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General introduction on the state of play

Until December 2014, two European networks, the European network of legal experts in the non-discrimination field (managed by the Migration Policy Group and Human European Consultancy)[1] and the European network of legal experts in the field of gender equality (managed by Utrecht University)[2] were providing the European Commission's Directorate-General Justice with updated information assessing the situation regarding anti-discrimination and gender equality in 33 countries. The two networks have been monitoring the transposition and implementation of relevant directives on the national level and delivered experts' assessments and analysis on specific cases and situations. Both networks have been intensively publishing country reports, thematic reports, comparative analyses and law reviews. They also jointly organised an annual legal seminar.

In December 2014, the two networks' contracts expired and following a successful call for tender put together by the three organisations mentioned above, a new single 'Network of legal experts in gender equality and non-discrimination' has been formed unifying the two former networks. This new network is comprised of one national expert on gender equality and one expert on non-discrimination for each of the 35 countries included in the call for tender.[3] The names and contact details of the national experts can be found on page viii.

The new European network of legal experts in gender equality and non-discrimination continues to provide the European Commission with updated information on the transposition and implementation process of relevant directives, experts' assessment and analysis and publishing annual country reports, thematic reports, comparative analyses, flash reports and the European equality law review. In 2015 four thematic reports will be published regarding issues such as the reconciliation of work, private and family life; legal implications of EU accession to the Istanbul Convention regarding violence against women and domestic violence; employment and reasonable accommodation law; and disability law outside employment with particular regard to reasonable accommodation. A legal seminar will also take place in Brussels on 24 November 2015.

This issue is therefore the first one of the European equality law review and provides an overview of the latest developments in gender equality and anti-discrimination law and policy, reflecting, as far as possible, the state of affairs for the period July - December 2014. It includes information relating to European case law developments (European Court of Justice, European Court of Human Rights) as well as the most recent developments in legislation, policy and case law on the national level.[4] The European equality law review also includes four in-depth analytical articles. The first article authored by Colm O'Cinneide deals with equality and non-discrimination rights within the framework of the European Social Charter. In the second article Jean Jacqmain and Nathalie Wuiame explore gender-based actuarial factors. Lucy Vickers in the third one examines religion and belief discrimination in employment under

1 All publications and reports from the European Network of legal experts in the non-discrimination field can be found at www.equalitylaw.eu.

2 All publications and reports from the European network of legal experts in the field of gender equality can be found at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9).

3 Contract No. JUST/2014/RDIS/PR/EQUA/0039, Directorate-General Justice and Consumers. The countries involved in the Network are the 28 EU Member States, the EFTA countries (Iceland, Liechtenstein and Norway in addition to the 28 EU Member States) and candidate countries (the Former Yugoslav. Republic of Macedonia, Montenegro, Serbia and Turkey).

4 On the basis of information provided by the national experts, Alexandra Timmer and Alice Welland from Utrecht University drafted the sections regarding gender equality and Isabelle Chopin and Catharina Germaine from the Migration Policy Group drafted those regarding anti-discrimination. The final compilation was done by the Migration Policy Group.

the Employment Equality Directive with a particular focus on case law in France, Germany and the United Kingdom and on the European level. Finally Leontine Bijleveld in the last article looks at the situation of domestic workers, with a particular focus on the Netherlands.

In 2014 a new Commission has been formed, and while the monitoring of the gender equality directives and of the Racial Equality Directive remain with DG Justice (Unit D Equal Treatment legislation), that of the Employment Equality Directive now falls under DG Employment, Social Affairs and Inclusion (Unit D4 – Rights of persons with disabilities). The new Commission's work programme for the coming years has been published and adopted on 17 December 2014 and is available at http://ec.europa.eu/priorities/work-programme/index_en.htm.

The Commission will continue the EU accession to the European Convention on Human Rights, and also reiterates its commitment to equality of opportunity for people with disabilities in full respect of the UN Convention on the Rights of Persons with Disabilities. The Commission commits itself to continuing to promote equality between men and women and allowing for more women to be present in the labour market. Regarding the 2008 pending maternity leave proposal,[5] it has been announced that should the negotiations not be unblocked within six months, the proposal will be withdrawn with the view of approaching the issue from a wider perspective. Commissioner Jourová has the task to ensure that, within the scope of EU competences, discrimination is fought against and gender equality is promoted. This includes exploring the possibilities for pursuing, with the pending proposal, a horizontal equal treatment directive.[6] In December 2014, during the Social Policy, Health and Consumer Affairs Council, Commissioner Jourová expressed her will to unblock the negotiations on this pending directive.

The Strategy for Gender Equality between men and women 2010-2015 (see http://ec.europa.eu/justice/gender-equality/index_en.htm) had the following priorities: equal economic independence between men and women; equal pay for work of equal value; equality in decision-making; dignity, integrity and ending gender-based violence and promoting gender equality beyond the EU. There is currently a public consultation on gender equality which aims at collecting the views of a broader public.[7] The results of this consultation will be used in the preparation of the Commission's policy on equality between women and men after 2015. Furthermore, the results of the Eurobarometer 428 on gender equality have been published in April 2015 and will be developed in the next issue of the European equality law review.[8]

The Rome Declaration on Non Discrimination, Diversity and Equality adopted in Rome in November 2014[9] by the Member States commits its signatories notably to '*effectively implement and apply the European Union equal treatment directives in place to prohibit discrimination in employment and occupation and in the provision of goods and services as mentioned above and to consolidate the legal instruments by seriously exploring the adoption of the proposal prohibiting discrimination on the grounds of disability, sexual orientation, religion or belief, and age in the provision of goods and services*'. The declaration also includes the adoption of measures aiming at advancing equality, promoting diversity and combating discrimination and welcomes the establishment by the Commission of a High-Level Group on Non-Discrimination, Equality and Diversity to be established in 2015.

5 Proposal for a directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. Brussels, 3.10.2008. COM (2008) 637 final.

6 Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. Brussels, 2.7.2008. COM (2008) 426 final.

7 One can find the questionnaire to be filled at http://ec.europa.eu/justice/newsroom/gender-equality/opinion/150421_en.htm.

8 The results are available at http://ec.europa.eu/public_opinion/archives/eb_special_439_420_en.htm.

9 http://ec.europa.eu/justice/events/hle-2014/files/hle2014_romedeclaration_en.pdf.

Finally, in September 2014 the European Commission initiated infringement proceedings against the Czech Republic for its failure to correctly implement the Racial Equality Directive, due to systemic discrimination of Roma children in schools.[10] The discrimination that has been taking place in the Czech school system includes segregation processes directing Roma children towards special schools for children with mild mental disabilities and segregated classes exclusively for Roma pupils. A new letter of formal notice has been sent in April 2015 to the Slovak Republic also regarding discrimination of Roma children in education.[11] This new infringement proceeding that demonstrates the Commission's will to pay specific attention to the situation of the Roma community in general and of Roma pupils in particular will be developed in the next issue of the European equality law review.

For more information about the network's activities and how to subscribe to the European equality law review, please visit www.equalitylaw.eu. Please do not hesitate to contact one of the network's three partners should you need more information.

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Utrecht University	Migration Policy Group	Human European Consultancy

10 Letter of formal notice 258 (ex 226) of 26 September 2014 to the Czech Republic for non-conformity with Directive 2000/43 on racial equality – discrimination of Roma children in education. Infringement number 20142174.

11 Letter of formal notice 258 (ex 226) of 29 April 2015 to the Slovak Republic for non-conformity with Directive 2000/43 on racial equality – discrimination of Roma children in education. Infringement number 20152025.

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Equality and non-discrimination rights within the framework of the European Social Charter

Colm O'Cinneide*

Introduction

The European Social Charter (ESC), a Council of Europe treaty instrument, protects a range of fundamental social rights. It also affirms the entitlement of individuals to enjoy these rights on a non-discriminatory basis. This aspect of the Charter has acquired new prominence in recent years, principally on account of the developing 'collective complaints' case law of the European Committee on Social Rights (ECSR), the expert body charged with assessing state conformity with the provisions of the ESC. In particular, the Committee is developing a body of ground-breaking case law on the nature and extent of state obligations towards socially marginalised social groups such as the Roma, who face considerable difficulties in accessing healthcare, housing and social support. The equality dimension of the ESC deserves to be better known: it illustrates how the protection of social rights is inextricably bound up with the right to equal treatment.

The Evolution of the European Social Charter

Adopted in 1961, the ESC was a ground-breaking instrument. It was one of the first international human rights treaties to set out a comprehensive list of socio-economic rights, predating the UN Covenant on Economic, Social and Cultural Rights (ICESR) by five years. It was intended to complement the provisions of the European Convention on Human Rights (ECHR): just as the ECHR was designed to ensure respect for fundamental civil and political rights, the Charter was supposed to ensure that European States also respected fundamental social rights such as the right to work, the right to organise and take part in collective action, the right to social security, and the right of families and vulnerable persons to enjoy social protection.

The Charter has nevertheless often lacked exposure, both among legal experts and the wider European population. For many years, it was overshadowed by the ECHR and the development of the social dimension of EU law.[1] However, a process of 'revitalisation' of the Charter was launched by the Council of Europe Ministerial Conference on Human Rights held in Rome in November 1990.[2] Subsequently, the Turin Protocol in 1991 clarified and strengthened the role of the European Committee on Social Rights (ECSR), formerly the Committee of Independent Experts, by establishing that the ECSR was the sole

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1 The Ohlin Report drafted by ILO experts in 1956, which together with the Spaak Report of the same year provided the basis of the Treaty of Rome in 1957 and the establishment of the EEC, suggested that the harmonisation of social protection across the six original EEC Member States could be best achieved by the States signing up to the draft Council of Europe instrument that subsequently became the ESC: see De Schutter, O. (2006), 'The Balance between Economic and Social Objectives in the European Treaties' *Revue Française des Affaires Sociales* 5, pp. 119-143.

2 See Harris D. (1992), 'A Fresh Impetus for the European Social Charter' *International and Comparative Law Quarterly* 659, p. 41.

body charged with providing a legal assessment as to whether State Parties were complying with their obligations under the Charter.[3] This Protocol also made provision for an enlargement of the membership of the ECSR, which is now composed of fifteen members elected by the Committee of Ministers of the Council of Europe who sit in an independent capacity and are required to be 'experts of the highest integrity and of recognised competence in national and international social questions'.[4]

In 1995, the revitalisation process bore fruit again, when an Additional Protocol to the Charter established the ground-breaking 'collective complaint mechanism', a unique feature of the ESC. As discussed in greater detail below, this mechanism allows certain categories of NGOs, employers and trade unions to lodge a collective complaint with the ECSR alleging that a State is not acting in conformity with its obligations under the Charter.[5] The introduction of this mechanism has greatly enhanced the profile of the Charter, and made it possible for the ECSR to expand and deepen its case law: as analysed below, it has in particular enabled the Committee to develop a comprehensive jurisprudence in the field of equality and non-discrimination.

In 1996, agreement was also reached on a Revised European Social Charter, which extends and deepens the list of social rights protected by the Charter mechanism.[6] In particular, the revised Charter reflects the more developed understanding of equality rights that has gradually emerged since the civil rights and feminist movements of the 1960s. The original ESC contains a detailed set of provisions that include the right to work (Article 1), rights to decent working conditions and fair remuneration (Articles 2-4), the right to organise and engage in collective bargaining (Articles 5 and 6), rights to vocational training (Articles 9-10), the right to healthcare (Article 10), the right to social security (Article 12) and social assistance (Article 13), rights to social protection and equality of treatment (Articles 7-8, 15-17, 20) and the rights of certain categories of migrant workers to engage in gainful occupation on the territory of Contracting States and to benefit (along with their families) from social protection and assistance (Articles 18-19). All of these rights are also protected by the revised Charter, which however extends and updates certain provisions of the original Charter: for example, the rights of persons with disabilities set out in Article 15 of the revised Charter are wider in scope than the equivalent provisions of Article 15 of the original Charter. The revised Charter also extends protection to a range of additional rights, including the right of workers to enjoy equal opportunities without discrimination on the grounds of sex (Article 20), the right of elderly persons to social protection (Article 23), the right to dignity at work (Article 26) and the right to housing (Article 31). States can choose to remain bound by the original instrument, or ratify the revised and updated version: thirty-three States have now ratified the revised Charter, leaving ten bound by the original instrument.

In general, almost all Member States of the Council of Europe have now signed and ratified either the original ESC or its revised successor instrument,[7] including all the EU Member States along with prominent non-EU states such as Turkey, Russia, Ukraine, Norway, Albania, Serbia, Bosnia-Herzegovina, Armenia, Azerbaijan and Georgia. Both the original and revised Charters are unusual in that States Parties are not required to accept every legal obligation set out in their texts: as Khaliq has noted, 'the ESC is unique among human rights treaties in permitting its parties not to accept all the rights it contains'.[8] However, all States must agree to be bound by a minimum number of provisions, including at least two-thirds of the

3 CETS No. 142, Protocol amending the European Social Charter ('the Turin Protocol'), opened for signature in Turin on 21 October 1991. This Protocol has not come into force, but most of its provisions have been given effect via the internal processes of the Council of Europe.

4 Article 3§1 of the Turin Protocol.

5 CETS n° 158, opened for signature in Strasbourg on 9 November 1995. See Churchill R., Khaliq U. (2004), 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' *European Journal of International Law* 15, pp. 417-456.

6 CETS n° 163, opened for signature in Strasbourg on 3 May 1996. The Revised European Social Charter entered into force on 1 July 1999.

7 The Member States of the Council of Europe which have not ratified the ESC are Liechtenstein, Monaco, San Marino and Switzerland.

8 Khaliq U. (2014), 'The EU and the European Social Charter: Never the Twain Shall Meet?' *Cambridge Yearbook of European Legal Studies* 15, pp. 169-196, 174.

'core' provisions of the Charter – which include the right to work, the migrant rights provisions contained in Article 19 of both instruments, and the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex set out in Article 20 of the revised Charter.[9] Finally, all States Parties are also required to comply with certain general, cross-cutting principles in how they give effect to Charter rights, in particular with the principle of non-discrimination set out in the Preamble to the original Charter and Article E of the revised Charter.

As a result, State Parties to the ESC commit themselves to respecting a framework of social rights: the specific nature of their commitments can vary from country to country, depending on which ESC provisions they have accepted, but the overall contours of the 'package' of rights they accept is very similar. Equality is an integral part of the Charter scheme of rights: it can be regarded as an animating central value that underpins each of the Charter's specific provisions, and it is recognised to form part of the central binding core of the ESC which all State Parties agree to be bound by.

The Supervisory Mechanism of the European Social Charter

Compliance with the requirements of the ESC (whether set out in the original or the revised Charter) is primarily monitored through a system of national reporting. All State Parties submit annual reports to the ECSR, setting out how they are complying with a particular group of Charter rights linked by a common theme such as 'employment, training and equal opportunities' or 'children, family, migrants'.[10] At present, there are four such groupings, which means that all the Charter rights are covered after four years, after which the reporting cycle begins again. When it receives the reports, the ECSR adopts reasoned conclusions 'from a legal standpoint'[11] on the reports submitted by the States on an article-by-article basis, and determines whether they are acting in conformity with the requirements of the Charter.[12] In arriving at its conclusions of conformity or non-conformity, the ECSR will also make reference to any relevant information contained in reports produced by bodies such as the International Labour Organisation (ILO), civil society bodies, employers' organisations and trade unions.

Furthermore, as mentioned above, fifteen States (including France, Greece, the Netherlands, Italy, Ireland, Norway, Sweden, and Finland) have at the time of writing also ratified the 1995 Additional Protocol to the ESC. This establishes a 'collective complaint mechanism', which permits (i) 'international' NGOs enjoying participatory status with the Council of Europe,[13] (ii) international employers and trade union associations, (iii) 'representative' national employer and trade union organisations, and (iv) (if a state accepts this extra category – only Finland has done so) national NGOs to bring a complaint to the ECSR alleging that a ratifying State is not acting in conformity with its obligations under the Charter. Such complaints have to be 'collective' in nature, i.e. they must raise issues concerning potential non-compliance of national law and policy with the Charter which go beyond individual, once-off situations.[14]

9 Parties to the original Charter must accept at least five out of the seven core rights, and in total either 10 of the 19 articles or 45 out of 72 numbered paragraphs set out in the text of the ESC, while parties to the Revised Charter must accept at least six of the nine core rights, as well as at least 16 of the 31 articles or 63 out of 98 numbered paragraphs.

10 State reports are prepared by reference to a standard form which is approved and periodically revised by the Committee of Ministers of the Council of Europe: this requires States to take into account the legal interpretation given by the ECSR to ESC rights and to provide relevant information on the measures they have taken within the timeframe of the report to give effect to the provisions covered by the reporting cycle: see http://www.coe.int/t/dghl/monitoring/socialcharter/ReportForms/FormIndex_en.asp.

11 Article 2§2 of the Turin Protocol.

12 Brillat, R. (2005) 'The Supervisory Machinery of the European Social Charter: Recent Developments and their Impact' in G de Búrca and B de Witte (eds.), *Social Rights in Europe* Oxford, Oxford University Press.

13 The Governmental Committee of the Charter has drawn up and maintains a list of international NGOs who are entitled to submit collective complaints under the relevant provisions of the 1995 Additional Protocol.

14 Holly Cullen has noted that the collective complaints procedure was the first 'quasi-judicial' process in international human rights law designed specifically for socio-economic rights: Cullen, H. (2009), 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee on Social Rights' 9 *Human Rights Law Review* p. 61.

The collective complaints procedure is quasi-judicial in nature, with both the complainant organisation and the State Party submitting extensive written arguments in an adversarial process once the complaint is deemed to be admissible, with the Committee having the ability if it so wishes both to ask the parties follow-up questions and also to stage a public hearing on the matter at issue. Organisations eligible to submit a collective complaint under the 1995 Protocol need not have exhausted domestic remedies, or refer their complaint to the ECSR within a particular timeframe: the admissibility criteria applied by the ECSR focus on whether the complainant organisation has formal standing under the Additional Protocol, and whether the complaint relates to Charter obligations which have been accepted by the State concerned.

The Committee has now made decisions on the merits in respect of 91 collective complaints at the time of writing.[15] In general, the collective complaints mechanism has become a key element of the supervisory mechanism for the Charter. It enables the Committee to scrutinise specific national situations to a greater degree than is generally possible under the national reporting mechanism. Furthermore, the interpretation the Committee gives to Charter rights in its decisions on collective complaints is carried across and applied in its conclusions in respect of national reports, and vice versa: its case law has expanded and deepened as a result.

The ECSR is now recognised to be the sole body charged with providing a legally authoritative interpretation of the Charter. Its role is thus similar to that of the UN human rights treaty bodies, such as the Human Rights Committee or the Committee on the Rights of the Child. However, the primary political organ of the Council of Europe, the Committee of Ministers, also plays a key role in the ESC supervisory mechanism. It receives the ECSR's decisions in collective complaints and conclusions in respect of national reports, together with a report by the Governmental Committee of the Charter on the latter which sets out what States are doing to remedy situations of non-conformity and suggests potential recommendations to State Parties.[16] The Committee of Ministers then usually adopts a resolution adopting the ECSR's legal findings while taking note of any measures adopted by States to remedy any situation of non-conformity: it is also the only body that can address recommendations to States, but does this infrequently. It therefore acts to some extent as a political gatekeeper: it regulates the pressure exerted on States to conform to the legally authoritative determinations of the ECSR.

The Interpretative Approach of the European Committee on Social Rights

In reviewing national reports or determining collective complaints, the Committee interprets the relevant provisions of the ESC in line with the requirements of the 1969 Vienna Convention on the Law of Treaties and the standard interpretative techniques used by the European Court of Human Rights, the UN human rights treaty bodies and the ILO expert committees. In other words, the Committee interprets the text of the Charter by reference to its overall purpose and objectives. The Committee will also cross-refer to UN, ILO, ECHR and EU standards in determining the scope of legal obligations under the Charter, although the Committee has indicated that the requirements of the Social Charter can differ from, and go beyond, those set out in EU law and other international frameworks.

Applying this interpretative approach via both the national reporting and collective complaint procedures, the ECSR has developed a comprehensive body of case law that has given concrete shape and definition to the abstract provisions of the Charter. This jurisprudence has established that state obligations under the Charter have both a negative and a positive dimension: State Parties cannot impose disproportionate

15 The list of collective complaints, together with the ECSR's decisions on admissibility and the merits, can be found at http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp. The Committee's conclusions in respect of national reports are accessible at http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/ConclusionsIndex_en.asp.

16 The Governmental Committee is composed of representatives of the State Parties and assisted by representatives of the European social partners participating as observers.

restrictions on the enjoyment of Charter rights they have undertaken to respect, and must also take positive steps to ensure effective enjoyment of these rights.

This emphasis on effective protection is a major theme in the jurisprudence of the Committee, and has played an important role in defining the extent of state obligations under the Charter. For example, Article 15 of the Charter sets out the right of persons with disabilities to independence, social integration and participation in the life of the community: in its interpretation of this Article, the Committee has taken the view that not alone must State Parties remove obstacles to participation by persons with disabilities in the life of the community, but they must also introduce legislation prohibiting discrimination against persons with disabilities in employment, occupation, access to goods and services and other areas of social interaction, on the basis that such legislation is necessary to ensure full and effective enjoyment of the right at issue.

In a detailed analysis of the collective complaints case law of the ECSR, Holly Cullen has identified four values which shape the Committee's interpretative approach: individual autonomy, human dignity, equality and solidarity.[17] In addition, Cullen has suggested that the Committee's legal reasoning has much in common with that of the European Court of Human Rights, in particular in how it makes use of concepts such as positive obligations, legitimate aim, and proportionality to structure its assessment of state conduct. She also notes that State Parties enjoy a certain margin of appreciation under the Charter, in particular in situations where complex issues of resource allocation, economic policy or labour regulation are concerned. However, States are required to take effective measures to ensure enjoyment of the social rights set out in its provisions, and the Committee has in particular emphasised the need for States to ensure that the enjoyment of social rights is secured on an equal basis.

The Specific Provisions of the ESC Giving Effect to the Principle of Equality and Non-discrimination

Equality is one of the values which underpin every substantive provision of the ESC. Indeed, social rights by their very definition are directed towards ensuring that everyone enjoys access to basic social goods such as employment, education, housing and social support, and can participate in the social, cultural and economic life of their society. Every right protected in the ESC is therefore concerned with protecting individuals and groups against social exclusion and the negative consequences of socio-economic inequalities. Thus, the ECSR in its decision in Collective Complaint 27/2004, *European Roma Right Center (ERRC) v.Italy*, interpreted Article 31 of the revised ESC, which protects the right to housing, as directed towards securing social inclusion, the integration of individuals into society and the abolishment of socio-economic inequalities.[18]

Certain rights protected by the ESC are nevertheless specifically concerned with securing equality of treatment. Thus, Article 1§2 ESC, which provides that State Parties shall 'protect effectively the right of the worker to earn his living in an occupation freely entered upon' has been interpreted by the ECSR as requiring States to prohibit any discrimination in employment on grounds of sex, race, ethnic origin, religion, disability, age and sexual orientation, i.e. on the 'suspect grounds' that are recognised in EU law and the case law of the European Court of Human Rights as constituting forms of discrimination of an especially problematic character.[19] As a result, national legislation should prohibit both direct and indirect discrimination on these suspect grounds. It should also provide for: (i) the setting aside or amendment of any provision contrary to the principle of equal treatment which appears in collective labour agreements, in employment contracts or in firms' own regulations;[20] (ii) protection against

17 See Cullen, H. (2009), 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee on Social Rights' 9 *Human Rights Law Review*.
18 Decision on the merits of 21 December 2005, §§ 18-19.
19 Conclusions XVI-1, Statement of Interpretation on Article 1§2, p. 9.
20 Conclusions XVI-1, Iceland, p. 313.

dismissal or other retaliatory action by the employer; (iii) appropriate and effective remedies in the event of an allegation of discrimination; and (iv) a shift in the burden of proof.[21] States must also supplement and ensure the effectiveness of the rights of victims of discrimination to take legal action by providing for some form of third-party enforcement mechanisms, by for example recognising the right of trade unions to take action in cases of employment discrimination, or establishing a special, independent body to provide discrimination victims with the support they need to take proceedings.[22]

Similarly, Article 8 ESC guarantees that 'employed women, in case of maternity, have the right to special protection in their work' and contains specific provisions requiring States to (i) guarantee the right to take maternity leave of at least 14 weeks' duration which is 'accompanied by the continued payment of the individual's wage or salary or by the payment of social security benefits or benefits from public funds', (ii) make it unlawful to dismiss female employees from the time they notify the employer of their pregnancy to the end of their maternity leave, subject to certain narrowly defined exceptions; (iii) to provide nursing mothers with adequate time-off for that purpose, and (iv) to regulate the employment of pregnant employees or those who have recently given birth in 'dangerous, unhealthy or arduous' occupations. The ECSR has interpreted these provisions as requiring the payment of adequate maternity benefit,[23] the establishment of effective legal remedies for women to challenge dismissals linked to pregnancy and/or maternity (including the award of adequate levels of compensation which also have a deterrent effect),[24] and the provision of strong and effective guarantees of the employment rights of pregnant women or new mothers (including nursing leave).[25]

The right to equal pay without discrimination on the grounds of sex is guaranteed by Article 4§3. As discussed above, Article 15 guarantees the rights of persons with disabilities to independence, social integration and participation in the life of the community. Article 19§4 guarantees the rights of migrant workers to treatment not less favourable than that of nationals in the areas of: (i) remuneration and other employment and working conditions, (ii) trade union membership and the enjoyment of benefits of collective bargaining, and (iii) accommodation. Article 19§5 makes similar provision in relation to the payment of employment taxes, dues or social security contributions, while Article 19§7 provides that migrants should have access to courts, lawyers and legal aid on an equal footing with nationals.

Article 20 of the revised ESC provides that 'all workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex': the Committee has interpreted this provision as requiring that comprehensive and effective legal protection be provided against sex discrimination across the full scope of employment and occupation,[26] and also as requiring States to take positive measures to promote equality of opportunity for female workers.[27] Article 23 of the revised ESC states that 'every elderly person has the right to social protection', which the Committee has *inter alia* interpreted as requiring States to introduce an effective legislative prohibition on age discrimination which extends beyond employment and occupation to encompass access to goods and services, social security and healthcare.[28]

21 Collective Complaint No. 24/2004, *Sud Travail et Affaires Sociales v.France*, Decision on the merits of 16 November 2005, §33; Collective Complaint No. 7/2000 *International Federation of Human Rights Leagues v. Greece*, Decision on the merits, 5 December 2000, §22. Part-time work must also be accompanied by adequate legal safeguards against discrimination: see Conclusions XVI-1, Austria, p. 28.

22 Conclusions XVI-1, Iceland, p. 313.

23 Conclusions XV-2, United Kingdom, p. 594.

24 Conclusions 2005, Estonia, p. 144.

25 Conclusions X-2, Statement of Interpretation on Article 8§4, p. 97; Conclusions X-2, Statement of Interpretation on Article 8§5, p. 97.

26 Conclusions XIII-5, Statement of Interpretation on Article 1 of the Additional Protocol, pp. 272-276.

27 See e.g. Conclusions XVII-2, Greece, Article 1 of the Additional Protocol, pp. 338-341. Note that the Appendix to the Charter makes it clear in relation to Article 20 that specific measures designed to remove *de facto* inequalities are permitted, while measures relating to the protection of pregnant women and mothers shall not constitute discrimination.

28 See e.g. Conclusions 2009, Finland, p. 29.

The ECSR has also interpreted the right of workers under Article 24 of the revised ESC to protection in cases of termination of employment as prohibiting dismissal of the employee on discriminatory grounds: recently, the Committee has concluded that this prohibition also covers dismissal based on an employee reaching a particular retirement age, unless the termination can be properly justified with reference to the 'capacity or conduct of the employee or the operational requirements of the enterprise'.[29] Article 26§1 requires State Parties to 'promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct', while Article 26§2 requires States to take effective measures to combat other forms of harassment and/or offensive behaviour. Finally, Article 27 guarantees the right of 'persons with family responsibilities and who are engaged or wish to engage in employment' to do so 'without being subject to discrimination and as far as possible without conflict between their employment and family responsibilities'. The Committee has interpreted this provision as requiring States to take active policy measures to enable persons with family responsibilities to enter and remain within the labour market, and to enact legislation protecting workers with family responsibilities against discrimination.[30]

The General Provisions of the ESC Giving Effect to the Principle of Equality and Non-discrimination

Various provisions of the Charter thus provide particular protection against specific types of discrimination. The Committee closely monitors the extent to which States that have accepted these provisions comply with these requirements through both the national reporting and collective complaints procedure. However, the most important non-discrimination provisions of the ESC can be found in the Preamble of the original Charter, and Article E of the revised Charter. These overarching requirements confirm that respect for the principle of equality and non-discrimination must be woven into the interpretation and application of all the rights set out in the text of the original and revised ESC. States must respect this principle in giving effect to all ESC rights by which they have agreed to be bound: this core requirement cannot be evaded.

The Preamble to the original Charter states that 'the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin'. The Committee has thus ruled that ESC rights must be 'read together' with this general principle, meaning that States must not discriminate on the grounds listed in the Preamble in giving effect to their social commitments under the Charter. Furthermore, the Committee has interpreted this requirement as also prohibiting States from discriminating on analogous 'status' grounds: thus, in Collective Complaint 45/2007, *INTERIGHTS v. Croatia*,[31] the ECSR concluded that the use of homophobic and stereotyping educational materials in the curriculum of Croatian schools was not in conformity with Croatia's obligations under Article 16 of the ESC, which requires States to take measures to guarantee the right of the family to social, legal and economic protection, read together with the Preamble.

Article E of the revised Charter is more extensive:

> The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

It is modelled on the provisions of Article 14 of the European Convention on Human Rights, and incorporates the principle of non-discrimination into the substantive text of the revised Charter, exemplifying the ambitions of its drafters to update the text of the ESC to reflect the greater salience of the principle of

29 See Conclusions 2012, General Introduction, p. 10.
30 Conclusions 2003, Statement of Interpretation on Article 27§3.
31 Decision on the merits of 9 April 2009.

non-discrimination. As with Article 14 ECHR, Article E does not constitute an autonomous right which could in itself provide independent grounds for a complaint against a State Party to the Charter: however, it does prohibit all forms of discrimination in the enjoyment of the rights set out in the ESC which are binding upon the State in question. If a State fails to respect this principle in giving effect to ESC rights, then the Committee will find the national situation to be in non-conformity with the requirements of Article E 'taken in conjunction with' the relevant social right in question.

The prohibited grounds for discrimination included in the text of Article E are a combination of those listed in Article 14 of the European Convention on Human Rights and those in the Preamble to the 1961 Charter. However, as with Article 14 ECHR, the expression 'or other status' means that this is not an exhaustive list, and the Committee has concluded for example that disability is a prohibited ground for discrimination under Article E although it is not listed as such in its text.[32]

The ECSR has interpreted the principle of equality underlying both the Preamble and Article E as reflecting the standard Aristotelian concept that persons in the same situation must be treated equally while persons in different situations must be treated differently. As a result, State Parties will fail to respect the Charter where, without an objective and reasonable justification, they treat similarly situated groups differently when securing their enjoyment of the social rights set out in the Charter – or alternatively, when they fail to take into account relevant differences between different groups when it comes to protecting and securing their Charter rights.

