs largely filled by women of color. For example, Black Americans make up 12.3 % of the US workforce, but 27.6 % of nursing home care-givers, and 30.5 % of home care-givers.¹⁵ Nursing home care-givers, made up disproportionately by women of color, have had disproportionately low rates of health insurance as well as high infection fatality rates.¹⁶ Over 700 US nursing home workers had died of the virus as of 5 September 2020.¹⁷

These data support the conclusion that the status of care workers in nursing homes violates equality norms, and that equality law and policy should provide them with greater protection. This would almost

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- 10 APM Research Lab Staff (updated 16/9/2020), 'The Color of Coronavirus: Covid-19 Deaths By Race And Ethnicity In The U.S.', *APM Research Lab*.
 - 11 Girvan, G. (2020), 'Nursing Homes & Assisted Living Facilities Account for 45 % of COVID-19 Deaths', *The Foundation for Research on Equal Opportunity*, available at: <https://freopp.org/the-covid-19-nursing-home-crisis-by-the-numbers-3a47433c3f70>.
 - 12 King, S., Jacob, J. (2020), 'Near birthplace of Martin Luther King Jr., a predominantly Black nursing home tries to heal after outbreak', *The Washington Post*, available at: <https://www.washingtonpost.com/business/2020/09/09/black-nursing-homes-coronavirus/>.
 - 13 Taylor, J., Mishory, J., Chan, O. (2020), 'Even in Nursing Homes, COVID-19 Racial Disparities Persist', *The Century Foundation*, available at: <https://tcf.org/content/commentary/even-nursing-homes-covid-19-racial-disparities-persist/?agreed=1&agreed=1>.
 - 14 Taylor, J., Mishory, J., Chan, O. (2020), 'Even in Nursing Homes, COVID-19 Racial Disparities Persist', *The Century Foundation*.
 - 15 Bureau of Labor Statistics (2019), 'Household Data Annual Averages 18. Employed persons by detailed industry, sex, race, and Hispanic or Latino ethnicity', available at: <https://www.bls.gov/cps/cpsaat18.htm>.
 - 16 Machledt, D. (2020), 'Disability, Race, and Structural Inequity: COVID-19 and the Long-term Care Workforce', *National Health Law Program*, available at: <https://healthlaw.org/disability-race-and-structural-inequity-covid-19-and-the-long-term-care-workforce/>.
 - 17 The New York Times (2020), 'How Many of These 68 000 Deaths Could Have Been Avoided?', editorial, 5 September 2020, available at: <https://www.nytimes.com/2020/09/05/opinion/sunday/coronavirus-nursing-homes-deaths.html?referringSource=articleShare>.

certainly require a legislative solution that applied equality principles to provide greater workplace protections, rather than a litigation solution enforcing equality/anti-discrimination law.

Persons with disabilities

US nursing homes also serve as residences for those persons with disabilities who need extra care and cannot receive it (or afford to receive it) at home. Unsurprisingly, they have also been disproportionately affected by COVID-19. Exacerbating the problem, Americans with disabilities are less likely to have private health insurance.¹⁸ And, as with elderly people, they are subject to a pervasive social bias that their lives are worth less than the young and able-bodied.¹⁹ This has seeped into the body politic in discussions about triage at overwhelmed hospitals, where the expectation has been that persons with disabilities and older persons should receive the lowest priority for ventilators and other care.²⁰ In April, as the pandemic surged through New York, approximately 4 % of those diagnosed with the virus succumbed to it. The figure for persons with intellectual/developmental disabilities was close to 10 %.²¹

Here again, the intersection with race is important to note, as persons with disabilities in the US are statistically more likely to be people of color.²² Here again, the equality violations are addressable by policy solutions and legislation, but would be hard to address by enforcing equality law through litigation.

Women

Among people with employment outside the home, the pandemic has had a greater impact on women than men. Unlike previous recessions, women have been more likely than men to lose their jobs, with women's jobs 1.8 times more vulnerable than men's.²³ In part this is because of the growth of childcare responsibilities, which fall more heavily on women, causing four times more women than men to voluntarily quit outside work to take on greater childcare responsibilities.²⁴ At home, with schools and daycare centers closed, and grandparents unavailable in their roles as informal (and free) childcare workers, the lion's share of added uncompensated work goes to women.²⁵ In the case of single parents, who are more likely to be women than men, the added responsibilities have been even greater.²⁶

For those women who kept their jobs, the jobs they hung onto were more likely to put them at risk of contracting the virus. Women in the US experience substantial job discrimination and wage discrimination,

18 Sabatello, M., Landes, S., McDonald, K. (2020), 'People With Disabilities in COVID-19: Fixing Our Priorities,' *The American Journal of Bioethics*, vol. 20, No. 7, pp. 187-190, available at: <https://www.tandfonline.com/doi/full/10.1080/15265161.2020.1779396>.

19 Sabatello, M., Landes, S., McDonald, K. (2020), 'People With Disabilities in COVID-19: Fixing Our Priorities,' *The American Journal of Bioethics*, vol. 20, No. 7, pp. 187-190.

20 Abrams, A. (2020), "'This Is Really Life or Death.' For People With Disabilities, Coronavirus Is Making It Harder Than Ever to Receive Care,' *TIME*, available at: <https://time.com/5826098/coronavirus-people-with-disabilities/>.

21 Sabatello, M., Landes, S., McDonald, K. (2020), 'People With Disabilities in COVID-19: Fixing Our Priorities,' *The American Journal of Bioethics*, vol. 20, No. 7, pp. 187-190.

22 Sabatello, M., Landes, S., McDonald, K. (2020), 'People With Disabilities in COVID-19: Fixing Our Priorities,' *The American Journal of Bioethics*, vol. 20, No. 7, pp. 187-190.

23 Alon, T., Doepke, M., Olmstead-Rumsey, J., Tertilt, M. (2020), 'The Impact of COVID-19 on Gender Equality,' *NBER Working Paper Series*, National Bureau of Economic Research, available at: <https://www.nber.org/papers/w26947>.

24 Rhubart, D. (2020), 'Gender Disparities in Caretaking during the COVID-19 Pandemic,' *Lerner Center for Public Health Promotion at Syracuse University*, available at: <https://lernercenter.syr.edu/2020/06/04/ds-18/>.

25 Alon, T., Doepke, M., Olmstead-Rumsey, J., Tertilt, M. (2020), 'The Impact of COVID-19 on Gender Equality,' *NBER Working Paper Series*, National Bureau of Economic Research.

26 Alon, T., Doepke, M., Olmstead-Rumsey, J., Tertilt, M. (2020), 'The Impact of COVID-19 on Gender Equality,' *NBER Working Paper Series*, National Bureau of Economic Research.

are less likely to have jobs that permit telecommuting,²⁷ and more likely to work as caregivers.²⁸ As noted above, caregivers are more likely to work with persons exposed to the virus, often with inadequate personal protective equipment, while they are less likely to have healthcare insurance.²⁹ Thus, they are more likely to contract the virus, and less likely to have access to good, affordable medical care when they do.

Another impact of the pandemic has been an increase in partner/domestic violence, partly because couples are stuck at home with each other; moreover, women who are endangered have a harder time seeking help because they are more likely to lack privacy and because shelters, which if still open could easily become contagion hotspots, are often closed because of the pandemic.³⁰

As noted briefly in the discussion of nursing homes, people who work outside the home as caregivers are usually women, and disproportionately women of color, who constitute nearly half of all direct care workers (personal care aides, home health aides, and nursing assistants). Of the overall healthcare workers infected with COVID-19, three out of four were women.³¹ Another large occupational category for US women is restaurant work, which is at the bottom of the wage scale, and is disproportionately female.³² When the virus reached pandemic proportions most restaurants were forced to close, throwing large numbers of women out of work.³³

Again, women of color experienced all of these compounded and intersecting disadvantages at a higher rate than other groups – and again, policy reform is more likely to address these equality violations than litigation. In particular, policies requiring pay transparency and pay equity would improve the position of women in the workplace, and policies addressing violence in the home would help protect women and their children.

The poor

Poor Americans are more likely to have been affected by the pandemic than others, and women – especially women of color – are more likely to be poor than men, because of intersectional job discrimination, wage discrimination and housing discrimination.³⁴ Poor Americans are more susceptible to the virus because they tend to live in more crowded conditions, have less access to good quality healthcare, are more likely to have lost their jobs, and if still employed are more likely to work in high-risk jobs.³⁵

Because of the pandemic, poor Americans are more likely to experience hunger, with one in eight families now experiencing food insecurity, and with the rate of hunger twice as high among Black and Latinx

27 Alon, T., Doepke, M., Olmstead-Rumsey, J., Tertilt, M. (2020), 'The Impact of COVID-19 on Gender Equality,' *NBER Working Paper Series*, National Bureau of Economic Research, available at: <https://www.nber.org/papers/w26947>.

28 Machledt, D. (2020), 'Disability, Race, and Structural Inequity: COVID-19 and the Long-term Care Workforce,' *National Health Law Program*, available at: <https://healthlaw.org/disability-race-and-structural-inequity-covid-19-and-the-long-term-care-workforce/>.

29 Machledt, D. (2020), 'Disability, Race, and Structural Inequity: COVID-19 and the Long-term Care Workforce,' *National Health Law Program*.

30 Ryan, E. & Ayadi, A. (2020), 'A call for a gender-responsive, intersectional approach to address COVID-19,' *Global Public Health* vol. 15, No. 9, pp. 1404-12, available at: <https://www.tandfonline.com/doi/full/10.1080/17441692.2020.1791214>.

31 Ryan, E. & Ayadi, A. (2020), 'A call for a gender-responsive, intersectional approach to address COVID-19,' *Global Public Health* vol. 15, No. 9, pp. 1404-12.

32 Scharff, X. (2020), 'Why the coronavirus outbreak could hit women hardest,' *Time*, 12 March 2020, available at: <https://time.com/5801897/women-affected-covid-19/>.

33 Scharff, X. (2020), 'Why the coronavirus outbreak could hit women hardest,' *Time*, 12 March 2020.

34 Semega, J. (2019), 'Pay is Up. Poverty is Down. How Women are Making Strides,' *United States Census Bureau*, available at: <https://www.census.gov/library/stories/2019/09/payday-poverty-and-women.html>.

35 Centers for Disease Control and Prevention (2020), 'Health Equity Considerations and Racial and Ethnic Minority Groups,' available at: <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

families as it is among white families.³⁶ The problem is particularly acute for poor children, who will suffer lifelong consequences from hunger and malnutrition.³⁷ Until the virus caused schools to close, most poor children had at least one good meal a day through school food programs, but with the schools closed many more children are going to bed hungry.³⁸ And, poor Americans are more likely than others to live in 'food deserts', where access to food is limited.³⁹

In early 1968, Dr Martin Luther King Jr proposed an Economic Bill of Rights to protect Americans from poverty, and had a sometimes enthusiastic (and other times reluctant) partner in US President Lyndon Johnson.⁴⁰ But Dr King was murdered in April of that year, and President Johnson's term ended nine months later.⁴¹ In the fifty years since, there has been little progress in eradicating poverty, at least in part because poverty is closely associated with race, and is used by politicians to increase white support at the expense of Black Americans.⁴²

People of color

The virus is more likely to affect people of color for several intersecting and compounding reasons, each of which is related to US systemic racism. People of color in the US are more likely to work in jobs requiring contact with people who are infected, are less likely to have healthcare insurance, are likely to earn less and have less wealth than white Americans, are more likely to live in areas with inadequate healthcare facilities, are more likely to live in crowded and overcrowded homes, are less likely to have jobs that allow them to isolate and work remotely, and are more likely to experience harmful implicit bias from healthcare professionals.⁴³

People of color are more likely to work in low-wage jobs like care-giver jobs, Government jobs, low-skilled jobs and laborer jobs.⁴⁴ This is partly because of employment discrimination against people of color, and partly due to the relatively poor education provided to people of color.⁴⁵ As a result, they are more likely to have jobs that cannot be performed remotely, and more likely to have jobs that require them to work with or near people who are infected.⁴⁶ Moreover, people of color have been more likely to lose their jobs during the pandemic, which exacerbates the problem of poverty already disproportionately experienced by people of color because of job discrimination, wage discrimination, and housing discrimination, which reduces the opportunity to save money or build wealth.⁴⁷ The median annual income for white men is more than USD 60 000/year, while for Black women it is less than USD 40 000/year.⁴⁸ And, losing a job

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- 36 Kenneally, B.A., LeBlanc, A. N., Arango, T. (2020), 'America at Hunger's Edge', *The New York Times*, 2 September 2020, available at: <https://www.nytimes.com/interactive/2020/09/02/magazine/food-insecurity-hunger-us.html?searchResultPosition=4>.
 - 37 Kenneally, B.A., LeBlanc, A. N., Arango, T. (2020), 'America at Hunger's Edge', *The New York Times*, 2 September 2020.
 - 38 Kenneally, B.A., LeBlanc, A. N., Arango, T. (2020), 'America at Hunger's Edge', *The New York Times*, 2 September 2020.
 - 39 Kenneally, B.A., LeBlanc, A. N., Arango, T. (2020), 'America at Hunger's Edge', *The New York Times*, 2 September 2020.
 - 40 Honey, M. (2018), 'Martin Luther King's forgotten legacy? His fight for economic justice', *The Guardian*, 3 April 2018, available at: <https://www.theguardian.com/commentisfree/2018/apr/03/martin-luther-king-50th-anniversary->.
 - 41 Honey, M. (2018), 'Martin Luther King's forgotten legacy? His fight for economic justice', *The Guardian*, 3 April 2018.
 - 42 Honey, M. (2018), 'Martin Luther King's forgotten legacy? His fight for economic justice', *The Guardian*, 3 April 2018.
 - 43 Oppenheimer, D. (2020), 'What Is "Systemic Racism?" How Is It Different from Racist Acts Caused by Bigotry, Prejudice or Bias?' *SSRN*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3644684.
 - 44 Cooper, D. (2018), 'Workers of color are far more likely to be paid poverty-level wages than white workers', *Economic Policy Institute*, available at: <https://www.epi.org/blog/workers-of-color-are-far-more-likely-to-be-paid-poverty-level-wages-than-white-workers/>.
 - 45 Weller, C. (2019), 'African Americans face systematic obstacles to getting good jobs', *Center for American Progress*, available at: <https://www.americanprogress.org/issues/economy/reports/2019/12/05/478150/african-americans-face-systematic-obstacles-getting-good-jobs/>.
 - 46 Gould, E., Wilson, V. (2020), 'Black workers face two of the most lethal preexisting conditions for coronavirus—racism and economic inequality', *Economic Policy Institute*, available at: <https://www.epi.org/publication/black-workers-covid/>.
 - 47 Gould, E., Wilson, V. (2020), 'Black workers face two of the most lethal preexisting conditions for coronavirus—racism and economic inequality', *Economic Policy Institute*.
 - 48 Gould, E., Jones, J., Mokhiber, Z. (2020), 'Black workers have made no progress in closing earnings gaps with white men since 2000', *Economic Policy Institute*, available at: <https://www.epi.org/blog/black-workers-have-made-no-progress-in-closing-earnings-gaps-with-white-men-since-2000/>.

in the US often means losing healthcare insurance. As noted above, because of job losses, a growing number of Americans, and particularly people of color, are experiencing hunger.⁴⁹

When people of color need medical care, they are far less likely to receive good care. For many years hospitals and other healthcare facilities have been fleeing non-white neighborhoods because operating in white neighborhoods is more profitable.⁵⁰ As a result, the only options available to people living in non-white neighborhoods are public facilities, which were underfunded and crowded even before the pandemic, and were the first to be overwhelmed when the virus hit.⁵¹ At the peak of the pandemic in New York, patients at public hospitals were three times more likely to die than patients at private hospitals in the wealthier parts of the city.⁵² Nationwide, the COVID-19 infection fatality rate for Black Americans (97.9 per 100 000) is 2.4 times higher than for white Americans (40.4 per 100 000).⁵³

Finally, it is a well-known but rarely discussed fact that even when we correct for factors like insurance, type of hospital, diagnosis and demographics, people of color don't receive the same quality of care from US physicians, most of whom are white.⁵⁴ They are likely to receive care that is less aggressive and less effective than that offered to similarly situated white patients.⁵⁵ Multiple studies have shown that these disparities result from healthcare professionals' implicit biases towards people of color.⁵⁶ Such indirect discrimination⁵⁷ suggests the availability of a *Griggs*⁵⁸-type litigation approach, but under U.S. Constitutional law it is insufficient to show a neutral policy with discriminatory effects; the claimant must show an intent to discriminate.⁵⁹

Immigrants

Among those who are suffering the greatest deprivations because of the pandemic is a group hard to measure, because so many of them live in the shadows and work in the informal or underground economy: immigrants. Because we have constitutionally protected birthright citizenship, most non-citizen residents of the United States are immigrants, and many are here without papers. They are disproportionately poor people of color, and suffer all of the disadvantages of American citizens who are poor people of color – and more.⁶⁰ Many work in the service economy, with jobs at restaurants and hotels that have disappeared with the pandemic, but without the benefit of unemployment insurance payments.⁶¹ If they're still

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- 49 Kenneally, B.A., LeBlanc, A. N., Arango, T. (2020), 'America at Hunger's Edge,' *The New York Times*, 2 September 2020, available at: <https://www.nytimes.com/interactive/2020/09/02/magazine/food-insecurity-hunger-us.html?searchResultPosition=4>.
- 50 Clark, B. (2006), 'Hospital Flight From Minority Communities: How Our Existing Civil Rights Framework Fosters Racial Inequality In Healthcare,' *DePaul University Journal of Health Law*, available at: <https://ssrn.com/abstract=883730>.
- 51 Timsit, A. (2020), 'France's data collection rules obscure the racial disparities of Covid-19,' *Quartz*, available at: <https://qz.com/1864274/france-doesnt-track-how-race-affects-covid-19-outcomes/>.
- 52 Rosenthal, B., Goldstein, J., Otterman, S., Fink, S. (2020), 'Why Surviving COVID May Come Down to Which Hospital Admits You,' *New York Times*, 1 July 2020, available at: <https://www.nytimes.com/2020/07/01/nyregion/coronavirus-hospitals.html>.
- 53 APM Research Lab Staff (updated 16/9/2020), 'The Color of Coronavirus: COVID-19 Deaths By Race And Ethnicity In The U.S.,' *APM Research Lab*, accessible at: <https://www.apmresearchlab.org/covid/deaths-by-race>.
- 54 Bridges, K. (2018), 'Implicit bias and racial disparities in health care,' *American Bar Association*, available at: https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/racial-disparities-in-health-care/.
- 55 Bridges, K. (2018), 'Implicit bias and racial disparities in health care,' *American Bar Association*.
- 56 FitzGerald, C., Hurst, S. (2017), 'Implicit bias in healthcare professionals: a systematic review,' *BMC Medical Ethics*, available at: <https://doi.org/10.1186/s12910-017-0179-8>.
- 57 For the sake of simplicity I use the European concept (as provided for in the EU sex equality directives, as well as EU directives 2000/43 and directive 2000/78) while in the USA we usually use the expression "disparate impact".
- 58 *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), where the Supreme Court ruled that a company's employment requirements (to pass an intelligence test and obtain a high-school diploma) did not pertain to applicants' ability to perform the job, and so were unintentionally discriminating against Black employees.
- 59 Please note that, according to the concept of indirect discrimination under the EU equality directives, the plaintiff does not need to prove intent of the defendant for a court to make a finding of discrimination.
- 60 Lillie-Blanton, M., Hudman, J. (2001), 'Untangling the Web: race/ethnicity, immigration, and the nation's health,' *American Journal of Public Health*, vol.91, No. 11, pp. 1736-41, available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446864/>.
- 61 Page, K., Venkataramani, M., Beyrer, C., Polk, S. (2020), 'Undocumented U.S. Immigrants and Covid-19,' *The New England Journal of Medicine*, available at: <https://www.nejm.org/doi/full/10.1056/NEJMp2005953>.

employed, they're without healthcare insurance or sick leave.⁶² Others are migrant agricultural workers, who are among those most likely to be homeless.⁶³ Undocumented immigrants are excluded from the Affordable Care Act – our limited version of a national healthcare plan.⁶⁴ Many have limited English language skills, making it all the more difficult to access any healthcare services. Moreover, a new 'public charge' rule discourages them from seeking any kind of state-supported healthcare as it could interfere with later efforts to gain legal status.⁶⁵ Because they often live in fear of deportation, the contact tracing efforts to control the virus add to their fear of being discovered.⁶⁶ Several policy approaches could reduce the impact of the pandemic on immigrants, but each would conflict with the current administration's policy of deterring immigration, whether legal or illegal.

Economic impact

As is true worldwide, the pandemic has caused severe economic disruption in the United States. It is estimated that 20 % of white-owned small businesses and 40 % of small businesses owned by Black Americans have permanently closed.⁶⁷ Many large businesses have also failed, leaving many Americans unemployed with no hope of returning to their previous jobs.⁶⁸ Unemployed Americans with documented jobs received supplemental unemployment insurance benefits from April through July, but the supplements have now ended.⁶⁹ Food programs run by the federal Government, many states, and many private charities have been expanded, but nonetheless many more Americans are suffering from hunger.⁷⁰

Policy responses

The Trump administration, working with the Congress, has undertaken a number of legislative policy initiatives intended to reduce the economic impact of the pandemic and increase access to healthcare, food and personal protective equipment. Virtually all of the programs have been either heavily criticized for corruption, favoritism, cronyism and mismanagement, or have been abandoned by the administration.

A summary by *The Washington Post* of its 5 October lead story identifies the problem:

'Six months after Congress approved one of the costliest relief efforts in U.S. history, the coronavirus battle is far from over and much of the USD 4 trillion in grants and loans failed to target the neediest or move the country beyond the economic crisis, a Washington Post analysis

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- 62 Open Society Foundations (2020), 'COVID-19 and Undocumented Workers,' available at: <https://www.opensocietyfoundations.org/explainers/covid-19-and-undocumented-workers>.
 - 63 Galley, C. (2018), 'The Connection Between Homelessness, Immigration, and Displacement,' *Center on Human Rights Education*, available at: <https://www.centeronhumanrightseducation.org/connection-homelessness-immigration-displacement/>.
 - 64 Page, K., Venkataramani, M., Beyrer, C., Polk, S. (2020), 'Undocumented U.S. Immigrants and Covid-19,' *The New England Journal of Medicine*.
 - 65 Page, K., Venkataramani, M., Beyrer, C., Polk, S. (2020), 'Undocumented U.S. Immigrants and Covid-19,' *The New England Journal of Medicine*.
 - 66 Chang, S. (2020), 'Immigration And Privacy Advocates Seek New Law Shielding COVID-19 Contact Tracing Data From Law Enforcement,' *Gothamist*, available at: <https://gothamist.com/news/immigration-privacy-advocates-coronavirus-contact-tracing-data-law-enforcement>.
 - 67 Leatherby, L. (2020), 'Coronavirus is hitting Black business owners hardest,' *The New York Times*, 18 June 2020, available at: <https://nyti.ms/2UWhYH1>.
 - 68 Tucker, H. (2020), 'Coronavirus Bankruptcy Tracker: These Major Companies Are Failing Amid The Shutdown,' *Forbes*, 3 May 2020, available at: <https://www.forbes.com/sites/hanktucker/2020/05/03/coronavirus-bankruptcy-tracker-these-major-companies-are-failing-amid-the-shutdown/#4e30feef3425>.
 - 69 Cohen, P., Casselman, B., Friedman, G. (2020), 'An Extra USD 600 a Week Kept Many Jobless Workers Afloat. Now What Will They Do?' *The New York Times*, 29 July 2020, available at: <https://www.nytimes.com/2020/07/29/business/economy/unemployment-benefits-coronavirus.html>.
 - 70 Kenneally, B.A., LeBlanc, A. N., Arango, T. (2020), 'America at Hunger's Edge,' *The New York Times*, 2 September 2020, available at: <https://www.nytimes.com/interactive/2020/09/02/magazine/food-insecurity-hunger-us.html?searchResultPosition=4>.

has found. More than half was targeted to businesses, including hundreds of billions in tax breaks for companies, many that were unaffected by the pandemic and some that still laid off thousands of workers.⁷¹

The administration has provided a USD 50 billion subsidy to United States airlines to save them from bankruptcy, in return for their agreeing to keep their employees on payroll through the end of September.⁷² As this paper is being completed, it is uncertain whether additional subsidies will be provided, and the airlines have begun laying off many of their employees.⁷³ As they do, we should expect a disproportionate impact on women.

The administration and Congress provided a subsidy program for businesses at a cost of USD 2.3 trillion, which included over USD 600 billion in tax breaks for large companies, large profits for banks asked to administer the loan programs, and other subsidies that were made with little oversight.⁷⁴ There were reports of favoritism and corruption, and of large businesses successfully masquerading as small companies to gain subsidies.⁷⁵ As *The Washington Post* reported, ‘by failing to focus on containing the virus and the particular harms of the pandemic, the relief packages distributed money to those with little need for it while allowing the illness, which is now more widespread than when the bills passed, to outstrip the aid.’⁷⁶

They provided a loan program for those small businesses that agreed to retain their employees on payroll, with a stated goal (but not a guarantee) that the loans would be forgiven. The program has been plagued by delays, cronyism and favoritism.⁷⁷ Congress required the program to pay particular attention to small businesses owned by members of vulnerable communities, but the banks administering the program favored their largest customers, ignoring small businesses owned by people of color.⁷⁸ Very few small businesses owned by Black Americans have been able to obtain loans.⁷⁹ As a result, while 20 % of US small businesses have failed, 40 % of Black-owned small businesses have failed, and half of the Black-owned small businesses in the country expect to close.⁸⁰ As many Black-owned small businesses are restaurants and other service businesses, these closures will have an outsized impact on Black women.⁸¹

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- 71 MacMillan, D., O’Connell, J., Whoriskey, P. (2020), “‘Doomed to fail’: Why a USD 4 trillion bailout couldn’t revive the American economy,” *The Washington Post*, available at: <https://www.washingtonpost.com/graphics/2020/business/coronavirus-bailout-spending/>.
 - 72 Hirsch, L., de la Merced, M., Sorkin, A. (2020), ‘Can airlines avoid another bailout?’, *The New York Times*, 15 September 2020, available at: <https://nyti.ms/3iCxOQU>.
 - 73 Chokshi, N. (2020), ‘Airlines, facing a painfully slow recovery, begin furloughing thousands’, *The New York Times*, 1 October 2020, available at: <https://nyti.ms/30GUY1N>.
 - 74 MacMillan, D., O’Connell, J., Whoriskey, P. (2020), “‘Doomed to fail’: Why a USD 4 trillion bailout couldn’t revive the American economy,” *The Washington Post*.
 - 75 Gordon, N., MacNeal, C. (2020), ‘Corrupted: How the PPP loans favored the historically advantaged’, *Project On Government Oversight*, available at: <https://www.pogo.org/analysis/2020/08/corrupted-how-the-ppp-loans-favored-the-historically-advantaged/>.
 - 76 MacMillan, D., O’Connell, J., Whoriskey, P. (2020), “‘Doomed to fail’: Why a USD 4 trillion bailout couldn’t revive the American economy,” *The Washington Post*.
 - 77 Gordon, N., MacNeal, C. (2020), ‘Corrupted: How the PPP loans favored the historically advantaged’, *Project On Government Oversight*, available at: <https://www.pogo.org/analysis/2020/08/corrupted-how-the-ppp-loans-favored-the-historically-advantaged/>.
 - 78 DeBarros, A., Hayashi, Y., Omeokwe, A. (2020), ‘PPP money abounded—but some got it faster than others’, *Wall Street Journal*, 6 October 2020, available at: <https://www.wsj.com/articles/ppp-money-abounded-but-some-got-it-faster-than-others-11601976601>.
 - 79 UnidosUS (2020), ‘First COVID-19 survey of Black and Latino small-business owners reveals dire economic future, inaccessible and insufficient government relief funds’, press release, 18 May 2020, available at: <https://www.unidosus.org/about-us/media/press/releases/051820-UnidosUS-Press-Release-COVID-19-Survey-Black-and-Latino-Small-Business>.
 - 80 Leatherby, L. (2020), ‘Coronavirus is hitting Black business owners hardest’, *The New York Times*, 18 June 2020, available at: <https://nyti.ms/2UWhYH1>.
 - 81 Becker-Medina, E. (2016), ‘Women are leading the rise of Black-owned businesses’, *United States Census Bureau*, available at: <https://www.census.gov/newsroom/blogs/random-samplings/2016/02/women-are-leading-the-rise-of-black-owned-businesses.html>.

They provided a supplemental unemployment insurance program that supplemented regular unemployment relief payments with an additional USD 600 a week, but the program ended in July, and the administration has opposed extending it.⁸² While it was in effect it was believed to have had a significant role in bolstering the economy.⁸³ With its expiration, the impact will be hardest on those who have lost their jobs – women and people of color.⁸⁴ It is noteworthy that it did not assist those who participate in the informal economy, and they too are disproportionately women and people of color.

They provided a one-time payment of USD 1 200 to those low and medium income Americans who pay federal income taxes, with an exception for those who are married to non-citizens.⁸⁵ The program was intended to put some immediate cash in everyone's (or almost everyone's) pockets, but was delayed because President Trump ordered that the checks, which, under normal US practice would be signed by the Secretary of the Treasury, must bear Trump's signature.⁸⁶

A proposal was rejected that we simply use the electronic data that reveals the payroll cost of every US small business to send them an automatic payroll subsidy and impose a no layoff order.⁸⁷ In retrospect, it might have avoided the enormously costly rise in unemployment, which rose to nearly 15 % of the US workforce, totaling approximately 25 000 000 workers.⁸⁸

In some regards the administration has pursued policies that do benefit the poor. For example, there have been efforts to address food insecurity.⁸⁹ These initiatives were initially seen as deeply flawed, as the number of children going to bed hungry rose dramatically.⁹⁰ But in the past month there have been reforms that are expected to reduce food insecurity, though probably not to pre-pandemic levels, which were already high for a developed country.⁹¹

Similarly, many scientists report that the 'Operation Warp Speed' project will probably speed the development of a vaccine, though recent attempts by the president to change the safety standards for vaccines are seen as undermining public confidence in the safety of any vaccine released.⁹²

In the healthcare area, the US was woefully unprepared for the demand for medical personal protective equipment (PPE). President Trump initially announced that the federal Government would oversee the distribution of PPE, but as it became clear that the supplies were insufficient, he denied his initial position and insisted it was up to the states to secure the needed supplies. That led to price wars as states

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- 82 Casselman, B. (2020), 'End of USD 600 unemployment bonus could push millions past the brink,' *The New York Times*, 21 July 2020, available at: <https://nyti.ms/2WHLktD>.
- 83 Casselman, B. (2020), 'End of USD 600 unemployment bonus could push millions past the brink,' *The New York Times*, 21 July 2020.
- 84 Casselman, B. (2020), 'End of USD 600 unemployment bonus could push millions past the brink,' *The New York Times*, 21 July 2020.
- 85 Dickerson, C. (2020), 'Married to an undocumented immigrant? You may not get a stimulus check,' *The New York Times*, 28 April 2020, available at: <https://nyti.ms/3bHcfex>.
- 86 Rein, L. (2020), 'In unprecedented move, Treasury orders Trump's name printed on stimulus checks,' *The Washington Post*, 14 April 2020, available at: https://www.washingtonpost.com/politics/coming-to-your-1200-relief-check-donald-j-trumps-name/2020/04/14/071016c2-7e82-11ea-8013-1b6da0e4a2b7_story.html.
- 87 Davidson, P. (2020), 'Should Congress follow Europe's lead on stimulus to help U.S. workers and businesses?', *USA Today*, 8 April 2020, available at: <https://www.usatoday.com/story/money/2020/04/08/coronavirus-wage-subsidy-stimulus-checks-loans-unemployment/2966589001/>.
- 88 Long, H. (2020), 'U.S. unemployment rate soars to 14.7 %, the worst since the Depression era,' *The Washington Post*, 8 May 2020, available at: <https://www.washingtonpost.com/business/2020/05/08/april-2020-jobs-report/>.
- 89 Center on Budget and Policy Priorities (2020), *States Are Using Much-Needed Temporary Flexibility in SNAP to Respond to COVID-19 Challenges*, available at: <https://www.cbpp.org/research/food-assistance/states-are-using-much-needed-temporary-flexibility-in-snap-to-respond-to>.
- 90 Silva, C. (2020), 'Food Insecurity In The U.S. By The Numbers,' *NPR*, 27 September 2020, available at: <https://www.npr.org/2020/09/27/912486921/food-insecurity-in-the-u-s-by-the-numbers>; Turner, C. (2020), 'Children Are Going Hungry: Why Schools Are Struggling To Feed Students,' *NPR*, 8 September 2020, available at: <https://www.npr.org/2020/09/08/908442609/children-are-going-hungry-why-schools-are-struggling-to-feed-students>.
- 91 Gilkesson, P. (2020), 'P-EBT Extended—States Must Act to Fight Child Hunger,' *The Center for Law and Social Policy*, available at: <https://www.clasp.org/blog/p-ebt-extended-states-must-act-fight-child-hunger-0>.
- 92 Scott, D. (2020), 'Trump's Operation Warp Speed could be a success. The problem is Trump,' *Vox*, 7 October 2020, available at: <https://www.vox.com/coronavirus-covid19/2020/10/7/21504134/trump-covid-19-vaccine-operation-warp-speed-debate>.

competed for the little equipment available.⁹³ At one point, the Governor of Maryland called out troops to protect equipment purchased by the state from South Korea that the federal Government was trying to seize.⁹⁴ When called on to invoke emergency powers to manufacture masks and other PPE, Trump refused because much of the benefit would go to ‘blue states’ – states that were expected to vote against him in the upcoming election.⁹⁵ As of October 2020, eight months into the pandemic, there are continuing shortages of PPE across the country.⁹⁶

When Government scientists recommended that lockdowns continue and that everyone wear masks, Trump called on militia groups to confront Democratic Party governors to ‘liberate’ their states from the lockdown, and actively discouraged his supporters from wearing masks or from social distancing.⁹⁷ Of the more than 200 000 who have died, it is estimated that half would have been saved simply by Americans exercising full compliance with social distancing and mask wearing.⁹⁸

Conclusion

On 7 February 2020, at a time when there were only a handful of COVID-19 cases in the United States, US President Donald Trump revealed in a private (but taped) conversation with journalist Bob Woodward that the coronavirus was more dangerously deadly than commonly assumed.⁹⁹ His national security advisor had told him that it would be the ‘biggest national security threat you face in your presidency.’¹⁰⁰ He knew that the coming pandemic was potentially catastrophic.¹⁰¹ Yet publicly, he claimed that reports of the danger were a ‘hoax’ and ‘fake news’, encouraged his followers to engage in armed confrontations to ‘liberate’ states that had imposed lockdowns, and discouraged people from wearing masks.¹⁰²

As I write this, we are less than four weeks from election day (3 November 2020) and President Trump is recovering from his own bout of the virus, while falsely claiming that the disease is only dangerous for the elderly, ignoring the tens of thousands of middle-aged and young who have died, and treating the elderly as if their lives didn’t matter.¹⁰³ Perhaps more tellingly (though still falsely), he is claiming that the virus is mostly killing people in ‘blue states’ – states where the electorate is likely to vote for the Democratic Party candidate Joe Biden.¹⁰⁴ In part because of the president’s disregard for science, and even though he knew the risk, the United States is the outlier among developed nations, with far more

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- 93 Goldberg, D., Ollstein, A. M. (2020), ‘A dangerous new chapter of the outbreak: Every state for itself,’ *Politico*, 14 July 2020, available at: <https://www.politico.com/news/2020/07/14/states-look-to-trump-for-a-national-plan-to-fight-coronavirus-361906>.
 - 94 Pickrell, R. (2020), ‘Maryland called in National Guard troops to defend coronavirus tests from South Korea against seizure’ *Business Insider*, April 2020, available at: <https://www.businessinsider.com/maryland-national-guard-police-guard-coronavirus-tests-at-secret-location-2020-4>.
 - 95 Goldberg, D., Ollstein, A. M. (2020), ‘A dangerous new chapter of the outbreak: Every state for itself,’ *Politico*, 14 July 2020.
 - 96 Cohen, D. (2020), ‘Why a PPE shortage still plagues the U.S.’, *CNBC*, 22 August 2020, available at: <https://www.cnn.com/2020/08/22/coronavirus-why-a-ppe-shortage-still-plagues-the-us.html>.
 - 97 Mervosh, S., Shear, M. (2020), ‘Trump encourages protest against governors who have imposed virus restrictions,’ *The New York Times*, 29 April 2020, available at: <https://nyti.ms/3ai5yhx>.
 - 98 Kandula, S., Pei, S., Shaman, J. (2020), ‘Differential Effects of Intervention Timing on COVID-19 Spread in the United States,’ *MedRxiv*, available at: <https://doi.org/10.1101/2020.05.15.20103655>.
 - 99 Costa, C., Rucker, P. (2020), ‘Woodward book: Trump says he knew coronavirus was ‘deadly’ and worse than the flu while intentionally misleading Americans,’ *The Washington Post*, 9 September 2020, available at: https://www.washingtonpost.com/politics/bob-woodward-rage-book-trump/2020/09/09/0368fe3c-efd2-11ea-b4bc-3a2098fc73d4_story.html.
 - 100 Costa, C., Rucker, P. (2020), ‘Woodward book: Trump says he knew coronavirus was ‘deadly’ and worse than the flu while intentionally misleading Americans,’ *The Washington Post*, 9 September 2020.
 - 101 Costa, C., Rucker, P. (2020), ‘Woodward book: Trump says he knew coronavirus was ‘deadly’ and worse than the flu while intentionally misleading Americans,’ *The Washington Post*, 9 September 2020.
 - 102 Shear, M., Mervosh, S. (2020), ‘Trump encourages protest against governors who have imposed virus restrictions,’ *The New York Times*, 29 April 2020.
 - 103 Bella, T. (2020), ‘“It affects virtually nobody”: Trump incorrectly claims covid-19 isn’t a risk for young people,’ *The Washington Post*, 22 September 2020, available at: <https://www.washingtonpost.com/nation/2020/09/22/trump-coronavirus-young-people/>.
 - 104 Bump, P. (2020), ‘Trump blames blue states for the coronavirus death toll — but most recent deaths have been in red states,’ *The Washington Post*, 16 September 2020, available at: <https://www.washingtonpost.com/politics/2020/09/16/trump-blames-blue-states-coronavirus-death-toll-but-most-recent-deaths-have-been-red-states/>.

infection and death than anywhere else in the developed world.¹⁰⁵ But although the ‘red states’ have been devastated by the pandemic too,¹⁰⁶ in one regard the president was correct: the principal victims have been the poor, people of color, people with disabilities, and particularly those whose identities intersect multiple disadvantages, with poor women of color particularly at risk, and these are the people the president appears to not care about, and whose support he does not expect.

It was obvious by March to anyone who pays attention to problems of inequality that the pandemic was likely to cause the greatest harm to those already disadvantaged in American society – the poor, people of color, and particularly poor women of color and their children. We might have responded with policies intended to focus on them, and more broadly on workers, in order to protect the most vulnerable. Instead, the policies adopted were focused on protecting the economy by protecting businesses, with an emphasis on large businesses.¹⁰⁷ As a result, the personal wealth of affluent Americans has risen dramatically during the pandemic,¹⁰⁸ while the most vulnerable have seen their ‘safety nets’ collapse. It should surprise no one that the primary beneficiaries of the USD 4 trillion spent to date have been white men.

105 Leonhardt, D. (2020), ‘The Unique U.S. Failure to Control the Virus,’ *The New York Times*, 6 August 2020, available at: <https://www.nytimes.com/2020/08/06/us/coronavirus-us.html>.

106 Bump, P. (2020), ‘Trump blames blue states for the coronavirus death toll — but most recent deaths have been in red states,’ *The Washington Post*, 16 September 2020.

107 Woods, H. (2020), ‘How billionaires got USD 637 billion richer during the coronavirus pandemic,’ *Business Insider*, 3 August 2020, available at: <https://www.businessinsider.com/billionaires-net-worth-increases-coronavirus-pandemic-2020-7>.

108 Woods, H. (2020), ‘How billionaires got USD 637 billion richer during the coronavirus pandemic,’ *Business Insider*, 3 August 2020.

Gendering the COVID-19 crisis: a mapping of its impact and call for action in light of EU gender equality law and policy

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1 Introduction

The COVID-19 crisis has severely affected all realms of society, exposing and in some cases exacerbating pre-existing weaknesses on a local, national, regional and global scale. Government emergency responses to the crisis as well as those of international institutions have disproportionately affected already disadvantaged groups, increasing inequalities based on race, ethnicity, gender, age, disability, and especially affecting people in intersections of these categories. One of the most striking features of this pandemic and the emergency responses to it is that it has thoroughly blurred the distinction between public and private life, as most public activities (for example, those related to work, education, and culture) are now carried out in our homes. Since the 'private' sphere has traditionally been (and still is) regarded as being the woman's realm, this blurring will have profound effects on gender equality for years to come.¹

Even though preliminary results show that men's health is slightly more affected by the virus itself than women's health, women seem to be at greater risk of suffering from the secondary consequences of the crisis.² In this article we seek to map some of the most problematic issues that the COVID-19 crisis raises for the achievement of gender equality in the EU. We will do so by outlining some national responses to the crisis so far, and by considering the obligations contained in the EU gender equality law *acquis* and the aims embodied in the new Gender Equality Strategy 2020-2025 (GES).³ In doing so, we wish to identify important areas and potential strategies for legal and policy action so as to counteract the negative impact of the crisis on gender equality in Europe, in both the shorter (emergency) and longer

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1 See e.g. Rana, S. (2020), 'COVID-19's Gendered Fault Lines and their Implications for International Law', *Australian National University College of Law*, available at: <https://law.anu.edu.au/research/essay/covid-19-and-international-law/covid-19s-gendered-fault-lines-and-their-implications>.

2 Blasko, Z., Papadimitriou, E. and Manca, A. (2020), *How will the COVID-19 crisis affect existing gender divides in Europe*, Publications Office of the European Union, available at: <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/how-will-covid-19-crisis-affect-existing-gender-divides-europe>.

3 European Commission (2020), *A Union of Equality: Gender Equality Strategy 2020-2025*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN>.

term.⁴ Since we are currently still in the midst of the crisis, the overview and analysis presented in this article is inevitably rather rough as reliable data on gendered impacts is only gradually emerging.

The European Commission published the new GES in early March 2020, just days before many EU Member States went into a general lockdown. It seeks to establish a 'Union of Equality', in line with Ursula von der Leyen's political commitment.⁵ The strategy recognises that 'progress with regard to gender equality is neither inevitable nor irreversible'⁶ and that important societal transitions and challenges have a gender dimension that should be reckoned with, making sure that 'inequalities are not further exacerbated by change.'⁷ Although the strategy itself refers predominantly to the climate and the digital sphere as important game changers, the COVID-19 crisis and other societal pressures emerging from the Black Lives Matter movement and the earlier #MeToo movement have also emerged as crucial factors.

The article will proceed in four main steps, along the lines of the first three key objectives of the GES. First, we will look at the effects of the pandemic on gender-based violence (GBV) (section 2), next we examine employment and work-life balance issues (section 3), then we discuss the participation of women and women in decision-making and leadership positions (section 4). Based on the analysis of these three main policy areas, we will identify some key ingredients for developing a gender-sensitive response to the crisis that is required with a view to creating a more resilient gender-equal Europe in the future (section 5).

2 Gender-based violence

How COVID-19 has impacted women's and girls' safety

António Guterres, Secretary-General of the UN, has recently commented on how the number of calls to domestic violence support services have doubled in some countries since the COVID-19 crisis, referring to 'a horrifying global surge in domestic violence.'⁸ Indeed, news outlets, blogs, academic articles and global institutions across the world have reported an increase of violent incidents against women and girls during the crisis, brought on by lockdowns, financial difficulties and other stressors that result in greater tensions within households.⁹ Many countries across the world report higher rates of violence against women and children during recent quarantine periods.¹⁰ While comprehensive EU-wide data on the rise of violence against women is still lacking, initial figures are deeply concerning. In France, domestic violence is said to have increased by more than 30 % during the lockdown and in Lithuania 20 % more

4 OECD (2020), *Tax Policy Reforms 2020*, available at: <https://www.oecd-ilibrary.org/docserver/7af51916-en.pdf?expires=1600245195&id=id&accname=guest&checksum=3F0AF31911F384753A10918CD94C724E>, p. 111.

5 European Commission (2020), *A Union of Equality: Gender Equality Strategy 2020-2025*.

6 European Commission (2020), *A Union of Equality: Gender Equality Strategy 2020-2025*, p. 2.

7 Jourová, V. (2020), 'Vice-President for Values and Transparency Vera Jourová on the Gender Equality Strategy: Striving for a Union of equality', available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_358.

8 United Nations Secretary General (2020), *Secretary-General's video message on gender-based violence and COVID-19*, available at: <https://www.un.org/sg/en/content/sg/statement/2020-04-05/secretary-generals-video-message-gender-based-violence-and-covid-19-scroll-down-for-french>.

9 See for example, Guardian (2020), *Lockdowns around the world bring rise in domestic violence*, 28 March 2020, available at: <https://www.theguardian.com/society/2020/mar/28/lockdowns-world-rise-domestic-violence>; New York Times (2020), *For Abused Women, a Pandemic Lockdown Holds Dangers of Its Own*, 24 March 2020, available at: <https://www.nytimes.com/2020/03/24/us/coronavirus-lockdown-domestic-violence.html>.

10 European Parliament (2020), *COVID-19: Stopping the rise in domestic violence during lockdown*, press release, 7 April 2020, available at: <https://www.europarl.europa.eu/news/en/press-room/20200406IPR76610/covid-19-stopping-the-rise-in-domestic-violence-during-lockdown>; Euronews (2020), *As it battles COVID-19, Europe is being stalked by a shadow pandemic: domestic violence*, 31 July 2020, available at: <https://www.euronews.com/2020/07/31/as-it-battles-covid-19-europe-is-being-stalked-by-a-shadow-pandemic-domestic-violence-view>; Sixth Tone (2020), *Domestic Violence Cases Surge During COVID-19 Epidemic*, 2 March 2020, available at: <http://www.sixthtone.com/news/1005253/domestic-violence-cases-surge-during-covid-19-epidemic>; BBC News (2020), *Coronavirus: Five ways virus upheaval is hitting women in Asia*, 8 March 2020, available at: <https://www.bbc.com/news/world-asia-51705199>; Plan International Brazil Blog (2020), *Countries and homes are on lock-down to prevent the spread of COVID-19. What happens when home isn't a safe space?*, 25 March 2020, available at: <https://plan-international.org/blog/2020/03/covid-19-quarantine-when-home-isnt-safe>.

cases were reported during three weeks of lockdown compared to the same period in 2019, whilst Spain, Germany and the UK reported increasing demand for shelters.¹¹ Rises in instances of GBV were also reported by several of the national experts for the European Equality Law Network. For example, the Croatian expert reported that during the first five months of 2020, rape cases increased by 227.8 % and attempted rape by 175 % when compared to the same period in 2019.¹² The Spanish expert notes that according to official data, during the first two weeks of April, requests for help in relation to GBV via telephone doubled, while online consultations increased by 733 %.¹³

Moreover, the rise in violent incidents coincides with overwhelmed healthcare and law enforcement services, closed or full shelters, and a lack of funding for or suspension of local support groups.¹⁴ This limits the possibilities for women and children in violent situations to seek help outside the home, find a place in a shelter, or receive care, thus exacerbating their situation. With health services being overwhelmed with COVID-19 cases, important support and care services for women such as sexual and reproductive health services are likely to be reduced or even suspended, including services for survivors of GBV.¹⁵ For example, SafeLives, a UK charity whose work focuses on combating domestic violence, carried out a survey which shows that up to 76 % of first response support services for victims of domestic abuse had to limit their services due to COVID-19.¹⁶ In addition, a further complexity brought on by the lockdowns is that some women may find it difficult to call for help due to being in close proximity with their abusers.¹⁷ In Italy, for instance, one helpline for victims of domestic abuse reported receiving over 55 % fewer calls in the first half of March, when the lockdown in Italy was put into place; similar numbers were reported by a women's shelter service in northern France.¹⁸

Beyond violence experienced at home, online violence against women (OVAW) presents another area where women and girls are particularly at risk. According to the UN special rapporteur on violence against women, OVAW has increased sharply over the years, in parallel with an increase in online activities in everyday life.¹⁹ As a result of the crisis, almost all aspects of daily life have moved online, exposing millions of women and girls, who are using online video conferencing platforms for educational or professional

- 11 European Institute for Gender Equality (2020), *Gender-based violence*, available at: <https://eige.europa.eu/covid-19-and-gender-equality/gender-based-violence>; Euronews (2020), *Domestic abuse is spiking in lockdown – so what can be done about it?* 7 April 2020, available at: <https://www.euronews.com/2020/04/07/domestic-abuse-is-spiking-in-lockdown-so-what-can-be-done-about-it>; Euronews (2020), *Domestic violence cases jump 30% during lockdown in France*, 28 March 2020, available at: <https://www.euronews.com/2020/03/28/domestic-violence-cases-jump-30-during-lockdown-in-france>; UN Women (2020), *COVID-19 and Ending Violence Against Women and Girls*, available at: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/issue-brief-covid-19-and-ending-violence-against-women-and-girls-en.pdf?la=en&vs=5006>, p. 2.
- 12 Flash report by Croatian expert, available at: <https://www.equalitylaw.eu/downloads/5172-croatia-covid-19-preliminary-indications-of-increase-of-violence-against-women-83-kb>; See similar reports in the Flash report by Turkish expert, available at: <https://www.equalitylaw.eu/downloads/5171-turkey-impacts-of-covid-19-measures-on-women-in-turkey-118-kb>.
- 13 Flash report by Spanish expert, available at: <https://www.equalitylaw.eu/downloads/5190-spain-gender-equality-sensitive-covid-19-measures-80-kb>. For similar reports in relation to Greece see Flash report by Greek expert, available at: <https://www.equalitylaw.eu/downloads/5135-greece-significant-increase-of-domestic-violence-during-the-lockdown-105-kb>.
- 14 Blasko, Z., Papadimitriou, E. and Manca, A. (2020), *How will the COVID-19 crisis affect existing gender divides in Europe*, Publications Office of the European Union, available at: <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/how-will-covid-19-crisis-affect-existing-gender-divides-europe>.
- 15 Blasko, Z., Papadimitriou, E. and Manca, A. (2020), *How will the COVID-19 crisis affect existing gender divides in Europe*, Publications Office of the European Union, available at: <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/how-will-covid-19-crisis-affect-existing-gender-divides-europe>.
- 16 SafeLives (2020), *Domestic abuse frontline service COVID-19 survey results*, available at: https://safelives.org.uk/sites/default/files/resources/SafeLives%20survey%20of%20frontline%20domestic%20abuse%20organisations%20for%20COVID-19%2020.03.20_0.pdf.
- 17 European Parliament (2020), Press Release, COVID-19: Stopping the rise in domestic violence during lockdown.
- 18 Blasko, Z., Papadimitriou, E. and Manca, A. (2020), *How will the COVID-19 crisis affect existing gender divides in Europe*, Publications Office of the European Union, available at: <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/how-will-covid-19-crisis-affect-existing-gender-divides-europe>; CNN (2020), *Women are using code words at pharmacies to escape domestic violence during lockdown*, available at: <https://edition.cnn.com/2020/04/02/europe/domestic-violence-coronavirus-lockdown-intl/index.html>.
- 19 Human Rights Council (2018), 38th Session, Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47.

purposes, to an even greater risk of online abuse.²⁰ Social media and online work environments pose particular threats, with women and girls being exposed to a myriad of online abuses, from cyber bullying to receiving unwanted pornographic images.²¹ And it is not only online work that has led to a rise in incidents of work harassment – there are reports that violence against female frontline workers is also more frequent.²² Other forms of violence that are at risk of being exacerbated by the crisis include female genital mutilation, honour-based violence, incest and child marriage, as these types of violence are harder to detect and efforts to end these practices are being seriously impeded during the pandemic.²³

While violence against women and girls is not a new problem, or one that is caused by a crisis such as the current health crisis, it is clear that the pandemic is causing more women and children to be exposed to violence.²⁴ Increases in GBV were also witnessed in the wake of similar critical situations, such as during the Ebola crisis, after natural disasters or during economic recessions, demonstrating that such situations can put women and girls at particular risk.²⁵ Therefore, it is crucial that Governments and lawmakers ensure that their responses to such crises include measures and strategies that minimise the risk of GBV, protect women and children from abuse and offer adequate support services and care to those who experience GBV.²⁶ In designing such measures, the particularly complex and vulnerable position of women who face inequalities beyond those based on sex – e.g. due to their age, race or ethnicity, religion, sexual orientation, disability or residence status – should be taken into account, given that the risk of increased violence, as well as the increased risk of infection due to lack of access to healthcare or overcrowded living conditions, are exacerbated by these intersecting factors.²⁷ For example, elderly people and the disabled are often at risk of maltreatment, making elderly women and disabled women

- 20 ILO (2020), *The COVID-19 response: Getting gender equality right for a better future for women at work*, available at: https://www.ilo.org/global/topics/coronavirus/WCMS_744685/lang--en/index.htm, p. 5; UN Women (2020), *Online and ICT* facilitated violence against women and girls during COVID-19*, available at: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/brief-online-and-ict-facilitated-violence-against-women-and-girls-during-covid-19-en.pdf?la=en&vs=2519>, pp. 2 to 3.
- 21 Barker, K., Jurasz, O. (2020), 'Online violence against women as an obstacle to gender equality: a critical view from Europe', *Equality Law Review Issue 2020/1*, available at: <https://www.equalitylaw.eu/downloads/5182-european-equality-law-review-1-2020-pdf-1-057-kb>; Reuters (2020), *Risk of online sex trolling rises as coronavirus prompts home working*, 18 March 2020, available at: <https://www.reuters.com/article/us-women-rights-cyberflashing-trfn-idUSKBN2153HG>.
- 22 ILO (2020), *The COVID-19 response: Getting gender equality right for a better future for women at work*, available at: https://www.ilo.org/global/topics/coronavirus/WCMS_744685/lang--en/index.htm, p. 3; CARE (2020), *COVID-19 Could Condemn Women To Decades of Poverty: Implications of the COVID-19 Pandemic on Women's and Girls' Economic Justice and Rights*, available at: https://www.care-international.org/files/files/CARE_Implications_of_COVID-19_on_WEE_300420.pdf; New York Times (2020), *Death of Store Clerk in Italy Highlights Contagion's New Front Line*, 25 March 2020, available at: <https://www.nytimes.com/2020/03/25/world/europe/coronavirus-italy-supermarkets.html>.
- 23 United Nations Population Fund (2020), *Impact of the COVID-19 Pandemic on Family Planning and Ending Gender-based Violence, Female Genital Mutilation and Child Marriage*, available at: <https://www.unfpa.org/resources/impact-covid-19-pandemic-family-planning-and-ending-gender-based-violence-female-genital>; European Women's Lobby (2020), 'Women must not pay the price for COVID-19! Putting equality between women and men at the heart of the response to COVID-19 across Europe', available at: https://www.womenlobby.org/IMG/pdf/ewl_policy_brief_on_covid-19_impact_on_women_and_girls-2.pdf.
- 24 CARE (2020), *COVID-19 Could Condemn Women To Decades of Poverty: Implications of the COVID-19 Pandemic on Women's and Girls' Economic Justice and Rights*.
- 25 Alon, T., Doepke, M., Olmstead-Rumsey, J., Tertilt, M. (2020), *The Impact of COVID-19 on Gender Equality*, National Bureau of Economic Research, available at: https://www.genderportal.eu/sites/default/files/resource_pool/w26947.pdf, p. 25; World Health Organization (2005), *Violence and disasters*, available at: https://www.who.int/violence_injury_prevention/publications/violence/violence_disasters.pdf; UN Women (2020), *COVID-19 and Ending Violence Against Women and Girls*, available at: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/issue-brief-covid-19-and-ending-violence-against-women-and-girls-en.pdf?la=en&vs=5006>, p. 4; United Nations General Assembly (2016), *Protecting Humanity from Future Health Crises: Report of the High Level Panel on the Global Response to Health Crises*, A/70/723; UNICEF (2020), *Five Actions for Gender Equality in the COVID-19 Response*, available at: <https://www.unicef.org/sites/default/files/2020-03/Five-Actions-for-Gender-Equality-in-the-COVID-19-Response-Technical-Note-2020.pdf>; Inter-Agency Standing Committee (IASC) (2015), *Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action: Food Security and Agriculture*, available at: https://gbvguidelines.org/wp/wp-content/uploads/2015/09/2015-IASC-Gender-based-Violence-Guidelines_lo-res.pdf.
- 26 This was also reflected in an online webinar on good practices for tackling domestic violence in the context of COVID-19 hosted by the European Commission for Member State representatives in May 2020. See: https://ec.europa.eu/info/publications/webinar-series-gender-sensitive-responses-covid-19-crisis_en.
- 27 CARE (2020), *COVID-19 Could Condemn Women To Decades of Poverty: Implications of the COVID-19 Pandemic on Women's and Girls' Economic Justice and Rights*; European Commission (2020), *A Union of Equality: Gender Equality Strategy 2020-2025*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN>, p. 4.

particularly vulnerable to abuse.²⁸ Equally, migrant women and female refugees face a higher threat of violence and abuse due to their already precarious living conditions, uncertainties concerning their status, and language barriers, as well as being at a disproportionate risk of discrimination.²⁹

Measures aimed at protecting women and girls from violence during the pandemic should be carefully developed to ensure that they do not put women and girls in further danger. For example, while technological means may be considered a useful way of reaching out to women and girls during lockdowns, it has to be taken into account that not all affected groups have online access, or are able to use their phone or computers independently at home without being monitored by a violent family member or partner.³⁰ Similarly, while it might be necessary to release prisoners in order to reduce prison populations to limit the risk of the virus spreading, such measures should be taken in a way that does not put women and girls at further risk of abuse. For example, consider how in Turkey, the release of male prisoners with a history of abusing women has put women and girls at further risk of victimisation.³¹

The EU legal and policy framework on gender-based violence

Violence against women constitutes a form of GBV and discrimination, and a human rights violation.³² With the CEDAW, ECHR and EU Charter, there is a solid legal framework in place to hold Member States accountable for their shortcomings in protecting women and girls from violence.³³ Moreover, enhanced efforts have been made at EU level over recent decades to directly address the issue of GBV, through legal

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- 28 Sixth Tone (2020), *Domestic Violence Cases Surge During COVID-19 Epidemic*, 2 March 2020, available at: <http://www.sixthtone.com/news/1005253/domestic-violence-cases-surge-during-covid-19-epidemic>; BBC News (2020), *Coronavirus: Five ways virus upheaval is hitting women in Asia*, 8 March 2020, available at: <https://www.bbc.com/news/world-asia-51705199>; Plan International Brazil Blog (2020), *Countries and homes are on lock-down to prevent the spread of COVID-19. What happens when home isn't a safe space?*, 25 March 2020, available at: <https://plan-international.org/blog/2020/03/covid-19-quarantine-when-home-isnt-safe>; ABC Action News (2020), *Action News Investigation: Local nursing homes cited for infection control before COVID-19 outbreak*, 25 March 2020, available at: <https://6abc.com/6046835/>; Human Rights Watch (2020), *Protect Rights of People with Disabilities During COVID-19*, 26 March 2020, available at: <https://www.hrw.org/news/2020/03/26/protect-rights-people-disabilities-during-covid-19>.
- 29 United Nations Development Programme (2020), *The Economic Impacts of COVID-19 and Gender Equality*, available at: <https://www.undp.org/content/undp/en/home/librarypage/womens-empowerment/the-economic-impacts-of-covid-19-and-gender-equality.html>; Refugees International (2020), *Exacerbating the other epidemic: How COVID-19 is increasing violence against displaced women and girls*, available at: <https://www.refugeesinternational.org/reports/2020/7/31/exacerbating-the-other-epidemic-how-covid-19-is-increasing-violence-against-displaced-women-and-girls>.
- 30 UN Women (2020), *COVID-19 and Ending Violence Against Women and Girls*, available at: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/issue-brief-covid-19-and-ending-violence-against-women-and-girls-en.pdf?la=en&vs=5006>, p. 4.
- 31 See Turkish expert's report, available at <https://www.equalitylaw.eu/downloads/5171-turkey-impacts-of-covid-19-measures-on-women-in-turkey-118-kb>; See also Milliyet (2020), *Kuşadası'nda saldırıya uğrayan müdür konuştu! Peşini bırakmayacağım* (The (bank) manager who was attacked in Kuşadası spoke to (the press)! 'I will not give up on pursuing this matter'), 29 May 2020, available in Turkish at: <https://www.milliyet.com.tr/gundem/kusadasinda-saldiriya-ugrayan-mudur-konustu-pesini-birakmayacagim-6222358>; Sözcü (2020), *Canı baba dünya basınında: Cezaevinden çıktı kızını döverek öldürdü* ('The villain father in the world press: He got out of prison and beat his daughter to death'), 22 April 2020, available in Turkish at: <https://www.sozcu.com.tr/2020/dunya/cani-baba-dunya-basiniinda-cezaevinden-cikti-kizini-doverek-oldurdu-5767080/>.
- 32 See European Parliament (2019), *Violence against women in the EU: State of play*, available at: https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI%282018%29630296, p. 2; ECHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009.
- 33 UN Convention on the Elimination of All Forms of Discrimination Against Women, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), available at: https://www.echr.coe.int/documents/convention_eng.pdf; Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391-407, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.

measures³⁴ and policies,³⁵ as well as various funding programmes³⁶ and awareness-raising campaigns³⁷ aimed at informing the public and key actors about GBV.³⁸ However, the EU legal apparatus does not include a legally binding instrument specifically dedicated to preventing GBV and protecting women and girls.³⁹ The adoption of the Council of Europe's Istanbul Convention⁴⁰ in 2011, the first legally binding instrument to address violence against women and girls specifically, is an important development in that respect, as it clearly lays down the measures that Member States are obliged to take.⁴¹ These obligations include adopting gender-sensitive policies,⁴² allocating financial resources towards implementing policies and measures to fulfil the Convention obligations,⁴³ providing general support services such as financial assistance, housing, and access to healthcare and social services,⁴⁴ providing shelter,⁴⁵ telephone helplines⁴⁶ and rape crisis centres,⁴⁷ and ensuring immediate and adequate responses from responsible Government agencies in order to prevent (further) violence and protect victims.⁴⁸

So far, the European Union has not been able to accede to the Convention due to questions concerning legal requirements relating to the EU's conclusion of mixed international agreements and the process applied in that regard by the Council, as well as the fact that there are still six European countries (Bulgaria, Czechia, Hungary, Latvia and Slovakia) that have signed the Convention but have not yet

- 34 See e.g. the adoption of directives on the rights of victims of crime, on human trafficking, sexual harassment and gender equality more broadly: e.g. Directive 2003/86/EC of 22 September 2003, OJ L 251/12; Directive 2004/80/EC of 29 April 2004, OJ L 261/15; Directive 2004/81/EC of 29 April, OJ L 261/19; Directive 2004/113/EC of 13 December 2004, OJ L 373/37; Directive 2006/54/EC of 5 July 2006, OJ L 204/23; Directive 2008/115/EC of 16 December 2008, OJ L 348/98; Directive 2010/13/EU of 10 March 2010, OJ L 95/1; Directive 2010/41/EU of 7 July 2010, OJ L 180/1; Directive 2011/36/EU of 5 April 2011, OJ L 101/1; Directive 2011/93/EU of 13 December 2011, OJ L 335/1; Directive 2011/95/EU of 13 December 2011, OJ L 337/9; Directive 2011/99/EU of 13 December 2011, OJ L 338/2; Directive 2012/29/EU of 25 October 2012, OJ L 315/57; Directive 2013/32/EU of 26 June 2013, OJ L 180/60; Directive 2013/33/EU of 26 June 2013, OJ L 180/96; Regulation (EU) No 606/2013 of 12 June 2013, OJ L 181/4; Council Framework Decision 2008/675/JHA of 24 July 2008, OJ L 220/32; Council Framework Decision 2008/947/JHA of 27 November 2008, OJ L 337/102; Council Framework Decision 2009/315/JHA of 26 February 2009, OJ L 93/23; Council Decision 2009/316/JHA of 6 April 2009, OJ L 93/33. A fitness check of existing legislation and legal provisions relevant for preventing and combating violence against women is set to be carried out between now and 2021 to assess what more can be done on this issue. See European Commission (2020), 'Violence against women and domestic violence – fitness check of EU legislation', available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12472-Violence-against-women-and-domestic-violence-fitness-check-of-EU-legislation?fbclid=IwAR0_XULaiNW4-VI569U_LhY4RIDE_RundnRr9_XJigDS34ICD-DiYHfJ5G8.
- 35 European Commission (2015), *Strategic Engagement for Gender Equality 2016-2019*, available at: https://ec.europa.eu/anti-trafficking/eu-policy/strategic-engagement-gender-equality-2016-2019_en; Regulation (EC) No. 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality (2006), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1435768861022&uri=CELEX:32006R1922>; EIGE (2019), *Gender Equality Index*, available at: <https://eige.europa.eu/gender-equality-index/2019>.
- 36 For example the Daphne programme 2014-2020 which forms part of the Rights, Equality and Citizenship programme, see European Commission, *The Daphne Toolkit – An active resource from the Daphne Programme*, available at: <http://ec.europa.eu/justice/grants/results/daphne-toolkit/>.
- 37 For example, the social media campaigns #SayNoStopVAW and #DigitalRespect4Her; see European Commission, *NON.NO.NEIN. Ending Violence Against Women – taking stock and next steps*, available at: <https://ec.europa.eu/justice/saynostopvaw/>; European Commission, *#DigitalRespect4Her*, available at: <https://ec.europa.eu/digital-single-market/en/digitalrespect4her>.
- 38 European Commission, *Ending gender-based violence*, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/ending-gender-based-violence_en#what-is-the-eu-doing.
- 39 See European Parliament (2019), *Violence against women in the EU: State of play*, p. 6.
- 40 Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Council of Europe Treaty Series – No. 210, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e>.
- 41 Book, B., Fernandes M., Dolic, Z. (2019), *Implementation of the Daphne programme and other funds aimed at fighting violence against women and girls*, Publications Office of the EU, available at: <https://op.europa.eu/en/publication-detail/-/publication/19f3b9ad-29c5-11e9-8d04-01aa75ed71a1/language-en/format-PDF/source-117447275>.
- 42 Istanbul Convention, Article 6.
- 43 Istanbul Convention, Article 8.
- 44 Istanbul Convention, Article 20.
- 45 Istanbul Convention, Article 23.
- 46 Istanbul Convention, Article 24.
- 47 Istanbul Convention, Article 25.
- 48 Istanbul Convention, Article 50.

ratified it.⁴⁹ Therefore, there is currently no common definition of violence against women and other forms of gender-based violence in the EU *acquis*,⁵⁰ and although some protection is provided by the Victims' Rights Directive, its implementation has been uneven⁵¹ and the obligations enshrined in it have not been sufficient to ensure uniform protection and prevention across the EU.⁵² As demonstrated in the previous section, having in place adequate preventive measures and support services such as those required by the Istanbul Convention (e.g. allocation of resources for prevention, shelters and helplines) is crucial in order to protect women from violence, and this is all the more so during crises when, as we can see from the examples provided above, there is an increased risk of violence and a concurrent increased need for services.⁵³ Indeed, the European Parliament has criticised the lack of EU legislation directly tackling violence against women.⁵⁴

Preventing and combating GBV is one of the European Commission's key policy objectives for achieving gender equality and the first heading in its GES.⁵⁵ One of its key aims in this respect is to offer the same level of protection as provided by the Istanbul Convention, and failing accession to the Convention itself, to develop other means of ensuring protection equal to the Convention.⁵⁶ Another objective for the current Commission's mandate is to introduce a Recommendation on the prevention of harmful practices against women and girls. The Recommendation would address the reinforcement of public services, support measures and capacity-building, as well as the prevention of violence through pre-emptive measures and education, among other things. In addition, the EU strategy on victims' rights 2020-2025 was adopted in June 2020. The strategy builds on the Victims' Rights Directive and focuses on the empowerment of all victims of crime, including the specific needs of victims of GBV.⁵⁷

The COVID-19 crisis shows that fulfilling the goals listed in the GES is of utmost importance to ensure that women and girls are adequately protected from GBV and that sufficient support services are available to provide safety, medical and psychological assistance, shelter, information and any other assistance necessary to ensure that they can leave violent situations and build a life free from abuse. The crisis has made it absolutely clear that crisis situations require specific attention to be paid towards how any response will include measures to protect women and girls from violence. It is now more important than ever to make sure that the EU's gender mainstreaming objectives are put into practice, ensuring that specific policies are developed to fulfil the strategy's goals, but also that these goals are realised through all other policy areas, including policies aimed at mitigating the current pandemic and any future crises. The following section explores some best practice from national responses to the current crisis and makes recommendations for future policies towards tackling GBV.