In other words, the ECSR has adopted the same approach to Article E as the European Court of Human Rights adopted to Article 14 ECHR in the case of *Thlimmenos v. Greece*.[33] It has interpreted both the Preamble and Article E as prohibiting both direct and indirect *negative* forms of discrimination against particular social groups, and also as imposing a *positive* obligation on States to secure the effective enjoyment of Charter rights on a non-discriminatory basis. This obligation will be breached by State Parties 'failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all'.[34]

Furthermore, in its collective complaints case law relating to this principle of equality as set out in the Preamble/Article E, the ECSR has concluded that, if credible evidence is adduced establishing a *prima facie* case that a State has discriminated against particular groups, or failed to take reasonable steps to secure their enjoyment of fundamental social rights, a shift in the burden of proof will take place.[35] The State in question will be required to demonstrate that it has adequately discharged its obligations under the Charter, by demonstrating that it was objectively justified in giving effect/failing to give effect to the measures at issue.

Examples of the ECSR's Case Law

Both the negative and positive dimensions of this principle have been prominent in the ECSR's collective complaint case law, where issues of equality and non-discrimination have been very much in the forefront. This is particularly illustrated by a sequence of collective complaints relating to the housing situation of Roma in a variety of European States.

32 See Collective Complaint 13/2000, *Association internationale Autisme-Europe (AIAE) v. France*, Decision on the merits of 4 November 2003, §51. For examples of the Committee assessing whether discrimination existed on other non-listed 'status' grounds in the enjoyment of social rights, see Complaints 42/2007, *International Federation of Human Rights Leagues (IFHR) v.Ireland*, Decision on the merits of 4 July 2008, and 53/2008, *European Federation of National Organisations Working with the Homeless (FEANTSA) v. Slovenia*, Decision on the merits of 29 September 2009.

33 (2001) 31 EHRR 15.

34 Complaint 13/2000, *Association internationale Autisme-Europe (AIAE) v. France*, Decision on the merits of 4 November 2003, §52.

35 See e.g. Complaint 27/2004, *ERRC v. Italy*, Decision on the merits of 7 December 2005.

Discrimination against Roma in relation to access to housing and healthcare

In Complaint 15/2003, *ERRC v. Greece*,[36] the Committee stated that one of the underlying purposes of the social rights protected by the Charter is to express solidarity and promote social inclusion. It went on to conclude that the available evidence clearly indicated that a significant number of Roma were living in housing conditions that failed to meet minimum standards, and that local authorities had failed to take proportionate steps to provide the necessary infrastructure to ensure that adequate temporary housing was available. It also concluded that the relevant legal framework governing evictions of Roma illegally occupying sites had to be clearly defined by law, adhere to the requirements of fair procedure and take account of the specific situation and particular vulnerabilities of the Roma community – in this respect, the ECSR cross-referred to the judgment of the ECHR in *Connors v. UK*.[37]

Similarly, in Complaint 27/2004, *ERRC v. Italy*,[38] the Committee concluded that the inadequate supply of housing for Roma communities in Italy, the failure to take into account their specific accommodation needs, over-reliance upon the use of temporary housing facilities, and a failure by local authorities to implement administrative decrees requiring the provision of adequate shelter and support for these communities constituted a violation of Article 31 of the revised ESC taken together with Article E. The Committee also addressed the responsibilities of national authorities to collect data relating to the housing needs of vulnerable groups, and in particular groups such as the Roma who are frequently subject to discrimination. It stated that the gathering and analysis of such data (with due safeguards for privacy and against other abuses) is indispensable to the formulation of rational housing policy in this context.[39]

In Complaint 31/2005, *ERRC v. Bulgaria*,[40] both the complainant organisation and the government acknowledged that Roma communities often suffered from substandard housing conditions. The Government had implemented certain measures to address these specific housing needs, and had demonstrated clear political will to deal with this problem. The Committee also acknowledged that States enjoyed a certain margin of appreciation in deciding what measures were best suited to address complex structural forms of poverty. However, such measures must be (i) implemented within a reasonable timeframe, (ii) demonstrate measurable progress and (iii) be financed and resourced to an adequate degree. In this situation, the Government was unable to demonstrate that the various housing programmes and action plans it had adopted to benefit the Roma were being effectively implemented, given clear evidence of the persistence of serious housing problems.[41] As such, it concluded that the situation was not in conformity with Article E taken together with Article 16. Furthermore, the Committee also concluded that eviction procedures had again failed to take into account the particular position of Roma families.

In Complaint 51/2008, *ERRC v. France*,[42] the Committee again concluded that a shortage of halting sites and other adequate forms of accommodation for Roma migrants, combined with a failure to take effective measures to remedy the situation, gave rise to a situation of non-conformity with Article E ESC taken together with Article 31. The Committee also concluded that the violent eviction of several Roma communities from illegal housing sites and the targeting of such communities for special enforcement action constituted a breach of Article E taken together with Article 31§2. In reaching this conclusion, the Committee made reference to concerns expressed by the Council of Europe Commissioner for Human

36 Decision on the merits of 7 February 2005.
37 (2005) 40 EHRR 9. The Committee subsequently reiterated its findings in this regard in Complaint 49/2008, *INTERIGHTS v. Greece*, Decision on the merits of 25 January 2010: see also Complaint 61/2010, *ERRC v. Portugal*, Decision on the merits of 1 July 2011, where the Committee emphasised the importance of national authorities taking steps to prevent the segregation of Roma in public housing.
38 Decision on the merits of 7 December 2005.
39 See also the Committee's conclusions in respect of France: Conclusions 2005, France, p.268.
40 Decision on the merits of 30 November 2006.
41 See also Complaint 39/2006, *Feantsa v. France*, Decision on the merits of 4 February 2008.
42 Decision on the merits of 26 October 2009.

Rights and the National Commission for Police Ethics (CNDS) relating to the methods used during such evictions. It also concluded that France had failed to give effect to an overall and co-ordinated approach to combating the social exclusion and poverty suffered by many Roma communities, contrary to the requirements of Article E taken in conjunction with Article 30 (the right to protection against poverty and social exclusion) of the Revised Charter.

In Complaint No. 58/2009, *Centre on Housing Rights and Evictions (COHRE) v. Italy*,[43] the Committee concluded that Italy had again failed to take adequate steps to address the housing problems of Roma communities or to develop a co-ordinated strategy to combat the poverty and social exclusion to which they were subject. The Committee also concluded that public authorities in Italy had failed to take adequate steps to investigate instances of targeted attacks against Roma sites, some of which had been actively incited by elected public officials, and to counter xenophobic propaganda directed against these and other vulnerable minorities. It also held that various targeted 'security measures' directed against Roma communities (based on the alleged existence of an *emergenza nomadi*) had created a discriminatory legal framework that exposed vulnerable groups to threats of collective expulsion based on their ethnicity. In response to the government argument that these security measures were primarily targeted at irregular migrants who had no legal right to be resident in Italy, the Committee noted that the affected group also included lawfully resident individuals, who were equally exposed to the offending measures in question. Taken together, the Committee concluded that multiple breaches of Articles 19, 30 and 31 the ESC had taken place read together with Article E, some of which constituted 'aggravated violations' of the Charter on the basis that public officials had actively contributed towards creating the climate of hostility and stereotyping at issue.

Similarly, in the high-profile Complaint No. 63/2010, *COHRE v. France,*[44] the Committee concluded that a policy of forced evictions and de facto mass expulsions from France which targeted particular Roma communities constituted a violation of Article E taken together with elements of Articles 19, 30 and 31 ESC.[45] It ruled that the evictions and deportations in question had been insufficiently protective of the rights of the persons concerned, and had constituted a clear case of direct discrimination based on the ethnic origin of the group concerned.[46] Again, the Committee reiterated that the fact that the measures in question were directed against groups some of whose members did not come within the personal scope of the Charter, on account of their irregular migration status, did not justify the discriminatory behaviour in question as they also impacted upon individuals and groups who came squarely within the scope of the ESC.

In the significant Complaint 46/2007, *ERRC v. Bulgaria*,[47] the Committee concluded that Bulgarian healthcare policies did not adequately address the specific public health risks and difficulties in accessing healthcare services faced by many Romani communities and therefore were not in conformity with the right to healthcare protected by Article 11 ESC taken together with Article E. The Committee reached similar conclusions in relation to Roma access to healthcare services and social welfare benefits in its decision in Complaint 67/2011, *Médecins du Monde v. France*,[48] where it also concluded that legal restrictions on migrant Roma accessing healthcare and other core social support services constituted a breach of the Charter.

43 Decision on the merits of 6 July 2010.
44 Decision on the merits of 13 July 2011.
45 A similar conclusion was reached in Complaint No. 64/2011, *European Roma and Travellers Forum (ERTF) v. France*, Decision on the merits of 1 February 2012.
46 A government circular of 5 August 2010, which stated that '300 unlawful sites must be cleared, with priority given to those occupied by Roma…' provided the evidential basis for this finding.
47 Decision on the merits of 3 December 2008.
48 Decision on the merits of 20 September 2012.

Discrimination on the grounds of sexual orientation and age

Moving beyond issues related to the Roma, the Committee's collective complaints case law has also engaged with issues relating to discrimination on the basis of sexual orientation, age and disability. Thus, in Complaint 45/2007, *INTERIGHTS v. Croatia* – already referred to above – the Committee concluded that certain specific elements of the educational material used in the ordinary school curriculum relating to family and reproductive health were manifestly discriminatory in their depiction of persons of a non-heterosexual orientation. The Committee acknowledged that States enjoyed a wide margin of appreciation in general when it came to the design and content of school curricula. However, it concluded that States were required to ensure that educational materials did not reinforce demeaning stereotypes and perpetuate forms of prejudice which contribute to the social exclusion of homosexuals and other historically excluded groups.

Turning to the context of age discrimination, in Complaint 66/2011, *General federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*,[49] the Committee was asked to rule *inter alia* on whether the payment of a lower minimum wage to workers below the age of 25 involves unjustified age discrimination. The Committee considered that it was open to a State to demonstrate that paying younger workers a lower minimum wage was objectively justified on the basis that it furthered a legitimate aim of employment policy and was proportionate to achieve that aim. In the particular circumstances of this complaint, the Committee concluded that the less favourable treatment of younger workers at issue was designed to give effect to a legitimate aim of employment policy, namely to integrate younger workers into the labour market in a time of serious economic crisis. However, the Committee concluded that the extent of the reduction in the minimum wage, and the manner in which it is applied to all workers under the age of 25, was disproportionate even when taking into account the particular economic circumstances in question. As such, the Committee considered that the relevant legislation was not in conformity with Article 4§1 (the right to a fair remuneration) read together with the non-discrimination clause of the Preamble of the original ESC.

In general, the Committee has adopted a relatively strict approach in assessing the conformity of differences of treatment based on age with the provisions of the Social Charter. Thus, in Complaint No. 74/2011, *Fellesforbundet for Sjøfolk (FFFS) v. Norway*,[50] the Committee concluded that legislation which required seamen to retire at 62 was not compatible with Articles 1§2 or 24 of the ESC, read alone or in conjunction with Article E. In assessing whether this mandatory retirement rule could be justified, the Committee recognised that States enjoyed a certain margin of appreciation in regulating their labour markets. However, it also emphasised the entitlement of older persons to exercise their right to work and to enjoy effective protection against dismissal, and concluded that the Norwegian Government had failed to demonstrate that the legislation in question was objectively justified. In particular, the Committee considered that no specific evidence has been submitted to show that the age limit in question reflected 'essential professional requirements' in the context of contemporary work conditions at sea. Nor had the age limit been shown to be necessary to ensure the safety and operational functioning of the Norwegian shipping industry. The Committee also rejected the argument that the age limit was justified on the basis that sailors could obtain a pension at 60, emphasising that the Charter protected the right of all workers to 'earn a livelihood in an occupation freely entered upon'.

Discrimination on the grounds of disability

The Committee's case law on disability discrimination is particularly notable for how it is focused on issues of equal access to educational, health and housing services. As outlined above, Article 15 of the revised ESC guarantees the right of persons with disabilities to independence, social integration and

49 Decision on the merits of 18 June 2012.
50 Decision on the merits of 5 July 2013.

participation in the life of the community.[51] The ECSR has interpreted these provisions as requiring States to take active steps to ensure that persons with disabilities are able to participate with equal dignity in the life of their community. Thus in Complaint 13/2000, *Association internationale Autisme-Europe (AIAE) v. France*,[52] the ECSR concluded that France had made little progress in securing the participation of autistic persons in mainstream education or in providing adequate resources to meet their special educational needs. It also determined that educational policy in France was making use of an unduly restrictive definition of autism, while there had been a failure to collect relevant statistics with which to rationally measure progress. These deficiencies in French policy taken together as a whole ensured that France was not meeting its Charter obligations under Articles 15 and 17 (the right of children to social protection) taken together with Article E.[53]

In Complaint 41/2007, *Mental Disability Advocacy Center (MDAC) v. Bulgaria*,[54] the Committee concluded that Bulgarian educational policy had failed to take adequate steps to integrate children with intellectual disabilities into mainstream education, or to provide the necessary degree of special educational support to children with intellectual disabilities residing in homes for mentally disabled children (HMDCs). As a consequence, the Committee concluded that the situation in Bulgaria constituted a violation of Article 17§2 of the Revised Charter (the right of children to social protection) read in conjunction with Article E.

Complaint No. 75/2011, *International Federation of Human Rights (FIDH) v. Belgium*,[55] concerned the situation of highly dependent disabled adults in need of special accommodation and support facilities. The complainant organisation alleged that the various layers of federal and regional government in Belgium had failed to make adequate provision for the special needs of these individuals as a result of poor co-ordination between the different levels of government and inadequate funding for care services. In its decision, the Committee recognised that States were entitled to a margin of appreciation when it came to deciding how best to meet the care needs of vulnerable groups. However, 'particularly deficient' policies and practices were incompatible with the requirements of the Charter. In this situation, the Committee ruled that Belgian care policies had been 'particularly deficient' for an extended period of time, and therefore had violated the right set out in Article 14§1 of the Charter to benefit from adequate social welfare facilities and the right of families to social protection set out in Article 16. However, it also concluded that the complainant organisation had not produced sufficient evidence to demonstrate that Belgium had breached its obligations under Article E or Article 15 ESC in relation to integrating such disabled persons within the life of their community, given their highly dependent status and the difficulties involved in comparing their treatment to those of adults with other forms of disability.

The importance of the collective complaints procedure

The decisions in collective complaints mentioned above give a sample of the ECSR's developing case law in the field of equality and non-discrimination. It should also be borne in mind that it continues to assess national situations and develop its interpretation of ESC rights taken together with Article E through the national reporting mechanism. For example, the Committee in reviewing state reports in relation to Article 15 ESC has emphasised the importance of data collection as a tool to identify and redress barriers to the equal participation of persons with disabilities in society.[56] The national reporting mechanism also serves as a useful vehicle for following up and reviewing state responses to decisions of non-conformity adopted under the collective complaints procedure. However, it is the latter mechanism that offers the

51 These provisions have extended the more limited protection conferred upon persons with disabilities by Article 15 of the original ESC of 1960, which recognised the right of 'physically or mentally disabled persons to vocational training, rehabilitation and social resettlement'.
52 Decision on the merits of 7 November 2003.
53 Similar conclusions were reached in the recent decision in Complaint No. 81/2012, *Action européenne des handicapés (AEH) v. France*, Decision on the merits of 4 October 2013.
54 Decision on the merits of 10 June 2008.
55 Decision on the merits of 26 March 2013.
56 See e.g. Conclusions 2007, Finland, pp. 16-19.

ECSR the best opportunity to develop its equality case law, given how it permits in-depth examination of particular national situations.

Conclusion

The principle of equality and non-discrimination is deeply embedded within the framework of the ESC, as reflected in the ECSR's expanding collective complaints case law. The Committee's decisions demonstrate how respect for social rights and the principle of equal treatment are interlinked and mutually dependent: it also demonstrates the importance of acknowledging that states may be subject to both negative and positive obligations to promote equality of treatment, especially in relation to particularly vulnerable social groups. The Committee's case law in this regard is likely to exert an increasing influence over national law and policy, along with the jurisprudence of the ECHR: given that the social rights provisions of the EU Charter on Fundamental Rights draw upon and are modelled on certain of the provisions of the ESC, they may also feature more prominently in the development of EU law in the years ahead.[57]

57 See in general Khaliq U. (2014), 'The EU and the European Social Charter: Never the Twain Shall Meet?' *Cambridge Yearbook of European Legal Studies* 15, pp. 169-196.

Gender based actuarial factors and EU gender equality law

'...there's the respect / that makes calamity of so long life'*

Jean Jacqmain and Nathalie Wuiame**

Introduction

Gender has long been used as a factor for calculating insurance premiums. It was considered as a cheap and efficient system[1] to classify insurance risks in a variety of domains, for example, life insurance or motor-vehicle liability insurance. Grounded on a combination of statistics, probabilities, mathematics and economics, actuarial factors are used to appreciate how possible it is that an event will happen in the future; in particular, they are needed when such an event is a risk against which insurance has to be taken out. When life expectancy constitutes a relevant factor in respect of that risk, it has been argued that a gender distinction is inevitable as within any human group mortality tables differ between men and women. But does this imply a causal link between sex and longevity?

In the 1990s, the use of gender-based actuarial factors (hereafter 'GBAF') was already addressed by the Court of Justice of the EU within occupational schemes. Occupational pension schemes were considered by the Court (Barber,[2] Neath[3] and Coloroll[4]) to be part of 'pay' and therefore had to respect the principle of equality between men and women.

The *Test-Achats*[5] case provoked an earthquake in the insurance field as it put an end to the exception allowing gender actuarial factors in the private insurance field, as laid down in Directive 2004/113/EC concerning the equal treatment of men and women in access to and the provision of goods and services[6] (hereafter, the 'Service Directive'). Gender equality is a fundamental right and the incorporation of the Charter of Fundamental Rights (i.e. Articles 21 and 23) in EU primary law allows for the gradual implementation of such a right. However, the very absence of a temporal limitation of the exemption in Article 5 (2) of the service directive was considered by the Court to breach the principle of equality.[7]

* Shakespeare, W., *Hamlet*, Act III, Scene 1.

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1 Slettvold, G, (2015), 'A Critical Analysis of Gender Discriminatory Practices in Insurance Law in the UK – Equality at All Costs?', *UK Law Student Review*, Vol. 3 Issue 1, hyperlink http://www.uklsa.co.uk/wp-content/uploads/2015/01/UKLSR-v3i1-A2.pdf, accessed on 6 April 2015.

2 Case C-262/88, [1990] ECR I-1889.

3 Case C-152/91, [1993] ECR I-6953.

4 Case C-200/91, [1994] ECR I-4389.

5 Case C-236/09, [2011] ECR I-773.

6 Council Directive 2004/113/EC of 13 December 2004, OJ 21.12.2004 L 373/37.

7 Caracciolo di Torella, E. (2012), *Gender Equality after Test Achats*, ERA forum, Springer.

Following the *Test-Achats* case, the Commission adopted guidelines[8] to clarify its effect and in particular the notion of a new contract.

In a recent Finnish case (C-318/13, *X*[9]), the Court extended the prohibition on the use of life expectancy criteria in determining benefits following a work accident covered by statutory social security schemes.

What is the direct impact of this case law on the use of GBAF in the field of employment and occupation?

This article discusses whether in the light of the past and recent case law of the Court of Justice of the EU, current exceptions relating to the use of GBAF, in particular in occupational pension schemes (covered by Article 9 of Directive 2006/54/EC) can still be considered valid in view of Articles 21 and 23 of the Charter of Fundamental Rights.[10]

Gender as a relevant factor to assess risk in the field of life insurance

The insurance industry widely uses gender considerations in the form of actuarial factors. Actuarial factors are those factors that are used to evaluate the risk of the group that is being insured.[11] In particular, a gender distinction has been argued to be inevitable when life expectancy constitutes a relevant factor in respect of that risk, as within any human group, mortality tables differ between men and women.

While in Europe, it is true that from a statistical point of view, women live longer than men, the proposition that there is a genuine causal link between sex and longevity should be questioned.

Sex is considered to be no more than a proxy for other secondary factors indicating life expectancy and is being used by insurance companies as a deciding parameter for risk evaluation because it is (economically) convenient to grasp and correlates with this risk.[12] As reported by Temming, research concerning the mortality of men and women in Bavarian monasteries and convents is proving that, under identical living conditions, the difference in the average life expectancy is consistently between zero and two years in favour of women.[13] This confirms arguments that the origins of the importance placed on gender in the insurance context are thought to be forceful social and cultural norms.[14] Clearly socio-economic characteristics, age or the type of occupation are other aspects that are at stake with regard to differences in the life expectancy of men and women.

Use of actuarial factors in EU gender Directives

The possibility of using GBAF, despite the principle of equality between men and women, has been recognised in European directives since 1986.

8 Communication of 22 December 2011: *Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the Court of Justice of the European Union in Case C-236/09*, C (2011) 9497final.

9 Judgment of 3 September 2014, *Proceedings brought by X*, ECLI:EU:C:2014:2133.

10 Charter of Fundamental Rights of the European Union, 18 December 2000, OJ 2000/C 364/01.

11 Caracciolo di Torella, E. (2012), *Gender Equality after Test Achats*, ERA forum, Springer.

12 Temming cited by Slettvold, G. (2015), 'A Critical Analysis of Gender Discriminatory Practices in Insurance Law in the UK – Equality at All Costs?', *UK Law Student Review,* Vol. 3 Issue 1.

13 Temming, F. (2012), 'Case Note – Judgment of the Court of Justice of the EU (Grand Chamber) of 1 March 2010: CJEU finally paves the way for unisex premiums and benefits in insurance and related financial service contracts', *German Law Journal*, Vol. 12 No. 1, pp. 105-123, hyperlink https://www.germanlawjournal.com/index.php?pageID=11&artID=1410, accessed on 7 April 2015.

14 Thiery, Y. & Van Schoubroeck, C. (2006), *Fairness and equality in insurance classification*, The Geneva Papers, 31, pp. 190-211, hyperlink https://www.genevaassociation.org/media/244444/ga2006_gp31(2)_thieryvan_schoubroeck.pdf, accessed on 7 April 2015.

The first mention of GBAF appeared in Article 6 of Directive 86/378/EEC concerning equal treatment of men and women in occupational social security schemes.[15] Those provisions are now to be found in Article 9 (1) of the 'Recast Directive 2006/54/EC, with the following more coherent phrasing:

> '[Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, for: (...)]
> (h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial factors which differ according to sex in the case of defined-contribution schemes; in the case of funded defined-benefits schemes, certain elements may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented (...)
> (j) setting different levels for employers' contributions, except:
> (i) in the case of defined-contribution schemes if the aim is to equalise the amount of the final benefits or to make them more nearly equal for both sexes,
> (ii) in the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined'.

A second mention of GBAF was made in Article 5 of Directive 2004/113/EC which covers specific provisions on the equal treatment of men and women in the field of insurance:

> '1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purpose of insurance and related financial services shall not result in differences in individuals' premiums and benefits.
> 2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.'

So while in its first paragraph the principle of equal treatment (i.e. unisex premiums) applies, paragraph 2 provides for the possibility to derogate from this principle. This is in relation to different premiums and benefits where the use of sex is a determining factor in the assessment of risks based on relevant and accurate actuarial and statistical data.

To be complete, it should be mentioned that paragraph 3 of Article 5 did not allow such derogations in relation to costs based on pregnancy and maternity.

Use of actuarial factors in the CJEU case law

Occupational pension schemes

The term 'occupational pension schemes' typically refers to a pension scheme that an employee in the private sector may be eligible to join by reason of his or her employment (second pillar).

15 Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, O.J. L 225, 12.08.1986.

The question of occupational pension schemes was addressed by the CJEU at the beginning of the 1990s but was directly contested using the principle of equal pay for men and women, at that time contained in Article 119 of the Treaty (which later became Article 141 EC, then Article 157 TFEU).

In Case C-162/88, Mr Barber was a member of a non-contributory pension fund. His contract of employment provided that, in the event of redundancy, members of the pension fund were entitled to an immediate pension subject to having attained the age of 55 for men or 50 for women.[16] Staff members who did not fulfil those conditions received certain cash benefits calculated on the basis of their years of service and a deferred pension which was payable at the normal pensionable age. Mr Barber was made redundant when he was 52 years old and was therefore not entitled to an immediate pension.

The Court of Justice of the EU held that occupational pension schemes are included as pay, even though the scheme is operated by a trust which is technically independent of the employers. It operates as a partial substitution for benefits under the state social security system, even if it is with reference to a national scheme. Therefore, Article 119 precluded men and women from having different age conditions for pension entitlements, and the principle of equal treatment applied to occupational pension schemes.

After the Court of Justice's decision in *Barber* the validity of Directive 86/378/EEC appeared to be seriously challenged, mainly because of the very long periods that it allowed for Member States to implement it.[17] See also point 26 of the CJEU's decision in Case *Moroni*, 'Directive 86/378/EEC cannot prevent Article 119 of the Treaty from being relied upon directly and immediately before national courts',[18] and later the recital of Directive 96/97/EC:[19] 'Whereas that judgment [*Barber*] automatically invalidates certain provisions of Directive 86/378/EEC [...]'. Consequently, in the various cases concerning occupational pension schemes that followed *Barber*, gender discrimination was disputed systematically under Article 119 EEC, without any reference to the Directive.

In Case C-152/91 *Neath,* one of the questions that the British court had submitted to the CJEU concerned the effect of GBAF. In the company that had made Mr Neath redundant, there was a contributory occupational pension scheme of the 'defined benefit/final salary' type. For the purposes of transferring acquired rights and of converting part of the pension into capital, the employer's contributions had to be included in the calculation. Those contributions were based on a percentage (equal for men and women) of every employee's remuneration, but given the use of sex-segregated actuarial factors in the funding arrangements of the scheme, the aggregated value of the employer's contributions was higher for a woman than for a man. The Court of Justice came to the conclusion that:

> 'the use of actuarial factors differing according to sex in funded defined-benefit occupational pension schemes does not fall within the scope of Article 119 of the EEC Treaty'.[20]

In Case C-200/91 *Coloroll*, the CJEU referred to *Neath*, but extended the range of its decision to cover two other situations:

> 'where a reversionary pension is payable to a dependant in return for a surrender of part of the annual pension and where a reduced pension is paid when the employee opts for early retirement, the funding arrangements chosen must also be taken into account. Since those arrangements are not covered by Article 119, any inequality of the amounts of those benefits, arising from the use of actuarial factors in the funding of the scheme, is not struck at by that article'.[21]

16 The usual pensionable age for employees was then 57 years for women and 62 years for men.
17 The principal forms of discrimination in this Directive that were no longer allowed were the possibility of different pension ages for women and men and the exclusion of survivor's benefits for widowers.
18 C-110/91, [1993] ECR I 6610, point 26.
19 It should be noted that Directive 96/97/EC aims to modify Directive 86/378/EC.
20 C-152/91, point 32.
21 C-200/91, point 83.

So according to the CJEU, the principle of equal pay applies to schemes which are the result of a decision or agreement of the employer, are financially financed by the employer (even partially) and where affiliation to these schemes derives from the employment relationship.[22]

However, according to *Neath,* in employers' contributions to funded defined-benefit occupational pension schemes, the use of GBAF did not fall within the scope of Article 119 EEC. If employers' contributions do not fall within the scope of Article 157 TFUE (previously, Article 119/EEC and Article 141 EC), then they cannot fall within the scope of Directive 2006/54 either. So why, in copying in substance the relevant provision of Directive 86/378/EEC, does Article 9 (1) (j) (ii) of Directive 2006/54/EC merely allow Member States to permit the exemption of those contributions from the equal treatment principle, as opposed to simply stating that the Directive does not apply at all to those contributions?

Private insurance schemes

Individuals can build up extra pension rights through private insurance schemes. A number of countries support such schemes through tax privileges (third pillar).

While protection against discrimination in relation to service on the grounds of nationality was granted from the very beginning of the European Economic Community, and whilst a prohibition on grounds of racial or ethnic origin has been in existence since 2000 under Directive 2000/43, the prohibition of discrimination on the ground of sex was only introduced by Directive 2004/113/EC.[23]

In Case C-236/09 *Test-Achats,* the CJEU observed that according to Recital 18 in the preamble to Directive 2004/113/EC, the use of sex as an actuarial factor must not result in differences in premiums and benefits as provided in individual insurance contracts (see Article 5 (1)).

However, in order to take into account the current practices of insurance companies, Recital 19 explained why it was necessary to grant Member States the option of permitting 'exemptions' (see Article 5 (2)). Thus, the Directive considered that with regard to insurance premiums and benefits, men and women were in comparable situations; and the principle of equal treatment enshrined in Articles 21 and 23 of the Charter of Fundamental Rights of the European Union was therefore applicable.

Consequently:

> 'Article 5 (2) of Directive 2004/113, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of the directive, and is incompatible with Articles 21 and 23 of the Charter of Fundamental Rights of the European Union. That provision must therefore be considered to be invalid upon the expiry of an appropriate period, i.e. the first five-year period provided by Article 5 (2)'.[24]

So, the general principle of gender equality, now enshrined in Articles 21 and 23 of the Charter of Fundamental Rights of the European Union, rendered invalid the provisions of Directive 2004/113/EC that permitted Member States to allow the use of GBAF in individual insurance contracts, mainly because of the unlimited temporal scope of such permission to grant exemptions from the equality principle.

What are the consequences of this judgment for already existing contracts?

22 European Network of Legal Experts in the Field of Gender Equality (2014), *Gender Equality Law in 33 European Countries: How are EU rules transposed into national law*, p. 14, hyperlink http://ec.europa.eu/justice/gender-equality/files/your_rights/gender_equality_law_33_countries_how_transposed_2013_en.pdf accessed on 6 April 2015.

23 Tobler, Ch. (2011), 'Test-Achats or the limits of lobbying', in *European Gender Equality Review* No. 2/2011, hyperlink http://ec.europa.eu/justice/gender-equality/files/egelr_2011-2_en.pdf, accessed on 7 April 2015.

24 C-236/09, recitals 32 and 33.

To facilitate compliance with the *Test-Achats* ruling at the national level, the Commission expressed its view in a Communication of 22 December 2011.[25] Although these guidelines were adopted 'without prejudice to any interpretation the Court of Justice may give to Article 5 in the future', the Commission gave its interpretation of the transitional period to be applied. According to the Commission, the ruling only applied to new contracts, e.g. contracts concluded for the first time as from 21 December 2012 or an extension of contracts concluded before that date which would have otherwise expired. So previously concluded contracts (before 21 December 2012) remained unaffected.

Statutory social security schemes

Statutory social security schemes are created by the authorities to provide a minimum income for their citizens and residents in certain circumstances such as retirement or disability (first pillar).

In Case C-318/13 *X.*, it was immediately obvious that while Article 7 (1) of Directive 79/7/EEC concerning the equal treatment of men and women in statutory social security schemes offered Member States an exhaustive list of grounds for 'derogations' that they could opt to permit, the use of GBAF in the calculation of a statutory social security benefit did not appear on that list. Thus, when the male victim of an accident at work applied for the conversion of the annual compensation into a lump sum, the Court inevitably had to rule that the application of GBAF constituted gender discrimination. The Finnish Government then tried to argue that men and women were not in comparable situations in that respect, as given their higher life expectancy, women who remained permanently injured after an accident at work had to endure that condition for a longer period of time than men. The CJEU dismissed that reasoning:

> 'Such a generalisation is likely to lead to discriminatory treatment of male insured persons as compared to female insured persons. Among other things, when account is taken of general statistical data, according to sex, there is a lack of certainty that a female insured person always has a greater life expectancy than a male insured person of the same age placed in a comparable situation. It follows from those considerations that the national scheme at issue in the main proceedings cannot be justified'.[26]

So as Directive 79/7/EEC did not leave Member States free to permit exemptions as to the disputed issue, the Court had the opportunity to determine that as the situations of men and women are comparable, the use of GBAF to calculate the amount of a benefit in a statutory social security scheme was grounded on a mere generalisation that was conducive to discrimination.

However, as for the liability of the Member State whose legislation thus appeared to be faulty (an issue for the national court to assess), the CJEU advised that court to 'take into consideration':

- the fact that, so far, the CJEU had not ruled on the legality of the use of GBAF within the scope of Directive 79/7/EEC;
- the existence of Article 5 (2) of Directive 2004/113/EC, and the CJEU's decision on the invalidity of that provision;
- the existence of Article 9 (1) (h) and (j) of Directive 2006/54/EC.[27]

A European staff case

When Ms. Lindorfer entered the European Council's service, she relied upon the Staff Regulations to request that the redemption value of the retirement pension rights which she had acquired previously in her country, Austria, be transferred to the Community pension scheme. At the time, the staff regulations

25 Communication of 22 December 2011: *Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the Court of Justice of the European Union in Case C-236/09*, C (2011) 9497final.
26 C-318/13, recitals 38 and 39.
27 C-318/13, recital 51.

prescribed the use of GBAF in order to calculate how many years of pensionable service corresponded to that redemption value. When she was notified of the Council's decision based on that method of calculation, Ms. Lindorfer challenged it before the Court of First Instance, complaining that she was subjected to discrimination on the ground of gender, as the use of GBAF resulted in a lesser number of years of pensionable service than if she had been a man. On 18 March 2004, the Court of First Instance[28] dismissed her application, considering that there was no gender discrimination in the application of the staff regulations.

Ms. Lindorfer appealed and on 11 September 2007 the Court of Justice[29] pointed out that Article 1*bis* (1) of the staff regulations provided that 'officials shall be entitled to equal treatment without reference to sex'. That provision, as well as Article 141 EC to which the complainant had referred, were expressions of the general principle of equality between the sexes. The CJEU then held that the difference in treatment that resulted from the use of GBAF could not be justified by 'the need for sound financial management of the pension scheme, given that:

> 'the identical level of contributions from the remuneration of male and female officials does not adversely affect such management';

and that

> 'the fact that the same equilibrium can be attained with "unisex" actuarial values is also shown by the fact that, subsequently to the facts of this case, as is clear from the replies of the Council and of the Commission to the Court's questions, the institutions decided to use such values'.[30]

Consequently, the judgment of the Court of First Instance was set aside and the Council's decision was annulled.

In conclusion, following *Lindorfer*, the use of GBAF in European staff pensions (which, given the consistent case law of the CJEU[31] concerning pension schemes for civil servants, would be regarded as 'occupational' if European staff schemes would fall within the scope of Directive 2006/54/EC) was not compatible with the general principle of gender equality, which at the time found expression in various provisions. Moreover, it clearly demonstrated that the use of 'unisex' actuarial factors was equally effective for the purpose of preserving the equilibrium of the pension scheme in question.

Taking stock

To recapitulate the CJEU's lessons in chronological order:

- According to *Neath* and *Coloroll,* in employers' contributions to funded defined-benefit occupational pension schemes, the use of GBAF does not fall within the scope of Article 119 EEC;
- As stated in *Lindorfer*, the use of GBAF in European staff pensions is not compatible with the general principle of gender equality. Moreover, the use of 'unisex' actuarial factors is equally effective to the purpose of preserving the equilibrium of the pension scheme in question;
- The judgment in the case of *Test-Achats* concluded that the general principle of gender equality, now enshrined in Articles 21 and 23 of the Charter of Fundamental Rights of the European Union, rendered invalid the provision of Directive 2004/113/EC which permitted Member States to allow the use of GBAF in individual insurance contracts, mainly because of the limitless temporal scope of such permission to grant exemptions from the equality principle;

28 Case T-204/01, *Lindorfer v Council* [2004] ECR-SC I-A-83; SC II-361.
29 Case C-227/04 P, [2007] ECR I-6767.
30 C-227/04 P, recitals 57 and 58.
31 Since Case C-7/93 *Beune* [1994] ECR I-4471.

– And finally in *X*, regarding the question of whether men's and women's situations are comparable in that respect, the use of GBAF to calculate the amount of a benefit in a statutory social security scheme is grounded on a generalisation that is conducive to discrimination.

The present situation in 33 European countries

So what is the current situation in the EU Member States and the candidate and associate countries regarding GBAF? Will they have to amend their legislation in view of the recent case law of the Court?

Following the *Test-Achats* case, it is obvious that all national legislative provisions must comply with Article 5 (1) Directive 2004/113/EC. In other words, any state that had made use of the permission granted by the now invalid paragraph 2 of Article 5 should have corrected the provisions concerned by 22 December 2012 at the latest.

As for Directive 79/7/EEC, it is equally obvious that the Finnish legislation concerning compensation for damages resulting from an accident at work must be brought into compliance with the CJEU's decision in *X*. The same applies to any other national provisions that might make similar use of GBAF. Indeed, a general scrutiny of all national statutes falling within the material scope of Directive 79/7/EEC seems advisable. Case C-318/31 *X*. highlighted the point that Article 7 of the Directive does not permit the use of GBAF; thus, they may not be validly used in respect of any of the risks covered by the Directive.

What, then, of occupational social security schemes and Article 9 (1) (h) and (j) of Directive 2006/54/EC? According to answers collected from national gender equality experts,[32] as of 2010 the national situations are extremely varied: it would appear that the permission granted by those provisions is used in 14 countries; it is not in nine; for six countries, there is no information, available; and, finally, the issue does not arise in four countries as they do not have any occupational pension schemes. However, given the lack of detailed information in a number of national contributions, it seems safer to rely on the Executive Summary of the report, which quotes 11 countries where GBAF are applied (Italy, Belgium, Austria, Luxembourg, Portugal, Spain, the UK, the Czech Republic, Malta, Ireland and Cyprus) and six countries in which the use of unisex factors is compulsory (Sweden, Greece, Denmark, France, Germany and the Netherlands; however, GBAF are still used in the Netherlands for funding purposes only). It therefore appears to be possible, at least in several countries, to have occupational pension schemes without any element of gender segregation.

Incidentally, the same report pointed out two related problems.

At least three Member States (France, Italy and Greece) found themselves in difficulties[33] because they had not adhered to the CJEU's analysis, according to which retirement pension schemes for civil servants are occupational and not statutory. In all three cases (and under various forms) the difficulties resulted from gender differences in the minimum age of access to benefits, which would have been permissible under Directive 79/7/EEC (statutory) but were not under Article 119 EEC/Article 141 EC/Article 157 TFEU and Directive 2006/54/EC (occupational). Obviously, a reverse discrepancy would have arisen concerning GBAF, but any speculation on such a theme would be idle as GBAF are not used in any pension scheme for civil servants in any European state that has such a distinct scheme.

32 The EU28, the EFTA countries, and Turkey and the former Yugoslav Republic of Macedonia. European Network of Legal Experts in the Field of Gender Equality (2010), *Direct and indirect gender discrimination in old-age pensions in 33 European countries*, European Commission, hyperlink: http://ec.europa.eu/justice/gender-equality/files/conference_sept_2011/dgjustice_oldagepensionspublication3march2011_en.pdf, accessed on 7 April 2015.

33 See C-366/99 *Griesmar* 2001-I-9383 and subsequent cases; C-46/07 *Commission v. Italy* 2008-I-151; C-559/07 *Commission v. Greece* 2009-I-47.

New Member States, in particular post-communist countries, which have opted for the 'World Bank Model' that distinguishes between state schemes, mandatory savings schemes, and voluntary schemes; seem to experience more difficulties in applying the EU criteria for occupational schemes than countries with the classic 'Three-Pillar Model' – statutory, occupational, and private schemes. It may be very difficult in the World Bank Model to determine whether the supplementary collective insurance schemes, which are definitely not occupational, should be regarded as closer to the first or to the third pillar of the classic model, and thus falling under Directive 79/7/EEC or 2004/113/EC. However, as far as the use of GBAF is concerned, the combination of *Test-Achats* and *X.* would also render speculation in that respect pointless, because regardless of whether they fall under the first or third pillar, GBAF are not allowed.

In contrast, and much more relevant, one should observe that the British 'contracted-out' formula, under which an occupational pension scheme may be a substitute for the general statutory scheme, transfers the question from the scope of Directive 79/7/EEC (no GBAF allowed) to that of 2006/54/EC (GBAF permitted).

The view from one Member State: Belgium

It will be remembered that *Test-Achats* was a Belgian case. In its original phrasing, Article 10 of the 'Gender Act' of 10 May 2007 (aimed at replacing the previous federal legislation in order to implement all EU directives concerning gender equality) provided that the use of GBAF in individual insurance contracts was prohibited as from 21 December 2007. However, a different majority in Parliament amended the Gender Act *in extremis* (on that very date) to make use of the permission granted by Article 5 (2) of Directive 2004/113/EC, in the case of life insurance. This led to an application to the Constitutional Court to annul the amendment, which was filed by Test-Achats, a consumers' rights association. This was followed by the Constitutional Court's decision to refer the situation to the CJEU for a preliminary ruling, which became Case C-236/09, and which finally resulted in the annulment of the Act of 21 December 2007. The latter was then replaced by the Act of 19 December 2012 amending Article 10 of the Gender Act along the guidelines that the European Commission had proposed after the CJEU's decision.

Meanwhile, an advisory body to the federal Government, the Council of Equal Opportunities for Men and Women (hereafter 'CEO'), had produced an opinion[34] on the follow-up that should be given to Case C-236/09. Among other issues, the CEO brought to attention the questionable use of GBAF in other pieces of legislation that fell within the scope of EU gender equality law. For instance, the CEO pointed out that under the Accidents at Work (private sector) Act of 10 April 1971, a worker who suffers a permanent disability is entitled to a monthly benefit, payable for life, but is free to apply for the payment of a lump sum that is equal to one third of the aggregate value of the benefit. The calculation of that lump sum is based on life expectancy tables, which are different for men and women. Thus, after the CJEU's decision in Case C-318/31 *X.*, the CEO immediately suggested to the relevant federal ministers that the Belgian legislation, like the legislation in Finland, failed to comply with Directive 79/7/EEC and should be amended forthwith. So far the CEO has not received any reply, but following a recent request for information from the Commission on the use of GBAF in statutory social security schemes, the Belgian authorities will have to consider the issue with some urgency.

In the same Opinion No. 131, the CEO also mentioned occupational pension schemes, given that Article 12 of the Gender Act made full use of the permission offered to Member States by Article 9 (1) (h) and (j) of Directive 2006/54/EC. Relying on Case C-227/04 P *Lindorfer*, the CEO recommended that the validity of such provisions should be the subject of a fresh examination. Moreover, the CEO also referred to an earlier Opinion[35] concerning the Complementary Pensions Act of 28 April 2003 (which at

34 Opinion No. 131 of 31 March 2011, hyperlink in French http://www.conseildelegalite.be and in Dutch at http://www.raadvandegelijkekansen.be, accessed on 2 April 2015.

35 Opinion No. 77 of 17 October 2003, hyperlink in French at http://www.conseildelegalite.be and in Dutch at http://www.raadvandegelijkekansen.be, accessed on 2 April 2015.

the time contained the provisions now transferred to Article 12 of the Gender Act). In that Opinion, the CEO suggested that the use of GBAF was conducive to gender discrimination and that it was possible to replace GBAF with unisex factors, as demonstrated in certain other Member States (i.e. the Netherlands, Italy and Sweden).

The case against gender-based actuarial factors

Indisputably, the use of GBAF is conducive to differences of treatment for persons of one sex or the other. In *X.*, because of the shorter life expectancy of men the calculation of the lump sum to be paid in lieu of yearly compensation for disablement after an accident at work resulted in affording a smaller amount to a man than to a woman in identical circumstances. In *Test-Achats*, women had to accept paying higher contributions and/or to provide entitlement to lower benefits in life insurance. In *Neath* and *Coloroll*, a lower rate of employers' contributions was detrimental to men when those contributions had to be included in the calculation of their acquired rights to an occupational pension. In *Lindorfer*, a woman's longer life expectancy produced a negative impact when her acquired rights to a national pension were transferred to the European staff pension scheme.

Striking as it may be, the case law of the CJEU does not offer many examples and has barely scratched the surface of the issue of GBAF, which is that by and large, when a Member State has made use of the permission granted by Article 9 (1) (h) and (j) of Directive 2006/54/EC women will receive lower benefits than men. At this point, it should be pointed out that the gender pay gap (given that a beneficiary's remuneration during his/her period of activity is generally used as the basis for calculation) exerts a strong influence on the inequality in occupational pension benefits; GBAF thus reinforcing that already existing gender gap.

In its Opinion No. 77 concerning complementary (i.e. occupational) pension schemes, as mentioned above, the Belgian CEO accepted that variations in life expectancy were a determining factor in the definition of employers' contributions and of benefits, as well as in the equilibrium of such schemes more generally. However, there are numerous criteria according to which a human population can be segmented into groups with different life expectancies. For instance, in Belgium the CEO quoted differences between persons living in Flanders and in Wallonia; between white-collar employees and blue-collar workers; between smokers and non-smokers, drinkers and teetotallers, etc. All of these differences are abundantly documented by statistics. Nevertheless, the fact remained that the only life expectancy–related criterion regularly used in occupational pension schemes was sex, so that although one can identify numerous groups of the population who enjoyed a longer life expectancy than others, and who could thus have been the subjects of less favourable treatment for insurance purposes, the only group for whom greater life expectancy consistently had negative effects was women. This, on its own, is enough to suggest that using GBAF was conducive to gender discrimination. So while it is legitimate for insurance companies to divide up the group to be considered, doing so by using such a suspect criterion as sex is not acceptable.[36]

Likewise, when Advocate General F.G. Jacobs gave his opinion on the *Lindorfer* case, he stressed that if, in a given country, it was observed that the members of a particular ethnic group had a higher life expectancy than the rest of the population, it would not be admissible to factor such a difference into the calculation of contributions or benefits under a pension scheme. The Advocate General did not refer to Directive 2000/43/EC, but it is worth mentioning that concerning race and ethnic origin, that Directive does not provide permission to allow the same type of exceptions as Article 9 (1) (h) and (j) of Directive 2006/54/EC. And neither does Directive 2000/78/EC (which is also applicable to occupational social security schemes[37]) concerning handicap, sexual orientation, religion or belief and age (unless, regarding that last criterion, one were to make an implausible attempt to use the permission offered by Article 6).

36 Opinion No. 131 of 31 March 2011, hyperlink in French http://www.conseildelegalite.be and in Dutch at http://www.raadvandegelijkekansen.be, accessed on 2 April 2015.

37 As first stated by the CJEU in Case C-267/06 *Maruko* [2008] ECR I-1757.

Moreover, according to another observation by Advocate General Jacobs which the CJEU also expressed in *X.*, sex-segregated life expectancy tables are a blunt instrument of comparison, insofar as using them means that the average characteristics of a category are applied arbitrarily to one individual, making it impossible to compare the situation of that person with that of any single individual belonging to the other category.

Conclusion

Is the permission offered to Member States by Article 9 (1) (h) and (j) of Directive 2006/54/EC still compatible (if indeed it ever was) with EU primary law?

In their successive opinions on *Lindorfer*, Advocates General Jacobs and then E. Sharpston referred to 'the general principle of equal treatment' rooted in international instruments and in the democratic traditions of Member States, and which found expression in various provisions such as Article 141 EC and Article 1*bis* (1) of the European Staff Regulations. Then the CJEU's decision in Case C-144/04 *Mangold*,[38] delivered while Ms. Lindorfer's appeal was still pending, confirmed that analysis at least in relation to discrimination based on age. Indeed, concerning gender, the same approach had been adopted by the CJEU as early as 1978 in Case C-149/77 *Defrenne III*:[39] 'there can be no doubt that the elimination of discrimination based on sex forms part of those fundamental [personal human] rights.'[40]

Later on, Directive 2004/113/EC was adopted on the basis of Article 13 (1) EC (now Article 19 (1) TFEU), which simply enables the Council to take steps in order to prevent discrimination based on a variety of criteria, including sex. However, during the course of the *Test-Achats* proceedings, the Charter of Fundamental Rights of the European Union came into force and the CJEU found that Article 5 (2) of the Directive was not reconcilable with the prohibition of discrimination now enshrined in Articles 21 and 23 of the Charter, so that it had to be declared invalid. It should be repeated that the decisive element in the CJEU's reasoning was that the disputed provision permitted Member States to allow exceptions to the prohibition of gender discrimination without any time limit.

Now, the similar permission granted by Article 9 (1) (h) and (j) of Directive 2006/54/EC has in fact been in existence for nearly thirty years, as the same provisions (in a slightly different formulation) were included in Article 6 of Directive 86/378/EEC.

As Directive 2006/54/EC refers specifically in Recital 5 of its preamble to Articles 21 and 23 of the Charter, it can be argued that the Court of Justice might be expected to retain the same reasoning as in the *Test-Achats* case if it had to revisit Article 9 (1) (h) and (j). It seems likely that the Court would then rule that the use of GBAF in occupational pension schemes is incompatible with the provisions of the Charter.

Given that the use of GBAF in occupational pension schemes is, on the one hand, highly suspect as it induces discrimination (mainly against women, occasionally against men) and, on the other, is demonstrably not indispensable to the sound operation of such schemes; Directive 2006/54 should be amended to remove the exception in relation to sex-based actuarial factors. This will also make the European Equal Treatment legislative framework more coherent as the same principle will apply to all grounds of discrimination.

38 [2005] ECR I-9981.
39 [1978] ECR 1365.
40 Case 149/77, Point 27.

Religion and belief discrimination in employment under the Employment Equality Directive: a comparative analysis

Lucy Vickers*

Introduction

The Employment Equality Directive 2000/78[1] requires all Member States to protect against discrimination on grounds of religion and belief in employment, occupation and vocational training. The Directive has been transposed in all Member States. No cases have yet been heard at the Court of Justice of the European Union (CJEU) regarding religion or belief discrimination, although two references have recently been made.[2] However, case law from the European Court of Human Rights (ECtHR) on work-related matters is available, which, together with the national case law, may provide examples of the matters which are likely to arise under the Directive. The purpose of this article is to provide a comparative overview of recent case law in France, Germany and the UK, together with the ECtHR case law, with particular regard to the position of ethos-based organisations, in order to identify any emerging themes. Although they are different legal frameworks, the case law of the ECtHR may have some significance when examining the EU legal framework, as the rights, freedoms and principles included in the ECHR are to be regarded as general principles of EU law.[3] Moreover, the position of the ECHR provided for in the Lisbon Treaty suggests that the Employment Equality Directive should be interpreted to comply with the norms of the ECHR.

The Directive prohibits direct and indirect discrimination,[4] harassment,[5] instructions to discriminate[6] and victimisation[7] on grounds of religion and belief.[8] Direct discrimination occurs where a person is treated less favourably on grounds of religion and belief and includes where employers refuse to employ religious staff altogether, or employ those of one religion on more favourable terms than others. Direct discrimination cannot be justified, although Article 4 provides exceptions for occupational requirements, discussed further below.

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1 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] O.J. L303/16 (the Directive).

2 French Court of cassation decision No. 630 of 9 April 2015 (file No. 13-19855); see also Belgian Court of cassation decision of 9 March 2015. 739-BE-71, 26th March 2015.

3 Article 6(3): 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

4 Article 2(2).

5 Article 2(3).

6 Article 2(4).

7 Article 11.

8 The terms 'religion' and 'belief' are not defined in the Directive.

Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief at a particular disadvantage compared with other persons. It can be justified where there is a legitimate aim for the requirement and the means of achieving the aim are appropriate and necessary.[9] Examples include where the employer imposes requirements in terms of uniforms or hours of work, with which it is difficult for those of particular religions to comply. Any such requirements must be justified as a proportionate means to meet a legitimate aim.

A number of cases have arisen in national courts, and in the cases reaching the ECtHR which illustrate some of the difficulties that can arise when dealing with the protection of religion and belief in employment, occupation and vocational training. Some relate to general matters such as whether the legal protection is limited to behaviours that are obligatory in religious terms; and whether indirect discrimination is limited to cases where a group disadvantage can be identified. Other matters relate to the workplace more specifically, such as dress codes, conscientious objection to work tasks and time off for religious observance. A final concern is the special protection afforded in the Directive to employers with an ethos related to religion or belief. These matters will be considered in turn.

In particular, consideration is given to the case of *Eweida and others v. UK*[10] which involved four cases heard together. Eweida was a member of the check-in staff for British Airways and was refused permission to wear a cross over her uniform. Chaplin, a nurse, was required to remove her cross at work. Ladele, a registrar, sought to be excused from carrying out civil partnerships on the basis of her religious beliefs. McFarlane was dismissed on the basis that he would not perform his role in compliance with the employer's Equal Opportunities Policies. The ECtHR upheld Eweida's complaint, as the employer could not justify the refusal to allow her to wear the cross. However, the other claims were unsuccessful, as in each case the employer had good reason to impose the requirements on its staff. In Chaplin's case, the dress code was necessary for reasons of health and safety, and in the case of Ladele and McFarlane, the employers were entitled to require all staff to offer services to all service users regardless of their sexual orientation. In all three cases, any interference with religious freedom was justified as proportionate to achieve a legitimate aim.

Preliminary issues

One preliminary issue that has arisen in cases involving religion and belief has been to define religion and belief, and its manifestation. The term religion and belief is left undefined in the Directive, and Member States have tended to follow the same approach, although guidance notes are provided in some states.[11] In the UK, explanatory notes show that the definition is likely to be based on Article 9 ECHR and then confirms: 'the religion must have a clear structure and belief system….The criteria for determining what is a "philosophical belief" are that it must be genuinely held; be a belief and not an opinion or viewpoint based on the present state of information available; be a belief as to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance; and be worthy of respect in a democratic society, compatible with human dignity and not conflict with the fundamental rights of others.' Given that this is based on the case law of the ECtHR it is likely that similar guidance will apply in other states.

Article 9 protects both freedom to believe, and freedom to manifest that belief, and it is in respect of the term 'manifestation' that the greater debate has occurred, a debate that could well have implications for the interpretation of the EU Framework Directive. Until the decision in *Eweida and others v. UK* a distinction was drawn between behaviour that was motivated by religion, which was not protected, and

9 Article 2.
10 ECtHR, *(Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10)* JUDGMENT 15 January 2013.
11 See Chopin, I. and Germaine-Sahl, C. (2013), 'Developing Anti-Discrimination Law in Europe', *European Network of Legal Experts in the Non-discrimination Field,* October at p. 15.

that which was mandated, which was.[12] This could mean that the question of whether the wearing of a religious symbol to work was protected or not would depend on whether the wearing of the symbol was mandatory or 'core' to the religion or not. This has led to significant debate in cases in the UK regarding whether or not a particular practice was strictly required by the religion, an enquiry which is not always appropriate for secular courts.[13] In the context of the Directive, this narrow approach to defining manifestation could mean that few religious practices would be protected. Instead, a court could find that there was no discrimination because of the religion, because the religious adherent has merely chosen to undertake a religion-related practice.

However, this requirement was relaxed in the *Eweida* case where it was held that as long as there is a sufficiently close and direct nexus between the act and the underlying belief there is likely to be a manifestation of religion.[14] In the context of the Directive, the implication of this finding will be that many of the practices to which the Directive may apply, such as adaptations to uniform codes, and requests to be exempt from performing certain work tasks, will be viewed as religious practices which are *prima facie* protected from direct or indirect discrimination.

An additional obstacle to claims under the ECHR was created by the specific situation rule, which restricts protection where a person voluntarily submits to a system of rules which limits the manifestation of religion: for example, choosing to go to work. This had been interpreted to mean that Convention rights have not applied at work because the worker remains free to resign.[15] In the context of the Directive, this could mean that employers could argue that there is no disadvantage to the employee because he or she can chose to leave. Again, in *Eweida and Others v. UK* the ECtHR relaxed this rule, and accepted that work-based restrictions on a person's exercise of religious freedom can amount to a *prima facie* infringement of the right. Instead, the fact that an employee could resign might be relevant in assessing whether a restriction on religious freedom was proportionate.[16]

A final general issue that has arisen in the UK in particular relates to the definition of indirect discrimination. In the national court in *Eweida* the Court of Appeal held that indirect discrimination requires a disparate impact on a group, and could not protect a single believer in the absence of others who shared the same belief.[17] In the ECtHR, Eweida was successful, suggesting that the Directive (and UK domestic law) should be interpreted so as to enable indirect discrimination to apply to individual claimants. Indeed, the Directive is worded solely in the conditional ('where an apparently neutral provision… would put persons of a particular religion or belief… at a particular disadvantage…'), and this has already led to the suggestion that it covers individual disadvantage.[18] The decision of the ECtHR in Eweida suggests that this reading is correct, despite the fact that indirect discrimination is traditionally understood to address group disadvantage.

12 *Arrowsmith v. UK* [1978] 3 EHRR 218.
13 See further Vickers, L. (2010), 'Religious discrimination in the workplace: An emerging hierarchy?', *Ecclesiastical Law Journal*, 12(3) pp. 280-303.
14 *Eweida* at para. 82.
15 *Ahmad v. UK* (1981) 4 EHRR 126. *Stedman v. UK* (1997) 23 EHRR CD168; *Thlimmenos v. Greece* ECtHR 2000 – IV, (2001) 31 EHRR 15.
16 '…where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.' *Eweida* at para. 83.
17 *Eweida v. British Airways* [2010] EWCA Civ 80 (Court of Appeal) at paras 13-24. For discussion see Vickers, L. (2009), 'Indirect Discrimination and Individual Belief: Eweida v. BA', *Ecclesiastical Law Journal,* p. 197. See also decision of the UK Employment Appeal Tribunal, *Chatwal* v. *Wandsworth Borough Council* [2011] UKEAT 0487_10_0607.
18 Bamforth, N., Malik, M., and O'Cinneide. C. (eds) (2008), *Discrimination Law, Theory and Context,* Sweet and Maxwell, London, at p. 307-308.

Work-related concerns

Dress codes and religious symbols[19]

If restrictions on the wearing of religious symbols at work are directed at a specific religion only then they may amount to direct discrimination, and the referral to the CJEU from Belgium[20] involves the question of whether a prohibition on wearing the headscarf can amount to direct discrimination. However, if the rule is applied to all, then it would seem unlikely that a ban would be directly discriminatory, as the less favourable treatment will not be on grounds of religion, but on grounds of refusing to comply with a dress code. However, requirements not to wear head coverings, to be clean shaven, for women not to wear trousers and other such uniform rules may potentially be indirectly discriminatory if they put employees from some religious groups at a disadvantage compared to others. Where this is the case, any such rules will need to be justified as a proportionate means to achieve a legitimate aim. In determining its proportionality, courts may consider whether any restriction on dress interferes with Article 9 rights, given the need to respect ECHR norms in interpreting the Directive.

Approaches to accommodating religious needs with regard to uniforms vary significantly across Europe. In the UK,[21] religious dress is often accommodated. Two cases illustrate the UK. First, in *Azmi v. Kirklees Metropolitan Borough Council,*[22] a teaching assistant was dismissed for refusing to remove her niqab when assisting in class. The Employment Appeal Tribunal held that the restriction on wearing the niqab was potentially indirectly discriminatory, but was justified as it was a proportionate measure given the interests of the children. In order to have the best possible education, the children needed to be able to see Azmi's face. The employer had undertaken some investigation to see if the needs of the children could be met with the niqab in place, and so they had evidence to back up their case that the indirect discrimination caused was justified. In contrast, in *Noah* v. *Sarah Desrosiers (trading as Wedge)*[23] a Muslim woman who applied for a position in a hairdressing salon succeeded in her indirect discrimination claim when Desrosiers stated that she would be required to remove her *hijab* while at work if appointed. The employer tried to justify this rule on the basis that it was needed to promote the particular image of the hairdressers. The employment tribunal found that the requirement for hairdressers to have their own hair visible was not a proportionate means of achieving this aim, in particular because in this case the employer had not brought any evidence that this was the case. These two cases suggest that in the UK employers will need to have clear evidence that the requirement is needed before being able to impose dress codes which have an indirectly discriminatory effect on staff who cannot comply for reasons related to religion or belief.

In contrast in Germany,[24] restrictions on religious symbols such as the headscarf are more widely imposed, although they have not always been found to be proportionate. The Federal Labour Court has held that the dismissal of a salesperson based on the wearing of a headscarf was invalid,[25] and the Federal Constitutional Court has held that a school teacher must not be denied employment on grounds of wearing a headscarf.[26] However, these decisions were fact specific and did not suggest that the

19 For a general discussion of the law relating to the wearing of religious symbols at work in a number of EU states, see van Ooijen, H. (2012), *Religious Symbols in Public Functions: Unveiling State Neutrality. A Comparative Analysis of Dutch, English and French Justifications for Limiting the Freedom of Public Officials to Display Religious Symbols*, Intersentia: Antwerp.

20 Belgian Court of cassation decision of 9 March 2015, not yet published.

21 For more detail see McColgan, A. (2014), *Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC, Country report 2013, UK.* http://www.migpolgroup.com/portfolio/country-reports-on-measures-to-combat-discrimination-2013/.

22 [2007] Industrial Cases Reported 1154.

23 ET 2201867/2007.

24 For more detail see Mahlmann, M. (2014), *Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC, Country report 2013, Germany*. http://www.migpolgroup.com/portfolio/country-reports-on-measures-to-combat-discrimination-2013/.

25 Federal Labour Court 10 October 2002, 2 AZR 472/01.

26 Bundesverfassungsgericht, 24 September 2003, *Ludin*, 2BvR 1436/02.

wearing of headscarves should generally be allowed. The German case law has suggested that proper procedural processes are necessary to impose a ban on religious clothing, but that where this has been done, such a ban has not necessarily infringed religious freedom. This led to the introduction of new laws prohibiting the display of religious symbols in violation of the principle of neutrality in several German Länder.[27] This limited level of protection for those who wish to wear religious symbols can also be seen in the 2014 decision of the Federal Labour Court case where a nurse wished to wear an Islamic headscarf at her work in a Christian hospital. Here the Court decided that the duty of neutrality could justify the prohibition of the headscarf during working times.[28] In particular, the Court took account of the religious orientation of the hospital in reaching its decision.