49 Council of Europe CoE, *Chart of signatures and ratifications of Treaty 210*, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>; Euronews (2020), *As it battles COVID-19, Europe is being stalked by a shadow pandemic: domestic violence*, 31 July 2020, available at: <https://www.euronews.com/2020/07/31/as-it-battles-covid-19-europe-is-being-stalked-by-a-shadow-pandemic-domestic-violence-view>.

50 Note, however, the definitions contained in the Istanbul Convention and in Recital 17 of Directive 2012/29/EU of 25 October 2012, OJ L315/57.

51 European Commission (2020), 'Report on the implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA', available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-188-F1-EN-MAIN-PART-1.PDF>.

52 European Parliament (2016), *The Issue of Violence Against Women in the European Union*, available at: [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2016\)556931](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2016)556931); European Parliament (2020), *Prevention of Violence Against Women*, available at: <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-prevention-of-violence-against-women>.

53 EIGE (2020), *Coronavirus puts women in the frontline*, available at: <https://eige.europa.eu/news/coronavirus-puts-women-frontline>.

54 European Parliament (2016), European Parliament resolution of 24 November 2016 on the EU accession to the Istanbul Convention on preventing and combating violence against women (2016/2966(RSP)), available at: https://www.europarl.europa.eu/doceo/document/TA-8-2016-0451_EN.pdf.

55 European Commission (2020), *A Union of Equality: Gender Equality Strategy 2020-2025*, pp. 2 and 3.

56 European Commission (2020), *A Union of Equality: Gender Equality Strategy 2020-2025*, p. 3.

57 European Commission (2020), *A Union of Equality: Gender Equality Strategy 2020-2025*, p. 4.

Best practices and recommendations

With the safety of women and girls continuing to be at risk as the crisis unfolds, policies should be adopted that place women and girls centre stage and take into account the different vulnerabilities that survivors may face, such as those based on their age, disability or race. Effective responses and measures include (short-term) practical measures taken at the national level, and broader (long-term) legal and policy responses at EU level.

Local authorities, support services and law enforcement services should be well informed about the increased risk of GBV and given guidelines on how to identify and address violent situations. First responders should also be trained in providing psychological support, information and referrals to relevant services. The Estonian Ministry of Social Affairs provides a good example in this respect, by adopting guidelines in May for local government and social service providers, highlighting the need for authorities to provide emergency accommodation for perpetrators of family violence where a protection order has been issued against them.⁵⁸ The police have even put this into practice during the state of emergency, in order to ensure that victims can stay in their own homes rather than having to flee to safety. The guidelines also require close cooperation between police and local authorities in providing such accommodation and remind local government and social services to carefully monitor families with a history of violence due to the increased risk during the crisis.⁵⁹

Member States should also ensure that they provide adequate protection services and safe accommodation, as required by the Istanbul Convention. Healthcare and support services, shelters and hotlines should remain open and should be considered essential services.⁶⁰ In some Member States, measures have already been taken in this regard. In Spain, the Government adopted a contingency plan to address GBV specifically by taking measures to ensure that existing support and protection services continued to operate during the crisis.⁶¹ Several countries have addressed shortcomings in shelter places by taking measures to increase access to safe places, for example through making use of vacant hotel rooms.⁶² Special support should be provided to those who are most vulnerable to abuse and violence, such as migrant women, homeless women, children and people with disabilities or receiving care in institutions or at home.

Another key tool to make sure that women can reach out to receive support included in the Istanbul Convention are emergency hotlines. Given that, in many countries, calls to such hotlines have been increasing during the pandemic, it is all the more important that Member States ensure that they provide a hotline that is always available and free of charge, and that there are enough staff to ensure that

58 Estonian expert's flash report, 'Effective protection for victims of domestic violence after COVID-19 emergency period', 8 July 2020, available at: <https://www.equalitylaw.eu/downloads/5177-estonia-effective-protection-for-victims-of-domestic-violence-after-covid-19-emergency-period-75-kb>; Ministry of Social Affairs (2020), 'Sotsiaalministeeriumi juhised kohalikule omavalitsusele ja teenuseosutajatele sotsiaaltöö ja lastekaitsetöö korraldamisel eriolukorra järgselt' ('Guidelines for local government and service providers in organizing social work and child protection after the emergency situation'), available in Estonian at: https://www.sotsiaalkindlustusamet.ee/sites/default/files/content-editors/COVID_eriolukorra_materjalid/kov_ja_teenuseosutajate_juhised_19_mai_2020.pdf.

59 Estonian expert's flash report, 8 July 2020; Ministry of Social Affairs (2020), 'Sotsiaalministeeriumi juhised kohalikule omavalitsusele ja teenuseosutajatele sotsiaaltöö ja lastekaitsetöö korraldamisel eriolukorra järgselt'.

60 United Nations Secretary General (2020), *Secretary-General's video message on gender-based violence and COVID-19*, available at: <https://www.un.org/sg/en/content/sg/statement/2020-04-05/secretary-generals-video-message-gender-based-violence-and-covid-19-scroll-down-for-french>.

61 Spanish expert's flash report, 'Gender equality sensitive COVID-19 measures', 20 July 2020, available at: <https://www.equalitylaw.eu/downloads/5190-spain-gender-equality-sensitive-covid-19-measures-80-kb>.

62 This was for example implemented in France, Belgium and Spain, see Blasko, Z., Papadimitriou, E. and Manca, A. (2020), *How will the COVID-19 crisis affect existing gender divides in Europe?*, Publications Office of the European Union, available at: <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/how-will-covid-19-crisis-affect-existing-gender-divides-europe>; France 24 (2020), *France to put domestic violence victims in hotels as numbers soar under coronavirus lockdown*, 3 March 2020, available at: <https://www.france24.com/en/20200330-france-to-put-domestic-violence-victims-in-hotels-as-numbers-soar-under-coronavirus-lockdown>; UN Women (2020), *COVID-19 and Ensuring Safe Cities and Safe Public Spaces for Women and Girls*, available at: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/brief-covid-19-and-ensuring-safe-cities-and-safe-public-spaces-for-women-and-girls-en.pdf?la=en&vs=632>, p. 8.

victims of violence can get through. In Austria and Serbia, the increased need caused by the crisis has been met with the introduction of 24/7 SOS hotlines, while in the Netherlands, a pre-existing 24/7 hotline has been supported by a chat function, which is considered safer to access than the hotline.⁶³ Other forms of technology can also be used to offer remote support, provide information and establish contact with women and girls who face violence at home. In Portugal, an email service was created to allow for questions and requests for support in relation to domestic violence,⁶⁴ while the contingency plan adopted in Spain introduced mechanisms to allow for assistance to be provided to victims through WhatsApp, telephone and other remote means, as well as through a mobile application that includes an SOS button to alert police and health services.⁶⁵ Moreover, an instant messaging service allows for women to use an online chat for remote psychological support, which uses GPS to locate women in case they need emergency help.⁶⁶

It is also important that women can seek help outside the home, away from their abusers, without fearing repercussions for leaving the house. Media campaigns were used in Italy and Ireland to convey the message to victims that they will not be punished for leaving their house during a lockdown if they are seeking help due to facing violence at home, and to emphasise that services are still available for them.⁶⁷ In Greece, the General Secretariat for Family Policy and Gender Equality launched an information campaign to reach out to and support victims of domestic violence, with the slogan: ‘We stay home but we do not stay silent. Confinement at home does not mean tolerance of violence’.⁶⁸

However, with victims often being forced to be in close proximity to their partners during lockdowns and shelter-at-home phases, many might not have private access to their mobile phone or computer. Therefore, it is important to adopt alternative measures that are safe for victims, beyond those aimed at reaching women in their homes, to give women the opportunity to seek help discreetly during short trips outside, such as when shopping. Several countries, including Greece, France, Spain and the Netherlands subscribed to the Mask19 campaign, which involved posters with the codeword ‘Mask-19’ being placed in pharmacies, inviting victims of violence to alert their local pharmacists that they need help, without having to say so out loud.⁶⁹ In France, drop-in counselling centres were set up in shops in order to allow women to drop in while doing the shopping,⁷⁰ while in one UK region (Cumbria), police asked postal

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- 63 See the Dutch expert’s flash report, ‘Domestic violence during Covid-19, 22 July 2020, available at <https://www.equalitylaw.eu/downloads/5192-netherlands-domestic-violence-during-covid-19-71-kb>. See also <https://veilighuis.nl/> for the chat function. For Austria, Blasko, Z., Papadimitriou, E. and Manca, A. (2020), *How will the COVID-19 crisis affect existing gender divides in Europe?*, Publications Office of the European Union, available at: <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/how-will-covid-19-crisis-affect-existing-gender-divides-europe>, p. 14. For Serbia, see UN Women (2020), *COVID-19 and Essential Services Provision for Survivors of Violence Against Women and Girls*, available at: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/brief-covid-19-and-essential-services-provision-for-survivors-of-violence-against-women-and-girls-en.pdf?la=en&vs=3834>, p. 9.
- 64 Blasko, Z., Papadimitriou, E. and Manca, A. (2020), *How will the COVID-19 crisis affect existing gender divides in Europe?*, Publications Office of the European Union.
- 65 Spanish expert’s flash report, ‘Gender equality sensitive COVID-19 measures’, 20 July 2020, available at: <https://www.equalitylaw.eu/downloads/5190-spain-gender-equality-sensitive-covid-19-measures-80-kb>.
- 66 UN Women (2020), *COVID-19 and Essential Services Provision for Survivors of Violence Against Women and Girls*, p. 9.
- 67 Blasko, Z., Papadimitriou, E. and Manca, A. (2020), *How will the COVID-19 crisis affect existing gender divides in Europe?*, Publications Office of the European Union; Still Here Campaign (2020), available at: <https://www.stillhere.ie/awareness-campaign/>; UN Women (2020), *COVID-19 and Essential Services Provision for Survivors of Violence Against Women and Girls*, p. 9.
- 68 Greek General Secretariat for Family Policy and Gender Equality, available at: <http://www.isotita.gr/>.
- 69 For the Netherlands, see the Dutch expert’s flash report, ‘Domestic violence during Covid-19, 22 July 2020. See also: <https://nos.nl/artikel/2332360-ook-in-nederland-codewoord-masker-19-voor-huiselijk-geweld.html>; For Greece, see the Greek expert’s flash report, ‘Significant increase of domestic violence during the lockdown, 14 May 2020, available at: <https://www.equalitylaw.eu/downloads/5135-greece-significant-increase-of-domestic-violence-during-the-lockdown-105-kb>. See also: Document No 1396/21.04.2020 of the Greek Union of Pharmacists, available at: <http://www.fsa.gr/LinkClick.aspx?fileticket=zRO%2bDD5sCiA%3d&tabid=36>. The posters stated: ‘Mask-19. If you are a victim of domestic violence or sexual abuse, come to your local pharmacy and ask for the mask that will save your life. Ask for Mask-19. Your pharmacist knows that he/she has to call 15900’; available at: <http://www.fsa.gr/>. For France and Spain, see also France 24 (2020), *France to put domestic violence victims in hotels as numbers soar under coronavirus lockdown*, 30 March 2020, available at: <https://www.france24.com/en/20200330-france-to-put-domestic-violence-victims-in-hotels-as-numbers-soar-under-coronavirus-lockdown>.
- 70 Blasko, Z., Papadimitriou, E. and Manca, A. (2020), *How will the COVID-19 crisis affect existing gender divides in Europe?*, Publications Office of the European Union, p. 14.

workers, delivery drivers and essential workers making home visits to look out for and report signs of abuse.⁷¹

When reaching out to women and girls and ensuring channels through which they can report violence and/or seek help, it is of vital importance that Member States support women so that they can leave a violent home without having to fear poverty, homelessness, or costly legal services that they cannot afford. Emergency practical support, including financial and legal support, is therefore crucial. The Governments of France and Ireland have allocated additional financial support to GBV support groups and services, with Ireland providing rent support to victims.⁷² Similarly, the continuity of justice services and police protection during the crisis should be ensured. In Malta, since April 2020, the Government has provided a new legal aid service with lawyers experienced in abuse cases to encourage more victims to come forward. This procedure is initiated as soon as a victim calls the national authority responsible or makes a police complaint.⁷³ In Estonia, the Penal Code was amended in May 2020 to establish that protection orders may be issued by an order of a prosecutor's office without the consent of the victim. The prosecutor's office has to inform a court within two days and the court then decides whether the protection order is admissible, taking into account the wishes of the victim.⁷⁴

Additionally, although we are still in the midst of the pandemic, in the wake of the crisis it will be important to analyse and understand the patterns of violence witnessed during this time, to understand why crises increase the risk of GBV, and to measure the overall impact.⁷⁵ In order to achieve this, comprehensive and gendered data will need to be gathered to understand not only the size of the problem, but also how to tackle it most effectively. EIGE is planning a study on the implications of COVID-19 for women victims of intimate partner violence aimed at improving crisis-related policies and measures and to reduce violence against women in crisis situations.⁷⁶ Collecting data with other disaggregated factors, such as age and disability, will also be helpful in identifying the specific risk to certain groups of society.⁷⁷ Eurostat is set to coordinate an EU-wide survey to collect this kind of data, with results expected in 2023.⁷⁸ One of the EEA member states, Norway, has already taken steps to gather data and information at the governmental level about the impact of COVID-19 on areas such as employment, economics and violence. The Department for Equality and Universal Design has been charged with looking into the discriminatory effects of the crisis in relation to gender and other discrimination grounds.⁷⁹ Moreover, a survey was carried out in April in cooperation with women's shelters to assess the effects of COVID-19 on these shelters and the situation of victims.⁸⁰ The survey showed that while the measures taken to

71 UN Women (2020), COVID-19 and Essential Services Provision for Survivors of Violence Against Women and Girls, p. 9.

72 Blasko, Z., Papadimitriou, E. and Manca, A. (2020), How will the COVID-19 crisis affect existing gender divides in Europe?, Publications Office of the European Union; France 24 (2020), France to put domestic violence victims in hotels as numbers soar under coronavirus lockdown, 30 March 2020, available at: <https://www.france24.com/en/20200330-france-to-put-domestic-violence-victims-in-hotels-as-numbers-soar-under-coronavirus-lockdown>.

73 Maltese expert's flash report, 'Legal aid to victims of domestic violence', 1 July 2020, available at: <https://www.equalitylaw.eu/downloads/5175-malta-legal-aid-to-victims-of-domestic-violence-65-kb>; Government of Malta (2020), *Legal Aid Malta*, available at: <https://justice.gov.mt/en/legalaidmalta/Pages/Domestic-Violence.aspx>.

74 Estonian expert's flash report, 'Effective protection for victims of domestic violence after COVID-19 emergency period', 8 July 2020, available at: <https://www.equalitylaw.eu/downloads/5177-estonia-effective-protection-for-victims-of-domestic-violence-after-covid-19-emergency-period-75-kb>; Ministry of Social Affairs (2020), 'Sotsiaalministeeriumi juhised kohalikule omavalitsusele ja teenuseosutajatele sotsiaaltöö ja lastekaitsetöö korraldamisel eriolukorra järgselt' ('Guidelines for local government and service providers in organizing social work and child protection after the emergency situation'), available in Estonian at: https://www.sotsiaalkindlustusamet.ee/sites/default/files/content-editors/COVID_eriolukorra_materjalid/kov_ja_teenuseosutajate_juhised_19_mai_2020.pdf.

75 European Women's Lobby (2020), 'Women must not pay the price for COVID-19! Putting equality between women and men at the heart of the response to COVID-19 across Europe', available at: https://www.womenlobby.org/IMG/pdf/ewl_policy_brief_on_covid-19_impact_on_women_and_girls-2.pdf.

76 EIGE (2020), Ex-ante publicity notice for procurement (€15 000.01- €60 000.00) Study on the implications of COVID-19 for women victims of intimate partner violence, available at: <https://eige.europa.eu/procurement/eige-2020-oper-09>.

77 IASC (2020), *Identifying & Mitigating Gender-based Violence Risks within the COVID-19 Response*, available at: <https://www.icvanetwork.org/system/files/versions/Interagency%20GBV%20risk%20mitigation%20and%20Covid%20tipsheet.pdf>.

78 European Commission (2020), A Union of Equality: Gender Equality Strategy 2020-2025, p. 5.

79 Norwegian expert's flash report, 'COVID-19 and sex discrimination issues in Norway', 22 July 2020, available at: <https://www.equalitylaw.eu/downloads/5198-norway-covid-19-and-sex-discrimination-issues-in-norway-80-kb>.

80 See Norwegian Centre for Violence and Traumatic Stress Studies (2020) 'Shelters and Covid-19, survey results from April 2020', available at: <https://rvtsnord.no/wp-content/uploads/2020/05/krisesentre-og-covid-19.pdf>.

fight the virus have impacted victims, shelters have overall adapted to the crisis and have been able to continue to provide their services.⁸¹ It also highlighted the importance that these services play especially during crises, in particular due to their specialised experience handling crisis situations.⁸²

Beyond the above practical measures, long-term steps should be taken both nationally and at the EU level, in order to address the long-term effects of GBV during the current crisis and to ensure effective responses to prevent a similar pandemic of GBV during future crises. One important step would be the adoption of EU-wide legislative measures on GBV. Although the letter of intent accompanying the Commission President's State of the Union address in May 2020 outlined the intention to adopt a legislative proposal on specific forms of gender-based violence,⁸³ what is needed is a comprehensive legal instrument on GBV at EU level, to ensure uniform definitions of the different types of violence at issue, equal protection across all Member States and a harmonised response to the threat of violence during future crises. Moreover, GBV should be considered and addressed in all general policy adopted during the crisis, including policies aimed at mitigating the economic effects of the crisis. Long-term plans to address the effects of the crisis in respect to GBV should be adopted. Those should include general measures to ensure women's economic independence (e.g. through paid maternity and care leave, support for childcare and other unpaid care, social security, etc.), access to employment and education, and good physical and mental health.⁸⁴ Equally, additional resources should be allocated to address GBV in response to the crisis. This should take into account the increased need for shelter places, staff, financial help for victims and other resources, as well as the additional need for specialised and additional services for certain groups that are particularly vulnerable. Finally, crisis response plans that include GBV as a key concern should be adopted to prevent another devastating increase in violence against women such as the one being witnessed during the current crisis.

3 Gendered impacts on employment and work-life balance

Job loss and horizontal sex segregation in the labour market

Two main factors determine which sectors of the economy are most likely to experience job losses⁸⁵ during this pandemic: 1) the extent to which sectors are affected by stay-at-home orders (e.g. the so-called key professions are much less affected, whereas sectors such as tourism and hospitality are deeply affected); and 2) the extent to which the nature of the jobs allow for teleworking.⁸⁶ US data suggests that women are more likely to suffer job loss on both these counts.⁸⁷ Alon *et al.* write that while past downturns, such as the financial crisis of 2008, resulted in more job losses for men, because industries such as manufacturing and construction were heavily affected, this crisis is having a high impact on

81 See the Norwegian expert's flash report, 'COVID-19 and sex discrimination issues in Norway', 22 July 2020.

82 See the Norwegian expert's flash report, 'COVID-19 and sex discrimination issues in Norway', 22 July 2020.

83 European Commission (2020) *State of the Union 2020, Letter of Intent to President David Maria Sassoli and to Chancellor Angela Merkel*, available at: https://ec.europa.eu/info/sites/info/files/state_of_the_union_2020_letter_of_intent_en.pdf, p. 6.

84 *Opinio Juris* (2020), *Gender Based Violence during the COVID-19 Pandemic and economic, social and cultural rights*, available at: <https://opiniojuris.org/2020/04/23/gender-based-violence-during-the-covid-19-pandemic-and-economic-social-and-cultural-rights/>.

85 The European Commission has taken the initiative to provide Member States with temporary support to mitigate unemployment risks in an emergency (SURE), to help protect jobs and prevent job loss. See: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/sure_en.

86 Alon, T., Doepke, M., Olmstead-Rumsey, J., Tertilt, M. (2020), *The Impact of COVID-19 on Gender Equality*, National Bureau of Economic Research, available at: https://www.genderportal.eu/sites/default/files/resource_pool/w26947.pdf, p. 7.

87 Alon, T., Doepke, M., Olmstead-Rumsey, J., Tertilt, M. (2020), *The Impact of COVID-19 on Gender Equality*, National Bureau of Economic Research, available at: https://www.genderportal.eu/sites/default/files/resource_pool/w26947.pdf, p. 10.

service jobs in which more women work, such as restaurants and hospitality.⁸⁸ Evidence from Spain⁸⁹ and Croatia⁹⁰ suggests that the picture in Europe is similar: job losses tend to be larger for women.⁹¹

That this crisis impacts women's employment more than men's is largely due to horizontal sex segregation in the labour market. Briefly put, this refers to 'the concentration of men and women in different kinds of jobs.'⁹² This type of segregation has deep historical roots – dating back to the emergence of industrial capitalism⁹³ – and is caused by the material and ideological separation between productive (paid) activities and reproductive (unpaid) activities. This separation is deeply gendered and raced, with women and racialised 'others' assigned to do unpaid reproductive work and men to work as breadwinners. As Joanne Conaghan has remarked: 'This mindset fosters a tendency to view care work as not proper work at all'.⁹⁴ As a result, care work is paid less when it is performed for a wage.⁹⁵

The ILO acknowledges that the pandemic is unfolding against a background of deeply entrenched gender inequalities in the labour market, and that as a result women's jobs are relatively more at risk than men's.⁹⁶ Therefore, the ILO has stated that gender equality must be at the core of both the short-term emergency efforts, and the longer-term employment recovery efforts.⁹⁷ An ILO policy brief indicates 'four policy priorities for a gender-responsive recovery: prevent women from losing their jobs; avoid premature fiscal consolidation; invest in care; and focus on gender-responsive employment policies.'⁹⁸ The brief emphasises that employment policies need to disrupt horizontal sex segregation to improve women's employment, and that policies need to continue to support sectors with predominantly female workers.⁹⁹ Together with the OECD and UN Women,¹⁰⁰ the ILO also calls for the prioritization of equal pay in COVID-19 recovery policies.¹⁰¹ Horizontal sex segregation has also long been on the agenda of EU lawmakers and policymakers. The current GES briefly mentions horizontal segregation,¹⁰² but the 2010-2015 strategy ('Strategy for equality between women and men'), was more explicit on this point.¹⁰³ The Council's European Pact for Gender Equality (2011-2020) also called for action to combat gender segregation in the labour market.¹⁰⁴ This pandemic could and should provide the momentum to address the issue again with renewed force.

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- 88 Alon, T., Doepke, M., Olmstead-Rumsey, J., Tertilt, M. (2020), *The Impact of COVID-19 on Gender Equality*, National Bureau of Economic Research, available at: https://www.genderportal.eu/sites/default/files/resource_pool/w26947.pdf, p. 1.
- 89 Farré, L., Fawaz, Y., González, L., and Graves, J. (2020), *How the Covid-19 lockdown affected gender inequality in paid and unpaid work in Spain*, IZA Institute of Labour Economics, available at: <http://ftp.iza.org/dp13434.pdf>, p. 1.
- 90 Flash report by Croatian expert, 'Covid-19: preliminary indications of increase of unemployment of women', 8 July 2020, available at: <https://www.equalitylaw.eu/downloads/5183-croatia-covid-19-preliminary-indications-of-increase-of-unemployment-of-women-85-kb>.
- 91 See also Papadimitriou, E., Blaskó, Zs. (2020), *Economic sectors at risk due to COVID19 disruptions: will men and women in the EU be affected similarly?*, available at: https://publications.jrc.ec.europa.eu/repository/bitstream/JRC121551/women_in_high_risk_sectors_1.pdf.
- 92 EurWORK (2017), *Segregation*, available at: <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/segregation>.
- 93 Conaghan, J. (2018), 'Gender and the Labour of Law', in Collins, H., Lester, G. and Mantouvalou, V. (2018), *Philosophical Foundations of Labour Law*, Oxford University Press.
- 94 Conaghan, J. (2020), *COVID-19 and inequalities at work: a gender lens*, available at: <https://futuresofwork.co.uk/2020/05/07/covid-19-and-inequalities-at-work-a-gender-lens/>.
- 95 Conaghan, J. (2020), *COVID-19 and inequalities at work: a gender lens*.
- 96 ILO (2020), *A gender-responsive employment recovery: Building back fairer*, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_751785.pdf.
- 97 ILO (2020), *A gender-responsive employment recovery: Building back fairer*.
- 98 ILO (2020), *A gender-responsive employment recovery: Building back fairer*, p. 1.
- 99 ILO (2020), *A gender-responsive employment recovery: Building back fairer*, pp. 9 and 13.
- 100 See the Equal Pay International Coalition, available at: <https://www.equalpayinternationalcoalition.org>.
- 101 ILO (2020), *Prioritize pay equity in COVID-19 recovery*, available at: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_755894/lang-en/index.htm.
- 102 European Commission (2020), *A Union of Equality: Gender Equality Strategy 2020-2025*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN>, pp. 9 and 10.
- 103 European Commission (2010), *Strategy for equality between women and men 2010-2015*, available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0491:FIN:en:PDF>, p. 6.
- 104 Council conclusions of 7 March 2011, OJ 2011, C155/02.

Care workers and self-employed workers

Across the EU, according to statistics from EIGE, women make up 76 % of care workers, including workers in healthcare and social care.¹⁰⁵ More specifically, EIGE reports that women make up: 93 % of child care workers and teachers' aides; 86 % of personal care workers in health services; and 95 % of domestic cleaners and helpers.¹⁰⁶ Moreover, these sectors are also highly racialised. In Britain, for example, 'Pakistani, Indian and Black African men are respectively 90 %, 150 % and 310 % more likely to work in healthcare than white British men.'¹⁰⁷ In northern, southern and western Europe, more than half of domestic workers are migrants.¹⁰⁸

Healthcare workers are obviously exposed to huge health risks during the pandemic. Healthcare workers are approximately three times more likely to get infected with the COVID-19 virus,¹⁰⁹ and also suffer from high levels anxiety and depression, especially female nurses.¹¹⁰ Moreover, a large proportion of care workers are in precarious jobs. It is estimated, for example, that 70 % of domestic work is performed under informal arrangements, by undeclared workers.¹¹¹ Domestic workers are at particular risk of losing their livelihoods during the pandemic,¹¹² and many European Governments have failed to give guidance to employers or to devise specific measures to support this group of workers.¹¹³ Spain is an exception, where the Government instituted a specific subsidy for domestic workers who are registered in the social security system.¹¹⁴ In the Netherlands, because of a lack of Government action, the Federation of Dutch Trade Unions started a crowdfunding action to support migrant domestic workers.¹¹⁵

The OECD has reported that 'more than a third of OECD and partner economies have expanded the coverage of unemployment benefits, to for example self-employed workers.'¹¹⁶ The report emphasises the potential of the pandemic to generate positive change, stating that 'many countries were already exploring how to shore up access to out-of-work benefits for non-standard workers before the crisis, and many have done so on a temporary basis in response to the crisis.'¹¹⁷ In Ireland for example, self-employed persons and persons in atypical employment relationships qualified to receive unemployment payments if they had lost their income due the pandemic.¹¹⁸ However, other data available shows more worrying trends. In many European countries, self-employed workers fell through the cracks when Governments devised social and economic policies to cushion the economic impact of the pandemic. The head of the Dutch Bureau for Economic Policy Analysis, for example, has stated that in the Netherlands, the

105 EIGE (2020), *COVID-19 and gender equality: Frontline Workers*, available at: <https://eige.europa.eu/covid-19-and-gender-equality/frontline-workers>.

106 EIGE (2020), *COVID-19 and gender equality: Frontline Workers*.

107 Guardian (2020), *British BAME Covid-19 death rate 'more than twice that of whites'*, 1 May 2020, available at: <https://www.theguardian.com/world/2020/may/01/british-bame-covid-19-death-rate-more-than-twice-that-of-whites>.

108 ILO (2015), *Migrant Domestic Workers Across the World: global and regional estimates*, p. 4, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/briefingnote/wcms_490162.pdf.

109 Nguyen, L.H. et al. (2020), 'Risk of COVID-19 among front-line health-care workers and the general community: a prospective cohort study', *The Lancet Public Health*, available at: <https://www.sciencedirect.com/science/article/pii/S246826672030164X>.

110 Pappa, et al. (2020), 'Prevalence of depression, anxiety, and insomnia among healthcare workers during the COVID-19 pandemic: A systematic review and meta-analysis', *Brain, Behavior and Immunity* 2020, pp. 901-907, at p. 906.

111 International Domestic Workers Federation (2020) *The impacts of COVID-19 on domestic workers and policy responses*, available at: https://idwfed.org/en/resources/idwf-policy-brief-the-impacts-of-covid-19-on-domestic-workers-and-policy-responses/@display-file/attachment_1, p. 5.

112 International Domestic Workers Federation (2020) *The impacts of COVID-19 on domestic workers and policy responses*, p. 5.

113 Pavlou, V. (2020), 'Whose equality? Paid domestic work and EU gender equality law', *European Equality Law Review*, 2020[1].

114 See Flash report by Spanish expert, 'Gender equality sensitive COVID-19 measures', 20 July 2020, available at: <https://www.equalitylaw.eu/downloads/5190-spain-gender-equality-sensitive-covid-19-measures-80-kb>; Royal Decree 11/2020, of 31 March 2020, that adopts urgent complementary measures in the social and economic field to face the Covid-19, <https://www.boe.es/buscar/act.php?id=BOE-A-2020-4208&p=20200404&tn=2>.

115 FNV (2020), 'Help onze huishoudelijk werkers!' (Help our domestic workers), 25 April 2020, available in Dutch at: <https://www.fnv.nl/nieuwsbericht/algemeen-nieuws/2020/04/help-onze-huishoudelijk-werkers>.

116 OECD (2020), *Tax Policy Reforms 2020*, available at: <https://www.oecd-ilibrary.org/docserver/7af51916-en.pdf?expires=1600245195&id=id&accname=guest&checksum=3F0AF31911F384753A10918CD94C724E>, p. 120.

117 OECD (2020), *Tax Policy Reforms 2020*, available at: <https://www.oecd-ilibrary.org/docserver/7af51916-en.pdf?expires=1600245195&id=id&accname=guest&checksum=3F0AF31911F384753A10918CD94C724E>, p. 120.

118 See flash report by the Irish expert, 'Covid-19 and matters of gender equality' 8 July 2020, available at: <https://www.equalitylaw.eu/downloads/5184-ireland-covid-19-and-matters-of-gender-equality-79-kb>.

income support scheme mostly benefits people with a permanent contract.¹¹⁹ The Government of Czechia adopted legislation to compensate with a caring benefit, parents who lost income because of the order to stay at home and who had to take care of children.¹²⁰ Self-employed persons were initially excluded from this benefit.¹²¹ In the end, large groups of care workers, self-employed workers and workers in the gig economy are faced with a dangerous choice in this pandemic: continue working and risk getting ill or stop working and face financial ruin.¹²²

Working from home

Teleworking, or working from home, is one striking phenomenon that has emerged from the pandemic and is another example of how the division between public and private life has become blurred. From a gender equality perspective, teleworking has a clear advantage, namely that it allows both men and women to be more flexible in combining work and care tasks.¹²³

Before the pandemic, teleworking was equally rare for men and women. In the EU, it was on average around 5 % for both men and women, with significant variations across the Member States.¹²⁴ This figure has now risen spectacularly. Since the start of the pandemic, according to Eurofound statistics, around 39 % of workers – 41 % women and 37 % men – report that they have started to work from home.¹²⁵ Considerable geographic variations continue to persist, however, with the highest proportions of teleworkers in the Benelux and Nordic countries.¹²⁶ Workers with tertiary education are much more likely to telework than workers with primary or secondary education.¹²⁷ Furthermore, there were also significant variations per type of household: 28 % of single parents, 36 % of parent couples and 43 % of people without dependent children reported working from home.¹²⁸ So while the numbers do not immediately show large gender inequality, they do show that the opportunities to telework and thus also the benefits that it brings are unevenly distributed. More vulnerable people on the labour market – single parents (85 % of whom are estimated to be women)¹²⁹ and less-educated people – are much less likely to profit from the advantages of teleworking. A Eurofound report from August 2020 found that ‘the large expansion of telework since the COVID-19 outbreak has been strongly skewed towards high-paid white-collar employment.’¹³⁰

Regulations around telework vary considerably across Europe. Currently there is no European ‘right to telework’. Article 9 of the Work-Life Balance Directive provides a right to request flexible working arrangements, which includes telework.¹³¹ The European Framework Agreement on Telework, which dates

119 NOS (2020), *2021 (onder voorbehoud): koopkracht omhoog, economische groei van 3,5% (2021 (subject to change): purchasing power up, economic growth of 3.5%)*, available at: <https://nos.nl/collectie/13848/artikel/2348399-cpb-werkloosheid-stijgt-minder-hard-steun-vergroot-ongelijkheid>.

120 See flash report by the Czech expert, ‘Covid-19 and gender – social security’, 18 September 2020, available at: <https://www.equalitylaw.eu/downloads/5252-czechia-covid-19-and-gender-social-security-87-kb>.

121 See flash report by the Czech expert, ‘Covid-19 and gender – social security’, 18 September 2020.

122 The Fairwork Project (2020), *The Gig Economy and Covid-19: Looking Ahead*, available at: <https://fair.work/wp-content/uploads/sites/97/2020/09/COVID-19-Report-September-2020.pdf>, p. 12.

123 For the advantages and disadvantages of telework, see e.g. OECD (2020), *Productivity gains from teleworking in the post COVID-19 era: How can public policies make it happen?*, available at: <https://www.oecd.org/coronavirus/policy-responses/productivity-gains-from-teleworking-in-the-post-covid-19-era-a5d52e99/>.

124 Eurostat (2018), *Working from home in the EU*, available at: <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180620-1>.

125 Eurofound (2020), *Covid-19: Policy responses across Europe*, available at: <https://www.eurofound.europa.eu/publications/report/2020/covid-19-policy-responses-across-europe>, p. 32.

126 Eurofound (2020), *Covid-19: Policy responses across Europe*, p. 32.

127 Eurofound (2020), *Covid-19: Policy responses across Europe*, p. 33.

128 Eurofound (2020), *Covid-19: Policy responses across Europe*, p. 33.

129 Blasko, Z., Papadimitriou, E. and Manca, A. (2020), *How will the COVID-19 crisis affect existing gender divides in Europe?*, Publications Office of the European Union, available at: <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/how-will-covid-19-crisis-affect-existing-gender-divides-europe>, p. 10.

130 Eurofound (2020) *Teleworkability and the COVID-19 crisis a new digital divide*, available at: <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc121193.pdf>, p. 2.

131 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

from 2002, stipulates the voluntary nature of teleworking, both for the employer and the employee.¹³² In response to the pandemic, some European countries, such as Italy,¹³³ have adopted legislation that provides workers with the right to work remotely – provided that the nature of their jobs allows for this.

It is essential to create a sound legal basis for teleworking across Europe. The pandemic has shown that telework is possible for a much larger part of the workforce than previously considered, namely for around 37 %.¹³⁴ Telework is here to stay,¹³⁵ but the current lack of a clear legal framework is creating uncertainty in several countries. In the Netherlands, for example, the Dutch Government urgently requested people to work from home but did not provide a legal right to do so. In a recent court case, an employee demanded the right to continue working from home, even after the coronavirus measures had become less strict.¹³⁶ Her employer wanted her back at work, and the court ruled in the employer's favour.¹³⁷ The OECD also emphasises the importance of creating, at least for some hours per week, a 'right to telework'.¹³⁸ Strengthening the right to telework would certainly advance the objectives of the Work-Life Balance Directive, at least for workers with care responsibilities.

The gender gap in unpaid care work and work-life balance

The pandemic has undoubtedly brought an increase in both paid and unpaid care work. This generates opportunities, because work-life balance appears to have become a more explicit issue. Societal expectations about gender roles seem to be questioned more. Fathers working from home also get the opportunity to be more involved, and in different-sex households where the mother works out of the house and the father is teleworking (a not insignificant group, due to the amount of women who work in healthcare), there might be role-reversal.¹³⁹

To what extent the increase in unpaid care work resulting from the closing of daycare centres and schools falls on women's shoulders is likely to vary across European countries. Many studies document that women have disproportionately picked up the extra childcare and homeschooling tasks.¹⁴⁰ However, this depends on the type of household. There is evidence from Spain, for example, that in different-sex couples with children, both fathers and mothers increased the time spent on children and household chores, in such a manner that the unequal situation from before the lockdown continued but did not worsen.¹⁴¹ Data from the US¹⁴² and Germany¹⁴³ suggests that women had to cut back more hours of

132 EU (2005), *Summaries of EU Legislation: Teleworking*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISUM%3Ac10131>; for an analysis, see Eurofound (2010), *Telework in the European Union*, available at: <https://www.eurofound.europa.eu/publications/report/2010/telework-in-the-european-union>.

133 Article 39 of Decree No. 18/2020, see flash report by Italian expert, 'A first intervention aimed at providing economic support to families to address the increasing need of care due to lockdown measures implemented to tackle the spread of COVID-19', 7 April 2020, available at: <https://www.equalitylaw.eu/downloads/5109-italy-a-first-intervention-aimed-at-providing-economic-support-to-families-to-address-the-increasing-need-of-care-due-to-lockdown-measures-implemented-to-tackle-the-spread-of-covid-19-92-kb>.

134 Eurofound (2020), *Teleworkability and the COVID-19 crisis a new digital divide*.

135 Eurofound (2020), *Teleworkability and the COVID-19 crisis a new digital divide*.

136 Dutch Civil Court, Judgement of June 2020, ECLI:NL:RBGEL:2020:2954, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBGEL:2020:2954>.

137 See flash report by Dutch expert, 'Work-life balance during Covid-19', 22 July 2020, available at: <https://www.equalitylaw.eu/downloads/5191-netherlands-work-life-balance-during-covid-19-48-kb>.

138 OECD (2020), *Productivity gains from teleworking in the post COVID-19 era: How can public policies make it happen?*, available at: <https://www.oecd.org/coronavirus/policy-responses/productivity-gains-from-teleworking-in-the-post-covid-19-era-a5d52e99/>, pp. 15-16.

139 Farré, L., Fawaz, Y., González, L., and Graves, J. (2020), *How the Covid-19 lockdown affected gender inequality in paid and unpaid work in Spain*, IZA Institute of Labor Economics, available at: <http://ftp.iza.org/dp13434.pdf>, pp. 6-7.

140 Farré, L., Fawaz, Y., González, L. and Graves, J. (2020), *How the Covid-19 lockdown affected gender inequality in paid and unpaid work in Spain*, p. 5.

141 Farré, L., Fawaz, Y., González, L. and Graves, J. (2020), *How the Covid-19 lockdown affected gender inequality in paid and unpaid work in Spain*, p. 18.

142 New York Times (2020), *Nearly Half of Men Say They Do Most of the Home Schooling. 3 Percent of Women Agree*, 6 May 2020, available at: <https://www.nytimes.com/2020/05/06/upshot/pandemic-chores-homeschooling-gender.html>.

143 Czymara, C.S., Langenkamp, A. and Cano, T. (2020), 'Cause for concerns: gender inequality in experiencing the COVID-19 lockdown in Germany', *European Societies*, p. 11.

paid work during the lockdown than men. The *New York Times* reported that ‘in couples with both people working remotely full time, 28 percent of women and 19 percent of men said they were working less than usual.’¹⁴⁴ What is more, during the lockdown phase of the pandemic, when children were at home, working mothers experienced it differently than working fathers. Research by the University of Valencia has ‘revealed the higher levels of stress and anxiety of women who have teleworked with dependent children during lockdown’.¹⁴⁵ German research has revealed that ‘women are more worried about childcare work while men about paid work’.¹⁴⁶ The researchers warn that this may lead to a widening of the gender pay gap in the long term, during the recovery process.¹⁴⁷

As with all aspects of this pandemic, Governments’ responses to the difficulties of combining paid and unpaid care work differ widely.¹⁴⁸ Italy provided an extended period of partially paid parental leave and subsidised baby-sitting services by means of legislation.¹⁴⁹ Latvia also extended the period of paid parental allowance.¹⁵⁰ Belgium introduced ‘corona’ parental leave by means of a Royal Decree.¹⁵¹ Greece enacted a range of measures concerning pregnancy and family related leave, including accommodation of working hours, due to COVID-19.¹⁵² Several national experts of the European Equality Law Network reported, however, that measures aimed at ensuring gender equality were only adopted in second instance. In Greece, for example, mothers on maternity leave whose leave expired were initially not covered by the furlough allowance, although this was later rectified.¹⁵³ In Ireland, people who had completed maternity, adoption or any related leave were initially not entitled to the pandemic unemployment payment, as they were not in employment in the weeks leading up to the state of emergency. This was corrected as soon as the issue came to light.¹⁵⁴ As will be further discussed in the conclusion to this article, mainstreaming a gender perspective should happen from the very start of policymaking.

Looking forward

Where to go from here? A sounder legal basis for teleworking would be one important step forward both for the duration of the pandemic and afterwards. Teleworking is currently crucial for a large section of the working population. Teleworking mostly benefits higher educated people, however, and it is notable that few single parents (who are overwhelmingly women) are able to telework. Therefore, it is important to encourage teleworking opportunities for a wider group of workers, in particular those with a lower level of education.

144 New York Times (2020), ‘Nearly Half of Men Say They Do Most of the Home Schooling. 3 Percent of Women Agree’, 6 May 2020.

145 See flash report by Spanish expert, ‘Gender equality sensitive COVID-19 measures’, 20 July 2020, available at: <https://www.equalitylaw.eu/downloads/5190-spain-gender-equality-sensitive-covid-19-measures-80-kb>; WomenNow (2020), *Pantallas, deberes y madrugones: así es la conciliación real para las mujeres durante el confinamiento* (Screens, homework and early rises: this is the real conciliation for women during confinement), available at: <https://www.womennow.es/es/noticia/estudio-conciliacion-teletrabajo-mujeres-durante-el-confinamiento/>.

146 Czymara, C.S., Langenkamp, A. and Cano, T. (2020), ‘Cause for concerns: gender inequality in experiencing the COVID-19 lockdown in Germany’, *European Societies*, p. 12.

147 Czymara, C.S., Langenkamp, A. and Cano, T. (2020), ‘Cause for concerns: gender inequality in experiencing the COVID-19 lockdown in Germany’, *European Societies*.

148 See also COFACE (2020), *Resources on Work-Life Balance and Gender Equality during COVID-19*, available at: <http://www.coface-eu.org/work-life-balance/resources-on-work-life-balance-and-gender-equality-during-covid-19/>.

149 See flash report by Italian expert, ‘The recent “Re-launching” Decree strengthens the support to families to address the increasing need of care due to lockdown measures implemented to tackle the spread of COVID-19’, 16 June 2020, available at: <https://www.equalitylaw.eu/downloads/5157-italy-the-recent-decree-re-launching-strengthens-the-support-to-families-to-address-the-increasing-need-of-care-due-to-lockdown-measures-implemented-to-tackle-the-spread-of-covid-19-90-kb>.

150 See flash report by Latvian expert, ‘Impact of COVID-19 measures on gender equality in Latvia’, 6 July 2020, available at: <https://www.equalitylaw.eu/downloads/5176-latvia-impact-of-covid-19-measures-on-gender-equality-in-latvia-130-kb>.

151 See flash report by Belgian expert, ‘Parental leave during the COVID-19 pandemic’, 30 June 2020, available at: <https://www.equalitylaw.eu/downloads/5167-belgium-parental-leave-during-the-covid-19-pandemic-76-kb>.

152 See flash report by Greece expert, ‘Pregnancy and family related leave due to COVID-19’, 13 July 2020, available at: <https://www.equalitylaw.eu/downloads/5186-greece-pregnancy-and-family-related-leave-due-to-covid-19-127-kb>.

153 Article 34 Act 4690/2020, see flash report by Greece expert, ‘Pregnancy and family related leave due to COVID-19’, 13 July 2020.

154 See flash report by Irish expert, ‘COVID-19 and matters of gender equality’ 8 July 2020, available at: <https://www.equalitylaw.eu/downloads/5184-ireland-covid-19-and-matters-of-gender-equality-79-kb>.

It is also important to take measures that support the most vulnerable in the labour market, such as domestic workers, the self-employed and workers in the gig economy. Based on reports from the national gender experts of the European Equality Law Network,¹⁵⁵ it appears that some Governments have taken a partial gender perspective on the pandemic, while adopting wide-ranging social and economic measures. Such a partial gender perspective is often based on the idea that gender is only of limited relevance to the labour market, which is based on a misconception. Gender is not marginal to the labour market and nor is race, as this pandemic has once again shown. Most of the care workers who are now revealed to be ‘essential’ are women. In fact, the labour market is deeply gendered and, moving forward, all social and economic policies should take this into account.

4 Gender balance in decision making

This section considers the third key issue that the Commission identified in the GES as an area of action – women in decision making. The strategy states that there are still far too few women in leading positions, be that in politics or Government bodies, at the highest courts, on company boards or otherwise.¹⁵⁶ Yet, many studies highlight that more inclusive and diverse leadership is beneficial in: solving current societal challenges; bringing forward new ideas and innovative approaches; ensuring a well-functioning democracy; contributing to more effective policy making;¹⁵⁷ improving decision making and corporate governance; and for driving economic growth.¹⁵⁸ What short-term and longer-term impacts can be discerned and expected from the COVID-19 crisis on women’s role in decision making and what legal and policy responses can be identified and would be advisable?

How the pandemic is impacting women in leadership and decision making

The first observation to make here is that the negative effects of the crisis on the employment of women and the work-life balance as presented in the previous section will also have long-term consequences for women’s career development and promotion opportunities. As discussed above, the pandemic has put women at a higher risk of unemployment than men, especially because of the sectoral job segregation along gender lines and women’s over-representation in precarious and flexible jobs. Adding to this the fact that women still carry a greater burden of unpaid care work,¹⁵⁹ it is without doubt that this will lead to a setback in women’s professional development. One illustration of this is that female scientists and, in particular, scientists with young children, experienced a substantial decline in time devoted to research,¹⁶⁰ which will impact on women’s advancement to leadership positions in academia.

155 For example, the Spanish expert in this issue of the *Equality Law Review* writes: ‘Whereas the Government has taken a wide range of social and labour related measures (the so-called social shield), the gender perspective is limited to the conciliation measures for adapting and reducing worktime, the preference for tele-work and the extraordinary subsidy for domestic workers.’

156 European Commission (2020), *A Union of Equality: Gender Equality Strategy 2020-2025*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN>, p. 13; EIGE (2019), *Gender Statistics Database, Women and men in decision-making*, see infographic available at: <https://eige.europa.eu/gender-statistics/dgs/browse/wmidm>.

157 As referenced in footnote 66 of the Strategy: EIGE (2019), *Gender Statistics Database, National parliaments: Single/lower house*, see infographic available at: https://eige.europa.eu/gender-statistics/dgs/indicator/wmidm_pol_parl_wmid_natparl.

158 As referenced in footnote 67 of the Strategy: ILO (2019), *The business case for change*, available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_700953.pdf; McKinsey & Company (2016), *Women Matter 2016 Reinventing the workplace to unlock the potential of gender diversity*, available at: <https://www.mckinsey.com/~/media/mckinsey/featured%20insights/women%20matter/reinventing%20the%20workplace%20for%20greater%20gender%20diversity/women-matter-2016-reinventing-the-workplace-to-unlock-the-potential-of-gender-diversity.ashx>; Catalyst (2020), *Why Diversity and Inclusion Matter: Quick Take*, available at: <https://www.catalyst.org/research/why-diversity-and-inclusion-matter/>; Anand, A. (2016), *Gender-Balanced Teams Linked to Better Business Performance: A Sodexo Study*.

159 ILO (2020), *A gender-responsive employment recovery: Building back fairer*, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_751785.pdf, p. 2.

160 See e.g. Myers, K.R., Tham, W.Y., Yin, Y. et al. (2020), ‘Unequal effects of the COVID-19 pandemic on scientists’, *Nature Human Behaviour*, 4, pp. 880-883.

A second area of concern is the extent to which women have been and are involved – at all – in formulating policy responses to the crisis at the political leadership level and beyond. The crisis has confirmed that women are effective leaders: countries in the EU and across the globe that are led by women have demonstrated fast and effective responses to the crisis.¹⁶¹ Their leadership styles have also been characterised as being ‘more collective than individual, more collaborative than competitive and more coaching than commanding.’¹⁶² However, worldwide, women are still starkly under-represented in political leadership positions and they are under-represented in politics and public administration more generally across the EU.¹⁶³ The only countries in the EU that currently have a female Head of Government are Germany, Denmark, Finland and Slovakia. The share of women in national Parliaments in EU countries averages a mere 32.7 %.¹⁶⁴ Parliaments in Sweden and Finland are the only ones that have more than 45 % women representatives, while in Belgium, Spain, France and Portugal, women make up 40 to 45 % of the representatives.¹⁶⁵

This under-representation of women is also reflected in emergency response teams and task forces that have been set up by states and international organisations to deal with the pandemic. While there is a high need for more systematic research in this respect, the data that is available reveals serious problems of women’s under-representation. A survey of 30 countries conducted by CARE found that the majority of such national-level committees are not gender balanced, 74 % having even less than one-third female membership. On average, women made up 24 % of the committees.¹⁶⁶ Czechia provides an interesting illustration of the problem at hand here. The National Economic Council that was set up to evaluate the economic impacts of the crisis and to assist the Government consists of 14 men and only 1 woman. The Czech Committee for Balanced Representation of Women and Men in Politics and Decision-making Positions urged the Government to strive for equal representation of women and men and drafted a list of potential female candidates to be appointed in the National Economic Council.¹⁶⁷ The COVID-19 International Health Regulations Emergency Committee set up by the World Health Organization (WHO) also comprises only 11 women out of 36 members and advisors.¹⁶⁸ The European Commission’s Advisory Panel on COVID-19 comprises only two women out of seven members.¹⁶⁹ Finland is one of the better performing countries, providing an example of good practice. The Government COVID-19 Coordination Group has 7 female members out of 17,¹⁷⁰ and a high-profile group that was established for the

- 161 UN Women (2020), *COVID-19 and Women’s leadership: from an effective response to building back better*, available at: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/policy-brief-covid-19-and-womens-leadership-en.pdf?la=en&vs=409>, p. 3; Chamorro-Premuzic, T. and Wittenberg-Cox, A. (2020), ‘Will the pandemic reshape notions of female leadership?’ *Harvard Business Review*, available at: <https://hbr.org/2020/06/will-the-pandemic-reshape-notions-of-female-leadership>; Some authors also claim that women leadership responses have been more effective, see e.g. Garikipati, S. and Kambhampati, U. (2020), ‘Leading the fight against the pandemic: does gender really matter?’ available at SSRN: <https://ssrn.com/abstract=3617953>; but other authors contest this: Aldrich A.S. and Lotito, N.J. (2020), ‘Pandemic Performance: Women Leaders in the Covid-19 Crisis’, *Politics & Gender* (forthcoming).
- 162 UN Women (2020), *COVID-19 and Women’s leadership: from an effective response to building back better*, available at: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/policy-brief-covid-19-and-womens-leadership-en.pdf?la=en&vs=409>, p. 3; with reference to Zednik, R. (2020) ‘A Shaken World Demands Balanced Leadership’, *Medium*, available at: <https://medium.com/@rickzednk/a-shaken-world-demands-balanced-leadership-ef140e658579>; Rees, M. and Chinkin, C. (2020) ‘COVID-19: Our Response Must Match the Male Leaders’ War on the Pandemic’ *WILPF (Women’s International League for Peace and Freedom)*, available at: <https://www.wilpf.org/covid-19-a-response-to-match-the-male-leaders-war-on-the-pandemic/>.
- 163 EIGE (2019), *Gender Statistics Database, Women and men in decision-making*, see infographic available at: <https://eige.europa.eu/gender-statistics/dgs/browse/wmidm>.
- 164 EIGE (2019), *Gender Statistics Database, Women and men in decision-making*, see infographic available at: <https://eige.europa.eu/gender-statistics/dgs/browse/wmidm>.
- 165 See EIGE Database available at: <https://eige.europa.eu/gender-statistics/dgs/browse/wmidm>.
- 166 CARE (2020), *Where are the women? The Conspicuous Absence of Women in COVID-19 Response*, available at: https://insights.careinternational.org.uk/media/k2/attachments/CARE_COVID-19-womens-leadership-report_June-2020.pdf, p. 3.
- 167 Council of Europe (CoE) (2020), *Promoting and protecting women’s rights at national level*, available at: [https://www.coe.int/en/web/genderequality/promoting-and-protecting-women-s-rights#\[%2263001324%22:9\]](https://www.coe.int/en/web/genderequality/promoting-and-protecting-women-s-rights#[%2263001324%22:9]).
- 168 See WHO (2020), *COVID-19 IHR Emergency Committee*, available at: <https://www.who.int/groups/covid-19-ih-emergency-committee>.
- 169 European Commission (2020), *Commission’s advisory panel on COVID-19 (E03719)*, available at: <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3719>.
- 170 Finnish Government (2020), *Prime Minister’s Office appoints Operations Centre to support management of COVID-19 situation*, available at: <https://valtioneuvosto.fi/en/-/10616/valtioneuvoston-kanslia-perusti-operaatiokeskuksen-tukemaan-koronavirustilanteen-johdantamista>.

strengthening of wellbeing and equality in the aftermath of the coronavirus epidemic has a 50-50 gender balance.¹⁷¹ Moreover, the Finnish expert group on the international success of businesses after the COVID-19 crisis has three female members out of a total of seven members.¹⁷²

It is also important to note that it is not only a problem that too few women are included in these response and advisory bodies as such, but also that women's organisations are often excluded from crisis response planning discussions and initiatives. Furthermore, there is a risk of a further deterioration of the level of participation of women in public life, on the one hand because of women's higher care responsibilities and on the other because such organisations risk collapsing due to funding constraints and changing donor priorities.¹⁷³ On top of that, women also appear under-represented as authors of COVID-19-related research papers in many scientific areas, gender biases being identified as an underlying reason for this. This under-representation has also been correlated to the low availability of sex-disaggregated data, which in turn is problematic for dealing effectively with gender inequalities in the responses to the crisis.¹⁷⁴ Another problem concerns the under-representation of women in the media reporting on the COVID-19 crisis.¹⁷⁵ A French survey during the lockdown (March-May 2020) found that the number of women experts in the media fell significantly during the pandemic.¹⁷⁶

The need for participation or, how women's under-representation in decision making is exacerbating inequalities

According to leading feminist academics, 'Full and equal participation requires that everyone has a voice and participation in decision making enables women to voice their needs and challenge gender norms in their community—individually and collectively'¹⁷⁷ and 'To have a voice is to be a citizen'.¹⁷⁸ Consequently, the lack of voice and agency of women because of their under-representation in and exclusion from Government and media responses to the pandemic not only denies women's individual citizenship rights, but also hampers any gendered perspective on the pandemic and the development of sufficiently gender-sensitive approaches to dealing with its consequences, in both the short and longer term. For instance, in order to provide effective responses to the rise in gender-based violence, it is crucial that women's organisations are at the decision-making table, as they have the knowledge and experience of what is needed to tackle this problem. The lack of women's representation thus undercuts an inclusive and effective response to the crisis,¹⁷⁹ while exclusion from male networks and power structures also affect

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- 171 Finnish Government (2020), *High-profile group to look for ways to strengthen wellbeing and equality in the aftermath of coronavirus crisis*, available at: <https://valtioneuvosto.fi/en/-/1271139/korkean-profilin-ryhma-etsii-keinoja-hyvinvoinnin-ja-tasa-arvon-vahvistamiseksi-koronakriisin-jalkihoidossa>.
 - 172 Finnish Government (2020), *New expert group focuses on international success of businesses after COVID-19 crisis*, available at: <https://valtioneuvosto.fi/en/-/1410877/new-expert-group-focuses-on-international-success-of-businesses-after-covid-19-crisis>.
 - 173 UN Women (2020), *UN Women Series: Voices of Women's Organizations on COVID-19*, available at: <https://www2.unwomen.org/-/media/field%20office%20eca/attachments/publications/2020/04/voices%20of%20womens%20organizations%20on%20covid19final.pdf?la=en&vs=2118>, p. 6.
 - 174 Pinho-Gomes, A.C., Peters, S., Thompson, K. et al. (2020), 'Where are the women? Gender inequalities in COVID-19 research authorship', *BMJ Global Health*, 5(7).
 - 175 Guardian (2020), 'Male experts dominate UK news shows during coronavirus crisis', 4 May 2020, available at: <https://www.theguardian.com/tv-and-radio/2020/may/04/male-experts-dominate-uk-news-shows-during-coronavirus-crisis>.
 - 176 Calvez, C. (2020), *Place des femmes dans les medias en temps de crise* (Place of women in the media in times of crisis), available at: <https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2020/09/Rapport-place-des-femmes-dans-les-medias-en-temps-de-crise-.pdf>. See also the survey of Women in Global Health (2020), *Operation 50/50: Women's Perspectives Save Lives*, available at: <https://www.womeningh.org/operation-50-50>.
 - 177 Kaber, N. (2013), *Paid Work, Women's Empowerment, and Inclusive Growth: Transforming the Structures of Constraint*, UN Women, available at: <https://www.unwomen.org/en/digital-library/publications/2013/1/paid-work-womens-empowerment-and-inclusive-growth>; also quoted in World Bank Group (2014), *Voice and Agency. Empowering women and girls for shared prosperity*, available at: <https://openknowledge.worldbank.org/handle/10986/19036>, p. 155.
 - 178 Drèze, J. and Sen, A. (2002), *India: Development and Participation*, New York: Oxford University Press; also quoted in World Bank Group (2014), *Voice and Agency. Empowering women and girls for shared prosperity*, available at: <https://openknowledge.worldbank.org/handle/10986/19036>, p. 155.
 - 179 UN Women (2020), *COVID-19 and Women's leadership: from an effective response to building back better*, <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/policy-brief-covid-19-and-womens-leadership-en.pdf?la=en&vs=409>, p. 4.

women's access to critical information.¹⁸⁰ The aforementioned CARE study found that where women have higher levels of leadership, Governments are more likely to be responding to the crisis in a way that supports gender equality and that in countries that lack a gender-balanced leadership, the effects of the crisis on women and girls could worsen and lead to a loss of gender equality gains.¹⁸¹

Data gathered by the UN Women Committee and the United Nations Development Programme (UNDP) by means of the 'COVID-19 Global Gender Response Tracker' confirms that, so far, gender-sensitive policy responses across the globe are falling short. The data is focused in particular on measures taken in four main policy areas: social protection, labour markets, fiscal and economic policies and measures to address violence against women and girls.¹⁸² The analysis so far of all gender-sensitive measures taken in these areas in Europe, North America, Australia and New Zealand reveals that these amount to 340 measures in total, of which the great majority has concerned violence against women and girls (256), with unpaid care coming in second (63) and women's economic insecurity only being addressed in 21 measures. In these countries, about 340 social protection and labour market measures were also taken in response to the crisis, only 21 % of these were gender-sensitive in the sense of ameliorating women's insecurity or addressing unpaid care. This percentage is substantially lower for the 233 fiscal and economic measures that were taken to help businesses – less than 5 % of these measures were geared towards channelling resources to feminised sectors.¹⁸³ The UN has also set out what measures would need to be taken in the short, medium and long term so as to ensure a gender-sensitive approach to economic recovery.¹⁸⁴

The legal and policy framework

As far back as 1996, the Council of Ministers of the EU adopted a recommendation on the balanced participation of women and men in the decision-making process.¹⁸⁵ Over the past decades, it has also been identified as a specific priority area in Commission and Council documents, such as the Commission's gender equality strategies and the Council conclusions on the European Pact for Gender Equality (2011-2020).¹⁸⁶ In 2015, in its conclusions on 'Equality between women and men in the field of decision-making', the Council called upon the Commission and the Member States, according to their respective competencies, to 'consider a broad range of different measures, legislative and/or non-legislative, voluntary or binding, as well as the exchange of good practice, with a view to improving the gender balance in decision-making bodies in all areas'.¹⁸⁷ In 2017, the Advisory Committee on Equal Opportunities for Women and Men also issued an opinion on gender balance in decision making in politics¹⁸⁸ and identified more specific issues for action. These included training and awareness raising, data collection, the development of gender mainstreaming mechanisms, the encouragement of transparent recruitment, selection and career advancement procedures, a revision of the aforementioned 1996 Recommendation

180 World Bank Group (2020), *Gender dimensions of the COVID-19 pandemic*, available at: <https://openknowledge.worldbank.org/handle/10986/33622>, pp. 13 and 14.