In its most recent decision,[29] however, the German Federal Constitutional Court has been stronger in protecting the religious freedom of workers when it comes to wearing religious symbols. Whilst it confirmed that restrictions on headscarves can be imposed where there is a legitimate aim, it was strict in its approach to justification and proportionality. The cases involved a school social worker and teacher who wished to wear the headscarf, but had been barred from doing so on grounds of the religious neutrality of the state. The Federal Constitutional Court held that the restrictions were not justified as they were disproportionate on their facts. There was no concrete danger of conflict on the facts as the symbols were not accompanied by any proselytising. Moreover, the court noted that the symbol did not violate the neutrality of the state as it was attributed to the person wearing the symbol, rather than to the state.

In France[30] there has been extensive debate on dress codes and religion, particularly relating to the headscarf. In general, the principle of neutrality applies in the public sector so that religious symbols are banned in public sector employment.[31] More recently, the scope of protection in the private sphere has also been under scrutiny in the *Baby Loup* case.[32] In the final hearing in the case, the plenary Cour de cassation upheld the dismissal of a nanny, working in a private nursery, who had refused to remove her headscarf, contrary to the nursery's policy. However, this decision was the culmination of four previous hearings of the case, which had reached different decisions on varied legal bases, perhaps reflecting the conflicts in French society regarding the issue of secularity. Although the decision that the nanny did not have the right to wear the headscarf in the private nursery might at first sight be taken to suggest that the principle of *laïcité* extends to the private sector, in fact the Cour de cassation was clear that this principle did not apply beyond the public sector. Instead, the decision was based on the view of the court that, in the fact-specific situation of the implementation of this particular day care centre, the restriction on the headscarf was a legitimate restriction on religious freedom under the provisions of the Labour Code. It thus seems not to provide a clear precedent on how the French courts would decide a case brought under the Directive, as the requirements of the Directive were not directly addressed by the Court.

The case is complex and involved a conflict between different jurisdictions including two decisions of the Cour de cassation itself, and in which very divergent reasoning was used. At the first hearing the principle of *laïcité* was applied because according to the labour court the nursery offered a service of public interest. This basis for the decision was rejected by the Court of Appeal of Versailles which based

27 E.g. Baden-Württemberg, Bavaria and Hesse. See Chopin, I. and Germaine-Sahl, C. (2013), Developing Anti-Discrimination Law in Europe', *European Network of Legal Experts in the Non-discrimination Field,* October at p. 17.

28 The Federal Labour Court (Bundesarbeitsgericht), on 24 September 2014 (case n° 5 AZR 611/12).

29 German Federal Constitutional Court – 1 BvR 471/10, 27 January 2015.

30 See further Latraverse, S. (2014), *Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC, Country report 2013, France*. http://www.migpolgroup.com/portfolio/country-reports-on-measures-to-combat-discrimination-2013/.

31 This neutrality requirement includes private law employees working for a company entrusted with a mission of public service. See Conseil d'Etat 28 June 1963 Narcy, Grands arrêts de la jurisprudence administrative 293 and Conseil d'Etat 22 February 2007 APREI (association du personnel relevant des établissements pour inadaptés), Grands arrêts de la jurisprudence administrative 294.

32 Cour de cassation Assemblée Plénière 25 June 2014 (2014) *Recueil Dalloz*, 1386. See Hunter-Henin, M. (2015), 'Living Together in an Age of Religious Diversity: Lessons from *Baby Loup* and *SAS*,' *Oxford Journal of Law Religion,* 4 (1), pp. 94-118.

its reasoning on children's rights, and emphasised the fact that religious neutrality duties were mandated by the nursery's mission: offering care to young children. A further review by the Cour de cassation Social Chamber quashed the decision and found that there was no extension of the duty of neutrality to a public interest mission defined by offering care to young children. The case was then remanded to the Court of appeal of Paris which found that the restrictions on the employee's rights were justified by the secular ethos of the nursery.[33] In a final review, the Cour de cassation Plenary Chamber concluded that the ban was lawful but provided a different legal basis for this finding, basing its decision on France's Labour Code,[34] which allows for reasonable restrictions on an employees' freedom of religion, provided that they are proportionate and justified by the nature of the employment (a different provision from that protected against discrimination). The court confirmed that *laïcité,* understood as neutrality and secularity of the state protecting equal relations with all religions, was not to be extended beyond the public service to impose duties on persons. However, it concluded that a general ban on the headscarf could still meet legal proportionality.

What can be seen from this brief comparison of the position in the three states is that there is a variety of practice in Europe with regard to the protection available for the wearing of religious symbols at work. When a case reaches the CJEU to determine the scope of the Directive on the issue of indirect discrimination and dress codes,[35] it may well look to the case law of the ECtHR to find guidance on how to resolve these issues.

The issue of dress codes has been considered by the ECtHR many times,[36] most recently in *Eweida and others v. UK,*[37] where two of the cases involved dress codes. In the first case, the court found in favour of the employee, in the second, the employer was able to justify the restriction on religious symbols. Eweida, a member of staff at British Airways, a private company, was refused permission to wear a cross over her uniform. Here the chamber of the ECtHR held that the restriction was not proportionate: factors which aided this decision included the fact that other forms of religious dress such as headscarves and turbans were allowed; and the argument that the employer needed to maintain its corporate image was not very strong when weighed against Eweida's freedom of religion. In comparison, Chaplin, a nurse, was required to remove the cross that she wore on a chain around her neck, for reasons related to health and safety, and the Court held these reasons were sufficient to outweigh the employee's religious interests.

The approach of the court was based on proportionality, in which a range of factors can be considered in assessing whether a restriction on religious symbols at work is justified. In assessing the proportionality of any interference with religious freedom, the ECtHR applies some discretion ('margin of appreciation') to States in their application of the Convention. The use of the margin of appreciation at European level reflects the fact that there is often little consensus across Europe on these matters, as seen by the variety of practice between states described above. It effectively allows the Court to take a deferential approach to national practice. Reliance on the margin of appreciation to determine difficult cases where there is a lack of consensus was confirmed in the ECtHR case of *SAS v. France,*[38] and makes it difficult to predict how proportionality might be determined in any particular case. What is as yet unclear is whether the CJEU will apply an element of discretion in applying the Directive on matters over which there is so little consensus and so much debate across Europe.

An alternative way to address religious symbols may be to use the genuine occupational requirement exception, discussed below. A case has recently been referred to the CJEU by France relating to the genuine

33 This is despite the fact that France has not transposed Article 4(2) of Directive 2000/78.
34 Articles L. 1121-1 and L. 1321-3.
35 Note that the Belgian referral relates to direct discrimination only.
36 E.g. *Dahlab* v. *Switzerland* Applic. No.42393/98 Decision of 15 Feb 01; *Sahin* v. *Turkey*, Application No. 44774/98 Judgment of 10 November 2005.
37 The case was heard by the Court of Appeal in England and Wales as *Eweida v. British Airways* [2010] EWCA Civ 80. It was then joined with others in an appeal to the ECtHR and heard as *Eweida and others v. the United Kingdom* (2013) 57 EHRR 213.
38 Application No. 43835 (ECtHR Grand Chamber, 1 July 2014); for a summary of the case, see also pp. 65-66 of this issue.

occupational requirement, questioning whether a rule of religious neutrality forbidding the wearing of the Islamic veil can qualify as a determining occupational requirement in a commercial context.[39] If the answer is affirmative, this will provide an alternative way to address the question of religious dress codes in employment and occupation. However, even if approached as a genuine occupational requirement rather than as a matter of indirect discrimination the question of proportionality will remain pivotal, as such occupational requirements must also be justified as a proportionate means to achieve a legitimate aim.

Time off for religious observance

The refusal by an employer of a request for time off for religious holidays or prayer time may amount to potential indirect discrimination as it will put religious individuals at a disadvantage compared to others, and so any such refusal will need to be justified. Two cases from the UK may illustrate the approach. The first involved the refusal of permission for time off work on Sundays for a Jehovah's Witness, making it impossible for her to attend worship.[40] The tribunal decided that the requirement to work on Sundays was not justified because there were other employees who could have covered the Sunday shift without difficulty. In contrast, in *Mba v. London Borough of Merton*[41] a care worker who had to work on Sundays was unsuccessful in claiming religious discrimination, with the Court deciding that the refusal was a proportionate response by the employer in the circumstances, as it was not possible to arrange rotas to cover the work.

In addition to the use of indirect discrimination law principles to deal with requests for time off for religious observance, in France separate legislation addresses the issue in the public service. Here ministerial instructions[42] allow the authorisation of requests for religious holidays not foreseen by the French legal holiday calendar.

Conscientious objection

A third matter that has arisen in the case law on religion and belief at work relates to conscientious objection to work tasks. For example, staff may ask to be excused from tasks such as selling alcohol or handling meat products. The requirement to undertake the task will put the religious employee at a disadvantage in comparison with others, and so a refusal to excuse an individual from such a task may be indirectly discriminatory unless justified. For example, it will likely be proportionate to refuse a request from a butcher to be excused from handling meat; but a refusal of a request from an office worker to be excused from occasional duties to clean a fridge due to the handling of meat products might not be proportionate.[43]

Cases have also arisen where the refusal of a task has been on grounds which themselves are discriminatory, and these cases are more complex. Cases have arisen in several jurisdictions, including the UK, involving marriage registrars who wish to be exempted from carrying out civil partnerships. These cases involve indirect discrimination; the requirement to carry out the civil partnership is a neutral requirement which causes disadvantage to the religious employee. In the UK, courts have found the refusal to allow a request for exemption to be a proportionate means to achieve the legitimate aim of equal treatment on grounds of sexual orientation.[44] This finding was upheld by the ECtHR in *Eweida and others v. UK*: the restriction on religious freedom is justified as a proportionate means to protect the equality rights of others.

39 Court of cassation referral to the CJEU of 9 April 2015 (n°13-19855) 13 April 2015.
40 *Thompson v. Luke Delaney George Stobbart Ltd* [2011] NIFET 00007_11FET (15 December 2011) (Employment Tribunal).
41 *Mba v. London Borough of Merton* [2013] EWCA Civ 1562 (Court of Appeal).
42 Ministerial instructions of the Ministry of Public Service No. 2106 of 14 November, 2005 regarding authorisations of absence on religious grounds. This reiterates ministerial instruction No. 901 of 29 September, 1967.
43 See *Chatwal* v. *Wandsworth Borough Council* [2011] UKEAT 0487_10_0607 (Employment Appeal Tribunal).
44 *Ladele v. Islington Borough Council* [2009] EWCA Civ 1357 (Court of Appeal); then heard with *Eweida and Others v. the United Kingdom*, Application No. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

Occupational Requirements

The Directive contains two genuine occupational requirement exceptions: a narrow general exception for all employers[45] and a broader exception for organisations with a religious ethos.[46] Article 4(1) provides an exception to the duty not to discriminate where, having regard to the occupational activities or their context, being of a particular religion is a genuine and determining occupational requirement of the job, and there is a legitimate objective for the requirement and it is proportionate. It only applies where there is a very clear connection between the work to be done and the characteristics required: the occupational requirement must be genuine *and determining*, and it must be proportionate in the particular case involved. It will be necessary to consider the requirements of the job very closely before being able to use the exception. For example, a mosque may require a Muslim imam, or a church may require a priest to be Christian.

Ethos-based organisations

Under Article 4(2), which applies only to organisations which have an ethos based on religion and belief, differences in treatment will not be discriminatory, where by reason of the nature of the activities or the context in which they are carried out, a person's religion or belief constitutes a genuine legitimate and justified occupational requirement, having regard to the organisation's ethos. The aim of the provision is to allow an organisation with an ethos based on religion or belief to require loyalty and good faith to its ethos, and it applies to a broader category of staff, including those whose jobs are not determinedly religious in nature. However, Article 4(2) does not justify discrimination on other protected grounds.

Occupational requirements related to religion or belief

Not all states have transposed Article 4(2).[47] The UK has transposed Article 4(2), and an exception for ethos-based organisations is contained in Schedule 9 of the Equality Act 2010. In these cases the religious ethos of the employer can be taken into account in assessing the proportionality of any religious occupational requirement.[48] An example of the use of this broader exception for religion and belief ethos employers can be seen in *Muhammed v. The Leprosy Mission International*,[49] where a small Christian charity was allowed to refuse applications from non-Christians, because Christianity permeated the organisation, with prayers starting each day. The tribunal held that being a Christian was an occupational requirement of the role and drew attention to the fact that Christian beliefs were at the core of the employer's activities and that employing a non-Christian would have a very significant adverse effect on the maintenance of that ethos.[50] In effect, as long as there is a sufficiently strong religious element to the staff role, the court may find that religious requirements are proportionate, even where the work is not inherently religious in nature. In addition, special rules apply in schools in England and Wales,[51] allowing schools with a religious character to appoint staff in accordance with the religious ethos.[52]

Germany too has transposed Article 4(2),[53] although its wording is different from that of the Directive. In German law exceptions exist for religious communities, to reflect the principle of the neutrality of the state and the autonomy of the Church. The autonomy of churches extends to institutions related to

45 Article 4(1).
46 Article 4(2).
47 See Vickers, L. (2006), *Religion and Belief Discrimination – The EU Law,* European Commission, Office for official publications of the European Communities, Luxembourg, available at http://www.migpolgroup.com/portfolio/religion-and-belief-discrimination-in-employment-the-eu-law/.
48 Equality Act 2010 Schedule 9 (3).
49 *Muhammad v. The Leprosy Mission International*, ET 2303459/0989, 16 December 2009 (Employment Tribunal).
50 *Muhammed v. The Leprosy Mission International,* ET 2303459/0989.
51 School Standards and Framework Act 1998 ss 58-60.
52 See Vickers, L. (2009), 'Freedom of Religion and Belief and Employment in Faith Schools', *Religion and Human Rights,* p. 1.
53 See further Mahlmann, M. (2014), *Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC, Country report 2013, Germany*. http://www.migpolgroup.com/portfolio/country-reports-on-measures-to-combat-discrimination-2013/.

the church, where the institution has a substantial relationship to the religious mission of the church. For Christian churches it has been accepted that charitable activities, such as running hospitals, are encompassed by the religious mission of the Christian faith.

This means that employment can be terminated if duties and obligations of loyalty are violated. For example, a doctor in a religious hospital could be dismissed if she leaves the church concerned or marries a divorced man if this contradicts the ethos of the church concerned. Similarly, an employee in a childcare centre supported by a Catholic organisation could be dismissed for leaving the Catholic Church, even though the child care centre was financed by the state.[54]

In addition to the special provisions for Churches as employers, a more general exception applies in Germany for employers with a religious ethos, allowing regard to be had to that ethos in setting occupational requirements. However, in order to use the exception, the belief-based requirement must constitute a 'substantial, lawful and justified' occupational requirement for the position.[55] These provisions are capable of being interpreted to comply with Article 4(2), although in each case any exception will need to be justified as proportionate.

In France[56] Article 4(2) has not been directly transposed. This means that ethos-based organisations will be governed by the narrower exception in Article 4(1), and will be unable to impose religious or loyalty requirements on employees other than those with clearly religious roles, such as the clergy. Nonetheless, in the *Baby Loup* case the Court of appeal of Paris referred to Article 4(2), and the argument was accepted by the CA Paris that the nursery was able to require the staff member to remove the headscarf because the nursery had a secular ethos. It was therefore allowed to require a stricter secular dress code than other employers without such an ethos. The 2014 Cour de cassation decision reached the same conclusion as the Court of appeal of Paris, as it also upheld the ban on the headscarf, but the legal basis for its decision was different.[57] In a similar case, this issue has now been referred to the CJEU.[58]

Occupational requirements related to other grounds

However, Article 4(2) makes clear that the occupational requirement exception does not make discrimination on other grounds lawful. Thus, for example, a requirement to be Christian to work in a Christian hospital may be lawful, but it will not be lawful if that requirement also discriminates on grounds of gender or sexual orientation.[59] If the sex or sexual orientation discrimination is indirect, for example because the requirement relates to loyalty to religious teaching rather than gender or orientation directly, then the requirement could be lawful if it can be justified as a proportionate means to achieve a legitimate aim.

In Germany, cases have arisen involving employees' homosexuality, which is, if openly manifested, interpreted by some religious organisations as a breach of such duties of loyalty. There is contesting case

54 Cf. e.g. Rhineland-Palantinate Land Labour Court, 2 July 2008, 7 Sa 250/08: no discrimination if employee in a nursing home which is attached to a Church is dismissed because the employee leaves the Church, as this is justified by a breach of the duty of loyalty (parties settled at the next instance, Federal Labour Court, 21 December 2010, 2 AZR 516/09); Federal Labour Court, 25 April 2013, 2 AZR 579/12 confirming that leaving a Church forms a sufficient reason for the dismissal of an educational social worker, employed for social work without religious content with children in a state-financed institution run by a Catholic charity.

55 Berlin Labour Court (*Arbeitsgericht Berlin*); 18 December 2013; 54 Ca 6322/13.

56 See further Latraverse, S. (2014), *Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC, Country report 2013, France*. http://www.migpolgroup.com/portfolio/country-reports-on-measures-to-combat-discrimination-2013/.

57 Article 4(2) of the Directive is not applicable to *Baby Loup* according to the 2014 final Cour de cassation decision because *laïcité* cannot be relegated to a mere belief or ethos.

58 French Court of cassation decision No. 630 of 9 April 2015 (file No. 13-19855).

59 However, see the position in the UK which allows for a specific exception for those employed for the purposes of an organised religion: Equality Act 2010 Schedule 9(2). In the English High Court case of *R (on the application of Amicus – MSF and others) v. Secretary of State for Trade and Industry and others* [2004] IRLR 430 (English High Court) it was confirmed that this is to be narrowly interpreted to cover clergy or their equivalent whose work involves religious practice.

law on this matter,[60] some courts allowing for different treatment on this ground, others not. For example, in one case[61] homosexuality was not a sufficient reason for refusing to admit an applicant for education as a carer for disabled persons; in contrast, in another[62] the fact that an applicant was in a registered partnership was justified as a reason not to employ the applicant as head of a Catholic Kindergarten.[63] This matter raises interesting issues relating to the position of clergy. Although the matter has not been tested in the CJEU, it is likely that religious requirements imposed on clergy (or their equivalent) that discriminate on other grounds will remain lawful because the roles will have occupational requirements related to sex or sexual orientation; and these requirements are likely to be proportionate to the aim of maintaining the autonomy of the churches. In the UK, an additional exception applies to the appointment of persons employed for the purposes of an organised religion allowing gender and sexual orientation discrimination in appointments where necessary to comply with religious doctrine or to avoid conflicting with the strongly held beliefs of a significant number of the religion's followers.[64] Other states do not have this additional exception, but have exempted the Church altogether from the protection of the Directive. In Germany, Section 9 AGG contains an exception allowing that differences of treatment on the grounds of the religion or belief of the employees of a religious community does not amount to discrimination where there is a justified occupational requirement to be of a particular religion or belief, with regard to the ethos of the religious community or organisation in question and by reason of their right to self-determination or by the nature of the particular activity. This means that not only is any religious discrimination in the appointment of clergy likely to be lawful, but any additional discrimination on grounds of gender and sexual orientation in relation to ordination may also be lawful if it can be justified as a genuine occupational requirement that is proportionate given the nature of the employer.

In effect, even where states have not provided special rules for religious ethos organisations, a religious rule related, for example, to the employment of male priests, which also discriminates on grounds of gender, would be likely to be held to be proportionate as a means of upholding the religious freedom of churches to determine their own priesthood.[65]

Genuine occupational requirements and the ECHR

The genuine occupational requirement exception as it applies to religious ethos organisations has the potential to undermine the equality rights of those to whom it is applied. It is thus worth considering whether it is likely to comply with the human rights standards in the ECHR. Under the ECHR, Article 9 is reasonably clear that the autonomy of religious groups should be respected; they should be able to determine their own leadership, for example.[66] This means that courts will be wary of restricting a religious organisation in its choice of clergy and so religious requirements imposed on priests or other religious leaders would be likely to be lawful, even if they discriminate on other grounds such as sex. However, where the work is less directly involved in religious practice, religious requirements are likely to be more strictly scrutinised. For example, in *Obst v. Germany* and *Schüth v. Germany*,[67] the ECtHR had to decide whether the dismissal of a broader category of church employee for breaching religious teaching

60 Mahlmann, M. (2014), *Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC, Country report 2013, Germany*, at page 83. http://www.migpolgroup.com/portfolio/country-reports-on-measures-to-combat-discrimination-2013/. On this matter, with reference to some case law, see Wedde in: Däubler/Bertzbach, *AGG* § 9 para. 58.

61 Land Labour Court Baden-Württemberg, 24 June 1993, 11 Sa 39/93, NZA 1994, 416.

62 Labour Court Stuttgart, 28 April 2010, 14 Ca 1585/09, NJOZ 2011, 1309.

63 For more detail see Mahlmann, M. (2014), *Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC, Country report 2013, Germany*. http://www.migpolgroup.com/portfolio/country-reports-on-measures-to-combat-discrimination-2013/.

64 Equality Act 2010 Schedule 9 para 2.

65 This suggests that the special protection in the UK under Schedule 9 para. 2 of the Equality Act 2010 is likely to accord with the Directive.

66 See for example, *Hasan and Chaush v. Bulgaria*, Application No. 30985/96, 26 October 2000, Para. 62; and *Serif v. Greece*, Application No. 38178/97, 14 December 1999.

67 *Obst v. Germany*, Application No. 425/03, 23 September 2010; *Schüth v. Germany*, Application No. 1620/03, 23 September 2010. The cases were brought under Article 8, but religion and belief pervade the reasoning of the Court, so they are discussed here.

was lawful. In both cases the members of staff of religious organisations had been involved in extra-marital relationships. In both cases, the ECtHR recognised the right of the employer to require loyalty to Church teaching from these staff. However, they held that the religious interests of the employer needed to be balanced against the rights of the staff in question, in terms of their privacy rights and rights to family life, but also in terms of other factors of relevance to the case, such as the ease with which they might find alternative other work.[68] Thus the right to religious freedom of the employer was recognised, but needed to be balanced against other competing interests.

This suggests that if these issues are considered by the CJEU under Article 4 of the Directive, the Court will need to consider the right to religious freedom of the religious employer along with other competing interests such as the equality, privacy and dignity rights of employees when assessing the proportionality of any occupational requirement imposed by an ethos-based employer.

Conclusion

This comparative overview of the law in France, Germany and the UK identifies some potential areas of difficulty in the application of Directive 2000/78 as it applies to religion and belief equality. The developing case law of the ECtHR may help create a methodology to address these difficulties in a way that is respectful of the long held commitment of each state to the values of human dignity and equality.

The first issue relates to the extent of religious practice that is protected by the Directive. For example, in some of the UK cases, the question of whether the religious practice is sufficiently closely related to religious belief has affected the question of justification, with the suggestion that restrictions on non-'core' beliefs are more likely to be proportionate.[69] The decision of the ECtHR in *Eweida* that religious practice that is sufficiently linked to religious belief will be protected along with practices which are strictly required by the religion should lead to broader protection for a wider range of staff with a religion or belief, whether or not those belief systems include strict practice requirements.

A second issue relates to the protection of individual believers. In *Eweida* the ECtHR upheld the rights of the staff member, even though no group was identified that shared her belief. The wording of the Directive is open on this issue, and it may well be that should such a case arise in future, the CJEU will follow the lead of the ECtHR in protecting the manifestation of individual beliefs at work, where it is proportionate to do so.

The final and overarching difficulty that is likely to confront the CJEU with regard to the protection of equality on grounds of religion and belief is the lack of consensus in the approach to religious matters across the EU. This is demonstrated perhaps most clearly with regard to the different approaches to the wearing of religious symbols, such as the headscarf, at work in the different national courts.

This matter is likely to be addressed via the notion of proportionality, the concept used by member states to deal with many of the complex issues that arise in relation to religion and belief protection in employment and occupation. This allows for a range of factors to be taken into account in assessing whether exceptions to the principle of equality can be justified, factors such as whether the employer is in the public or private sector, whether the employer has an ethos based on religion or belief; the business or organisational needs of the employer, any competing interests such as the equality right of others etc. For example, in the 2014 case in Germany, the Federal Labour Court took into account the religious ethos of the hospital in deciding that the duty of neutrality could justify the refusal of a nurse's request to wear a headscarf. Similarly, in the UK case of *Azmi* the court could consider the need of the employer to provide the best education for children in assessing as proportionate the ban on wearing a face veil in class.

68 The Court reasoned that the organist would find it difficult to find other work; the PR Director less so.
69 *Ladele v. Islington Borough Council* [2009] EWCA Civ 1357 (Court of Appeal) at para. 52.

The flexibility of this approach allows for sensitive decisions to be made, but it also militates against certainty and can allow different outcomes in what initially look like similar cases. Moreover, the flexibility inherent in the concept of proportionality allows for very different approaches to develop within and between Member States. For example, in France, the headscarf is banned in public sector workplaces; and the wearing of the integral veil is banned in all public spaces. In the case of the German nurse, the fact that the hospital was a Protestant foundation was relevant to the finding that the ban was justified, but in the later Constitutional Court cases the facts led to a different conclusion. In the UK, headscarves are routinely worn throughout the public sector, and the case of *Azmi* illustrates well the strong contrast with other Member States. The employer in the case was a Church of England school, a fact that did not feature in the reasoning of the court; and the ban was imposed only on the wearing of the face veil not on the headscarf which she could continue to wear.

The ECtHR approaches the lack of consensus by relying on the margin of appreciation, allowing a clear area of discretion to national courts in the application of the Convention. This approach is fitting for a court which aims to ensure that no Member State falls below the standard required by the Convention in protecting individual rights. However, it is unclear whether such an approach is appropriate for the CJEU which is charged with ensuring the uniformity and efficacy of EU Law.[70]

There may be good reasons for the CJEU to take a deferential approach to national courts when it comes to matters of religion and belief. For example, the need to respect national identity is guaranteed in Article 4(2) of the TEU, which provides that 'the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.'

Moreover, in cases involving fundamental rights from beyond the sphere of equality law, the CJEU has allowed a 'margin of discretion', thereby introducing an element of flexibility in interpretation, in cases such as *Schmidberger v. Austria*,[71] and the *Omega* case.[72] In these cases the CJEU accepted that EU law must be interpreted in the light of fundamental human rights principles. In effect, there is room for different standards of protection for fundamental rights to be accepted as legitimate within the EU Member States, to reflect different national contexts and traditions, as long as the standards of protection do not fall below a minimum standard.

In interpreting the Directive in religion and belief cases, the CJEU will no doubt seek to ensure compliance with the human rights principles of the ECHR. It will be able to use the flexibility in the concept of proportionality to give due regard to the importance of upholding religious freedom when interpreting the Equality Directive. What remains less clear is the extent to which it will, in the process, maintain the current diversity in approach between states to protecting religion and belief at work.

70 See the *Simmenthal case* (case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, [1978] ECR 629).
71 *Schmidberger Internationale Transporte Planzüge v. Republik Österreich* Case C-112/00.
72 *Omega v. Oberburgermeisterin der Bundesstadt Bonn* Case C-36/02.

Domestic work in the Netherlands: a job like no other

Is the exclusion from certain social rights for part-time domestic workers acceptable from an EU and international law perspective?

Leontine Bijleveld*

Introduction

Part-time domestic workers have never enjoyed proper social protection in the Netherlands. Their current condition does not reflect an overlooked relic of the past. In the 21st century the legal definition of domestic workers, a group that lacks proper social protection, has actively been extended; and consequently the numbers who fall into this category of insecure work has increased. What is striking from a gender equality perspective is that more than 95 % of these workers are female.[1] Yet in the public and political debate hardly any attention is paid to the fact that domestic work is mainly carried out by women. As a consequence the issue of (indirect) sex discrimination has not been properly discussed.[2]

The inferior legal position of (part-time) domestic workers in the Netherlands is unique in the EU in two ways. First, (part-time) domestic workers are denied certain social rights that all other employees enjoy. Second, this underprivileged position is extended to more than 100 000 workers in publicly-financed homecare.[3]

This article discusses the position of (part-time) domestic workers in Dutch social law from an EU and international law perspective. Section 1 describes the present position of (part-time) domestic workers in

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1 Zandvliet, K. and Tanis, O. (2013), *Doorrekening varianten huishoudelijk werk. Eindrapport* (Domestic work calculation variants. Final report. SEOR Erasmus School of Economics Rotterdam p. 21. *Dienstverlening aan huis: wie betaalt de rekening* (Service at Home: who pays the Bill?), Advies commissie Dienstverlening aan huis (Advice by the Services at Home Advisory Commission), March 2014 p.10 Annex to: *Parliamentary Papers II* 2013/14 29 544 no. 507.

2 That was the reason why Eva Cremers and myself started to research the matter. This article is based on that research as well as on a recent update thereof: Bijleveld, L. and Cremers, E. (2010), *Een baan als alle andere?! De rechtspositie van deeltijd huishoudelijk personeel.* (A job like any other?! The legal position of part-time domestic workers), Vereniging voor Vrouw & Recht Clara Wichmann, Leiden. Online available: http://www.vrouwenrecht.nl/2010/10/01/leontine-bijleveld-en-eva-cremers-vereniging-voor-vrouw-en-recht-clara-wichmann-leiden-2010/ (accessed 1 April 2015). Bijleveld, L. (2015), *Vooruitgang in de rechtspositie van deeltijd huishoudelijk personeel? Een overzicht van ontwikkelingen 2010-2014* (Progress in the legal position of part-time domestic workers? An overview of the developments 2010-2014). In PDF available at http://www.vrouwenrecht.nl/opinie. Both publications contain detailed references and sources.

3 *Dienstverlening aan huis: wie betaalt de rekening* (Service at Home: who pays the Bill?), Advies commissie Dienstverlening aan huis (Advice by the Services at Home Advisory Commission). March 2014 p. ii. Annex to: *Parliamentary Papers II* 2013/14 29 544 no. 507.

the Netherlands in social law and provides some historical background to this lesser status compared to other groups of employees in the country. In Section 2 the reasons submitted by the Government for the different position of (part-time) domestic workers are discussed. Section 3 highlights a specific category of domestic workers in homecare. Another specific group of subsidised care workers is discussed in Section 4. The relevant EU standards are described in Section 5. Section 6 provides a discussion on whether the indirect discrimination of part-time domestic workers can be objectively justified under EU law. Section 7 is dedicated to other relevant international standards. A summary and some conclusions are provided in Section 8.

1. The exceptional position of domestic workers in Dutch social law

Domestic workers usually work under an employment contract as defined under the Dutch Civil Code (Article 7:610 BW). As long as a private person employs a domestic worker for less than four days a week, a 'softer' regime of employer obligations is applicable, meaning less social protection for that domestic worker. This is the case even when a domestic worker works a full working week for several private persons.

The employer is a private person who employs a domestic worker to clean the house, perform other domestic chores, take care of the children, and so on. Cleaning a home office or a doctor's or dentist's surgery (whether or not in combination with the rest of the doctor's or dentist's house) is not considered to be domestic work. In those cases the 'domestic worker' enjoys the same social protection as all other employees.

The criteria for an employment contract as defined in the Dutch Civil Code (Article 7:610 BW) are: the worker performs or works personally; the employer pays a wage to the worker; and there is the existence of a power differential between the employer and the worker. Because of the employment contract the domestic worker is entitled to certain statutory labour conditions. The entitlement to the minimum wage and the minimum holiday allowance was introduced in 1992, when the so-called '⅓' criterion (which held that the Minimum Wage Act was not applicable to workers working less than ⅓ of the full-time working week) was abolished. The other main entitlements are: paid leave (four times the working time per week), paid maternity leave and other leave arrangements in the Work and Care Act (*Wet Arbeid en Zorg*), a statutory notification period, and health and safety protection.

There are differences in the level of social protection given to (part-time) domestic workers, compared to all other employees, in the tax legislation, the social security legislation and in labour law. These differences make a privately employed domestic worker cheaper than a domestic worker hired via a cleaning company. The description or the exact wording of the exclusion of (part-time) domestic work or workers in the legislation was slightly different in the past. Prior to 2007, this exceptional position concerned domestic workers working less than *three* days for the same private employer. The extension to less than *four* days was included in the Tax Bill 2007 (*Belastingplan* 2007), which also harmonised most of the descriptions of domestic work in the fiscal, social, and labour legislation. Apart from an extension of the days, the scope of domestic work was also extended to services for the household. This includes care for the members of the household, even outside the home. Neither the Tax Bill 2007 nor the parliamentary records on this Bill contain any reasoning for these extensions. The yearly Tax Bill is usually limited to fiscal measures, such as the adaptation of tax rates, and this requires a timely decision-making process in Parliament. As a consequence, the changes regarding the legal position of domestic workers have not been properly discussed by the spokespersons on labour law in Parliament, which was also criticised by the Council of State.

Since 2007, the exceptional position of part-time domestic workers has been termed the 'Services at Home Scheme' ('*regeling Dienstverlening aan huis*').[4] It should be noted that the scheme as such has no legal status; it is not a regulation. With respect to domestic workers, the Tax Bill 2007 contains articles that exempt (part-time) domestic workers and their private employers from the tax legislation, the social security legislation, and labour law. This is discussed below.

Differences in tax legislation

Normally the employer deducts tax from the worker's gross wage, and pays tax and social contributions for the worker as well as the employer's contributions to the tax authorities. Private employers of (part-time) domestic workers are exempt from this obligation, and also from the compulsory employers' contributions to social security. Domestic workers are required to regulate their own tax declaration, plus the payment of income-related contributions under the Care Insurance Act (*Zorgverzekeringswet*).[5] Other workers do not pay an income-related contribution under the Care Insurance Act. No information is available about the number of domestic workers who do indeed declare their work for tax purposes, except with respect to domestic workers in homecare (to be discussed in Section 3). According to a Government Advisory Committee (2014), very few domestic workers in private households declare their income.[6]

Differences in social security legislation

Domestic workers are not entitled to employee insurances in the social security system (unemployment, disability), unless they participate in the voluntary scheme for which they are required to pay rather high premiums.[7] All other workers participate in the social security scheme on a compulsory basis, without any payment being made by the workers (employers' contributions finance employee insurances).

Differences in labour legislation

If a worker is unfit to work due to illness, the employer has to continue to pay the worker's wage up to a certain level (70 %, but at least the statutory minimum wage) for a maximum of two years (104 weeks). However, in the case of illness domestic workers are only entitled to have their wages paid for up to six weeks.

In general, employers cannot terminate the employment relationship with an employee without prior permission from the Employee Insurance Schemes Implementing Body (Uitvoering Werknemersverzekeringen (UWV)) or the courts.[8] With respect to the dismissal of (part-time) domestic workers, the employer does not need such prior permission. The employer can terminate the employment contract of a (part-time) domestic worker by giving notice, in writing, terminating the employment. The statutory notice period to be observed by the employer depends upon a worker's length of service, but it must amount to at least one month.

4 Tax Bill 2007 (*Belastingplan 2007*). *Stb.* 2006 no. 682. In some English publications the government uses 'Services at Home Scheme' and in others 'Home Help Services Scheme'.

5 *Stb.* 2005, no. 525. 5-7% of the gross wage (the percentage can differ from year to year).

6 *Dienstverlening aan huis: wie betaalt de rekening* (Service at Home: who pays the Bill?), Advies commissie Dienstverlening aan huis (Advice Services at Home Advisory Commission), March 2014 p.iii Annex to: *Parliamentary Papers II* 2013/14 29 544 no. 507.

7 These social security premiums can add up to some 20% of the gross wage. This is one of the reasons why part-time domestic workers (in both the public and private sector) hardly participate in these schemes. Another reason is that domestic workers in the private sector do not declare their income and therefore do not want to submit information to the employee insurance agency.

8 Extraordinary Labour Relations Decree (Buitengewoon Besluit Arbeidsverhoudingen) 1945. *Stb.* 1988, 573. New legislation includes statutory protection against dismissal from July 2015 onwards in the Dutch Civil Code (Book 7 Title 10). The exception for (part-time) domestic workers is maintained without any reasoning being given.

Another distinction between (part-time) domestic workers and other employees is the obligation of employers to inform employees in writing about the content of the employment relationship.[9] Employers of domestic workers are exempted from this obligation unless the worker explicitly requires him/her to do so.

Due to a recent change in the Minimum Wage Act, another distinction has been introduced: the employer must pay the statutory minimum wage directly into the employee's bank account via a bank transfer (cash payments are no longer allowed at that level), but this does not apply to (part-time) domestic workers.[10]

2. The arguments for the different position of domestic workers in social law

Some parliamentary records attempt to justify extensively the reasons for the exemption of (part-time) domestic workers. This was the case in 1989 when a gender-neutral formulation was introduced in the exemption from statutory protection against dismissal for part-time domestic workers.[11] In the view of the Government, the protection against dismissal for (part-time) domestic workers working only a few hours would not outweigh the administrative burden for the private employer. Moreover, effective protection against dismissal for domestic workers could be considered as an infringement of the private lives of members of the household. In the parliamentary debate, the issue was raised whether a general exemption could be considered as indirect sex discrimination since the overwhelming majority of domestic workers are women. According to the Government, the exclusion of part-time domestic workers was (objectively) justified, because:

- the employment relationship is relatively minor, only a few hours per week;
- domestic workers earn an additional income;
- domestic workers do not rely on this income for their living costs;
- the employer is a private person who is assisted a few hours per week with domestic chores;
- such a private person should not be burdened with all employers' obligations, especially given the government's general policy of limiting citizens' administrative burdens; and
- the potential consequence of the alternative being an infringement of private life, as mentioned above.

In addition the question was raised whether the criterion of a limited amount of hours instead of 'less than three days' would be more appropriate. The Government admitted that it was seemingly unfair to exclude a domestic worker who works two full days and to include a domestic worker who works only a few hours five days a week. However, it considered the criterion of the number of days to be necessary because of the social security legislation with a similar provision (exclusion for domestic workers). The (in the view of the author: obvious) question as to whether an 'hour' (rather than a 'day') criterion could be implemented in the social security legislation was not raised.

In later changes to the labour legislation almost no arguments were advanced to justify the continuation of the exclusion of (part-time) domestic workers, even though experts in social law and discrimination issues had criticised this exclusion in several publications.[12]

9 Art. 7:655 BW was included in the Civil Code in 1994 in order to implement Directive 91/533/EEC. It is questionable whether this can be considered to be an appropriate implementation. See Section 5.

10 *Parliamentary Papers* 2014/15 34 108 (the bill is scheduled to be discussed in the Senate on 26 May 2015).

11 Before 1989 *female* domestic workers were excluded from statutory protection against dismissal (Extraordinary Labour Relations Decree – Buitengewoon Besluit Arbeidsverhoudingen 1945).

12 All references to the relevant parliamentary records can be found in § 3.2 of Bijleveld, L. and Cremers, E. (2010), *Een baan als alle andere?! De rechtspositie van deeltijd huishoudelijk personeel* (A job like any other?! The legal position of part-time domestic workers), Vereniging voor Vrouw en Recht Clara Wichmann, Leiden.

Since 1967, part-time domestic workers have been excluded from the social security legislation.[13] No specific justification for this was provided at the time. In 1985 and 1986, new unemployment benefit legislation was introduced in the context of the implementation of Directive 79/7/EEC.[14] On this occasion the position of part-time domestic workers was extensively debated. The Government admitted that from a principled point of view it was more just to include domestic workers in the employee insurance scheme, but insisted on the continuation of the exclusion. According to the Government this exclusion was objectively justified because:

- inclusion would mean practical and technical problems for the employee insurance agencies;
- inclusion would result in administrative burdens for the private employer, the tax authorities as well as the employee insurance agencies;
- part-time domestic workers do not need unemployment benefit insurance and if so they can take out insurance on a voluntary basis; and
- compulsory inclusion in the employee insurance system would make domestic work more expensive and could result in a diminishing supply and demand and/or the disappearance of domestic work in the undeclared economy.

The scope of the compulsory employee insurance system has been discussed on several occasions since then. However, with respect to (part-time) domestic workers the Government has always repeated this line of argument, despite doubts and criticism expressed by experts and governmental advisory councils. As explained above, the extension of the number of days (from less than three to less than four) in 2007 was not accompanied with any reasoning for this decision.

Until recently, an inquiry into whether a criterion of hours rather than days is more appropriate was not undertaken. The Cabinet and the social partners agreed to create an advisory committee (Services at Home) to investigate possible means to improve the position of domestic workers, and to analyse the potential consequences of ratifying ILO Convention No. 189 on Decent work for domestic workers (see Section 7). One of the Committee's suggestions was to inquire into whether the use of a criterion in hours instead of days was feasible. The current Government decided to follow this advice.[15] The results of this exercise are expected in mid-2015.

3. A specific group: home-care workers – 'alphahelp'

In 1977 the Government introduced the use of the exceptional/weaker position of part-time domestic workers in public financed homecare. Homecare is help provided on medical grounds in the form of domestic chores, personal care (for instance, help with washing and dressing), and care by home-visit nurses for the elderly and/or disabled persons living independently. These social services are supplied as 'care in kind' by homecare institutions to persons who can no longer perform the tasks themselves. Beneficiaries pay an income-related contribution to a specialised government-funded agency.

Until 1977, all workers in homecare enjoyed full workers' rights under the collective agreement applicable to homecare, with the homecare institution as the employer. With the introduction in an official regulation of the so-called 'alphahelp construction' ('*alfahulpconstructie*') for ordinary domestic work (mainly cleaning duties) a special category of homecare workers came into existence ('alphahelp' – 'alfahulp'). The construction intended the homecare institution to act as an 'intermediary' between the client and the alphahelp, a sort of triangular relationship:

13 Before 1967 social security legislation excluded all domestic workers.

14 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

15 *Dienstverlening aan huis: wie betaalt de rekening* (Service at Home: who pays the Bill?), Advies commissie Dienstverlening aan huis (Advice Services at Home Advisory Commission), March 2014 p.iii Annex to: *Parliamentary Papers II* 2013/14 29 544 no. 507. For the position of the government: *Parliamentary Papers II* 2014/15, 29 427 no. 100.

- an employment contract was introduced between the client and the alphahelp;
- a care contract between the institution and the client; and
- an intermediate contract between the institution and alphahelp.

The alphahelp worked for one or more clients for less than three days each. In name, the client was the employer of the alphahelp, who received her wages from the homecare institution, which also informed the tax authorities about the income that the alphahelp had earned. The wage was the same as the statutory minimum wage, whilst the predecessor of the alphahelp called 'homecare worker A' (*Thuishulp A*) employed by the institution could earn up to 137 % of the statutory minimum wage. As the alphahelp was excluded from participation in the employee insurance schemes, no employer and employeerelated contributions had to be paid. With the introduction of the 'alphahelp construction' the Government could substantially reduce the costs of public financed homecare. Although over the years the legislative context of homecare changed, the existence of the 'alphahelp construction' remained, in later years even without an official regulation as such.[16] The number of women employed yearly as a alphahelp has varied over the years, depending on the legislative context of homecare; estimates are between 40 000 and 100 000.

It should be noted that the 'alphahelp construction' deliberately imposed the inferior status of being (part-time) domestic workers for private persons in Dutch social law on workers in public financed homecare. The justification for this is based on the presumed burden for private persons (see Section 2). In the case of alpha-helps working as a home help the homecare institution is responsible for all administration including the payment of wages. This (mis)use is unique in Europe: the 'alphahelp- construction' does not exist in other EU countries. Over the years there has been broad political support in the Netherlands for the use of the alphahelp construction. A small political minority have occasionally tried to raise the issue of indirect sex discrimination and questioned whether this could be objectively justified. Only in situations in which many properly employed homecare workers lost their job as a homecare worker and were invited by the homecare institution to resume work as alphahelp have attempts been made to limit the so-called 'misuse' of the construction, but without much success. The construction itself, however, has not been questioned. The focus of the political mainstream has always been much more on the weak position of clients in need of help than on the weaker position of this category of workers.

Given the artificial use of the exceptional position of (part-time) domestic workers it is surprising that the alphahelp construction has only been contested in a few court cases. At stake in these court cases was whether the homecare institution ought to be considered as the employer or the client (the private person), using the criteria for an employment contract as defined in the Dutch Civil Code (Article 7:610 BW – see the first section of this article). In other words, the question was whether the alphahelp is entitled to full social rights or to the limited social rights of a (part-time) domestic worker. In one of these court cases it was the tax authorities and the Employee Insurance Schemes Implementing Body (UWV) that jointly decided that the homecare institution had to be considered as the employer of some alphahelps and the court agreed with this position.[17] Both based this opinion on the actual situation, as follows from the jurisprudence of the Central Appeals Tribunal on employment relations as defined under the Dutch Civil Code (Article 7:610 BW).[18] Consequently the homecare institution had to pay the taxes and social security contributions.

In a different case before the District Court, it was an alphahelp who contested the construction that she was employed by the clients she assisted, as instructed by a homecare institution.[19] She worked for 26½ hours per week for nine clients via a homecare institution that paid her wages. When she broke her wrist the homecare institution stopped her payments, leaving the alphahelp without any income until she could

16 There is no regulation for alphahelps other than the exceptional position of (part-time) domestic workers in tax legislation, employee insurance legislation and labour law as described in Section 1.
17 Rb. Almelo 24 augustus 2007, ECLI:NL:RBALM:2007:BB3315.
18 CRvB 24 maart 2005, ECLI:NL:CRVB:2005;AT3472, CRvB 11 May2004, ECLI:NL:CRVB:2004:AO9646.
19 The home help was assisted by NGOs and later also by the union for health & homecare workers.

resume work after a few months. The home-care institution referred her to the clients for her wages to be paid during her illness. The clients, however, had no financial relation with the alphahelp or the home-care institution. Clients paid an income-related contribution to a specialised government-funded agency. The alphahelp applied to the court for a continuation of her wage payments by the homecare institution during the months that she was unable to perform her duties (see Section 1 of this article for the entitlement to a maximum of 104 weeks continued wage payments during illness). In other words: she claimed that the homecare institution was her employer. Alternatively, she claimed a continuation of her wage payments for six weeks – the entitlement of (part-time) domestic workers working for a private person – to be paid by the homecare institution that also paid her wages when she performed her duties.

The judgment of the District Court provided that the homecare institution had to pay her wages for six weeks.[20] The court approved of the 'alphahelp construction'. In 2013 the Court of Appeal ruled, however, that given the actual situation the homecare institution had to be considered as the employer of the alphahelp and consequently it had to pay the home help's wages for the full period of disability.[21] In addition, the Central Appeals Tribunal ruled in another case that as the homecare institution had to be considered as an employer, the alphahelp ought to participate in the compulsory employee benefit scheme and was consequently entitled to unemployment benefit.[22] In most of the specialist literature the judgment of the Court of Appeal is not considered to be spectacular: it simply applied the rule that had been developed by the Supreme Court in several judgments on the employment relationship.[23]

Somewhat more surprising is that the judgments of the District Court, the Court of Appeal, and the Central Appeals Tribunal hardly had any impact on the use of the alphahelp construction. In 2012, employers' organisations in the field of homecare called upon their membership to ignore the judgment of the District Court. That meant that any alphahelp who also wanted to receive six weeks of wage payments during illness had to go to court as well (but as far as is known no one did this, which is not surprising given the vulnerable position of this category of workers). Even though at the request of Parliament the Minister of Social Affairs and Employment explained the consequences of the District Court verdict, this did not change the attitude of the employers' organisations or the homecare institutions. When the judgments of the Court of Appeal and the Central Appeals Tribunal were published at the end of 2013 and early 2014, the employers' organisations spoke in a press release about the dramatic financial consequences for homecare institutions if the judgments should lead to the abandonment of the alphahelp-construction. In practice, however, nothing changed. No other alphahelps resorted to the courts to claim an employment relationship with the homecare institutions. Even more homecare workers have been made redundant as full employees followed by an invitation to resume work as alphahelp. The judgements have not been discussed in Parliament.

In the view of the author it is surprising that these court cases did not result in the abandonment of the alphahelp construction. The judgments of the Court of Appeal and the Central Appeals Tribunal ought to have a norm-setting effect that is broader than only with respect to the individual worker(s) who resorted to the courts. The tax authorities and the Employee Insurance Schemes Implementing Body (UWV) should play an active role in holding the homecare institutions responsible as the actual employers of the alphahelps. The government should have acknowledged the fact that the artificial use of the exceptional position of (part-time) domestic workers in homecare had been successfully contested, even though an

20 Ktr. Harderwijk 16 januari 2012, ECLI:NL:RBZUT:2012:BV2123, *JAR* 2012/43, m. nt. E. Cremers-Hartman.

21 Hof Arnhem-Leeuwarden (zittingsplaats Arnhem), 5 november 2013, ECLI:NL:GHARL:2012:8304, JAR 2014, 12, m.nt. E. Cremers-Hartman.

22 CRvB 4 december 2013, *USZ* 2014/34, m.nt. Alink.

23 Boot, G.C. (2010), 'De (on)rechtspositie van alfahulpen' (The (wrongful) legal position of alphahelps), *Arbeidsrecht* no. 21 p. 3-6; Cremers-Hartman, E., 'Is een alfahulp in dienst van de thuiszorginstelling?' (Is an alfahelp employed by a homecare institution?), annotation of the judgement by Hof Arnhem-Leeuwarden 5 november 2013, *JAR* 2014/12; and in: Cremers-Hartman, E. (2014), *Betogen voor recht en verandering* (Pleas for justice and change), Deventer: VVR and Kluwer. Vegter, M.S.A.; (2014),'Bestaan arbeidsovereenkomst tussen alphahulp en zorginstelling', (An employment relationship between the alfahelp and the homecare institution), *TRA*. The Court of Appeal and the experts referred to HR 13 juli 2007, ECLI:NL:HR:2007:BA6231 and HR 25 maart 2011, ECLI:NL:HR:2011:BP3887.

increase in public expenditure on homecare would have been the consequence. It is not reasonable to require alphahelps to individually claim an employment relationship with the homecare institution via court proceedings. Most alphahelps do not even know that the client is formally their employer and not the homecare institution, or that they do not enjoy the same rights as all other workers. In the author's view the root cause of the unlawful continuation of the alphahelp construction is a stereotyped and discriminatory opinion that this is typically work performed by women.

From the fact that the Government, the municipalities, and the homecare institutions negate the outcome of the above-mentioned court cases, the author concludes that the only way to eradicate the 'alphahelp construction' is by abolishing the exceptional position of (part-time) domestic workers in social law. As will be discussed in Sections 5, 6 and 7 this exceptional position is incompatible with international requirements.

4. Another special group: subsidised homecare workers

In the 1990s, a new element was introduced in the Exceptional Medical Expenses Act (*Algemene Wet Bijzondere Ziektekosten, AWBZ*): instead of 'care in kind' a client can apply for a personal budget that enables him or her to hire a care worker or care from an institution of his or her own choice ('Personal Budget' – *Persoonsgebonden Budget*, *PGB*).[24] The amount of PGB is 75 % of the costs of the 'care in kind'. Such PGB can also be used to compensate a family member for the extra effort and time spent on care for a handicapped child at home, instead of having to rely on care in an institution. In order to ensure that the budget holders have acted as proper employers an AWBZ-funded public service institution (the SVB (Social Insurance Bank) Service Centre for PGB) was assigned to provide free information and advice. Clients or budget holders can outsource employers' duties free of charge, including salary administration, and download examples of employment and care contracts.

PGB care workers fall under the scope of the exceptional position of domestic workers if they usually work for less than three days (since 2007 less than four days) per week. Their number is estimated to be around 50 000. Until recently it was also possible to hire an intermediate organisation to outsource personnel management or even the application for a PGB and control over as well as the payment of the PGB. This was one of the reasons for the growing demand of PGB. In practice, the 'intermediate' organisation often acted as the employer, paying wages on behalf of the clients and informing the tax authorities, while the Services at home scheme was still being used. One could call this a form of disguised employment relationship.

Until 2007 clients (or the intermediate organisations) could apply for a PGB for personal care (for instance, help with washing and dressing), care by home-visit nurses for disabled persons living independently and some paramedical assistance. From 2007 onwards it was also possible to apply for a PGB from the municipality for help with domestic work. Some municipalities established intermediate organisations to 'help' with applications for a PGB, or to use the construction of a PGB for clients who think that they are receiving 'care in kind'.

Because of the growing demand (and the corresponding costs) and the increasing risk of misuse and fraud, the Government decided to change the legislative context of the PGB system in the new Long-term Care Act (*Wet langdurige Zorg*) that replaced the Exceptional Medical Expenses Act (*Algemene Wet Bijzondere Ziektekosten*) starting from 2015.[25] The PGB is no longer being paid to the client / budget holder or to an ordinary intermediate organisation, but solely to the SVB Service centre for PGB, which pays the wages of all PGB care workers. The Services at Home scheme is still in place for those PGB care workers who work on less than four days a week for a budget holder, in fact almost all PGB care workers.

24 As far as the author is aware the PGB system does exist in other EU countries, but since the exceptional position of (part-time) domestic workers does not exist there are no similar problems.

25 The Act on long-term care (Wet langdurige zorg), 3 December 2014. *Stb.* 2014, 494, *Parliamentary Papers* 33891.

The extension of the exceptional status of domestic workers employed by a private person in days (from less than three to less than four in the Tax Bill 2007) did have a real impact on use in the homecare and PGB service, much more than in private personal services. The use of the construction implies that those care workers with several clients (which most have) can work full time without any proper social protection.

In looking at the reasons the Government provided to justify the exclusion of domestic workers (see Section 2), it is obvious that those reasons targeting the workers are not only questionable in general but are in any case not applicable to PGB care workers. The reasons targeting the private employer are also not valid for PGB budget holders: the SVB Service centre for PGB bears the brunt of the administrative burden. It is also pertinent to bear in mind that the budget holders are free to choose for 'care in kind' – to be delivered by care workers with full social protection. Budget holders are not obliged to make use of a PGB; they have a choice, so why not combine the choice for a PGB with full employer obligations?

5. EU standards

Equal treatment and the prohibition of sex discrimination

Equality is one of the values on which the European Union is founded according to Article 2 of the Treaty of the European Union (TEU), which emphasises that the Member States form a society in which (amongst others) non-discrimination and equality between women and men prevail. Article 3.3 TEU formulates that the EU strives to 'combat social exclusion and discrimination, and shall promote social justice and protection, equality between men and women (...)'. In addition, Article 157 of the Treaty on the Functioning of the European Union (TFEU) is the legal basis of the principle of equal pay and equal treatment for men and women. The principle is elaborated in several directives, of which for present purposes mainly Directives 79/7/EEC[26] and 2006/54/EC[27] are relevant.

The positive formulation of Article 3.3 TEU in conjunction with these two Directives has not yet led to social justice or protection for the predominantly female group of (part-time) domestic workers in the Netherlands, nor to efforts to promote their position. It might be argued that the Netherlands is obliged to offer the same level of employment protection to (part-time) domestic workers as to other employees who work on the basis of an employment agreement. In this respect the following arguments are relevant:

- Equal pay. It can be said that the principle of equal pay for male and female workers for equal work or work of equal value entails the obligation to pay domestic workers the same salary or benefit during sickness as other employees who perform work of equal value receive. However, this argument only applies if the domestic worker and the other employee are in a comparable situation, as is the case, in the view of the author, with homecare workers (see Section 3).
- Access to working conditions. The principle of equal treatment as regards access to employment and working conditions, including dismissals and the right to information about the employment relationship, might entail the obligation to treat the domestic workers in the same way as comparable workers.
- Equal treatment in social security. It can be said that the principle of equal treatment in statutory social security forbids both the exclusion of domestic workers from the compulsory employee insurance scheme *and* the obligation for domestic workers to pay an income-related contribution for the health insurance that other workers do not have to pay.

Directives 79/7/EEC and 2006/54/EC prohibit both direct and indirect sex discrimination. In this context it should be mentioned that nobody contests the fact that the overwhelming majority of domestic workers

26 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

27 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).

are women. It is questionable whether indirect discrimination can be objectively justified in this case. This will be discussed in Section 6.

Equal treatment of part-time workers

Directive 97/81/EC[28] requires that Member States implement the principle of non-discrimination of part-time workers compared to full-time workers in their legislation. Directive 97/81/EC has a broad personal scope. Although Clause 2.2 allows Member States to restrict the scope of the Directive for some casual part-time workers, a *general* exclusion on the basis of days or hours worked is not allowed. That is also the case with the possibilities that Clause 4.4 offers (allowing a threshold in the access to certain employment conditions by requiring a period of service, time worked or earnings). In light of this, the author wonders what the view of the CJEU would be on the implementation of Directive 97/81/EC in the Netherlands with respect to (part-time) domestic workers. Moreover, the purpose of the Directive is to provide for the prohibition of discrimination against part-time workers and to improve the quality of part-time work (Clause 1. A). So, in the author's view, it would have been appropriate for the Dutch Government to assess the implication of the Directive when the proposal to extend the group of (part-time) domestic workers in the Tax Bill 2007 was discussed in Parliament. More part-time workers faced a worsening of their working conditions due to the extension of the number of days worked, but the Directive was not mentioned at all.

Directive 97/81/EC does not address the issue of statutory social security for part-time workers. Since there is no doubt that the exclusion of (part-time) domestic workers can be considered as indirect sex discrimination, Directive 79/7/EC can be invoked in legal proceedings to contest the exclusion of (part-time) domestic workers from the employee insurance schemes as described at the beginning of this section.

Directive 91/533/EEC and the employers' obligation to inform

Council Directive 91/533/EEC[29] provides for the employers' obligation to inform their employees of the conditions applicable to the contract or employment relationship. Member States may omit some categories from the scope of the Directive. According to Clause 1.2 this possibility exists for a contract or employment relationship:

a. with a total duration not exceeding one month, and/or with a working week not exceeding eight hours; or
b. of a casual and/or specific nature provided, in these cases, that its non-application is justified by objective considerations.

Since the exception in Dutch labour law for (part-time) domestic workers consists of days worked and not hours (or one month) Clause 1.2.a is not applicable. The Dutch experts Massuger and Plessen convincingly argued in 1998 that domestic work cannot be considered as being 'of a casual and/or specific nature', that the legislator never explained why this would be the case nor what the objective considerations could be to justify an exception to the employer's obligation to inform domestic workers.[30] They concluded that Council Directive 91/533/EEC has not been properly implemented in the Netherlands, a view that is shared by the author.[31]

28 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work.

29 Council Directive 91/553/EC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

30 Massuger, P.M.M. and Plessen, W.G.M. (1998), 'Informatieverplichting van de werkgever; een aantal kritische kanttekeningen' (Employers' obligation to inform; some critical notes), *SMA*, pp. 177-183.

31 Bijleveld, L. and Cremers, E. (2010), *Een baan als alle andere?! De rechtspositie van deeltijd huishoudelijk personeel.* (A job like any other?! The legal position of part-time domestic workers), Vereniging voor Vrouw & Recht Clara Wichmann, Leiden, p. 147.

6. Can the indirect discrimination of domestic workers be objectively justified?

The definition of indirect discrimination in Article 2.1(b) of Directive 2006/54/EC reads: 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.' It is obvious that (part-time) domestic workers are disadvantaged compared to all other employees (see Section 1). It is also evident that the overwhelming majority of (part-time) domestic workers are women. Whether the provisions and criteria in the legislation that cause this disadvantage can be objectively justified by a legitimate aim and appropriate and necessary means to achieve that aim remains to be seen. This question has not yet been brought before the Court of Justice of the European Union (CJEU).

The Government of the Netherlands prevented this in the 1980s and 1990s: the trade union for care workers, AbvaKabo, started a court procedure against the State in 1986, invoking Directive 79/7/EEC. The union contested the fact that alphahelps do not have access to employee insurance schemes (see Sections 1 and 3 of this article – at that time it concerned the employee insurance scheme for unemployment, disability and a benefit during illness). The State claimed that the union's complaint was not admissible in this class action, amongst other things because the union did not have alphahelp workers amongst its membership. In 1993 the Supreme Court confirmed this view.[32]

The Government claims that the reasons that have been provided on several occasions are sufficiently sound to justify this weaker social position (see Section 2). Several experts have expressed their doubts about this claim and the (gender) stereotypes implicit in the Government's line of argument.[33] There seems to be a consensus among experts that the Government uses generalisations and generic statements to justify the exceptions it wishes to make for (part-time) domestic workers. For each and every exception it wishes to make the Government should clearly indicate the legitimate aim, and the appropriateness and necessity of the means to achieve that aim. The Government cannot persist in solely referring to the existence of the Services at Home scheme or simply refer to another law or regulation in which the exception also exists. There are two recent examples of the inadequacy of the too briefly worded justification.

1. Through a recent amendment to the minimum wage legislation the employer has to pay the statutory minimum wage by means of a bank transfer; cash payments are no longer allowed at the level of the minimum wage. Employers of (part-time) domestic workers are exempt from this obligation. The justification for this is limited: reference is made to the Services at Home Scheme that aims to stimulate the market for personal services, and therefore diminishes administrative duties for the private employer.[34] It is unclear why it would be too difficult for a private person to pay a domestic worker via a bank transfer, as the vast majority of payments in the Netherlands are carried out by means of telebanking; and cash payments in shops are being discouraged, and are even impossible in several situations (for instance, the payment of compulsory medical insurance). It is true that in the informal market for domestic work cash payments are the habit to accommodate domestic workers who do not want, or are not allowed (in the case of migrant domestic workers), to declare their income.

32 *NJ* 1993 no. 450 (annotated by HJS).