181 CARE (2020), *Where are the women? The Conspicuous Absence of Women in COVID-19 Response*, available at: https://insights.careinternational.org.uk/media/k2/attachments/CARE_COVID-19-womens-leadership-report_June-2020.pdf, p. 4.

182 See the COVID-19 Global Gender Response Tracker, available at: <https://data.undp.org/gendertracker/> and in particular the 'Factsheet: Europe, North America, Australia and New Zealand', Version 1, 28 September 2020.

183 See also Council of Europe (2020), *Promoting and protecting women's rights at national level*, available at: [https://www.coe.int/en/web/genderequality/promoting-and-protecting-women-s-rights#\[%2263001324%22:\[9\]\]](https://www.coe.int/en/web/genderequality/promoting-and-protecting-women-s-rights#[%2263001324%22:[9]]) for an overview of measures taken in Council of Europe Member States to promote and protect women's rights.

184 UN Women (2020), *Addressing the economic fallout of COVID-19: pathways and policy options for a gender-responsive recovery*, available at: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/policy-brief-addressing-the-economic-fallout-of-covid-19-en.pdf?la=en&vs=406>.

185 Council Recommendation of 2 December 1996 on the balanced participation of women and men in the decision-making process (96/694/EC).

186 Council of the European Union (2011), *Council conclusions of 7 March 2011 on European Pact for Gender Equality (2011-2020)*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011XG0525%2801%29>.

187 Council of the European Union (2015), *Council conclusions of 7 December 2015 on Equality between women and men in the field of decision-making*, available at: <https://www.consilium.europa.eu/en/press/press-releases/2015/12/07/epsco-council-conclusions-on-equality-women-men-decision-making/>.

188 Advisory Committee on Equal Opportunities for Women and Men (2017), *Opinion on Gender Balance in Decision making in Politics*, available at: https://ec.europa.eu/info/sites/info/files/final_version_5_december.pdf.

and also the consideration of legislative electoral measures for ensuring equal representation of women and men with effective enforcement measures.

So far, these legislative suggestions have only been partly acted upon and mostly by the Commission, in supporting Member States to achieve gender-balanced representation in politics and public life through financing projects, exchange of good practice, awareness-raising, etc. The introduction of policies in areas such as reconciliation, combating the gender pay gap, violence against women, promoting female entrepreneurship and women in ICT also contribute to creating an enabling environment to promote women's participation in decision-making positions. Furthermore, the current Commission also seeks to lead by example: Von der Leyen is its first female President, there is a gender balanced representation of men (14) and women (13) in the College of Commissioners and it is seeking to reach a 50/50 target for its own administration. The Commission is also doing its utmost to help the Council find a compromise on the proposal the Commission made in 2012 for a directive on the promotion of gender-balanced company boards, which has been stalled ever since in the Council.¹⁸⁹ The Council itself has so far been very reluctant to pass any legislation in the field. Yet, taking the persistently disappointing figures of women's representation into account, it is clear that the political intentions of the Council and the Member States have not been put into practice and the COVID-19 crisis is now also making it painfully visible how this failure negatively impacts on the realisation of much-needed gender-sensitive policy responses.

Where to go from here?

A fundamental question to conclude this section with is then, what to expect for the future and, even more importantly: what is crucial for bringing about such gender-sensitive policy responses? What will be key is not only the adoption of the Commission's proposed directive, as promoted in the GES, and the taking of a variety of effective measures to truly enhance women's participation,¹⁹⁰ but also the effective implementation of the mainstreaming principle. The Trio Presidency Declaration on Gender Equality, issued in July 2020,¹⁹¹ has recognised that the crisis is exacerbating existing inequalities¹⁹² and expressed its commitment to 'strive to make gender equality an integral and fundamental part of social and economic recovery plans and to improve support systems for victims of domestic violence across the EU'. It also calls for 'gender mainstreaming in all fields of action and policies of the EU and the Member States.' While there is thus much political lip service paid to this principle, even within the context of the COVID-19 crisis, at the same time, the lack of gender-sensitive policy responses as identified above shows the failure to apply the principle actively and effectively. There appears thus to be not only ample scope but also a great need to put into practice the toolkit developed by EIGE, which contains a variety of mainstreaming tools, including gender impact assessments, institutional transformation, training, auditing, evaluation and budgeting.¹⁹³ This toolkit offers a springboard to developing an effective mainstreaming approach towards a more gender-proof COVID-19 policy response. The High Level Group on Gender Mainstreaming¹⁹⁴ that is to support the Council and the Commission in implementing this could also contribute to the actual development and application of structural mainstreaming tools.¹⁹⁵

189 Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among directors of companies listed on stock exchanges and related measures – Progress report, 31 May 2017, <https://data.consilium.europa.eu/doc/document/ST-9496-2017-INIT/en/pdf> and Commission Communication, 'Gender balance in business leadership: a contribution to smart, sustainable and inclusive growth', COM(2012)615 final.

190 Cf the Opinion mentioned in fn 185 and UN Women (2020), *UN Women Series: Voices of Women's Organizations on COVID-19*, available at: <https://www2.unwomen.org/-/media/field%20office%20eca/attachments/publications/2020/04/voices%20of%20womens%20organizations%20on%20covid19final.pdf?la=en&vs=2118>.

191 Trio Presidency Declaration on Gender Equality, available at: <https://www.bmfsfj.de/blob/158154/252af172d6d4b456d05743156db36a36/20200706-trio-declaration-data.pdf>.

192 Such recognition is also implied in the Council of the European Union (2020), *Council conclusions on Team Europe Global Response to COVID-19*, available at: <https://www.consilium.europa.eu/media/44347/team-europe-ccs-200608.pdf>.

193 EIGE's Methods and Tools, available at: <https://eige.europa.eu/gender-mainstreaming/methods-tools>.

194 European Commission (2020), *High Level Group on gender mainstreaming*, available at: <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=1240&NewSearch=1&NewSearch=1>.

195 EIGE (2017), *Gender Impact Assessment*, available at: <https://eige.europa.eu/gender-mainstreaming/toolkits/gender-impact-assessment/following-gender-impact-assessment>.

It should also be understood that enhanced participation and representation of women will contribute to better mainstreaming and bringing about gender-sensitive policy responses. The COVID-19 crisis should thus also be taken as a window of opportunity for bringing about positive change in women's participation and representation and to reflect on more effective ways to realise this. Now more than ever, is there a need to adopt the Commission's proposal for a directive on gender-balanced boards, to revise the 1996 Council Recommendation on balanced representation of men and women in decision making and to consider other possible courses of action.

5 General conclusions

During a crisis, addressing inequalities is easily set aside as a 'luxury problem' to be dealt with in times of peace and stability. A sense of urgency is lost, and the focus is diverted to mitigating the direct crisis at hand. The way in which a crisis is framed by dominant stakeholders in society influences how priorities are set and which issues are pushed to the foreground of policy making. Actions that would, under normal circumstances be regarded as exceptional, can be normalised in times of crisis.¹⁹⁶ However, the mapping of the gendered impacts of the COVID-19 crisis in this article has underscored the need for such actions and policy responses to be gender sensitive – for the shorter emergency term, the intermediate recovery term and the longer term, with a view to building a resilient, gender-equal Europe. These impacts have revealed the exacerbation of inequalities, not only between women and men, but also between different groups of women. On the one hand, the crisis has been seen to affect specifically vulnerable groups of (low-skilled) women even more than others, including migrant women, women in flexible and precarious (domestic and self-employed) work and women in specific 'essential' professions and hard-hit service sectors because of gendered job segregation. On the other hand, high-skilled female workers in more secure jobs may potentially benefit from certain developments in the longer run, for example because of the flexibility that telework may offer them. Gender-sensitive policy responses should have an eye for these different impacts and take an intersectional and wider labour market and social justice approach to effectively address these as well as rising inequalities between lower-skilled and higher-skilled women.

However, we have seen that policies adopted by Member States during the emergency and recovery phases have mostly been gender blind, therewith also providing little hope for the third – resilience – phase. Allwood (2020) notes that it becomes difficult to keep gender equality on the policy agenda when different policy areas intersect.¹⁹⁷ The current crisis, which has cut across many different policy areas, seems to have affirmed this observation and demonstrated a clear lack of effective gender mainstreaming at all levels and also of representation of women and women's organisations in the policy and decision-making process. At the EU level, there is not only a Treaty duty of gender mainstreaming EU policy making at the outset of all policy responses at all levels and in all policy areas (Article 8 TFEU), but also of ensuring the participation and voice of European citizens and stakeholders in this process (Article 11 TEU). As such, the EU should also put pressure on the Member States to ensure such participation and voice to women and to effectively mainstream gender concerns in all national policy measures taken to combat the crisis.

The lack of a truly – intersectional – gender-sensitive response to the COVID-19 crisis has painfully brought to the fore the fact that gender mainstreaming often remains a hollow term in practice. Late in 2019, the FEMM committee of the European Parliament highlighted that gender mainstreaming is still a weak instrument in many respects, and has remained fragmented both at the EU and national level, lacking evaluation and accountability. The reasons that the committee identified for this include a lack of target setting for policy areas and monitoring of results, as well as a lack of budgeting and gender equality

196 Allwood, G. (2020), 'Gender Equality in European Union Development Policy in Times of Crisis' *Political Studies Review*, 18(3), pp. 329-345.

197 Allwood, G. (2020) 'Gender Equality in European Union Development Policy in Times of Crisis' *Political Studies Review*, 18(3), pp. 329-345.

impact assessment.¹⁹⁸ The crisis has now made the development of solid gender impact assessment and gender mainstreaming tools a matter of great urgency. This should be set as a top priority for the EU in the years to come and would also create an opportunity for the EU to lead by example and to live up to the goals the Commission set in its GES 2020-2025, especially those concerning gender mainstreaming. This should be acted upon by all EU institutions, including those whose focus is not solely on gender equality, as is the case for EIGE. EIGE has not only been the most active voice in the EU in flagging up the precarious situation of women during this crisis,¹⁹⁹ but as observed already in the previous section, it also developed a gender mainstreaming toolkit. Now the time has come to put this toolkit to effective use and to develop it in connection with other efforts already taken in the field at the EU-level, such as by the High Level Group on Gender Mainstreaming and in the *EQUAL guide on gender mainstreaming*.²⁰⁰ A more holistic, coherent and consistent approach is called for in this regard and the newly created Taskforce on Equality that is to support the EU Commissioner for Equality would also have an important role to play in this regard.

The crisis has, however, also opened the door to new opportunities and sped up certain processes that had already been set in motion prior to the crisis. If we want to take advantage of the momentum that has been created by the crisis to enhance women's participation and representation, solidify gender mainstreaming, seize opportunities regarding work-life balance improvements, foster a more equal sharing of care tasks between men and women and a greater appreciation for highly feminised labour sectors, we must ensure that gender equality remains high on the agenda in policy responses at all times, and especially in times of crisis.

198 European Parliament (2019), *Gender mainstreaming in the EU: State of play*, available at: [https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/630359/EPRS_ATAG\(2019\)630359_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/630359/EPRS_ATAG(2019)630359_EN.pdf).

199 See for example the website EIGE established to raise awareness of the gendered impact of the COVID-19 crisis available at: <https://eige.europa.eu/topics/health/covid-19-and-gender-equality>. See also EIGE (2020), *Coronavirus puts women in the frontline*, available at: <https://eige.europa.eu/news/coronavirus-puts-women-frontline>; EIGE (2020), *Gender-based violence*, available at: <https://eige.europa.eu/covid-19-and-gender-equality/gender-based-violence>.

200 European Commission (2005), *EQUAL guide on gender mainstreaming*, Office for Official Publications of the European Communities, Luxembourg, available at: https://ec.europa.eu/employment_social/equal_consolidated/data/document/gendermain_en.pdf.

Sanction systems in the light of EU Directives 2000/43/EC and 2000/78/EC: a comparative study of Slovakia, Czechia and Poland

Jakub Tomšej*

Introduction

A successful implementation of the principle of equal treatment and non-discrimination cannot be reached without a functioning system of sanctions. This need is reflected in the EU Racial Equality Directive 2000/43/EC and the Employment Equality Directive 2000/78/EC (hereinafter the Directives) which set out requirements for such systems. However, they leave room for Member States to determine their precise nature. This can have a significant impact on the enforcement of non-discrimination rules and hence on the overall quality of national non-discrimination law and the implementation of the Directives.

It is often argued that, since the adoption of the Directives, at the level of the Member States there has generally been an upgrading of the national legislation on sanctions and remedies in discrimination cases.¹ Nevertheless, there is still room for improvement in terms of the guarantees of compliance with national discrimination legislation provided by the current system.² Arguably, in some countries, the compensation awarded by the courts tends to be too low to adequately serve as compensation.³ This applies especially to non-pecuniary damages, which certain courts are reluctant to impose.⁴ In some countries, the imposition of certain sanctions is limited to only some discriminatory grounds or fields of application.⁵

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1 See, for example, Wladash, K. (2015), *The sanctions regime in discrimination cases and its effects: An Equinet paper*, Equinet, Brussels, ISBN 978-92-95067-92-9, p. 4, available at: https://www.archive.equineteurope.org/IMG/pdf/sanctions_regime_discrimination_-_final_for_web.pdf.

2 Report from the Commission to the European Parliament and the Council, *Joint report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0002>.

3 This seems to be an issue not only in eastern Europe, on which this article focuses, but elsewhere. See, for example, De Vries, K. (2019), *Country report, The Netherlands: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 68.

4 Wladash, K. (2015), *The sanctions regime in discrimination cases and its effects: An Equinet paper*, Equinet, Brussels, ISBN 978-92-95067-92-9, p. 11, available at: https://www.archive.equineteurope.org/IMG/pdf/sanctions_regime_discrimination_-_final_for_web.pdf.

5 Milieu Ltd on behalf of the European Commission (2011), *Comparative study on access to justice in gender equality and anti-discrimination law: Synthesis report*, ISBN 978-92-79-20694-8, available at: <https://op.europa.eu/en/publication-detail/-/publication/c3fe272d-f5e6-47d6-b06b-e481a179c564>.

This article aims to analyse the sanction systems in three Eastern European countries: Slovakia, Czechia and Poland. The purpose of the article is to assess whether the sanction systems of these countries are appropriate and meet the requirements of the Directives.

Firstly, the author will closely examine the conditions related to the system of sanctions as set out by the Directives, including an analysis of the case law of the Court of Justice of the European Union (CJEU).

Secondly, the current practice in each country will be investigated. Focusing on the attitude of the judicial system to individual legal claims, the article will further examine the most relevant and interesting cases which have been dealt with by the national courts. Furthermore, the author will look at the extent to which the requirements of the Directives, as well as those of the CJEU case law, are being fulfilled in each State. Finally, the standards and approaches of these three countries will be compared, while highlighting their advantages, best practice and areas for improvement.

While the main focus of this article will be on compensation for victims, be it pecuniary or non-pecuniary damages, it will also examine the extent to which the purpose of the Directives can be achieved using other sanctions, such as penalties and fines imposed by public authorities on those who commit acts of discrimination.

1 EU framework

This section analyses the EU framework regulating the conditions of a proper sanction system. The criteria set by the Directives are described, looking not only at those expressly incorporated into the wording of the Directives, but also those developed by the CJEU case law. Furthermore, the principles of equivalence and procedural effectiveness are examined, with an emphasis on relevant case law from the CJEU.

1.1 EU law requirements of effectiveness, proportionality and dissuasiveness

The need for a functional system of sanctions is established in several EU equality Directives.⁶ In particular, this article will focus on sanctions provided for discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation, as prohibited by Directives 2000/78/EC and 2000/43/EC.

Directive 2000/78/EC states in its preamble that, ‘Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive’ (Recital 35). This is set out in detail in Article 17 on sanctions which obliges Member States to ‘lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and take all measures necessary to ensure that they are applied’. These sanctions may include compensation for the victim. Most importantly, the Directive states that these sanctions established by Member States must be effective, proportionate and dissuasive. The same wording is also contained in Directive 2000/43/EC (Recital 26 and Article 15).

Directive 2004/113/EC states in Article 8(2) that Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation, as the Member States so determine, for the loss and damage sustained by a person injured as a result of

⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, pp. 22-26; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, p. 16-22; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 303, pp. 37-43.

discrimination within the meaning of this Directive, in a way which is dissuasive and proportionate to the damage suffered.

Thus, the requirements enshrined in the Directives call for sanctions which are (i) effective, (ii) proportionate and (iii) dissuasive. These standards are also reinforced by a variety of instruments of international⁷ and EU law.⁸ Since the Directives do not contain any further guidelines on how to fulfil these three requirements, they leave the regulation of the sanction system up to Member States, provided they fulfil these conditions.

In theory, effectiveness can be defined as the ability to produce the desired effect for the victim, thus generating a punitive and preventive effect for the infringer and safeguarding the aim of the directive. Proportionality is related to the extent of damage and loss experienced by the victim which results in an adequate sanction. Dissuasiveness relates to the effectiveness of sanctions and remedies as a measure to stop the perpetrator from repeating the discrimination as well as deterring other people from engaging in the same conduct.⁹

A more detailed explanation can be found in Directive 2006/54/EC, which states in Recital 35 and Article 18 that, 'the compensation awarded for any breach must be adequate in relation to the damage sustained. It is therefore appropriate to exclude the fixing of any prior upper limit for such compensation, except where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive was the refusal to take his/her job application into consideration'.¹⁰ These specifications have also been developed in the case law of the CJEU, as discussed in more detail below.

A study commissioned by the European Commission in 2011 concluded that, in general, 'Compensation for the damages caused by discriminatory acts or omissions would constitute an adequate remedy if it covers the material disadvantage suffered by victims and puts them in the situation they would have been in had the discrimination not taken place'.¹¹

1.2 CJEU case law

The CJEU has dealt with the interpretation of the EU law requirements related to sanctions. In one of the first cases, *Von Colson*,¹² the CJEU commented on the compatibility of the form of sanctions imposed by a German court with EU law. It concluded that, even though the Directive (in this case Directive 76/207/EEC), 'does not require any specific form of sanctions, it does entail that that sanction be such as to guarantee real and effective judicial protection'.¹³ It requires that, 'if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the

7 UN Convention on the Elimination of All Forms of Racial Discrimination, Article 6; UN Convention on the Elimination of Discrimination Against Women, Articles 2(b) and 2(c); UN Convention on the Rights of Persons with Disabilities, Article 13; European Convention on Human Rights, Articles 1 and 13.

8 Treaty on the European Union, Article 19; Charter of Fundamental Rights of the European Union, Article 47; Council Framework Decision 2008/913/JHA of 28 November 2008 on combatting certain forms and expressions of racism and xenophobia by means of criminal law.

9 Wladash, K. (2015), *The sanctions regime in discrimination cases and its effects: An Equinet paper*, Equinet, Brussels, ISBN 978-92-95067-92-9, p. 5, available at: https://www.archive.equineteurope.org/IMG/pdf/sanctions_regime_discrimination_-_final_for_web.pdf.

10 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, pp. 23-36.

11 Milieu Ltd on behalf of the European Commission (2011), *Comparative study on access to justice in gender equality and anti-discrimination law: Synthesis report*, ISBN 978-92-79-20694-8, available at: <https://op.europa.eu/en/publication-detail/-/publication/c3fe272d-f5e6-47d6-b06b-e481a179c564>.

12 Judgment of 10 April 1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, Case 14/83 (1984), EU:C:1984:153.

13 Judgment of 10 April 1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, Case 14/83 (1984), EU:C:1984:153, paragraph 23.

damage sustained and must therefore amount to more than purely nominal compensation'.¹⁴ This newly formulated criterion of adequacy of sanctions was later confirmed as a general rule, extending to all fields of discrimination.¹⁵

In the *Accept* judgment,¹⁶ the CJEU clarified that solely symbolic sanctions, for example a warning, are not considered to be effective, proportionate and dissuasive in the sense of the Directives. 'The severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect ... while still respecting the principle of proportionality.'¹⁷

The case of *Marshall*¹⁸ concluded that the establishment of a priori upper limits of compensation for unequal treatment does not meet the condition for an effective sanction. Placing such limits on sanctions could constitute a lack of real and effective judicial protection and result in the lack of a deterrent effect.¹⁹ In *Draehmpaehl*,²⁰ the CJEU further interpreted the Directives as precluding provisions in national law from setting an upper limit for compensation claimed by a job applicant who has lost a job opportunity as a result of discrimination (the decision deals specifically with an upper limit of three months' salary). In the case of *Dekker*,²¹ the Court emphasised the importance of the sanction having a real deterrent effect and rejected any requirement that the claimant establish a fault attributable to the discriminator.

In the case of *María Auxiliadora Arjona Camacho v. Securitas Seguridad España*,²² the CJEU stated that, in order to fulfil the criteria of the Directives, Member States which opt for the financial form of compensation have to choose 'measures providing for payment to the person injured of compensation which covers in full the loss and damage sustained'.

The CJEU has also addressed the appropriateness of a sanction. In *Feryn*,²³ a list of demonstrative measures was set: 'If it appears appropriate to the situation at issue in the main proceedings, those sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings.' Furthermore, in the *Feryn* case the CJEU also ruled that 'sanctions applicable to breaches of national provisions adopted in order to transpose [the Racial Equality Directive] must be effective, proportionate and dissuasive, even where there is no identifiable victim.'²⁴

14 Judgment of 10 April 1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, Case 14/83 (1984), EU:C:1984:153, paragraph 28.

15 Judgment of 15 May 1986, *Johnston v. Chief Constable of the RUC*, Case 222/84, EU:C:1986:206; judgment of 15 October 1987, *UNECTEF v. Heylens*, Case 222/86, EU:C:1987:442; judgment of 16 November 2004, *Panayotova v. Minister voor Vreemdelingenzaken en Integratie*, C-327/02, EU:C:2004:718.

16 Judgment of 25 April 2013, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, C-81/12, EU:C:2013:275.

17 Judgment of 25 April 2013, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, Case C-81/12, EU:C:2013:275, paragraph 63.

18 Judgment of 2 August 1993, *M. Helen Marshall v. Southampton and South-West Hampshire Area Health Authority*, C-271/91, EU:C:1993:335.

19 Judgment of 2 August 1993, *M. Helen Marshall v. Southampton and South-West Hampshire Area Health Authority*, Case C-271/91, EU:C:1993:335, paragraph 24.

20 Judgment of 22 April 1997, *Nils Draehmpaehl v. Urania Immobilienservice OHG*, C-180/95, EU:C:1997:208.

21 Judgment of 8 November 1990, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, C-177/88, EU:C:1990:383.

22 Judgment of 17 December 2015, *María Auxiliadora Arjona Camacho v. Securitas Seguridad España, SA*, C-407/14, EU:C:2015:831.

23 Judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, C-54/07, EU:C:2008:397.

24 Judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, C-54/07, EU:C:2008:397, paragraph 40.

1.3 Principles of procedural effectiveness and equivalence

Two additional principles appear in the CJEU case law that have not been covered by the Directives: the principles of procedural effectiveness²⁵ and equivalence.

According to the principle of procedural autonomy, Member States are autonomous in defining their legal systems and determining their own procedural rules for actions in order to guarantee individual rights granted by EU law.²⁶ However, this has to be done under two cumulative conditions:²⁷ (i) these procedural rules cannot be less favourable than those governing similar domestic situations (also known as the principle of equivalence); (ii) they cannot make it excessively difficult or impossible in practice to exercise the rights granted by EU law (also called the principle of procedural effectiveness).²⁸ Without fulfilling these conditions, a Member State cannot assert the principle of procedural autonomy in situations which are governed by EU law.

In respect of the principle of equivalence, it requires all the procedural rules to be applied without distinction to actions alleging infringement of EU law and to similar actions alleging infringement of national law.²⁹ As a result, sanctions imposed in the areas covered by the Directives should not be milder or less effective than sanctions imposed in comparable situations in other areas of law. With regard to the principle of procedural effectiveness, a national procedural rule must not be such that it would make the exercise of rights conferred by EU law impossible or excessively difficult.³⁰

1.4 Conclusion

It can be concluded that the Directives set out a legal framework on sanctions consisting of minimum requirements to be subsequently implemented in an adequate manner at national level. Additional guidance on the Directives' requirements stems from the CJEU case law. To sum up some of the most relevant requirements as described above, the sanctions need to be (i) genuinely dissuasive, thus not only symbolic in nature; (ii) adequate in relation to the violation; (iii) proportionate; (iv) equivalent to national sanctions in analogous situations; and (v) accessible to the victims and complainants. It lies within the competence of the Member States to put in place sanctions that are in line with the relatively general requirements as developed by the CJEU.

2 National regulations

We have discussed the criteria defined by EU law for proper sanctions and the way in which the CJEU has elaborated on them. Notwithstanding the existing case law, there is still wide scope for the Member States to determine the particular nature and specificities of their sanction systems.

The next part of the article looks specifically at Slovakia, Czechia and Poland, and provides a general overview, outlining the understanding of and approach to sanctions in these countries. Keeping in mind

25 Not to be confused with the EU law requirement for the effectiveness of sanctions.

26 See notably judgment of 16 December 1976, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, Case 33-76.

27 Judgment of 17 March 2016, *Abdelhafid Bensada Benallal v. État belge*, C-161/15, EU:C:2016:175.

28 See also judgment of 21 January 2016, *'Eturas' UAB and Others v. Lietuvos Respublikos konkurencijos taryba*, C-74/14, EU:C:2016:42; judgment of 27 June 2013, *ET Agroconsulting-04-Velko Stoyanov v. Izpalnitelen direktor na Darzhaven fond 'Zemedelie' — Razplashtatelna agentsia*, C-93/12, EU:C:2013:432; judgment of 6 October 2015, *Dragoș Constantin Târșia v. Statul român and Serviciul Public Comunitar Regim Permisi de Conducere și Immatriculare a Autovehiculelor*, C-69/14, EU:C:2015:662.

29 Judgment of 15 March 2017, *Lucio Cesare Aquino v. Belgische Staat*, C-3/16, EU:C:2017:209, paragraph 50; judgment of 16 January 2014, *Siegfried Pohl v. ÖBB Infrastruktur AG*, C-429/12, EU:C:2014:12, paragraph 26; judgment of 20 October 2016, *Evelyn Danqua v. Minister for Justice and Equality and Others*, C-429/15, EU:C:2016:789, paragraph 30.

30 Judgment of 15 March 2017, *Lucio Cesare Aquino v. Belgische Staat*, C-3/16, EU:C:2017:209, paragraph 52; judgment of 20 October 2016, *Evelyn Danqua v. Minister for Justice and Equality and Others*, C-429/15, EU:C:2016:789, paragraph 29.

the criteria and concepts presented in the first section, the sanction systems of each country are examined through the lens of these principles.

2.1 Slovakia

In Slovakia, the main piece of non-discrimination legislation is the Anti-Discrimination Act.³¹ Section 9(2) of the Act stipulates that rights holders may claim discrimination before the courts in any case where they argue that their rights and freedoms have been negatively affected by unequal treatment. In such cases, victims of discrimination can ask for a number of remedies, i.e. an injunction ruling that the perpetrator refrain from illegal conduct, the rectification of the situation and/or ‘adequate satisfaction’.

The adequate satisfaction, besides non-monetary forms such as an apology, can take the form of compensation for material damages as defined by national civil law. The rights holders can also claim compensation for non-pecuniary damages, however, this is subject to the conditions that other forms of satisfaction are not sufficient and that the discrimination has materially impaired the individual’s dignity, social status or social functioning.³²

The court has complete discretion when determining the amount of such compensation as the legislation provides no caps. Besides an obligation to compensate for pecuniary damages, local regulators (such as labour inspectorates, trade inspectorates and school inspectorates) may issue fines when discrimination takes place within their area of competence.

2.1.1 Effectiveness, proportionality and dissuasiveness

The Slovak non-discrimination expert in the European network of legal experts in gender equality and non-discrimination expresses doubts about the sanctions being sufficiently effective, proportionate and dissuasive, with the main issue lying in the national courts’ hostility to granting non-pecuniary damages in cases of discrimination. Access to compensation for victims is complicated due to the burden of having to convince the court that the severity of the harm is sufficient to justify monetary compensation for non-pecuniary damages. According to the Slovak equality expert, this could possibly contribute to the insufficient execution of the obligations arising from EU law. As the Slovak Anti-Discrimination Act defines additional requirements³³ as a precondition for non-pecuniary damages, the courts often push the affected claimant to prove the severity of the violation and the precise impairment of their dignity, instead of evaluating any discriminatory conduct as humiliating per se from the beginning. This mostly stems from judicial practice; however, the law sets a significantly high bar for the right to obtain non-pecuniary damages. A legislative amendment to the Anti-Discrimination Act that focuses on better access for victims to non-pecuniary damages, for example, by lowering the high standard of ‘impairment of dignity, social status or social functioning’ as every type of discrimination is inherently demeaning, would be helpful.

The necessity for the claimant to demonstrate the severity of the harm in order to obtain non-pecuniary damage imposes a significant burden on the claimant. It seems that this requirement arises from a misunderstanding of the concept of burden of proof in discrimination cases as defined by the Directives. It appears that it is solely the claimant who must bear the burden of proving that the harm suffered is severe enough to justify the compensation claimed. In practice, insisting on such a rule may have an impact on the amount of compensation awarded, as the courts may have a tendency to argue that a claimant did not prove the severity of the harm they suffered and thus no monetary compensation will

31 Slovakia, Anti-Discrimination Act, (Zákon č. 365/2004 Z.z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou), No. 365/2004 Z.z.

32 Slovakia, Anti-Discrimination Act, No. 365/2004 Z.z., Section 9(3).

33 Those additional requirements are (i) that other forms of satisfaction are not sufficient, and (ii) that the discrimination has materially impaired the individual’s dignity, social status or social functioning.

be awarded, even though discrimination took place. Such a disproportionate burden laid on the claimant, when compared with the lack of a similar burden for the defendant, therefore poses the question of whether the sanction imposed in such proceedings will be proportionate in the sense of the Directives. This occurred, for example, in a case of discrimination against Roma persons who were prevented from entering a dancing bar. The court acknowledged that such conduct was discriminatory; however, the claimants were not granted any non-pecuniary damages as they had not proven that there was any impairment of their dignity. The punitive aspect of potential sanctions was not considered by the court.³⁴

There is no limit to the amount of financial compensation for non-pecuniary damage and it is related to the severity of the damage and the circumstances of the violation. Nevertheless, the Slovak courts are reluctant to grant these damages. Often, they conclude that a mere declaration of a violation of the principle of equal treatment is sufficient satisfaction for the victim.³⁵ As of 2018, non-pecuniary damages were granted in only three out of 23 cases decided.³⁶ The compensation frequently only has a symbolic meaning and this also applies to the fines imposed by the administrative offices.³⁷

Another issue relates to the legal fees: the claimant who alleges discrimination must pay a fee of EUR 66 plus 3 % of any sum claimed as compensation for non-pecuniary damages.³⁸ It must be noted that this rate is lower than the rate applicable for pecuniary damages (6 %). Still, many victims of discrimination (notably people belonging to minorities or disadvantaged groups) can find it difficult to pay the fee. This may deter them either from even initiating a case, or from claiming an adequate amount of money that would be proportionate to their suffering.

Finally, the compensation granted by courts is not very motivating for victims of discrimination. In addition, general problems relating to the length of judicial proceedings and delays in receiving the remedies further weaken the dissuasive effect of sanctions and, in general, they do not enhance public trust in the judicial system. Similarly, private businesses do not fear the sanctions for discrimination, thus discrimination-related claims have not yet become part of their risk-assessment process.

2.1.2 Principles of procedural effectiveness and equivalence

According to Slovak experts, written legal procedural rules regulating discrimination cases do not disadvantage this type of action in comparison with other civil actions and the rules for compensation do not differ from other comparable rights, thus it can be concluded that they are not contrary to the principles of equivalence. There is just one significant difference in the litigation process. In discrimination cases, unlike in other cases where one party is a weaker party, the courts do not follow the 'concentration principle' where new facts and proofs can be submitted only up to a certain point of time in the proceedings. In discrimination cases, parties may introduce new materials up to the issuing of the final decision. In practice, the courts allow both parties to do so, which leads to significant delays in proceedings. However, this difference does not seem to have any impact on the sanctions.

The level of effectiveness of sanctions in non-discrimination lawsuits seems low, especially given the amounts awarded by the courts. Comparing these amounts to the efforts needed to bring a discrimination

34 District Court in Michalovce, decision of 29 January 2008, No. 12 C 139/2005, upheld by the Regional Court in Košice, decision of 15 July 2010, No. 2 Co 115/2008.

35 Durbáková, V., Holubová, B., Ivanco, Š. and Liptáková, S. (2012), *Hľadanie bariér v prístupe k účinnej právnej ochrane pred diskrimináciou (Searching for barriers in access to effective legal protection from discrimination)*, Košice: Poradňa pre občianske a ľudské práva, p. 98.

36 Regional Court in Košice, decisions No. 6 Co 833/2014 and No. 9 Co 259/2017; Regional Court of Prešov, decision No. 13 Co 38/2017.

37 Durbáková, V. (2019), *Country report, Slovakia: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 26.

38 Durbáková, V. (2019), *Country report, Slovakia: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 79.

lawsuit, and taking into account the level of stress connected with this type of proceedings and their estimated length, many victims of discrimination may be expected to decide that the costs of such action exceed the potential benefits in the event of the case being successful.

2.1.3 Case law

From a more practical viewpoint, it is worth examining a number of cases dealt with by the Slovak courts.

One successful case is that of *V.P. v. Town of Spišská Nová Ves*³⁹ where the court ruled in favour of a Roma victim of discrimination in a case relating to access to employment. The first-instance court upheld all the demands of the claimant: it recognised there had been a violation of the principle of equal treatment, ordered the perpetrator to apologise and awarded non-pecuniary damages, although it reduced the amount originally claimed by half. None of the courts closely examined the required extent of the sanctions, but the first-instance court concluded that merely issuing a statement that discrimination had occurred would not be adequate, as the dignity of the claimant had been impaired.⁴⁰ The court exceptionally affirmed that any discrimination is humiliating and painful by its nature and it reiterated that non-pecuniary damages should not only have a compensatory and satisfaction function, but also a punitive one. In this regard, the court considered the amount of EUR 2 500 to be an appropriate measure to fulfil the aforementioned functions of a sanction. This case is one of the positive, but very rare, examples that promote an inclusive and empathetic approach towards the victims of discrimination; still, it could be questioned whether the amount of EUR 2 500 (corresponding to less than 2.5 average monthly salaries in Slovakia at the time of the ruling) is high enough to satisfy the requirements of the Directives.

Another case dealt with a Roma couple who were refused service in a local bar.⁴¹ The district court pronounced that discrimination on the ground of ethnicity had occurred. It ordered the perpetrator to apologise and it granted compensation of non-pecuniary damages of EUR 300 per person. The court referred to the Slovak Charter of Rights and Freedoms and concluded that the couple's human dignity had been significantly impaired.⁴² To calculate the amount of non-pecuniary damages, the court used such criteria as the behaviour of the claimants during the incident and subsequently it reduced the claimed financial compensation. The court of appeal confirmed the decision. It declared that the remedy should fulfil a satisfaction function, but also take into account a prevention aspect and that, in this regard, the amount of EUR 300 per person was adequate. In the author's view, the amount of EUR 300 seems very low, as it cannot even compensate for the level of effort and stress connected with bringing litigation. Notwithstanding this, the case was one of the first where a court awarded financial compensation for racial discrimination and it still represents a remarkable precedent.⁴³

Finally, the Regional Court in Prešov dealt with a case of residential segregation of a Roma family which had been evicted from their apartment illegally.⁴⁴ In the final decision, the court asserted that non-pecuniary damages of EUR 1 000 per person were adequate and that this fulfilled both the satisfaction and punitive functions of sanctions.⁴⁵

39 Spišská Nová Ves District Court, decision of 23 March 2017, No. 8 C 268/2016 – 523, upheld by the Regional Court in Košice, decision of 7 February 2018, No. 9 Co 259/2017.

40 Spišská Nová Ves District Court, decision of 23 March 2017, No. 8 C 268/2016 – 523, upheld by the Regional Court in Košice, decision of 7 February 2018, No. 9 Co 259/2017), paragraph 63, p. 22.

41 Regional Court in Košice, judgment of 28 June 2016, No. 6 Co 833/2014 – 223.

42 Spišská Nová Ves District Court, decision of 23 March 2017, No. 8 C 268/2016 – 523, upheld by the Regional Court in Košice, decision of 7 February 2018, No. 9 Co 259/2017, p. 19.

43 For the sake of clarity: the Slovak court system is not based on precedents as understood in the Anglo-American legal system; however, courts tend to follow opinions formed in previous judgments unless they can present compelling reasons why they should rule differently.

44 Regional Court of Prešov, decision of 20 March 2018, No. 13 Co 38/2017.

45 Regional Court of Prešov, decision of 20 March 2018, No. 13 Co 38/2017, paragraph 33.

2.1.4 Other penalties

In Slovakia, the sanctioning of discriminatory conduct may have the character of the imposition of a fine. The authorities in charge of this administrative sanction are the Labour, School and Trade Inspectorates.

In Slovakia, Labour Inspectorates can investigate complaints involving discrimination. Where discrimination is found, the Inspectorates have the power to impose fines up to EUR 100 000.⁴⁶ For example, on finding a discriminatory job announcement, the Labour Inspectorate may impose a fine of up to EUR 33 193.

In education, the responsible authority is the State School Inspectorate. After inspecting a school facility, the School Inspectorate releases a report with its findings and recommendations for improvement. It is also entitled to examine possible breaches of the principle of non-discrimination. In general, if the school does not rectify the problems presented in the report (which may or may not relate to discrimination), the School Inspectorate may impose a fine of up to EUR 331.⁴⁷ The fines for discrimination in education can therefore be considered as purely symbolic.

Trade Inspectorates, as the main authority monitoring the area of access to goods and services, have the capacity to punish discrimination with a fine of up to EUR 16 600. In case of a repeated violation within one year, the Trade Inspectorate can rule this repetition as an aggravating circumstance and can impose a fine of up to EUR 33 000.⁴⁸ The fines imposed in all spheres by the Trade Inspectorate have generally been approximately EUR 1 200. According to the Slovak non-discrimination expert in the European network of legal experts in gender equality and non-discrimination, the sanctions for discrimination have been considered to be ineffective or not sufficiently dissuasive.⁴⁹

Nevertheless, proceedings before these public authorities are seldom used with the aim of applying the provisions of the Anti-Discrimination Act.⁵⁰ Besides other reasons for this lack of interest, the shift in the burden of proof does not apply to these proceedings. According to the assessment of the Slovak expert on discrimination, fines are rarely imposed and, even if they are, they are not sufficient and lack any dissuasive effect.⁵¹

2.2 Czechia

In Czechia, with regard to cases of discrimination, the Anti-Discrimination Act⁵² and the Civil Code⁵³ serve as the basis for awarding damages, including non-pecuniary damages.

Under Section 10 of the Anti-Discrimination Act, an injunction to refrain from discrimination and to provide rectification and non-monetary satisfaction, for example by way of apology, are the primary means of compensation. Monetary compensation would also be possible under the Civil Code. Non-pecuniary

46 Slovakia, Labour Inspection Act (*Zákon č. 125/2006 Z. z. o inspekcii práce*), No. 125/2006, Section 19(1)(a).

47 Slovakia, Act on State Administration of the School System and School Self-Governance (*Zákon o štátnej správe v školstve a školskej samospráve*), No. 596/2003, Section 37a(2)(b).

48 Durbáková, V. (2019), *Country report, Slovakia: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 89.

49 Durbáková, V. (2019), *Country report, Slovakia: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 90.

50 Durbáková, V. (2019), *Country report, Slovakia: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 12.

51 Durbáková, V. (2019), *Country report, Slovakia: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union.

52 Czechia, Anti-Discrimination Act, (*Zákon o rovném zacházení a o právních prostředcích ochrany před diskriminací a o změně některých zákonů (antidiskriminační zákon)*), No. 198/2009, 23 April 2009.

53 Czechia, Civil Code (*Zákon občanský zákoník*), No. 89/2012, 1 January 2014.

damages can only be claimed as a subsidiary remedy. Specifically, the Anti-Discrimination Act asserts that if none of the forms of redress appear adequate, the victim of discrimination also has the right to monetary compensation for non-pecuniary damages. This is applicable especially in cases of significant impairment of the victim's reputation, dignity or social status caused by discrimination. Although it is appropriate for monetary compensation for non-pecuniary damages to be awarded alongside another form of redress, in Czechia it inherently represents a subsidiary remedy.⁵⁴

As the law does not stipulate minimum or maximum awards or even offer any guidelines on how to determine the amount, it is at the discretion of the judge to determine such an award. The practice between courts differs in terms of the type of compensation and the sum granted, irrespective of the field of discrimination – courts have granted amounts ranging from EUR 200 to EUR 10 000.⁵⁵

There are currently no statistics available on the number of cases in which monetary compensation has been awarded. Based on the information available, the Czech Ombudsperson is currently conducting an analysis of this and the results should be available later in 2020. In any case, the total number would be higher than in Slovakia and Poland but still relatively low.

2.2.1 Effectiveness, proportionality and dissuasiveness

Sanctions imposed in accordance with the Anti-Discrimination Act are likely to be viewed as not sufficiently effective. Similarly, as in the case of Slovakia, the Czech legislation could be seen as contrary to the principles set out above, as it understands monetary compensation of non-pecuniary damages as a secondary method of compensation that comes into play only in the most serious, highly specific cases. While the Directives do not expressly require Member States to establish monetary compensation, it is clearly questionable whether all the requirements of the Directives (in particular with regard to the dissuasive effect of damages) can be achieved in such a situation. Any discrimination causes damage, such as psychological hardship, stress and humiliation, and victims should be eligible for compensation.

Similarly, when it comes to the assessment of the practice of the courts, the proportionality of such sanctions must be questioned. It is up to the court to determine the amount of non-material damages, and the actual amounts awarded vary widely, with a general tendency to award relatively low amounts which are likely barely to compensate for the harm and humiliation suffered. Moreover, if a claimant loses their case, they may be liable to compensate the defendant for their legal costs, which can reach between EUR 1 000 and EUR 2 000.

With regard to dissuasiveness, the sanctions probably do not meet the EU criteria. The sanction system currently in place does not include in any way the preventive or punitive aspects. Similarly to Slovakia, the number of discrimination cases eventually dealt with by the courts is still very low, public debate and awareness are not really open and oriented to tackling discrimination, and the compensation granted by courts is not very motivating for victims of discrimination.⁵⁶

54 Office of the Public Defender of Rights (Czech Ombudsperson) (2015), *Diskriminace v ČR: Oběť diskriminace a její překážky v přístupu ke spravedlnosti (Discrimination in the Czech Republic: Victims of discrimination and obstacles to access to justice)*, pp. 99-100.

55 Tomšej, J. (2019), *Country report, Czech Republic: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 8.

56 Tomšej, J. (2019), *Country report, Czech Republic: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 62.

2.2.2 Principles of procedural effectiveness and equivalence

Czechia may be in breach of the principle of equivalence, as the regulation of compensation of non-pecuniary damages in the Anti-Discrimination Act differs from the general regulation of non-pecuniary damages in the Czech Civil Code.

Following the introduction of a new Civil Code that became effective as of 1 January 2014, Czech civil law takes a positive position on claims for non-pecuniary damages.

Section 2956 of the Civil Code contains a general obligation for a tortfeasor to compensate not just material damages but also any non-pecuniary harm which, according to express statement in the law, also includes mental suffering.

Under Section 2957 of the Civil Code, the manner and amount of adequate satisfaction must be determined so as also to compensate for circumstances deserving special consideration. These circumstances include intentional conduct, causing harm by trickery, threat, abuse of the victim's dependence on the tortfeasor, multiplying the effects of the offence by making it publicly known or as a result of discriminating against the victim with regard to their gender, health condition, ethnicity, religion or other similarly serious reason. Account should also be taken of the victim's fear of loss of life or serious damage to their health, if such concerns were caused by the threat or other causes.

The provisions stated above would be applied in cases covered by the Civil Code, such as cases for compensation of any damage to life or health, as well as any personality claims such as infringements of human dignity, privacy etc. However, there is no clarity regarding the relationship between the Anti-Discrimination Act and the Civil Code. While some experts argue that the Civil Code should be the primary source of regulation for any non-pecuniary claims,⁵⁷ courts in the majority of non-discrimination cases do not apply these provisions. This may lead to a peculiar situation where in civil law relations discrimination is deemed to be a factor increasing the amount of non-pecuniary damages, but in discrimination lawsuits any non-pecuniary damages are deemed to be a subsidiary measure that will only be awarded in some cases where the claimant proves an offence of increased gravity.

The adoption of a new Civil Code also created an expectation that amounts of non-pecuniary damages would increase. Such an increase has not been seen in discrimination disputes, although experts would argue that it has been seen in the area of compensation for damage to health, for instance.⁵⁸ Even compensation awarded in cases of infringements of an individual's dignity and privacy, which is also governed exclusively by the Civil Code, often seems to exceed the standards in non-discrimination disputes.⁵⁹

To avoid any legal doubts, the Czech Ombudsperson issued a recommendation to the Chamber of Deputies of the Czech Parliament in early 2019, proposing that the Anti-Discrimination Act be amended so that Sections 10(2) and 10(3), which currently detail the terms and conditions of non-pecuniary damages, would be replaced with a reference to the Czech Civil Code.⁶⁰ This change has, however, never been implemented.

57 Kühn, Z. (2016), '§ 10', in Boučková, P., Havelková, B., Koldinská, K., Kühn, Z. and Kühnová, E. and Whelanová, M., *Antidiskriminační zákon (Anti-Discrimination Act)*, 2nd edition, Prague, C. H. Beck, p. 369.

58 Tomšej, J. (2019), Country report, Czech Republic: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018, Luxembourg, Publications Office of the European Union, p. 68.

59 In certain cases gathered by the Czech equality body, individuals have been awarded, for example, compensation of EUR 4 659 (Municipal Court in Prague, decision No. 22 Co 50/2016), EUR 11 652 (Municipal Court in Prague, decision No. 22 Co 421/2016), EUR 27 986 (Municipal Court in Prague, decision No. 58 Co 275/2017), EUR 11 664 (Municipal Court in Prague, No. 58 Co 6/2018).

60 Office of the Public Defender of Rights (Czech Ombudsperson) (2019), *Annual report 2018*, p. 14, available at: https://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snmovnu/Reports/2018/2018-Annual_Report.pdf.

With regard to effectiveness, similar conclusions may be drawn as in the case of Slovakia. The Czech Ombudsperson recently issued a recommendation for lawyers defending victims of discrimination which is *inter alia* intended to increase the effectiveness of discrimination lawsuits.⁶¹ The document includes a recommendation to pursue claims for monetary compensation and to try to overcome the interpretation that these claims are subsidiary through strategic litigation. Still, as also shown in the case law summary below, the amounts awarded remain symbolic, and principle (rather than financial reasons) remains the main driver for discrimination lawsuits being brought.

2.2.3 Case law

The lowest compensation that the author is aware of was awarded in a case where a landlord refused to offer accommodation in a rented flat to a Roma individual with the explanation that there were no more flats available, while a Czech couple making the same inquiry were offered the option to move in immediately.⁶² The first instance court awarded compensation of EUR 400 which was subsequently reduced by half by the appellate court.

There was a renowned case in Czechia in which a restaurant owner displayed in his restaurant premises a statue of an ancient Greek goddess holding in her hand a baseball bat with the visible inscription 'Go and get the gypsies'. In repeated proceedings and after more than 12 years of litigation, the Prague High Court awarded the claimant, a Roma man who had been offended by the statue, compensation of approximately EUR 1 000.

In a situation where a discrimination claim regarding access by Roma to housing was openly presented as situation testing, the court only imposed an obligation to issue an apology. When evaluating the amount of non-pecuniary damages claimed, the district court held that the claimant's dignity had not been significantly damaged because she had participated in situation testing as part of her work duties.⁶³

There have been other cases published in the media or highlighted by the Czech Ombudsperson where courts have awarded compensation for non-pecuniary damages. In most cases, the amounts ranged between approximately EUR 2 000 and EUR 4 000.⁶⁴

2.2.4 Other penalties

In Czechia, the Trade and Labour Inspectorates are authorised to impose a fine in cases of discrimination in access to goods and services and in employment. Fines are imposed in cases of discrimination prohibited by the national law.

The Labour Inspectorates may intervene in cases of discrimination in employment. Anyone who violates the Employment Act or the provisions on discrimination contained in the Labour Code may be fined up to EUR 40 000.⁶⁵ In reality, the sanctions imposed by the Inspectorates are much lower. In cases regarding discriminatory job advertisements, the Labour Inspectorate imposes an average fine of EUR 954, the highest amount being EUR 10 000.⁶⁶

61 Czech Ombudsperson, 'Recommendations for lawyers', available at: https://ochrance.cz/fileadmin/user_upload/ESO/40-2019-DIS-LK_summary_in_english.pdf.

62 Regional Court in Ostrava, decision No. 23 C 110/2003; High Court in Olomouc, decision No. 1 Co 99/2004.

63 District Court in Litoměřice, decision of 14 August 2015, No. 14 C 46/2013.

64 To give an example, the District Court in Ostrava, in its decision No. 85 C 20/2016 in March 2018, awarded compensation of CZK 50 000 to an employee who lodged a complaint of age discrimination, bullying and creating a hostile working environment.

65 Czechia, Employment Act, No. 435/2004, 13 May 2004, Sections 139 and 140.

66 Tomšej, J. (2019), *Country report, Czech Republic: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 69.

The Trade Inspectorate deals with discrimination in goods and services. Mostly, it resolves issues of dual pricing. There is again a significant gap between the maximum fine permitted by the law (EUR 120 000)⁶⁷ and the average fine imposed in reality (EUR 1 750).⁶⁸ In 2018, the Trade Inspectorate found discrimination in 12 cases.⁶⁹ Details of these cases were not made public. In 2016, a case was publicly discussed where Roma individuals were refused by two real estate agents when looking for a flat. The Trade Inspectorate imposed a fine of EUR 1 000 on both agents.⁷⁰

In general, fines are not very often used and the number of cases where a fine was imposed is very low. According to the Ombudsperson, the inspectorates particularly tend to sanction discriminatory conduct which was supported by sufficient documentary evidence or witnesses.⁷¹ Even if imposed, the amount of the fine tends to be low. The rarity of this measure and the low sums prevent fines from being effective, proportionate or dissuasive.⁷²

2.3 Poland

In Poland, there is no specific list of sanctions and/or claims of victims of discrimination in the Equal Treatment Act (ETA).⁷³ Section 13 of the ETA merely contains a general rule that anyone whose right to equal treatment has been violated has the right to compensation. While the lack of more detailed regulation does not in itself seem unusual, it seems to generate issues in this particular case as the scope of the legal instrument of compensation (*odszkodowanie*) is not entirely clear in national court practice. Even non-discrimination experts argue that it covers only material damages and not non-pecuniary damages.⁷⁴ The Polish Ombudsperson and other bodies tend to interpret the word ‘compensation’ in the light of the Directives, thus extending the scope of the provision to cover non-pecuniary damages as well.⁷⁵ Some courts are inclined to use this interpretation, but it has been refused in some judgments.⁷⁶

Claims by victims of discrimination regarding compensation for non-pecuniary damages are thus often based on general civil law regulation rather than on the provisions of the non-discrimination legislation.⁷⁷ While there is no doubt that victims of discrimination can achieve success in one way or another, the uncertainty caused by the lack of clarity regarding the legal basis for compensation for non-pecuniary damages may lead to complications in court proceedings as well as demotivate victims of discriminations from lodging their claims. There have been two proposals to change the wording of the ETA, but they were not successful.

67 Tomšej, J. (2019), *Country report, Czech Republic: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 69.

68 Czech Trade Inspectorate (2018), *Výroční zpráva ČOI za rok 2018 (Annual report for 2018)*, p. 22; available at: https://www.coi.cz/wp-content/uploads/2019/04/web_COI_vyrocní_zprava_2018.pdf.

69 Czech Trade Inspectorate (2018), *Výroční zpráva ČOI za rok 2018 (Annual report for 2018)*, p. 22; available at: https://www.coi.cz/wp-content/uploads/2019/04/web_COI_vyrocní_zprava_2018.pdf.

70 Office of the Public Defender of Rights (Czech Ombudsperson), *Zpráva o šetření č. 6780/2014/VOP (Report on inquiry No. 6780/2014/VOP)*, 19 January 2016, available at: <http://eso.ochrance.cz/Nalezene/Edit/3922>.

71 Office of the Public Defender of Rights (Ombudsperson) (2015), *Diskriminace v ČR: Oběť diskriminace a její překážky v přístupu ke spravedlnosti (Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice)*, available at: <http://www.ochrance.cz/en/discrimination/research/>, p. 137.

72 Tomšej, J. (2019), *Country report, Czech Republic: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 69.

73 Poland, Act on implementing some EU regulations concerning equal treatment (*Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*), 3 December 2010.

74 Bojarski, L. (2019), *Country report, Poland: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 83.

75 Polish Ombudsperson, *Annual Report for 2017*, pp. 155-156.

76 Bojarski, L. (2019), *Country report, Poland: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 87.

77 Poland, Civil Code (*Kodeks cywilny*), Sections 415 et seq.

General provisions of the Civil Code and the Code of Civil Procedure are applicable to these proceedings. Sanctions in cases of discrimination in the field of employment, specifically fines, are provided by the Employment Act.⁷⁸ The amount of any sanction is not limited, but there is a minimum compensation level set by the Labour Code – at least equal to the minimum salary (to date, approximately EUR 610). There is a lack of convention in calculating the level of compensation, with judges meant to award an appropriate amount⁷⁹ for moral loss and suffering. There are significant variations from one judge to another.

In addition, in some cases, it is possible to defend the rights covered by the Directives through criminal procedures.⁸⁰

2.3.1 Effectiveness, proportionality and dissuasiveness

In general, according to the Polish expert in the European network of legal experts in gender equality and non-discrimination, the sanctions must be questioned in respect of their effectiveness, proportionality or dissuasiveness in the sense of the Directives.

In respect of effectiveness, one of the most significant imperfections of the system is the absence of non-pecuniary damages in the ETA and hence the inability to award these damages under this act. On similar grounds, the sanctions can also not be deemed to be proportionate as the available remedies do not reflect the severity of discrimination and do not have the potential to heal the consequences of such conduct.

The Polish sanction system does not meet the criterion of dissuasiveness. The number of cases where compensation was granted is not large, courts have the tendency to choose moderate compensation awards (in the range between EUR 300 and EUR 5 000).⁸¹ Claims under the ETA should include not only non-pecuniary damages, but should also reflect the punitive element of sanctions.

2.3.2 Principles of equivalence and effectiveness

According to the Polish expert in the European network of legal experts in gender equality and non-discrimination, there are no specific issues regarding the principles of equivalence and effectiveness. However, the lack of any mention of non-pecuniary damages in the ETA could be considered as an error related to these principles. It is clear that legal action based on the Directives faces different conditions and circumstances compared with other civil actions, for example those focused on the protection of personal rights. Similarly, the inability to claim non-pecuniary damages directly under the ETA makes it harder, although not impossible, to achieve sufficient protection of appropriate rights.

2.3.3 Case law

In one of the first cases decided in accordance with Article 13 of the ETA,⁸² which dealt with a discrimination claim arising from an alleged unlawful termination of contract, the court made a distinction between material damages and non-pecuniary damages. It argued that Article 13 covers both, even though in that particular case the court did not find sufficient grounds to award non-pecuniary damages. After the claimant appealed against the judgment, the court of appeal argued that Article 13 does not cover

78 Poland, Employment Act (*Kodeks pracy*), Articles 121(3) and 123.

79 Poland, Civil Code, Article 445.

80 Poland, Law on Code of Petty Crimes (*Ustawa z dnia 20 maja 1971 r. Kodeks wykroczeń*), of 20 May 1971

81 Bojarski, L. (2019), *Country report, Poland: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 85.

82 Warsaw Śródmieście District Court, judgment of 9 July 2014, *XY and Polish Society of Anti-discrimination Law on behalf of XY v. Company Z*, No. VI C 402/13; Warsaw Regional Court (second instance), judgment of 18 November 2015, No. V Ca 3611/14.

non-material damages and thus the claim should have been reviewed by the civil court as a civil law claim. Simultaneously, it argued that in any case, the damages granted by the first-instance court were sufficient and adequate. This view of the court makes it more difficult for victims of discrimination to exercise their rights.

2.3.4 Other penalties

In Poland, there are two acts allowing the imposition of a fine as a way to deal with discrimination: the Law on Petty Crimes and the Employment Act.

The Law on Petty Crimes introduces an option to impose a fine on someone who violates the principle of equal treatment in certain fields, typically access to goods and services.⁸³ The competent body is the Police, which acts as prosecutor in petty crime procedures. Fines may reach up to EUR 1 250. However, the provisions governing fines are rarely invoked.⁸⁴

Furthermore, the Employment Act provides the option to impose fines for discrimination in the sphere of employment.⁸⁵ There are two circumstances that can lead to such a fine. First, anyone running an employment agency without complying with the principle of equal treatment is liable to a fine. However, this rule is primarily likely to be applied in cases of unequal treatment of agency workers compared to core employees. Secondly, anyone who refuses to employ a candidate in a vacant job position on discriminatory grounds is liable to be fined. The minimum fine is EUR 700. The National Labour Inspectorate is the responsible authority for imposing fines.

The Polish Labour Inspectorates may monitor compliance solely through the labour legislation, such as the Employment Act and they are not allowed to monitor the implementation of the ETA. Thus, they may not punish discriminatory conduct in other spheres. The Polish Ombudsperson continually points out this challenge and stresses the need to expand the remit of the Labour Inspectorates.⁸⁶

Conclusion

In the introduction, the minimum requirements as set out by the Directives were presented. While the exact implementation of these principles depends on each and every Member State, all three countries subjected to analysis exhibit very similar patterns.

All these countries exhibit certain shortcomings in their implementation of the criteria of effectiveness and dissuasiveness as required by the Directives. Polish non-discrimination law does not contain a clear entitlement of victims of discrimination to claim non-pecuniary damages, which leads to doubts on the part of the national courts and legal scholars about the extent to which these could be claimed and the right procedural path to follow. In Slovakia and Czechia, non-pecuniary damages are defined by the courts as a last resort measure that will only be awarded if the claimant proves that other awards are not satisfactory due to the gravity of the particular case. In both countries, this triggers cases in which victims of discrimination do not receive any monetary compensation at all. In the author's view, this is not entirely in accordance with the principles of effectiveness, proportionality and dissuasiveness as enshrined in the Directives and in the CJEU case law. Any case of discrimination is likely to have negative

83 Poland, Law on Code of Petty Crimes, 20 May 1971, Articles 135-138.

84 Bojarski, L. (2019), *Country report, Poland: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 75.

85 Poland, Act on the Promotion of Employment and the Institutions of the Labour Market (Employment Act) (*Ustawa z 20 kwietnia 2004 o promocji zatrudnienia i instytucjach rynku pracy*), 2 April 2004, as amended.

86 Bojarski, L. (2019), *Country report, Poland: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 39.

impacts on the victim, and monetary compensation should be the primary method of redress. In cases in which a court finds that discrimination has occurred but provides no monetary award to a claimant, the dissuasive aspect of the sanctions seems to be disregarded. Further progress in this area is highly recommended.

While Slovakia does not trigger any specific concerns with regard to the principle of equivalence, Czech law puts victims of discrimination in a less favourable position than claimants in other cases involving non-pecuniary damages. In Poland, uncertainty about the right to claim non-pecuniary damages may also be considered as a disadvantage compared to other cases, which is also relevant with regard to this principle.

All three countries have implemented laws containing fines for infringement of non-discrimination rules, at least in the most regulated areas such as employment. However, these instruments are rarely used in practice and the level of the penalties is low. As a result, these laws do not play an important role in tackling discrimination.

When assessing the effectiveness of the sanction systems, the wider context needs to be taken into account. All the countries in question have seen recent social developments which do not benefit victims of discrimination seeking redress. In Slovakia, the Parliament rejected the local Ombudsperson's annual report for 2019, in which she concentrated *inter alia* on the protection of the rights of children, the elderly, women and marginalised communities.⁸⁷ In Czechia, the new Ombudsperson, Stanislav Křeček, gained votes for his election by making a number of controversial statements, arguing that discrimination is a 'virtual' issue that deserves a lower level of attention, and targeting in particular the Roma community which is the most vulnerable minority in Czechia.⁸⁸ Poland has recently gained international attention in particular with regard to so-called LGBT-free zones in the country, with some officials making statements to support discrimination against and hatred of LGBT individuals.⁸⁹ While all these developments may seem distant from the topic of sanctions for discrimination, they reflect trends and patterns that undermine the general perception of the importance of non-discrimination rules and the necessity of appropriate compensation.

These issues, along with many other incidents and public statements, may help to create a certain feeling of hostility, where victims of discrimination may fear diverse adverse effects of a decision to pursue their claims, starting with a possible lack of sympathy on the part of the court and ending with the potential mediatisation of the case and impacts on the claimant's private life. In Czechia, a Somali student who won a landmark case on religious discrimination in education before the Supreme Court recently decided to withdraw her claim and refrain from further court action due to victimisation and bullying.⁹⁰

87 Slovak Ombudsperson, *Správa o činnosti verejného ochráncu práv za rok 2019* (Report on the activity of the Public Defender of Rights in 2019), available at: https://www.vop.gov.sk/files/Sprava_o_cinnosti_VOP_2019.pdf; Slovak Ombudsperson, 'Pokračovať v ochrane tých, ktorých práva sú porušované, je mojou povinnosťou i poslaním' ('It is my duty and mission to continue to protect those, whose rights are breached'), available at: <https://www.vop.gov.sk/pokra-ova-v-ochrane-t-ch-ktor-ch-pr-va-s-poru-ovan-je-mojou-povinnos-ou-i-poslan-m>.