33 Bijleveld, L. and Cremers, E. (2010), *Een baan als alle andere?! De rechtspositie van deeltijd huishoudelijk personeel.* (A job like any other?! The legal position of part-time domestic workers), Vereniging voor Vrouw & Recht Clara Wichmann, Leiden, especially pp 34-46 (in which chapter the opinion of several experts is summarised) and pp.158-181. Cremers-Hartman, E. (2014), 'Geen objectief gerechtvaardigd onderscheid' (No objectively justified distinction) and Voet, G. van der, Houweling, R. and Bouwens, W. (2014), 'De rechtspositie van deeltijd huishoudelijk personeel: wordt het na één zwaluw dan eindelijk toch zomer?' (The legal position of part-time domestic workers: will one swallow finally make a summer?') both in: Cremers-Hartman, E. (2014), *Betogen voor recht en verandering,* Uitgeverij Kluwer Deventer pp. 193-217 respectively at pp. 183-191.

34 *Parliamentary Papers II* 2014/15 34 108 no. 3 p. 10 and p. 47. In a footnote reference is made to the explanatory memorandum of the Tax Bill 2007.

Anyway, most private employers think (wrongly) that they are paying 'black' wages to their domestic workers by paying with cash. So it is hard to see what extra administrative burden they would face. In homecare (alphahelp and PGB) all wages are paid via bank transfers.

2. With regard to the statutory protection against dismissal, the new legislation maintains the exception for (part-time) domestic workers in the previous Extraordinary Labour Relations Decree, without any justification.[35] That same new legislation however introduces severance pay for workers including domestic workers, the rule that there has to be reasonable grounds for dismissal and the possibility for the (domestic) worker to claim compensation in case of unfair dismissal. Why then still exempt the private employer of a domestic worker from the need to obtain prior permission from the Employee Insurance Schemes Implementing Body (UWV) or the courts?

The Government has argued that the exception in social legislation for (part-time) domestic workers can be compared with the situation in Germany: part-time workers in marginal jobs[36] who were excluded from participation in social security schemes. The Dutch Government referred to the cases of *Megner* and *Nolte* in the early 1990s in which the CJEU found an objective justification for this exclusion, ignoring the differences between the German and the Dutch situations.[37] One of the differences is that Germany used an hour criterion for all minor part-time jobs and the Netherlands a day criterion (two days and then later three days) for domestic work. Referring to the cases of *Seymour*, *Kurz-Bauer*, and *Steinicke* the Dutch Government emphasised that Member States have a broad margin of discretion in choosing the measures capable of achieving the aims of their social and employment policy. This is as long as the Member State does not submit overly general statements with respect to the supposedly positive effects of the measures.[38] However, that is exactly what the Dutch Government does: it argues that the Services at Home scheme has a positive effect on the demand for personal services and contributes to job creation concerning lower skilled jobs (at the bottom end of the labour market), without being able to provide facts and figures to support this claim. The statement that the work will disappear in the undeclared economy is unsatisfactory, because most domestic work for private persons currently falls within the undeclared or informal economy. All 'domestic work' in the homecare sector is at present in the formal economy and will not disappear into the undeclared economy.

The view that a private person should not be burdened with administration is not convincing for several reasons. Alternatives are already in place in the homecare sector: clients do not have any administrative duties that are already taken care of by the homecare institutions and by the Social Social Insurance Bank (SVB). Moreover: this is the era of expanding digital possibilities, which diminishes administrative duties, in contrast to previous times. Also, 'intermediate' organisations in the private sector do exist, taking over all administrative duties from the private employer, using the exemption for domestic work in the same artificial way as homecare institutions use the 'alphahelp construction'. Such intermediate organisations (like Helplink) are often very clever in using digital possibilities, but in fact disguise the employment relationship with 'domestic workers'.[39] What is more: why can a very small-scale employer or a self-employed person hiring a part-timer resort to such alternatives while a private person cannot? The administrative obligations for small-scale employers have been diminished since the 1980s and 1990s – the years in which the justification was most extensively argued by the government (see Section 2 and above in Section 6). Last but not least: the argument that the protection for part-time domestic workers would not outweigh the administrative burden is targeted at those '*working only a few hours*' – there is a huge gap between only a few hours and less than four days, not to mention the fact

35 *Parliamentary Papers* 33 818. Act work and security (Wet werk en zekerheid) *Stb.* 2014, 274.
36 The essential characteristic of 'marginal employment' (*geringfügige Beschäftigung*) or 'mini-jobs' is that wages do not exceed EUR 450 per month, and they are not captured by collective agreements or trade-based compensation structures.
37 *Parliamentary Papers II* 29544 no. 281. Case C-317/93 *Nolte* and Case C-444/93 *Megner*. Germany later changed its legislation concerning marginal jobs, taking into account that workers can combine different part-time jobs with different employers in order to work a full-time week and to earn a full-time income.
38 Case C-167/97 *Seymour*, Case C-187/00 *Kutz-Bauer* and Case C-77/02 *Steinicke*.
39 In the view of the author the tax authorities and employee insurance schemes implementing body (UWV) should be far more active in holding these intermediate institutions responsible as the actual employers of domestic workers.

that a domestic worker may be using several private employers to work long hours part time, or even a full-time working week.

In relatively recent cases such as *Brachner* and *Elbal Moreno* the CJEU ruled that the justifications by the Austrian and the Spanish Governments to disadvantage part-timers/women respectively in pension schemes were not sufficient.[40] In *Elbal Moreno* the Spanish Government emphasised the consideration of social policy. However, referring to opinions of the Belgian Government and the European Commission, the CJEU in the same case stated in paragraph 35 that nothing in the documents suggested that the exclusion of part timers was genuinely necessary to achieve the objective. Further, the CJEU stated that nothing suggested that no other measure that is less onerous for those workers is capable of achieving the same objective. In the view of the author, the CJEU narrowed the margin of discretion for member states in these cases vis-à-vis *Nolte* and *Megner*.[41] Therefore, it is very well possible that the margin of discretion is not actually as broad as the Dutch Government assumes. In the opinion of the author the Dutch Government cannot objectively justify the disadvantage for (part-time) domestic workers and any challenge brought regarding the implementation of the relevant EU law in the Netherlands would be likely to succeed.

7. Other relevant international commitments

UN Convention on the Elimination of all Forms of Discrimination against Women

The Kingdom of the Netherlands ratified the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in 1991. Articles 1 and 2 address the general obligation to eliminate discrimination against women. Article 3 contains the obligation to ensure the full development and advancement of women. Article 5 obliges states parties to eliminate practices based on the stereotyped roles of men and women. Article 11 specifically obliges states parties to eliminate discrimination against women in the field of employment, which includes ensuring the right of women to the same employment conditions as men; to job security, to equal treatment, and to social security. The weaker position of (part-time) domestic workers is clearly incompatible with these articles of the Convention. It is therefore not surprising that after being informed by NGOs and after receiving unsatisfactory explanations from the government, in 2010 the Committee on the Elimination of Discrimination Against Women called upon the Dutch Government to provide domestic workers with full social rights:

> '38. The Committee expresses serious concern that in the Netherlands several hundred thousand domestic workers working in private households and home-care workers financed by public schemes, 95 per cent of whom are women, have limited social rights and limited access to social security, notably unemployment and disability benefits and pensions.
> 39. The Committee calls upon the State party to take measures to ensure that women domestic workers are duly provided with full social rights and that they are not deprived of social security and other labour benefits.'[42]

Since the Dutch Government did not provide an adequate answer to this recommendation in its sixth periodic report, the issue will undoubtedly be addressed once again in the NGO shadow reports, the list of issues and questions, and at CEDAW Session No. 65 (in October 2016).[43]

40 Case C-123/10 *Brachner* and Case C-385 *Elbal Moreno*. Both invoked Directive 79/7/EEC.
41 Case C-317/93 *Nolte* and Case C-444/93 *Megner*.
42 CEDAW, Concluding Observations of the Committee on the Elimination of Discrimination against Women: Netherlands (CEDAW/C/NLD/CO/5) paras 38 and 39.
43 CEDAW/C/NLD/6. Annex to *Parliamentary Papers II* 2014/15 30420 no. 210.

UN International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) was ratified by the Kingdom of the Netherlands in 1978. Article 2(2) contains the obligation for States Parties to guarantee the exercise of the rights in the covenant without discrimination of any kind (amongst which is discrimination based on sex). Article 3 reads: 'The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.' Article 7 recognises the right to just and favourable working conditions (and some specifications thereof). Article 9 recognises the right to social security, including social insurance.

NGOs had included the weaker position of (part-time) domestic workers as being incompatible with the covenant in the shadow report. The Committee on Economic, Social and Cultural Rights was not convinced by the government's explanation that '(...) domestic workers enjoy sufficient protection under current legislation (...)'.[44] Therefore the Committee stated in its 2010 Concluding Observations:

> '17 The Committee is concerned that in all the constituent countries of the State party, domestic workers do not enjoy the same protection as other workers and are in a disadvantaged position in that their employers do not contribute to the payment of their health insurance and pensions, as do employers in other sectors (art. 7, 9).
> The Committee calls on the State party to adopt remedial measures, legislative or otherwise, to bring the rights and benefits accorded to domestic workers in line with those afforded to other workers, particularly in terms of social security benefits.'[45]

The 6th periodic report of the Netherlands for the Committee on Economic, Social and Cultural Rights is due in mid-2015. The Government must again explain why it negates the Committee's recommendations.

ILO Convention No. 175 on Part-time Work

The Part-Time Work Convention 175 (1994) aims to ensure equal treatment for part-time and full-time workers. The Netherlands ratified the convention in 2001. Article 3 provides the possibility to exclude, wholly or partly, particular categories of workers from its scope when its application to these categories would raise particular problems of a substantial nature.[46] The Member State that avails itself of that possibility should indicate in the periodic reports any particular category of workers thus excluded and the reasons why this exclusion was or is still considered to be necessary. The Netherlands did exclude (part-time) domestic workers (less than *three* days) without reporting on the consultation of social partners and in its 2008 report it did not 'describe the particular problems of a substantial nature that the application of the Convention to this category of workers would have raised.'[47] Neither did it explain why the group had been extended (less than *four* days). The Committee of Experts on the Application of Conventions and Recommendations (CEACR) invited the Government to submit this information in its 2013 periodic report, which it did not do. It is therefore likely that the discussion between the CEACR and the Dutch Government on the exclusion of (part-time) domestic workers will continue over the next few years.

44 E/C.12/NLD/Q/4-5/Add.1
45 E/C.12/NLD/CO4-5.
46 Before ratification a Member State should consult the representative organisations of employers and workers concerned, especially about the exclusion of certain categories from the scope of the convention.
47 The social partners explicitly pointed at the misuse of the 'alphahelp construction'. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::::P13100_COMMENT_ID:2307519 accessed 7 April 2015.

ILO Convention No. 189 on Domestic Work

The Domestic Workers Convention No. 189 was adopted at the 100th Session of the International Labour Conference in June 2011 and entered into force in September 2013. Convention No. 189 lays down global minimum labour protection for domestic workers. One of the elements is social security protection under conditions that are not less favourable than those generally applicable to workers (Article 14). It is clear that Dutch legislation is not compatible with Article 14, but that is also the case with Article 7 (employment contract and information obligations) and Article 18 (labour inspection). The government has announced its decision not to ratify Convention No. 189.[48]

In this respect it is remarkable that the European Commission argued in its Proposal for a Council Decision authorising Member States to ratify Convention No. 189 that most of the rules under Convention No. 189 'are covered to a large extent by Union *acquis* in the areas of social policy, anti-discrimination (...)' in footnotes referring to relevant Directives as discussed in Paragraph 5.[49] The Council Decision was taken on 28 January 2014.[50] The author concludes from this that in fact the Dutch situation with respect to domestic work is not compatible with the *acquis*.

In summary, the exclusion of part-time domestic workers from certain social rights is incompatible with several international standards. The conclusions and recommendations of the treaty bodies are unequivocal: the under-privileged position of domestic workers amounts to sex discrimination.

8. Summary and conclusions

Domestic workers who work for a private person for less than four days per week do not enjoy the same social protection as other workers in the Netherlands. This applies regardless of whether the domestic worker works for one or for more private persons, or whether the domestic worker works a few hours per week or in total a full-time working week. Those domestic workers are disadvantaged in employment protection, wage payments during illness and entitlements to social security benefits. The exemption for domestic workers is also applicable in situations where the services are being financed via public means (homecare in different manifestations, childcare at home – '*gastouders*'). Since 2007 this exceptional status for (part-time) domestic workers has been known as the Services at Home scheme.

As the overwhelming majority of domestic workers are female this disadvantaged position can be qualified as indirect sex discrimination, which is incompatible with European and international standards. Several expert committees supervising the implementation of relevant UN and ILO Conventions have questioned the Dutch Government about this indirect sex discrimination. Some expert committees have recommended remedial measures. In general it could be said that the debate on domestic workers and international standards is ongoing in several constructive dialogues.

In the EU context a prima facie case of indirect sex discrimination can be refuted through an objective justification by a legitimate aim, by which the means to achieve it are appropriate and necessary. The Dutch Government is convinced that it is able to do this. Several experts, including the author of this article, doubt whether the government's line of argument would pass the test. A critical issue in this context is the fact that the Government makes use (or allows others to make use) of the Services at Home scheme in homecare and childcare.

48 *Parliamentary Papers II* 2014/15 29 427 no. 100.
49 COM (2013) 152 final 2013/0085 (NLE).
50 Council decision of 28 January 2014 authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No. 189) (2014/51/EU).

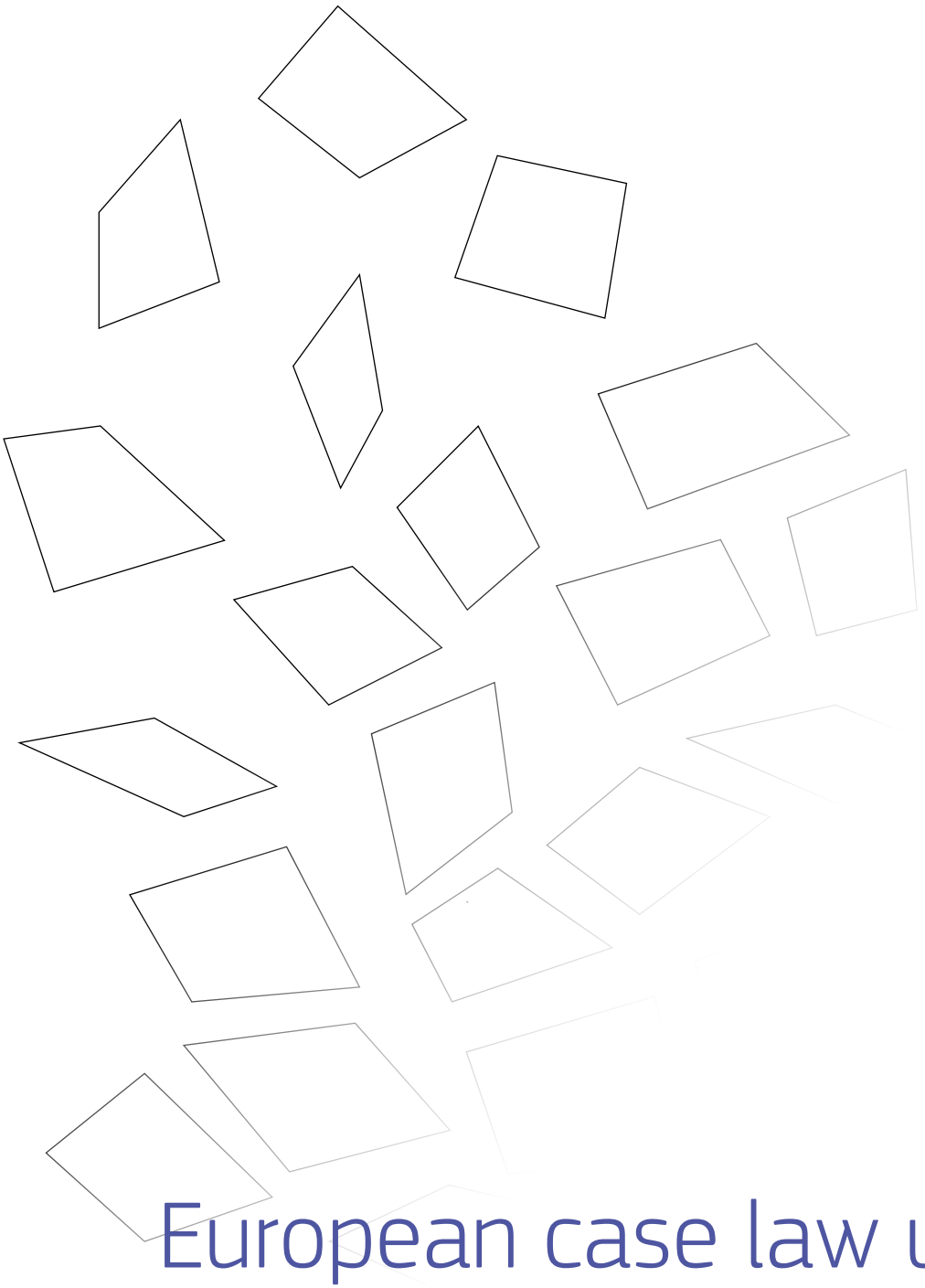
A case has yet to be brought to the CJEU on this issue. The Dutch Government prevented the question from coming before the court by successfully pointing at the inadmissibility of the trade union that had commenced proceedings. In the view of the author, it is unlikely that a domestic worker herself would start legal proceedings for indirect discrimination against the Netherlands and, in that unlikely case, could successfully convince a Dutch judge to pose prejudicial questions to the CJEU. Domestic workers, including alphahelps, are a vulnerable low-skilled and low-paid group. The author wonders whether other relevant stakeholders can and will be instrumental in order to invoke an opinion of the CJEU.

In conclusion, the author and other experts are convinced that the Government's line of reasoning will not pass the test of the objective justification for indirect discrimination. They do not consider that Directives 79/7/EEC, 91/533/EEC, 97/81/EC, and 2006/54/EC have been properly implemented with respect to (part-time) domestic workers in the Netherlands. Support for this view can be found in both in the EU context as well as in the international human rights context. For instance, it can be found in both the Council Decision[51] with respect to the *acquis*, and in ILO Convention No. 189, as quoted in the previous section of this article. In addition, further support for this view can be found in the unequivocal conclusions and recommendations of the UN treaty bodies: the under-privileged position of domestic workers amounts to sex discrimination.[52]

The positive formulation of Articles 2 and 3(3) TEU can be considered to be encouraging: the time is ripe for a challenge.

51 COM (2013) 152 final 2013/0085 (NLE) and Council decision of 28 January 2014 authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No. 189) (2014/51/EU).

52 CEDAW, Concluding Observations of the Committee on the Elimination of Discrimination against Women: Netherlands (CEDAW/C/NLD/CO/5) paras 38 and 39. E/C.12/NLD/CO4-5 para 17. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::::P13100_COMMENT_ID:2307519 accessed 7 April 2015.



European case law update

This section provides as far as possible an overview of the main latest developments in gender equality and non-discrimination cases pending at or decided by the Court of Justice of the EU and the European Court of Human Rights, from 1 July to 31 December 2014.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE GENERAL OPINIONS

Case C-354/13, FOA, acting on behalf of Karsten Kaltoft v. KL acting on behalf of the Municipality of Billund, Advocate General Jääskinen's Opinion of 17 July 2014, EU:C:2014:2106

Disability

The case was referred by the district court of Kolding (Denmark), and concerned Mr Kaltoft who had been dismissed after having been employed by a Danish municipality as a child-minder for approximately 15 years. During the entire time when the applicant was employed it was undisputed by the parties that he was 'obese' (within the meaning of the definition of the World Health Organisation) and that he had received financial assistance from his employer to lose weight. In 2010, the applicant was informed that the municipality intended to dismiss him due to a decline in the number of children and therefore in workload. Mr Kaltoft claimed in a letter to his employer that he believed his dismissal to be motivated by his obesity. He did not receive any information as to why he was the only child-minder to be dismissed due to the alleged decline in workload.

A workers' union brought an action before the referring court on behalf of Mr Kaltoft, claiming that he had been discriminated against on the ground of his obesity. The referring court sought to determine, firstly, whether or not it constituted discrimination contrary to EU law for an employer to dismiss an employee due to his obesity. In this regard, the claimant before the referring court argued that such a dismissal constituted discrimination, either (a) on the self-standing ground of obesity, in violation of a general principle in EU law prohibiting discrimination on any ground in the field of employment, or (b) on the ground of disability in violation of the Employment Equality Directive.

The Advocate General advised the Court to conclude that there is no general principle of EU law prohibiting discrimination on any ground in the field of employment and that, therefore, obesity does not constitute a self-standing ground of discrimination under EU law. In this regard, he noted that the only Treaty provision which could eventually be found to provide such a principle would be Article 21 of the EU Charter of fundamental rights, but due to its scope which is limited to Member States 'implementing' EU law, this provision cannot be found to impose such a general principle on the Member States. In addition, however, the Advocate General did conclude that obesity can under certain circumstances constitute a disability and can as such fall within the scope of the protection provided by the Employment Equality Directive. To come to this conclusion, the Advocate General noted, based on existing case law of the CJEU, that the ability to carry out work does not necessarily exclude disability; i.e. it is not because the claimant before the referring court carried out the work of a child-minder for 15 years that his obesity may not constitute a disability in accordance with the definition established by the Court's case law.

The Advocate General finally concluded that 'only severe obesity can amount to a disability in accordance with Article 1 of Directive 2000/78, and only when it fulfils all the criteria set out in the Court's case-law on the concept of disability.' It is for the referring court to determine whether or not these criteria are fulfilled in the case at hand.[1]

1 See below; p. 63, for a summary of the Court's judgment in this case.

Case C-416/13, Mario Vital Pérez v. Ayuntamiento de Oviedo, Advocate General Mengozzi's Opinion of 17 July 2014, EU:C:2014:2109

Age

The case was referred by the fourth Court for Contentious Administrative Proceedings of Oviedo (Spain), and concerned an age limit (30 years) imposed for participation in an open competition to enter the local police force. The claimant before the referring court argued that this age limit is incompatible with his right to equal treatment and equal opportunities in access to employment in the public sector as contained in the Spanish Constitution and in the Employment Equality Directive.

The Advocate General advised the Court to conclude that an age limit of 30 years for entering an open competition to access the local police force constitutes direct discrimination on the ground of age which cannot be objectively and reasonably justified, in violation of Articles 4(1) and 6(1) of the Employment Equality Directive. With regard to Article 6(1), the Advocate General concluded that among the objectives invoked by the defendant, only those that are linked to training conditions or to the need for ensuring a certain period of employment before retirement could be found to be 'legitimate'. The age limit was however found by the Advocate General to be disproportionate to the legitimate aims at hand, and it cannot therefore be found to be reasonably and objectively justified.

Case C-528/13, Geoffrey Léger v. Ministre des Affaires sociales et de la Santé v. Établissement français du sang, Advocate General Mengozzi's Opinion of 17 July 2014, EU:C:2014:2112

Sexual orientation

The case was referred by the administrative tribunal of Strasbourg (France), and concerned the national legislation which permanently excludes men who have had sexual relations with other men from the possibility of donating blood. The claimant before the referring court argued that this blanket ban is incompatible (a) with Directive 2004/33/EC implementing Directive 2002/98/EC as regards certain technical requirements for blood and blood components and (b) with the general principle of non-discrimination on the ground of sexual orientation.

The Advocate General advised the Court to conclude that the sole fact that a man has had sexual relations with other men does not constitute a risk in itself with regard to blood donations as stipulated under point 2.1 of Annex III of Directive 2004/33/EC. He particularly advised the Court to find that it is for the referring court to determine whether or not such a permanent blanket ban can be found to be in compliance with the general principle of non-discrimination on the ground of sexual orientation and, specifically, with the principle of proportionality. In this regard, the Advocate General provided elements to be taken into consideration when examining the proportionality of the measure, such as the adequacy and reliability of currently available data on sexually transmitted diseases and of the questionnaire which is currently to be filled in by potential blood donors.

Case C-527/13 Opinion of Advocate-General Yves Bot of 9 October 2014 Request for a preliminary ruling from the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia, Spain) lodged on 7 October 2013 – Lourdes Cachaldora Fernández v. Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS)

Gender

Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security

Under Spanish law, permanent invalidity pensions are calculated by considering the contributions paid in the eight years prior to the occurrence of the event giving rise to the invalidity. The law provides a corrective mechanism if, during some months of that reference period, the person concerned has not

paid contributions to the social security scheme. If the person concerned ceased her/his professional activity immediately after a period of full-time employment, the protective mechanism allows for the contribution applicable to periods of full-time employment to be taken into account. However, if that person was working part time immediately prior to interrupting contribution payments, the integration of the periods when the person did not pay contributions is to be calculated using a reduced contribution. This was the case for the applicant Ms. Lourdes Cachaldora Fernández, who worked part time only for four years prior to ceasing contributions, and before that period had worked for almost 27 years full time.

When the case reached the High Court of Justice, the Court asked the CJEU if the method of calculation was incompatible with EU rules that preclude:
1. discrimination between men and women in social security; and
2. discrimination between full-time and part-time workers.

The Court considered the disproportionately high number of female part-time workers in Spain as giving rise to potential indirect sex discrimination.

AG Bot did not consider the provision of the Spanish legislation in question to fall within the scope of the Directive on part-time work, nor did he consider that the legislation amounts to indirect discrimination on the ground of sex, contrary to Directive 79/7.

The AG reasoned that the calculation method is likely to penalise far more women than men, considering the percentage of female part-time workers in Spain. He also reasoned that the method in question reduces the pension in a way that is disproportionate in view of the contributions paid by the applicant over the entirety of her career, and that the calculation method could not therefore be justified.

Case C65/14 Opinion of Advocate General Eleanor Sharpston of 18 December 2014 Request for a preliminary ruling from the Tribunal du travail de Nivelles (Belgium) – Charlotte Rosselle v. Institut national d'assurance maladie-invalidité (INAMI) and Union nationale des mutualités libres

Gender

Directive 92/85/EEC on Safety and health of pregnant workers and workers who have recently given birth or are breastfeeding, and Directive 2006/54/EC on Equal treatment of men and women at work

Under Belgian law, a worker is only entitled to a maternity allowance if, during the six months preceding her maternity leave, she worked for at least 120 working days. Mrs Rosselle, who worked in Flanders, applied for that allowance. Although she had been working for several years, her application was refused because her working status had changed and she had not completed the required minimum contribution period since starting her new employment. The referring court seeks guidance from the CJEU on how to interpret the second subparagraph of Article 11(4) of the Maternity Directive, which states that Member States may under no circumstances require for that purpose periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement (birth). The referring court also asks whether refusing to grant Mrs Rosselle a maternity allowance entails discrimination on grounds of sex and thus violates the Equal Treatment Directive.

The Advocate General recalled that maternity leave is intended, first, to protect a woman's biological condition during and after pregnancy and, secondly, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment. She observed that the Belgian rule at issue in this case is clearly at odds with those objectives, as the rule makes it difficult for the worker to which it applies to take maternity leave (at least beyond the period of compulsory leave) if she is to maintain a sufficient income.

The Advocate General observed that, before going birth, Mrs Rosselle had been in employment for more than 12 months within the meaning of the second subparagraph of Article 11(4). She did not accept the Belgian Government's argument that Mrs Rosselle did not contribute *specifically* to the social security scheme for *salaried employees* for at least six months, as that argument presupposes distinguishing between various employment statuses. Accepting this argument would render the limit imposed on Member States by the second subparagraph of Article 11(4) of the Maternity Directive inoperative.

As regards the question of whether the refusal to allow Mrs Rosselle to receive a maternity allowance would violate the Equal Treatment Directive, the Advocate General reasoned that the Belgian rule at issue is likely to discourage female established public servants from accepting a new job as a salaried employee in the six months prior to the start of their maternity leave. This has potential detrimental effects for the woman worker concerned, whereas it can be inferred from Article 14(1)(a) of the Equal Treatment Directive that women should be able to embrace new career opportunities on equal terms with men.

Accordingly, the Advocate General advised the Court to rule that both the second subparagraph of Article 11(4) of Directive 92/85/EEC and Article 14(1)(a) of Directive 2006/54/EC preclude a Member State from adopting the kind of rule that is at issue in this case.

REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

Joined Cases C501/12 to C506/12, C540/12 and C541/12, Thomas Specht, Jens Schombera, Alexander Wieland, Uwe Schönefeld, Antje Wilke, Gerd Schini v. Land Berlin; and Rena Schmeel and Ralf Schuster v. Germany, judgment of 19 June 2014, EU:C:2014:2005

Age

The cases were all referred by the administrative court of Berlin (Germany), and concerned the methods applied for the allocation to a number of civil servants (the claimants before the referring court) of a step or a transitional step within grades of the pay scheme applicable in each case. The claimants had all been recruited as civil servants and initially remunerated under the previous version of the Federal Law on the remuneration of civil servants. They were then reclassified in accordance with a new system for remuneration. The claimants argued that the previous system for remuneration was discriminatory on the ground of age and that they had been or were still being discriminated. The referring court asked a number of questions to the Court, regarding mainly the legality of the previous system of remuneration, under which 'the basic pay of a civil servant, upon his entry into the public service, is to be decisively determined by reference to his age, and thereafter to rise primarily on the basis of his length of public service'.

Responding, firstly, to a question of applicability raised by the referring court with regard to Article 153(5) TFEU under which the EU is not entitled to intervene in matters of pay, the Court recalled the distinction to be made between the term 'pay' in that provision and the terms 'conditions, including … pay' as used in Article 3(1)(c) of the Employment Equality Directive, determining that any other interpretation would deprive several of the provisions of the Directive of their substance. The Court thus concluded that national rules governing the methods for allocating pay grades and steps in the civil service fall within the material scope of the Directive.

The Court then determined that the previous remuneration system gave rise to a difference in treatment directly based on age, as it considered the age of each civil servant in addition to his/her number of years of service when determining the relevant pay grade. The remuneration system pursued the aim of 'rewarding previous professional experience in a standard manner, whilst guaranteeing a uniform

administrative practice', which was found by the Court to be legitimate. In this regard, the Court noted that although the length of service as such has been found to be an appropriate criterion to be taken into consideration when rewarding professional experience, the conclusion must be different when the criterion effectively taken into account is, as in the cases at hand, the actual age of each appointed civil servant. The previous remuneration system cannot therefore be justified under Article 6(1) of the Directive.

Finally, the Court examined questions six and seven of the referring court, relating to the new system of remuneration established in the Land of Berlin, which is directly based on the previous system which was found by the Court to be discriminatory. The aim of basing the new system on the previous one was to ensure the protection of the acquired rights of civil servants and specifically the preservation of previous pay. In this regard the Court found that the relevant measure was appropriate to achieve the pursued aim and did not go beyond what was necessary to achieve this. In addition, the Court also answered the referring court's questions regarding State liability for violations of the rights inferred upon EU citizens by EU law and regarding the effects of the ruling for the persons concerned. For these purposes, the Court recalled its standing jurisprudence on these issues and called upon the referring court to determine whether the relevant conditions were fulfilled in the cases at hand or not.