88 Aktuálně.cz, 'Diskriminace v ČR? Virtuální problém, neziskovky přehánějí, řadu lidí to živí, říká Křeček' ('Discrimination in the Czech Republic? Virtual problem, NGOs are exaggerating, many people make their living out of it, Křeček argues'), available at: <https://video.aktualne.cz/dtv/diskriminace-v-cr-je-virtualni-problem-neziskovky-to-prehane/r~afc4163867a6c11e6a3e5002590604f2e/>; Aktuálně.cz, 'Ombudspersonem bude Stanislav Křeček: Romové by se měli o svoje práva starat sami, říká' ('Stanislav Křeček will be the new Ombudsperson: The Roma should take care of their rights themselves, he says'), available at: <https://video.aktualne.cz/dtv/Ombudspersonem-bude-stanislav-kreckek-romove-by-se-meli-o-svoje/r~15686f8a4dbd11eaa24cac1f6b220ee8/>.

89 PES GROUP European Committee of Rights (2020), *Zoning out fundamental rights and local democracy: The LGBT-free zones in Poland*, available at: <https://pes.cor.europa.eu/zoning-out-fundamental-rights-and-local-democracy-lgbt-free-zones-poland>.

90 Idnes.cz, 'Studentka stáhla žalobu kvůli zákazu hidžábu ve škole, ta nesouhlasí' ('Student has withdrawn her claim regarding prohibition of hijab at school, the school disagrees'), available at: https://www.idnes.cz/zpravy/domaci/hidzab-kauza-stredni-skola-studentka-soud-zaloba-zpetvzeti.A200429_075844_domaci_aug.

In such an environment, victims of discrimination will surely compare the risks and losses connected with a discrimination lawsuit with any benefit they may obtain. While many victims of discrimination would argue that financial gain is not their primary motivation, bringing such a lawsuit is typically associated with significant cost. The fact that, in the event of success, the redress provided will most likely not be higher than a few thousand euro, may play a significant role in a complainant reaching the decision that the effort will not be worth it (along with other reasons mentioned in the literature, such as difficulties in establishing elements of proof, inaccessibility of legal advice, the length of proceedings, levels of awareness of discrimination rules etc).⁹¹ The effectiveness of judicial proceedings is further undermined by the fact that, in the view of a claimant, they may seem financially onerous and very long.⁹² This raises doubts regarding the effectiveness of the entire system. Where claims need to be enforced in lengthy proceedings with demanding procedural rules, the system will not be appealing unless the final compensation is high enough and not just symbolic. This seems not to be the case in any of the three countries. In conclusion, the sanction systems seem not to be effective.

It has previously been noted that a successful sanction system should put the victims of discrimination in the situation they would have been in had the discrimination not taken place. This general principle cannot easily be translated into figures, as discrimination often has no financial value, a plethora of criteria must be assessed and there can be differing opinions as to a reasonable amount of compensation. As a result, it appears that the current situation, where courts use their discretion to determine the amount of compensation using very general criteria, cannot be replaced, as any 'tariff' of compensation contained in a law cannot factor in all the criteria that only humans can consider and weigh up. Even introducing a minimum amount of compensation may seem disproportionate.

Even though not all the issues can easily be fixed, relatively straightforward changes could be made to the sanction system which could still have a significant impact. As there are so few court cases and the judges do not seem to have the necessary courage to challenge the current system, changes in legislation seem necessary. In Poland, they should take the form of the express enactment of the claim for non-pecuniary damages in national non-discrimination law. In all three countries, the anti-discrimination legislation should expressly refer to the requirements of the Directives for sanctions to be effective, proportionate and dissuasive. In Czechia, a clear connection between the national non-discrimination and civil law regulation appears necessary. Changes in the sanction systems would probably not lead to an immediate increase in discrimination lawsuits, but could significantly contribute to a better enforcement of discrimination claims and creation of an environment where discrimination will be rejected not only for legal and ethical reasons, but also for financial reasons.

91 Tomšej, J. (2019), *Country report, Czech Republic: Non-discrimination, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, 1 January 2018 – 31 December 2018*, Luxembourg, Publications Office of the European Union, p. 62.

92 Office of the Public Defender of Rights (Czech Ombudsperson) (2015), *Diskriminace v ČR: Oběť diskriminace a její překážky v přístupu ke spravedlnosti (Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice)*, available at: <http://www.ochrance.cz/en/discrimination/research/>.

Some reflections on racial and ethnic statistics for anti-discrimination purposes in Europe

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Statistics related to racial and ethnic minorities have been debated for a long time in Europe. With few exceptions, most Member States prefer not to compile such statistics or use available data for anti-discrimination purposes. Racial and ethnic statistics are undeniably a more complex issue than statistics on sex, which are compiled routinely, but the potential and benefits of such statistics are also difficult to dismiss.

This article is an attempt to reflect on the possible way forward for an issue that has become unavoidable at least since the adoption of the Racial Equality Directive in 2000.

Background

With the adoption of the Racial Equality Directive,¹ the European Union established a comprehensive legal framework for protection against discrimination based on racial and ethnic origin. The Directive has a wide material scope covering employment and occupation, social protection including social security and healthcare, social advantages, education, and access to and supply of goods and services available to the public including housing. It is also comprehensive in terms of its concepts, covering direct discrimination, indirect discrimination, harassment and instructions to discriminate. At the time of its adoption, no other EU equality directive had all the above-mentioned concepts and scope combined in one legal instrument.

In contrast, the codification of sex equality, which has a much longer history under EU law, developed gradually. For instance, Directive 76/207/EEC, which is the first directive protecting against sex discrimination in employment, had to be ‘modernised’ in 2002 through Directive 2002/73/EC,² ‘making the definition of direct and indirect discrimination in the area of gender equality consistent with the definition employed in the Race Directive’.³

Following the same pattern, statistical evidence was not mentioned in Directive 76/207/EEC and was introduced in Directive 2002/73/EC (recital 10) using the formula of the Racial Equality Directive (recital

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1 Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

2 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

3 Burri, S. and Prechal, S. (2008), *EU Gender Equality Law*, Office for Official Publications of the European Communities, Luxembourg.

15) providing that indirect discrimination may ‘be established by any means including on the basis of statistical evidence’.

Against this background, it would be reasonable to expect the application of the Racial Equality Directive as well as the forms in which it has been transposed into the national legislation of the Member States to be the leading example when it comes to the use of statistical evidence, at least in relation to indirect discrimination provisions. However, it is the other way around. Statistics on sex were produced and used in litigation long before the adoption of the Racial Equality Directive. Furthermore, in 2006 the existing provisions of the different sex equality directives were brought together and incorporated in Directive 2006/54/EC, commonly known as the Recast Directive.⁴ This new directive included a non-optional reference to the use of statistics, maintaining that ‘comparable statistics disaggregated by sex should continue to be developed, analysed and made available at the appropriate levels’ (recital 37). It is worth noting that this recital is not related to indirect discrimination exclusively; rather, statistics are promoted as a general and necessary tool in the advancement of gender equality.

However, the definition of indirect discrimination in the Racial Equality Directive differs from the one that was previously introduced for gender equality through the Burden of Proof Directive, Directive 97/80/EC.⁵ While the Racial Equality Directive speaks of ‘a particular disadvantage’ in the comparison with other persons, the Burden of Proof Directive speaks of disadvantaging ‘a substantially higher proportion of the members of one sex’. According to Tyson (2001)⁶ and Howard (2010),⁷ this was the result of a compromise in the negotiations concerning the Racial Equality Directive: a number of the Member States opposed collecting statistics on racial or ethnic origin and the Racial Equality Directive wording made it possible to prove indirect discrimination without such statistics.⁸

Furthermore, as Makkonen (2006)⁹ and Tobler (2008)¹⁰ point out, this should not pose an obstacle to proving indirect racial discrimination as courts are able to use what sometimes has been called ‘a common sense assessment’ based on common knowledge or obvious facts. This is partially due to the definition of indirect discrimination in the Racial Equality Directive that speaks of a provision, criterion or practice that ‘would’ put persons of a racial or ethnic origin at a particular disadvantage.

However, the usefulness of statistics on racial and ethnic minorities goes beyond proving indirect discrimination. It is about understanding and defining the challenges at hand in order to design adequate responses through analysis of disaggregated data at all appropriate levels. Indeed, this is the fundamental idea behind recital 37 of the Recast Directive concerning sex discrimination.

Racial statistics: the potential and challenges

In a 2004 green paper, the European Commission presented its analysis of the progress that had been made so far in the field of equality and non-discrimination in the enlarged EU.¹¹ The paper identified the lack of data as a specific area of concern, as this ‘makes it difficult to assess the real extent of the challenges that exist and to measure the effectiveness of legislation and policies to tackle discrimination’. The paper

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

5 Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

6 Tyson, A. (2001), ‘The Negotiation of the European Community Directive on Racial Discrimination’, *European Journal of Migration and Law* 3(2), pp. 199-229.

7 Howard, E. (2010), *The EU Race Directive. Developing the protection against racial discrimination within the EU*, Routledge, London.

8 Howard, E. (2010) and Tyson, A. (2001).

9 Makkonen, T. (2006), *Measuring Discrimination Data Collection and EU Equality Law*, Office for Official Publications of the European Communities, Luxembourg.

10 Tobler, C. (2008), *Limits and potential of the concept of indirect discrimination*, Office for Official Publications of the European Communities, Luxembourg.

11 European Commission (2004), *Equality and non-discrimination in an enlarged European Union*, green paper.

also recognised the ‘understandable concern to respect personal privacy and data collection rules’ as well as the ‘the sensitivity of this issue’. Nevertheless, the green paper expressed the need to continue the dialogue on this matter for the ‘future development of policy in the field of anti-discrimination’.

The Commission continued its efforts to bring clarity concerning the two main challenges in relation to the collection of racial statistics: respect for the data protection framework and the sensitivity of classification and categorisation of racial and ethnic minorities. Several research reports were commissioned. First, in 2006, the Commission launched a report on data collection and EU equality law.¹² In 2007, the *Handbook on Equality Data*¹³ was published and in 2017, a revised handbook was issued together with a number of thematic reports including one on racial and ethnic statistics.¹⁴

In this regard, it is fair to say that the EU has made adequate and high-quality guidance available to the Member States including comprehensive guidelines on how to improve the collection and use of equality data.¹⁵ As a whole, the above-mentioned reports provide a good understanding of the usefulness of racial statistics, tackle the challenges related to data protection rules and cover the sensitivity of classification. The following is a short summary of the main findings of these reports and some other previous research.

Usefulness of statistics

In general, racial statistics can be useful concerning the following areas:¹⁶

- Statistical evidence can play a decisive part in legal proceedings. Individual claimants often find themselves in need of statistical evidence to back up their claim, particularly where indirect discrimination is at issue. This is recognised in the Racial Equality Directive (recital 15).
- Statistical data can play a key role in recognising the need for, and planning of, positive action measures. The Racial Equality Directive permits positive action by allowing the maintenance or adoption of specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin (Article 5).
- Statistical data can be collected by Government agencies, businesses and other organisations for the purposes of monitoring compliance with equal treatment laws.
- Statistics are needed to assess the effectiveness of current anti-discrimination laws and policies, and to guide future policy and legal developments.
- Statistical and other scientific knowledge and evidence can give a major boost to awareness raising and sensitising efforts, and provide a compelling, factual baseline for national discussions on discrimination.
- Key international human rights conventions, to which all EU Member States are parties, directly and indirectly necessitate the collection of data on discrimination. Several conventions require the contracting states to submit periodic country reports on their human rights situation to the international treaty bodies, and full compliance with these requirements necessitate the compilation of statistical data.

12 Makkonen, T. (2006), *Measuring Discrimination Data Collection and EU Equality Law*, Office for Official Publications of the European Communities, Luxembourg.

13 Makkonen, T. (2007), *European handbook on equality data*, Office for Official Publications of the European Communities, Luxembourg.

14 Besides the updated handbook, (Makkonen (2017), *European handbook on equality data 2016 revision*) the package included also a specific report on equality data based on racial and ethnic origin (Farkas (2017), *Data collection in the field of ethnicity*), a report on equality data indicators, (Huddleston (2017), *Equality data indicators: Methodological approach overview per EU Member State technical annex*) and an analysis of the legal framework and practice in the EU Member States, (European Commission (2017), *Analysis and comparative review of equality data collection practices in the European Union*). The package is available at: www.humanconsultancy.com/projects/equality-data-collection-in-the-eu.

15 European Commission High Level Group on Non-Discrimination, Equality and Diversity (2018), ‘Guidelines on improving the collection and use of equality data’, available at: https://ec.europa.eu/info/sites/info/files/final_guidelines_4-10-18_without_date_july.pdf.

16 Makkonen, T. (2006), *Measuring Discrimination Data Collection and EU Equality Law*.

Data protection and privacy

When it comes to the legality of data, a common claim is that data protection laws prohibit the collection and processing of data revealing racial or ethnic background. However, available legal analyses indicate that this claim is not entirely accurate, at least in relation to international legal instruments.¹⁷

Makkonen (2006) analysed the data protection framework relevant for all Member States. The analysis covered the EU Data Protection Directive (that was in force at the time),¹⁸ the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,¹⁹ as well as the International Covenant on Civil and Political Rights to which all Member States are a party. The analysis led to two general conclusions:

- the international and European frameworks on the protection of privacy and data do not categorically prohibit the collection of so-called sensitive data in relation to discrimination – instead, the frameworks establish strict safeguards against the possible abuse of data;
- the processing of sensitive data is permitted on the basis of the consent of the data subject, except where this option is ruled out by national law in particular circumstances or where the authorisation of the national data protection authority is needed but not obtained.

The first *European Handbook on Equality Data*²⁰ confirms the same line of reasoning as above. The revised handbook,²¹ which analysed the current General Data Protection Regulation (GDPR)²² draws the same conclusion.

As Simon (2007)²³ points out in an analysis for the European Commission against Racism and Intolerance, the international data protection frameworks impose a prohibition to start with, and then add a relatively long list of conditions under which data may nonetheless be collected. In other words, the ambiguity is due to this prohibition-with-exceptions formula.

The European Union Fundamental Rights Agency (FRA) highlighted the challenges posed by this ambiguity. In its opinion on the then proposed data protection reform package, FRA suggested²⁴ that the GDPR could explicitly mention that sensitive data can be collected for the purpose of combating discrimination based on the grounds listed in Article 21 of the Charter of Fundamental Rights.

However, the GDPR was adopted with the same prohibition-with-exceptions formula. It does, however, bring some clarification in comparison with the repealed directive. According to recital 4 of the GDPR, processing of personal data should be ‘designed to serve mankind’, thus the ‘right to the protection of personal data is not an absolute right’ and ‘must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality’.

17 Makkonen, T. (2006), *Measuring Discrimination Data Collection and EU Equality Law*, Makkonen, T. (2007), *European handbook on equality data*, Makkonen, T. (2017), *European handbook on equality data 2016 revision*, Reuter, N. et al (2004), *Study on Data Collection to measure the extent and impact of discrimination in Europe*, Simon (2007), *‘Ethnic’ statistics and data protection in the Council of Europe countries*, European Commission against Racism and Intolerance, Strasbourg.

18 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

19 ETS Convention No. 108.

20 Makkonen, T. (2007), *European handbook on equality data*.

21 Makkonen, T. (2017), *European handbook on equality data 2016 revision*.

22 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

23 Simon, P. (2007), *‘Ethnic’ statistics and data protection in the Council of Europe countries*.

24 FRA (2012). Opinion of the European Union Agency for Fundamental Rights on the proposed data protection reform package. Available at: <https://fra.europa.eu/sites/default/files/fra-opinion-data-protection-oct-2012.pdf>.

Defining and categorising

As Makkonen²⁵ points out, racial or ethnic origin is one of those socially relevant distinctions that are socially constructed even though they refer to the real world. They therefore ‘do not have a single, self-evident meaning’. In other words, there are no universal solutions when it comes to collecting data on these kinds of socially constructed distinctions. However, there is a useful methodology on how to approach the issue, as set out in the series of questions below.

- Definitions: what is meant by terms such as ‘race’ or ‘ethnicity’?
- Classifications: how should data be grouped so that the compiled statistics produce a structured and understandable picture of reality?
- Categorisation: by what criteria should a person be assigned to one of the available categories? Should this take place on the basis of self-identification by the person concerned, on the basis of some objective criteria or on the basis of recognition by other members of the group?

The European equality data handbooks, suggest the following guiding principles:²⁶

- There are no universally accepted definitions of the concepts ‘racial origin’ or ‘ethnic origin’ in international law, EU law or the national law of the EU Member States. Due to international case law and authoritative interpretations of UN human rights bodies, some guiding principles to establish definitions have been given: recognition of factual diversity, not hinging on political considerations; terms are not to be narrowly construed; groups must not be excluded without an acceptable justification, as this might lead to unlawful discrimination.
- While there are no universally accepted definitions of these concepts, some standards for classification (grouping of data as a structured and understandable picture of reality) have been developed at international level to enhance comparability of statistics.
- There are different methods of categorisation (assignment to a category representing a group): self-identification, third-party identification and mutual recognition by members of a group. Self-identification has grown to become the most practised and accepted type of categorisation, in line with human rights principles such as respect for human dignity and respect for private life.

Concluding reflections

The usefulness of statistics on racial or ethnic origin seems to be well documented in the literature. In a survey conducted by the European Commission in 2004, 93 % of the respondents, who were mostly experts in the area of non-discrimination, recognised the need to improve data for the purpose of developing effective policies to promote equality and tackle discrimination.²⁷ Furthermore, the need for statistics has been embraced by the EU through the commissioning of several reports covering both research and legal analysis (above) as well as in several explicit statements.²⁸

The international and European legal frameworks for the protection of privacy do not seem to impose any absolute prohibition on the collection and processing of data on racial or ethnic origin for the purposes of anti-discrimination. Still, as Makkonen (2017) remarks, the current European regulation (GDPR, recital 10) leaves it to the Member States to determine more precisely under which conditions sensitive data may be collected and processed.

²⁵ Makkonen, T. (2017), *European handbook on equality data 2016 revision*.

²⁶ Makkonen, T. (2007) and (2017), *European handbook on equality data and European handbook on equality data 2016 revision*.

²⁷ Response statistics for green paper on anti-discrimination and equal treatment. Quoted by Makkonen (2006), p. 12.

²⁸ See for instance, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Non-discrimination and equal opportunities: A renewed commitment, COM (2008) 420 final, Brussels, 2 July 2008.

Due to the lack of established, common definitions and categories for the concepts of racial origin and ethnic origin on the European level, it is up to the individual Member State to define what is relevant, based on its demographic and social reality and in line with the principles outlined above. This could be one reason why the European Commission previously made it clear that it is up to the Member States 'to decide whether or not ethnic data should be collected'.²⁹

How different Member States tackle the issue is therefore very much dependent on the state's national history and traditions as well as its approach to anti-discrimination policies. It does not seem unreasonable to say that the collection and processing of data on racial and ethnic groups are subject to national priorities rather than questions of legality.

National responses: some disparate examples

The reluctance of some Member States to compile and process racial and ethnic statistics that was pertinent to the negotiations on the Racial Equality Directive seems to remain common in most Member States in spite of all the available guidance.³⁰

Historically, statistical evidence in the equality field has been strongly associated with the concept of indirect discrimination and the notion of disparate impact that was coined by the United States Supreme Court in its landmark ruling on *Griggs v. Duke Power Co.*³¹ As Hepple (2009) points out, after it was developed by the US Supreme Court, the concept of indirect discrimination was incorporated in the UK and Irish domestic legislation during the 1970s. It could also be found in the EU case law, starting with the *Defrenne* case.³² However, the first codification of indirect discrimination in the EU equality framework came as late 1997, with the Burden of Proof Directive.

In other words, the codification of statistical evidence for proving disparate impact came into the EU legal system from countries with a certain tradition of compiling demographic data on racial or ethnic groups, such as the USA and UK. On the other hand, continental Europe had had devastating experiences in relation to the identification of racial or ethnic minorities, of which the Holocaust is the most notorious example.

Twenty years after the adoption of the Racial Equality Directive, it seems that the reluctance of continental Europe to compile data on racial or ethnic origin has resulted in the UK standing out from the majority of the Member States who remained sceptical. Although at this point the UK has left the European Union, it is useful to discuss the UK experience in this field as it was designed and implemented under the EU legal regime.

The next section gives a short overview of the situation in the UK and Sweden to illustrate two diametrically different approaches to the collection of data on racial or ethnic origin. It is followed by a concluding reflection with examples from France and Germany. These are partially based on a questionnaire prepared specifically for this article.³³

29 Communication from the Commission to the Council and the European Parliament, The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM (2006) 643 final, Brussels, 30 October 2006.

30 Escafré-Dublet, A. and Simon, P. (2011), 'Ethnic Statistics in Europe: the Paradox of Colour-blindness', in Triandafyllidou, A. et al (eds) *European Multiculturalisms: Cultural, Religious and Ethnic Challenges*, Edinburgh University Press, Edinburgh. See also: Farkas, L. (2017), *Analysis and comparative review of equality data collection practices in the European Union: Data collection in the field of ethnicity*, Publications Office of the European Union, Luxembourg.

31 *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

32 Hepple, B. (2009), 'Equality at work' in Hepple, B. and Veneziani, B. (ed) *The transformation of labour law in Europe. A comparative study of 15 countries 1945 – 2004*, Hart Publishing, Oxford. Also: Schiek, D. et al (2007) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*.

33 The questionnaire was sent to four national experts in the European network of legal experts in gender equality and non-discrimination. The author is grateful to Matthias Mahlmann (Germany), Paul Lappalainen (Sweden), Sophie Latraverse (France) and Lucy Vickers (UK).

United Kingdom

In the UK, positive action is permitted in national law in respect of racial or ethnic origin. This provides that public authorities must have due regard to the need to eliminate discrimination, harassment, victimisation and to advance equality of opportunity. In Great Britain, there is a general statutory duty on public authorities to eliminate unlawful discrimination and to promote equality of opportunity related to each of the protected characteristics in the law, including race.³⁴ In Northern Ireland, a duty is imposed on specified public authorities to have ‘due regard to the need to promote equality of opportunity’ across all the equality grounds.³⁵

The positive duties outlined in the national equality legislation require the collection of data and its use to formulate positive action planning. In response, many public sector organisations have put in place processes to try to promote equality in the workplace and in the provision of their services, as part of a process of mainstreaming equality. Private bodies are also increasingly using data to develop positive action on a voluntary basis.³⁶

The GDPR is transposed through national legislation. The Data Protection Act 2018 allows processing of sensitive data for the purpose of monitoring of equality legislation under certain conditions.³⁷ This is based on Article 6(1) of the GDPR, which allows for processing of necessary data for compliance with legal obligations, processing necessary for the performance of a task carried out in the public interest or processing necessary for the purposes of the legitimate interests of the data controller.

Data is collected on the basis of voluntary self-identification and does not meet the condition mentioned above if it is carried out for the purposes of measures or decisions with respect to a particular data subject or if it is likely to cause substantial damage or substantial distress to an individual.³⁸

Racial and ethnic categories are also included in the national census with the main categories being: White, Mixed/Multiple ethnic group, Asian/Asian British, Black/African/Caribbean/Black British, Other ethnic group.³⁹ This kind of baseline data is useful as benchmark data for public or private bodies that wish to assess the impact of their policies.

One example of the usefulness of such data collection is in the higher education sector. Statistics are collected regarding attainment and are broken down by gender and by ethnicity, which allows for the design of relevant measures to close the attainment gap between different ethnic groups.⁴⁰

Another example of an area in which such data collection is useful is policing. Data on ethnicity is collected at every stop and search performed by the police. Statistics on stop and search are then compiled, which allows for careful analysis and scrutiny regarding the potential disproportionality of the data as regards the ethnicity of those stopped.⁴¹

34 Equality Act 2010, Section 149.

35 Northern Ireland Act 1998, Section 75.

36 Vickers, L. (2020), *United Kingdom country report 2020 on the non-discrimination directives Reporting period: 1 January 2019 – 31 December 2019*.

37 Vickers, L. (2020), *United Kingdom country report 2020 on the non-discrimination directives Reporting period: 1 January 2019 – 31 December 2019*.

38 Data Protection Act 2018, Schedule 1, part 2, para 8.

39 2011 Census analysis: Ethnicity and religion of the non-UK born population in England and Wales: 2011: <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/2011censusanalysisethnicityandreligionofthenonukbornpopulationinenglandandwales/2015-06-18#ethnicity-of-the-non-uk-born-population>.

40 <https://www.advance-he.ac.uk/guidance/equality-diversity-and-inclusion/student-recruitment-retention-and-attainment/degree-attainment-gaps>.

41 <https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest>.

Sweden

In Sweden, the national equality legislation imposes a duty on employers and education providers to take active measure in order to prevent discrimination and promote equal opportunities in relation to ethnic background (among other protected characteristics).⁴² However, the collection of data on ethnic background is specifically discouraged by the legislative materials that accompany the law, as it is clearly stated that collecting data on ethnic background would amount to an invasion of privacy.⁴³ Furthermore, according to the legislative materials, the provisions on active measures in working life do not require the collection of data on the ethnic backgrounds of the employees.⁴⁴

In 2012, the Equality Ombudsman issued a report on equality data commissioned by the Government.⁴⁵ The report covered all protected characteristics covered by the national equality legislation, except sex as most national statistics are disaggregated in terms of data on sex; the analysis followed the logic of the first *European Handbook on Equality Data*.⁴⁶ The report concluded that collecting data on ethnic background is both doable and needed. The report pointed out that restrictions on collecting sensitive data in the national data protection legislation at the time, allow the Government to make necessary adjustments to make data collection easier and in line with the relevant international frameworks concerning data protection and the international obligations of Sweden. It was suggested that the Government should initiate a public debate on the usefulness of ethnic data as well as establishing a task force to work out definitions and categories, and to propose a roadmap. The task force was supposed to include equality professionals, statisticians, researchers as well as representatives of ethnic minorities.⁴⁷

In 2013, the UN Committee on the Elimination of Racial Discrimination issued its concluding observations on the periodic report of Sweden.⁴⁸ The Committee recommended the State Party seek guidance from the above-mentioned study 'on methods for determining the composition of the population in terms of relevant discrimination indicators, and living conditions of all components of society, including immigrants, foreign-born citizens and members of indigenous and minority groups, with particular reference to the fields of employment, housing, education and health'. However, so far, no steps have been taken to follow up on the report's conclusions and recommendations.

In 2014, the provisions on active measures were revised. The legislative materials behind the new proposal did not mention statistics and data collection.⁴⁹ The Government proposal that passed in the Parliament mentioned data collection in one instance, clarifying that employers' obligation to examine the workplace for discrimination risks does not imply the collection of sensitive data.⁵⁰

National statistics do not include any data on racial or ethnic origin. However, statistics are sometimes disaggregated in terms of two categories – Swedish background and foreign background. The latter is defined by the national statistics authority as being born outside Sweden or being born in Sweden but both parents having been born outside Sweden.

42 Discrimination Act (2008:567), Chapter 3.

43 Government proposal (*Regeringens proposition*) 2007/08:95, p. 170.

44 Government proposal (*Regeringens proposition*) 2007/08:95, p. 326.

45 Al-Zubaidi, Y. (2012), *Statistikens roll i arbetet mot diskriminering* (The role of statistics in the fight against discrimination), the Equality Ombudsman, Stockholm.

46 Makonnen, T. (2006), *Measuring Discrimination Data Collection and EU Equality Law*.

47 Al-Zubaidi, Y. (2012), *Statistikens roll i arbetet mot diskriminering* (The role of statistics in the fight against discrimination).

48 Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, adopted by the Committee at its eighty-third session (12–30 August 2013), CERD/C/SWE/CO/19-21.

49 *Nya regler om aktiva åtgärder mot diskriminering* (New rules on active measures against discrimination) (SOU 2014:41).

50 Government proposal (*Regeringens proposition*) 2015/16:135.

Concluding reflections

It is not unreasonable to say that the UK and Sweden seem to have adopted two diametrically different approaches to the notion of race and ethnicity. The UK approach embraces the significance of the notions of race and ethnicity and recognises the need to mirror them in official statistics and monitoring. The Swedish approach on the other hand seems to consider race and ethnicity a private issue that should be kept away from public consideration. Its view on statistics related to ethnic background can be found in its periodic report to the Council of Europe on the implementation of the European Charter for Regional or Minority Languages stating that the country ‘does not compile official statistics regarding the ethnic origins of individuals, only information with regard to citizenship and country of birth’, because ‘no methods are available for assessing ethnic origin that are both ethically acceptable and scientifically reliable’.⁵¹

The country of birth approach is not unique to Sweden. For instance, both France and Germany have adopted the same idea of ‘colour blindness’, looking only at the country of birth or citizenship. This seems to be the dominant approach in Europe with some few exceptions.⁵² Country of birth can be useful in some specific contexts, for instance when studying the living conditions of newly arrived immigrants with the aim of advancing their equal rights and opportunities.⁵³ This is recognised in the UK as well, as the census includes the categories UK-born and foreign-born. However, both categories are further broken down by ethnicity.

According to Simon (2007), Sweden, Germany and France are all countries with longstanding immigration dating back to the 1950s and 1960s. Thus, country of birth is not relevant for a considerable part of the population that has some immigrant background. For instance, it does not cover or reflect physical characteristics such as colour of skin.

Another shortcoming that comes with the country of birth as a proxy is that it does not cover the domestic racial and ethnic minorities. In this respect, Finland provides an interesting example as data on language provides information about one domestic minority.⁵⁴ The country is bilingual with Finnish and Swedish as official languages. The Language Act (423/2003), allows every person to use their language (Finnish or Swedish) when receiving public information or interacting with authorities, except for unilingual authorities and municipalities. The Sámi Language Act (1086/2003) allows the Sámi minority to use their language when interacting with the municipalities, the state’s regional and local authorities to whose area of jurisdiction those municipalities belong as well as with courts in those municipalities. These legal requirements are met through collecting data on the first language of every resident in Finland. Data on language is collected through public statistics: every person indicates their native language and the information is listed in the Population Information System. Authorities are obliged to determine on their own initiative a person’s registered native language.

The Finnish language rights’ system is not designed for anti-discrimination purposes specifically, although it does provide two advantages from an anti-discrimination perspective. First, it contributes to diminishing the risks of discrimination by providing information in the relevant language and secondly, it recognises the ethnic composition of the population including domestic minorities. However, the Finnish language rights’ system is limited to the Finnish, Swedish and Sámi languages.

Different realities need different solutions and these realities are sometimes mirrored in the statistical systems of the Member States. For instance, in Germany, data on religious affiliation, which is also classified as sensitive data, is collected for administrative purposes through micro-censuses. The choice to collect data on a given characteristic does not seem to be an issue of legality.

51 Sweden’s report to the Council of Europe on the European Charter for Regional or Minority Languages (2013).

52 See for instance Simon (2007), *‘Ethnic’ statistics and data protection in the Council of Europe countries*.

53 Al-Zubaidi, Y. (2012), *Statistikens roll i arbetet mot diskriminering*.

54 See information from the Finnish Ministry of Justice: <https://oikeusministerio.fi/en/linguistic-rights>.

In that sense, country of birth, even combined with the country of birth of the parents, is too narrow a category and does not reflect the real world and diversity of the population in contemporary Europe. It perhaps only reflects the self-perception by a country in terms of multiculturalism.⁵⁵ In that sense, the use of country of birth as a proxy for racial or ethnic origin is a social construct that only reflects the current political or ideological self-perception.

Much of the reluctance to collect data on race and ethnicity is understandable due to the historical persecution of minorities in Europe. This explains why there is no substantial debate on racial data in Germany and why such debates in Sweden and France can be described as heated. However, considering all available guidance, it seems that Europe is 'locked in self-inflicted taboos' when it comes to racial and ethnic data collection (Chopin et al, 2013).⁵⁶

Statistical evidence is admissible in courts in all the above-mentioned countries. It is also possible, as mentioned previously, to prove indirect discrimination without statistical data. However, the availability of data enables victims of discrimination to explore the full potential of the concept. Thus, in the UK, several cases have been successfully won in court with the help of monitoring data.⁵⁷ In contrast, the full potential of indirect discrimination is somewhat limited in the other countries due to the lack of data and the need to compensate with other proxies. For instance, in both France⁵⁸ and Sweden,⁵⁹ successful litigation was based on compiling and grouping the names of the claimants given that the available data on country of birth was not helpful in showing the ethnic composition of the relevant groups. In Germany, there is no case law in relation to indirect racial discrimination, but several examples of successful litigation in terms of indirect sex discrimination.

Still, lack of data on racial or ethnic background that mirrors the reality is a considerable shortcoming when it comes to assessing the impact of current anti-discrimination policies and legislation. With the current changes in the demographics of Europe, the issue deserves more attention than the colour-blind approach might offer. As Escafré-Dublet and Simon (2011) remark, the idea that colour-blindness is a way to blur ethnic and racial boundaries in order to achieve equality is challenged by a reality where those boundaries are becoming even more visible.

The way forward?

Racial and ethnic data are a contentious issue: they are rooted in a history made up of 'slavery, colonisation, xenophobia, exploitation and domination, and they have the power to reveal historically crystallised relationships of power'.⁶⁰ Ironically, it is also data that gives power to the victims of discrimination to claim equal rights.

One illustrative example is a tweet by Statistics Sweden launching a tool that makes national statistics available for the general public. The tweet said: 'The power is yours. We are now launching "Sweden in Figures". Discover an easier and more fun way to understand society, examine what others say and build your own arguments. Statistics and knowledge are power. Now it's yours.'⁶¹

55 Patrick, S. and Piché, V. (2012), 'Accounting for ethnic and racial diversity: the challenge of enumeration', *Ethnic and Racial Studies*, vol 35, No. 8.

56 Chopin, I., Farkas, L. & Germaine-Sahl, C. (2013). Collection of data on race, ethnicity and disability in the field of public education in Bulgaria, Germany, Hungary, Ireland, Romania and Sweden, and public employment in France: What are the possibilities? Migration Policy Group: Brussels.

57 For instance: *Essop and others v Home Office (UK Border Agency)* [2017] UKSC 27 and *R (TW) and R (Gullu) v London Borough of Hillingdon* [2019] EWCA Civ 692.

58 As in Paris Court of Appeal, 6 July 2007 *Garnier Adecco* No. 06/07900 or Toulouse Court of Appeal, 19 February 2010, No. 08/06630.

59 Stockholm District Court, 2011-04-13, case No. T 9176-08.

60 Escafré-Dublet, A. and Simon, P. (2011), 'Ethnic Statistics in Europe: the Paradox of Colour-blindness', in Triandafyllidou, A. et al (eds) *European Multiculturalisms: Cultural, Religious and Ethnic Challenges*.

61 Translated by the author. The tweet in Swedish can be found here: <https://twitter.com/sverigeisiffror/status/656348362313211904>.

The optional formula for statistical evidence provided by the Racial Equality Directive (recital 15) leaves the choice to collect data on racial and ethnic origin to the Member States. Furthermore, the GDPR (recital 10) leaves it to the Member States to set out the circumstances for specific processing situations, including determining more precisely the conditions under which the processing of personal data is lawful. It is the Member State that has the power to decide what evidence of discrimination is available for the potential victims of discrimination as well as the power to frame awareness about equal rights. On the other hand, despite the reluctance of many Member States to collect data on racial or ethnic origin, a majority of Europeans seem to be willing to share their sensitive data for the purpose of advancing equal rights.⁶²

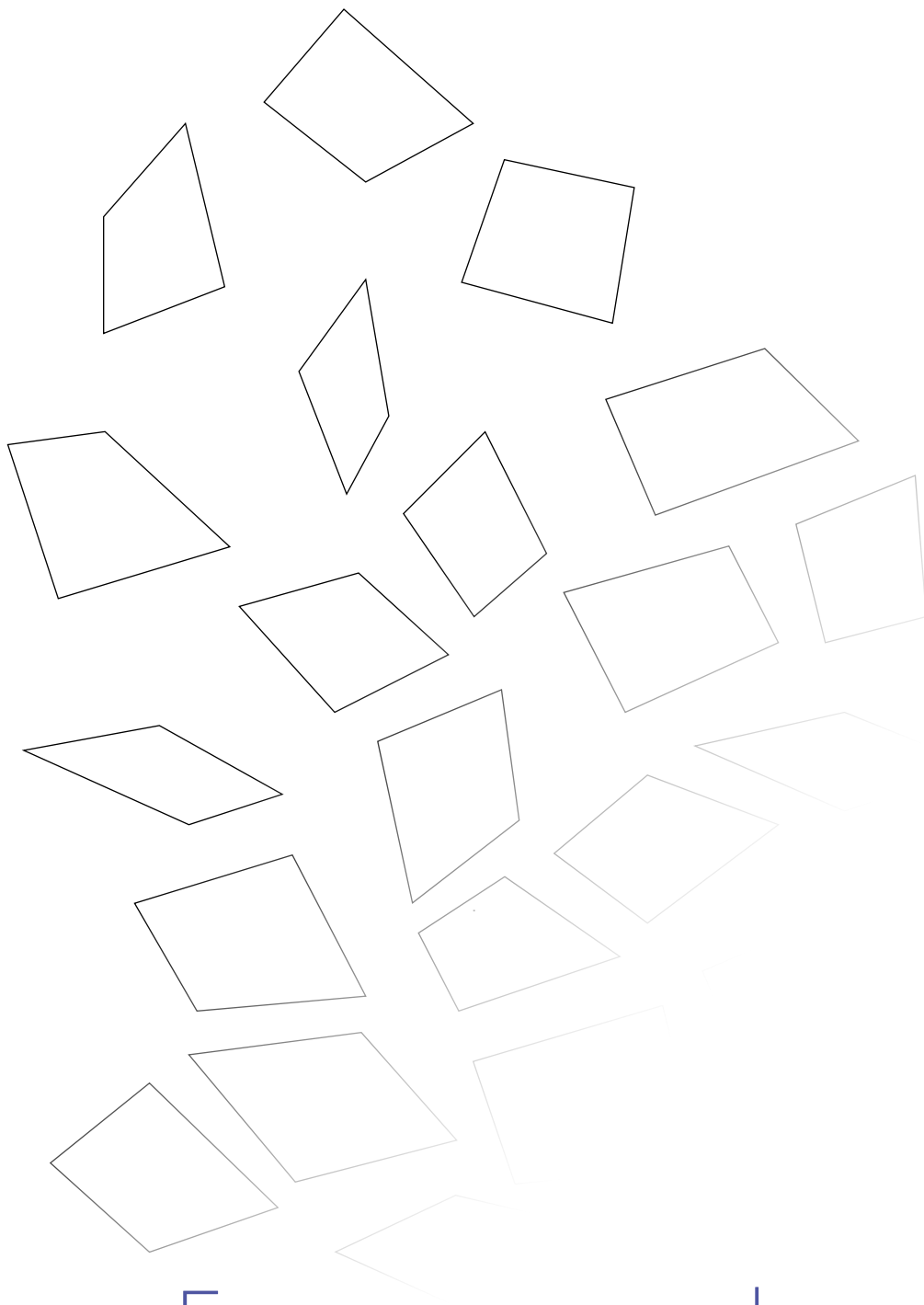
As Solanke (2009)⁶³ points out, the debate on racial and ethnic classification in the UK started in the 1960s. A fierce public debate continued for several decades and racial and ethnic categories were only included in the public statistics from 1990 – compromise takes time.

It seems that the most plausible way forward for the EU in relation to racial and ethnic statistics is a renewed dialogue between the European Commission and the Member States. In its newly adopted anti-racism action plan for 2020-2025, the Commission has expressed a renewed commitment to such dialogue with the Member States.⁶⁴ This dialogue would benefit from including not only those who have the power to make the decision, but also those who aspire to equal rights and opportunities.

62 Special Eurobarometer 263.

63 Solanke, I. (2009), *Making anti-racial discrimination law*, Routledge, London.

64 European Commission (2020), *A Union of equality: EU anti-racism action plan 2020-2025*, COM(2020) 565 final, available at: https://ec.europa.eu/info/sites/info/files/a_union_of_equality_eu_action_plan_against_racism_2020_-2025_en.pdf.



European case law update

This section provides an overview of the latest main developments in gender equality and non-discrimination cases pending or decided by the Court of Justice of the EU and the European Court of Human Rights, from 1 January to 30 June 2020.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE GENERAL OPINIONS

Case C-223/19, YS v. NK, Opinion of Advocate General Kokott delivered on 7 May 2020, ECLI:EU:C:2020:356

Gender

Age

This opinion by Advocate General Kokott ('the AG') concerns the request for a preliminary ruling from the *Landesgericht Wiener Neustadt* (Austria) with regard to the equal treatment of men and women in matters of pay and social security. Essentially, the Austrian court questions whether men, who are the primary recipients of larger pensions compared to women, are indirectly discriminated against when they are obliged to contribute more to secure the pension revenue. The legislation allegedly affects more men than women as well as more old people than young people. Therefore, the Court of Justice is asked to clarify whether the anti-discrimination directives preclude such national legislation. In this respect, the Court will have to determine whether such legislation is compatible with the prohibitions of (indirect) discrimination on grounds of sex and age contained in Directives 2000/78 and 2006/54.

The AG starts out by assessing whether the legislation in question falls within the scope of the above-mentioned directives. The legislation in the main proceedings concerns occupational pensions of a contractual nature, which generally do fall within the scope of the directives. However, the Austrian Government is of the opinion that, because the specific pensions in question constitute a type of special tax of particularly large pension entitlements, they fall outside the scope of Directives 2000/78 and 2006/54. The AG, on the other hand, ascertains that because of the purpose of the provisions at issue, namely increasing public revenue to ensure the long-term financial feasibility of pension entitlements, it does not make them fiscal regulations. Both directives are thus applicable.

Consequently, the AG assesses whether the provisions at issue constitute indirect discrimination on the grounds of sex. She examines whether the difference in treatment is based on a neutral criterion of differentiation and whether the disadvantage concerns one sex in particular, as opposed to the other. Difference in treatment only exists if different rules are applied to comparable situations. However, with regard to the occupational pensions in question, the AG finds that they are not comparable to other types of pensions. Nonetheless, in the opinion of the referring court, the link to the amount of benefit entitlement (those entitled to a higher benefit have to provide a higher contribution) is the decisive criterion giving rise to indirect discrimination. In the opinion of the AG, however, this question is only relevant when examining the justification of the provisions. As for the particular disadvantage for men, the AG affirms statistical data may be used, but that it is not sufficient to consider absolute figures, as the referring court did. By finding that more men than women have made a pension contribution such as the one at issue, the referring court compared the number of men with the number of women affected. However, the court only considered the group of people meeting the criterion at issue, which results in the ratios of 100 % of men and 100 % of women being affected. All workers, subject to the legislation, would need to be taken into account and consequently, the percentage of male workers affected would need to be considered in comparison to the percentage of female workers affected. The assessment of such figures falls within the exclusive jurisdiction of the referring court.

As for the question of justification, if the referring court establishes indirect discrimination, it must examine whether it is objectively justified by a legitimate aim. The AG emphasises that, if the referring court finds such discrimination, it is at most linked to already existing inequality – because on average, men still predominantly earn more than women. Thus, the already existing inequality is not increased

by the provisions at issue, which makes the requirements for justification correspondingly lower. The AG holds that because of the foregoing and, *inter alia*, the aim to reduce the burden on the public budget, the legislation cannot be evidently regarded as inappropriate or inconsistent.

The AG holds that Directive 2006/54 may preclude national provisions, such as the ones at issue in the main proceedings, if the referring court can determine indirect discrimination by means of statistical data, or by any other means. However, this is the case only when that fact cannot be objectively justified by any reasons unrelated to discrimination on the grounds of sex.

With regard to indirect discrimination on the grounds of age, the referring court questions whether older people are discriminated against, because they fall under the legislation at issue in the main proceedings (as younger people fall under (new) occupational pensions funds, which were introduced at the end of the 1990s). The AG states that it is natural that people to whom a later legal situation applies are younger, however this does not constitute indirect discrimination under Directive 2000/78.

Lastly, the AG considers whether Articles 16, 17, 21 and 47 of the Charter preclude the national legislation. The applicability of the Charter is called into question because of the necessity of EU law to impose obligations on Member States in the subject area of the legislation in question. However, if the national legislation introduces indirect discrimination (which requires justification), it is subject to EU law, as the aforementioned directives require the allocation and calculation of benefits in occupational social security schemes to be without discrimination. In the opinion of the AG, merely Article 21(1) would be applicable, and merely on the grounds of sex, because Directive 2006/54 gives specific expression to that Article. Nonetheless, the directives are to be interpreted in light of Article 21, which means that if a breach of the former is established, it is not necessary to examine the latter. As for Articles 16, 17 and 47 of the Charter, the AG states that a limitation on the freedom of the employer with regard to remuneration (Article 16) as well as a limitation on the use of property of an employee (Article 17) can be justified when objectively necessary and Article 47 does not require a national legal order to provide an examination of whether national provisions are compatible with EU law (by means of a free-standing action).

Case C-30/19 *Diskrimineringsombudsmannen v. Braathens Regional Aviation*, Opinion of Advocate General Saugmandsgaard Øe delivered on 14 May 2020

The Advocate General Opinion follows a request for preliminary ruling by the *Högsta domstolen* (Supreme Court, Sweden) which inquired whether a person who considers himself a victim of discrimination, has the right to have a court examine whether that discrimination occurred in the context of an action for damages, where the defendant agrees to pay the compensation sought while contesting any discrimination.

In this case, the applicant was a passenger of Chilean origin who, during an internal flight from Gothenburg to Stockholm operated by Braathens, was subjected to an additional security check. The Equality Ombudsman brought proceedings before the district court of Stockholm, claiming that the applicant had been directly discriminated against on grounds of his physical appearance and ethnicity. The district court ordered Braathens to pay the sum of EUR 955 (SEK 10 000) as compensation to the passenger, but it declared inadmissible the form of declaratory judgment on the substance of the case sought by the Ombudsman. This decision was confirmed by the Court of Appeal of Stockholm that dismissed the appeal brought by the Ombudsman. The Ombudsman eventually requested the Supreme Court to submit a reference to the Court of Justice for a preliminary ruling.

Advocate General Saugmandsgaard Øe recalled that Member States have the autonomy to set out the detailed procedural rules governing actions for safeguarding those rights which individuals derive from EU law. However, that freedom must be consistent with the concept of 'effective judicial protection'.

Racial or
ethnic origin

All
grounds

This principle, now guaranteed in Article 47 of the EU Charter of Fundamental Rights, recognises that individuals whose rights and freedoms guaranteed by EU law are violated have the right to assert before a court their rights under EU law.

As regards the Member States' 'freedom' to adopt sanctions, the AG observed that the link between the payment of compensation and the acknowledgement of an infringement of the right to equal treatment, is crucial for both the compensatory and deterrent functions of the sanction. In particular, building on the case law of the ECtHR, the AG noted the importance of finding a link between the compensation and the existence of discrimination, not only to obtain adequate compensation but also in order that the sanction may perform its deterrent function, in accordance with Article 15 of the Racial Equality Directive.¹ The AG underlined that, if the sanction is not clearly related to any discriminatory conduct, the deterrent effect is considerably reduced since the defendant would not be penalised for such discrimination.

The AG further recognised that Member States have the freedom to choose legal remedies, but this is subject to the condition that legal remedies are available under national law, if only indirectly, for ensuring respect for the rights that individuals derive from EU law. The availability of criminal proceedings cannot compensate for the absence of a civil law remedy for obtaining a finding of discrimination, in the event of admission of a claim without acknowledgement of discrimination by the defendant.

Saugmandsgaard Øe concluded that Articles 7, 8 and 15 of Council Directive 2000/43/EC, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, a person who has been discriminated against on grounds of ethnic origin has the right, in addition to compensation, to have a court examine whether discrimination actually occurred.

REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

Cases C-773/18 to C-775/18, *TK and Others v. Land Sachsen-Anhalt*, Judgment of 27 February 2020, ECLI:EU:C:2020:125

This request for a preliminary ruling was submitted by the *Verwaltungsgericht Halle* (Halle Administrative Court, Germany) and concerned the lawfulness of German law for the remuneration of judges and public servants with Articles 2, 6, 9 and 17 of the Employment Equality Directive.

This preliminary ruling originated in three disputes against the *Land* (federal state) Saxony-Anhalt regarding a request for damages for discrimination on the basis of age, allegedly suffered by judges and public employees. As of 31 March 2011, the applicants in the main proceedings were remunerated under the Federal Law on the Salary of Civil Servants determining the level of the basic salary of civil servants or judges, at the time of hiring, based on their age. The previous ruling of the Court in *Hennigs and Mai* already clarified that the principle of non-discrimination based on age under Directive 2000/78 prohibits the determination of the level of an agent's basic salary in the public sector on the basis of their age.² The federal state of Saxony-Anhalt initially adopted the same approach as the Federal Ministry of the Interior, which instructed the federal authorities to reject any complaint lodged by civil servants or judges against the determination of their remuneration under the previous federal law, because the aforementioned CJEU's judgment targeted contract agents and could not be applied to civil servants and judges. Two laws adopted on 18 December 2015 and 8 December 2016 respectively by the federal state of Saxony-Anhalt later introduced a salary increase applicable to all civil servants and judges employed in its service. For the period up to and including 31 March 2011, the salary increase was based upon a

¹ See, inter alia, decision of the ECtHR of 25.11.2004, *Nardone v. Italy* (CE:ECHR:2004:1125DEC003436802), and judgment of the ECtHR of 07.06.2012, *Centro Europa 7 S.R.L. and Di Stefano v. Italy* (CE:ECHR:2012:0607JUD003843309).

² Judgment of 08.09.2011, *Hennigs and Mai*, C-297/10 and C-298/10, EU:C:2011:560.

percentage of the basic salary that civil servants and judges had received, in each relevant year, pursuant to the previous federal law on the remuneration of civil servants.

The referring court asked whether a percentage increase of the salary made retrospectively under an age-based pay system constitutes a new discrimination when it is the same for all levels of a certain pay grade. It also asked whether Article 9 of Directive 2000/78 and the principles of equivalence and effectiveness are to be interpreted as meaning that a Member State can establish a two-month time limit for lodging a compensation claim for damage starting from the day of a judgment of the Court that found the discriminatory nature of a similar measure.

First, the Court ruled that Articles 2 and 6 of Directive 2000/78 must be interpreted as meaning that they do not preclude a measure that, in order to guarantee civil servants and judges adequate remuneration, provides a salary increase equal to a percentage of the basic salary that they previously received according to their age. However, such a measure must respond to the need to guarantee the protection of rights acquired in a given context and not lead to the perpetuation of a difference in treatment according to age.

Secondly, the Court also concluded that the principle of effectiveness must be interpreted as meaning that it prevents Member States from setting a two-month time limit to bring an action for damages, following a judgment of the Court that ascertained the discriminatory nature of a similar measure, if the persons concerned risk not being able to become aware, within this term, of the existence or extent of the discrimination they have suffered.

Case C-670/18, *CO v. Comune di Gesturi*, Judgment of 2 April 2020, ECLI:EU:C:2020:272

This request for a preliminary ruling was submitted by the *Tribunale Amministrativo Regionale per la Sardegna* (Sardinia Regional Administrative Tribunal, Italy) and concerned the interpretation of Articles 1 and 2 of Directive 2000/78 and the lawfulness of provisions prohibiting public administrative authorities from awarding consultancy contracts to individuals who have already retired.

The main dispute involved the municipality of Gesturi in Italy, which published a call for expressions of interest in a consultancy role for the local recycling centre but required potential candidates to not be former private or public workers who had retired. The claimant fulfilled all the professional requirements set out in the call, but he was not eligible to apply because he was a retired public sector worker. The claimant therefore argued that the provisions at issue constituted indirect discrimination on the ground of age.

The Court found that the applicable Italian law is indirectly based on an age-related criterion and imposes on retired individuals a less favourable treatment than all persons who still pursue a professional activity. However, the aim of the provisions at issue is to promote the access of younger people to the public service and to carry out an effective review of public expenditure by reducing the operating costs of the public administration. In light of the above considerations, the Court concluded that Articles 2(2), 3(1) and 6(1) of Directive 2000/78 must be interpreted as meaning that they do not preclude national legislation which prohibits public administrations from awarding consultancy contracts to retired persons, when that legislation pursues a legitimate aim of employment policy and labour market and the means used to achieve this aim are appropriate and necessary.


 Age

Case C-507/18, *NH v. Associazione Avvocatura per i diritti LGBTI – Rete Lenford*, Grand Chamber judgment of 23 April 2020, ECLI:EU:C:2020:289

Sexual
orientation

This request for a preliminary ruling was submitted by the *Corte suprema di Cassazione* (Supreme Court of Cassation, Italy) and concerned statements made during a radio programme by a lawyer, NH, stating that he would never recruit persons of a certain sexual orientation to his law firm.

The claimant in the original proceedings, an association of lawyers that defends the rights of lesbian, gay, bisexual, transgender and intersex persons (LGBTI) in court proceedings, considered that NH's conduct amounted to discrimination on the ground of workers' sexual orientation. The Bergamo District Court ruled that NH's conduct was unlawful and directly discriminatory and ordered him to pay EUR 10 000 to the claimant in damages. The Brescia Court of Appeal dismissed NH's appeal against that order. NH eventually appealed in cassation against that judgment before the referring court and alleged that he expressed an opinion as a private citizen, and that the statements at issue were not made in any practical professional context.

The referring court queried, in the first place, whether an association of lawyers constitutes a representative entity for the purposes of Article 9(2) of Directive 2000/78 and has standing to bring proceedings, including in respect of a claim for damages, in circumstances of alleged discrimination against LGBTI persons. In the second place, the referring court asked whether there must be an ongoing individual recruitment negotiation or public offer of employment in order for statements such as those at hand to fall within the scope of Directive 2000/78 and its national implementing legislation.

As regards the first question, the Court highlighted that Article 9(2) of Directive 2000/78 does not preclude a Member State from recognising the right of associations to bring legal or administrative proceedings, without acting in the name of a specific complainant or in the absence of an identifiable complainant. The Member State has thus to decide under which conditions an association may bring legal proceedings for a finding of discrimination prohibited by Directive 2000/78 and for a sanction to be imposed in respect of such discrimination.

Secondly, the Court noted that Directive 2000/78 is capable of applying in circumstances involving public statements concerning a particular recruitment policy, even if the recruitment procedure has not yet been opened or planned.³ It is, however, necessary to demonstrate that the link between those statements and the conditions for access to employment is not hypothetical. To this end, the Court clarified that the relevant criteria to be considered are the status of the person making the statements and the capacity in which he or she made them. These criteria must show either that he or she is a potential employer or is, in law or in fact, capable of exercising a decisive influence on the recruitment procedure. Also, the nature and content of the statements must relate to the conditions for access to employment and establish the employer's intention to discriminate. Finally, the public or private context in which the statements at issue are made must be taken into consideration. The Court concluded that this interpretation of Directive 2000/78 is not affected by any possible limitation to the exercise of freedom of expression. The Court agreed with the Opinion of the Advocate General and emphasised that, according to Article 52(1) of the Charter, freedom of expression is not an absolute right and its exercise may be subject to limitations, as far as these are provided for by law and respect the essence of that right and the principle of proportionality.

³ See judgment of 25.04.2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraphs 44 and 45.

European Court of Human Rights

Case of *Beizaras and Levickas v. Lithuania*, Application No. 41288/15, Judgment of 14 January 2020

Sexual
orientation

The case originated in an application lodged by two Lithuanian nationals who alleged that they were discriminated against on the grounds of sexual orientation, due to the public authorities' failure to launch a pre-trial investigation into hateful comments on the social media account of one of the applicants. They claimed a breach of Article 14 of the Convention, taken in conjunction with Article 8.

In 2014, the applicants posted a photograph on their social media accounts depicting a same-sex kiss to announce the beginning of their relationship. However, the majority of online comments on the photo were of a nature to incite hatred and violence against the applicants and LGBT people in general. As a result, the National Lesbian, Gay, Bisexual and Transgender Rights Association (LGL) lodged a complaint with the Prosecutor General's Office asking that criminal proceedings be initiated regarding 31 such comments. The comments were degrading and detrimental to the dignity of the applicants, inciting discrimination and violence. The prosecutor at the Klaipėda district prosecutor's office decided to not initiate a pre-trial investigation because the authors of the comments at issue had been merely 'expressing their opinion'. The LGL Association lodged an appeal against the prosecutor's decision with the Klaipėda City District Court, but it was dismissed. Despite another appeal of the LGL Association, the Klaipėda Regional Court upheld the reasoning of the prosecutor and the district court, highlighting that initiating criminal proceedings would constitute a 'waste of time and resources' and cause an unlawful restriction of the rights of others.

The applicants complained before the European Court of Human Rights that they had been treated differently by the Lithuanian authorities because of their sexual orientation. The difference in treatment was proved by the decision of the prosecutor and the courts not to enforce the Lithuanian criminal legislation and not to start a pre-trial investigation, despite evidence of extreme homophobic online hate speech.

The Government of Lithuania argued in its defence that none of the domestic authorities had a predisposed bias against the homosexual minority and that the applicants' sexual orientation was never a ground in itself for the refusal to start a pre-trial investigation. The Government also underlined that the applicants had themselves provoked the hateful online reaction and that the comments at issue could not be considered criminal.

First, the ECtHR found that the hateful comments including undisguised calls for violence by private individuals against the applicants and the homosexual community were instigated by a bigoted attitude towards the LGBT community. Secondly, the Court relied on statistics from multiple sources to note the unsatisfactory practice of the Lithuanian authorities' in dealing with instances of homophobic hate crimes and hate speech and stated that the failure of the relevant public authorities to discharge their positive obligation to investigate the hate speech crimes was the result of a discriminatory attitude. The Court therefore considered that the failure of the authorities to discharge their positive obligation to investigate the hate speech crimes amounted to a violation of Article 14, taken in conjunction with Article 8 of the Convention.

Case of *Cînta v. Romania*, Application No. 3891/19, Judgment of 18 February 2020

Disability

The case originated in an application against Romania concerning the alleged unlawfulness of the restrictions imposed on the applicant's contact rights in respect of his four-year-old daughter during divorce and custody proceedings. The applicant complained that his mental illness played a significant role in these restrictions, in violation of Article 14 in conjunction with Article 8 of the Convention. The applicant highlighted that the contact schedule with his daughter was limited to two, two-hour meetings per week and only in the mother's presence. He claimed that there was no evidence before the national courts that he would pose a threat to his daughter's wellbeing. These restrictions, motivated by his state of health, did not allow the applicant to maintain and develop a personal relationship with the daughter and to participate effectively in her education. The claimant therefore argued that he had been placed in a less favourable situation than a person without a mental illness. The Government instead rejected this claim by emphasising that domestic courts limited the applicant's contacts rights to ensure the child's best interests.

First, regarding the differential treatment, the Court recognised that mental illness may be a relevant factor in assessing parents' capability of caring for their child. However, it may amount to discrimination when the mental illness does not affect the parent's ability to take care of the child. The Court found that the applicant's mental illness was a decisive element of the final decision to limit his contact with the daughter. Consequently, the applicant suffered a difference in treatment from other parents based on his mental health, a ground which is covered by 'other status' in the text of Article 14 of the Convention.

Secondly, in relation to the complaint raised under Article 8 of the Convention, the Court concluded that the applicant's mental illness was not genuinely assessed by the domestic courts, as their decisions failed to indicate the existence of any risk the applicant could supposedly pose to his child. The Court underlined that the applicant was perceived as a threat because of his mental illness, but the specific circumstances of the case and the family situation were not properly considered.

The Court found that his treatment was discriminatory and amounted to a violation of Article 14 in conjunction with Article 8 of the Convention.

Case of *Munteanu v. the Republic of Moldova*, Application No. 34168/11, Judgment of 26 May 2020

Gender

This case originated in an application by two Moldovan nationals, a mother and son, ('the applicants') concerning an allegation under Article 3 ECHR with regard to domestic violence. Particularly, they alleged that the domestic authorities had condoned the domestic violence they had endured. Moreover, the first applicant also complained under Article 14 ECHR, stating she was discriminated against because of her gender.

The first Applicant was married to IM, who both verbally and physically abused both applicants. On 18 April 2011, the first applicant went to the police, after being assaulted by IM. However, the applicant was fined because IM had called the police stating that she had verbally and physically attacked him. On 19 April 2011, the first applicant called the police again, after another assault. A protection order was issued and subsequently, in May 2011, a criminal investigation was requested by the applicant, because IM did not adhere to the protection order. On several occasions the applicant was assaulted again by IM and on multiple occasions the applicant requested new protection orders. In June 2011, criminal proceedings were initiated against IM for causing bodily harm, but not for domestic violence, even though the applicant had requested on multiple occasions that domestic violence be included in the criminal proceedings. In October 2011, charges of domestic violence were included in the proceedings and IM was convicted of causing bodily harm in March 2012 and of domestic violence in February 2013. After serving a prison sentence until July 2014, another criminal investigation against IM was started,

for violence against the first applicant in 2015. However, the investigation was discontinued in October 2016 and IM died in December 2016.

Before the Court, the applicants argued that the domestic authorities had failed to fulfil their positive obligation under Article 3. Against this, the Government argued the authorities had taken all reasonable measures to protect the applicants.

In its judgment, the Court starts out by emphasising that ill-treatment (as prohibited by Article 3) must attain a minimum level of severity, which is relative – depending on all the circumstances of the case. If the treatment reaches the threshold of severity (triggering the protection of Article 3), the Court has to examine whether the domestic authorities fulfilled their positive obligation to ensure individuals are protected against all forms of ill-treatment (including situations between private individuals). The Court sums up the positive obligations, which are interlinked, as follows:

‘(a) the obligation to establish and apply in practice an adequate legal framework affording protection against ill-treatment by private individuals;

(b) the obligation to take reasonable measures that might have been expected in order to avert a real and immediate risk of ill-treatment of which the authorities knew or ought to have known; and

(c) the obligation to conduct an effective investigation when an arguable claim of ill-treatment has been raised.’

In the case in question, the Court assessed that the first applicant suffered systematic ill treatment. Moreover, her experience of suffering and anxiety amounted to inhuman treatment, which is also prohibited by Article 3. Similarly, the second applicant suffered as a result of witnessing the violence against his mother as well as his own physical assault by his father. Therefore, Article 3 is applicable to the present case. With regard to the first obligation formulated above, the Court notes that the domestic authorities have put in place a legislative framework to counteract domestic violence. However, when there is a real and immediate threat, there is also an obligation to take account of the recurrence of successive episodes of violence within the family. The Court considers that the authorities were well aware of the violent behavior of IM and did not fulfil their positive obligations, thus breaching Article 3. In short, *inter alia*, none of the protection orders were fully enforced, one of the most serious instances of violence took place while the police were still nearby, it took the authorities more than two months to adopt more decisive actions, and despite the numerous complaints, the authorities did very little to effectively protect the applicants.

As for the breach of Article 14 ECHR, the applicant argued that the failure of the authorities to protect her from domestic violence, was a result of preconceived ideas concerning the role of women within the family. The Court initially reiterated that mainly women are affected by domestic violence. Subsequently, a failure to protect women from domestic violence breaches their right to equal protection under the law (even though this failure is unintentional). As for the case at hand, the applicant was subjected to violence on a number of occasions, while the authorities were aware of this violence. The applicant made formal complaints, *inter alia* about the fact that the authorities were not taking the situation seriously enough (e.g. taking notice, but no action and refusing assistance). Moreover, the authorities tried to convince her to ‘keep the family together by being nice’ to IM and the domestic courts referred to ‘the immorality of the victim’s actions, who [had] provoked the offence’. Consequently, the Court found that the authorities’ actions reflected a discriminatory attitude towards her as a woman. Therefore, the Court found that a violation of Article 14 had occurred.⁴

⁴ However, the Court notes that the applicants’ representative failed to submit any claims for just satisfaction. Thus, the Court makes no award to the applicants, although the applicants each claimed EUR 20 000 in respect of non-pecuniary damages.



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

This section provides an overview of the main latest developments in gender equality and non-discrimination law (including case law) and policy at the national level in the 27 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia, Turkey, and the United Kingdom, from 1 January to 30 June 2020.

POLICY AND OTHER RELEVANT DEVELOPMENTS

The Committee on the Rights of Persons with Disabilities adopted the Concluding observations on the initial report of Albania

Albania ratified the Convention on the Rights of Persons with Disabilities in 2012 and the initial report was submitted by the Government to the Committee on the Rights of Persons with Disabilities (CRPD) in December 2015. In September 2019, the Committee adopted its Concluding observations on the report.

The Committee commended Albania for the adoption of legislation and policy documents that aimed at the protection of persons with disabilities.¹ However, it also expressed some concern in relation to a wide array of issues, including:

- insufficient efforts to revise existing legislation to bring it into compliance with the Convention, notably legislation regarding the legal capacity of persons with disabilities, their deprivation of liberty and forced treatment based on a medicalised model of disability;
- lack of participation and consultation of representative organisations due to the lack of legislation, transparent procedures and sustainable financial support;
- lack of comprehensive policies regarding multiple and intersecting discrimination faced by women and girls with disabilities, and addressing the situation of children with disabilities in all aspects of their lives, notably in education;
- lack of regular awareness-raising and training programmes;
- insufficient measures to ensure the access of persons with disabilities to the justice system, to increase their level of employment, to deinstitutionalise them, to guarantee accessible healthcare services and facilities in the community and to provide appropriate financial support for persons with disabilities; and
- the absence of disaggregated data about the situation of persons with disabilities.

The Committee strongly recommended that Albania take specific measures to guarantee a high level of protection from discrimination for persons with disability, such as:

- reviewing the legislation to incorporate a clear prohibition of disability discrimination, explicitly including all forms of discrimination on the ground of disability, including multiple and intersecting forms of discrimination and the denial of reasonable accommodation;
- developing and applying harmonised and transparent criteria, fair assessment procedures and equal entitlements for persons with disabilities throughout the country;
- adopting a national programme with effective incentives to improve the situation of Roma, women and girls with disabilities, especially on their rights to education, healthcare, and employment.

In March 2019, the Ministry of Health and Social Protection published the *Mid-term Monitoring and Evaluation Report of the National Action Plan for People with Disability*,² which recommended some necessary corrective measures. In March 2020, based on these recommendations, the Albanian Government initiated the process for the revision of the National Action Plan on Disability 2016–2020,

1 Albania, Law No. 93/2014 on inclusion and accessibility for persons with disabilities; Order No. 195/2016 establishing the 'inclusive teacher profile'; National Action Plan on Disability 2016–2020.

2 Government of Albania (2019), *Mid-term Monitoring and Evaluation Report of the National Action Plan for People with Disabilities 2016–2018*, March 2019.

with the support of UNDP Albania.³ The majority of the CRPD recommendations will be included in the revised action plan.

Online source:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fALB%2fCO%2f1&Lang=en

Belgium

BE

LEGISLATIVE DEVELOPMENT

Parental leave during the COVID-19 pandemic

A Royal Decree of 13 May 2020 introduced special arrangements for ‘corona parental leave’ available to workers in the private sector (subject to a minimum employment period of one month), as well as all workers in the public sector. The Decree offers workers the option to reduce their working hours to half time or to four fifths of their time (subject to the agreement of their employer) to take care of their children under 12 years of age (up to 21 years of age for children with disabilities, no age limit for children with certain specified disabilities). This leave could initially be taken in May and June, and was later extended to 31 August 2020. A Royal Decree of 4 June 2020 introduced a system of temporary parental allowance for the self-employed, which can be considered to be comparable to the corona parental leave for employees.

Gender

The material scope of corona parental leave is in principle identical to that of ordinary parental leave. However, as this special leave concerns a part-time interruption, it is only accessible to workers with a full-time employment contract (and to part-time workers working three quarters of a full-time job). The classic parental leave allowance is increased by 25 %. Corona parental leave can be taken up on shorter notice since the employer must only be notified three days in advance, and it is also more flexible in terms of how the leave is taken up.⁴ Furthermore, the duration of the corona parental leave has no impact on the maximum duration of parental leave under the regular scheme (i.e. four months full time, with possible fractions). Finally, it is also accessible to foster parents.

Corona parental leave is an additional parental leave option that addresses the difficulty of combining work with childcare. This is why, unlike traditional parental leave, corona parental leave is limited to a reduction of work by a half or one fifth, because taking full-time leave does not meet the objective of this measure, namely that childcare must allow the worker to return to work at least part-time. Workers who are already taking forms of part-time parental leave may suspend the current parental leave and take corona parental leave.

Online sources:

<http://www.ejustice.just.fgov.be/eli/arrete/2020/05/13/2020020950/moniteur>

<http://www.ejustice.just.fgov.be/eli/arrete/2020/06/04/2020021143/moniteur>

³ See: https://jobs.undp.org/cj_view_job.cfm?cur_job_id=90618.

⁴ Parents may take all available leave at once until the end of the measure, or they may spread out the leave over several months or weeks (subsequent or with time intervals).

Working conditions for women in the fishing sector

Gender

On 16 June 2020, the *Moniteur belge/Belgisch Staatsblad* published the federal Work in Fishing Act of 12 June 2020, which aims to implement Directive 2017/159/EU implementing the Agreement of 21 May 2012, which in its turn is aimed at implementing ILO Convention No. 188 (2007) concerning Work in Fishing.⁵

According to official data, there are currently 413 men and 9 women working in Belgian fishing vessels. However, all successive instruments (the Convention, the Agreement, the Directive and the Act) are applicable to ‘any person’ who works in fishing. Further, the main purpose of the Convention is to guarantee suitable working conditions to ‘any person’. Particularly, Article 26 (copied from Article 23(e) and (f) of the Agreement) provides for adequate sleeping rooms and sanitary facilities.

Media reporting on the experience of women in various countries,⁶ where women belatedly were given access to jobs in merchant or military navies, reveal that issues related to sleeping quarters, washrooms and toilets had to be tackled as they were quoted as ‘intractable obstacles’ for the admission of women.

Of course, after transposing the Directive, every Member State has to make sure that its own general provisions on gender equality in employment and on health and safety at work are upheld in the ‘fisherman’s’ profession, but some EU guidance would not have come amiss in that respect. Guidance could have been provided by, for example, reiterating the importance of gender mainstreaming in this respect, enabling the participation of women in this sector by ensuring adequate working conditions and the removal of any obstacles.

Online source:

<http://www.ejustice.just.fgov.be/eli/loi/2020/06/12/2020202545/moniteur>

CASE LAW

Constitutional Court ruling on headscarf ban in higher education

Religion
or belief

According to the internal regulation of a school of higher education approved by the Brussels City Council, students are banned from wearing signs, jewellery or clothing that reflect a political, philosophical or religious opinion or affiliation, and they are also banned from wearing any headgear. This regulation is based on Article 3 of the Decree of the French Community ‘defining the neutrality of the education in the French Community’ adopted on 31 March 1994.

Muslim female students filed a lawsuit in emergency proceedings before the President of the first instance court of Brussels on the basis of Article 50 of the Decree of the French Community adopted on 12 December 2008 on the fight against certain forms of discrimination (FRED). They alleged that the ban was discriminatory, and that it amounted to a breach of freedom of religion (Article 19 of the Constitution, Article 9 of the European Convention on Human Rights (ECHR)), of the right to education (Article 2 of the First Additional Protocol to the ECHR), of the neutrality of public education (Article 24 of the Constitution) and of the right to human dignity (Article 23 of the Constitution). The first instance court of Brussels referred a preliminary ruling to the Constitutional Court to decide whether such a ban, aimed at ensuring a neutral educational environment, was constitutional with regard to adult students wearing headscarves.

⁵ Directive 2017/159/EU, accessible at: <http://data.europa.eu/eli/dir/2017/159/oj>.

⁶ In Europe but also the United States, for instance.

On 4 June 2020, the Constitutional Court ruled that the ban is not contrary to the obligation to respect neutrality in public education and does not violate the freedom of religion guaranteed by the Constitution and by the ECHR. The Court did not find it necessary to examine the matter further under Article 23 of the Constitution (right to human dignity). The Court found that it was a legitimate objective to try to ensure a neutral educational environment in order to protect students who do not wish to make their beliefs visible from the social pressure that might be exerted on them by those who wish to make their beliefs visible.

According to the Constitutional Court, Article 3 of the Decree of the French Community adopted on 31 March 1994 'defining the neutrality of education in the French Community' is not unconstitutional. The Court decided that neutrality is a variable concept; while it may justify a total ban of political, philosophical or religious symbols – if explicitly provided for in the internal regulation of a school of higher education – such a general ban is not necessarily mandatory to ensure neutrality. Higher education institutions may therefore also allow the wearing of signs of conviction and opt for a policy of inclusive neutrality.

Unia, the equality body, took part in the case in support of the claimants. Unia regrets that the Constitutional Court did not take into account the fact that the students concerned are aged over 18, nor did it consider the case law of the European Court of Human Rights according to which there is no right not to be exposed to the beliefs of others.

Online source:

<https://www.const-court.be/public/f/2020/2020-081f.pdf>

Bulgaria

BG

CASE LAW

Ethnicity-based preferential treatment for Roma in school

Racial or ethnic origin

On 13 January 2020, the Supreme Administrative Court ruled on a positive action measure established by the Centre for Educational Integration of Ethnic Minority Children within the Ministry of Education. The measure was part of a targeted project aimed at preventing school dropout by Roma students and involved scholarships that were available only to Roma students. The measure had been challenged before the Protection Against Discrimination Commission by a civil society organisation claiming that it amounted to discrimination against non-Roma students. Although the PADC had dismissed the claim, the Sofia City Administrative Court considered that the measure was directly discriminatory against non-Roma students. To this end, the court compared the scholarships at hand to generally available scholarships for academic achievement, which are only awarded to excellent or very good students, while the Roma scholarships were not dependent on a high-achieving academic record, a minimum achievement being sufficient. In addition, while socioeconomic need is required to be granted a general scholarship, no such requirement applies to the Roma scholarships. Finally, the general academic scholarship involved amounts that were far lower than those awarded to the recipients of the Roma scholarship. The court concluded that while students should indeed be encouraged to continue their studies, ethnicity-based scholarships were not the only means to achieve that aim and disproportionately disadvantaged non-Roma students. The court held that in addition to lack of funds, there are other reasons for Roma school dropout, such as lack of motivation. Furthermore, non-Roma students can also be in need of scholarships, and Roma students should thus be encouraged to make an academic effort before being awarded financial stimuli.

This judgment was confirmed on appeal in all its elements by the Supreme Administrative Court.⁷ The Court referred to the Racial Equality Directive and to the CJEU decision in *CHEZ*⁸ to conclude that (positive) measures should not help foster a mentality that certain students have more rights and are subject to more favourable treatment and are therefore entitled to working less hard in school.

Importantly, the Court recognised the legal standing of the civil society organisation to bring an appeal against the decision of the PADC, reversing its own settled case law that CSOs filing *actio popularis* motions alleging discrimination did not have standing to appeal against the PADC's decisions as they were lacking a legal interest of their own. In conflict with its own case law, the Court held in this regard that the CSO in question had an affected legal interest because of its statutory goals and activities, i.e. affirming civil society values, including non-discrimination and inclusion.

The Court failed however to take into account the fact of disproportionate Roma exclusion and marginalisation in education, among other relevant facts, such as overwhelming Roma poverty and social disadvantage, not comparable to the economic and educational opportunities generally enjoyed by majority families and children. In particular, the Court did not take into consideration Article 5 of the Directive regarding positive action.

Online source:

<http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/6cddcda4a76dce8fc22584e40036cb9d?OpenDocument>

Supreme Court of Cassation refuses to hear incitement (instruction) to discrimination case against non-traditional faith group

Religion
or belief

The claimants were members of a non-traditional faith group and filed a claim against a pro-Orthodox, anti-minority advocate who had successfully instructed various service providers to deny the minority group access to renting premises for faith-related concerts and other events. The advocate had done so by publishing and propagating an article against the minority group and by directly engaging with premise providers. The first-instance civil court had ruled in favour of the claimants, finding incitement to discrimination on grounds of belief, ordering the respondent to terminate, and abstain from, the impugned conduct, and awarding damages (the equivalent of EUR 175 to each of the two claimants). The appeals court found that the respondent's conduct did not amount to incitement to discrimination as the respondent had been entitled to publish and propagate her article as a part of her right to free expression. Her article had not contained hate speech and therefore, it had not contained incitement (implicitly including instruction) to discriminate. In addition, the claimants had not proven that the respondent had treated them less favourably as compared to others.⁹

The claimants applied for cassation review, formulating a number of questions related to the appraisal of evidence by the appeals court, its manner of applying the rule on the burden of proof to the facts, and the interpretation of the concept of incitement to discrimination under domestic law, in particular whether it required a comparison.

The Supreme Court of Cassation ruled that the questions filed on behalf of the minority group were inadmissible as they were poorly formulated or irrelevant from the standpoint of general procedural law and/or were inadequately substantiated. The Court did not engage with any issues of discrimination law.¹⁰ The appeals court decision is thus final in holding that a finding of incitement to discrimination (including

7 Bulgaria, Supreme Administrative Court, Decision No. 458 of 13.01.2020 in case No. 5375/2019.

8 CJEU, decision of 16.07.2015, *CHEZ*, Case C-83/14, ECLI:EU:C:2015:480.

9 Bulgaria, City Court of Sofia, decision No. 553 of 24.01.2019 in case No. 16814/ 2017.

10 Bulgaria, Supreme Court of Cassation, ruling No. 221 of 25.03.2020 in case No. 2958/ 2019.

instruction to discriminate) requires intent to be established, as well as less favourable treatment in comparison to third parties, and, in terms of content of the impugned expression, hate speech.

Online source:

<http://www.vks.bg/pregled-akt?type=ot-spisak&id=92A568B1FF053D16C2258536004456A7>

Croatia

HR

LEGISLATIVE DEVELOPMENT

Amendments to the Act on Maternity and Parental Benefits

Gender

On 19 March 2020, the Croatian Parliament adopted the Act on Amendments to the Act on Maternity and Parental Benefits, increasing the amount of parental leave benefits payable to employed and self-employed parents.¹¹ The amendments also shorten the duration of the prior qualifying period (duration of prior employment or self-employment) for eligibility for the higher amount of parental benefit. The amendments entered into force on 1 April 2020.

Parental benefits for employed and self-employed parents are paid as salary compensation during parental leave, at the expense of the state budget. The amount of parental benefit is set at 100 % of the last paid salary calculated in accordance with the rules on health insurance benefits, but it is limited to a certain percentage of the budget calculation base. A budget calculation base is the base for calculating various benefits and assistance. Its amount is set each year by the act regulating implementation of the state budget. In 2020, it amounts to EUR 440 (HRK 3 326). The latest amendments increase the upper limit of the parental benefit, from 120 % of the budget calculation base to 170 % of the budget calculation base (Article 24(2) of the Act on Maternity and Parental Benefits). The same increase is provided for salary compensation during leave for a mother in the event of the death of a child (Article 24(5) of the Act on Maternity and Parental Benefit). Another amendment concerns the shortening of the qualifying period for the payment of full parental benefits. Previously, the qualifying period (required duration of prior employment or self-employment) was 12 months of consecutive insurance or 18 months of insurance with interruptions in the past two years. Under the amendments, the required period is 9 months of consecutive or 12 months of insurance with interruptions in the past two years. An employed or self-employed parent who does not fulfil the required qualifying period is still entitled to parental benefit, but at a reduced amount of 70 % of the budget calculation base.

Online source:

https://www.sabor.hr/sites/default/files/uploads/sabor/2019-12-12/175602/PZ_815.pdf

11 Croatia, Act on Amendments to the Act on Maternity and Parental Benefits (*Zakon o izmjenama i dopunama Zakona o roditeljskim potporama*), Official Gazette No. 37/2020; Act on Maternity and Parental Benefits (*Zakon o roditeljskim potporama*) Official Gazette Nos. 85/2008, 110/2008, 34/2011, 54/2013, 152/2014, 59/2017 and 37/2020.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Impact of the COVID-19 pandemic on gender equality– preliminary indications of increase of violence against women and increase of unemployment of women

Gender

Violence against Women

Preliminary evidence shows an increase of violence against women and partner violence in the first half of 2020, which is believed to be a result of the COVID-19 pandemic lockdown. The most staggering data is that in the first five months of 2020, reported cases of rape increased by 227.8 %, and attempted rape by 175 % in comparison with the same period in 2019.¹² The Ministry of Interior attributes this rise to the changes in the Criminal Act, which entered into force on 1 January 2020, abolishing the previous criminal offence of non-consensual sexual intercourse (it is now prosecuted as a criminal offence of rape).

Much preliminary evidence and available information point to an increase of partner and domestic violence during the COVID-19 pandemic lockdown. Reported cases of rape have more than doubled. Other available statistical evidence shows that domestic violence is on the increase as well (in April 2020, a 10 % increase in reported cases of domestic violence is reported, which includes criminal, as well as misdemeanour offences).¹³ However, there is no specific evidence on how many of these cases involved women victims.

Preliminary indications of increase of unemployment of women

Preliminary evidence also shows an increase of unemployment of women in the first half of 2020, which has been associated with the COVID-19 pandemic lockdown. In April 2020, there was an increase of 110.1 % of new unemployed people as opposed to the same month of the previous year. For women, this surge is higher and amounts to 114 %.¹⁴ About 90 % of newly registered unemployed persons come directly from employment, suggesting that unemployment is the consequence of the crisis caused by the pandemic. Again, the share of female newly unemployed persons is slightly higher than that of men.

The consequences of the COVID-19 pandemic have hit the labour market heavily. There was a surge of unemployment in April, with an increase of 110 % as compared to the same month of the previous year. In May 2020, there was 54 % less employment (exit from the registry of unemployed) than in May 2019. The number of unemployed has likewise increased by 35.5 %. The share of unemployed women is about 10 % higher than men (in May 2020, 55.7 % of unemployed people were women and 44.3 % were men).¹⁵ The already unfavourable trend of higher unemployment of women is further deteriorating, because in April 2020, this ratio was 54.8 % to 45.2 %.¹⁶ In May 2020, for 51 % of women who became newly unemployed, this was due to the expiry of fixed-term contracts and an additional 18 % were dismissed for business reasons. This shows that women are especially vulnerable in the crisis, because it is estimated that around 20 % of all female employment in Croatia is based on fixed-term contracts.¹⁷

12 Croatia, Ministry of Interior (*Ministarstvo unutarnjih poslova*), 'Basic security indicators in Croatia, January – May 2020' (*Pregled osnovnih sigurnosnih pokazatelja I.-V. 2020. godine u Republici Hrvatskoj*), available at: https://mup.gov.hr/UserDocsImages/statistika/2020/Pokazatelji%20javne%20sigurnosti/Web_hrvatski_I-V_2020.pdf.

13 Data retrieved from the Ministry of Interior's daily dispatch on reported cases classified as cases of domestic violence ('*Kalendar nasilja*'), available at: <https://mup.gov.hr/kalendar-nasilja/283308>.

14 In May 2020 the situation has drastically improved (8.8 % fewer registrations of unemployment status). See Croatian Employment Service (2020), 'Monthly Statistics Bulletin 5/2020', available at: https://www.hzz.hr/content/stats/0520/HZZ_stat_bilten_05_2020.pdf.

15 Croatian Employment Service (2020), 'Changes in registered unemployment at the end of May 2020' (*Promjene u evidentiranoj nezaposlenosti i stanju registrirane nezaposlenosti na kraju svibnja 2020*), available at: <https://www.hzz.hr/content/stats/0520/PR-Nezaposlenost-Zaposljavanje-5-2020.pdf>.

16 Croatian Employment Service (2020), 'Monthly Statistics Bulletin 4/2020', available at: https://www.hzz.hr/content/stats/0420/HZZ_stat_bilten_04_2020.pdf; Croatian Employment Service (2020) 'Monthly Statistics Bulletin 5/2020', available at: https://www.hzz.hr/content/stats/0520/HZZ_stat_bilten_05_2020.pdf.

17 Eurostat, available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment_statistics/hr#Pove_C4.87anje_rada_u_nepunom_radnom_vremenu_i_privremenog_rada.

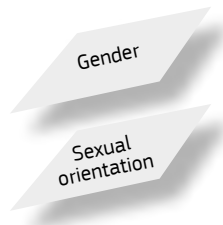
Online sources:

https://mup.gov.hr/UserDocsImages/statistika/2020/Pokazatelj%20javne%20sigurnosti/Web_hrvatski_I-V_2020.pdf

https://www.eurofound.europa.eu/data/COVID-19/working-teleworking?var=D002&cat_sel=Yes,%20permanently_Yes,%20temporarily&chart_type=Bar&country_filter=Croatia

Annual Report of the Ombudsperson for Gender Equality for 2019

The Ombudsperson for Gender Equality submitted the *Annual Report for 2019* to the Croatian Parliament for approval. The report was completed this year under extreme hardship caused by the earthquake that struck Zagreb on 22 March 2020, which has partly destroyed the offices of the Ombudsperson for Gender Equality. The Parliament, however, given the extraordinary circumstances caused by the earthquake and the COVID-19 pandemic, did not discuss and vote on the report prior to its dissolution on 18 May 2020 pending the ordinary parliamentary elections in July 2020.



During the reporting period, the Ombudsperson for Gender Equality worked on 1 719 cases, out of which 503 were new individual complaints for the protection against discrimination filed in 2019. Other cases mostly concern monitoring of implementation of the Gender Equality Act and are opened at the initiative of the Ombudsperson for Gender Equality. A continuous increase of individual complaints can be observed in the last five years (in 2019, the number of individual complaints increased by 9.8 % in comparison with the previous year). The majority of complaints concern discrimination based on sex (85.8 %), followed by sexual orientation (6 %) and gender identity (3 %). In 73.4 % of cases, the victims of discrimination were women. The majority of complaints concern discrimination in the field of social security (29.2 %), work and working conditions (21.1 %) and public administration (14.5 %). One fourth of individual complaints (24.4 %) relate to physical, psychological and other forms of domestic violence and/or partnership violence, as well as violence in the public domain, which is a continuing trend from the previous years.

During the reporting year, the Ombudsperson for Gender Equality issued 293 written recommendations, 160 warnings/admonitions and 131 suggestions for action. Compliance continues to be high: in around 89.3 % cases. The Ombudsperson for Gender Equality has also filed five criminal complaints and one misdemeanour complaint to the competent state attorney's office.

In addition, the Ombudsperson for Gender Equality has implemented two EU-projects in the reporting period: 'Equal rights – equal pay – equal pensions. Expanding the scope of gender equality actions and legal standards towards achieving gender equality and combating poverty in Croatia'¹⁸ and 'Building more effective protection: transforming the system for combating violence against women'.¹⁹

Online source:

https://www.prs.hr/attachments/article/2894/IZVJESCE_O_RADU_ZA_2019_Pravobraniteljice_za_ravnopravnost_spolova.pdf

18 Project No. REC-RGEN-PENS-AG-2017-820696-GPPG. More information available at: <http://gppg.prs.hr>.

19 Project No. JUST/2016/RGEN/AG/VAWA/9940. See <http://vawa.prs.hr> Research results, which include two publications with quantitative results of analysis of decisions in criminal and misdemeanour procedures in the period from 2012 to 2016, as well as two publications concerning analysis of media coverage of violence against women and femicide are available in Croatian at: <http://vawa.prs.hr/publikacije/>. In addition, media codex with a guide to professionally sensitive reporting about violence against women and femicide was also published.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Impact of COVID-19 measures on groups vulnerable to discrimination

Racial or
ethnic origin

Disability

The first measure adopted by the Government in response to COVID-19 was to close four checkpoints along the ceasefire line separating the south (the Republic of Cyprus) from the north (the 'Turkish Republic of Northern Cyprus').²⁰ The checkpoints had been opened by the Turkish army in 2003 to assist collaboration between the Greek and Turkish communities and had remained open for 17 years until 28 February 2020. The closure prevented Turkish Cypriots working or attending schools or universities in the south from accessing their place of work/education, whilst those Turkish Cypriots who were receiving medical treatment in hospitals in the south could not access healthcare.

When the state authorities started adopting other protection and restriction measures to fight the pandemic, no specific precautions were taken with regard to persons with disabilities, such as providing awareness materials in accessible formats. Given the fact that persons with disabilities are often obliged to rely on others in order to access the built environment and get to work, without easy access to protection measures, they are at a higher risk of contracting COVID-19; yet they are not considered to be a 'vulnerable category' and were not permitted or supported to stay at home.²¹ Many persons with disabilities work at the 'front line', servicing the public and face an increased risk of contracting the virus and falling severely ill because of pre-existing aggravating health issues. With few exceptions, all services supporting the right of persons with disability to independent living were suspended and no measures were taken to inform them and to protect those living in institutions or homes in the community.²² Persons with intellectual disabilities participating in the state programme of supported employment were required to stay away from work during the two months of lockdown. They received a state subsidy of EUR 30 to EUR 50 for the two months, while no salary was paid to them by their employers.²³ After the end of the lockdown, those who returned to work either received only 50 % of their salaries or had their employment terminated.²⁴

On 20 May, the day before the scheduled reopening of the schools, the Ministry of Education announced that students attending special units or having special needs that require attendance by assistants or escorts should remain at home and would only be allowed to attend school following a medical opinion from their personal doctor, which would then be assessed by a special committee deciding on whether the pupil would be allowed to go to school and what measures ought to be taken for their protection. The same measure was to apply for the future re-opening of special education schools. Following strong criticism, notably from parents of children with disabilities and from the Commissioner for Administration,²⁵ the Ministry announced on 29 May that 323 children of special education without any COVID-19 symptoms could return to school.²⁶ Schools of special education re-opened on 9 June.²⁷ Parents were required to fill out a special form on their children's state of health and to provide a medical certificate and a report from the child's doctor recommending, or not, school attendance. Depending on the information provided, the special committee would decide whether the child would be permitted

20 Cyprus, Council of Ministers (2020), *Series of measures decided by the Ministerial Council for addressing the coronavirus epidemic* (Σειρά μέτρων αποφάσισε το Υπουργικό Συμβούλιο για αντιμετώπιση της επιδημίας του κορωνοϊού), 28.02.2020.

21 Consultation with head of the Cyprus Confederation of Disability Organisations KYSOA, 11.05.2020.

22 Consultation with head of the Cyprus Confederation of Disability Organisations KYSOA, 11.05.2020.

23 Communication via e-mail with the Confederation of Disability Organisations KYSOA, 06.07.2020.

24 Communication via e-mail with the Confederation of Disability Organisations KYSOA, 06.07.2020.

25 Kathimerini (2020), 'Επίτροπος Διοικήσεως: Παραβίαση των δικαιωμάτων των παιδιών ΑμεΑ' 21.05.2020.

26 Cyprus, Ministry of Education, Culture and Sports (2020), *Απόφαση της Ειδικής Επιτροπής για άμεση φοίτηση παιδιών στις Ειδικές Μονάδες ή στις γενικές τάξεις*, 29.05.2020.

27 Cyprus, Ministry of Education (2020), press release of 03.06.2020.

to return to school.²⁸ These requirements led to reactions from parents arguing that they amounted to discrimination and an infringement of the children's right to education.²⁹

Czechia

CZ

LEGISLATIVE DEVELOPMENT

Family related leave provisions during the COVID-19 pandemic

Gender

In connection with the state of emergency due to the COVID-19 pandemic in March 2020, additional provisions were made in the field of social security. More generous care benefits (originally available only to employees for a maximum of 9 calendar days – 16 for single parents – in the amount of 60 % of the daily wage paid from the sickness insurance system) were made available to all employees (excluding self-employed).

A separate care allowance was paid to all insured persons, including the self-employed, in the amount of 80 % of the daily wage (with a ceiling) from May to June. A similar benefit could also be used by persons working outside the employment relationship, in more flexible forms of employment.

The care benefits were made available to parents of children under the age of 13 (and children who attended a school for children with disabilities). Employees who, due to the closure of certain social service facilities (day hospitals, etc.), had to care for an elderly person with a disability living in the same household were also eligible for these benefits. The benefits could be taken up by both caregivers who could share the care benefits between them as needed. This means, for example, that both parents could take turns in going to work and staying at home to care for the children or other persons in need of care as specified by the provisions.³⁰

This generous care allowance was intended to help large sections of the population overcome the severe consequences of the crisis caused by the COVID-19 pandemic. It should be noted, however, that action in this area has been taken relatively slowly and chaotically. At first, the Government was hesitant to increase the amount of the care allowance, and to extend the entitlement to other groups of insured persons, especially to the self-employed. The activities of these groups are an essential part of the Czech economy, and at the same time it was small-scale self-employed persons who were the most economically affected by the crisis. People working in precarious jobs were excluded from benefits and were only considered at a later stage. Payments of care benefits were delayed, especially in the first weeks of the crisis, so that families without economic reserves were at significant risk of poverty.

Women were the most affected by this situation being employed in the most affected areas of the economy (hotels, restaurants, small shops, tourism etc). Moreover, at least 80 % of people claiming care allowance were women who mainly took on the responsibility for home schooling their children and housekeeping.³¹

Online source:

<https://www.mpsv.cz/web/cz/osetrovne>

28 Cyprus, Ministry of Education, press release of 25.05.2020.


29 Agalia Elpidas (2020), press release of 09.06.2020.

30 Information available at: <https://www.mpsv.cz/web/cz/osetrovne>.

31 Czech Sociological Institute (2020) press release, available at: <https://www.soc.cas.cz/aktualita/dopady-opatreni-proti-pandemii-na-zeny-muze-na-trhu-prace>.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Children with disability allowed to return to elementary schools following complaints



On 25 May 2020, elementary schools were reopened as part of governmental measures to soften previous restrictions introduced as a response to the COVID-19 pandemic in Czechia. However, children with disabilities were excluded from this reopening. Based on the Government's decision, schools and classes educating children with disabilities were to stay closed until the end of the school year (30 June 2020).³²

This would create social, economic, and personal challenges for children with disabilities and their parents. Prolonged absence from school may harm children's psychological and social wellbeing, worsen their school results, and could make it more difficult to return to school after the summer.

The Government argued that various disabilities – without distinguishing between physical and intellectual disabilities – are combined with certain illnesses, such as epilepsy or heart conditions. Thus, COVID-19 infection would be more dangerous for children with disabilities.³³ Postponement of the school attendance of children with disabilities would allegedly serve as a protection of their health.

According to the Deputy of the Public Defender of Rights, it cannot be assumed that any type of disability automatically means worse overall health. Such different treatment between children with and without disabilities may not be justified by a legitimate aim.³⁴

After criticism from NGOs, parents of children with disabilities, and the Public Defender of Rights, the Ministry of Education acknowledged that postponing the school attendance of disabled children would harm them in the future, especially children from a socially disadvantaged environment.³⁵ Subsequently, the Ministry of Health issued a decision that children with disabilities may return to school on 1 June.³⁶

Online source:

[https://koronavirus.mzcr.cz/wp-content/uploads/2020/05/Mimo%C5%99%C3%A1dn%C3%A9-opat%C5%99en%C3%AD-omezen%C3%AD-provozu-%C5%A1kol-a-%C5%A1kolsk%C3%BDch-za%C5%99%C3%ADzen%C3%AD-s-%C3%BA%C4%8Dinnost%C3%AD-od-1.-6.-2020-do-odvol%C3%A1n%C3%AD.pdf](https://koronavirus.mzcr.cz/wp-content/uploads/2020/05/Mimo%20%C5%99%C3%A1dn%C3%A9-opat%C5%99en%C3%AD-omezen%C3%AD-provozu-%20%C5%A1kol-a-%20%C5%A1kolsk%C3%BDch-za%20%C5%99%C3%ADzen%C3%AD-s-%20%C3%BA%C4%8Dinnost%C3%AD-od-1.-6.-2020-do-odvol%C3%A1n%C3%AD.pdf)

32 Ombudsperson (2020), 'Děti s postižením mají právo chodit do školy' (*Children with disability have the right to go to school*) – press release, available at: <https://www.ochrance.cz/aktualne/tiskove-zpravy-2020/deti-s-postizenim-maji-pravo-chodit-do-skoly/>.

33 Czech Radio (2020), 'Ministr školství Plaga: Děti s postižením se do speciálních škol vrátí postupně od 25. května' (*Minister of Education: Children with disability will start returning to school since 25 May*) – news article, available at: https://www.irozhlaz.cz/zpravy-domov/ministerstvo-skolstvi-specialni-skoly-plaga-koronavirus-otevreni_2005132117_tkr.

34 Ombudsperson (2020), 'Děti s postižením mají právo chodit do školy' (*Children with disability have the right to go to school*).

35 Lidovky.cz (2020), 'Děti s postižením se budou moci vrátit do speciálních škol 1. června, omezeně se otevrou také střední školy' (*Children with disability may return to special schools on 1 June, also high school will be reopened, albeit limitedly*) – news article, available at: https://www.lidovky.cz/domov/deti-s-postizenim-se-budou-moct-vratit-do-specialnich-skol-1-cervna-omezene-se-otevrou-take-stredni.A200525_182653_In_domov_sei.

36 Czechia, Ministry of Health, Emergency Measure, No. MZDR 20584/2020-3/MIN/KAN, available at: <https://koronavirus.mzcr.cz/wp-content/uploads/2020/05/Mimořádné-opatření-omezen%C3%AD-provozu-škol-a-školských-zaří%C3%ADzen%C3%AD-s-účinnost%C3%AD-od-1.-6.-2020-do-odvol%C3%AD.pdf>.

Denmark

DK

CASE LAW

Denial of tort compensation for unjustified loss of a social service

The claimant is a swimmer with a psychosocial disability who had done well in disability sports, both in Denmark and internationally. She received social-education support from a personal assistant when participating in swimming competitions, but the municipality no longer provided funding for her personal assistant when she turned 18. According to several decisions from the Social Appeals Board, the claimant should have continued to receive the funding, but the municipality failed to comply with their decisions.

Disability

The claimant took the case to the civil courts, claiming tort compensation due to the material damage suffered as well as the significant inconvenience experienced by herself and her family. In this regard she invoked Section 26 of the Damage Liability Act as well as the European Convention on Human Rights, Protocol 1, Article 1 (a violation of her 'property' – her right to receive social benefits).

On the basis of the decisions by the Social Appeals Board, the Eastern High Court found that it was not justified to end the social-educational support when the claimant turned 18 years of age. However, following the evidence, the Court found that there was no basis to establish that the inconveniences for the claimant had been of such magnitude or character that it had violated her self-esteem or reputation. The Court therefore concluded that there was no basis for granting tort compensation in accordance with the Damage Liability Act. The Court also invoked the case law of the European Court of Human Rights on the right to social benefits to conclude that the municipality's decisions did not violate the claimant's rights under Article 1 of Protocol 1. Therefore, the ECHR did not provide a basis for tort compensation either. The Eastern High Court upheld the ruling of the city court and acquitted the municipality.³⁷

School segregation of children with ethnic minority backgrounds

In 2018, the Herning City Council decided to establish a new section of the Herningsholm public school for children from the marginalised residential area of Holtbjerg. The new section was called the Holtbjerg section and opened on 13 August 2019 with 64 students – 63 of these students were bilingual and had an ethnic minority background. Children from the residential area of Holtbjerg starting in kindergarten in August 2019 had to start in the Holtbjerg section and children from this area starting first to third grade were moved from their existing classes to the Holtbjerg section.

Racial or ethnic origin

In November 2019, the Danish Institute for Human Rights (DIHR) filed a complaint to the Board of Equal Treatment claiming that the Holtbjerg section constituted discrimination based on ethnic origin. DIHR claimed that the city council knew that the arrangement would result in segregation of ethnic minority children. DIHR argued that even though special resources were provided to the Holtbjerg section, the segregation of ethnic minority children in a special section of a primary school constituted discrimination of the children with an ethnic minority background.³⁸

On 2 March 2020, DIHR published a statement that it had reached an agreement with the municipality of Herning in an out-of-court settlement concluding the case before the Board of Equal Treatment.

The settlement included the following wording:

³⁷ Denmark, Eastern High Court, judgment of 22.01.2020 in case No. BS-12019/2019.

³⁸ Description of the DIHR viewpoints when filing the complaint to the Board of Equal Treatment in November 2019: <https://menneskeret.dk/nyheder/opdeling-skole-strid-ligebehandlingsloven>.

‘The municipality of Herning recognises that the City Council’s decision unintentionally constituted discrimination due to ethnicity, because of the fact that the basis for the decision emphasised the ethnic origin of the pupils and because the decision involved the segregation of children with minority background in the Holtbjerg section. [...] The decision thus unintentionally constituted a violation of the prohibition of [direct] discrimination in Section 3(3) of the Act on Ethnic Equal Treatment.’³⁹

The settlement also indicated that DIHR would withdraw its complaint to the Board of Equal Treatment.

Online source:

<https://menneskeret.dk/nyheder/kommune-anerkender-opdeling-skole-diskrimination>

Compensation for discrimination on the ground of disability

The claimant was a full-time teacher who was violently pushed in the back by a student in December 2014. Following this work-related injury, the claimant was periodically on sick leave until she went on maternity leave in 2015. After her maternity leave, the claimant went on part-time sick leave again because of the physical and cognitive impairments she had sustained in 2014. Six months after her return from maternity leave, the local municipality dismissed the claimant due to a number of operational difficulties which they had not been able to solve despite their attempts at accommodating the claimant’s needs.

The claimant filed a complaint to the Board of Equal Treatment arguing that the municipality had failed to provide reasonable accommodation and that she had been discriminated against because of disability. In May 2018, the Board of Equal Treatment awarded a financial compensation equal to nine months’ full salary.⁴⁰ The municipality denied to pay and the case therefore came before the City Court of Roskilde.

The City Court ruled on the case in May 2020, stating that the work injury, according to a specialist doctor’s statement, had caused difficulties in concentrating, memory problems, fatigue and difficulties in reading and writing. The Court thus held that it did not “understand that a person with such a disorder and impairments can be competent, suitable or available for a teaching job.”

On the basis of the specific circumstances of the case, the Court nevertheless found that the municipality had not proved that the claimant could not be successful in a part-time position with appropriate accommodations. The Court therefore concluded that the claimant was entitled to compensation according to Section 7 of the Act on Prohibition of Discrimination in the Labour Market etc. because of a violation of Section 2(1) of the Act. In other words, the Court found that there had been discrimination on the ground of disability.

Finally, the Court argued that the claimant would not have been able to hold more than a part-time position and therefore concluded that the compensation had to be set to the equivalent of nine months’ salary for a half-time position, even though the claimant was employed at full time. The City Court thus reduced by half the compensation awarded by the Board of Equal Treatment.⁴¹

39 Website of the municipality of Herning: <https://nyheder.herning.dk/nyhedsarkiv/2020/mar/forlig-i-sag-om-folkeskole>.

40 Denmark, Board of Equal Treatment, decision No. 9399 of 23.05.2018, available at: <https://www.retsinformation.dk/eli/retsinfo/2018/9399>.

41 Denmark, City Court of Roskilde, Case No. BS-33137/2018-ROS of 07.05.2020.

Equality body decision regarding post-traumatic stress syndrome (PTSD) as a disability protected by anti-discrimination law

A social worker claimed that she had been discriminated against because of disability. In 2019, she was dismissed from her position in the Danish Prison and Probation Service where she had been employed since 1983. In 1986 she was the victim of a violent client assault during her work. After the assault she worked full time, primarily as a specialist in the community service team. In 2017, the Prison and Probation Service issued a requirement that all employees in the future should be generalists working with all kinds of clients, including clients who had been convicted to undergo psychiatric treatment. This requirement by the employer reactivated the social worker's post-traumatic stress disorder (PTSD) and she went on sick leave. According to a statement from a psychiatrist, the social worker would be able to work again full time on the condition that she was spared contact with convicted clients with mental illnesses or with other clients who could be expected to exhibit unpredictable behaviour. After more than two years of sick leave, she was dismissed and the employer argued that the dismissal was based on her sick leave.

Disability

The Board of Equal Treatment assessed that the claimant had a disability encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc. based on the fact that her PTSD was long term and that the impairment constituted a limitation to her participation in professional life on an equal basis with others. The Board also argued that the employer at the time of dismissal at least should have known that the social worker had a disability within the meaning of the Act.

The Board further argued that the employer is under an obligation to provide reasonable accommodation, which can be of both a material and organisational nature, including adjustment of workplaces and workstations, modification of work patterns or divisions of labour, or a reduction of working hours. During the sickness absence of the complainant, the employer had appointed a substitute social worker who had community service functions, which did not include clients who had been convicted to psychiatric treatment. On that basis, the Board assessed that the employer in reality had offered the substitute employee the kind of position that would provide reasonable accommodation for the complainant. The Board therefore concluded that the employer had not proved that it would have constituted a disproportionate burden to offer appropriate precautionary measures so that the social worker could retain her position. In other words, the employer had not lifted the burden of proof that it had fulfilled its obligation to provide reasonable accommodation. The Board also found that the employer had not lifted the burden of proof that the complainant was not competent, capable and available to perform the most important functions of her position. In summary, the Board concluded that discrimination because of disability had taken place and the social worker was therefore awarded a compensation equal to 12 months' salary.⁴²

POLICY AND OTHER RELEVANT DEVELOPMENTS

Impact of COVID-19 on gender equality in Denmark

The Danish Government has adopted several measures to mitigate the economic consequences for businesses, especially in respect of the possible risk of mass redundancies, both via statutory legislation and tripartite agreements. None of these measures were aimed at combating gender inequalities since there have been no reports of adverse effects so far. The legal framework on gender equality, such as the protection against dismissal on grounds of gender, remained fully operational and enforceable during the Covid crisis. However, some of the consequences of the Covid crisis could have an adverse effect on

Gender

42 Denmark, Board of Equal Treatment decision No. 9538 of 24.06.2020, available at: <https://www.retsinformation.dk/eli/accn/W20200953825>.

women due to their role as primary caretaker, whereas the societal acknowledgement of the bravery of healthcare workers could have a positive effect on their claim for equal pay.

The Danish society was locked down on 10 March 2020. The lockdown included, among other things, the closure of schools, public childcare services, universities, cultural institutions, restaurants and cafes. Public gatherings of more than 10 people were prohibited. Denmark has since April slowly opened up for businesses and educations. All facilities are functioning again, including childcare, primary school, secondary school and tertiary education, with local actions in case of a student or teacher found to be COVID-19 positive

Equal pay for nurses

As a result of the lockdown, all non-essential public employees were sent home to work from their private home. A large number of healthcare workers, in particular nurses and doctors, were naturally deemed essential in the fight against the pandemic, which led to a surge of public empathy and praise directed towards these workers. In the public eye these workers, the majority of whom were women, risked their lives in the fight against the pandemic and were thus regarded as heroes.⁴³ This led the Chairman of the Danish Nurses Organisation to reopen the topic of nurses receiving lower pay when compared to male-dominated jobs, such as construction engineers, bearing in mind they have the same educational requirements, which makes it a question of equal pay.

Work-life balance during COVID-19

Private employers were strongly encouraged to send their employees home to work remotely, or to let them take time off or take outstanding holidays in order to combine work and care duties. This affected the work-life balance, but as of yet there have been no studies on it having a gender adverse effect. However, bearing in mind the documented⁴⁴ gender orientated role distribution in terms of housekeeping and the majority of single providers being women, the stress of having to work from home, whilst homeschooling children, could result in women being treated less favourably than men under those circumstances. Even in families with multiple parents, studies show that it is usually the mother who does the majority of cleaning, homework and so on, which negatively affects their ability to perform their work-related duties on an equal footing with men. However, so far there have been no cases tried before the courts, concerning the termination of employment contracts based on poor performance due to circumstances related to working from home.

One reason for the lack of cases could be the general active involvement of the Government in mitigating the economic consequences of the lockdown for businesses as well as persons out of employment. By use of emergency legislative procedures, Parliament has adopted several acts, as well as tripartite agreements, providing different measures that aim to mitigate the consequences of the COVID-19 crisis, especially redundancies.

Childcare services

The Government, with regard to reopening society, focused on providing childcare for the youngest children during mid-April. Because of the closing of schools and public childcare services, emergency daycare services were established.⁴⁵ This service was available to children between the age of 0 and 9 years, whose parents were not sent home to work, i.e. public employees in essential functions, or private employees not working from home. The emergency daycare service was also available to special needs children. Schooling for children aged six and up continued online from their private homes, and re-opened

43 News story on healthcare workers as Covid-heroes: <https://www.dr.dk/nyheder/webfeature/coronahelte>.

44 See study on how Danes use their spare time from 2018, Rockwool Fondens Forskningsenhed (2018) *Hvordan bruger danskerne tiden?*: https://www.rockwoolfonden.dk/app/uploads/2018/11/Hvordan-bruger-danskerne-tiden.pdf?fbclid=IwAR24I2WylpGc_Ykj9FNna1aWxcbJnThFjMtV8Wm6hixmesAbbRCG4AIM5Rk.

45 Denmark, Ministerial Order No. 217 of 17.03.2020: <https://www.retsinformation.dk/eli/lta/2020/217>.

in different phases of the reopening plan, until the summer holidays started end of June. All homes have private digital devices or were loaned them by the schools, which made home-schooling involving on teacher-student interaction possible. Nonetheless, the period with home-schooling of one or more underaged children would adversely have affected mostly women.

All schools (up to age 15) and childcare (0 to 5 years) have since May been opened for full physical attendance.

Particularly vulnerable persons and family-members

In connection with the re-opening of society, some employees were particularly vulnerable, as they are at risk of serious complications if they contract COVID-19. The Parliament has adopted an act that allows for particularly vulnerable employees and their close relatives to stay home from work during the re-opening of society, while receiving pay or sick leave benefits.⁴⁶ The scheme is currently planned to cease on 1 September 2020. The Danish Health Authority has also issued guidelines on ensuring safe work for particularly vulnerable employees.⁴⁷ These measures have mainly affected women who are often the primary care-givers of particularly vulnerable people.

Estonia

EE

POLICY AND OTHER RELEVANT DEVELOPMENTS

Sexual harassment case against the director of the University of Tartu

On 29 August 2018, a (male) director of the library of the University of Tartu was dismissed due to 'inadequate behaviour'. He was accused of sexual harassment and of coercion into sexual activity or other sexual acts, exploiting the victim's dependence on the accused. Criminal proceedings were started in October 2018, the trial was held behind closed doors to protect the victim. On 18 March 2020, the defendant was convicted by the Tartu County Court and sentenced to 1.5 years' suspended imprisonment.

Gender

At the same time, civil proceedings were started by the defendant in response to the termination of his employment contract as the director of the Library of the University of Tartu. The director was dismissed with immediate effect in August 2018. Dismissal with immediate effect is only lawful in Estonia under 'extraordinary circumstances'. The employer found that the director had breached Articles 3(1)(3) and 3(1)(5) of the Gender Equality Act and had lost the university's trust, which in its opinion qualified as extraordinary circumstances, and therefore enabled dismissal with immediate effect. The dismissed director claimed that the employer had no right to extraordinarily cancel the employment, and was in breach of the Employment Contracts Act.

In its decision, No. 4-1/1857/18 of 29 September 2018, the Labour Dispute Committee declared the direct dismissal unlawful and ordered that compensation of EUR 118 000 should be paid to the dismissed employee.⁴⁸ The University of Tartu appealed the decision. In September 2019, the Tartu County Court also found the extraordinary cancellation of the director's contract wrongful. However, on appeal in the second instance, on 20 February 2020, the Tartu Circuit Court found the employer's decision to terminate the employment contract due to loss of trust rightful. The Tartu Circuit Court found that in this labour

46 Denmark, Act No. 190 of 20.05.2020, available at: https://www.ft.dk/ripdf/samling/20191/lovforslag/l190/20191_l190_som_vedtaget.pdf.

47 <https://www.sst.dk/da/nyheder/2020/hvordan-skal-politi-og-andet-frontpersonale-uden-for-sundhedssektoren-forholde-sig-til-haandtering>.

48 See https://www.ti.ee/sites/default/files/dokumendid/Meedia_ja_statistika/Tooevaidlused/TVK_menetluses_olnud_diskrimineerimisvaidlused_2018.pdf.

dispute, the necessity of the warning is precluded both by the gravity and nature of the acts alleged against the employee and by the fact that the director violated the duties of the head of the structural unit of the University of Tartu arising from the employment contract and the library statutes.⁴⁹ On 17 June 2020, the Supreme Court held that the dismissal was rightful. Due to the closed procedure the decision of this civil case No. 2-18-19202/90 will not be made public

Online source:

<https://tartu.postimees.ee/6926692/maakohus-moistismartin-halliku-seksuaalses-ahistamises-suudi>

POLICY AND OTHER RELEVANT DEVELOPMENTS

Social guarantees for PhD students

On 31 January 2020, the Chancellor of Justice was asked to give an opinion about maternity leave and parental leave payment principles in Estonia. The applicant asked whether it is fair that the social tax paid by the state for PhD students receiving a PhD student allowance is not considered for the calculation of the allowance for temporary incapacity to work. The applicant stated that the doctoral allowance was a significant part of her income before maternity leave. The Chancellor of Justice stated in the answer that there is nothing in the law to prevent calculating sick leave payments and parental benefits for PhD students, but that PhD students' status as students rather than employees is problematic. The poor social guarantees for PhD students have been discussed for years, but no positive solution has yet been achieved. The issue affects more women than men, because only 2 % of those receiving parental benefit at the rate of the minimum monthly wages are men. This in turn, could be a reason for women not choosing to pursue a PhD.

The state or legal persons in public law pay social tax for persons receiving a doctoral allowance, as stipulated in the Article 6(14) of the Social Tax Act. PhD students, whose studies are funded by the Estonian Government, are entitled to a monthly PhD student allowance, which in 2020 is EUR 660. Some students receive a performance scholarship as additional monetary support.⁵⁰ In Estonia, parental benefits are calculated based on the individual's income for which employers pay social taxes (salary, bonuses, etc.). The parental benefits are however also paid based on any income earned from forms of employment which fall outside the taxable bracket. Unfortunately, the PhD student allowance is not considered as income from employment. Consequently, social taxes paid by the state are not considered in the calculation of leave payments for PhD students. A PhD student who is on academic leave or on parental leave is therefore not entitled to the monthly student allowance.

Online source:

<https://www.oiguskantsler.ee/et/seisukohad/seisukoht/doktorandi-sotsiaalsetest-garantiidest>

Equal pay awareness raising campaign

In Estonia, employers are, by law, obliged to raise employees' awareness of gender equality and take specific steps to improve gender equality within the company. On 4 March 2020, a rideshare service provider sent an email to their clients, offering a discount for women for their next five taxi rides as part of their gender equality awareness-raising activities. Women were offered five rides with a 25 % discount, quoting the high gender pay gap in Estonia as the rationale for this campaign. Due to several

⁴⁹ According to the Employment Contracts Act, an employer may generally terminate an employment contract due to a breach of an employee's obligation if the termination has been preceded by a warning from the employer. However, prior notice is not required as a precondition for cancellation if the employee cannot expect it from the employer in good faith due to the special gravity of the breach of the obligation or for any other reason.

⁵⁰ This means that the PhD student's monthly income is higher than the minimum wage in Estonia.

complaints about the rideshare service provider's unequal pricing for women and men, the Gender Equality and Equal Treatment Commissioner issued a position paper on principles of gender equality promotion campaigns.

The Commissioner explained that offering diverse rates based on sex for a taxi ride, albeit in the short term, cannot be seen as a positive special measure that corrects gender inequalities. Furthermore, the Commissioner explained that awareness-raising campaigns should be carried out responsibly, and that gender discrimination in the provision of goods and services is prohibited.

The Commissioner reiterated the need to be careful in interpreting Article 5(2) of the Gender Equality Act, which provides that a difference in the provision of goods and services based on sex is permitted only if it is justified by a legitimate aim, is proportionate to that aim and the aim itself is not considered to constitute direct or indirect discrimination.

Online source:

<https://volinik.ee/artiklid/seisukoht-sama-teenuse-soo-jargi-erinevahinnastamise-kohta/>

Effective protection for victims of domestic violence after the COVID-19 emergency period

On 19 May 2020, guidelines concerning domestic violence for local government and social service providers was issued by the Ministry of Social Affairs. In addition, Article 141.1 of the Penal Code concerning temporary restraining orders was amended in May 2020. It established that in urgent cases, the protection order may be issued by an order of a prosecutor's office regardless of the consent of the victim. In such a case, the prosecutor's office will inform a court of the establishment of the protection order within two working days and the court decides, taking into consideration the consent of the victim, on the admissibility of the protection order.

Gender

The guidelines issued by the Ministry of Social Affairs stress that in cases of domestic violence, local government authorities must ensure accommodation for people who have used violence against their family members, who received an emergency barring order and who do not have alternative accommodation. Even during the state of emergency due to the COVID-19 pandemic, the police applied restrictions, when necessary, prohibiting the perpetrator from (temporarily or for a longer period of time) contacting the victims or staying at their place of residence. The aim of this policy is to ensure the protection of victims of intimate partner violence, *inter alia*, by enabling them to remain in their homes in order to avoid further suffering.

In order to prevent the possible spread of COVID-19, it is important that local government authorities accommodate perpetrators who have tested positive for COVID-19 in an appropriate way. The police may take a perpetrator (including those tested positive for COVID-19) to a detention centre for a short period (up to 48 hours), after which their accommodation should be provided by the local government. Local government must share information with the police about institutions that organise such accommodation (including outside working hours).

Moreover, it is important that people and families who have experienced violence are monitored and supported at all times by local government social and child protection workers. Physical isolation and limited contact with relatives and friends can increase the risk of domestic violence.

Online source:

https://www.sotsiaalkindlustusamet.ee/sites/default/files/content-editors/COVID_eriulukorra_materjalid/kov_ja_teenuseosutajate_juhised_19_mai_2020.pdf

FI

Finland

POLICY AND OTHER RELEVANT DEVELOPMENTS

Reform of family-related leave

Gender

The current Government's programme promised in its communication of 28 May 2020, to make the necessary reforms regarding family-related leave in order to fulfil the requirements of the Work-life Balance Directive (2019/1158/EU). Previous attempts to reform such leave were made by the previous Government, but were unsuccessful due to disagreements on the aims. The Ministry of Social Affairs and Health started preparing the reform during the fall of 2019. A tripartite working group was nominated, and a hearing on the reform took place on 25 February 2020. The aim is to implement the reforms in 2020.

The reform will introduce family leave under which mothers and fathers will have an equal number of non-transferable months of family-related leave, without shortening the current leave for mothers. Both parents will receive more leave payment during a part of their leave period. At the moment, the benefit paid to mothers for the first part of the leave is higher. The Government programme thus promises an increase of leave covered by income-related benefits. The period available for fathers will be extended.

There will be no reform of the home care leave and related flat rate benefit. The home care leave, which may be taken until a child is three years old, has been considered a trap for women who have difficulties in finding work outside the home, such as women with a low level of education and immigrant women in particular.

The reform of family-related leave is long overdue. The use of the right to parental leave is gendered, as mothers in most cases make use of the right to the leave period that is transferable between the parents. It is positive that the non-transferable part of leave is increased, as that may have a positive impact on fathers' willingness to share care. The overall benefit covered leave period, if both parents use their promised right to leave, should become longer. The reform is expected to take into account different family forms, and the legislation will be formulated in gender-neutral terms.

Online sources:

<https://valtioneuvosto.fi/marinin-hallitus/hallitusohjelma/luottamuksen-ja-tasa-arvoisten-tyomarkkinoiden-suomi>

<https://stm.fi/perhevapaauudistus>

FR

France

CASE LAW

Disability

Creation of a new position cannot be required as reasonable accommodation

The claimant is employed as a technician in a construction firm but was found by the occupational health services to be unfit to pursue his employment. Measures of reasonable accommodation were thus required so that he would be ensured a sedentary post of an administrative nature close to his home.

In the absence of a position corresponding to these requirements, the claimant was dismissed for being unfit to pursue employment with the employer.

The claimant contested the unavailability of relevant employment, alleging that his employer could have created a function for him as site coordinator, considering that there was sufficient work for an additional supervisor since the persons occupying these functions were overworked.

The Versailles Court of Appeal found that an employer cannot be obliged to create a post in order to provide reasonable accommodation for an employee who is no longer fit to pursue his work. Dismissing an employee because of the unavailability to work in vacant positions corresponding to accommodation requirements prescribed by the occupational health services does not amount to discrimination as defined by Article L1133-3 of the Labour Code.⁵¹

Supreme Administrative Court decision on religious neutrality and Islamic beards

The claimant is an Egyptian medical student who was admitted as an intern for one year in the digestive surgery department of a public hospital of the Paris suburbs, pursuant to a convention between the hospital and his university. Article 6 of the convention states that the intern will be bound to respect the rules of discipline provided by the Code of Public Health, which among other requirements contains a rule of religious neutrality.

Religion
or belief

After four months of service, the hospital put an end to the claimant's internship due to his Islamic beard, which was considered to be in violation of the rule on religious neutrality. The supervising practitioner was consulted and issued a favourable recommendation due to the 'impression it was making on the work environment and the perturbation created by this situation'.

On 19 December 2017, the Versailles Administrative Court of Appeal ruled on the following facts: the claimant is Muslim, and his very imposing beard was perceived as a religious sign by members of personnel. Furthermore, he was working in a multicultural environment and when he was invited to reduce his beard, he refused, invoking his right to privacy. The claimant did not do so by referring to his religion, but he did not deny that his appearance could be held to manifest an Islamic religious sign.

The Court held that a beard, even long, cannot be held to constitute a religious sign, in the absence of other factors confirming that it is, in the circumstances, the expression of a religious belief. However, it decided that the request of the hospital authorities to reduce the claimant's beard was justified by the necessity to enforce the principle of neutrality on the premises, particularly in a multicultural environment.

In these conditions, the claimant was found to have failed in his duty to respect the principle of neutrality, even if this beard was not combined with any religious proselyte behaviour, or remarks by patients and the public, because the claimant did not establish that his beard was not religious.⁵²

On 12 February 2020, the Supreme Administrative Court decided on the claimant's appeal.⁵³ The Court first recalled that interns in public hospitals are protected against discrimination on the ground of religion but are subject to the obligation of religious neutrality imposed on agents of the public service. It then concluded that the decision of the Administrative Court of Appeal was erroneous in law because the fact that the claimant had refused to reduce his beard and had not denied that it had a religious character

51 France, Court of Appeal of Versailles, decision No. 18/01698 of 30.01.2020.

52 France, Administrative Court of Appeal of Versailles, decision No. 15VE03582 of 19.12.2017, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000036252625&fastReqId=110506859&fastPos=1>.

53 France, Supreme Administrative Court (*Conseil d'Etat*), decision No. 418299 of 12.02.2020.

was insufficient to conclude to the expression of his religion in the context of the public service, in the absence of other expressions of his religious convictions.

The Court clearly stated that the beard in itself cannot be held to be a religious sign, that colleagues' impressions as to the religious nature of a beard are insufficient to characterise a public indication of a religious belief and that, in order to protect public agents' freedom of conscience, the judge must seek objective expressions of a person's religious convictions before concluding to a violation of the obligation of religious neutrality.

Online source:

<https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-02-12/418299>

POLICY AND OTHER RELEVANT DEVELOPMENTS

Results of situation testing on discrimination in access to employment on the grounds of origin and place of residence

In November 2017, the President of the Republic announced that the Government would commission a research team to implement testing operations to document discriminatory practices on the ground of origin and place of residence in relation to access to employment, and that it would use the results to 'name and shame' and prosecute employers who were practising discrimination.

The testing programme was organised and executed by an experimental research team and was based on 8 572 pairs of applications, either in response to a public job offer or spontaneously. The tests targeted 103 important corporations (registered on the stock market) in six different geographical areas in France and were conducted between November 2018 and January 2019. The aim was to test the impact of North African origin (using North African names and surnames), as well as place of residence.

The results of the testing shows that candidates with North African names have 20 % less chance of being invited for an interview when they reply to a job offer, and 30 % less chance when submitting a spontaneous application, than applicants with French names. Place of residence has little impact except in the industrial economic sector in the Paris region.

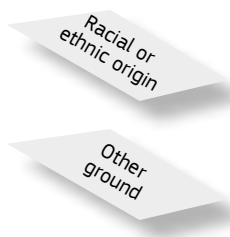
The overall analysis indicates significant discrimination on the ground of North African origin for all tested employers in all six geographical areas.

However, it is more acute in the 40 larger corporations, and more specifically in 15 corporations concentrated in specific economic sectors operating in the areas of industry, consumer goods and services to other corporations. The research team's hypothesis is that these firms are more attractive, which has a negative impact on candidates of North African origin.

Despite the publicity surrounding the launch of this testing operation, the Government decided not to publish the results and use them to prosecute employers as planned, possibly because of the negative results for important brands in the French economy. In reaction to the Government's failure to publish the results, the research team published an anonymised version of them.

Online source:

https://drive.google.com/file/d/1_-z4deMawsSD3x2xVDGXWQqPNBsS7UV9/view



Equality body report on discrimination on the ground of origin in France

In June 2020, the French equality body, the Defender of Rights, published a report on racial and ethnic discrimination in France. Based on research, public data, surveys and reports published by public and academic research centres and official institutions in the last 15 years, the report presents the situation in France of persons of foreign origin from the first, second and third generations.

All available information reveals similar indicators: racial and ethnic origin discrimination is massive and in progression, affecting the lives of millions of persons and constituting a threat to social cohesion. It interacts with identifying people as following the Muslim religion and holds an intersectional dimension with discrimination based on religion.

Persons of foreign origin or perceived as such are disadvantaged in access to employment and access to housing, are more exposed to unemployment, poverty and police checks, their health is worse and the education system does not provide equal opportunities.

Public policies initiated at the time of the transposition of the EU non-discrimination directives have evolved into policies focusing on underprivileged neighbourhoods or the promotion of diversity focusing on disability and equality between women and men. The issue of discrimination based on origin has disappeared off the radar.

The national strategy to fight discrimination relies exclusively on the equality body and judicial redress, which is insufficient to address the systemic and massive reality of discrimination on the ground of race and ethnic origin today. Populations who are the victim of such discrimination face multiple systemic difficulties that need to be addressed through public policy.

The report proposes to modify the law to limit discriminatory police checks, facilitate access to penal redress and class action, and introduce punitive damages in cases of direct discrimination and harassment. In addition, the report proposes a comprehensive strategy mobilising all levels of society, including private employers, to document and correct discrimination on a wide scale. In this context, it proposes that the Government should support research and create an observatory, to develop statistics and data in order to monitor racial and ethnic discrimination, and to impose non-financial measures in the public and private sectors.

Online source:

<https://www.defenseurdesdroits.fr/fr/rapports/2020/06/discriminations-et-origines-lurgence-dagir>

Racial or
ethnic origin

Religion
or belief

Germany

DE

LEGISLATIVE DEVELOPMENT

New non-discrimination law of the *Land* of Berlin

On 4 June 2020, the legislature of the *Land* (federal state) of Berlin passed the state Non-Discrimination Law, providing protection against discrimination in public law against acts of all public authorities in Berlin. The new law prohibits discrimination on the grounds of sex, ethnic origin, racist ascriptions, religion and belief, disability, chronic illness, age, language, sexual and gender identity and social status. It prohibits direct and indirect discrimination and provides for the justification of discrimination if there is a sufficient objective reason for unequal treatment. It establishes the possibility of representative action against the action of public authorities, by associations dedicated to the work against discrimination.