Case C-173/13 of 17 July 2014, Reference for a preliminary ruling – Administrative Appeal Court, Lyons, France (Cour administrative d'appel de Lyon) in the case of Maurice Leone & Blandine Leone v. Garde des Sceaux, ministre de la Justice & Caisse nationale de retraite des agents des collectivités locales

Article 141 EC, Equal pay for female and male workers

Gender

The applicant Maurice Leone, a civil servant in the hospital sector, worked as a nurse in civilian care homes in Lyon. In 2005 he applied for early retirement with immediate payment of his pension in his capacity as the father of three children. His application was rejected on the ground that he had not taken a break from work for each of his children. Mr Leone then started legal proceedings, claiming that he was the victim of indirect discrimination. Mr Leone claimed that female civil servants automatically satisfy the condition under French law relating to a career break by reason of the automatic, compulsory nature of maternity leave, while male civil servants are for the most part excluded from those benefits because there is no legal provision enabling them to take paid leave equivalent to maternity leave. The Administrative Court of Appeal in Lyon referred this issue to the CJEU, and asked the following questions:

1. do the relevant national legal provisions indirectly discriminate between men and women within the meaning Article 157 TFEU?
2. if the answer to the first question is in the affirmative, can this indirect discrimination be justified?

The Court, going directly against the Opinion of Attorney General Jääskinen of 27 February 2014, found that the rules at stake did indirectly discriminate between men and women, because they 'in reality, are liable to be met by a much lower proportion of male civil servants than female civil servants, with the result that it places a much higher number of workers of one sex at a disadvantage as compared to workers of the other sex'.

The Court also found that the measure cannot be justified because it does not genuinely concern the stated objective to compensate for career-related disadvantages resulting from taking a career break for reasons of birth, arrival in the home, or the raising of children. In addition, the Court found that in its content, application, and exceptions, the measure was neither consistent nor systematic in relation to the objective pursued.

- It is interesting to note that the Court applied a very strict approach towards indirect discrimination, which was made possible by the strict interpretation and application of the 'consistent and systematic' criterion, which originated in the case of *Gambelli*.[2]
- In addition, the 'consistent and systematic' criterion seems to have been applied separately from the criterion that the measure is 'genuinely concerned with attaining the stated objective'.
- This approach is completely contrary to the Opinion of AG Jääskinen, who emphasised instead that male and female workers are in different situations that cannot be compared, and the existence of comparable situations of different groups is crucial to make a finding of indirect discrimination.[3]

Case C-318/13 of 3 September 2014, Reference for a preliminary ruling – Supreme Administrative Court of Finland (Korkein hallinto-oikeus) in the case of X v. the Ministry of Social Affairs and Health

Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security

Gender

X, born in 1953, was injured in an accident at work, which occurred on 27 August 1991. The Insurance Court held that he was entitled to a lump-sum payment of compensation for long-term disability, which the competent insurance authority paid to him and this amounted to EUR 4 198.98. However, Finnish legislation applies the different life expectancies of women and men as an actuarial calculation criterion for statutory social benefits payable due to an accident. X brought an action against the decisions, arguing that the amount of compensation ought to be calculated on the basis of the same criteria as those stipulated for women, which would result in an additional EUR 278.98. When the complaint reached the Supreme Administrative Court, the Court decided to stay proceedings and asked the CJEU:

1. If Article 4(1) of Directive 79/7 is to be interpreted to preclude national legislation, when that national legislation applies the different life expectancies of women and men as an actuarial calculation criterion and results in a smaller benefit for a man than for a woman in the same age and situation; and
2. If the answer to the previous question is in the affirmative, whether or not the case involves a sufficiently serious breach of EU law.

The Court found that the unequal treatment could not be justified, as life expectancy is not included in the (exhaustive) grounds of derogation as provided for by Article 7(1) of the Directive; and further that a calculation of compensation cannot be made on the basis of such a generalisation. It therefore concluded that Article 4(1) of the Directive should be interpreted to preclude the national legislation as described by the Supreme Administrative Court in its first referral question.

As to the second question, the Court decided that it was for the national court to decide whether the infringement of EU law must be considered 'sufficiently serious', but provided guidance on how to do so.

2 Case C-243/01 *Reference for a preliminary ruling: Tribunale di Ascoli Piceno – Italy, Gambelli and Others* [2003] ECR I-13031, and Paragraph 67.

3 See: Case C-173/13 Opinion of Advocate General Jääskinen of 27 February 2014.

Case C-221/13 of 15 October 2014, Reference for a preliminary ruling – District Court, Trento, Italy (Tribunale ordinario di Trento) in the case of Teresa Mascellani v. Ministero della Giustizia

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

Gender

The applicant in the main proceedings is an employee at the Ministry of Justice (*Ministero della Giustizia*), and since October 2000 has been working part time. Her contract was unilaterally terminated and a new full-time working arrangement imposed, in accordance with national law. The applicant opposed these changes, and stated that working part time has enabled her to care for her family and undertake vocational training.

The District Court (the referring court) has asked the CJEU:

1. Should Clause 5.2 of the Framework Agreement implemented by Directive 97/81 be interpreted to mean that provision may not be made in national legislation, which allows for employers to convert a part-time employment relationship into a full-time employment relationship even when the employee does not consent to this?
2. Does Directive 97/81 preclude a provision of national law under which employers may convert a part-time employment relationship into a full-time employment relationship, even where the employee does not consent?

Within the context of the Directive, a part-time employment relationship increased to a full-time employment relationship is not comparable to a full-time employment relationship reduced to a part-time employment relationship, because the consequences of these actions differ, particularly in the remuneration of the worker.

The Directive should not thus be interpreted to preclude national legislation that allows for such a conversion without the employee's consent.

- It is interesting to note that even though the applicant cited family care reasons, a claim of indirect discrimination on the ground of sex or gender was not made.

Case C-252/13 of 22 October 2014 – Failure of a Member State to fulfil obligations – The European Commission v. The Netherlands

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)

Gender

On 30 September 2011 the Commission, acting under Article 258 of the EU Treaty, sent the Kingdom of the Netherlands a reasoned opinion stating its view that by retaining provisions of Dutch legislation contrary to Article 1(2) (a) and (b), Article 15, and Article 28(2) of Directive 2006/54, the Kingdom of the Netherlands has failed to fulfil its obligations under that Directive. The Commission argued that the Netherlands allegedly did not sufficiently establish that if female workers returning after the conclusion of maternity leave are faced with less favourable employment conditions, this is contrary to the prohibition on discrimination on the grounds of pregnancy, childbirth, and motherhood. The Commission rejected as insufficient both the argument that when a legal right to leave is recognised, that right automatically implies that any less favourable treatment is unlawful; and the possibility to bring an action on the basis of the general prohibition of discrimination. The Commission claimed that the Court should declare that

the Kingdom of the Netherlands has failed to fulfil its obligations under the Directive, and should order the Kingdom of the Netherlands to pay the costs of the proceedings.

Although the Commission set out in detail the Dutch legislation in force, this was only for the purposes of its contention that those measures are insufficient to ensure the full transposition into national law of the provisions of Directive 2006/54 – the Commission failed to identify a specific rule of Dutch law which is contrary to the Directive.

Without the crucial information relating to a specific rule of Dutch law, the Court could not rule on the order sought, and therefore considered that the application failed to meet the requirements of clarity, precision, and coherence. The action was dismissed as inadmissible.

Case C-476/12 of 5 November 2014 – Reference for a preliminary ruling – Supreme Court of Austria in the case of Österreichischer Gewerkschaftsbund v. Verband Österreichischer Banken und Bankiers

Framework Agreement on part-time work concluded on 6 June 1997, which is annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC

Gender

A collective agreement between a trade union (the Österreichischer Gewerkschaftsbund) and an employers' federation (the Verband Österreichischer Banken und Bankiers) required contracts of employment in the Austrian banking sector to contain a provision on the payment of a 'dependent child allowance' by the employer to meet part of the employee's expenses for the maintenance of his or her child. The trade union sought a declaration from the Oberster Gerichtshof (Supreme Court) that part-time workers falling within the scope of the collective agreement were entitled to payment of the full amount of the dependent child allowance provided for in Paragraph 22(1) of that collective agreement and not only to an amount calculated pro rata on the number of hours worked. The Supreme Court then sought guidance from the CJEU as to whether the principle of *pro rata temporis* contained in Clause 4.2 of the Framework Agreement on part-time work may be applied to that allowance.

The Court considered that the allowance concerned constitutes 'pay' to the worker. It follows that if, according to the terms of that employment relationship, the worker is employed on a part-time basis, the calculation of the dependent child allowance in accordance with the principle of *pro rata temporis* is objectively justified, within the meaning of Clause 4.1 of the Framework Agreement on part-time work.

Clause 4.2 of the Framework Agreement on part-time work must be interpreted as meaning that the principle *pro rata temporis* applies to the calculation of the amount of a dependent child allowance paid by an employer to a part-time worker pursuant to a collective agreement such as that applicable to the employees of Austrian banks and bankers.

Case C-530/13, Leopold Schmitzer v. Bundesministerin für Inneres, Grand Chamber judgment of 11 November 2014, EU:C:2014:2359

Age

The case was referred by the Austrian administrative court, and concerned the legality of a remuneration system for civil servants which had been adopted to put an end to previous age discrimination. The previous legislation did not take into account periods of employment completed before the age of 18 when determining the advancement reference date based on which the basic initial pay of civil servants

was calculated, in violation of Articles 1, 2 and 6 of the Employment Equality Directive.[4] The amending legislation examined in the case at hand provided a new salary advancement system for new civil servants, to which older civil servants who had been employed before they had reached the age of 18 were also invited to opt in if they required such periods of employment to be taken into account retrospectively. This new system however implied a slower pace of advancement for those older civil servants who opted in, having the direct consequence that such civil servants do not in practice receive a higher salary than under the previous system.

The claimant before the referring court was a civil servant employed by the Ministry for the Interior who requested to opt into the new salary advancement system in order to have his periods of work before the age of 18 taken into account. He however challenged the slower pace of salary advancement before the referring court. The questions referred to the Court mainly concerned the difference in treatment between older civil servants who request to opt into the new system (due to discrimination they had suffered under the previous system) and older civil servants who do not request to opt in (as they benefit from favourable treatment under the previous system).

Firstly, for the purpose of the comparison to be made to determine a potential difference in treatment, the Court considered 'civil servants disadvantaged by the previous system' as opposed to 'civil servants favoured by the previous system' (i.e. who had not worked before the age of 18). With regard to these two groups of civil servants, the Court noted that the slower pace of salary advancement will only apply to older civil servants who were disadvantaged by the previous system and who therefore apply to opt into the new system, but not to older civil servants who were favoured by the previous system. Thus, the amended legislation continues to treat the two groups of civil servants differently with regard to their remuneration status and salary. The Court found that this difference in treatment is directly based on age, as the slower pace of advancement only applies to older civil servants who had completed work before the age of 18.

The Court then examined whether the difference in treatment based on age could be justified under Article 6(1) of the Employment Equality Directive. In this regard, the Court applied its standing jurisprudence by excluding considerations relating purely to budget and procedural economy as potentially legitimate objectives as of themselves. Instead, it examined the invoked objectives of respect for acquired rights and the protection of the legitimate interests of the civil servants favoured by the previous system. The Court however concluded that these objectives cannot justify a measure which maintains indefinitely a difference in treatment between the two groups of civil servants, taking into consideration that the acquired rights and legitimate interests of the civil servants who were favoured by the previous system would not be affected in any way by changes made to the system applied to those who had previously been disadvantaged. The difference in treatment cannot therefore be justified.

Finally, the Court answered a question of the referring court which concerned the ability of a claimant to rely on Article 2 of the Directive in order to challenge the discriminatory effects of a measure which he had himself requested (in this case, the recalculation of his advancement reference date so that work completed before the age of 18 may be taken into account for the calculation of his basic pay). The Court clearly demonstrated that depriving a claimant of that ability would be in direct violation of Articles 9 (defence of rights) and 16 (compliance) of the Directive.

4 In its previous judgment in *Hütter* (C88/08, EU:C:2009:381), the Court had found that the pre-existing system for the calculation of remuneration in the Austrian civil service constituted discrimination on the ground of age, following which the Austrian legislature adopted the amending legislation examined in the case at hand.

Case C-416/13, Mario Vital Pérez v. Ayuntamiento de Oviedo, judgment of 13 November 2014, EU:C:2014:2371

Age

The case was referred by the fourth Court for Contentious Administrative Proceedings of Oviedo (Spain), and concerned an age limit imposed for participation in an open competition to enter the local police force.[5]

Having noted that the age limit at hand falls within the scope of the Directive and that it has the direct consequence that some persons are treated less favourably than others in comparable situations on the sole ground that they have exceeded the age of 30 years, the Court examined whether the relevant regulation could be upheld on the basis of either Article 4(1) or 6(1) of the Directive.

Regarding the exception for genuine and determining occupational requirements (Article 4(1)), the Court recalled that 'the possession of particular physical capacities is one characteristic related to age' and noted that some of the duties of local police officers may require the use of physical force, thereby implying the necessary possession of certain physical capacities. The Court concluded that the objective pursued by the introduction of the age limit to 'safeguard the operational capacity and proper functioning of the local police service, by ensuring that newly recruited officers are able to perform the more physically demanding tasks for a relatively long period of their career', is legitimate with regard to, in particular, recital 18 in the preamble to the Directive. However, the Court did not find that the age limit was a proportionate means to achieve the objective pursued, in particular as the stringent physical tests which form part of the eliminatory recruitment conditions would, according to the referring court, make it possible to achieve the pursued objective in a less discriminatory manner. Article 4(1) of the Directive does not therefore permit the relevant regulation to be upheld.

Regarding the possible justification of differences in treatment on grounds of age provided by Article 6(1) of the Directive, the Court noted that the age limit was based on the training requirements for the post of local police officer and the need for a 'reasonable period of employment before retirement or transfer to another activity', which constitute legitimate objectives pursued by the measure. However, the Court noted that no evidence was submitted to show that the age limit for recruitment was a necessary and appropriate means to achieve either of those legitimate aims, which is why the Court found that the measure could not be justified on the basis of Article 6(1). The Employment Equality Directive must therefore be interpreted to preclude a provision such as that at issue before the referring court.

Case C-354/13, Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v. Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund, judgment of 18 December 2014, EU:C:2014:2463

The case was referred by the district court of Kolding (Denmark), and concerned potential discrimination on the ground of obesity in the field of employment.

Disability

Following the opinion of the Advocate General,[6] the Court noted that neither the Treaties nor EU secondary legislation prohibit discrimination on the ground of obesity as such, and that the provisions of the Charter of Fundamental Rights are not applicable as the situation at hand does not fall within the scope of EU law. However, the Court then examined whether obesity can constitute a 'disability' by referring to the definition provided in the *HK Danmark* judgments.[7] The Court underlined that the 'concept of disability must be understood as referring not only to the impossibility of exercising a professional activity, but

5 For a summary of the facts of the case, see the Advocate General's Opinion referred to above, p. 54.
6 For a summary of the facts of the case, see the Advocate General's Opinion referred to above, p. 54.
7 Joined cases C-335/11 and C-337/11, EU:C:2013:222, see also Waddington, L. (2013), 'HK Danmark (*Ring and Skouboe Werge*): Interpreting EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities', *European Anti-Discrimination Law Review*, Issue 17, pp 11-21.

also to a hindrance to the exercise of such an activity' (para. 54), and that it 'does not depend on the extent to which the person may or may not have contributed to the onset of his disability' (para. 56). Thus, the conclusion of the Court was that obesity, although it does not in itself constitute a disability, can be covered by the concept of 'disability' when, under given circumstances, it 'entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one' (para. 59). Finally, the Court added that such would be the case in particular where reduced mobility or the onset of medical conditions would prevent the worker from carrying out his professional activity without discomfort.

European Court of Human Rights

S.A.S v. France, Application No. 43835/11, Grand Chamber Judgment of 1 July 2014

Religion or belief

The applicant held that the prohibition of wearing clothing covering one's face in public space applicable in France since 2010, violated her rights in breach of Articles 3, 8, 9, 10 and 11 of the ECHR, separately or in conjunction with the non-discrimination provision of Article 14. The applicant is a French national who declared that she wears the burqa and the niqab when she feels that her faith requires it (for instance, during religious events such as the Ramadan) but not systematically, and that she does this out of respect for her religious beliefs, culture and personal convictions, and not because anyone forces or compels her to do so. She also pointed out that she did not need to wear the burqa or the niqab when visiting a bank, or when travelling by aircraft and that she was fully willing to remove it whenever an identity control is necessary.

The Court firstly noted that the prohibition of wearing the full veil in public spaces constitutes a limitation both of the applicant's right to respect for her private and family life (Article 8) and in particular of her freedom of thought, conscience and religion (Article 9). Thus, the Court examined in some detail whether the limitation was 'necessary in a democratic society' and therefore complied with the Convention, by analysing whether the general prohibition prescribed by law was a proportionate means of achieving the aims of ensuring public safety or protecting the rights and freedoms of others, as invoked by the French government. Firstly, the Court held that neither the principle of gender equality nor that of human dignity can justify a general prohibition such as the one imposed by French law. A prohibition of *forcing women* to wear the full veil could possibly be justified by the principle of gender equality. But a State cannot invoke gender equality in order to ban a practice that is defended by women such as the applicant, in the context of their right to exercise their freedom of religion. Similarly, the Court noted that the principle of human dignity is not violated by some women wearing the full veil as long as their aim is not to offend or violate others' dignity. The expression of different cultures and traditions is rather an element of pluralism which enriches democratic societies.

However, the Court did recognise that it may be justified to require respect for minimum rules of living together in a society as an aspect of ensuring the rights and freedoms of others, and that the fact of covering one's face in public spaces may be found to breach others' right to evolve in a sociable environment facilitating people 'living together'.[8]

The Court examined whether the general prohibition of wearing, in public spaces, clothing which covers one's face, is 'necessary in a democratic society', either to ensure public safety or to protect the rights and freedoms of others. It found that with regard to the interest of ensuring public safety, a prohibition on covering one's face in public spaces would only be proportionate, due to its invasive character for women wishing to wear the full veil, at times when a particular threat is posed to public safety, which was not the case in France at the time. With regard to the interest of protecting the rights and freedoms of others by ensuring minimal requirements for living together in society, the Court held that this limitation of the applicant's rights to freedom of religion and to respect for her private life may be justified in principle. Examining the proportionality of the limitation, the Court noted that the number of women wearing the full veil in France is comparatively very low and that it may therefore seem disproportionate to impose a general prohibition. It also noted that the impact of the prohibition on these women is very important and may have the effect of isolating them if they are forced to avoid going into public spaces. The Court finally noted that a number of national as well as international non-governmental organisations, including for instance the Commissioner for Human Rights of the Council of Europe, find that a general prohibition of

8 In French, the Court continuously referred to the concept of '*vivre ensemble*'.

wearing the full veil is disproportionate. However, it came to the conclusion that the arguments of the French government invoking the need to ensure interaction between people in a democratic society were well founded. In such circumstances, the Court underlined the need to respect the choices made by the French Government in this regard. The Court thus concluded that the limitation of the applicant's rights were justified and could be considered 'necessary in a democratic society'.

Case of Hämäläinen v. Finland (Application No. 37359/09), of 16 July 2014 – Grand Chamber Judgment

Gender

The applicant, Heli Hämäläinen, is a Finnish national who was born male and married in 1996. She and her wife had a child in 2002, and in 2009 Ms Hämäläinen underwent male-to-female gender reassignment surgery. Although she had changed her first names in June 2006, she could not have her identity number changed to indicate her female gender in her official documents unless her wife consented to the marriage being turned into a civil partnership (which she refused to do) or unless the couple divorced. The couple, who are Evangelical Lutherans, preferred to remain married because divorce would be against their religious convictions and they felt that a civil partnership did not provide them and their child with the same degree of security as marriage. Ms Hämäläinen's request to be registered as a female at the local registry office was therefore refused.

Her appeal to the domestic courts against the refusal to register her as a female was rejected on the grounds that the law relating to the confirmation of the gender of transsexuals was not intended to change the fact that only a man and a woman could marry under Finnish law. In 2010 the Supreme Administrative Court refused her further appeal and in November 2012 the Fourth Section of the ECtHR held unanimously that there had been no violation of Article 8 ECHR (the right to private and family life) in her case. Subsequently the applicant complained to the Grand Chamber that by making the recognition of her new gender conditional upon transforming her marriage into a civil partnership, and the refusal to give her a female identity number which corresponded to her actual gender, violates her rights under Articles 8, 12 (the right to marry) and 14 (the prohibition on discrimination) respectively.

The Grand Chamber first examined the case under Article 8. Under this provision, the question to be determined by the Court was whether respect for the applicant's private and family life entailed a positive obligation on the State to provide an effective and accessible procedure allowing the applicant to have her new gender legally recognised while remaining married. The Court noted that, if it were to accept the applicant's claim, in practice this would lead to a situation in which two persons of the same sex could be married to each other, whereas no such right existed in Finland. The Court reiterated that the Convention does not impose an obligation on the States to allow same-sex marriage. The regulation of the effects of a change of gender in the context of marriage falls to a large extent, though not entirely, within the margin of appreciation of the States. Furthermore, the Convention does not require that any further special arrangements be put in place for situations such as those of the applicant. The Grand Chamber also noted that there is still no European consensus on allowing same-sex marriages and no consensus in those States which do not allow same-sex marriages as to how to deal with gender recognition in the case of a pre-existing marriage. In the absence of a consensus, and given the sensitive moral and ethical issues at stake, Finland had to be afforded a wide margin of appreciation.

On the side of the applicant, the Court considered that the differences between a marriage and a registered partnership are not such as to involve an essential change in the applicant's legal situation. The applicant would thus be able to continue enjoying in essence, and in practice, the same legal protection under a registered partnership as afforded by marriage. Furthermore, the Court considered that the effects of the conversion of the applicant's marriage into a registered partnership would be minimal or non-existent as far as the applicant's family life is concerned. In conclusion, the Court was of the opinion that the current Finnish system as a whole has not been shown to be disproportionate in its effects on the applicant and

that a fair balance has been struck between the competing interests in the present case. Thus, the Court found no violation of Article 8.

Next, the Court ruled that the complaint did not raise a separate issue under Article 12. As to the complaint of discrimination (Article 14 in conjunction with Articles 8 and 12), the Court used the term cissexual for the first time (i.e. people whose experience of their gender matches the gender they were assigned at birth). The applicant had compared her situation to that of cissexuals, who had obtained legal gender recognition automatically at birth and whose marriages, according to the applicant, did not run the risk of "forced" divorce in the way that hers did. The Grand Chamber agreed with the Chamber that the applicant's situation and the situations of cissexuals are not sufficiently similar to be compared with each other. The applicant cannot therefore claim to be in the same situation as cissexuals. Thus the Court found no violation of Article 14.

Mansur Yalçın v. Turkey, Application No. 21163/11, judgment of 16 September 2014

The applicants were 14 Turkish nationals practising the Alevi faith,[9] who argued that the mandatory classes in religion and ethics provided throughout primary school and the first level of secondary school infringed their (children's) rights in violation of Article 2 of Protocol No. 1 (the right to education) to the Convention as well as Article 9 (freedom of thought, conscience and religion) in conjunction with Article 14 (the prohibition of discrimination).

The Court first concluded that the application was inadmissible with regard to 11 of the 14 applicants, as they had simply claimed (*in abstracto*) that the curriculum of the classes conflicted with their religious beliefs, without explaining how they had been personally affected. They could not therefore claim to be direct, indirect or even potential victims of the alleged violation, within the meaning of the jurisprudence of the Court. The application was however admitted with regard to the remaining three applicants.

On the merits of the case, the applicants claimed that the religion and ethics classes were not provided in an objective manner respecting their beliefs and allowing them to educate their children according to their convictions. Instead, the classes were based on the Sunni understanding of Islam which is practised by the majority in Turkey, and religious practices such as prayer according to this branch were taught. In this regard, the Court emphasised the State's duty of neutrality and impartiality when regulating matters of religion. It noted that despite important amendments made to the curriculum of the religion and ethics classes since the lodging of the application,[10] the main focus of the classes remained the Sunni understanding of Islam. The Court concluded that the applicants could legitimately have felt that their children were caught in a 'conflict of allegiance' between the faith and practices taught in school and those practised at home, considering in particular the differences between the Sunni and the Alevi branches of Islam.

The Court found that an adequate exemption procedure would be necessary to avoid such a conflict, noting that the exemption procedure that does currently exist is only available to Christian and Jewish children, thus forcing parents to reveal their religious beliefs for their children to benefit from this exemption. The Court thus concluded that the religious education currently provided in Turkey is still inadequately equipped to ensure respect for parents' convictions, in violation of Article 2 of Protocol No. 1. The Court did not examine the complaints under Articles 9 and 14.

9 The Alevi faith is an unorthodox branch of Islam practised by a minority of Muslims in Turkey. The majority practise the Sunni branch of Islam.

10 The Turkish Government had amended the curriculum following the Court's ruling in the case of *Hasan and Eylem Zengin v. Turkey* (application No. 1448/04, judgment of 9 October 2007).

Case of J.L. v. the United Kingdom (Application No. 66387/10), of 30 September 2014

Gender

The applicant, J.L., is a British national, who used to be married to an army officer who violently abused the applicant and one of her daughters. He resigned from the army following a court martial which found him guilty of 'ungentlemanly conduct'. The army therefore no longer had a duty to house the applicant, but in 1989 and on compassionate grounds the army moved her to Ministry of Defence (MoD) accommodation in Leeds, close to her daughters' boarding school, until she was able to obtain housing through the local council. Her licence to occupy was terminated in 1990, the MoD was granted a possession order in July 1993, and attempts were made to find the applicant alternative accommodation for her and her daughters. However, when an offer was made by the MoD, the applicant had to refuse it because she is registered as disabled and requires a wheelchair, and the proposed housing did not accommodate this. Several further possession attempts were made, but the applicant remained in occupation. In 1996 the MoD sold its Leeds property to a company called Annington Homes and leased it back, and in 1999 it was stated that the applicant's dwelling was surplus to MoD requirements and should be handed back to Annington Homes. A possession order based on the 1993 order failed, but several notices to quit were still made. Possession proceedings started, and the MoD was granted a possession order. Bearing in mind the applicant's disability, her daughter's mental health problems, and her other daughter's young son with Crohn's disease, the applicant claimed that the granting of the possession order violated her rights under Article 8 of the ECHR. However, and after an assessment of proportionality at two levels of jurisdiction, the High Court upheld the order on the grounds that the MoD had a legitimate and proportionate aim in seeking possession. Appeal was denied.

The applicant complained under Article 8 of the Convention that the possession proceedings brought against her had violated her right to respect for her home. The applicant further complained that in view of her 'different situation' the decision to grant the Ministry of Defence the right to evict her before alternative accommodation was available had violated her rights under Article 14 read together with Article 8 of the Convention. The Fourth Section of the ECtHR considered the assessment of proportionality sufficient to ensure the protection afforded by Article 8, and the Court also noted the applicant's failure to explain how she had been treated differently within the context of Article 14. Therefore the Court declared the application inadmissible.

Case of Durmaz v. Turkey (Application No. 3621/07) of 13 November 2014

The case concerned the applicant's daughter, Gülperi O., who was married to O.O., who, according to the applicant, frequently used violence against Gülpiri O.

Gender

On 18 July 2005, O.O. brought Gülperi O. to the accident and emergency department at the Aegean University Hospital and told the doctors and nurses that Gülperi O. had overdosed on two medicines, namely 'Prent' and 'Muscoril'. A police officer at the hospital took O.O.'s statement, where he reported that following a row earlier in the day Gülperi O. attacked him and he had hit her. The subsequent police report stated that an officer had spoken to the prosecutor, and the prosecutor had instructed that officer to question both O.O. and Gülperi O. Later that evening, doctors were unsuccessful in their attempts to resuscitate Gülperi O., and she died at 10.10pm. A post-mortem examination was carried out the following day and the police prepared a report that stated the cause of death as suicide by an 'overdose of medicines'.
Several days later, the applicant's husband, Mr. Kanter, lodged a complaint with the prosecutor against O.O., alleging that O.O. was responsible for the death of his daughter and that she had not been suicidal, also stating that O.O. had beaten her on many occasions that had twice hospitalised her. A doctor at the hospital informed the prosecutor that O.O. had informed them that Gülperi O. had injested 'Prent' and 'Muscoril'; however, on 19 December 2005 the prosecutor informed the Registry Office for births, marriages and deaths that Gülperi O. had killed herself by taking an overdose.

On 30 January 2005 the Forensic Medicine Institute published its post-mortem examination, which revealed that no drugs could be detected in the forensic samples taken from the victim, and that the victim died of fatal lung problems.

On 4 April 2006, the applicant and her husband lodged an objected with the Karşıyaka Assize Court against the prosecutor's decision, specifically bringing to the Court's attention the failure of the prosecutor to question O.O. despite his admission that he had beaten the victim on the day of her death, and the fact that the cause of death established in the prosecutor's report ran contrary to the findings of the post-mortem examination. The applicant also alleged that the prosecutor had accepted from the outset that Gülperi O. had committed suicide. Additional arguments were also set out before the Court on 20 June 2006.

The Karşıyaka Assize Court dismissed the objection, and following a notice of the application to the respondent Government, the Forensic Medicine Institute was asked to render an expert opinion on whether undetectable medicines could have caused the fatal lung disease reported in the post-mortem examination. The experts responded and stated that although an alternative toxin could not be ruled out, they disagreed that lung damage was the cause of death and stated that the initial report should have stated that the cause of death could not be established.

The applicant complained under Articles 2, 6 and 13 of the Convention that the national authorities had failed to carry out an effective investigation into the death of her daughter.

The Court considered it appropriate to examine the complaints solely from the standpoint of Article 2 of the Convention. After examining the submissions from both parties, the Court identified numerous deficiencies in the investigation into the death of Gülperi O. Specifically, the Court noted that it appeared that neither the prosecutor nor the investigating officers had kept an open mind throughout the investigation, and criticised the failure of the prosecutor to question the victim's husband and to consider properly the results of the post-mortem and toxicology report. Taking into consideration the inadequate investigation, the Court noted that the 'theoretical possibility' that the victim had taken an overdose was not sufficient to support the prosecutor's decision. The Court therefore concluded, unanimously, that there had been a violation of Article 2. The Court also specifically highlighted that the applicants are entitled to request the authorities to re-open the investigation.

Case of Emel Boyraz v. Turkey (Application No. 61960/08) of 2 December 2014

On 19 October 1999, the applicant, a female, sat an examination to become a public servant. She was successful and was later informed that she had been appointed to her first choice out of five posts: the position of security officer at the Batman branch of TEDAŞ, the state-run Electricity Company. However, on 5 July 2000 the human resources department informed the applicant that she would not be appointed as she did not fulfil the requirements of 'being a man', and 'having completed military service'.