All
grounds

These associations are entitled to represent individuals in court proceedings. There is a shift of the burden of proof if a complainant has made it plausible that there has been discrimination by a public authority. The act establishes an Ombudsperson's office, with a right to notably investigate cases, give advice, commission expert opinions and formulate recommendations. The act establishes a general duty of all the Berlin federal state public authorities to work towards a culture of diversity and respect.

The act is the first anti-discrimination law concerning the action of public authorities at the federal state level in Germany. It contains various innovative elements including a broad list of protected grounds, which includes most notably the term 'racist ascriptions', signalling that there are no human 'races'.

Online source:

<https://www.berlin.de/sen/lads/recht/ladg/materialien/>

CASE LAW

Ban on headscarves for legal trainees

The complainant was a legal trainee in the Hessen federal state and wears a headscarf in public because of her Muslim faith. Prior to her traineeship, the Higher Regional Court instructed her that legal trainees wearing a headscarf were not allowed to perform any tasks in which they could be perceived as being a representative of the justice system or of the state.

The Federal Constitutional Court decided that the relevant legal provisions⁵⁴ form a sufficient constitutional statutory basis for the headscarf ban but then considered whether such a ban violated any constitutionally protected rights, or whether it amounted to indirect discrimination on the ground of sex or gender.⁵⁵

The Court argued that there was an interference in the rights to the free exercise of religion, to freely choose one's place of training and the general right of personality. The interference in these rights, however, is justified according to the Court by considerations related to the neutrality of the state especially in the judiciary, the proper functioning of the judiciary and the negative freedom of religion of those who are facing a member of the judiciary displaying visible religious symbols. It did not answer the question whether there was indirect discrimination on the ground of sex or gender because it argued that in any case such indirect discrimination would be justified for the same reasons as the interference in the other fundamental rights mentioned. It did not consider possible indirect discrimination on the ground of religion or discuss EU anti-discrimination law.

The Court argued that the legislature enjoys a margin of appreciation and is not prevented from allowing the wearing of headscarves in the courtroom. Certain provisions in the respective norms referred to the 'occidental tradition' of Hessen, which is taken to be 'shaped by Christianity and humanism' and that this has to be 'adequately taken into account when determining the content of neutral conduct'. The Court held that these provisions do not violate the principle of the neutrality of the state. It did state, however, that a ban on Christian symbols would be permissible, too.

The dissenting opinion argued that the interference is disproportionate because the legal trainee is visibly not performing the same tasks as other members of the judiciary. The trainee's freedom of religion and right to freely chose her training should therefore prevail over other considerations, and the interference is thus unconstitutional.

⁵⁴ Hesse Act on Legal Training, Section 27.1, second sentence, in conjunction with Section 45, first and second sentence of the Hessen Civil Service Act.

⁵⁵ Germany, Federal Constitutional Court, judgment of 14.01.2020, 2 BvR 1333/17, ECLI:DE:BVerfG:2020:rs20200114.2b vr133317.

The decision of the Federal Constitutional Court is more restrictive than the latest decision of a different Senate of the same court on the impermissibility of a general ban on headscarves in schools for public teachers.⁵⁶ The decision has considerable practical importance because of the number of Germans with Muslim faith and their increasing level of higher education, including in the law. The Court argued that the trainees are not prevented from finishing their training because the ban concerns only a small number of specific tasks. The dissenting opinion, however, pointed out that these particular tasks are of a quasi-judicial nature and have a particular value, not the least to train students in the neutral exercise of judicial functions.

Online source:

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/01/rs20200114_2bvr133317.html

Discrimination in access to housing by a large building society

The complainant sued a building company in Berlin owning about 110 000 apartments because of alleged discrimination on the ground of ethnic origin. He had enquired about one of the company's apartments using his real ('Turkish-sounding') name but was informed that it was no longer available. The complainant then enquired again with an invented ('German-sounding') name and was then invited to visit the apartment. When he tried to collect the key at the service point however, the attendant told him that the apartment was already let to somebody else. One hour later, one of the complainant's colleagues enquired about the same apartment and was invited to visit it. The same events happened a second time within the next month with another of the company's apartments.

Racial or ethnic origin

The local court of Charlottenburg argued that there was direct discrimination on the ground of ethnic origin.⁵⁷ The complainant was treated differently because of his 'Turkish-sounding' name. The Court admitted the proof established by the complainant through an individual situation test, as there was no indication that the complainant was not seriously interested in renting an apartment. The complainant was awarded compensation of EUR 6 000.

Online source:

http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/279b/bs/10/page/sammlung.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&doc.id=KORE201212020&doc.part=L&doc.price=0.0#focuspoint

Discrimination against a blind person

The complainant is blind and attended physiotherapy sessions accompanied by a guide dog to access the rooms of the physiotherapist. To access these rooms, one could either use a staircase – which was impossible for the guide dog – or pass through the waiting room of another medical office. The complainant was allowed to do the latter for several weeks accompanied by her dog. After some time, the complainant also needed to use a wheelchair. The medical office whose waiting room she had to cross then prohibited the complainant from using this access route with her dog because of hygienic reasons. It argued that it was unnecessary to cross the rooms of the practice with the dog because she could tie up the dog in front of the practice and let herself be helped by its employees.

Disability

⁵⁶ Germany, Federal Constitutional Court, judgment of 27.01.2015, 1 BvR 471/10, ECLI:DE:BVerfG:2015:rs20150127.1bvr047110.

⁵⁷ Germany, Charlottenburg Local Court, judgment of 14.01.2020, No. 203 C 31/19, ECLI:DE:AGBECH:2020:0114.203C31.19.00.

The German Federal Constitutional Court⁵⁸ decided – contrary to the decision of a lower instance court – that the prohibition of the practice of crossing its rooms with a dog was unconstitutional. The Constitutional Court argued that the prohibition of discrimination on the ground of disability according to Section 3.3 of the Basic Law was violated. With regard to the material scope, the Court found that Section 19 AGG (General Equal Treatment Act) prohibiting discrimination on the ground of disability was applicable, as the contractual relations of the complainant with the physiotherapist constituted ‘bulk business’ in the sense of Section 19 AGG.⁵⁹ The Court argued that this provision has to be interpreted in the light of Section 3.3 of the Basic Law because of its indirect horizontal effect.

The Court did not examine whether direct discrimination was at hand because in any case there was indirect discrimination on the ground of disability. Barring the complainant from being accompanied by her guide dog amounted to a disadvantage disproportionately affecting persons with disabilities. There was no objective reason justifying this indirect discrimination. Given expert opinions on the matter, there were no hygienic dangers for the medical practice because of the dog passing through its waiting room. The Court highlighted that in particular in the light of the UN Convention on the Rights of Persons with Disabilities it was a disproportionate demand to expect the complainant to relinquish her autonomy by leaving her dog outside and by accepting guidance by the medical practice personnel. In this regard, the Court underlined that the Convention is formally federal law but can be used to interpret the rules established by fundamental rights of the Basic Law.

Online source:

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/01/rk20200130_2bvr100518.html.

EL

Greece

LEGISLATIVE DEVELOPMENTS

Legislation concerning conditions for receiving social allowances

On 3 February 2020, legislation was adopted on ‘birth allowance and other provisions’,⁶⁰ to explicitly guarantee equal treatment with Greek citizens in the provision of childcare allowance for stateless persons and third-country nationals with refugee status, subsidiary protection status or a humanitarian residence permit.

Article 17 of the new law also introduces a new requirement as a prerequisite for receiving a housing allowance, related to the adequate education of every minor member of the household during compulsory education. Specifically, granting the allowance requires not only that each child is enrolled in school but also that the child actually attends school in such a way as to exclude households where a child is obliged to repeat the same school year because of too many unjustified absences. The explanatory report clarifies that this provision aims to eliminate the phenomenon of school absenteeism and thereby reinforce the compulsory education system. The housing allowance is thus used as an incentive for parents to make sure that their children attend school.

58 Germany, Federal Constitutional Court, judgment of 30.01.2020, 2BvR 1005/18, ECLI:DE:BVerfG:2020:rk20200130.2bvr100518.

59 ‘Bulk business’ is a contractual relation where the individual party is of no significance. Such contractual relations are not excluded from the material scope of the prohibition of discrimination under German law.

60 Greece, Law No. 4659/2020 on ‘birth allowance and other provisions’ (OG A 21/03.02.2020).

However, according to the Hellenic League for Human Rights,⁶¹ this requirement seriously affects the Roma in particular because it relies on the problematic link between school attendance and the provision of assistance that the state considers necessary for decent living, and transfers to the minor family member the responsibility for whether or not the family will receive a housing allowance.

Online source:

<https://www.e-nomothesia.gr/oikogeneia/nomos-4659-2020-phek-21a-3-2-2020.html>

Positive measures for stateless Roma and persons with disabilities

In March 2019, the Greek Parliament adopted legislation⁶² introducing a positive measure for the acquisition of Greek citizenship for two categories of people: (1) stateless Roma and (2) children with disabilities who do not – due to their disability – meet the regular naturalisation requirement of continuous and successful education. Regarding this latter category, children born in Greece who have a certified disability of more than 80 % and whose parents are legally residing in Greece are not required to succeed in education if they attend specialised care services and psychosocial or therapeutic rehabilitation interventions for an appropriate period of time. Regarding the first category, persons of Roma origin with Greek birth certificates and with a long-term presence in Greece but without registration in the municipal records could acquire citizenship through a specific transparent procedure for the identification of a stateless person and an individual examination. Both measures constituted exceptions to the generally applicable procedure for acquiring Greek citizenship but had not yet been implemented by spring 2020.

Racial or
ethnic origin

Disability

In February 2020, a draft law was tabled in Parliament which implied both procedural and substantive changes to the acquisition of Greek citizenship. More specifically, Article 42 of the draft law stipulated that the positive measures described above would be abolished.

According to the initial explanatory report of the draft law, the measure planned for children with disabilities would be abolished because ‘specialised care services and psychosocial or therapeutic rehabilitation interventions do not constitute permanent educational services and are therefore incompatible with the content of that law, a basic condition for the application of which is the concept of continuous and successful study’. In other words, an exception to the general rule of citizenship by birth and education, which had been introduced as a positive measure to compensate for severe disability, would be abolished solely on the grounds that it was an exception.

Regarding the measure planned for stateless Roma, the explanatory report stipulated that the relevant provisions did not specify how Roma ethnicity and long-term presence in the Greek territory can be ‘unequivocally proven’ because there is a generally applicable regime for stateless persons born and living in Greece which could apply to stateless Roma.

Human rights organisations such as Generation 2.0, the Hellenic League of Human Rights and the National Confederation of Persons with Disabilities found Article 42 of the bill to be problematic, at both a practical and a symbolic level, citing in particular the Greek state’s commitment to the UN Convention on the Rights of Persons with Disabilities.

61 Hellenic League of Human Rights (2020), Press release of issued on 03.02.2020, available in Greek at: <https://www.hlhr.gr/%ce%b4%cf%84-%ce%b5%ce%bb%ce%b5%ce%b4%ce%b1-%ce%b3%ce%b9%ce%b1-%cf%84%ce%bf%cf%85%cf%82-%cf%80%ce%b5%cf%81%ce%b9%ce%bf%cf%81%ce%b9%cf%83%ce%bc%ce%bf%cf%8d%cf%82-%ce%b5%ce%b9%cf%82-%ce%b2%ce%ac%cf%81/>.

62 Greece, Law 4604/2019 on ‘promoting effective gender equality, preventing and combating gender- based violence -Legal arrangements on citizenship and other provisions’ (OG A 50/26.03.2019).

Finally, after the reactions of the above NGOs, the Minister of Interior withdrew the provision on the abolition of the measure for children with disabilities. The abolition of the measure for stateless Roma was however maintained when the law was adopted on 10 March 2020.⁶³

Finding ambiguity in the criteria for eligibility for the special citizenship procedure, the Greek legislature did not enrich this process with specific criteria or further controls to avoid abuse, but abolished it completely. The Roma individuals concerned are referred to the current general procedure for ‘proven stateless’ persons.

Online source:

<https://www.e-nomothesia.gr/autodioikese-demoi/nomos-4674-2020-phek-53a-11-3-2020.html>

New provisions on family-related leave in the public sector (Article 47 Act 4674/2020)

New provisions on family-related leave in the public sector were adopted on 11 March 2020 with Article 47 of Act 4674/2020 (hereinafter ‘the new Act’).⁶⁴ All types of leave provided cover civil servants⁶⁵ and employees of local authorities.⁶⁶ The types of leave under points (i), (ii) and (iii) below also cover persons employed by the state or by local authorities under a fixed-term employment relationship governed by private law, but only in proportion to the duration of their fixed-term contract.⁶⁷

i) Special paid leave up to 22 days a year⁶⁸

Leave of up to 22 working days a year, transferable and fully paid, was originally granted: a) to employees with a spouse or child requiring regular blood transfusions or periodic hospitalisation; b) to employees with children suffering from a serious mental disability or Down’s syndrome or diffused developmental disorder. According to the new Act, cases under (b) are covered only if the child is underage or an adult but unemployed. If an employee is entitled to this leave in relation to more than one protected person, the leave is extended to up to 32 working days a year. If more than one employee is entitled to the leave in relation to the same protected person, the leave is extended to up to 32 working days a year for all entitled persons cumulatively, with the number of days to be taken by each person to be defined by an affidavit.

ii) Extra annual leave of six days a year⁶⁹

A specific paid extra annual leave of six working days a year (in addition to the legal annual leave) was originally granted to employees who are themselves disabled at a percentage of at least 50 %. According to the new Act, this leave is granted only if there is no entitlement to the type of leave under point (i). Moreover, the new Act grants this leave to employees with children disabled at a percentage of 50 % or more (minors or adults who are not employed due to their disability). If an employee is entitled to this leave in relation to more than one disabled person, said leave is extended to up to 10 working days a year. If more than one employee is entitled to the leave in relation to the same disabled person, said leave is extended to up to 10 working days a year for all entitled employees cumulatively, with the number of days to be taken by each entitled person to be defined by an affidavit.

63 Greece, Law 4674/2020 on strategic development perspectives of local authorities, regulation of Ministry of Interior Affairs issues and other provisions (OJ A 53/11.03.2020).

64 Greece, Article 47 of Act 4674/2020 on strategic developmental perspective of local authorities, regulation of Ministry of Interior Affairs issues and other provisions, OJ A 53/11.03.2020.

65 Civil servants are governed by the Civil Servants Code (Act 3528/2007, OJ A 26/09.02.2007), as amended.

66 Employees of local authorities are governed by Act No. 3584/2007, OJ A 14/28.06.2007, as amended.

67 Employees of the state or local authorities under a fixed-term employment relationship governed by private law are governed by Presidential Decree 410/1988, OJ A 191/30.08.1988, as amended.

68 Greece, Article 50(2) of the Civil Servants Code, as amended by Article 47(1)(a) of Act 4674/2020; Article 57(2) of Act 3584/2007, as amended by Article 149 of Act 4483/2017 and further amended by Article 47(1)(b) of Act 4674/2020; Article 21 of Presidential Decree No. 410/1988, as amended by Article 47(7) of Act 4674/2020.

69 Greece, Article 50(3) of the Civil Servants Code, as amended by Article 47(1)(a) of Act 4674/2020; Article 57(3) of Act 3584/2007, as amended by Article 47(1)(b) of Act 4674/2020; Article 21 of Presidential Decree No. 410/1988, as amended by Article 47(7) of Act 4674/2020.

iii) Entitlement of guardians to leave under points (i) and (ii)⁷⁰

For the first time, the new Act expands the types of leave under points (i) and (ii) to employees who have been appointed by a court judgment as guardians and have been awarded the custody of the 'protected' persons, if the everyday care of the latter is not provided by competent institutions and social care. Otherwise, half the leave is granted. Leave under point (ii) is also granted to guardians of persons suffering from dementia.

iv) One-day's paid leave for annual gynaecological check-up⁷¹

For the first time, paid leave of one day a year is granted to female employees for an annual gynaecological check-up upon a medical certificate being provided.

v) Two-days' leave for treatment of malignant growths⁷²

For the first time, paid special leave is granted to employees with a spouse or a minor child suffering from malignant growths, such as leukaemia, lymphoma and solid tumours and receiving treatment with chemical or immunomodulator agents or radiotherapy. This leave covers the day of the treatment and the day after and is granted upon a medical certificate evidencing the scheduled treatment. It can be taken once the types of leave under points (i) and (ii) have been exhausted.

vi) Parental leave for adoptive or fostering parents⁷³

According to the new Act, nine months' fully paid leave is granted to parents who adopt or foster a child under the age of four after the exhaustion of the adoption leave,⁷⁴ as an alternative to a paid daily time reduction. If the age of four is to be reached sooner than nine months, only the corresponding part of the leave for the remaining time is granted. This is a big step forward, given that until the adoption of the new Act, fostering parents had no such entitlement, whereas adoptive parents were entitled only to leave of a length amounting to the total number of hours by which the daily working time would be reduced.

vii) Paid daily working time reduction for the fourth child and beyond⁷⁵

An additional, paid, daily working time reduction by one hour for two more years was originally provided for the fourth child. The new Act grants this leave not only for the fourth child but also for any child born beyond the fourth.

Online source:

<https://www.e-nomothesia.gr/autodioikese-demoi/nomos-4674-2020-phek-53a-11-3-2020.htm>

Pregnancy and family-related leave due to COVID-19

In order to mitigate the consequences of the COVID-19 pandemic, several measures were taken regarding pregnancy and family-related leave (including accommodation of working hours). Article 4(2) of the Act of Legislative Content on urgent measures in order to deal with the negative consequences of the appearance of coronavirus COVID-19 and the need to restrict its diffusion was adopted on 11 March

Gender

70 Greece, Article 50(4) of the Civil Servants Code, as amended by Article 47(1)(b) Act 4674/2020; Article 57(4) Act 3584/2007, as amended by Article 47(1)(b) Act 4674/2020; Article 21 of Presidential Decree No. 410/1988, as amended by Article 47(7) of Act 4674/2020

71 Greece, Article 50(9) of the Civil Servants Code, as added by Article 47(3)(a) of Act 4674/2020; Article 57(3) of Act 3584/2007, as added by Article 47(3)(b) of Act 4674/2020.

72 Greece, Article 50(10) of the Civil Servants Code, as added by Article 47(3)(a) of Act 4674/2020; Article 57(3) of Act 3584/2007, as added by Article 47(3)(b) of Act 4674/2020.

73 Greece, Article 53(2) of the Civil Servants Code, as amended by Article 47(4)(a) of Act 4674/2020; Article 60(2) of Act 3584/2007, as amended by Article 47(4)(b) of Act 4674/2020.

74 Greece, Article 53(9) of the Civil Servants Code, as added by Article 34(1) of Act 4590/2019, OJ A 17/07.02.2019, grants to civil servants adoptive or fostering parents of a child under the age of six a paid leave for three months within the first six months following the finalisation of the adoption or the fostering, which corresponds to maternity leave after birth. One month of this leave can be taken before the adoption or the fostering.

75 Greece, Article 53(2) of the Civil Servants Code, as amended by Article 47(4)(a) of Act 4674/2020; Article 60(2) of Act 3584/2007, as amended by Article 47(4)(b) of Act 4674/2020.

2020 as an emergency measure in order to deal with the crisis.⁷⁶ The provisions have been amended on several occasions and new provisions have been adopted, including several listed below.

1. Furlough allowance (which was originally excluded in the emergency measures) is extended to mothers on maternity leave that expired within the period of the furlough (Article 34 Act 4690/2020) and to parents on parental leave (Circular No 29056/938/15.07.2020 of the Ministry of Employment and Social Affairs).

In enterprises, the function of which has been suspended by order of the state due to COVID-19, employees on a legal leave, such as maternity leave, the six-month special maternity leave⁷⁷ or sick leave were excluded from the furlough according to Article 13(5b) of the Act of Legislative Content (hereinafter ALC) of 14 March 2020, OJ A 64/14.03.2020.

Article 34 Act 4690/2020, OJ A 104/30.05.2020 has provided, for the first time, that in case said leave expired during the suspension of the function of the enterprise by order of the state, the employees returning from maternity leave are entitled to the furlough allowance from 1 May 2020 until the end of the suspension of the function of the enterprise. The allowance is calculated *pro rata* of the full furlough allowance (EUR 534 net for 30 calendar days) according to the number of days of furlough following the end of the leave. However, the period before 1 May 2020 has not been covered. Moreover, Circular No 29056/938/15.07.2020 of the Ministry of Employment and Social Affairs provided that the parents' right to parental leave is not affected by the furlough: parental leave is suspended during the furlough and is continued after the end thereof; if parental leave falls within the period of furlough, it is transferred after the end thereof. This temporary arrangement does not affect the right of the employee to the six-month special maternity leave.⁷⁸

2. The 'special purpose' leave⁷⁹ is extended until the re-opening of the schools, and in some cases until the end of the school year.

When the schools closed,⁸⁰ a 'special purpose' paid three-day leave was adopted to facilitate employees with children:⁸¹ for every three days of the 'special purpose' leave, the worker makes use of one day of his/her annual leave. As a rule, two-thirds of the cost of the days of said leave are covered by the employer and one third thereof is covered by the state. This leave, originally provided for the period 11 March 2020 to 10 April 2020, was successively extended until 24 April 2020,⁸² again until 10 May

76 Greece, Act of Legislative Content of 11.03.2020, OJ A 55/11.03.2020, sanctioned by Article 2 Act 4682/2020, OJ A 76/03.04.2020. See EELN flash report (Greece) of 26 March 2020 'Urgent measures for family related leave due to COVID-19'; available at: <https://www.equalitylaw.eu/downloads/5100-greece-urgent-measures-for-family-related-leave-due-to-COVID-19-95-kb>.

77 The 'special' paid maternity leave is provided for employees in the private sector for six months after the end of the maternity leave (Article 142 Act 3655/2008, OJ A 58/03.04.2008, as amended by Article 36 of Act 3996/2011, OJ 170/05.08.2011). It is independent from both maternity and parental leave. It is granted to women only, in addition to maternity leave and cannot be shared with the father.

78 The 'special' paid maternity leave is provided for employees in the private sector for six months after the end of the maternity leave. See above.

79 See EELN flash report (Greece) of 26 March 2020 'Urgent measures for family related leave due to COVID-19'; available at: <https://www.equalitylaw.eu/downloads/5100-greece-urgent-measures-for-family-related-leave-due-to-COVID-19-95-kb>.

80 All preschools, schools and universities closed down on 10 March 2020 (Joint Ministerial Decision Δ1α/ΓΠ.οικ. 16838/10.03.2020, OJ B 783/10.03.2020).

81 Article 4(3) Act of Legislative Content (hereinafter ALC) of 11.03.2020, OJ A 55/11.03.2020, sanctioned by Article 2 Act 4682/2020, OJ A 76/03.04.2020.

82 Greece, Joint Ministerial Decision of the Ministers of Finance, Labour and Social Affairs and Health 14556/448/07.04.2020, OJ B 1208/07.04.2020.

2020⁸³ and finally until the reopening of the schools.⁸⁴ Exceptionally, in both the private⁸⁵ and the public sector,⁸⁶ the said leave was extended until the end of the school year⁸⁷ only for parents of children: (i) who are exempted from schooling because they belong to high-risk groups for COVID-19 or come into close contact with family members who belong to such groups or have already been ill or (ii) who attend exclusively e-classes because their teacher belongs to a high-risk group; in this case, as an alternative, the parent may perform telework upon the consent of the service and under the condition that this is feasible. If schooling is scheduled every second day (which is the norm for Greek schools as classes were divided in two rotating sections), parents can combine the 'special purpose' leave on a piecemeal basis for the days off school with the accommodation of reduced daily working hours up to 25 % (see under 3. below) for the days of school attendance. In the public sector, the 'special purpose' leave was also extended until the end of the school year of nurseries and crèches (31 July 2020) for parents of children who are exempted from schooling because they belong to high-risk groups for the COVID-19 or come into close contact with family members who belong to such groups or have already been ill.⁸⁸

3. Employees with children are entitled to reduced daily working hours up to 25 % upon agreement with the employer (Article 35 Act 4690/2020).

According to Article 35 Act 4690/2020, by exception to the fixed labour law provisions on working time limits, until the end of the school year 2019-2020: a) employees, who are parents of children who (i) attend nurseries and crèches, (ii) are students in compulsory education grades⁸⁹ or (iii) attend special education schools, irrespective of their age; b) employees, who are parents of disabled persons benefiting from open care structures for disabled persons, irrespective of their age, following a petition and upon agreement with their employer, are entitled to reduced daily working hours up to 25 % without any pay reduction. In this case, they can be employed beyond their normal working hours on other working days to be agreed between the parties for the equivalent hours without any surplus of pay. This accommodation is provided irrespective of the use of the 'special purpose' leave and aims to facilitate working parents in collecting their children from school given that after their shutdown due to COVID-19, for the period 1-25 June 2020 nurseries, crèches and elementary schools functioned only for the basic hours without the programme of 'all-day schooling'.

4. Alternatively, entitlement to the four-day paid leave for school visits in order to collect children from school.⁹⁰

Alternatively, employees in the private sector can make use of the four-day paid leave 'for school visits'⁹¹ on a piecemeal (hourly or daily) basis. According to the Ministry, this aims to facilitate parents

83 Greece, Joint Ministerial Decision of the Ministers of Finance, Labour and Social Affairs and Health 16135/499/23.04.2020 OJ B 1566/24.04.2020.

84 Greece, Joint Ministerial Decision 1 of the Ministers of Finance, Labour and Social Affairs and Health 7787/520/8.5.2020, OJ B 1778/10.05.2020; High schools reopened on 18 May 2020 (except the last grade, which reopened on 11 May 2020) and elementary schools, nurseries and crèches reopened on 1 June 2020.

85 Greece, Circular 20477/604/27.05.2020 of the Ministry of Labour and Social Affairs, available at: <https://www.ergasiaka.gr/wp-content/uploads/2020/05/egk-20477-%CE%A8%CE%94%CE%97446%CE%9C%CE%A4%CE%9B%CE%9A-%CE%918%CE%A1.pdf>.

86 Greece, Circular ΔΙΑΔ/Φ.69/118/οικ. 11134/2020 of the Ministry of Interior, available at: <https://www.taxheaven.gr/circulars/33283>.

87 The school year 2019-2020 for high school ended on 12 June 2020 whereas for elementary school it ended on 26 June 2020.

88 Greece, Joint Ministerial Decision Δ1α/ΓΠ.οικ. 36857/14.05.2020, OJ B 2277/14.06.2020, Article 16(3).

89 In Greece, education is compulsory from kindergarten to the third grade of high school, i.e. in normal conditions up to the age of 15 years.

90 Greece, Circular 20477/604/27.05.2020 of the Ministry of Labour and Social Affairs, available at: <https://www.pim.gr/index.php/ergatikamenu/ergatika-menu-egkapofasis/file/2053-27-5-2020-egkyklios-20477-604-diefkolyneise-goneon-sto-plaisio-epanaleitourgias-ton-sxoleion-kai-ton-vrefonipiakon-stathmon-odigies-gia-tin-efarmogi-tis-17787-520-8-5-2020-v-1778-xorigisis-adeias-eidikoy-skopoy-gia-tin-antimetopisi-tou-koronoioy-COVID-19->

91 Article 9 Act 1483/1984, OJ A 153/08.10.1984, Article 4 National General Collective Agreement 2008-2009 and Article 20(5) Act 3896/2010, OJ A 207/08.12.2010. The leave 'for school visits' is four working days per calendar year for each child up to 16 years attending compulsory education. Entitled thereto are (both full-time and part-time) employees in order to get informed on the child's school performance.

in collecting their children from school given that for the period 1-25 June 2020, nurseries, crèches and elementary schools function only for the basic hours without the programme of ‘all-day schooling’, whereas grandparents who often used to accompany children to school belong to high-risk groups for COVID-19. This leave can be taken up by employees who are not entitled to the special purpose leave or who have exhausted their annual leave for the current year and consequently have lost entitlement to the special purpose leave.

5. Pregnant women in public sector entitled to a paid special leave.

The paid leave provided⁹² for employees in the public sector (public servants, local authorities etc.) belonging to high-risk groups for COVID-19 originally covered only cancer patients in chemotherapy and those who have undergone a transplant. On 11 May 2020, this leave was extended to cover pregnant employees as well.⁹³ This leave does not apply to private sector employees.

CASE LAW

Follow-up to the CJEU *Kalliri* case

In its judgment in *Kalliri*,⁹⁴ of 18 October 2017, the CJEU found that the provisions of Council Directive 76/207/EEC, as amended by Directive 2002/73/EC, must be interpreted as precluding any law of a Member State that makes candidates’ admission to the competition for entry to the Member State’s police school subject to a height requirement of at least 1.70 m, regardless of their sex. The Court held that the law at issue in the main proceedings put a far greater number of women in a disadvantaged position than men, and that it appeared to be neither appropriate nor necessary to achieve the legitimate objective that it pursued, which it is up to the national court to determine.

Following the CJEU *Kalliri* judgment, the seven-member section of the Council of State (CS) issued Judgment No 2055/2019.⁹⁵ By a majority of five out of seven votes, the CS found that the impugned provision of Article 2(1) of Presidential Decree 4/1995 constitutes indirect discrimination on the ground of gender.⁹⁶ However, the case was referred to the CS Full Section due to the importance of the issues raised regarding the compatibility of the impugned provisions with the Greek Constitution and with EU law.⁹⁷ The same was decided by CS Judgments Nos 2056-2060/2019 with regard to five other similar cases.

92 Article 25 ALC of 14 March 2020, OJ A 64/14.03.2020, sanctioned by Article 3 Act 4682/2020, OJ A 76/03.04.2020.

93 Greece, Joint ministerial decision of the Ministers of Health and Interior Affairs ΔΙΔΑΔ/Φ.64 /341/9188/11.05.2020, OJ B 1800/11.05.2020; Joint ministerial decision of the Ministers of Health and Interior Affairs ΔΙΔΑΔ/Φ.64/346/9011/14.5.2020, OJ B 1856/15.05.2020.

94 CJEU, judgment of 18 October 2017, *Kalliri*, C-409/16, EU:C:2017:767. Ms Kalliri made an application to participate in the competition, accompanied by the required supporting documents, to the competent police station. Those documents were returned to her on the ground that she was not of the minimum height of 1.70 m, since she was only 1.68 m tall and she was not allowed to participate in the competition in question. Ms Kalliri disputed that refusal before the Administrative Court of Appeal of Athens, which upheld her claim holding that the provisions were contrary to the constitutional principle of equality of the sexes. The competent ministers appealed against that decision before the Council of State (Supreme Administrative Court). By its judgment No 1420/2016, the Council of State decided to stay the proceedings and to refer to the CJEU for a preliminary ruling.

95 CS 2055/2019 has been published in the legal review, *Theory and Praxis of Administrative Law*, vol. 12/2019, p. 1165, where its date of issue does not appear. It is still not accessible in legal databases.

96 Article 2(1) Presidential Decree 4/1995 (OJ A 1/10.01.1995), as amended by Article 1(1) of Presidential Decree 90/2003 (OJ A 82/10.04.2003), provides a common minimum height of 1.70 m, without shoes, for both male and female candidates for participation in the competition for enrolment in the Greek police schools.

97 According to Article 14(2)(b) of Presidential Decree 18/1989 (OJ A 8/09.01.1989), the CS Full Section is competent for issues or cases referred to it by judgments of the five-member or seven-member section due to their major importance. The judgment of referral is considered to be a report to be developed before the CS Full Section by the Judge Rapporteur, who is appointed by the same judgment.

The CS makes reference to the history of women's access to police schools and its previous case law, which had found earlier restrictions on women's enrolment in police schools to constitute direct gender discrimination.⁹⁸ Moreover, it cites various research documents concerning the average height of men and women in Greece, including the 2011 study on 'Minimum body height requirements for police officers – an international comparison', invoked by the European Commission in its remarks to the CJEU in the *Kalliri* case. The CS found that in the period 2001-2011: (a) the minimum height requirement (MHR) of 1.70 m was 7-8 cm lower than the average height (AH) of men aged 18-24 years, whereas it is 6-7 cm higher than the AH of women of the same age group; (b) 80 % of the male population are of this height compared to only 19 % of the female population. Thus, it is evident that the percentage of female potential candidates (aged 18-26 years, according to the impugned provision) who are excluded for being shorter than 1.70 m is disproportionately larger than that of male potential candidates, who are excluded for the same reason.

In view of the above, the CS found by a majority of five out of seven members that the common MHR of 1.70 m for both sexes, does not constitute a genuine occupational requirement and that it is not necessary and suitable to ensure the operational capacity and proper functioning of the police services. Endorsing the phrasing of the CJEU in *Kalliri*, the CS found that even if all the functions carried out by the Greek police required a particular physical aptitude, it would not appear that such an aptitude is necessarily connected with being of a certain minimum height or that shorter persons naturally lack that aptitude. In any event, the aim pursued by the law at issue can be achieved by the preselection of candidates based on specific tests allowing their physical ability to be assessed. In this respect, the CS noted that two more common athletic tests have been added to those originally provided (running 100 m in 16 seconds and throwing a shot put weighing 7.275 kg, which is used by male athletes). Moreover, all candidates (both male and female) have to accomplish the minimum score provided for each athletic test (common athletic requirement), which in the case of certain sports was even raised above the minimum score required for male candidates in the past. The CS made explicit reference to the remarks of the European Commission to the CJEU in the *Kalliri* case concerning the international requirements of the physical aptitude of the police force, which showed (a) that a large number of European States have abolished MHR for access to the police force, with a few exceptions regarding special corps or specific managerial posts; (b) that at the international level there is a tendency to substitute MHR by body mass index, differentiated by gender; (c) that in the majority (51 %) of EU Member States, MHR exist, but they are set in conformity with the average height of each sex, with registered differences between the MHR set for male and the MHR for female candidates ranging from 2 to 10 cm (most commonly 5 cm); (d) that a common MHR is an exception among EU Member States, and in most cases it is set lower than the average height of the population, so that the number of excluded candidates is limited; (e) in other European countries (except Greece), MHR for female candidates, either common, or differentiated by sex, range from 1.52 to 1.65 m and only in Greece there is a MHR for female candidates set at 1.70 m.

Online source:

<http://www.nbonline.gr/journals/51/volumes/1078/issues/1714/lemmas/4914529> (private database; no free access).

98 An original quota of 15 % to the detriment of women for enrolment to the police schools, provided by Article 1(2a) Act 2226/1994 (OJ A 122/21.7.1994), as amended by Article 12(1) Act 2713/1999 (OJ A 89/30.04.1999), was found to constitute direct gender discrimination by the CS judgment No 1917/1998. This quota was abolished by Article 20(3) Act 3103/2003 (OJ A 23/29.01.2003), which provided common physical requirements and athletic and psychotechnical tests for both sexes. Presidential Decree 4/1995 originally provided a minimum height of 1.70 m for male candidates and 1.65 m height for female candidates for the police schools. For reasons of conformity with the above provision of Article 20(3) Act 3103/2003, Article 2(1) Presidential Decree 4/1995 was amended by Article 1(1) of Presidential Decree 90/2003, providing a common height requirement of 1.70 m for both sexes.

Less favourable retirement ages for male public servants constitutes direct discrimination

On 4 March 2020, a judgment was issued concerning retirement ages which varied according to sex and varied for women with or without minor children. Article 56(1),(2) of the Code of Civil and Military Pensions⁹⁹ used to provide for civil servants of a certain category¹⁰⁰ a retirement age that varied according to sex: for female civil servants with minor children (under 18 years) this was set at 50 years, and for female civil servants without minor children it was set at 58 years (to be accrued by 6 months for every calendar year until the age of 60 years). Whereas for male civil servants (irrespective of whether they had minor children within their care) the retirement age was set at 60 years (to be accrued by 6 months for every calendar year until the age of 65 years). Following the CJEU judgment *Commission v. Greece* C-559/07,¹⁰¹ which found that said provisions infringe the principle of equal pay between men and women enshrined in Article 141 TEC, and the subsequent letter of warning of the European Commission of 29 January 2010 regarding the non-timely compliance of Greece with said CJEU judgment, the provision was amended as of 1 January 2011 by Article 6(1-9) Act 3865/2010, OJ A 120/21.07.2010 with the aim of gradually equalising the retirement age of female and male civil servants (see the explanatory report of Act 3865/2010). However, according to the transitional provision of Article 6(11) Act 3865/2010 adopted for reasons of legal safety and the protection of trust, the amended provisions (including retirement age differentiated by sex) continued to apply to civil servants who have established a right to a pension until 31 December 2010.

The complainant, a male civil servant who retired in 2014, is a father of a minor child and had reached the retirement age provided for women with minor children (50 years) but not the retirement age provided for men (60 years). He alleged direct discrimination in pay on the grounds of sex and claimed that the more favourable retirement age provided for female civil servants who are mothers of minor children should apply in his case as well. The Court of Audit by its judgment 790/2016 upheld the case. The Greek State lodged an appeal on points of law. The case was heard by the Full Session of the Court of Audit on 1 March 2017 and the judgment was issued on 4 March 2020, i.e. three years later(!).

The Court of Audit, by a strong majority (25 out of 32 judges), dismissed the appeal by the Greek State on points of law. It held that the more favourable retirement ages provided for female civil servants who are mothers of minor children (and the rest of female civil servants as well) compared to that provided for male civil servants constituted direct discrimination in pay on the ground of sex, breaching Article 141(2) TEC (now Article 157(2) TFEU) with regard to the material scope of which the national civil and military retirement pensions regime. According to the Court, such discrimination cannot be justified by reasons of general social or public interest or by reasons amounting to a greater need of protection of women in issues related to maternity, marriage or family or to purely biological differences that require the adoption of specific measures. Moreover, the provision in question cannot be considered as a positive action measure according to Article 141(4) TEC (now Article 157(4) TFEU) as it does not facilitate women to continue their professional activity nor does it redress problems faced by women in their professional career.

Online source:

<https://www.elsyn.gr/el/node/813>

99 Greece, Code of Civil and Military Pensions Presidential Decree 169/2007, OJ A 210/31.08.2007, Article 56 (1),(2).

100 Those appointed within the period 1 January 1983-31 December 1992 or those with a minimum retirement service of 25 years until 31 December 2010.

101 CJEU, judgment of 26 March 2009, *Commission of the European Communities v Hellenic Republic*, C-559/07 OJ C 113, 16.5.2009, p. 9.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Significant increase of domestic violence during the lockdown

During the COVID-19 lockdown in Greece, an information campaign was launched by the General Secretariat for Family Policy and Gender Equality (hereinafter GSFPGE) in order to support female victims of violence under the title 'We stay home but we do not stay silent. Confinement at home does not mean tolerance of violence'.¹⁰²

Gender

This campaign was carried out together with the Greek Union of Pharmacists, which joined the European campaign 'Mask-19'. Posters with the code 'Mask-19' and explanatory notes were placed in the front of pharmacies and relevant advice was given to pharmacists by their union.¹⁰³ The posters invited victims of domestic violence and sexual abuse to come to their local pharmacy to ask for a Mask-19, which would let the pharmacist know that they needed to contact the GSFPGE's SOS hotline to get help.¹⁰⁴ To date, the Greek Union of Pharmacists has not made public any data on eventual calls to local pharmacists for help by victims of domestic violence. However, the GSFPGE, in a newsletter dated 5 May 2020,¹⁰⁵ announced that there has been a significant increase in domestic violence against women during the lockdown and the confinement at home due to the COVID-19 pandemic in April 2020.

More specifically, in April 2020, a total of 1 769 calls were made to the GSFPGE's SOS hotline. According to the data available, 1 070 of these calls concerned incidents of violence, in comparison with 325 calls in March 2020. Moreover, in April 2020 the calls for domestic violence incidents quadrupled from 166 to 648 in comparison to the previous month. The majority of the victims of violence (61 % of the incidents or 485 persons) were spouses/partners.

Online source:

<http://www.isotita.gr/δελτίο-τύπου-σημαντική-αύξηση-των-περ/>

Ombudsman's *Special Report 2019 on Equal Treatment*

The Ombudsman's *Special Report 2019 on Equal Treatment* was published on 27 April 2020, illustrating the Ombudsman's activity as the national body promoting the principle of equal treatment in 2019.

All grounds

The data presented in the report show an increase of 31 % in the number of complaints submitted compared to 2018, recording the largest increase since 2016 when the relevant duty was assigned to the Ombudsman. The highest number of complaints submitted concerned discrimination on the ground of gender (44 %) and disability or chronic illness (37 %).

In the field of gender equality, the report highlights a significant deficit of protection regarding pregnant women and young parents, in particular in the private sector. According to the Ombudsman, there is a widespread attitude that pregnant workers are a 'burden' for private enterprises and employers try to find lawful ways to get rid of that 'burden'. For some employers, pregnant workers often signify not only an obligatory absence from the workplace but, mainly, the shift of the focus of their interest from professional to family life. The Ombudsman notes that in a context where women are disproportionately burdened with the care of family members, it is more than necessary to ensure the equal share of family

¹⁰² Available at the site of General Secretariat for Family Policy and Gender Equality: <http://www.isotita.gr/>.

¹⁰³ See document No. 1396/21.04.2020 of the Greek Union of Pharmacists, available at: <http://www.fsa.gr/LinkClick.aspx?fileticket=zRO%2bDD5sCiA%3d&tabid=36>.

¹⁰⁴ The posters stated: 'Mask-19. If you are a victim of domestic violence or sexual abuse, come to your local pharmacy and ask for the mask that will save your life. Ask for Mask-19. Your pharmacist knows that he/she has to call 15900'; available at: <http://www.fsa.gr/>.

¹⁰⁵ General Secretariat for Family Policy and Gender Equality (2020) Newsletter, dated 5 May 2020 available at: <http://www.isotita.gr/δελτίο-τύπου-σημαντική-αύξηση-των-περ/>.

care with the equal participation of men and women in professional life. In this field, the obligation to implement Directive 2019/1158¹⁰⁶ into national law by the summer of 2022 offers an opportunity to revisit and plan again measures which will bring substantive changes towards better work-life balance.¹⁰⁷ Such measures will hopefully improve the disappointing classification of Greece among EU Member States in the field of gender equality.¹⁰⁸

With regard to discrimination on the ground of racial or ethnic origin, the report highlights the recurring issue of social tension between Roma and non-Roma residents and the reluctance, especially of local authorities, to take action to reduce this tension, improve the living conditions of the Roma population and encourage their gradual social integration. A new element noted in the 2019 report is that, despite the complexity and contrasts, real positive results can come out of Ombudsman's opinions and of municipalities' efforts in this area.

The report also notes worrying trends of unequal treatment of and racism against asylum seekers, refugees and migrants residing legally in the country, mainly in relation to barriers to access goods and services. Furthermore, the report reveals that discrimination on the ground of racial or ethnic origin often includes elements related to religious beliefs as well.

With regard to age discrimination, the report raises the specific issue of discriminatory age requirements in job advertisements, often associated with stereotypical perceptions of natural suitability and the ability to fulfil certain types of tasks.

The *Special Report for 2019* also attempts a brief mapping of the level of respect for the principle of equal treatment in Greece. It highlights – as in previous years – persistent sources of discrimination, particularly at work, in education, and in housing. In his introductory remarks, the Greek Ombudsman deplores the country's multiannual experience of the Memoranda of Understanding, which have led to economic misery and strict financial adjustments. He also notes, however, that this is not the only cause of the current levels of discrimination, as deeply rooted prejudices and stereotyping also play their role.

Online source:

https://www.synigoros.gr/resources/docs/ee_im_2019_el.pdf

HU

Hungary

LEGISLATIVE DEVELOPMENT

Amendment of the provisions on legal recognition of gender

On 31 March 2020, a draft omnibus bill¹⁰⁹ was filed on behalf of the Hungarian Government, by the Deputy Prime Minister (delegated by the Christian Democratic People's Party, the junior coalition partner of Fidesz). Some provisions of the bill, aimed at amending the Registry Act,¹¹⁰ relate to the issue of

Transgender

106 Directive 2019/1158 of the European Parliament and of the Council of 20.06.2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1158&from=EN>.

107 The Greek Ombudsman makes reference to his relevant proposals to the General Secretariat for Family Policy and Gender Equality and states that his efforts will be intensified in 2020.

108 The Greek Ombudsman makes reference to 'Gender Equality Index 2019: Greece' of the European Institute for Gender Equality (EIGE), available at: www.ec.europa.eu/greece/sites/greece/files/gender_equality_index_2019_greece.pdf.

109 Hungary, Bill No. T/9934, see the draft (in Hungarian): <https://www.parlament.hu/irom41/09934/09934.pdf>.

110 Hungary, Act I of 2010 on civil registration procedure, 14.12.2009.

legal recognition of gender and the possibility of sex-change in the registry, thus affecting the rights of transgender people in Hungary.

The proposal was presented amidst the COVID-19 crisis. The Hungarian Parliament passed the State of Emergency Law¹¹¹ the day before filing the omnibus bill, on 30 March 2020 (the State of Emergency Law entered into force several hours later, at midnight) which allowed the Prime Minister to rule by decree for an undefined period of time. The omnibus bill was considered by the Parliament in the normal way of legislation, however, at the outset of this special political situation.

On 6 April 2020, the MP of the Dialogue for Hungary Party (*Párbeszéd Magyarországért*) filed a motion to amend the bill, rejecting the proposal by claiming that no prior public consultation took place with LGBT organisations regarding the plan to amend the Registry Act. On 9 April 2020, an independent MP filed a motion to amend, rejecting the proposal by claiming that it would violate transgender people's right to identity. Eventually, on 19 May 2020 the Parliament voted by 133 to 57 to pass the bill, with the two-thirds majority of the governing coalition. The President of the Republic signed the Act on 28 May 2020, which came into force the next day.

The relevant part (relating to Article 33) of the Detailed Reasoning (*Részletes indokolás*) of the bill describes:

'Sex is not conceptualised in the current legislation, given that the determination of sex is based on biological facts. It can be determined based on primary sex characteristics and chromosomes.

Sex included in the civil registry is based on facts determined by a doctor, declared by the registry. The registry certifies the facts and rights which are included in it, until proven otherwise, thus the registry does not create rights. However, the sex declared by the registry could create rights or obligations, and therefore it is necessary to define the concept of birth sex.

Given that it is impossible to completely change one's biological sex, it is necessary to ascertain by law that it cannot be changed in the civil registry either.'

The provisions in Article 33 of the omnibus bill were opposed by numerous bodies and organisations, on national, European and international levels, including;

- a coalition of Hungarian LGBT and human rights organisations, including Amnesty International Hungary, the Hungarian Helsinki Committee and the Hungarian Civil Liberties Union;¹¹²
- the LMBTQ section of the Hungarian Psychological Association;¹¹³
- the Equal Treatment Authority;¹¹⁴
- the ILGA-Europe and the Transgender Europe (TGEU);¹¹⁵
- 63 MPs, in an open letter to the Hungarian Government;¹¹⁶ the LGBTI Intergroup of the EP, in a press release;¹¹⁷ and the majority of the EP in a resolution;¹¹⁸

111 Hungary, Act XII of 2020 on Protection against the Coronavirus.

112 See (in Hungarian): <https://lmbtszovetseg.hu/hirek/vonjak-vissza-a-transznemueket-ellehetetlenito-torvenyjavaslatot>.

113 See (in Hungarian): https://www.facebook.com/permalink.php?story_fbid=659477707948832&id=230520050844602.

114 The summary of the opinion of the Authority is available (in Hungarian): <https://www.facebook.com/lmbtszovetseg/photos/a.10151500607922055/10157478266457055/?type=3&theatre>.

115 See: <https://ilga.org/hungary-drop33-legal-gender-recognition-ILGA-Europe-TGEU>.

116 See: <https://lgbti-ep.eu/2020/04/15/63-meps-call-on-hungarian-government-to-revoke-article-33-restricting-the-rights-of-trans-and-intersex-persons/>.

117 See: <https://lgbti-ep.eu/2020/04/02/latest-move-by-fidesz-is-a-deliberate-attack-against-the-hungarian-trans-community/>.

118 See: European Parliament resolution of 17.04.2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.html.

- the Council of Europe's Commissioner for Human Rights;¹¹⁹ the Conference of INGOs of the Council of Europe;¹²⁰
- the UN High Commissioner for Human Rights,¹²¹ the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the right to privacy and the Special Rapporteur on violence against women, its causes and consequences;¹²² UNAIDS;¹²³ the UN independent expert on protection against violence and discrimination based on sexual orientation and gender identity;¹²⁴
- the Human Rights Commissioner of Germany.¹²⁵

As a consequence of the legislation, the 'birth sex', included in the birth certificate and in the registry, would be included in all identification documents (e.g. passports, ID cards), and this arrangement may make the change of the first name in official documents impossible as well.¹²⁶ Practically, according to the Háttér Society (*Háttér Társaság*)¹²⁷ the new legislation 'would make legal gender recognition in Hungary impossible', and may 'also impact those who had their gender recognised in the last two decades; possibly resulting in the reversal of previously issued documents including new birth certificates'.¹²⁸ The Prizma Transgender Community (*Prizma Transznemű Közösség*) stated that, if 'the proposed bill is adopted, a transgender person will risk discrimination every time they are required to present their identity documents' in Hungary.¹²⁹

Online source:

<https://magyarkozlony.hu/dokumentumok/2473fb7525bcb68f41e2b0d2a1bb60e718fa4eff/megtekintes>

CASE LAW

Equal Treatment Authority unable to assess the contents and implementation of equal opportunity plans

In terms of Article 63 of the ETA, so-called budgetary organisations (i.e. organisations funded from the state or municipal budget) and companies whose majority share is held by the state are obliged to adopt equal opportunity plans if they employ more than 50 persons. The complainant and his child both have a hearing impairment. The complainant had worked as a project manager at a budgetary organisation for two years before the organisation went through legal succession. He continued to be employed at the legal successor of the organisation. The predecessor organisation had an equal opportunity plan that was in force between 15 April 2017 and 14 April 2019. Based on the plan, the complainant would have

119 See: https://www.facebook.com/CommissionerHR/posts/1552971991545372?_xts_%5B0%5D=68.ARAMmwUonNxGcEcChP7ZyQzLYvYtVMAh2hwhVOBPw-A7FJ0S66deLk4mwUjvylRvyZuTEyV6Y0xZLWUWCNIHnZFik68k44yPPBQvr0tYOKREOm2gbEni-7HTbFYKR5JzqwEf0rzRXGlgZ9YK8gg0rJ4FDT7ow0q1eeAoBHwkEgRRFLHH5K-R7Euax0FRsIPpxS382E7saXEc1NCilexhoFO-iPSto_jkWeNZkQDjMjrYG34SJdy_TbfQAOALi5sMRhQKkpF51Amnil0vOguGSFY4A7hy2tu4V_QBsLUaiGK2cfGYTjclUREH6upcysfnezdlVgXLMaYaGtIA&_tn_=-R.

120 See: https://www.coe.int/en/web/ingo/newsroom/-/asset_publisher/BR9aikJBXnwX/content/call-to-hungary-to-align-legal-gender-recognition-with-internationally-recognized-human-rights-standards.

121 See: <https://www.ohchr.org/Documents/Issues/LGBT/LGBTpeople.pdf>.

122 See: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25172>.

123 See: https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2020/may/20200508_hungary.

124 See: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25844>.

125 See: <https://www.auswaertiges-amt.de/en/newsroom/news/kofler-hungary-transgender/2340742>.

126 See an assessment in English: Milieu Consulting SPRL (2020) 'Coronavirus pandemic in the EU – Fundamental Rights Implications. Country: Hungary', 04.05.2020, pp. 4-5, https://fra.europa.eu/sites/default/files/fra_uploads/hu_report_on_coronavirus_pandemic_may_2020.pdf.

127 A prominent LGBTIQ organisation in Hungary, see: <https://en.hatter.hu/about-us>.

128 Háttér Association (2020) 'Hungarian government proposes bill to ban legal gender recognition amid COVID chaos', 02.04.2020, <http://en.hatter.hu/news/hungarian-government-proposes-bill-to-ban-legal-gender-recognition-amid-covid-chaos>.

129 Háttér Association (2020) 'Hungarian government proposes bill to ban legal gender recognition amid COVID chaos'.

been entitled to two additional days off per month because of his and his child's hearing impairment. However, he was granted only one day off on this basis throughout the two years of his working career with the predecessor organisation. At the time of the legal succession, the equal opportunity plan was put out of force and no new plan was adopted in its stead.

In response to the complaint, the employer adopted an equal opportunity plan and sent it to the Equal Treatment Authority on 28 November 2019. The respondent did not react to the part of the complaint related to the days off that were allegedly due to the complainant.

In January 2020, the Equal Treatment Authority concluded that the respondent had violated the complainant's right to equal treatment when it failed to adopt an equal opportunity plan between 14 April and 28 November 2019. The Authority ordered that its decision be published on the Authority's website.¹³⁰

However, regarding the employer's failure to allow the complainant during 2 years altogether close to 50 days off that he would have been entitled to based on his and his child's impairment, the Authority concluded that it was not in a position to examine the matter. Article 63 of the ETA only prescribes the obligation to adopt an equal opportunity plan but does not contain any provision regarding the required contents of such a plan. Therefore, the Authority can only examine whether an equal opportunity plan is in place, but not its content, nor can it examine whether or not the employer is actually complying with the obligations it undertakes by adopting its equal opportunity plan.

The Authority's interpretation renders the obligation to adopt equal opportunity plans meaningless and seems to be highly problematic. If the Equal Treatment Authority cannot conclude that a violation of the right to equal treatment has been committed where an employer fails to meet the requirements it set for itself in the equality plan, the plan cannot fulfil its function as envisaged by the ETA.

Online source:

<https://www.egyenlobanasmod.hu/hu/jogeset/1152020>

Curia ruling regarding continuing violations of the Equal Treatment Act

In December 2015, the Hungarian LGBT Alliance asked the maintainers of the Government's information portal on family policy to include its member organisation, the Rainbow Families Foundation in the list of 'family organisations' published on the website. In January 2016, the website maintainers informed the Alliance that the press department of the Ministry of Human Capacities was responsible for the site's professional contents. The Alliance then approached the Ministry with the same request on numerous occasions. Finally, in July 2016, the editor-in-chief of the website responded to the Alliance in a letter that implicitly but rather clearly stated that they had no intention of including the Rainbow Families Foundation in the list of 'family organisations'. Subsequently, the Alliance sent a letter to both the maintainer and the Ministry informing them that this amounted to a violation of the requirement of equal treatment. As there was no further reaction, on 21 June 2017, the Rainbow Families Foundation filed a complaint with the Equal Treatment Authority.

The respondents argued that since the complainant was demonstrably aware of the alleged violation already in December 2015, the complaint was submitted after the one-year time limit prescribed by Equal Treatment Act and should therefore be rejected.¹³¹ The Authority found that the complainant became 'aware' of the violation in July 2016, when the editor-in-chief made it clear that the complainant would not be included in the list, and therefore the one-year time limit had not passed when the complaint

¹³⁰ Hungary, Equal Treatment Authority, decision No. EBH/115/2020, case summary published on 30.03.2020.

¹³¹ The Authority may only investigate a complaint if no more than one year from becoming aware of the violation and no more than three years from when the violation took place have passed.

was submitted in June 2017. The Authority concluded that the respondents had discriminated against the complainant on the basis of sexual orientation and gender identity and obliged the respondents to include the complainant in the list of family organisations within 30 days of receiving the decision.¹³² The respondents requested a judicial review by the Metropolitan Regional Court which accepted their argument and quashed the Authority's decision.¹³³ However, the Authority challenged the judgment before the Curia (Supreme Court of Hungary).

In January 2020, the Curia quashed the judgment and ordered the Court to retry the case on the basis of the Curia's interpretation of Article 17 of the ETA. According to this interpretation, the time-limit for submitting a complaint under the ETA does not start as long as a continuing violation is still ongoing. If a violation is ongoing at the time of submitting the complaint, it cannot be time-barred on the basis of Article 17.¹³⁴

The Curia acknowledged that the strict grammatical interpretation of the ETA allows for the stance taken by the Metropolitan Regional Court. However, the Curia drew from the Preamble which refers to 'effective' protection against any discrimination and underlined that the aim of the legislature in inserting Article 17 into the ETA was to ensure that the evidence be still available when the Authority's investigation starts. The Curia thus concluded that if a violation is still ongoing when a complaint is submitted, it is irrelevant that the complainant might have known about it for over a year. If the violation is ongoing, the evidence is obviously available and the requirement of effective protection against a violation that is still in place when a person seeks protection under the law is only met if he/she would be given that protection.

Online source:

<http://hatter.hu/sites/default/files/dokumentum/konyvlap/csaladhu-kuria-hatarido.pdf>

Curia decision on non-pecuniary damages for school segregation

In 2015, the Curia concluded in an *actio popularis* lawsuit launched by the Chance for Children Foundation (CFCF) that Roma pupils in Gyöngyöspata (Northern Hungary) had been segregated. In each grade there was one non-Roma class and one Roma class, where the latter was provided with lower quality education. Based on this decision, 63 former Roma pupils launched a lawsuit for damages against the school, the Municipal Council and the Klebelsberg School Maintaining Centre¹³⁵ for the long-term disadvantages they had suffered as a result of their substandard education (e.g. the loss of the real possibility of succeeding in the labour market).

In 2018, the first instance court concluded that the respondents had violated the claimants' right to equal treatment and ordered the payment of compensation to most claimants.¹³⁶ On 16 September 2019, the Debrecen Appeals Court modified the first instance court decision (it increased or decreased the amount of damages with regard to some of the claimants), albeit in essence upholding the finding that non-pecuniary damages were due to the victims of segregation.¹³⁷ The respondents requested an extraordinary review from the Curia.

In January 2020, members of the Government and of the Fidesz party initiated a campaign questioning the fairness and legitimacy of the court judgment and notably of the principle finding that compensation should be paid. Notably, a Member of Parliament for the region where the school is located published a message on social media stating that '[t]he court decision may be in accordance with the law, but it is

132 Hungary, Equal Treatment Authority, decision No. EBH/450/20/2017 of 15.11.2017.

133 Hungary, Metropolitan Regional Court, judgment No. 15.K.700.064/2018/21.

134 Hungary, Supreme Court (Curia), decision No. Kfv.III.37.881/2018/6 of 21.01.2020.

135 The Klebelsberg School Maintaining Centre (KLIK) is the state body that – as of 01.01.2013 – became the municipality's legal successor as a result of the national centralisation of school management.

136 Hungary, Eger Regional Court, decision No. 12.P.20.489/2015/402 of 16.10.2018.

137 Hungary, Debrecen Appeals Court, decision No. Pfl.20.123/2019/16 of 16.09.2019.

unjust, biased, excessive and destructive. [...] With the millions [of HUF] thrown among the Roma families, the past years' continuous [...] development, the hard-won peace may disappear. Gyöngyöspata refuses to become a battlefield [...].¹³⁸

The Prime Minister made a series of statements, notably to the effect that it was unfair that members of an ethnic group would receive a significant amount of money without performing any work, and that 'the people of Gyöngyöspata' must have justice in this regard.¹³⁹ He further stated that it was possible that there had been segregation or 'a failed catch up attempt', but 'we cannot remedy the trouble by giving money'. It is better 'to provide services, instead of giving money into their hands, which the Hungarians will never accept.'¹⁴⁰ In relation to this, the Secretary of State of the Ministry of Human Capacities said at a press conference that it would serve the people's sense of justice and the improvement of the situation of the 60 claimants concerned much better if instead of money they received in-kind compensation in the form of IT or language training and assistance in combating their integration difficulties and the trauma they had experienced.¹⁴¹

In the context of this campaign, the Curia delivered its decision in May 2020,¹⁴² upholding the second instance decision. The Court explicitly invoked Article 26 of the Fundamental Law of Hungary, which stipulates that judges are independent, that they are only subjected to the laws and shall not be instructed in their adjudicative work. The Curia then stated that *in integrum restitutio* is inconceivable with respect to the humiliation and frustration caused by segregation. The provision of in-kind compensation for violations of inherent personality rights (such as the right to dignity and non-discrimination) would also be conceptually impossible, as this type of compensation is only applicable if the damage occurred in so-called replaceable items (such as crops). Reviewing the history and literature of non-pecuniary damages, the Curia concluded that such damages may only be compensated with money. Training and education may only replace financial compensation for non-pecuniary damages if the complainants accept such compensation, but even in that case such an agreement between the parties could only be reached outside of the lawsuit's framework.

The Curia upheld the first and second instance approach which – based on the common knowledge concerning the damaging impacts of segregation and discriminatively substandard education – offers victims of discriminatory and segregating practices an enhanced access to judicial remedies and enables them to build on the success of *actio popularis* litigation. The Curia's interpretation prevented a situation, in which perpetrators of segregation would be in a more advantageous situation than the perpetrators of any other fundamental rights violations, as (although conditional on the court's decision) they could be exempted from the 'hard' consequence of having to pay each segregated child pecuniary compensation. Such a solution would have been in all likelihood much cheaper for the perpetrators, as organising a few training sessions for larger groups of victims of segregation would in all probability require less funding than paying substantial amounts to each segregated individual. Hence, the Curia upheld the degree of dissuasiveness of the current system of sanctions.

Online source:

<https://www.kuria-birosag.hu/hu/sajto/gyongyospatai-szegregacios-nem-vagyoni-karok-megteritesenek-karterites-megitelesenek-egyetlen>

138 https://index.hu/belfold/2020/01/04/gyongyospata_hovath_laszlo_soros_halozat_dontes_kuria_penz_millio_roma_szegregacio/.

139 https://index.hu/belfold/2020/01/09/orbaninfo_gyongyospata_gyori_gyerekgyilkos_birosagi_iteletek_biralat/.

140 https://index.hu/belfold/2020/01/17/orban_engem_mar_nyolcszor_olt_meg_soros_halozata/.

141 <https://infostart.hu/belfold/2020/01/17/gyongyospatai-iskolaugy-itt-a-kormany-megoldasi-javaslat>.

142 Hungary, Curia, decision No. Pfv.IV.21.556/2019/22 of 12.05.2020.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Budapest Mayor's Office unblocks access to LGBTQI websites

In March 2019, the media reported that the Budapest Mayor's Office had blocked access to LGBTQI websites from its local network, meaning that neither the staff of the office, nor local council members could access such pages. Before the Equal Treatment Authority, the main argument of the Mayor's Office was that staff do not need access to these websites for their work. However, several other types of websites such as entertainment videos and internet auctions were not blocked, neither were the websites of other vulnerable groups, such as Roma, women and people with disabilities.

On 29 May 2019, the Equal Treatment Authority found that the conduct of the Mayor's Office amounted to discrimination based on sexual orientation and gender identity. The Authority pointed out that the conduct also caused harm to the entire LGBTQI community, by limiting their opportunity to have their interests represented and humiliating them. The Authority stated that blocking such content 'in the same way as they do with deviant topics condones and strengthens existing social prejudices.'¹⁴³

The Authority ordered the Mayor's Office to discontinue its unlawful practice, forbade such conduct in the future, imposed a fine of approximately EUR 3 000 (HUF 1 million) and ordered its decision to be published on the front page of the city's website. The Mayor's Office challenged the decision of the Authority by requesting a judicial review.

In October 2019 however, following local elections, the opposition candidate won the seat of Mayor of Budapest. In December 2019, the new Mayor terminated the lawsuit against the Authority's decision and ordered the unblocking of access to LGBTQI websites from the local network.

Online source:

<https://budapest.hu/Lapok/2019/karacsony-nem-folytatja-a-tarlos-altal-inditott-pert-az-egyenlo-banasmod-hatosag-ellen.aspx?fbclid=IwAR0zcYEg008BUZeHqW9SZL3XQh3K55sN1SkHne8ehm6KDVxcUw11j-Od40w>

Draft Bill on mandatory in-kind compensation for segregation in education submitted

In the context of the Gyöngyöspata segregation case and the subsequent political campaign regarding the alleged unfairness and illegitimacy of awarding compensation for non-pecuniary damages to the victims of school segregation, the Curia delivered an important decision in May 2020, concluding that violations of inherent personal rights (including segregation) may only be compensated with money. Training and education may only replace the financial compensation for non-pecuniary damages, if the complainants accept such compensation in an agreement reached outside of the lawsuit's framework.¹⁴⁴

As a response to the judgment, the Fidesz MP of the region submitted on 4 June 2020 an amending proposal to the currently pending draft bill on the Amendment of Act CXCV on National Public Education. The proposed amendment would insert a paragraph (Paragraph (4)) into Article 59 of the Act and would read as follows:

'If the educational institution violates the inherent personal rights of the child or pupil in relation to education, the Civil Code's provisions regarding moral damages shall be applied with the difference that the moral damages shall be granted by the court in the form of educational or

¹⁴³ The case description is based on the summary of the decision provided by the Hátér Society, available at: <http://en.hatter.hu/news/equal-treatment-authority-fines-budapest-mayors-office-for-blocking-lgbtqi-websites>.

¹⁴⁴ For further details regarding the case and the political campaign, see above p. XXX.

training services. The educational or training services granted by the court can be either provided or purchased by the violator.¹⁴⁵

The reasoning attached by the MP states:

‘It has been raised in relation to the Debrecen Appeals Court’s judgment in the Gyöngyöspata segregation case [...] that in-kind compensation would be just and reasonable for similar violations. The amendment prescribes in relation to future violations caused by access to substandard education that the court shall grant the compensation for the damages in the form of educational services instead of pecuniary compensation to be paid for moral damages.’

The MP’s amending proposal was endorsed by the Parliamentary Committee for Cultural Affairs, which included it in its amending proposal dated 9 June 2020.¹⁴⁶

The proposed amendment is highly problematic on several levels:

- 1) The proposed text concerns all types of violations of inherent personal rights related to education. This can include violations regarding which the provision of educational or training services is completely meaningless (e.g. harassment by a teacher).
- 2) In the case of segregation, pupils who have been segregated may succeed despite the segregation; go to secondary or higher education, get a job, etc. For such pupils, educational or training services may also be completely meaningless.
- 3) It is highly controversial to oblige the victims of inherent rights violations to accept educational or training services from the institution that violated their rights in the first place.
- 4) The amendment would itself constitute indirect discrimination based on ethnicity. It is obvious that it would disproportionately concern segregated Roma pupils, as most known cases of inherent rights violations committed by educational institutions are segregation cases. It is also clear that the amendment would be disadvantageous to the victims of such rights violations, since – compared to all other victims of rights violations – it would reduce their freedom of choice regarding the kind of remedy they wish to receive.
- 5) The amendment would also put perpetrators of educational violations in a more advantageous situation than the perpetrators of any other fundamental rights violations, as they would be exempted from the ‘hard’ consequence of having to pay each concerned child pecuniary compensation.
- 6) Due to the above, the planned amendment would in all likelihood also reduce the degree of dissuasiveness of the current system of sanctions, thus breaching the requirement set out by Articles 6 and 15 of the Racial Equality Directive.

Online sources:

<https://www.parlament.hu/irom41/10742/10742-0003.pdf>

<https://www.parlament.hu/irom41/10742/10742-0005.pdf>

¹⁴⁵ Inherent personal rights are rights that are inalienably attached to the human personality – they are to a great extent equivalent to fundamental rights and freedoms.

¹⁴⁶ The amendment was adopted by Parliament on 03.07.2020, after the cut-off date of this publication, and published in the Official Journal on 14.07.2020. It entered into force on 22.07.2020.

CASE LAW

Minister of Education, Science and Culture found in breach of Gender Equality Act in appointing Permanent Secretary

Gender

On 27 May 2020, the Gender Equality Complaints Committee held in Ruling No. 6/2020¹⁴⁷ that the appointment of the Permanent Secretary of the Office of Permanent Secretary in the Ministry of Education, Science and Culture was discriminatory on the basis of sex. The claimant, a woman, considered that the Gender Equality Act No. 10/2008 had been violated by the Minister of Education, Science and Culture (the Minister) when a man had been appointed as Permanent Secretary instead of her. The Gender Equality Complaints Committee ruled that there had been various shortcomings in the assessment procedure of the claimant as a possible candidate as well as of the man who was appointed Permanent Secretary. The claimant was able to show with enough likelihood that she had been discriminated against on the grounds of gender, and therefore Article 26, para. 4 of the Gender Equality Act No. 10/2008 applied, shifting the burden of proof. According to this provision, the burden of proof lies with the defendant who must demonstrate that there was no discriminatory treatment based on the ground of gender, unless such discrimination can be justified with a legitimate aim and the methods used to achieve this aim are appropriate and necessary.

According to the Gender Equality Act, the rulings of the Complaints Committee are binding for the parties to each case. The parties may refer the Committee's rulings to the courts.¹⁴⁸ Subsequent to the ruling in favour of the claimant, her next move would be to initiate legal proceedings against the Minister and seek compensation.

However, the Minister intends to initiate legal proceedings against the claimant. The Minister sought legal advice, and was advised that there were legal shortcomings in the ruling and furthermore that the ruling, if uncontested, would bring with it legal uncertainty. The only option for the Minister to seek annulment of the ruling of the Gender Equality Complaints Committee, is by suing the individual it ruled in favour of. The Directorate of Gender Equality declared after the Minister's intention was known that this method of suing an individual in order to annul a ruling of the Complaints Committee needs revision.¹⁴⁹

The claimant's lawyer considers that this attempt of the Minister will have a chilling effect on others who consider themselves victims of gender discrimination if they fear that legal action will be taken against them.

Online source:

<https://www.ruv.is/frett/2020/06/02/lilja-braut-jafnrettislog-med-radningu-pals-magnussonar>

147 Iceland, Gender Equality Complaints Committee, Ruling 2020/06, available at: <https://www.stjornarradid.is/gogn/urskurdir-og-alit/-stakur-urskurdur/?newsid=3de81c49-a4d6-11ea-8114-005056bc8c60&cname=Kærunefnd%20jafnréttismála&cid=e219adb3-4214-11e7-941a-005056bc530c>.

148 Iceland, Gender Equality Act No. 10/2008, Article 5(4).

149 <https://www.ruv.is/frett/2020/06/25/tilefni-ad-endurskoda-tha-leid-sem-radherra-nytir-ser>.

Ireland

IE

POLICY AND OTHER RELEVANT DEVELOPMENTS

COVID-19 and matters of gender equality

Gender

In March 2020, the Government passed the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020 and the Emergency Measures in the Public Interest (COVID-19) Act, 2020 and regulations made thereunder to provide for certain provisions in relation to the public health emergency arising from the pandemic.

The impact of the pandemic cannot be underestimated. As of April 2020, there was 28.2 % unemployment, up from 15.5 % unemployment in March 2020. As an emergency measure, the Government introduced the COVID-19 unemployment payment in the sum of EUR 350 gross per week for employees and self-employed persons who had lost all their employment due to the COVID-19 public health emergency. This payment was effective from the end of March and was extended to 10 August 2020. The rate of payment will change for persons who were earning less than EUR 200 per week effective from the end of June. In order to receive the pandemic unemployment payment, a person must be aged between 18 and 66 years, live in the Republic of Ireland, have been in employment or self-employment before 13 March 2020 and if they were in atypical employment, in employment after 6 March 2020.

However, a problem arose when a person had completed maternity leave, adoptive leave and any related care leave. They initially were told that they were not entitled to the COVID-19 pandemic unemployment payment as they were not in employment in the weeks leading up to the state of emergency as they were on maternity leave or adoptive leave. Consequently, urgent changes were made so 'the date last worked' for the COVID-19 unemployment payment is the date that they were due to return to work. This payment applies when their employer has no work due to the pandemic and this payment is higher than the payment for jobseekers.

If a person was pregnant and there was no work available due to COVID-19, they are entitled to the COVID-19 unemployment payment and should submit their forms for maternity leave in the normal way.

The Government also brought in a number of subsidies for employers so that they could retain staff. One such subsidy was the temporary wage subsidy scheme. This scheme was available to employers severely affected by the pandemic. The employee then received payments through their employer effective from 26 March 2020 rather than through the social protection system, so that there was still a link between employer and employee. Again, due to an anomaly, changes were made to facilitate employees who were not on the employer's payroll on 29 February 2020 following a period of maternity, adoptive leave or related unpaid leave or paternity, parental or related unpaid leave or having been in receipt of health and safety benefit from the Department of Employment Affairs and Social Protection or having been in receipt of illness benefit. There were further amendments made to address this anomaly so that persons could receive payment of up to EUR 410 per week.

One major issue arose out of the closing of schools on 12 March 2020 and along with crèches and various childcare arrangements. Employees who left work because they did not have proper childcare arrangements due to the closing of crèches and schools were and are entitled to the COVID-19 pandemic unemployment payment. It should be noted that there is an additional scheme called the Department of Children and Youth Affairs temporary COVID-19 wage subsidy childcare scheme.

As regards domestic violence there has been a significant publicity campaign and special arrangements for immediate rent payments to victims of domestic abuse.

Online sources:

<https://data.oireachtas.ie/ie/oireachtas/act/2020/2/eng/enacted/a0220.pdf>

<https://data.oireachtas.ie/ie/oireachtas/act/2020/1/eng/enacted/a0120.pdf>.

<https://www.stillhere.ie>

IT

Italy

LEGISLATIVE DEVELOPMENT

Measures taken to mitigate the impact of COVID-19

On 17 March 2020, the Italian Government adopted Decree 18/2020, aimed at providing economic support to families to mitigate the impact of the measures taken to tackle the spread of COVID-19. The Decree strengthened the right to parental leave and economic support for families with care duties, including the right for those assisting a disabled relative to carry out their work through smart working. Initially, Decree 18/2020 provided for an additional leave period of 15 days, to be taken consecutively or split, by mothers or fathers of children up to 12 years old or of children with a serious disability. This period was increased to 30 days through Decree 34/2020 adopted on 19 May 2020.

Parents taking this leave receive an allowance of 50 % of their respective conventional wages. For self-employed and quasi-subordinated workers, the leave is paid by INPS (the National Institute for Social Security). Moreover, under Articles 23 and 25 of Decree 18/2020, unpaid leave can be taken for the entire period during which school activities are suspended by employees taking care of children aged between 12 and 16. This right was extended to parents of children up to 16 years of age by Decree 34/2020. As an alternative to the measures mentioned above, a voucher for babysitting services originally of up to EUR 600, and, following Decree 34/2020, EUR 1 200, paid by INPS, has been provided to working parents from 5 March. The amount of the allowance can be raised to up to EUR 2 000 (originally EUR 1 000) for workers in the health services.

Workers assisting a seriously disabled relative receive an additional 12 days of fully paid leave during March and April (Decree 18/2020) and May and June (Decree 34/2020) on top of the three days a month they usually receive. This right was extended under Act 27/2020 of 24 April 2020, amending Decree 18/2020, to the personnel of the police, the armed forces, the fire brigade and local police, where this is compatible with the organisational needs of the employer and with the prevailing public interest to be protected. Moreover, under Article 39, workers have the right to smart working (provided that the job can be performed in this way), if the worker's family unit includes a person with a disability of certified seriousness, while Article 87 determines that in the public sector, smart working becomes the ordinary way to work (provided the job can be performed in this way). Under the amendment through Act 27/2020, the right under Article 39 was extended until the end of the COVID-19 emergency period and now also covers workers suffering from immunodepression and workers whose family composition includes someone suffering from immunodepression. Article 90 of the new Decree 34/2020 also extends this right to parents of children aged 14 or younger.

In order to protect workers from redundancy during the lockdown phase, Article 46 of Decree No. 18/2020 also provided a general ban on redundancy procedures and a suspension of ongoing procedures, as well as a ban on individual dismissals for organisational reasons. This ban was increased from 60 days to 5 months through the introduction of Decree 34/2020. Although this is a gender-neutral provision, it is aimed at preventing unfair behaviour from employers, which is very likely to impact on weaker categories in particular, such as working women. Moreover, Article 85 of Decree 34/2020 entitles family housekeepers and care workers, most of whom are women, to a EUR 500 allowance per month for April

Gender

and May, paid by the National Institute for Social Security (INPS), on the condition they had a contract of at least 11 hours a week and they did not live with their employers.

Finally, Act 27/2020 also addressed the issue of women's safety in the home. The new Article 18bis provides for the allocation of EUR 3 million in 2020, to support both public and private refuge houses to counteract domestic violence and to protect women. In this period, the Network of Anti-Gender Violence Centres (DI.Re) noted a decrease in reports of new cases but a high increase in help requests from women who were already assisted by an anti-violence centre. The lockdown measures worsened remarkably women's condition as regards domestic violence. The situation is likely to become even more serious considering the likely effects of the crisis and the mere allocation of this fund is likely to be a too light intervention in the opinion of the network.

Online source:

<https://www.gazzettaufficiale.it/eli/id/2020/03/17/20G00034/sg>

Budget Act for 2020: Increase in the length of paternity leave and promotion of gender equality in access to sports as professionals

The Budget Act for 2020 (Act No. 160/2019) provided for some changes with regard to the protection of motherhood and fatherhood and the promotion of equal opportunities in sports.

Gender

Under Article 1 para 342 of Act No. 160/2019 compulsory paternity leave to be taken within the first five months after the child's birth, previously set at five days, has been raised to seven days in 2020. During this period, fathers are also entitled to an additional one-day optional leave, if they take it in place of the mother. While the increase in compulsory paternity leave is positive, it is still too short to make any real difference in the sharing of care duties amongst parents.

Article 1 para 181 provides for a 100 % cut in contribution up to EUR 8 000 a year for sports clubs signing an autonomous or subordinate working contract with female athletes. EUR 20 million has been allocated to finance this measure from 2020 until 2022. This allocation of funds aimed at promoting female athletes in professional sports is a first and very important step to fight gender discrimination in sports, where no female athlete has a working relationship. In fact, under Act No. 91/1998, regulating professional relationships in sports, the choice to have a professional sector is up to different national federations following guidelines of the CONI (the National Olympic Committee), which has never issued them. Consequently, to date, only four federations (football, cycling, basketball and golf) have a professional sector, but only for high levels and only for men.

Online source:

<https://www.normattiva.it/ricerca/semplice>

POLICY AND OTHER RELEVANT DEVELOPMENTS

The online network of equality advisers

As of 15 January 2020, equality advisers have a new tool at their disposal in fighting discrimination and promoting equal opportunities. They are all connected on a digital platform on the Ministry of Labour's official site. The aim of this instrument, which can be accessed only by authorised users, is to increase the efficacy of the equality advisers' intervention by means of technology. In fact, this platform is an easy way to share information, personal experiences, good practices and for the planning of different events. Moreover, a messenger system has been provided for, which bypasses traditional (and less smart) forms of communication.

All grounds

The new tool provides useful support to the network of equality advisers provided for by Decree No. 198/2006. Additionally, it is an important sign that attention is given to gender equality bodies. Nevertheless, a serious problem is the financing of their activity, which is not allocated by the state anymore due to Decree No. 151/2015 but by local bodies which are often suffering from a shortage in economic resources. This problem will need to be addressed to ensure their effective and homogeneous functioning in all regions, metropolitan cities and other local government bodies. Moreover, parallel redesign and updating of the official site of the National Equality Adviser, including references to the network and the activities of local advisers, would help to spread news and information about gender equality issues to the broader public.

Online source:

<https://www.lavoro.gov.it/ministro-e-ministero/Organi-garanzia-e-osservatori/ConsiglieraNazionale/Accedi-alla-piattaforma/Pagine/default.aspx>

Measures to promote work-life balance and gender equality for working mothers

On 11 June 2020, the Government approved the act commonly known as the Family Act. The proposed act is aimed at reorganising and improving different measures to support families and promote work-life balance (especially for women), and includes the following measures:

- the reorganisation and unification of economic support of families in a single allowance to be applied according to their annual income and to the number of children;
- the promotion of gender equality within the family, supporting women's participation in the labour market (also through smart working and more flexible scheduling) and incentives for the second earner in the family (which is more often the mother);
- measures and cuts in taxes regarding the expenses for children's education;
- reorganised and simplified procedures aimed at easing access to the services offered by the reform.

Specifically, the draft act envisages the Government issuing different decrees to reform the regulation of parental leave, in order to strengthen and harmonise it within two years of the act coming into force. The new regulation will have to respect certain criteria, including:

- more flexible use of parental leave, compatibly with the employer's organisational needs and following the provisions of collective agreements, will have to be provided;
- parents will have to be entitled to a five-hour remunerated time off to talk with the child's teachers during the school year;
- at least two months of parental leave will have to be assured to each parent as non-transferrable ones.

Moreover, the implementation of the reform will provide 10 days of compulsory leave for each child to be used by the working father, regardless of his marital status, in accordance with Directive No. 2019/1158. No minimum contribution or length of service will be required. Only a notice to the employer will be required according to the provisions of the collective agreements. The paternity leave will also be extended to the public sector and to different forms of self-employment.

As regards working mothers' participation in the labour market, Article 5 delegates the Government to issue decrees, within one year from when the act comes into force, to reorganise and strengthen different measures aimed at promoting it. The latter will have to ensure, for instance, an allowance paid by the INPS (the National Institute for Social Security) to supplement women's remuneration when going back to work after the compulsory maternity leave as well as a cut in taxes for expenses for babysitting and housework services. Finally, the decrees will also have to provide for a priority in access to smart work for parents of children younger than 14 and incentives for employers to provide reversible flexible working



conditions to working parents according to national collective agreements. Further economic support will have to be allocated as an incentive for female entrepreneurship.

Overall, the Family Act is an important first step in an ambitious project of strengthening and re-orienting policies to support families with children, supporting both the cost of children and the reconciliation of family and work with a view to gender equality. Nevertheless, it has several points that are open to criticism, which have already been underlined by gender equality experts and unions, but could perhaps be bypassed in its procedure of approval.

The resources to be allocated as well as the concrete implementation of the principles stated in the draft are still uncertain. Most of the criticisms towards the draft specifically concern the part on the promotion of gender equality. In particular, the reform of parental leave risks being a backwards step. The current regulation is already very flexible (leave can also be taken hourly), while the new reference to the organisational needs of employers could hamper the use of this right. Moreover, at present each parent is entitled to 6 months of parental leave covered by an allowance of 30 % of the remuneration paid by the INPS with a maximum of 10 months for each child, which can be increased to 11 months in the event that the father takes up at least 3 months of leave. The implementation of the principles provided by the draft, where only two months of leave are guaranteed as non-transferrable ones, could paradoxically have an impact contrary to the declared objectives of the reform. There has also been no increase of the allowance and the latter is one of the main reasons for the scarce use of parental leave by fathers, along with cultural reasons. While the increase of paternity leave from 7 to 10 days is commendable, this period is not long enough to help change the traditional distribution of roles within the family.

In the end, considering all measures mentioned above, it is clear that one of the main issues of the draft is the fact that it does not abandon the traditional pattern. In particular, the promotion of conciliation measures is planned as assistance that is mainly addressed to women, who are 'normally' the caregivers and normally suffer from the indirect negative effect of this role. No emphasis is put on the promotion of sharing the task of parental care by incentivizing the father's role so that the mother can access and maintain paid work. If no remarkable changes arise in the parliamentary discussion, an important chance of enacting a real change of pace in gender equality policies will have been missed.

Online source:

<https://www.ingenere.it/articoli/gender-equality-serve-piu-del-family-act>

Latvia

LV

LEGISLATIVE DEVELOPMENT

Impact of COVID-19 measures on gender equality in Latvia

The level of unemployment in Latvia on 31 May 2020 reached 8.4 % (72 917 persons).¹⁵⁰ As a result, Latvia is among the EU Member States with the highest rate of unemployment. In comparison, during the last quarter of 2019, the level of unemployment was 6 % (close to the highest point of economic activity during 2007 before the economic crisis of 2008)¹⁵¹ and mid-April 2020, unemployment rates were already 7.5 % (68 264 persons). In other words, the number of officially registered unemployed persons

Gender

¹⁵⁰ State Employment Agency, in Latvian at: <https://www.nva.gov.lv/index.php?cid=6>.

¹⁵¹ Special Economic Area of Latgale, Unemployment rate rapidly approaches rates on 2007 *Bezdarba rādītāji strauji pietuvojas 2007. gada limenim*, 25.02.2020, available in Latvian at: <https://lpr.gov.lv/lv/2020/bezdarba-raditaji-strauji-pietuvojas-2007-gada-limenim/#.Xq02cEBuK70>.

has increased by 10 000 since the beginning of the COVID-19 crisis. As compared by the State Social Security Agency – during 2019, the monthly average number of applications for unemployment benefits was 6 600, while during the first half of April 2020, the total number of such applications submitted was 10 000 (around 800 a day).¹⁵²

Among those who have lost their jobs, are employees of all qualification levels and from various sectors. According to the data provided by the State Employment Agency (between 29 February 2020 and 13 May 2020) among registered unemployed persons, women accounted for one fifth more than men. The increase of female unemployed persons grew in the age groups 25-34 and 40-44 in particular.¹⁵³

The Latvian Government took several measures in order to mitigate the impact of the COVID-19 pandemic. Legislative changes mainly concern special social security support measures. On 26 April 2020, amendments to the Law on Insurance in Case of Unemployment entered into force. The amendments provide a specific emergency situation flat-rate monthly unemployment allowance of EUR 180, for persons who are no longer entitled to unemployment allowance as of 12 March 2020.¹⁵⁴ Among those who received this allowance 60 % were female and 40 % were male.¹⁵⁵

Since the introduction of the emergency situation, persons who were diagnosed with COVID-19 or were subject to 14 days of quarantine (returning from abroad or being in contact with infected persons) were paid sickness allowance by the state from the statutory social insurance budget for their entire period of sick leave.¹⁵⁶ Normally, the first 10 days of sickness allowance is paid by the employer. The sickness leave on account of a COVID-19 diagnosis or quarantine was mostly used by female workers, who accounted for 68.3 % of the total amount of people who took such leave. Among the recipients of sickness allowance belonging to this group, female workers were entitled to a daily sickness allowance which was EUR 3.5 lower than for male workers. The relevant data once again highlights the existing pay gap.¹⁵⁷

In addition, the entitlement to social insurance parental allowance was extended until the end of the emergency situation. This means that when a child reaches 12 months of age (or 18 months of age) – the period up to which a parent is entitled to social insurance parental allowance – a parent retains the right to such allowance until the end of the emergency situation if a person is unable to return to their workplace. Such 'extended' parental allowance, however, may not exceed EUR 700.¹⁵⁸ According to the data provided by the State Social Insurance Agency until 14 May 2020, the parental allowance was paid to 589 persons, of which 81.8 % of recipients were women.

152 State Employment Agency, in Latvian at: <https://www.nva.gov.lv/index.php?cid=6>.

153 Ministry of Welfare (2020) 'Advancement of equality between men and women in Latvia and the World' (*Sieviešu un vīriešu vienlīdzīgu iespēju veicināšana Latvijā un Pasaulē*), newsletter, May 2020, http://www.lm.gov.lv/upload/dzimumu_lidztiesiba/LM_Aktualitates_05.2020.pdf.

154 Latvia, *Likums 'Par apdrošināšanu bezdarba gadījumam'*, Official Gazette No. 80B, 25.04.2020, available in Latvian at: <https://www.vestnesis.lv/op/2020/80B.2>.

155 Ministry of Welfare (2020) 'Advancement of equality between men and women in Latvia and the World' (*Sieviešu un vīriešu vienlīdzīgu iespēju veicināšana Latvijā un Pasaulē*), newsletter, May 2020, http://www.lm.gov.lv/upload/dzimumu_lidztiesiba/LM_Aktualitates_05.2020.pdf.

156 Latvia, Regulations of the Cabinet of Ministers No. 133 'Amendments to the Cabinet of Ministers Regulation No.152 adopted on 03.04.2001 'On the procedure of granting sick-lists and their annulment' (*Grozījums Ministru kabineta 2001. gada 3. aprīļa noteikumos Nr. 152 'Darbnespējas lapu izsniegšanas un anulēšanas kārtība'*), Official Gazette No.52, 13.03.2020, available in Latvian at: <https://www.vestnesis.lv/op/2020/52.1>; Amendments to the Law on Maternity and Sickness Insurance (*Grozījums likumā 'Par maternitātes un slimības apdrošināšanu'*), Official Gazette No. 57B, 21.03.2020, available in Latvian at: <https://www.vestnesis.lv/op/2020/57B.5>.

157 Ministry of Welfare (2020) 'Advancement of equality between men and women in Latvia and the World' (*Sieviešu un vīriešu vienlīdzīgu iespēju veicināšana Latvijā un Pasaulē*), newsletter, May 2020, http://www.lm.gov.lv/upload/dzimumu_lidztiesiba/LM_Aktualitates_05.2020.pdf.

158 Latvia, Amendments to the Law on Sickness and Maternity Insurance (*Grozījums likums 'Par maternitātes un slimības apdrošināšanu'*), Official Gazette No. 67B, 03.04.2020, available in Latvian at: <https://likumi.lv/ta/id/313732-grozijums-likuma-par-maternitates-un-slimibas-apdrosinasanu>.

The Government allocated around EUR 4 billion to tackle economic challenges posed by the crisis. This includes a 'downtime allowance' for workers, which is to be paid to employers in the amount of 75 % of previous pay of an employee or self-employed worker, but not higher than EUR 700 monthly. This 'downtime allowance' is a subsidy for the loss of income for companies due to forced inactivity during the emergency situation. The 'downtime allowance' is also available to self-employed persons.

As regards the sectors, the recipients of 'downtime allowance' are divided as follows: 35 % hospitality and the catering sector; 13 % wholesale, retail, vehicle repair sector; and 11 % art and entertainment sector. In the beginning of May 2020, the State Revenue Office published the 'portrait' of a recipient of 'downtime allowance' – a young female residing in the capital Riga, who worked as a waitress over the last 3 years, and who has received remuneration lower than 80 % from her average salary. In total there are twice as many women than men who are the recipients of 'downtime allowance'.¹⁵⁹

Liechtenstein

LI

POLICY AND OTHER RELEVANT DEVELOPMENTS

Advancements towards the ratification of the UN CRPD

Disability

In September 2018, a first national conference on the ratification of the UN Convention on the Rights of Persons with Disabilities (UN CRPD) was held by the Liechtenstein Government, involving institutions affected by the implementation of the Convention as well as relevant state authorities. Subsequently, an expert opinion was commissioned on the question of which legislative adaptations would be necessary prior to a possible ratification of the Convention and which reservations should be made, if any.

In February 2020, the second conference on the ratification of the Convention took place, presenting the results of the legal assessment on the consequences and necessary legislative adjustments of a possible ratification of the Convention. The main results which showed a need for action can be summarised as follows:

- the definition of disability in Article 29 of the Act on Disability Insurance¹⁶⁰ must be examined regarding its compatibility with the concept of disability in the Convention;
- the constitutive deprivation and restriction of the capacity to act for persons with disabilities is fundamentally contrary to the Convention and a number of national provisions related to restrictions of legal capacity should be repealed;
- the practice of restricting the freedom of old age persons in in-patient nursing and care institutions on the basis of the guidelines of the Liechtenstein Old Age and Sickness Assistance is contrary to the Convention;
- to ensure full compliance with Article 19 of the Convention, the necessary personnel and material resources have to be made available so that persons with disabilities can decide autonomously on their place of residence and form of housing;
- Article 10 of the Act on Equality of People with Disabilities¹⁶¹ should be amended to provide a clear and general legal framework for reasonable accommodation in the field of work and employment as required by Article 27(1) of the Convention;

¹⁵⁹ Ministry of Welfare (2020) 'Advancement of equality between men and women in Latvia and the World (*Sieviešu un vīriešu vienlīdzīgu iespēju veicināšana Latvijā un Pasaulē*)', newsletter, May 2020, http://www.lm.gov.lv/upload/dzimumu_lidztiesiba/LM_Aktualitates_05.2020.pdf.

¹⁶⁰ Liechtenstein, Act on Disability Insurance of 23.12.1959, LGBl. 1960 No. 5.

¹⁶¹ Liechtenstein, Act on Equality of People with Disabilities of 25.10.2006, LGBl. 2006, No. 243.

- in the field of vocational training, the idea of an inclusive education system is already well established in the legal foundations of Liechtenstein, but the Scholarship Act¹⁶² and the related Regulation to the Scholarship Act should be amended to address people with disabilities and inclusive educational aspects.¹⁶³

Following the conference, all relevant institutions were invited to submit their final written statements in relation to a possible ratification. By May 2020, all comments received were in favour of ratification, although some requests for specific reservations or declarations were made.

At its meeting on 26 May 2020, the Government decided to sign the Convention. The ministries concerned were instructed to present a timetable for making the necessary legislative adjustments. As soon as those amendments have been made, the Convention can be ratified.

Online source:

<https://www.regierung.li/de/mitteilungen/223510>

MT

Malta

POLICY AND OTHER RELEVANT DEVELOPMENTS

COVID-19 Parental Benefit

Gender

After schools were shut down on 8 March 2020, as a measure to combat the spread of the COVID-19 pandemic, parents of children who were under 16 and who could not go to work in order to take care of children were entitled to a benefit. Persons who were eligible received a direct payment of EUR 166.15 per week if working full time or EUR 103.85 per week if working part time. Moreover, social security contributions were paid in order to safeguard future contributory pension rights.

Both mothers and fathers could apply for this benefit, which enabled one of the parents to stay home to take care of their children due to the closure of schools. Parents who benefited from the Covid parental benefit, were considered to be on unpaid vacation leave by their employers and therefore no wages/salaries were due by employers. Therefore, this also indirectly helped employers who would have had to pay salaries for workers who were at home at a time when business was at an all-time low. It is positive that this was one of the first measures taken, recognising the fact that in most cases both parents are in employment and that the particular circumstances had put parents in a very difficult situation. A few years ago, it would have most likely been taken for granted that the mother was always at home to take care of the children. This shows that with the increase of the employment rate for women, Maltese society is changing.

Online source:

<https://socialsecurity.gov.mt/covid19/Documents/INF%20-%20Covid19ParentBenefitEN.pdf>

Gender

Legal Aid to victims of Domestic Violence

The Government is setting up a new service for legal aid lawyers who are trained in cases of domestic violence for victims who do not have access to the necessary finances to pay for a lawyer. In a statement

¹⁶² Liechtenstein, Scholarship Act of 20.10.2004, LGBl. 2004 No. 262.

¹⁶³ For further information, see: <https://www.regierung.li/media/attachments/Gutachten-Liechtenstein-UNBRK-28-10.pdf?t=637188255405710836>.

announcing the service, the Government noted that the legal aid service was introduced following a suggestion by the Maltese MEP, who stated that victims often hold back from filing legal action because of concerns about the costs involved.

The service came into force on 24 April 2020 in collaboration with Appogg (the national agency) and the Victim Support Unit within the Malta Police Force. The system covers both urgent as well as less urgent situations. The procedure is instigated when the victim calls the responsible national agency or files a police report. A social worker from the national agency contacts or meets the victim and makes a risk assessment and sends the victim's details to Legal Aid Malta, which assigns a lawyer for legal advice and information to the victim. In less urgent situations, the victim can communicate with the national agency by email or phone and subsequently a legal aid lawyer will be assigned.

Victims of domestic violence who take the step to report the violence are often faced with questions regarding their rights such as those relating to property and children. This service will ensure that victims can access a lawyer to represent them *parte civile* in criminal cases or pursue civil cases in those instances where such victims do not have the necessary financial means to engage and pay for a lawyer.

Online source:

<https://justice.gov.mt/en/legalaidmalta/Pages/Domestic-Violence.aspx>

Netherlands

NL

CASE LAW

Abortion during COVID-19

Two women's rights NGOs (Bureau Clara Wichmann and Women on Waves) initiated together with a pregnant woman (the applicant), summary proceedings against the Dutch state. The applicant wished to terminate her pregnancy by means of an abortion pill which can be obtained in the Netherlands by visiting an abortion clinic. However, due to the lockdown measures in connection with COVID-19, she was unable to go to the clinic as her daughter showed symptoms of COVID-19 and she was a single mother.

Gender

The NGOs and the applicant therefore requested the court to order the Dutch Government to authorise doctors to send the abortion pill by regular mail. They referred to the fact that, inter alia, in the United Kingdom and in Ireland it was made possible during the corona crisis to terminate a pregnancy in this way. However, the court dismissed the request on 10 April 2020, stating that it was not impossible to reach the abortion clinic and therefore there was no need to send the abortion pill by mail. In the Netherlands, a general practitioner (or abortion doctor), acts in breach of criminal law when prescribing the abortion pill. In practice, these doctors have not been prosecuted so far since the practice is formally tolerated, but since there is no legal basis for this there is no certainty that this will not be done some day. The women's rights NGOs have been informed of various cases of women with an unwanted pregnancy, who could not or dared not to go to an abortion clinic during the corona crisis.

The Dutch Government takes the view that it is necessary for a woman to come to an abortion clinic in order to receive an abortion pill. However, there is no evidence that this is necessary and that a woman cannot take this pill at home. The fact that other countries allow for this procedure shows the opposite.


Internet source:

<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:3551>

POLICY AND OTHER RELEVANT DEVELOPMENTS

Impact of COVID-19 on gender equality

1 Work-life balance during COVID-19



On 12 March 2020, economic and social life was put on hold in the Netherlands during an ‘intelligent lockdown’ in order to stop the COVID-19 pandemic from spreading. Schools and childcare facilities were closed and parents were asked to work from home as much as possible. Employers were requested to be flexible with working schemes (starting later, leaving earlier, working in the evening hours etc.), but there was no obligation to do so. There have been no national special leave arrangements or leave allowances made available during the crisis. The only exception is for employees in so-called crucial professions or vital processes who could not work from home, for whom special school and childcare support was arranged. Crucial professions include professions in healthcare, education, public transport, the food chain, transport of energy sources, trash collection, and the media. Vital processes, included processes that are essential in a democracy, public health and safety, and security.

Despite the urgent request from the Dutch Government to work from home, there was and is no legal right to work remotely. According to Article 2(3)(4) and (6) of the Flexible Working Act, the employer is obliged to seriously consider a request by an employee to work from another place or to work remotely, but there is no obligation to facilitate or agree to this.

A recent court case of 16 June 2020, where an employee demanded the right to continue to work from home illustrates this. The employee had worked from home during the lockdown and did not want to go back to the workplace (after the restrictions of the lockdown became less strict) out of fear of contracting COVID-19. Her employer however stated that he needed her to come to the workplace. The court ruled that (1) there is no legal right to work from home, especially not because Article 2 of the Flexible Working Act does not apply to employers with 10 or less employees, (2) the employer had taken sufficient measures to protect employees against the coronavirus, and (3) the employer had made it sufficiently clear that he needed the employee at work.¹⁶⁴

2. Domestic Violence during COVID-19

In the Netherlands, there has not been an increase of reports of domestic violence during the COVID-19 crisis. This, however, does not mean that there was indeed less domestic violence. It is possible that the violence became less visible and/or that victims had less opportunity to ask for help. As of 25 May 2020, 26 call-centres of the organisation ‘Safe at Home’ opened a hotline in order to provide advice and support to victims of domestic violence. In the first week, the chat function of the organisation was used 400 times, despite the fact that the chat could and can only be reached between 9am and 5pm on working days (there is a phone number which can be reached 24/7, but this is less safe).

Another measure was introduced on 1 May 2020, the code word ‘Masker19’ (Mask-19) could be used by victims of domestic violence in pharmacies in order to ask for help in a safe way.¹⁶⁵ It is not clear yet what the result of this measure has been. In the last week of April 2020, the Government started an awareness-raising campaign with the aim of encouraging victims and bystanders to take action in the event of domestic violence. This campaign had been planned already and was not related to the corona crisis.¹⁶⁶

¹⁶⁴ <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBGEL:2020:2954>.

¹⁶⁵ <https://www.rijksoverheid.nl/actueel/nieuws/2020/05/01/huiselijk-geweld-melden-via-apotheek>.

¹⁶⁶ <https://www.ggdghorkennisnet.nl/thema/veilig-thuis/nieuws/14430-campagne-tegenhuiselijk-geweld-en-kindermishandeling-in-coronacrisis>.

3. Preliminary research on the impact of the COVID-19 pandemic on gender equality

Research from Utrecht University, Amsterdam University and the Radboud University (Nijmegen) shows that the lockdown measures due to the COVID-19 pandemic affected mothers more than fathers.¹⁶⁷ The research shows that approximately 20 % of fathers spent more time on care for their children than before the crisis, however mothers continued to carry out the vast majority of care tasks and household tasks, even though they more often work in crucial professions (especially in healthcare and education) and therefore were more often working outside the home; mothers mostly adapted their working hours; many parents experienced more work pressure (35 %), less free time (48 %), more conflicts about caring for the children (51 %) and less balance between their work and their private life; mothers experienced a higher increase in work pressure than fathers and massively gave up on free time; work pressure was (is) highest in families where both parents have a crucial profession.

North Macedonia

MK

CASE LAW

Constitutional Court repeals the Anti-Discrimination Law of 2019

On 16 May 2019, Parliament adopted a new Law on Prevention and Protection against Discrimination ('new ADL'), replacing the previous anti-discrimination legislation ('old ADL'). The law was first adopted in March 2019, but its promulgation was delayed due to the opposition of the (then) President of the Republic against the new name of the country (North Macedonia). Due to the President's veto, the act was returned to Parliament. When the new ADL was adopted again, it received only 55 votes in favour. Under Article 75 of the 1991 Constitution, however, '[t]he Assembly reconsiders the law and the President of the Republic is then obliged to sign the promulgation in so far as it is adopted by a majority vote of the total number of Representatives'. Although the law fell short of the required 61 votes as stipulated in this article, the President of the Parliament proclaimed the new ADL adopted, and sent it to the (new) President of the Republic, who then signed it. The law was published in the *Official Gazette* and soon entered into force.

All grounds

According to the transitory provisions of the new ADL, the mandate of the Commissioners of the (then) equality body – the Commission for Protection against Discrimination (CPAD), ends when the new equality body is established, as per the new ADL.¹⁶⁸

In June 2019, the members of the CPAD challenged the constitutionality of the new ADL before the Constitutional Court, arguing that the act was adopted in violation of Article 75 of the Constitution (due to the lack of a majority vote of the total number of Representatives).

In May 2020, the Constitutional Court considered the CPAD challenge, although in the meantime the CPAD members' mandates had ended (in August 2019) on grounds of the transitory provisions of the new ADL and the CPAD itself had ceased to exist. The Court agreed with the CPAD that the law should have been adopted with 61 votes, and that, by being adopted with 55 votes, it was indeed unconstitutional. The Court therefore decided to annul and repeal the new ADL.

¹⁶⁷ <https://www.uu.nl/nieuws/taakverdeling-vaders-en-moeders-verandert-door-coronacrisis>.

¹⁶⁸ If the new ADL had not been adopted, the CPAD members' mandates would have lasted until January 2021, five years after their appointment on 11.01.2016.

Different interpretations of Article 75 of the Constitution are possible, as is shown notably by the dissenting opinion of one of the Constitutional Court's judges.¹⁶⁹ The latter followed a textual interpretation of the constitutional provision, finding that it contains an *obligation* for the President to sign the law *if* it is adopted by a majority vote of the total number of Representatives, but not that a law that has been returned to Parliament for a second vote *cannot* be adopted with less than this majority. The majority of the Court adopted a teleological interpretation however, taking into consideration that the aim of the legislation was to institute a system of checks and balances.

At the time of writing, the country is thus left without anti-discrimination legislation and without an equality body, as repealing the new ADL did not mean that the old ADL was revived. NGOs have expressed strong concerns and have called upon all relevant political bodies to ensure that the new ADL is adopted anew in accordance with the Constitution.¹⁷⁰ Considering the difficult process that the law underwent the first time it was adopted however, it is far from certain that a new adoption process would not encounter some significant hurdles.

Online source:

<http://ustavensud.mk/?p=19246>

NO

Norway

CASE LAW

The Equality and Anti-Discrimination Tribunal awarded compensation in two cases on pregnancy and parental leave discrimination

Gender

In January 2020, the Equality Tribunal awarded compensation in two cases concerning discrimination based on pregnancy and parental leave prohibited by Article 6 of the Gender Equality and Anti-Discrimination Act (GEADA).¹⁷¹ These cases are important as they are amongst the first where the Tribunal has awarded compensation in cases on gender equality after the amendment of the Act relating to the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal (EAOA) in 2018.¹⁷² The cases also demonstrate the importance of the principle that pregnant employees and employees taking up parental leave should not be treated less favourably than a non-pregnant employee, and employees that are not taking up parental leave.

Cases 19/115 and 19/196¹⁷³

A female employee's contract was not extended after she got pregnant and wanted to take parental leave. The employee filed two complaints with the Equality Tribunal; one against the company where she had been placed to work (19/196), and one against the recruitment agency who had recruited her for this position (19/115). The Equality Tribunal unanimously found that the woman was victim of direct discrimination, violating Article 6 the GEADA, based on her pregnancy and parental leave. The Tribunal found there were no other reasons than the pregnancy and planned parental leave, for not extending the

169 North Macedonia, Constitutional Court, Dissenting Opinion Regarding Case U.br.115/2019, <http://ustavensud.mk/?p=19246>.

170 See for example the reaction of the Network for Protection against Discrimination and the Blueprint Group (2020) 'Reaction Regarding the Repeal of the Law on Prevention and Protection against Discrimination', European Policy Institute – Skopje website, <https://epi.org.mk/post/14844>.

171 Norway, Gender Equality and Anti-Discrimination Act (GEADA) <https://lovdata.no/dokument/NLE/lov/2017-06-16-51> (English).

172 Norway, Act 2017-06-16-50 <https://lovdata.no/dokument/NLE/lov/2017-06-16-50>.

173 Norway, Equality Tribunal, Statement of 29.01.2020, available at: <https://www.diskrimineringsnemnda.no/media/2276/sak-19-115-anonymisert-vedtak.pdf>.

contract. In the Tribunal's opinion, there was no doubt that the woman had been put in a less favourable position, because she was pregnant and planned parental leave. A central question was whether the recruitment agency had contributed to the discrimination, which is prohibited by Article 16 of the GEADA. The Tribunal found that there was 'reason to believe' that the agency had contributed by failing to engage in a dialogue with, and seek to, influence the company to extend the assignment despite the woman's announced leave, which should have begun several months later. Therefore, the Tribunal found that the agency was also responsible for the discrimination.

The Tribunal awarded the complainant approximately EUR 1 500 (NOK 15 000) in compensation from the company and approximately EUR 2 500 (NOK 25 000) from the recruitment agency. The amount of compensation will normally be between EUR 2 000 and 8 000 (NOK 20 000 and 80 000), with the possibility of larger sums in serious cases. Relevant factors in this decision are the discriminatory action, the guilt, the strength of the relationship between the parties, and the financial situation of the responsible party.¹⁷⁴ The Tribunal did not explain why the compensation was not set any higher, but pointed out that the prohibition against discrimination on the ground of pregnancy in employment requires particularly strong protection, and that both the company where she was placed to work and the agency should be held responsible.

Case 19/1185¹⁷⁵

This case concerned a woman who wanted to apply for an internal position in her kindergarten as headmaster, whilst they were going through organisational changes. When she got pregnant and wanted to take up parental leave, she was not considered for the position, and not given the opportunity to apply for other positions or functions in the kindergarten. She did not return to work in the kindergarten after her leave. Apart from a claim of discrimination based on pregnancy, it was also questioned whether she was discriminated against due to parental leave, as she was removed from the employer's email list during the leave period.

The Equality Tribunal unanimously found that the complainant was victim of direct discrimination, violating Article 6 the GEADA, because of her pregnancy and use of parental leave. The Tribunal found there were no reasons other than the pregnancy and the parental leave, as to why the employer had not given her the opportunity to apply for other positions with more responsibilities in the kindergarten. The Tribunal found that she had not been discriminated against when she was removed from the email list during her leave, as the restriction was intended to shield employees on leave from receiving useless information by email. In this case, the Equality Tribunal also awarded the complainant compensation. When determining the amount, the Tribunal stated that the prohibition against discrimination on the ground of pregnancy in employment requires particularly strong protection. Moreover, the Tribunal stated that the complainant in fact had been deprived from opportunities for various positions, and that this could possibly further impact her career. However, the Tribunal also pointed out that in this case there was not sufficient evidence to state that the complainant would have actually obtained the relevant positions and function had she not been pregnant and then taken parental leave. Therefore, the compensation was not set any higher than approximately EUR 3 000 (NOK 30 000).

Online source:

<https://www.diskrimineringsnemnda.no/artikkel/2588>

174 Norway, EOAO preparatory works, Prop.80 L (2016-2017), p. 94, available at: <https://www.regjeringen.no/no/dokumenter/prop.-80-l-20162017/id2545683/>.

175 Norway, Equality Tribunal, Statement of 14.01.2020, available at: <https://www.diskrimineringsnemnda.no/media/2286/anonymisert-vedtak-29701.pdf>.

POLICY AND OTHER RELEVANT DEVELOPMENTS

COVID-19 and gender equality issues in Norway

Because of the COVID-19 pandemic, the Norwegian Government shut down large parts of the country as of 16 March 2020, with diverging consequences for gender equality issues.¹⁷⁶

Gender

The pandemic has especially raised concern over the situation of women and children suffering from domestic violence. Recent figures from the Directorate of Police show that the reports of domestic violence have remained largely unchanged compared to last year, with an increase of 1.5 %. However the directorate also states that it is likely there will be an increase in the real number of domestic violence cases, including child abuse, both at home and online during the pandemic.¹⁷⁷ The Norwegian Centre for Violence and Traumatic Stress Studies (NKVTS) and the regional resource centres on violence, traumatic stress and suicide prevention in Eastern Norway (RVTS Øst) have together with the women's shelters in Norway conducted a survey¹⁷⁸ on the effects of the COVID-19 pandemic on the work of the shelters, on the situation of victims of violence and the need for help as a result of the pandemic.¹⁷⁹ The survey shows that women's shelters have changed their help offered to avoid the spread of COVID-19 infection, and much of the follow-up on victims has been done by phone. The overall impression from the survey is however that the shelters in Norway continue to work well throughout the corona pandemic. The shelters report generally good cooperation with other municipal services and agencies during the pandemic. The conclusion is that the shelters serve as an important critical infrastructure and play an important role in a crisis situation like this pandemic, precisely because they have experience in and specialised expertise in dealing with crises. However, the women's shelters also express great concern for certain groups of women and children, such as those with ethnic minority backgrounds, and children and women suffering from drug addiction. Aid agencies and services such as language training, voluntary services provided by the Red Cross, school and kindergartens were closed for several months. Thus, agencies that can inform and refer users to the shelters are closed, and fewer women have the opportunity to contact them for guidance and help if needed. The survey's conclusion is that the pandemic will have a clear impact on women's shelters work for a long time, and that there will be an increased need for more awareness of domestic violence in general.

The Secretariat for Women's Shelters in Norway estimates that approximately EUR 1.5 million (NOK 15 million) will be needed to cover the crisis centres' increased costs in connection with infection control measures and the expected aftermath of the pandemic. The Equality and Anti-Discrimination Ombud and the Director of the Secretariat for Women's Shelters in Norway argue that the Government should provide more resources to the shelters throughout the country.

When it comes to employment issues during the pandemic, reports¹⁸⁰ show that more women than men have applied for unemployment benefits during the pandemic. This may be explained by the fact that most women work in sectors such as retail and accommodation, which were severely affected, and that these sectors have been especially targeted by the Government's COVID-19 measures.

On 24 April 2020, the Norwegian Government created a commission that will evaluate the authorities' actions regarding COVID-19. Discrimination issues are not mentioned in particular, but the economic and social consequences of the pandemic and the measures taken against it are on the list of things it

176 Timeline for COVID-19 measures: <https://www.regjeringen.no/no/tema/Koronasituasjonen/tidslinjekoronaviruset/id2692402/>.

177 Dagbladet newspaper (2020); <https://www.dagbladet.no/nyheter/politiet---okning-i-vold-inaere-relasjoner/72541222>.

178 See the report: <https://rvtsnord.no/wp-content/uploads/2020/05/krisesentre-og-COVID-19.pdf>.

179 The survey was carried out in April 2020, during the stringent COVID-19 measures in Norway.

180 See the report from Statistics Norway; https://www.ssb.no/arbeid-og-lonn/artikler-og-publikasjoner/_attachment/416435?ts=1711ab33788

will look into.¹⁸¹ The Directorate for Children, Youth and Family Affairs' (BufDir) department for equality and universal design, has been given the responsibility for looking into any discriminatory effects of COVID-19 in Norway 'based on gender and other grounds of discrimination in relevant areas, for example violence, employment and economics'.¹⁸²

COVID-19 and discrimination issues in Norway

The Norwegian Government shut down large parts of the country, including some health services and all schools and kindergartens, from 16 March until 20 April 2020 in an attempt to fight the COVID-19 pandemic. Kindergartens then reopened partially, and schools reopened for all pupils from 11 May, entirely or partially, depending on the school's administration.¹⁸³

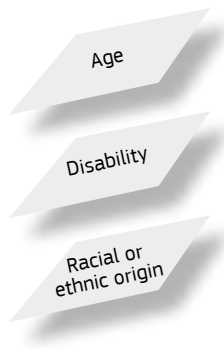
The effects of these measures have especially impacted persons with disabilities. The umbrella organisation for NGOs working for their rights reported the following:

- Persons with cognitive disabilities have been subjected to measures targeting them as a group with few individual considerations, such as visiting prohibitions in their homes and closing of daycare and schools. The prohibition of visits has been criticised by the National Human Rights Institution (NHRI).¹⁸⁴
- Due to the closing down of a number of part-time care facilities as well as municipal care at home, many families of persons with disabilities have been unable to work. When the person needing care has been over 18 years old their families have had very limited opportunities to receive social benefits to replace their wages.
- Children in need of individual accommodation in kindergarten or school have very often not received such accommodation, as resources have been moved to the larger group of pupils.
- Persons with mental illness have received less healthcare, while many more people than usual reported anxiety and depression during the COVID-19 lockdown.

A disproportionately high number of immigrants have had COVID-19 due to a lack of information in languages other than Norwegian.¹⁸⁵ In Norway, language is protected against discrimination under the ground of ethnicity. A number of measures were subsequently taken to remedy the situation.¹⁸⁶

In the field of employment, work migrants are in a particularly vulnerable position, both because they often have looser connections to the workplace and because they have difficulties in obtaining information about their rights and opportunities in their language.¹⁸⁷ Some are stranded in their home countries without receiving Norwegian unemployment benefits to which they are entitled.

Civil society organisations report that even though there were early reports on vulnerable groups suffering disproportionately due to the COVID-19 measures, reactions from the Government were too slow.



181 The Norwegian Government has appointed an independent commission to carry out a thorough and comprehensive review and evaluation of how the Government has handled the COVID-19 pandemic. The commission consists of members of different areas of society and is headed by Emeritus Professor in Medicine Stener Kvinnsland. See the Commission's website: <https://www.koronakommisjonen.no/medlemmer/>.

182 Email from Lise Margrethe Østby, senior advisor in BufDir, department for equality and universal design, 23 June 2020; The Gender Research Foundation Norway has been commissioned by the Directorate for Children, Youth and Families (Bufdir) to lead, administer and design documentation and recommendations on gender equality consequences of COVID-19. The duration of the assignment is initially up to and including September 2020. The first report had not been published when this report was written.

183 Timeline for COVID-19 measures: <https://www.regjeringen.no/no/tema/Koronasituasjonen/tidslinje-koronaviruset/id2692402/>.

184 Letter from the National Human Rights Institution to the Norwegian Government, 06.04.2020, <https://www.nhri.no/wp-content/uploads/2020/04/Brev-til-HOD-KMD-HD-FHI-fra-NIM-4.4-20.pdf>, p. 4.

185 <https://www.aftenposten.no/norge/i/b5vJE3/kraftig-økning-i-koronasmitte-blant-innvandrere-i-norge>.

186 <https://www.klartale.no/norge/gir-10-millioner-til-korona-info-for-innvandrere-1.1699906>.

187 <https://fafoestforum.no/index.php/seminarer/item/ny-undersokelse-blant-polske-arbeidsinnvandrere> and <https://www.norskindustri.no/dette-jobber-vi-med/arbeidsliv/koronaviruset-rad-til-bedrifter/status-for-og-analyse-av-industrien-17.-april/>.

Report on discrimination against Sami people in Norway

A new report was published in May 2020 on the living conditions of three of the national minorities in the northern part of Norway:¹⁸⁸ Sami people (the indigenous people in Norway), Kvens and Norwegian-Finnish people (both descending from people migrating from Finland from the 16th century or later).¹⁸⁹ There is no registration of ethnicity in Norway, so it is uncertain how many people define themselves as belonging to each of these groups. Kvens and other Norwegian-Finnish people constituted between 10 000 and 15 000 people in 2001 in Norway. The people who can vote for representatives for the Sami Parliament are defined on the basis of geography, not ethnicity, and constitute 55 544 people.¹⁹⁰

Some 5 645 of a total of 21 761 respondents in the survey on which the newly published report was based, i.e. 26 %, answered that they either spoke Sami, Kven or Finnish, had one of these ethnic backgrounds or defined themselves as belonging to one of these groups. Among these people, 5 624 answered the question on whether they had been discriminated against on the basis of their ethnicity or other grounds. Among Sami people, 11 % reported that they had been discriminated against in the last two years, and a further 21.8 % that they had experienced discrimination prior to that, i.e. a total of 32.8 %. Some 8.5 % did not know whether they had been discriminated against. Among those with both Sami and Kven background, 7.9 % had experienced discrimination in the last two years, and another 17.7 % prior to that, i.e. a total of 25.6 %. Some 7.9 % did not know whether they had been discriminated against. Among those with Kven background only, 3.7 % had experienced discrimination in last two years, and 7.2 % prior to that, i.e. a total of 10.9 %. Some 6.8 % did not know whether they had been discriminated against.

Of the persons reporting discrimination, about 60 % reported that the discrimination had been based on ethnicity, and about 30 % on the basis of where they live or come from in the geographical sense.

The report is of interest because there is a lack of data on discrimination against Sami and Kven people, and it provides useful insights into the living conditions, including discrimination issues, of these people in the region where the majority of them reside.

Online source:

https://www.tffk.no/_f/p1/i2c5ac7f4-6b0d-485d-96d2-a68d9de030c2/rapport_troms_finnmark_sshf_redigert_april2020.pdf

Report on integration of and discrimination against immigrants

The Directorate of Integration and Diversity implements the Government's integration policies and published in June 2020 its first annual report on the status of the immigrant population in Norway. The directorate's mandate is to strengthen the competences of municipalities, sector authorities, and other collaborative partners in the field of integration and diversity.

In the last 20 years, the immigrant population in Norway has tripled, but the average differences between immigrants and the remaining population has not increased. Most indicators that have been studied over time show that the differences have been either stable or gradually lessened, such as employment rates, kindergarten attendance, and crime statistics. For most immigrants, such indicators of living conditions

188 Melhus, M. and Broderstad, A.R. (2020), 'Public health survey of the population in Troms and Finnmark' (*Folkehelseundersøkelsen i Troms og Finnmark. Tilleggsrapport om samisk og kvensk/nordfinsk befolkning*) Tromsø, Centre for Sami Health Research, available at: https://www.tffk.no/_f/p1/i2c5ac7f4-6b0d-485d-96d2-a68d9de030c2/rapport_troms_finnmark_sshf_redigert_april2020.pdf.

189 Norwegian Government, white paper, *St.meld. nr. 15 (2000-2001) Nasjonale minoriteter i Noreg- Om statleg politikk overfor jødar, kvener, rom, romanifolket og skogfinnar* (National minorities in Norway – on government policy regarding Jews, Kvens, Roma, Travellers and Forest Finns), p. 6.

190 <https://www.ssb.no/befolkning/statistikker/samisk/hvert-2-aar/2018-02-06#content>.

improve when they have lived longer in Norway. For those with a refugee background however, things stabilise at a rather low level after 7 to 10 years of residence.

The report summarises several studies that have measured trust in the institutions of society (vertical trust) and trust in other people (horizontal trust). This is seen as a key indicator of the level of integration, and also of experienced discrimination. The immigrant population has a somewhat lower level of horizontal trust than the general population (an average of 1.5 points lower on an 11-point scale). Persons born in Norway with immigrant parents have a slightly higher level of horizontal trust than immigrants of the same age, but less than the general population. People who have experienced discrimination report a lower degree of trust than others. Regarding vertical trust, immigrants have a higher level of trust in the political system and the police than the general population.

Immigration is much debated in Norway, often in a rather polarised manner, and research shows that the population is divided. However, the European Social Survey shows that Norway is among the European countries where the population on average is the most positive towards immigration.

Several research reports show that a significant part of the population has a negative attitude towards Muslims in particular. In the integration barometer of 2018, 56 % expressed scepticism towards having a Muslim son or daughter-in-law, and 47 % expressed scepticism towards Muslims in general. Anti-Semitism is also an issue. However, there has for many years been a slow improvement in the attitudes towards immigrants in the general population.

In a 2016 survey, 22 % of immigrants and 27 % of the descendants of immigrants reported having been discriminated against in at least one of four areas: recruitment for employment, the workplace, an educational institution or while being in touch with the health services. In a 2019 survey of young adults, more than 40 % of those with an immigrant background reported having been discriminated against by at least one of the following: the police, a public administration officer, at work or at an educational institution, in a restaurant or café, in a store, on public transport, or on the street. Descendants of immigrants report the highest number of discrimination experiences, and more than half of the descendants of immigrants from Somalia, Pakistan, Iraq or Turkey reported experiencing discrimination.

Online source:

https://www.imdi.no/contentassets/05e2fd2076cf4b17938d2913a403a852/integrering_i_norge_2020.pdf

Poland

PL

LEGISLATIVE DEVELOPMENT

Changes to the provisions related to the Office of the Government Plenipotentiary for Equal Treatment

On 20 February 2020, the law amending Article 20 of the Equal Treatment Act (ETA), concerning the location of the Office of the Government Plenipotentiary for Equal Treatment within the governmental administrative structure, entered into force. This office has been moved from the Chancellery of the Prime Minister to the Ministry of Family, Labour and Social Policy. This amendment was accompanied by a personnel change regarding the post of the Plenipotentiary.¹⁹¹

All grounds

¹⁹¹ This function has been entrusted to the deputy minister, Anna Schmidt Rodziewicz – a sociologist who graduated from the Catholic University of Lublin, and who is also deputy to the Parliament. <https://www.gov.pl/web/rodzina/anna-schmidt-rodziewicz>.

According to Article 18 of the 2010 ETA, the ‘Performance of tasks related to the implementation of the principle of equal treatment’ shall be entrusted to the Government Plenipotentiary for Equal Treatment (alongside the Commissioner for Human Rights (RPO)). The RPO is an independent body, but the Plenipotentiary is the body in charge of non-discrimination policies and the coordination of governmental efforts. For this reason, the status of Plenipotentiary does not meet the requirements for an equality body in the meaning of EU law. The Plenipotentiary has, however, several important duties in the field of equal treatment. It prepares and presents to the Council of Ministers the national programme of activities for equal treatment (*Krajowy Program Działań na rzecz Równego Traktowania*) and then reports on its execution annually. Other responsibilities include preparing draft laws related to equal treatment and preparing opinions about such drafts. It also has several analytical and monitoring roles. The Plenipotentiary is responsible for the promotion of equal treatment, international cooperation and implementing projects that support equal treatment and counteract discrimination.

During the last 20 years of its existence, the location of the Plenipotentiary, as well as its name and responsibilities, has been subject to frequent changes. The location in 2001 of this office (initially called the Plenipotentiary on the equal status of men and women, renamed in 2008 the Government Plenipotentiary for Equal Treatment) in the Chancellery of the Council of Ministers was connected, among other things, to the implementation of a gender mainstreaming policy. After the parliamentary elections in 2015, the office of the Plenipotentiary was renamed again, this time as the Plenipotentiary for Civil Society and Equal Treatment. This meant merging two institutions (the Government Plenipotentiary for Civil Society and the Government Plenipotentiary for Equal Treatment) into one and entrusting one person with the responsibilities of these two institutions. The current change of the ETA leads to a re-division of these two institutions. After the amendments to the ETA, only the Government Plenipotentiary for Civil Society remains within the Chancellery of Council of Ministers, and the Government Plenipotentiary for Equal Treatment moves to the Ministry of Family, Labour and Social Policy.

It is currently difficult to assess the importance of this change in terms of implementing anti-discrimination policy. Experience shows that the way this office functions did not depend on its location, but mainly on the knowledge about discrimination, competences and willingness to act of the persons occupying it. It is, however, noteworthy that the transfer of this office from the Chancellery of the President of the Council of Ministers to one of the ministries significantly lowers its rank.

Online sources:

<http://orka.sejm.gov.pl/Druki9ka.nsf/0/6232C3AAA6673633C12584F60038F398/%24File/158-A.pdf>

<https://www.rpo.gov.pl/pl/content/czym-w-2018-r-zajmował-sie-pelnomocnik-rzadu-ds-rownego-traktowania>

New legal provisions aimed at enforcing civil law protection of victims of family violence

On 11 March 2020, the Sejm (the lower house of the Polish Parliament) received the Government’s bill to amend the Code of Civil Procedure (CCP) and certain other acts concerning the introduction of comprehensive solutions to quickly isolate a person affected by violence from the perpetrator in situations where it poses a threat to the life or health of the household members. The draft was immediately sent for reading to the plenary session of the Sejm and the law was passed on 30 April 2020. The Senate did not make any amendments. The President signed the law on 19 May 2020. The new regulations enter into force six months after the announcement.

Although the current law already provides for similar civil law measures, also applicable prior to the initiation of criminal proceedings, their implementation in practice required approximately one month and therefore did not provide sufficiently effective protection for victims of domestic violence. As a result, the victims, usually women and children, were forced to leave their living premises in order to protect their life or health. The new legislation introduces a special free of charge proceeding, in which the court

may issue a special security order to ensure the safety of a person affected by family violence (Articles 7552 -7554 of the CCP) in a shorter timeframe than previously, due to shortened time limits and the introduction of a separate method for the delivery of court documents. Moreover, the draft provides for the first time that a respective application to the court may be preceded by an order issued by the police or, in the case of professional soldiers, by the military gendarmerie, ordering perpetrators of violence to leave the premises immediately, for a period of up to 14 days and prohibiting them from approaching their cohabitants (at a specified distance) for that period. This order may later be extended by the court through a security order for a specified period. The planned new powers of the police are provided for in Articles 15aa-15ak of the Act on the Police and for the military gendarmerie in Articles 18a-18k of the Act on the Military Gendarmerie. In addition, these new powers have been supplemented by a formulation in these acts of the criteria for assessing the risk of repeated violence for the victim if the perpetrator were to remain in the common premises. In order to protect minors, the law provides that after receiving notice from the police or military gendarmerie about an order against a violent person who resides with minors, the guardianship court is obliged to initiate proceedings ex officio and to issue, without delay, a ruling on the custody of minor children, pursuant to Article 755(1)(4) of the Code of Civil Procedure (Article 7554 of the CCP). The draft also provides for the possibility of introducing penal-administrative provisions (Article 66b of the Code of Contraventions), which will penalise non-compliance with prohibitions or orders imposed on a violent person, under threat of imprisonment for up to one month, restriction of liberty for up to one month or a fine of up to EUR 1 190 (PLN 5 000). Proceedings in such cases will be conducted under an accelerated procedure.

Online source:

[http://orka.sejm.gov.pl/opinie9.nsf/nazwa/279_u/\\$file/279_u.pdf](http://orka.sejm.gov.pl/opinie9.nsf/nazwa/279_u/$file/279_u.pdf)

Portugal

PT

LEGISLATIVE DEVELOPMENTS

Work-life balance in times of COVID-19

In the context of the COVID-19 crisis, working from home was adopted in Portugal as a general instrument to pursue and combine social distancing, caring for children after the schools' shut down, and the running of the economy. This development was formally enabled by the legal provisions on 'telework',¹⁹² but in practice it has gone beyond what is formally covered by the legal notion of telework as it was made compulsory for all professional activities that could be performed remotely with the adoption of Article 29 of Decree-Law No. 10-A/2020 of 13 March 2020.

This enormous use of telework poses new challenges to the reconciliation of family and working-life, especially since during the crisis, children also had to stay at home and have to be taken care of or be assisted in their own activities, including e-learning activities that were put in place after the closing of the schools. In many cases for the first time, these responsibilities are being shared by both parents because, in many cases, they are both working from home. However, future developments in this area are still uncertain.

Workers with children under 12 years old who had to stay at home due to the closing of schools were allowed time off from work to take care of the children (Article 2 of Decree-Law No. 10-K/2020 of 26 March 2020) and were granted the right to a special social security allowance to take care of their children (Article 23 of Decree-Law No. 89/2009 of 9 April 2009, as amended by Decree-Law No.

Gender

¹⁹² Portugal, Articles 165 and ff. of the Labour Code, approved by Law No. 7/2009 of 12.02.2009.

14-D/2020 of 13 April 2020). However, this allowance was not paid if the worker or their partner could work remotely from home. So, the challenges of work-life balance have indeed been enormous in these last months.

Government information¹⁹³ on the payment of this special assistance allowance (which ended at the end of June 2020), indicates that the allowance was mostly paid to women (82 %). This may arise from the gender pay gap (as women earn less than men, the financial family loss is lower if the member of the couple that stops working is the woman), but it also demonstrates that even during this crisis women tend to take the lead in the care of their children.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Impact on vulnerable groups of measures to fight the COVID-19 pandemic

In the context of the COVID-19 pandemic, the Government put in place a series of measures in relation to the state of emergency declared on 18 March 2020. One of these measures concerned persons aged 70 and above, who were subjected to specific restrictions in terms of their freedom of movement, regardless of their medical conditions or health status. In particular, they were explicitly prohibited from exercising any professional activity (which was not the case for persons aged below 70, even if they had a previous medical condition, as long as they were not on medical leave). These restrictions did not apply to workers in health and social care institutions, civil protection agents, security forces and services, military and civilian personnel of the armed forces, inspectors of the Food and Economic Security Authority, holders of political office, magistrates or leaders of the social partners.¹⁹⁴ The restrictions ended on 3 May 2020.

Online source:

<https://dre.pt/home/-/dre/130473161/details/maximized>

RO

Romania

LEGISLATIVE DEVELOPMENT

Emergency Order extending the mandate of the members of the national equality body's steering board

On 9 April 2020, the Government adopted an Emergency Order amending Government Order No. 137/2000. The Emergency Order introduces a new Article 24¹, which stipulates that the mandate of the members of the steering board of the National Council for Combating Discrimination (NCCD) is exercised as of the date when the decision of the Parliament nominating them is published in the Official Gazette. The second paragraph provides that the mandate of the members of the steering board lasts until the publication in the Official Gazette of the nomination of the new members, but not more than six months after the date provided in Article 25(2), which established the mandate of the members at five years. The third paragraph of the Emergency Order provides that the mandate of the president and of the vice-president of the NCCD lasts until the publication in the Official Gazette of the decision of the steering board electing a new president and a new vice-president, but not more than six months after the date established in Article 22(1) of Government Order No. 137/2000, which provides for a five-year mandate for the president of the NCCD and a mandate of two and a half years for the vice-president of the NCCD.

¹⁹³ This information was disclosed in a meeting of the Commission for Equality and Citizenship, by the Minister in charge of equality issues.

¹⁹⁴ Portugal, Decree 2-A/2020 of 20.03.2020, Article 4.

The rationale of these provisions is the need to ensure continuity in the activity of the NCCD given that on 22 April 2020, the mandates of seven of the nine members of the steering board were supposed to expire, including the mandates of the president and vice-president of the institution.

On 22 January 2020, the president of the NCCD notified the Chamber of Deputies and the Senate that the mandates would expire in April and asked the two chambers to initiate the procedures for nominating new members, but no hearings were organised. In the context of the state of emergency related to COVID-19, the activity of the Parliament was modified and the joint committees that were supposed to carry out the hearings could not be convened. Six parliamentary committees have to be involved in the hearings leading to proposals presented to the plenary of the Parliament, which is supposed to vote on the nominations.

Online source:

<https://lege5.ro/Gratuit/gm3donjuguzq/ordonanta-de-urgenta-nr-45-2020-pentru-completarea-ordonantei-guvernului-nr-137-2000-privind-prevenirea-si-sanctionarea-tuturor-formelor-de-discriminare>

CASE LAW

New sanction issued by the Equality Body for the segregation wall in Baia Mare

In July 2011, the mayor of the northern Romanian city of Baia Mare ordered the building of a concrete wall of a height of 1.8-2m and approximately 100m long between a Roma neighbourhood and the main road. Following an ex officio investigation, the National Council for Combating Discrimination (NCCD) found that the wall amounted to harassment, imposing a fine of approximately EUR 1 500 (RON 6 000) and recommending the demolition of the wall.¹⁹⁵ The Court of Appeal of Cluj accepted the appeal by the mayor and quashed the NCCD decision.¹⁹⁶ However, the High Court of Cassation and Justice rejected the appeal filed by the mayor and maintained the initial decision of the NCCD.¹⁹⁷ In 2017, the presence of the wall was challenged again and was found by the NCCD as well as the courts to amount to discrimination.

Racial or ethnic origin

Given that the wall was not demolished in spite of the repeated sanctions, an NGO filed a new complaint with the NCCD, which issued its decision on 29 January 2020.¹⁹⁸ The NCCD found discrimination under Article 2(1) and Article 15 (right to dignity) of the Romanian Anti-Discrimination Law. The Baia Mare Territorial Administrative Unit was ordered to pay a fine of approximately EUR 1 300 (RON 7 000). The NCCD held that the high amount was justified because the discrimination affected a community, the defendant was a public institution and was previously fined for the same deed but had not changed its conduct.

The case shows the limitations of the remedies provided by the NCCD given that the wall is still standing despite repeated sanctions imposed by the NCCD that have been confirmed by the courts of law.

High Court of Justice and Cassation's decision on segregation in education

The case was initiated in 2016 by the NGO Centre for Advocacy and Human Rights, which during its monitoring work had identified a case of school segregation in the city of Iasi and filed a complaint with the national equality body against the school responsible and the Iasi county school inspectorate. Based on the complaint and its own investigation work, the National Council for Combating Discrimination

Racial or ethnic origin

¹⁹⁵ Romania, National Council for Combating Discrimination, decision No. 439 of 15.11.2011.

¹⁹⁶ Romania, Court of Appeal of Cluj, decision No. 141/2012 of 24.02.2012.

¹⁹⁷ Romania, High Court of Cassation and Justice, decision No. 640/27.09.2013 of 27.09.2013.

¹⁹⁸ Romania, National Council for Combating Discrimination, decision No. 89 of 29.01.2020.

(NCCD) issued its decision in December 2016, finding discrimination against Roma children who were disproportionately placed in one building of the school (building C) for primary education (0-4 classes). In the NCCD decision, the building is described as having reduced educational resources and being in a poor condition, with only one qualified teacher and providing an overall poorer educational experience compared to Romanian children enrolled in the other buildings of the same school. The NCCD ordered the school to pay a fine of approximately EUR 667 (RON 3 000), and the school inspectorate to pay a fine of approximately EUR 1 111 (RON 5 000). Furthermore, both respondents were ordered to produce a desegregation plan that was different to the plan produced by the school each year and that was presented as being a desegregation plan.¹⁹⁹ This decision was challenged before the court of appeal by both the school and the county school inspectorate.

The Court of Appeal of Iasi quashed the NCCD decision.²⁰⁰ The court found that the school and the school inspectorate had reasonably justified their management of primary education in building C, and noted that the state has a reasonable margin of appreciation in such situations. The court of appeal also discussed the hetero-identification done by the school during the registration process with the support of the Roma educational mediator to enrol Roma children in building C. Although the school had previously provided information on the ethnicity of the pupils following requests of public information, it argued before the NCCD that it does not have any information on the ethnicity of the children. Similarly, the Iasi county school inspectorate argued that there is no clear proof that the children in the school are Roma or declare themselves as Roma, while the claimant argued that in building C 50 % of the children are Roma. The Court of Appeal mentioned in its reasoning that self-identification is the only scientific and relevant criterion and desegregation cannot be achieved as long as there is no official data on the ethnicity of the pupils. The best interest of the child was used as justification for the differential treatment leading to the segregation of Roma children, with reference to residential proximity and the custom of sending Roma children to this school (as some of their parents had themselves been enrolled in that same school building and allegedly asked for their children to be enrolled there). The respondents denied that any ethnic segregation had occurred but agreed that segregation on grounds of socioeconomic status might occur given the poverty of the community in the neighbourhood.

The court of appeal judgment was appealed by the NCCD and the initial claimant. A request for fast track proceedings was denied by the High Court of Justice and Cassation as was the claimant's request to submit a reference for a preliminary ruling to the CJEU.

The High Court of Justice and Cassation issued its decision on 20 February 2020, quashing the judgment of the Court of Appeal of Iasi and rejecting the arguments of the school and of the school inspectorate, reinstating the NCCD decision and ordering the respondents to pay the claimant's legal costs.²⁰¹ The decision is final and cannot be further appealed.

Online source:

<http://www.scj.ro/1094/Detalii-dosar?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=450000000024874>

National equality body rules in favour of reserved spots in education for children with special educational needs

The NGO Asociația Autism Europa Bistrița filed a petition with the National Council for Combating Discrimination (NCCD) against the Ministry of Education in relation to the methodology for the organisation and the carrying out of the admission exam in high school and professional education for 2006-2007, which has been applied since then. The aim of the methodology was to ensure reserved spots for Roma

¹⁹⁹ Romania, National Council for Combating Discrimination, decision No. 769 of 07.12.2016.

²⁰⁰ Romania, Court of Appeal of Iasi, decision No. 90/2017 of 29.05.2017.

²⁰¹ Romania, High Court of Justice and Cassation, decision No. 1015/2020 of 20.02.2020.

children in high schools and universities as a temporary measure meant to provide equal chances for education. The claimant showed that although pupils with special educational needs have access to adapted curricula, the evaluation exams to be undertaken in grades 8 and 12/13 and which lead to enrolment in high school/ professional education or in universities were not adapted and the topics were based on the standard curricula.

In February 2020, the NCCD found that the Ministry's methodology failed to take into consideration the particular needs of children with special educational needs.²⁰² The NCCD argued that the state has a positive duty to adopt positive measures in relation to particularly vulnerable categories of the population, including children with special educational needs. The NCCD stated that

'the situation of children with special educational needs obliges the state to adopt special measures in order to ensure access to the fundamental right to education. The pupils with special educational needs are confronted with a series of discriminations in access to education, starting from kindergarten and up to higher education. Even if the law provides for a series of duties for the state in providing support to children with special educational needs, they accumulate a series of disadvantages while following the educational stages, so that their presence is extremely reduced in high schools or universities. The disadvantages are triggered by the situation of these children, by the lack of resources of the state to fulfil the obligations provided in the law, by the lack of professional training of the teachers and by the biases of the society towards this category of persons. In order to compensate for the disadvantages that are present and accumulated by the children with special educational needs, and to ensure their access to exercising the right to education in high school and university, the Steering Board finds that the state has the duty to establish special places for this category of persons as well, as one of the means to ensure the constitutional principle of substantive equality [...] As long as the reality produces inequalities, affirmative action is needed so that the gaps which were artificially created can be recuperated.'

The NCCD unanimously found that the failure to adopt measures providing for reserved spots for children with special educational needs, similar to the measures adopted for Roma children, amount to an infringement of Government Order 137/2000, and issued a warning to the Ministry of Education.

The NCCD decision responded mostly to the claimant's argument regarding the positive duty of the state to adopt temporary measures, but also mentioned cursorily the topic of adapting the evaluation exams, which is a related and equally important issue.²⁰³

Decision of the national equality body on a refusal to host a conference due to the presence of a trans activist

A conference for high school students (15-19 years old) entitled 'Women Talk' was organised on 24 February 2019 by a group of young activists. Three days before the event, the president of the venue decided to withdraw the approval to hold the event in the building. He explained to the organisers as well as to the media that the reason for the withdrawal was the presence on the list of speakers of a trans activist who is the co-president of the NGO ACCEPT. He invoked the complaints that he had received about the presence of the activist from local leaders, including the local archbishop of the Orthodox Church, the head of the county school inspectorate, and the dean of the local bar association. One of his statements was 'we are a serious institution... I am not going to admit in the [venue] discussions on homosexuality, lesbianism, transgender and so forth'.

The trans activist filed a complaint with the National Council for Combating Discrimination (NCCD) against the decision to cancel the hosting of the event due to his gender identity as well as against the campaign

202 Romania, National Council for Combating Discrimination, decision No. 202 of 26.02.2020.

203 See further information below on p. XXX.

Transgender

Sexual
orientation

that targeted him online and offline after the respondents made his name and private information public. The complaint was filed against the president of the venue and against the local archbishop of the Orthodox Church, the head of the county school inspectorate, the dean of the local bar association and one of the leaders of the Coalition for Family who incited the cancelling of the event.

The NCCD found that the decision to cancel the event and the refusal to provide the public space amounted to discrimination and the president of the venue was ordered to pay a fine of approximately EUR 200 (RON 1 000).²⁰⁴ This is the first case of discrimination on grounds of gender identity in which the NCCD has found discrimination and issued a sanction. The NCCD did not find the local authorities responsible despite their pressures on the president and on the organisers and despite the online hate campaign that targeted the claimant during and following the event. The NCCD decision can be appealed by the parties.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Ministry of Education publishes methodology for piloting the monitoring of school segregation

In December 2019, the Ministry of Education and Research published an Order approving the methodology for monitoring school segregation in pre-university education, which came into force as of 31 December 2019.²⁰⁵ The Order builds on the previous 2016 Order prohibiting segregation in education and it is the first document produced by the National Commission for Desegregation and Inclusive Education established in early 2019. The monitoring methodology will be piloted in the first phase in a limited number of primary and secondary schools in three counties. The target is the segregation of children of Roma ethnicity, children with disabilities and children with special educational needs as defined in the 2016 Order of the Ministry of Education.

The methodology to be piloted is based on the ‘Index for Inclusion: A Guide to School Development Led by Inclusive Values’ and was developed with the support of UNICEF. The Order provides that the methodology will be implemented in the 2019–2020 school year. The results of the monitoring should be centralised by county school inspectorates and sent to the National Commission for Desegregation and Inclusive Education, which has a duty to propose recommendations on the basis of indicators integrated within the Romanian Education Integrated Information System (SIIR).

The methodology establishes in Article 4 the obligation of schools to monitor ‘the balanced distribution of children/pupils in groups/classes, buildings, last two rows in classrooms, in order to ensure the community’s socio-cultural diversity’.

Online source:

https://www.edu.ro/sites/default/files/Proiect_metodologie_pilot%20monitorizare%20%20segregare%20scolara.pdf?fbclid=IwAR2C-TkETp9Lz4a5RU51l5E0lC9sIKs20gktZlIREoZ_oOfjReNLp1vQM54

²⁰⁴ Romania, National Council for Combating Discrimination, decision No. 690 of 09.10.2019.

²⁰⁵ Romania, Ministry of Education, Order No. 5633/2019 for approving the methodology for monitoring school segregation in pre-university education, from 23.12.2019, available at: https://lege5.ro/Gratuit/gm2tmnbqg42q/ordinul-nr-5633-2019-pentru-aprobarea-metodologiei-de-monitorizare-a-segregarii-scolare-in-invatamantul-preuniversitar?fbclid=IwAR3HG_w1fVd5iGVelrs1kSRNce1tUVX2Yhf1TiOt_br6zjrortJhRfqCo3c.

Procedure to ensure equal opportunities for children with special educational needs during the national evaluation exams

In February 2020, the National Council for Combating Discrimination (NCCD) found that the Ministry of Education's methodology for the organisation and the carrying out of the evaluation exams for admission to high school and professional education amounted to discrimination due to the lack of special measures to ensure access to education for children with special educational needs.²⁰⁶ Following this decision, the Ministry convened with the NCCD and the National Authority for the Rights of Persons with Disabilities, Children and Adoptions and adopted special procedures in June 2020. The procedures aim to ensure equal opportunities for children with disabilities and with special educational needs during the national evaluation exams to be taken in grades 8 and 12/13.²⁰⁷

Disability

Specific provisions adapting the examination procedures are provided regarding children with visual or hearing impairments, children on the autism spectrum and with learning impairments who want to take the graduation exams for grade 8 to access high school or a professional school or in grade 12/13 to access university. Similar to the request for adapted curricula, in order to qualify for the adapted procedures, the pupils need a disability certificate and to file a specific request.

The rapid response of the Ministry of Education to the NCCD decision gave children with visual and hearing impairments or with special educational needs the opportunity to take the national evaluation examinations in adapted conditions in 2020 for the first time, thus increasing their opportunity to achieve the scores needed to pursue their educational options. The procedures provide in detail the various options and conditions for adapted examinations.

Online source:

http://andpdca.gov.ro/w/procedura-de-asigurare-a-egalitatii-de-sanse-pentru-elevii-cu-dizabilitati-si-ces-la-evaluarile-nationale/?fbclid=IwAR3nahOWU_2htP7XquAvwtb5NrOTsAEbKqR7xGriPjs-bLV_imGLyVmu08

Serbia

RS

POLICY AND OTHER RELEVANT DEVELOPMENTS

Strategy for the improvement of the position of persons with disabilities (2020-2024)

On 5 March 2020, the Government adopted the strategy for the improvement of the position of persons with disabilities (2020-2024).²⁰⁸ The aim of this strategy is to improve the overall social and economic position of persons with disabilities and to ensure their equal participation in society by removing obstacles in areas such as accessibility, participation, equity, employment, education and training, social protection and health. The strategy provides a comprehensive overview of the current situation of persons with disabilities and defines general and specific goals that need to be achieved.

Disability

The main objective is to provide the conditions to allow persons with disabilities to enjoy all civil, political, economic, social and cultural rights, respecting their dignity and individual autonomy, their independence, freedom of choice and full and effective participation in all areas of social life. In order to fulfil this general goal, the following three specific goals are stipulated:

²⁰⁶ For further information, see above p. XXX.

²⁰⁷ Text of the procedures available in Romanian at: <http://andpdca.gov.ro/w/procedura-de-asigurare-a-egalitatii-de-sanse-pentru-elevii-cu-dizabilitati-si-ces-la-evaluarile-nationale/>.

²⁰⁸ Serbia (2020), *Strategy for the Improvement of the Position of Persons with Disabilities from 2020 to 2024*.

1. to increase social inclusion of persons with disabilities;
2. to ensure the enjoyment of the right to legal capacity and family life on an equal basis with others, and the effective protection from discrimination, violence and abuse; and
3. to introduce, in a systemic manner, the disability perspective in the adoption, implementation and monitoring of all public policies.

Key indicators are set out for each of these three specific goals. In addition, the strategy provides for the adoption of an action plan.

Online source:

<https://www.srbija.gov.rs/dokument/45678/programi-planovi-strategije-.php>

Equality body's annual report for 2019

In March 2020, the Commissioner for Protection of Equality (CPE) published her annual report for 2019.²⁰⁹ The report contains detailed complaints data, showing that the CPE received 711 complaints in 2019, compared with 947 complaints in 2018 and 532 in 2017. The CPE issued opinions in 70 cases, finding discrimination in 52 of them. In the majority of cases where discrimination was found, the CPE's recommendations were followed (87.5 %).

Most of the complaints submitted in 2019 concerned discrimination based on disability (16.2 %), sex (13.2 %), or health status (11.8 %), followed by discrimination based on age (9.9 %), membership of political and trade unions (9.9 %), marital and family status (7.9 %), ethnic origin (6.8 %), property status (4.5 %) and sexual orientation (2.5 %). The majority of complaints concerned discrimination in employment (32.2 %), by public authorities (21.8 %), in the area of education and vocational training (14.3 %), access to public services and facilities (7.5 %), in social protection (5.8 %) and healthcare (3.8 %).

In addition, the CPE provided 31 opinions on draft laws and general acts and initiated one strategic lawsuit, six criminal charges, three misdemeanour charges, 23 warnings and 34 announcements, as well as making 686 general recommendations (compared to 300 in 2018). Mediation was only proposed in one case, compared to 88 cases resolved by mediation in 2018.

The report also contains findings in relation to discrimination of the most vulnerable groups in Serbia, which are the same as in previous years. Thus, the CPE found that persons with disabilities are still among the most discriminated groups in Serbia, facing problems related to access to public buildings, areas and services, information and communication, as well as discrimination and lack of reasonable accommodation in employment and education. Therefore, the CPE recommends intensifying the work on removing barriers and continuing the process of deinstitutionalisation, including in education, through the development of local services and continuous cooperation of social, health, educational and employment services. The CPE also underlines that children with disabilities are very often exposed to discrimination in education, recommending that teaching assistants be engaged and that all inadequate, discriminatory and stigmatising terms and content be removed from textbooks.

Gender equality is still not achieved, and women are facing the same problems as in previous years. Women mostly file complaints due to changes in their employment status after returning from maternity leave and absence from work for childcare. They also claim discrimination in relation to job advertisements. In 2019, a significant number of men also addressed the CPE claiming discrimination in the area of health protection. The CPE recommends prescribing mandatory gender mainstreaming in all decisions and policies on the national and local level and to support women's entrepreneurship.

²⁰⁹ Commissioner for the Protection of Equality (2020), *Annual report of the Commissioner for Protection of Equality for 2019*, 13.03.2020, Belgrade.

The CPE also found that age discrimination is present in all areas of social relations and is based on deeply rooted stereotypes. In this regard, the report notes the discrimination experienced notably by citizens aged between 50 and 65 in the area of employment, due to prejudices regarding their efficiency and productivity.

Roma are still facing discrimination and limitations, especially in relation to access to documents, adequate housing, health services, social services and employment, as well as in education. The CPE recommends securing the access of Roma children to primary and secondary education, as well as to higher education, and to ensure that international standards are respected when forced evictions are carried out.

Regarding sexual orientation and gender identity, the majority of complaints concern offensive and hate speech. The CPE recommends the adoption of legislation on same-sex partnerships, intensifying the work to diminish hate speech, and making intersex persons legally visible.

Overall, the CPE concludes that although the legal framework for combating discrimination and achieving equality is satisfactory, it still needs to be fully aligned with the EU *acquis*, in particular regarding the scope of exceptions from the principle of equal treatment, the definition of indirect discrimination and the duty of employers to provide reasonable accommodation. Furthermore, the adoption of the new Gender Equality Act and amendments to the Law on the Prohibition of Discrimination (LPD) must be completed without delay. Furthermore, the CPE recommends adopting a new strategy for the prevention and protection against discrimination, to follow the previous strategy, which expired in 2018. Finally, the CPE concludes that it is necessary to continuously work on the education of judges, public prosecutors, police officers and other public servants, as well as journalists.

Online source:

<http://ravnopravnost.gov.rs/izvestaji/>

Expiry of the mandate of the equality body Commissioner for the Protection of Equality

The Commissioner for the Protection of Equality was established in 2010 by the Law on the Prohibition of Discrimination (LPD)²¹⁰ as an independent, autonomous and specialised state body, with a wide mandate related to the promotion and protection from discrimination.

The LPD prescribes that the Commissioner is elected by the Parliament upon the proposal of the committee authorised to deal with constitutional matters (Article 28(1)). The Commissioner is elected for a period of five years and can be re-elected once (Article 29). However, the LPD does not prescribe the election procedure in more detail. Furthermore, it is not stipulated in the LPD that the Commissioner should have deputies to help him/her in performing the duties, which means that when the term of the Commissioner expires, there is no one to run the office before a new Commissioner is appointed. On 27 May 2020, the term of the Commissioner expired and parliamentary elections were scheduled for April 2020.

However, due the state of emergency declared in March and lasting until early May because of the COVID-19 pandemic, the parliamentary elections were postponed until June and the new composition of the National Assembly will not resume its regular session until October 2020. In the meantime, the term of the previous Commissioner has expired and she has not been replaced. The office of the Commissioner currently only performs operational tasks but cannot handle the complaints that are being submitted.

All grounds

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

On 16 June 2020, a group of 51 NGOs expressed their concern, calling on ‘all relevant actors’ to urgently initiate the process of electing a new Commissioner immediately after the constitution of the new composition of Parliament.

Online source:

<https://www.autonomija.info/nvo-u-srbiji-zabrinute-zbog-blokade-poverenika-za-zastitu-ravnopravnosti.html>

SK

Slovakia

CASE LAW

Dismissal by a first instance court of an *actio popularis* lawsuit on segregation of Roma children in education

Racial or
ethnic origin

In 2015, a human rights NGO filed an *actio popularis* lawsuit against the state represented by the Ministry of Education concerning the segregation of Roma children in a primary school in a village that has a relatively small, residentially segregated Roma community. Before September 2015, all children from the community (about 70 children) attended up to 4th grade a small Roma-only school located directly in the village and from the 5th grade they moved to the bigger schools in nearby villages and towns. All non-Roma children from the village commuted to the other nearby schools starting from their 1st grade. Due to a lack of space in the village school, the municipality reached an agreement with the Ministry of Education in April 2014 to build a new low-cost school building made of metal containers, located outside the main village area, in close vicinity to the segregated Roma community.

The claimant argued that education of Roma children in the new school amounted to segregation. It argued that the Ministry of Education did not take effective measures to prevent segregation, stressing the fact that the other nearby schools had sufficient capacity to accommodate Roma children from the 1st grade, too. The claimant asked the court to order the Ministry of Education to produce and implement a desegregation plan, suggesting that the measures to be adopted could include securing transportation for Roma children to the nearby schools and securing their inclusion there.

The district court finally decided on the case in February 2020, dismissing the lawsuit.²¹¹ The court found that the respondent had proved that it had not violated the principle of equal treatment and that the claimant had failed to sustain a *prima facie* case of discrimination. The court found no illegal action of the respondent excluding or separating Roma children from non-Roma children based on their ethnic origin, as the Roma children attended the school which was freely chosen by their parents and located within their school catchment area (noting that the Roma parents could have enrolled their children in the other nearby schools as the parents of non-Roma children did). The court further reasoned that: 1) it was not proved that Roma children were educated in the given school due to their ethnic origin, as the school was built for all children whose parents chose to place their children there, and 2) it was not proved that the decision to build a new school close to the Roma community was ‘ethnically motivated’, as the reason was to improve the quality of education. The court also pointed out that the claimant did not prove the lower quality of education provided in the new school, disregarding the expert opinions submitted by renowned Slovak academics highlighting the inherent negative psychological, social and pedagogical impacts of segregated education of Roma children, including its wider negative impacts on social cohesion. Finally, the district court also rejected the claimant’s proposal to submit a request for a preliminary ruling to the Court of Justice of the EU.

211 Slovakia, District Court of Bratislava, decision No. 21 C 698/2015 of 06.02.2020.

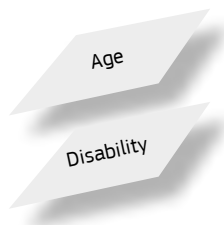
The claimant has appealed the decision, proposing that the appeal court refer the case to the CJEU for a preliminary ruling.

Online source:

<https://www.poradna-prava.sk/en/documents/district-court-judgment-concerning-alleged-segregation-of-roma-children-in-education-in-a-village-muranska-dlha-luka/>

Age discrimination of people with severe health disabilities

In September 2018, the Public Defender of Rights (the Ombudswoman) submitted a proposal to the Constitutional Court to initiate proceedings on the conformity of the Act on financial allowances for the compensation of severe health disability with the Constitution and international human rights treaties (UN CESCR, UN CRPD). The relevant wording of the Act specified 1) that persons with a severe health disability are only eligible to receive the state allowance for the purchase of a car until they reach the age of 65, and 2) that persons with a severe health disability are only eligible to receive the state allowance for personal assistance between the age of 6 and 65. Persons over 65 years are eligible to continue receiving the allowance for personal assistance only if it was already provided to them before reaching that age.



The Ombudswoman argued that such age limits for access to these allowances constitute intersectional discrimination on the grounds of age and health disability. The Government argued that the relevant state allowance is only one specific form of state support and that persons with a severe health disability who are not eligible to receive such an allowance can apply for other forms of financial support. The Government described a range of existing alternatives of state support for persons who are not eligible to receive the allowances concerned.

The Constitutional Court found in favour of the Ombudswoman's proposal.²¹² It found that the relevant provisions constitute an inadmissible restriction on the exercise of the right to equal treatment on the ground of age. It essentially reasoned that the other forms of state support are of a different nature as their recipients are other persons (such as parents or nurses taking care of persons with severe disabilities) and they pursue different aims. The Constitutional Court concluded that the legislature had violated the relevant provisions of the UN CESCR and UN CPRD as well as Slovakia's obligation to recognise and comply with international treaties, set by Article 1 of the Constitution. The Constitutional Court did not address the issue through the lens of intersectional discrimination but found discrimination solely on the ground of age.

The discriminatory provisions are no longer applicable and persons who have been refused the allowances on the ground of their age under the discriminatory provisions or who have not applied for them due to the legal obstacles, will be able to apply again.

Online source:

<https://www.ustavnysud.sk/vyhľadavanie-rozhodnuti#>

Segregation of Roma children in education

In 2015, a human rights NGO filed an *actio popularis* lawsuit concerning the documented segregation of Roma children at a primary school in the town of Stará Ľubovňa. For a long time, the school had been attended solely by socially disadvantaged Roma children from the nearby marginalised Roma community. Non-Roma children living in the town district attended other primary schools in the town. The claimant argued that by failing to adopt effective measures to eliminate the segregation of Roma



212 Slovakia, Constitutional Court ruling of 2.04.2020, No. PL. ÚS 16/2018-104.

children, the municipality and the responsible state authorities, including the Ministry of Education, violated the domestic and international anti-discrimination laws. Instead of eliminating the segregation, the authorities expanded the capacity of the school by adding a new low-cost annex made out of metal containers. The claimant pointed out that education in an ethnically segregated school is unable to provide socially disadvantaged Roma children equal educational opportunities and asked the court to order the respondents to produce and implement a desegregation plan that would ensure the integration of Roma children in other schools with the other children in the town.

The district court dismissed the lawsuit in October 2016,²¹³ essentially reasoning that the claimant did not prove that the education of Roma children in the school is carried out on the ground of their ethnic origin and failed to sustain a *prima facie* case of discrimination. The claimant filed an appeal to the regional court in Bratislava.

In April 2020, the regional court fully upheld the judgment of the district court, finding that the school was attended only by Roma children due to demographic developments and that the affected children's parents agreed with their education in the given school. It held that the situation arose without any intentional action by the state and local authorities. The regional court also disregarded the expert opinions of renowned academics submitted by the claimant that highlighted the inherent negative psychological, social and pedagogical impacts of segregated education of Roma children, including its wider negative impacts on social cohesion.²¹⁴

On a positive note however, the court rejected the procedural objections of the Ministry of Education and confirmed that the state itself as well as state authorities that represent the state in proceedings can be sued in anti-discrimination civil court disputes. The court also noted that civil courts can order the adoption of measures to prevent discrimination that has been proved in proceedings. This includes the preparation of a desegregation plan as the claimant proposed in this proceeding.

The claimant is planning to submit an extraordinary appeal to the Supreme Court and to suggest that the case be referred to the CJEU for a preliminary ruling.

Online source:

<https://www.poradna-prava.sk/sk/dokumenty/rozsudok-krajskeho-sudu-v-bratislave-v-pripade-namietanej-segregacie-romskych-deti-na-zakladnej-skole-v-starej-lubovni/>

POLICY AND OTHER RELEVANT DEVELOPMENTS

Area quarantine imposed on entire Roma communities to fight the COVID-19 pandemic

Two of the measures adopted by the Slovak state authorities to prevent the spread of the COVID-19 pandemic have raised serious concerns and have been widely discussed due to their clearly disproportionate negative impact on two particular vulnerable groups: Roma living in marginalised communities and people aged over 65 years.

On 2 April 2020, the Government adopted a plan on preventing the spread of COVID-19 in marginalised Roma communities, considering that they constituted a specific risk-bearing group. In particular, the plan proposed targeted sample testing in selected Roma communities and area quarantine on whole Roma communities where more than 10 % of inhabitants had tested positive.²¹⁵

213 Slovakia, District Court Bratislava III decision of 06.10.2016, No. 11C351/2015- 387.

214 Slovakia, Regional Court in Bratislava, judgment No. 4Co/260/2017 of 29.04.2020.

215 The plan is available in Slovak at: https://www.uvzsr.sk/index.php?option=com_content&view=article&id=4166:plan-rieenia-ochorenia-COVID-19-v-marginalizovanych-romskych-komunitach&catid=250:koronavirus-2019-ncov&Itemid=153.

Starting on 3 April, the sample testing in Roma communities was conducted by military physicians while army soldiers supervised the process, with the help of military helicopters. Persons who tested positive were supposed to be placed in individual quarantine.²¹⁶ On 9 April, the state authorities imposed area quarantine on five localities inhabited by Roma although only 31 persons (in total) had tested positive in these five localities, which amounted to approximately 0.5 % (as opposed to the 10 % limit provided in the plan).²¹⁷ The Government declared that it was providing healthcare services and access to all necessary resources so that those under quarantine would be impacted as little as possible and would be able to live their daily lives with dignity.²¹⁸

The decision to impose area quarantine on these communities was criticised by the former Roma Plenipotentiary, Abel Ravazs, who was dismissed from this function shortly beforehand (on 31 March 2020) and who publicly denounced omissions in the Government's overall approach to preventing the spread of COVID-19 in Roma communities.²¹⁹

Furthermore, information reported in the media and by the NGO Centre for Civil and Human Rights indicated that the state authorities, regardless of their public declarations, fell short of providing adequate healthcare and access to all the necessary resources during the quarantine. As the inhabitants were not given the opportunity to prepare for the quarantine themselves, some of them experienced severe lack of food. Furthermore, people who tested positive for COVID-19 were not promptly isolated from healthy people, which would have prevented a potentially uncontrolled spread of the virus inside the Roma communities. This issue was raised as a particular matter of concern by the Public Defender of Rights.²²⁰

By 15 May 2020, the area quarantine had been lifted from all Roma communities.²²¹

Parliament approval of the new Government's programme declaration

Following the parliamentary elections held in February 2020, a new Government was formed based on a coalition of four conservative parties that had been in opposition to the previous Government. In April 2020, the Government's programme declaration was submitted to and approved by the Parliament.

The programme declaration embraces the Government's commitment to promoting the rule of law and equality before the law and to supporting vulnerable groups. The Government aims to improve the quality of the current system of human rights protection, including the independent state mechanisms (implicitly including the equality body). The work of civil society organisations will be supported, as will the protection of children's rights in all state policies. The Government further aims to promote equality between women and men and to prevent discrimination against women, although no concrete policies or measures are specified.

With regard to national minorities, the Government declares its intention to adopt a law that should contribute to decreasing the pressure on minorities to assimilate and guarantee the protection of their

All grounds

216 For further information, see: ROMEA (2020) 'Slovakia: COVID-19 testing begins in Romani settlements, those who test positive will be locally quarantined', 1 April 2020: <http://www.romea.cz/en/news/world/slovakia-COVID-19-testing-begins-in-romani-settlements-those-who-test-positive-will-be-locally-quarantined>.

217 Information on comparison of positively tested persons to all persons living in these communities was reported in the media <https://www.teraz.sk/slovensko/v-romskych-lokalitach-na-spisi-je-v-k/459288-clanok.html>.

218 For further information, see ROMEA (2020) 'Slovakia: Five Romani-inhabited settlements are being closed for quarantine, 30+ COVID-19 infected persons found so far', 1 April 2020, available at: <http://www.romea.cz/en/news/world/slovakia-COVID-19-testing-begins-in-romani-settlements-those-who-test-positive-will-be-locally-quarantined>.

219 Ravazs, A. (2020): 'Do not sacrifice Roma for coronavirus', *Denník*, 9 April 2020. Available in Slovak at: <https://dennikn.sk/1847811/neobetujme-romov-koronavirusu/>.

220 Public Defender of Rights (2020) 'How will the state protect life and health of people in closed communities?', public statement, 09.04.2020. Available at: <https://www.vop.gov.sk/ako-t-t-ochr-ni-ivot-a-zdravie-ud-uzavret-ch-v-osad-ch-vyhl-senie>.

221 Pravda (2020) 'The quarantine is over also in the last settlement', 15.05.2020. Available at: <https://spravy.pravda.sk/regiony/clanok/551546-v-izolacii-zostava-sedemsto-ludi/>.

rights. It is also considering establishing an ‘Office for National Minorities,’ which would replace the Office of the Plenipotentiary for National Minorities and the Council on Human Rights, National Minorities and Gender Equality.

The Government specifically targets the situation of marginalised Roma communities, listing a series of specific commitments. These include: improving their civic, economic and social position and to reduce poverty, notably in segregated areas; improving housing standards and access of Roma to drinking water, basic infrastructure, and healthcare; making ‘maximum effort’ to prevent illegal groundless placement of Roma children in schools for children with intellectual disabilities and to secure their access to quality education on all levels; implementing policies that would increase employment of Roma; supporting early preschool education of socially disadvantaged Roma children, ideally from the age of three, preventing their early dropout from primary schools and supporting their later access to secondary/higher forms of education; strengthening Roma cultural identity and the Romani language; and improving the perception of Roma in Slovak society.

The new Government also specifically commits to promoting equal educational opportunities, adopting a strategy on inclusive education and supporting projects that aim to assess methods for decreasing segregation in education. The Government further declares that it will reform the guardianship law aimed at people with physical or intellectual disabilities and the protection of their position in legal relations.

Finally, the Government declares its intention to eliminate discrimination in the calculation of pensions for women born between 1958 and 1960, which was recently widely discussed in the media. The issue is currently being reviewed by the Constitutional Court after the President of the Republic submitted a complaint arguing discrimination.²²²

Online source:

<https://www.nrsr.sk/web/Default.aspx?sid=zakony/cpt&ZakZborID=13&CisObdobia=8&ID=68>

Ministry of Finance report assessing public expenses and measures for inclusion of marginalised Roma and other disadvantaged groups

In March 2020, the Ministry of Finance completed its research report, *Revision of expenses for groups threatened by poverty and social exclusion*. The report includes all chapters of the preliminary report, which was published in January 2019, analysing and evaluating public expenses and policy measures impacting social inclusion of marginalised Roma communities in the areas of education, social security, employment and healthcare services. The preliminary report also provided a general overview of the situation of persons threatened by poverty and social exclusion in Slovakia compared to other EU states and gave broader insight into public expenses for social inclusion.²²³

The completed report contains additional chapters covering areas of early intervention and housing in relation to marginalised Roma as well as an evaluation of public expenses and policy measures for the inclusion of other disadvantaged groups: people with health disadvantages, single parent families with children and homeless persons. Importantly, the report also proposes specific measures to improve the inclusion of disadvantaged groups to contribute to effective budgeting in public administration.

The report raises numerous shortcomings in the effectiveness of current policies relating to the inclusion of marginalised Roma and other disadvantaged groups endangered by poverty and social exclusion. Essentially, it derives its conclusions and proposals from a wide range of quantitative research data. In general, it proposes measures to increase expenses on social inclusion to EUR 263 million. It suggests that two thirds (66 %) of the total financial package be allocated for early care and education, about

²²² For further information, see: <https://www.zenyvmeste.sk/odchod-do-dochodku-zeny-rocnik-1958-1959-1960>.

²²³ For further information, see *European equality law review*, Issue 2019/2, pp. 141-142.

20 % for housing support, 12 % for strengthening policies on the labour market and social policies, and 2 % for the remaining areas. The report notes that some measures cannot be implemented immediately but will require up to 10 years. It acknowledges that the implementation of the measures will depend, among other things, on the possibilities of the state budget and on Government priorities but finds its financing to be fully feasible. Aside from the resources from the saving measures proposed directly in this report, it also refers to savings identified through revisions of Government expenditure in other policy areas. The total potential for these savings is EUR 880 million.

The report does not present the proposed measures only in terms of their positive impact on the effectiveness of the state economy but refers also to their importance in terms of improving guaranteed human rights of the disadvantaged groups.

On 18 May 2020, the Government adopted the National Programme of Reforms for 2020 that was produced by the Ministry of Finance. This strategic document specifically refers to the report and proposes reforms on its basis. The Government did not adopt the report as a whole but will evaluate which measures and reforms it is possible to carry out given the current economic situation.²²⁴

Online source:

<https://www.mfsr.sk/sk/financie/hodnota-za-peniaze/revizia-vydavkov/revizia-vydavkov.html>

Parliament's refusal to acknowledge the annual report of the Ombudswoman

In March 2020, the Public Defender of Rights (Ombudswoman) submitted to the National Council of the Slovak Republic (the Parliament) the annual activity report containing her findings on the protection of fundamental rights and freedoms of people by the public administration and her recommendations for improvements. In May 2020, the Ombudswoman presented her report to the Parliament, which formally refused to take it into consideration. Most MPs who voted against the acknowledgment of the report represent two of the (conservative) Government coalition parties.

All grounds

During the parliamentary discussion after the presentation of the report, some of the MPs reproached the Ombudswoman primarily for allegedly excessive protection of sexual minority rights, and for her negative position on the restriction of abortion rights. The leading Government party officially commented in the media that the Ombudswoman allegedly gave 'inadequate space to the second generation of human rights and other problems that are not directly linked to the protection of fundamental human rights'. The MPs of the remaining two coalition parties mostly acknowledged the report and some of them criticised the hostile attitude of some MPs towards the Ombudswoman.

The President of the Republic took part in the presentation of the Ombudswoman's report in the Parliament to express the importance of her work. This arguably contributed to the relatively high number of MPs present in comparison to previous years when the Ombudswoman's presentations were somewhat ignored. The President publicly stressed that the Ombudswoman's report points to shortcomings that need to be removed, and commented that it is not expected that all the MPs should agree with the Ombudswoman's revelations, but it is a sign of respect for the people who turn to her with their problems, to listen to them and acknowledge them. Furthermore, the Council for Human Rights, National Minorities and Gender Equality as well as Slovak civil society organisations expressed their support for the Ombudswoman and their concern over the vote.

The Ombudswoman in response to the vote said that her work should not correspond to the ideas of the Parliament but should respond to the people who turn to her, including minorities and vulnerable

224 All the documents are available on the Government's website: <https://rokovania.gov.sk/RVL/Material/24864/1>.

groups whose rights are at stake. She also pointed to the significant increase in the number of complaints received in 2019, showing the increased trust in her office.²²⁵

The Ombudswoman's report gives information about a wide range of relevant issues concerning the violations of human rights by public administration bodies including their reluctance to take reasonable measures that would enhance the protection of human rights in Slovakia. Among other things, the report stresses the need for public administration bodies to provide further protection to vulnerable groups of people.

Online source:

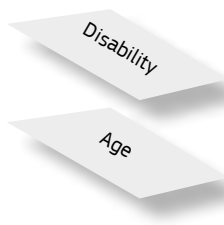
https://www.vop.gov.sk/files/Sprava_o_cinnosti_VOP_2019.pdf

SI

Slovenia

POLICY AND OTHER RELEVANT DEVELOPMENTS

Impact on vulnerable groups of measures to fight the COVID-19 pandemic



In March and April 2020, a number of governmental measures were adopted in numerous fields, including in access to goods and services available to the public, with the aim of preventing the spread of the COVID-19 pandemic. One of these measures was the adoption of an Order on the provisional prohibition on the offering and sale of goods and services to consumers.²²⁶ The Order was amended numerous times to respond to the latest developments in the spread of the infection. With the amendment of 28 March 2020, the Order stipulated that 'Between 8 am and 10 am grocery shopping may be done exclusively by vulnerable groups (e.g. people with disabilities, retired people, pregnant women). Retired people may shop only in this time slot.' Due to criticism that the allocated time slot was too short,²²⁷ further amendments added one hour to the time slot as of 3 April 2020. The concept of 'vulnerable groups' was not defined, and its meaning could only be assumed from the examples listed. Furthermore, the examples included 'persons with disabilities' although far from all disabilities imply vulnerability with regard to COVID-19.

Due to criticism from the Information Commissioner regarding the difficulties of determining who belongs to vulnerable groups and who is a retired person,²²⁸ on 9 April 2020 the provision was further amended to focus on 'persons aged over 65' rather than 'retired people', and requiring that persons aged over 65 prove their age using a public document. The Information Commissioner maintained that identity cards may prove one's age but no other vulnerabilities.²²⁹

Online source:

http://www.zagovornik.si/wp-content/uploads/2020/04/02042020_Priporocilo_predlog-za-podalj%C5%A1anje-%C4%8Dasa-ko-lahko-nakupujejo-upokojenci-invalidi-in-nose%C4%8Dnice.pdf

225 The Ombudswoman's office received 2 825 complaints in 2019 and found 130 violations of fundamental human rights and freedoms in 104 cases.

226 *Odlok o začasni prepovedi ponujanja in prodajanja blaga in storitev potrošnikom v Republiki Sloveniji*, Official Gazette of the Republic of Slovenia No. 25/20, 29/20, 32/20, 37/20, 42/20, 44/20, 47/20, 53/20, 58/20 and 59/20).

227 See, e.g., Recommendation of the Advocate of the Principle of Equality of 02.04.2020, available at: http://www.zagovornik.si/wp-content/uploads/2020/04/02042020_Priporocilo_predlog-za-podalj%C5%A1anje-%C4%8Dasa-ko-lahko-nakupujejo-upokojenci-invalidi-in-nose%C4%8Dnice.pdf.

228 See, e.g., a letter of the Information Commissioner to the Government of the Republic of Slovenia, available at: https://www.ip-rs.si/fileadmin/user_upload/Pdf/Dopisi/Dopis_Vlada_izvajanje_odloka_glede_nakupovanja_starejsih_in_ranljivih_skupin_02042020.pdf.

229 Statement of the Information Commissioner of 10.04.2020, available at: <https://www.ip-rs.si/novice/informacijski-pooblastenec-poziva-k-spostljivemu-odnosu-do-vseh-pri-preverjanju-pogojev-za-1182/>.

Spain

ES

LEGISLATIVE DEVELOPMENT

Abrogation of the ‘intermittent absences’ provision of the Workers’ Statute

In February 2020, the Government approved a Royal Decree-Law, which repealed the provision of the Workers’ Statute that provided for the objective dismissal of workers due to intermittent absences from work, even justified, under certain circumstances.²³⁰

The provision had been the subject of the CJEU judgment of 18 January 2018 in *Ruiz Conejero*,²³¹ which had declared that it was contrary to Directive 2000/78/EC due to discrimination on grounds of disability.²³²

In the Explanatory Statement of the Royal Decree-Law abrogating the relevant provision, the Government relied on both Directive 2000/78/EC and the CJEU ruling in *Ruiz Conejero*, pointing out that this legal reform

‘guarantees compliance with the regulations of the European Union and, specifically, of Council Directive 2000/78/EC (...), thus complying with the principle of primacy of European law. In addition, it ensures the adequate and immediate transfer to the Spanish legal system of what is established by the CJEU in its Judgment of 18 January 2018, which admits only on an exceptional, limited and conditioned basis the application of Article 52(d) of the Statute of Workers and subject to a specific analysis of adequacy and proportionality’. It also noted that ‘this law has the clear objective of preventing from occurring – because of the application of the precept that is now repealed – direct or indirect discrimination of particularly vulnerable groups that are at a high risk of professional and social exclusion (for example due to disability or gender)’.

Online source:

<https://www.boe.es/boe/dias/2020/02/19/pdfs/BOE-A-2020-2381.pdf>

POLICY AND OTHER RELEVANT DEVELOPMENTS

Programme for new anti-discrimination legislation presented by the new Government

After two general elections (April 2019 and November 2019), a new Government was formed on 7 January 2020. It is a coalition Government composed of the Socialist Party and other parties to the left of the political spectrum.

In the investiture speech, the President of the Government presented the programme agreement for the Government coalition, declaring that a number of legislative proposals will be made in relation to non-discrimination (a comprehensive law for equal treatment and non-discrimination, a law prohibiting discrimination against LGBTI people, and a law promoting the social and labour integration of trans people and their full participation in political, social and cultural life). He further declared that public policies will be adopted to improve access and stability in education and employment of the Roma

230 Spain, Royal Decree-Law 4/2020, of 18.02.2020, which repeals the objective dismissal due to absences from work established in Article 52(d) of the consolidated text of the Law of the Statute of Workers, approved by Royal Legislative Decree 2/2015, of 23.10.2015 (published in the Official Gazette of 19.02.2020 and entering into force on 21.02.2020).

231 CJEU, judgment of 18 January 2018, *Carlos Enrique Ruiz Conejero v Ferroservicios Auxiliares SA and Ministerio Fiscal*, Case C-270/16, ECLI:EU:C:2018:17.

232 For further information, see *European equality law review*, Issue 2018/2, p. 95.

population and, finally, that a comprehensive legislative and political framework will be adopted to eradicate hate speech and hate crimes.

In addition, the president of the Government has indicated the Government's intention to propose the amendment of Article 49 of the Constitution regarding the rights of persons with disabilities, for the purpose of adapting it to the UN CRPD.

The plans of the new Government follow previous initiatives in 2011 and 2017-2018 which aimed at the adoption of a new comprehensive equal treatment act but failed.

Online source:

http://www.congreso.es/public_oficiales/L14/CONG/DS/PL/DSCD-14-PL-2.PDF

Bill submitted to spell out equality and non-discrimination as fundamental principles of the education system

The Government has submitted to the Parliament a legislative bill amending Organic Law 2/2006 on Education.²³³ In addition to modifying the school curriculum, this bill spells out equality of treatment and non-discrimination as fundamental principles of the education system. The most relevant changes are set out below.

1. 'Guiding principles of the educational system': a new basic principle which must guide the educational system would be added: 'The quality of education for all students, without any discrimination based on birth, sex, racial or ethnic origin, disability, age, disease, religion or belief, sexual orientation or gender identity or any other personal or social condition or circumstance'.
2. Equal treatment as an objective of education: among the objectives of the high school educational system, it would be established that the education system will contribute to developing in students the abilities that allow them to 'Promote effective equality of rights and opportunities of women and men, to analyse and critically assess existing inequalities, as well as the recognition of the role of women in history, and to promote real equality and non-discrimination based on birth, sex, racial origin or ethnicity, disability, age, illness, religion or belief, sexual orientation or gender identity, or any other personal or social condition or circumstance'.
3. The obligations of educational administrators to guarantee equal treatment: Article 68(2) currently in force stipulates that 'It is the responsibility of the educational administrations (...) to periodically organise (academic) tests so that people over the age of 18 can directly obtain the title of Graduate in Compulsory Secondary Education (...). Educational administrations shall ensure that the necessary measures are taken to ensure equal opportunities, non-discrimination and universal accessibility for people with disabilities who take these (academic) tests'. The bill would extend the scope of this provision by establishing that 'educational administrations shall ensure that the necessary measures are taken to ensure equal opportunities and non-discrimination based on birth, sex, racial or ethnic origin, disability, age, illness, religion or belief, sexual orientation or gender identity, or any other personal or social condition or circumstance, and universal accessibility of people with disabilities who present themselves to such (academic) tests'.

Equal treatment and non-discrimination are already consolidated as basic principles of education in Spain in a general manner, but this bill would specify the grounds concerned and the ways in which these principles should apply.

Online source:

http://www.congreso.es/public_oficiales/L14/CONG/BOCG/A/BOCG-14-A-7-1.PDF#page=1

²³³ Spain, Bill amending Organic Law 2/2006, of 03.05.2006 on Education, published in the Official Gazette of Parliament, 13.03.2020.

Gender equality sensitive COVID-19 measures

The crisis produced by COVID-19, as well as the measures taken by the authorities to fight against the disease, affect women significantly in various areas. In Spain, several general measures of confinement and social distancing were adopted on 14 March 2020. From the beginning of the lockdown, concerns about the lack of a robust gender perspective in the Spanish (and European) response to the crisis were raised.²³⁴ Several analyses on the gender impact of the crisis have recently been published, making visible the gender measures adopted and making recommendations to incorporate the gender perspective in various response areas.²³⁵

Gender

In Spain, the situation of women in the economic, labour and social fields creates three areas of differential impact of the crisis.

First, care both within the family and in care professions is highly feminised in Spain. Domestic care tasks, 70 % of which are carried out by women, have multiplied with the closure of schools and care centres for the elderly and disabled. In order to avoid layoffs, the Government has expressed a preference for teleworking over temporary cessation or the reduction of activity.²³⁶ Despite the possibility of adapting the schedule and reducing the working day to enable women to reconcile work and care, teleworking has been a very limited reconciliation mechanism under these circumstances. A study by the University of Valencia has revealed the higher levels of stress and anxiety of women who have teleworked with dependent children during lockdown.²³⁷ In the labour market, essential care jobs to fight the pandemic are mostly carried out by women. Women represent 66 % of healthcare personnel, 84 % of the personnel hired in nursing homes and homes of care dependents, and practically all domestic workers. These jobs, which the crisis has demonstrated to be essential, are generally precarious. In this area, the Government has established an extraordinary subsidy for lack of activity for domestic workers registered in the special social security regime for domestic workers,²³⁸ since this regime does not contemplate unemployment benefits. However, this is a group of workers with a high percentage of irregular work, and many workers in the sector are not registered in the social security system or are fraudulently registered with shorter working hours, so they will not receive the subsidy or will receive a very limited one.

Secondly, in the context of job losses, women start from a structural disadvantage in the labour market. The gender gap in the employment rate is 11.7 %. Further, women's employment is highly concentrated in a few sectors and occupations: 88.5 % of women work in the service sector. Women, and especially migrant women, are also disproportionately present in the informal economy (domestic work, agriculture and the textile industry). Feminised economic sectors likely to suffer from the crisis (such as retail, tourism, hotel and leisure) show higher rates of precarious labour: the percentage of women in a combination of temporary contract and part-time work was 9.1 % in 2019 whereas for men the rate is half that (4.3 %). The opposite situation, employment stability, i.e. permanent contract for full-time work, shows a gender gap of 13.7 %.²³⁹ Although the Government has taken a wide range of social and labour related measures (known as the social shield), the gender perspective is limited to the reconciliation

234 See: http://www.realinstitutoelcano.org/wps/portal/rielcano_es/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/ari33-2020-solanas-tesis-del-COVID-19-y-sus-impactos-en-igualdad-de-genero.

235 Women's Institute (2020) *La perspectiva de género, esencial en la respuesta a la COVID-19* (Gender perspective, essential in the response to COVID-19), [http://www.inmujer.gob.es/disenio/novedades/IMPACTO_DE_GENERO_DEL_COVID_19_\(uv\).pdf](http://www.inmujer.gob.es/disenio/novedades/IMPACTO_DE_GENERO_DEL_COVID_19_(uv).pdf); Ministry of Equality (May 2020) 'Igualdad de género y COVID-19' (Gender equality and COVID-19), *Boletín de Igualdad en la Empresa*, http://www.igualdadenlaempresa.es/novedades/boletin/docs/BIE_60_Igualdad_Genero_COVID19.pdf.

236 Spain, Royal Decree 8/2020, of 17.03.2020, of extraordinary urgent measures to face the social and economic impact of COVID-19, <https://www.boe.es/buscar/act.php?id=BOE-A-2020-3824>.

237 <https://www.womennow.es/es/noticia/estudio-conciliacion-teletrabajo-mujeres-durante-el-confinamiento/>.

238 Spain, Royal Decree 11/2020, of 31.03.2020, that adopts urgent complementary measures in the social and economic field to face the COVID-19, <https://www.boe.es/buscar/act.php?id=BOE-A-2020-4208&p=20200404&tn=2>.

239 General Union of Workers (UGT) (2019) *Una fotografía de la temporalidad y parcialidad en el mercado laboral español*, (A snapshot of temporary and part-time traits in the Spanish labour market), <https://serviciostudiosugt.com/fotografia-de-la-temporalidad-y-parcialidad-en-el-mercado-laboral-espanol/>.

measures for adapting and reducing worktime, the preference for telework and the extraordinary subsidy for domestic workers.

Finally, in a lockdown situation, gender-based violence worsens, and female victims of gender-based violence and victims of trafficking and sexual exploitation face greater risks and have fewer opportunities to defend themselves or find help. Official data reflects an increase in requests for help due to gender violence for the period 1-15 April 2020 of 48 % (telephone) and 733.3 % (online consultations). The Government established a Contingency Plan to tackle gender based-violence²⁴⁰ with a series of organisational measures aimed at guaranteeing the continuity of the operation of the existing services aimed at the protection of victims of gender violence, and victims of trafficking and sexual exploitation. The plan also established mechanisms adapted to the circumstances of the lockdown, such as psychological, legal or social remote assistance (through WhatsApp, telephone or other channels), an action guide for female victims of gender violence confined to home by the COVID-19 lockdown, and a free mobile application for health and police alerts (SOS button).

TR

Turkey

POLICY AND OTHER RELEVANT DEVELOPMENTS

Impact of COVID-19 measures on women in Turkey

Gender

The Turkish Government introduced several measures from 14 March 2020 onwards to slowdown the spread of the COVID-19 pandemic including the closure of schools, universities, childcare centres and public and private service providers as well as facilities from the entertainment and cultural sectors, restaurants and shops. Social distancing measures were introduced, and various groups of people were asked to stay at home whilst those performing essential jobs continued to travel to work. These measures had an impact on gender equality in various ways.

Inequality and economic impact of the crisis on women

In Turkey, women perform five times more unpaid housework and care than men.²⁴¹ Self-isolation measures have overburdened women with unpaid housework and care. As schools were closed and switched to distance learning, care responsibilities, which are still mostly carried out by women, increased. Many women had to combine this with working from home.

In Turkey, women make up 50 % of all doctors, 70 % of all workers in the healthcare sector (such as cleaners, laundry, catering). This occupational segregation disproportionately affects women when health systems are overburdened due to the crisis.

The crisis has led to an increase in unemployment of female workers. 42.2 % of women employed in Turkey work in the informal (unregistered) sector as carers, domestic workers, seasonal workers and unpaid family workers. Workers in this sector are often not registered and therefore do not have any social protection. They were seriously affected by the crisis, many losing their jobs and income. Furthermore, female-led micro, small and medium-size enterprises (hairdressers, beauty salons) and other occupations where women are over-represented (the retail sector, tourism, food and accommodation services, bath and spa sectors) were strongly affected by closures, cuts and layoffs due to the crisis. In other highly

²⁴⁰ Spain, Royal Decree 12/2020, of 31.03.2020, on urgent measures regarding the protection and assistance to victims of gender violence, <https://www.boe.es/buscar/act.php?id=BOE-A-2020-4209>.

²⁴¹ http://www.keig.org/wp-content/uploads/2019/01/Calisma-Zamani_KEIG-Bilgi-Notu-1.pdf.

feminised sectors (e.g. the textile sector) disruption to supply chains has led to a huge loss of income for women.

Measures taken to protect women and (female) workers

The Government took several measures to protect women and workers in general. Paid leave was provided for civil servants aged 60 years and older, pregnant civil servants and civil servants with chronic illnesses. These provisions do not apply to employees in the private sector. Public institutions were ordered to provide for alternating and flexible schedules, and to enforce remote working if possible. The private sector followed this practice for jobs that did not require employees to be at the workplace.

Employers were prohibited from dismissing employees during the pandemic. This measure opened the door for employers to send employees on unpaid leave for up to six months without terminating their contracts. Employees who took unpaid leave received approximately EUR 153 per month from the Unemployment Insurance Fund.

The coronavirus pandemic has caused a dramatic spike in unemployment among women in Turkey, but only those who satisfy the minimum requirements receive support. Unfortunately, the pandemic has deepened pre-existing inequalities. Even the limited gains made in the past decades are at risk of being rolled back.

Increase in domestic violence

Although there are insufficient numbers of systematic studies, preliminary data shows that there are increased cases of violence against women.²⁴² Reports of child abuse to a non-governmental organisation specialising in its prevention have doubled since the coronavirus outbreak.²⁴³ No data is available in relation to abuse and neglect of the elderly and disabled.

Around 90 000 inmates were released from prison as a virus containment measure. The release of violent male prisoners due to the pandemic posed a threat to women. Some of the released prisoners were convicted of violence against women in the public domain²⁴⁴ as well as domestic violence.²⁴⁵

United Kingdom

UK

CASE LAW

Discrimination against tenants on the basis of their actual or perceived nationality

Under the Immigration Act 2014, private landlords in England are required to verify the immigration status of tenants and potential tenants. Knowingly leasing a property to a disqualified person is a criminal offence, punishable by up to five years' imprisonment, an unlimited fine, or both.

In 2018, the Joint Council for the Welfare of Immigrants (JCWI) sought judicial review of this policy, on the basis that fear of criminal sanctions would indirectly cause landlords to discriminate against those without British passports, even if they were lawful potential tenants. This was particularly the case if the potential tenants did not have traditionally British-sounding names or did not appear ethnically British.

Racial or ethnic origin

²⁴² <https://doi.org/10.17986/blm.2020.v25i.1408>.

²⁴³ <https://english.alaraby.co.uk/english/news/2020/4/21/turkish-man-kills-daughter-after-coronavirus-prison-release>.

²⁴⁴ <https://www.milliyet.com.tr/gundem/kusadasinda-saldiriya-ugrayan-mudur-konustu-pesini-birakmayacagim-6222358>.

²⁴⁵ <https://www.sozcu.com.tr/2020/dunya/cani-baba-dunya-basininda-cezaevinden-cikti-kizini-doverek-oldurdu-5767080/>.

The claim was not brought by any individual claiming to have been the victim of discrimination as a result of the operation of the scheme, but was a challenge to the validity of the statutory provisions themselves on the basis that its provisions are incompatible with Article 14 when read with Article 8 of the European Convention on Human Rights (ECHR). In addition, the decision to extend the scheme beyond England to Scotland, Wales and Northern Ireland without further evaluation of its efficacy and discriminatory effect was a breach of the public sector equality duty (PSED) in Section 149 of the Equality Act 2010.

The High Court held that the policy as it applies in England had a disproportionately discriminatory effect, was incompatible with Articles 8 and 14 of the ECHR and that to extend the scheme without further evaluation of its efficacy and discriminatory impact would constitute a breach of Section 149 Equality Act 2010.²⁴⁶ The case was appealed to the Court of Appeal.

The Court of Appeal allowed the appeal by the Government, agreeing that those who had a right to rent, but did not have British passports or, had neither such passports nor ethnically-British attributes, were the subject of discrimination on the basis of their actual or perceived nationality, and that that discrimination was caused by the scheme. However, the Court of Appeal found that this discriminatory effect was justified, because the scheme was capable of being implemented in a proportionate way, and so the threshold for finding legislation incompatible with the ECHR was not met. On the basis that the substantive claim failed, the court agreed that it would be premature to declare that any future extension of the scheme was incompatible with the PSED.²⁴⁷

Online source:

<https://www.bailii.org/ew/cases/EWCA/Civ/2020/542.html>

²⁴⁶ United Kingdom, England and Wales High Court, case No. CO/598/2018, decision of 01.03.19, available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2019/452.html>.

²⁴⁷ United Kingdom, England and Wales Court of Appeal, case No. C4/2019/0660, decision of 21.04.2020.

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