Gender

On 18 September 2000 the applicant lodged an action against the general directorate of TEDAŞ with the Ankara Administrative Court, requesting the annulment of the decision with all its financial consequences. She noted that being a man was not a requirement for the post, that she was deprived of her opportunity to be appointed to one of her four other choices of posts, and that she could not resit the examination as she had already succeeded in 1999. In response, the general directorate of TEDAŞ submitted to the same court that one of the requirements for the post in question had been that the applicant had 'completed military service', and as a woman, the applicant could not therefore be recruited as a security officer. On 27 February 2001 the Ankara Administrative Court held that this requirement should be considered to apply to only male candidates, and consequently annulled the decision of the Batman branch of TEDAŞ. TEDAŞ then proceeded to offer the applicant a contract and she took up her duties on 11 July 2001.

In the meantime, on 8 May 2001 TEDAŞ lodged an appeal against the judgment of 27 February 2001 before the Supreme Administrative Court. On 31 March 2003 the Supreme Administrative Court quashed the judgment of the Ankara Administrative Court, and held that the requirement to complete military service applied to all candidates, and that this was a lawful requirement. On 17 March 2004, the applicant was dismissed from her post. The applicant appealed and highlighted that there were three other similar cases brought against TEDAŞ, and one of them was currently pending before the Supreme Administrative Court. However, the subsequent requests for rectification were rejected, and on 17 September 2008 the Supreme Administrative Court dismissed the applicant's appeal.

The applicant complained under Article 14 of the Convention in conjunction with Article 8, alleging that the administrative authorities' decision and the domestic courts' judgments constituted discrimination against her on the ground of sex. The applicant also complained under Article 6(1) of the Convention that the proceedings she had brought before the administrative courts had not been concluded within a reasonable time, and given the similar cases before the Supreme Administrative Court, were not concluded fairly.

After assessing the submissions from both parties, the Court found that neither the administrative authorities nor the Supreme Administrative Court could substantiate the grounds for the requirement that only male staff be employed in the post of security officer in the TEDAŞ. In addition, the Court specifically noted that the applicant worked as a security officer at TEDAŞ between 11 July 2001 and 17 March 2004, and the reason for her dismissal was not her inability to fulfil her tasks. The Court also took note of the fact that the applicant's case had been pending before the Supreme Administrative Court for seven years, and furthermore that the Supreme Administrative Court had failed to provide adequate reasoning for its decisions. The Court therefore held that there had been a violation of Article 14 of the Convention, in conjunction with Article 8 of the Convention, which amounted to discrimination on the ground of sex.

Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfı v. Turkey, Application No. 32093/10, judgment of 2 December 2014

Religion or belief

The applicant is a religious foundation of the Alevi faith, based in Istanbul, which argued that its exclusion by the government from a social advantage granted to 'places of worship' under Turkish law violated Article 14 of the Convention (the prohibition of discrimination) in conjunction with Article 9 (freedom of thought, conscience and religion). The relevant Turkish legislation stipulates that the electricity bills of 'places of worship' are to be paid from a fund administered by a public authority (the Directorate of Religious Affairs, *Diyanet*). The long-standing position of the Turkish authorities, including the *Diyanet*, is that the Alevi faith does not constitute a 'religion', which is why its 'places of worship' (*cemevis*) did not benefit from the exemption from paying for electricity as provided by Turkish legislation. The applicant foundation runs Alevi *cemevis* across Turkey and in particular one cultural centre which contains, amongst other things, a *cemevi* and a room for funerals. The applicant argued that the Turkish government, by refusing to recognise *cemevis* as 'places of worship', thus infringed the applicant's rights in violation of Articles 9 and 14 of the Convention.

The Court first determined that the application fell within the scope of Article 9, considering that an exemption for religious communities from paying electricity bills can have important repercussions on the exercise by those communities of their right to express their religion. Comparing the nature of the activities taking place in the *cemevis* with those taking place in (other) places of worship recognised as such by the Turkish authorities, the Court then concluded that the *cemevis* do constitute places of worship and that the situation of the applicant foundation was therefore similar to that of other religious communities in Turkey as regards the exemption from the payment of electricity bills. Finally, the Court then examined whether the difference in treatment could be reasonably and objectively justified. In this regard, the Court noted that States Parties have an obligation of neutrality with respect to different religious groups, and are held to consider and approach these groups without any appreciation on

their part of their legitimacy and without exercising any discrimination between them, including when providing them with certain benefits. Noting that the government had presented no possible justification for the difference in treatment at hand, the Court thus concluded that it had no objective or reasonable justification and amounted to discrimination in violation of Article 14 in conjunction with Article 9. It found the applicant's separate claim under Article 9 to be inadmissible.

Case of Dubská and Krejzová v. the Czech Republic (Application nos. 28859/11 and 28473/12) of 11 December 2014

Gender

The applicants, Šárka Dubská and Alexandra Krejzová, are both Czech nationals. Both applications concern their complaint that it is not possible under Czech law to give birth at home with the assistance of a health professional.

After feeling pressured from medical personnel to undergo medical interventions during the birth of her first child in 2007, the first applicant, Ms. Dubská, decided to give birth to her second child at home. However, after making enquiries she was informed that Czech legislation did not provide for the possibility of a public health insurance that covered the costs of a home birth. Midwives were only allowed to assist at births in premises with the technical equipment that the law requires. In May 2011 Ms. Dubská gave birth at home without the assistance of a midwife. She subsequently lodged a constitutional appeal and claimed that she was denied the possibility to give birth at home with the assistance of a healthcare professional, which violated her right to respect for private life. The Constitutional Court dismissed this complaint, but it did however express its doubts regarding the compliance of the Czech legislation with Article 8 of the Convention.

Ms. Krejzová, the second applicant, gave birth at home to two children with the assistance of a midwife in 2008 and 2010 respectively. The applicant specifically wanted medical personnel to agree to refrain from any unnecessary medical interventions, and to agree to her wish for uninterrupted contact with the baby from the moment of birth; the normal practice being that the baby is immediately taken away to be weighed and tested. Ms. Krejzová could not find any hospital that would allow these requirements.

When the second applicant again became pregnant in 2012 she struggled to find a midwife to assist her home birth, as midwives now face a heavy fine if they provide medical services without authorisation. After making a number of enquiries, the second applicant was told that public insurance did not cover the attendance of a health professional at her home birth, and that no midwife registered in Prague was authorised to assist in home births.

In May 2012 the second applicant gave birth in a hospital, which she had chosen for its reputation of respecting the wishes of mothers. However, the second applicant's specific wishes were not respected.

Both applicants complained that the Czech legislation that forbade a health professional from assisting with a home birth was in violation of the right to private life as provided for in Article 8 of the Convention. The Court paid particular attention to whether or not the measure was 'necessary in a democratic society'. As there is no common ground on home births amongst Member States, the Court considered that the margin of appreciation afforded to Member States should in this context be wide. The Court also considered the many and specific risks that may occur during birth, and the time it may take to reach a hospital from birth. In addition, the Court noted that the national authorities had attempted to lead an open discussion with all relevant interest groups on the matter, and that the Constitutional Court had made a further assessment of the matter by way of *obiter dictum*. Taking these factors into account, the Court concluded that the national authorities had not exceeded their wide margin of appreciation by enacting the measure in question. The Court decided to join the applications, and concluded that there had been no violation of Article 8 of the Convention.

Case of Hanzelkovi v. The Czech Republic (Application No. 43643/10) of 11 December 2014

The applicants were Ms. Eva Nolčová (née Hanzelková) and her son Miroslav Hanzelka, who are both Czech nationals.

Gender

On Friday 26 October 2007 Mrs Hanzelková gave birth to her son without medical complications, and on the same day took him home despite the advice of the medical team. The hospital doctor proceeded to contact the social welfare authority and inform them in a note that the health and welfare of the child were at risk. The District Court granted an interim measure to the authority, to entrust the child to the care of the hospital.

A bailiff, a social worker, a doctor, and two police officers went to the applicants' house. The doctor examined the child and found him to be in good health; however, he agreed that the interim measure should still be enforced and the mother and child were forced to return to the hospital for two days, after which time the interim measure was lifted.

Mrs Hanzelková appealed against the interim measure which had, in her view, breached her rights and those of her son to liberty and to respect for private and family life. On 30 April 2008 the Regional Court dismissed Mrs Hanzelková's appeal, finding that the appeal had become without object because the measure had been discontinued on 29 October 2007. The Constitutional Court rejected a second appeal, giving the opinion that the interference was justified by established facts.

Before the ECtHR the applicants complained of a violation of their right to respect for their private and family life under Article 8, alleging that the interim measure was neither lawful nor necessary.

The Court considered that the interim measure was in principle guided by a legitimate aim within the meaning of Article 8(2) of the Convention. However, the Court found that the court that adopted the interim measure had failed to properly establish the risks incurred by the child and failed to ascertain whether his health could have been protected by less intrusive measures. The Court also observed that the reasoning set out in the interim order simply referred to the referring doctor's note, and it could not be shown that the parents could not have been informed before executing the measure. The Court was therefore not convinced that there were unusually compelling reasons for the child to be withdrawn from the care of his mother. This was a serious interference with the applicants' family life and the conditions of implementation had overstepped the State's margin of appreciation. The interim order could not therefore be regarded as necessary in a democratic society. For these reasons, the Court held that there had been a violation of Article 8 of the Convention.

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

This section provides as far as possible an overview of the main latest developments in gender equality and non-discrimination law (including case law) and policy on the national level in the 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey, from 1 July to 31 December 2014.

The text has been drafted on the basis of information provided by the national experts of the European network of legal experts in gender equality and non-discrimination.

AT Austria

LEGISLATIVE DEVELOPMENT

Increase in family benefit

Gender

The general family benefit (*Familienbeihilfe*) is a family benefit in cash that is payable to parents raising their children in Austria.[1] It had not been increased for several years. As of 1 July 2014 every benefit has been increased by 4 % and will be increased by another 1.9 % in both 2016 and 2018. Benefits for children with disabilities are increased by 8.4 %.

CASE LAW

Constitutional Court confirms the constitutional equality of positive action measures in admission to university medical studies

Gender

After a ruling from the CJEU that has opened access to Austrian universities for all EU citizens, Austrian university legislation limited the number of university places available for first year medical students. Medical universities are now legally required to announce the number of study places that are available at the start of each academic year. Due to the high demand, aspiring medical students must pass an eligibility examination that tests an aptitude range of knowledge and skills necessary to study medicine. The available first year places for medical students are assigned to the candidates with the best test results.

Male candidates consistently achieve better results in the admission tests and pass in greater numbers than female students. Therefore, significantly less women have entered medical studies. An evaluation commissioned by the Ministry for Economics, Research and Science recommended an investigation into the testing method to identify specific biases and obstacles that present larger difficulties for female students.[2] It also recommended, as a positive action measure, the implementation of a separate framework to score female candidates.

The medical universities and the Ministry for Economics, Research and Science decided to follow these recommendations for the academic year 2012/2013. The test results of female candidates were scored within a different framework, resulting in a more balanced gender representation for first year medical students. Male candidates who did not attain a study place complained to the Constitutional Court, citing a breach of the constitutional equality principle. The Court rejected these claims largely by arguing that the preferential treatment of female candidates had been motivated by evaluations and recommendations based on solid methodological findings. Preferential treatment or positive actions in favour of one gender in order to avoid unfair and biased treatment are not only allowed but are required by Article 7 section 2 Federal Constitutional Act (*Bundes-Verfassungsgesetz*, *B-VG*).

Both at university and later in the medical profession, the balanced representation of men and women is well within the public interest, which is a central principle required for the validity of positive action measures. The argument of the Constitutional Court is therefore valid.

1 80 % of recipients are female, because the Act on Balancing Family Burdens (*Familienlastenausgleichsgesetz*) requires payment to the mother of the children unless a request for payment to the father or another person or institution acting in place of the parents is submitted to the authorities.

2 Evaluation study: http://wissenschaft.bmwfw.gv.at/uploads/tx_contentbox/Spiel_Studie_Zusammenfassung.pdf, accessed 25 March 2015.

A new testing method for medical university admission tests is currently being developed, which will address the same issue. If the newly developed tests still do not solve the under-representation of women within medical studies and the medical professions, the constitutional arguments will be useful to justify the continuation of separate testing, or positive action measures for test scoring.

Internet sources:
Constitutional Court (*Verfassungsgerichtshof*), V 5/2014-17, 27 September 2014, http://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_20140927_14V00005_00/JFT_20140927_14V00005_00.pdf, accessed 25 March 2015.

Case law from the Constitutional Court and the Supreme Court clarifies the legal status of registered same-sex partners in respect of adoption, parental leave, and the corresponding small children's benefit

Gender

In October and December 2014 two cases concerning the legal status of registered same-sex partners were brought before the Supreme Court and the Constitutional Court respectively. Both decisions have a bearing on the right of same-sex couples to parental leave and on the corresponding small children's benefit.

The adoption of a biological child of one of the spouses by his or her partner has been open to registered same-sex couples since 2013. However registered same-sex couples were excluded from the adoption of non-biological children. The Constitutional Court case concerned the legitimacy of the legislative prohibition. It was argued that registered same-sex partnerships are essentially identical to marriages in relation to child care. Married couples are legally recognised as potential adoptive parents for a non-biological child and have to be considered by the authorities as such. Until the decision by the Constitutional Court, registered same-sex partners were precluded from adopting children from outside the partnership.

The Supreme Court had to decide if a registered same-sex partner is entitled to share the small children's benefit with his or her partner.

The Constitutional Court has repealed passages in the Civil Code and in the Law on Registered Partnerships effecting the elimination of distinctions between registered same-sex couples and heterosexual couples with respect to adoptions (Paragraph 191 (2) first sentence Civil Law Code and Paragraph 8 (4) Act on Registered Same-Sex Partnerships). According to procedural rules the legal changes have to be implemented by federal legislation until 31 December 2015. The competent Ministry for Justice has announced that a legislative initiative will be prepared and presented to Parliament within the next few months.

The Supreme Court ruling concerns a same-sex couple living in the same household with a biological child of one of the partners. While the birthmother of the child was entitled to receive the first part of the small children's benefit, the authorities denied the second part of the benefit to the other partner on the ground that the personal scope of the law includes "parents, adoptive parents and foster parents" but not same-sex partners. The Supreme Court based its interpretation of the law on the legal objective which is to enable both parents and persons who act in the role of parents, e.g. foster parents, to receive the small children's benefit to its full extent. Same-sex partners who share a household with the biological parent and the child are to be considered as foster parents even if there is no formal foster agreement. They are therefore entitled to receive the small children's benefit in the same way as heterosexual partners.

In Austria both parents have the same right to parental leave which is extended to adoptive parents but not to foster parents. Previous to the decision by the Constitutional Court registered same-sex partners could not adopt non-biological children. Same-sex couples wanting to raise small children were limited

to foster care and were excluded from parental leave. The decision has eliminated the discriminatory distinction between registered same-sex partnerships and heterosexual marriages in this respect.

Until the Supreme Court decision only one partner of a same-sex couple could claim the small children's benefit while the other partner was completely excluded from entitlement.

Internet sources:
https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_20141211_14G00119_01/JFR_20141211_14G00119_01.pdf
https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20141021_OGH0002_0100BS00068_14V0000_002/JJR_20141021_OGH0002_0100BS00068_14V0000_002.pdf

POLICY DEVELOPMENT

Changes to childcare in order to, *inter alia*, facilitate the reconciliation of work and family life

Gender

Competent federal and provincial authorities have laid the groundwork for policy changes in childcare by a binding constitutional agreement. Preschool is set to include not only elementary care but also elementary education. The capacity of childcare is going to be extended in order to meet the Barcelona goals, and operators of childcare institutions are being encouraged to extend their services. Closing days for preschool care institutions are to be limited to an amount that is compatible with the requirements of parents' working life, and opening hours should be organised with improved considerations of working time and business hours. The federal authorities have agreed to co-finance the extension of childcare in cooperation with the competent authorities of the nine provinces (the *Länder*). Between 2014 and 2017 EUR 305 million will be allocated by the Ministry of Finance towards these goals providing that the requirements are met and the measures are co-financed by the Provinces.

Internet source:
http://www.parlament.gv.at/PAKT/VHG/XXV/I/I_00187/fname_355218.pdf, accessed 30 March 2015.

BE Belgium

LEGISLATIVE DEVELOPMENTS

New Article 4(3) of the 'Gender Act' prohibits transgender discrimination

Gender

The 'Gender Act' of 10 May 2007 implements all EU gender equality directives within the jurisdiction of the Federal Parliament.
Under Article 4(2) of the Act, which is a horizontal provision, discrimination on the ground of gender reassignment is to be regarded as gender discrimination. An Act of 22 May 2014 inserted a new Paragraph 3 in Article 4, which came into force on 3 August 2014.[3] This new Paragraph 3 stipulated that discrimination on the grounds of 'gender identity or gender expression' also amounts to gender discrimination.

In its capacity as a legal adviser to the Federal Government, the *Conseil d'état / Raad van State* recommended during the drafting process that the proposed provision should define the new concepts of 'gender identity' and 'gender expression'. However, in its statement of purpose the Act of 22 May 2014

3 Act of 22 May 2014, *Moniteur belge/Belgisch Staatsblad*, 24 July 2014.

only makes reference to the definitions found in the non-binding Yogyakarta Principles on the Application of International human rights law in relation to sexual orientation and gender identity. It is therefore likely that the ambiguity of the new Article 4(3) will give rise to many legal disputes over its interpretation.

Internet link sources:
http://www.juridat.be
Statement of purpose of the Act of 22 May 2014, *Documents parlementaires/Parlementaire stukken*, 2013-2014, No. 3483/001, available in French and Dutch at:
http://www.lachambre.be or www.dekamer.be, accessed 14 March 2015.
http://www.yogyakartaprinciples.org, accessed 14 March 2015.

New Act of 22 May 2014 prohibits sexism in public places

Gender

A second Act of 22 May 2014, which entered into force on 3 August 2014, made 'sexism in public places' a criminal offence, liable to imprisonment of between one month and one year, and/or a fine of between EUR 300 and EUR 6 000.[4] The offence is defined as 'any gesture or behaviour obviously aimed at expressing contempt towards a person on the grounds of her/his belonging to one sex, or at considering that person, on the same grounds, as inferior or as reduced essentially to her/his sexual dimension, and which entails a serious infringement of that person's dignity'. The offence arises if it was perpetrated in any public place, or in any place in the presence of witnesses, or in writings that have been widely disseminated; and the victim must be an identified person.

The media immediately collected public opinions on this development, along with the police and the investigating public prosecutors' offices. On the basis of these opinions, it is reasonable to suggest that identifying the perpetrators and producing evidence of the alleged offence will be significant hurdles for the effectiveness of this new Act.

Internet source:
All legislative instruments are available in French and Dutch at http://www.juridat.be, accessed 14 March 2015.

CASE LAW

No sanction against a previous discriminatory practice with no risk of repetition

Religion or belief

The applicant was a student who was hired by the finance department of the administration of the Region of Brussels on a one-month contract. When she was filling in forms and signing her contract, an employee explained to her that wearing the headscarf was 'a problem' in the administration with regard to the neutrality of public services. The applicant refused to remove her headscarf and was informed that she could not be hired.

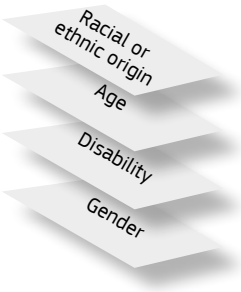
The applicant complained to the national equality body, the Inter-federal Centre for Equal Opportunities and Opposition to Racism (ICECLR), claiming that she had been the victim of discrimination in employment. The Centre initiated mediation between the applicant and the respondent administration, resulting in the respondent proposing (on 9 August 2011) that the applicant could work for the rest of the month, wearing her headscarf as an 'exceptional derogation', being paid for the entire month. The applicant however refused the proposal, requesting the following remedies: official apologies, a meeting with the administration and the ICECLR, remuneration for the entire month and compensation amounting to six months of remuneration.

4 Act of 22 May 2014, *Moniteur belge/Belgisch Staatsblad*, 24 July 2014.

In February 2012, the applicant brought injunction proceedings before the President of the Labour Tribunal of Brussels, requesting an order for the administration to cease the discriminatory practice. In October 2012, the Court declared the action admissible but dismissed it on the merits. The applicant lodged an appeal before the Labour Court of Brussels.

By a judgment of 6 March 2014, the Labour Court of Brussels ruled that the action of the applicant was inadmissible, noting that an injunction procedure can only be brought to stop an existing illegal act. In the case at hand the illegal act had already ceased. The Court noted that it can recognise the illegal character of a practice which has already ceased, but only if a risk of repetition exists. In the case at hand the Court found no such risk of repetition, since the applicant had not worked for the respondent administration and was not likely to apply for such a position in the future as she was no longer a student at the time of the hearing.

Conviction of railway police officers for violent acts against vulnerable persons



Between January and November 2006, about 15 vulnerable people such as undocumented migrants and homeless people were victims of violent and degrading treatment by railway police officers, in the offices of the police in the south of Brussels.

At the request of the public prosecutor, 14 officers were brought before the Court of First Instance of Brussels and were notably charged with:

- inhuman treatment with the aggravating circumstance that it was committed by police officers who knew that the victims were vulnerable people (because of their age, pregnancy, illness, disability or precarious situation);
- use of violence by a police officer without any legitimate reason with the aggravating circumstance of a discriminatory motive based on the alleged race, ethnic and national origin of the victims.

The Inter-federal Centre for Equal Opportunities and Opposition to Racism (ICECLR) acted as a civil party at the trial on behalf of two victims against four police officers.

On 26 February 2014, the Court of First Instance of Brussels convicted 11 out of 14 defendants on different charges including the ones mentioned above. The sentences varied between 60 hours of community service, imprisonment ranging from one year to 40 months and fines ranging from EUR 500 to 600. In addition, the defendants in the cases where the ICECLR intervened on behalf of two victims were ordered to pay damages ranging from EUR 3,300 to 4,300.

Conviction for discrimination on the ground of disability in access to goods and services

The claimant is an independent journalist who is a specialist music commentator and who has congenital cerebral palsy and is in a wheelchair.

On November 2012, the claimant contacted a press agent to set up an interview with an artist, and asked the press agent if the artist's dressing room was accessible for people in wheelchairs. During the telephone conversation the press agent reportedly made discriminatory statements about the claimant's disability, refusing to organise the interview. The claimant then wrote down the entire conversation.

The claimant and the Inter-federal Centre for Equal Opportunities and Opposition to Racism (ICECLR) suggested a mutual agreement which was refused by the press agent and his company. The claimant and the ICECLR then brought an action before the Court of First Instance of Brussels in order to obtain an injunction ordering that the discriminatory practice must cease and that damages be paid.

In its decision, the Court held, first, that the refusal to organise an interview falls within the material scope of the General Anti-discrimination Federal Act under the provision of services and participation in an economic activity available to the public (Articles 5, § 1, 1° et 8°). Second, the Court held that the written transcriptions of the telephone call could amount to a presumption of discrimination, reversing the burden of proof. The Court also stated that although this transcription interfered with the press agent's right to private life, this interference was proportionate as it was the only way for the claimant to support his claim. The Court thus granted the applicant and the ICECLR's requests stating that (1) the claimant had been directly discriminated against on the ground of disability; (2) he had also been discriminated against because the agent and his company refused to provide reasonable accommodation to give him the opportunity to interview the artist (Art. 14 of the General Anti-discrimination Federal Act). The Tribunal granted the injunction ordering the discriminatory practice to cease under threat of a daily fine of EUR 1000. In addition, it ordered the press agent to pay a lump sum of EUR 1300 as compensation.[5]

Internet source:
http://www.diversite.be/tribunal-de-premiere-instance-de-bruxelles-16-juillet-2014

Council of State cancels school regulations prohibiting the wearing of any conspicuous philosophical signs

Religion or belief

In 2013, the Flemish Education Council (a public authority at the head of 700 public primary and secondary schools in the Flemish Region) had approved an Administrative Circular of the Board of the Flemish Community schools, prohibiting the wearing of any conspicuous philosophical signs at school (except during religion classes) and enjoined the Boards of Flemish Community schools to include this prohibition in their internal regulations. On this basis, several school boards adopted internal regulations prohibiting the wearing of any conspicuous philosophical signs on school premises.

Students wearing the Islamic headscarf and their parents filed an action for an annulment of the Flemish Education Council's decision, the Administrative Circular and the internal implementation regulation of their school before the Council of State. At the same time, two Sikh students also commenced distinct actions for suspension and annulment before the Council of State against the above-mentioned Circular and the internal implementation regulation of their respective schools. In the three procedures, the applicants argued that such regulations breach their freedom of religion.

On 14 October 2014, the Council of State delivered its rulings on the requests for annulment in the three cases. Firstly, following its established case law, the Council of State refused to cancel the challenged Circular of the Flemish Education Council stating that it had no competence to do so.[6]

Secondly, the Council of State decided, in the three cases, to cancel the internal school regulations. The Council of State found that such a prohibition of any conspicuous philosophical signs in schools constitutes an interference with the right to freedom of religion and has to comply with the conditions of Article 9 of the European Convention on Human Rights. In this regard, the Council of State ruled that all three schools failed to prove that the prohibition was 'necessary in a democratic society'. According to the Council of State, the disputed Circular was adopted by the Flemish Education Council because of serious problems in some schools in the Antwerp Region. However, the schools of the applicants were not in a situation which could justify such a prohibition in their internal regulations.

It is noteworthy that, after a number of consecutive decisions on the prohibition of conspicuous philosophical signs at school,[7] the Council of State has thus for the first time ruled on the question of freedom of religion.

5 Court of First Instance of Brussels, 16 July 2014 (ruling No. RG 13/13580/A).
6 Council of State, ruling Nos 228.753, 228.754 and 224.755 of 14 October 2014.
7 See for instance *European Anti-Discrimination Law Review*, issue 18, pp 46-47 and issue 19, p. 52.

Internet source:
http://www.raadvst-consetat.be/?page=news&lang=fr&newsitem=237

"Women only" housing illegal

Gender

In a judgment of 10 November 2014, the Civil Court in Bruges ruled on a case brought by a male French national in Belgium on a one-year academic research grant.[8] The applicant had applied with a housing agency for a bedsit in a certain residence. His application was rejected on the grounds that the landlords of the residence intended to reserve it for female tenants, otherwise he would have been the only male among 32 women. The applicant filed a complaint, alleging that he was discriminated against on the ground of his gender.

The Court made a finding of direct discrimination under Article 8 of the Gender Act. As the claimant had only applied for the compensation of material damage, the Court decided that the amount of EUR 500 was equitable.

Commercial housing activities indisputably fall within the scope of the Federal Gender Act. In the absence of the adoption of an ancillary decree that determines the list of goods and services intended for persons of one sex, no exceptions to gender equality in goods and services are allowed within the jurisdiction of the federal authority.

Internet source:
All legal texts available in French and Dutch via http://www.juridat.be, accessed on 25 February 2015.

BG Bulgaria

CASE LAW

Supreme Court denies that secondary legislation can amount to discrimination and that the Equality Body can hold administrative bodies accountable for discrimination

Age

A retired army employee who was younger than 65 had been renting a Ministry of Defence flat since 1987. He complained to the Equality Body about secondary legislation adopted in 2010 by the Minister of Defence introducing a minimum age of 65 as a condition for former army employees to rent such accommodation. Although no measures were taken against the complainant, despite the new legislation, he requested that the Equality Body order the Ministry to repeal the relevant provisions. The Equality Body ruled that the Ministry was liable for indirect discrimination on grounds of age, and imposed a financial sanction (a fine of BGN 1000, approx. EUR 500), and an injunction for the repeal of the relevant provisions. That decision was confirmed on appeal by the first-instance court. The Ministry appealed against the decision of the first-instance court before the Supreme Administrative Court.

The Supreme Administrative Court held that the Equality Body only had powers to find a "concrete *de facto* instance of unequal treatment [...] and not a hypothetical, contingent, potential possibility of future less favourable treatment ensuing from a secondary legislative provision."[9] According to the Court, discrimination is an objective fact which needs to be established in each particular case; only a concrete act could thus be an infringement of equality law. The adoption of a discriminatory norm was

8 Court of First Instance of West Flanders, division of Bruges, Civil Court, 10 November 2014, *Algemene Rol* No. 14/355/A, unreported. Judgment to be published in a French translation in *Journal des tribunaux*, 2015.
9 Supreme Administrative Court, decision No. 15637 of 19 December 2014 in case No. 1925/2014.

not sufficient, as there had to be concrete discriminatory treatment of a complainant ensuing from the implementation of such a norm, which was not the case here.

Furthermore, the Court held that only a natural person could in principle perpetrate an infringement of equality law; a legal person could only do so in cases expressly stated under the law.[10] Administrative authorities, whether single-person or collective, could not perpetrate such an infringement. The Court held that where the Equality Body found less favourable treatment ensuing from the implementation of a discriminatory legal provision, it only had two options: 1. to appeal against the administrative act containing such a discriminatory provision, or to bring a claim before the civil courts against the body; or 2. to make a non-binding proposal to that body to repeal its own discriminatory act. The Equality Body could not issue injunctions in cases of discriminatory administrative acts. The procedure for natural persons to defend themselves against discriminatory regulations was not the one before the Equality Body, but rather the general procedure for the repeal of administrative acts under the Code of Administrative Procedure.

In addition, the Court also found that there were procedural irregularities, including regarding the respondent's standing as the Minister himself was the administrative authority who issued the impugned acts, rather than the Ministry.

The Supreme Administrative Court's findings directly contradict the law and are in stark contrast to its own previous case law since the entry into force of the equality law. A great number of court decisions have previously held administrative bodies as well as other legal persons liable for discrimination, including in respect of secondary legal provisions.

Internet source:
http://www.sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/e8608f76443ddaedc2257db2003af705?OpenDocument

Croatia HR

LEGISLATIVE DEVELOPMENT

New Labour Act enters into force

The new Labour Act entered into force on 8 August 2014.[11] Among other things, provisions on the protection of pregnant women, women who have recently given birth, and adoptive parents have been amended with a view to making horizontal adjustments with other legislation in force. The Act contains an express prohibition of unequal treatment of pregnant workers, and an express protection of the health of pregnant workers, workers who have recently given birth and workers who are breastfeeding. Dismissal during pregnancy and during maternity and parental leave is still prohibited. However, the Act now contains an explicit provision that the employment contract is terminated on the death of the employer (a natural person), and on the closure of the business by force of law or by deletion of an individual tradesman from the register of individual tradesmen.

Gender

10 In reality, the Protection Against Discrimination Act expressly states that the ban on discrimination is *erga omnes* (Art. 6 (1)). Further, the law features a number of specific duties for employers and service providers (Titles I, III) who are usually legal persons. Furthermore, the law expressly provides that legal persons, as well as natural persons, are subject to administrative sanctions for infringements of the law (Art. 80 (2)).

11 *Zakon o radu*, Official Gazette of the Republic of Croatia *Narodne novine* No. 93/2014.

Another innovation is that an employment contract with the protected category of workers may be terminated in the procedure of the winding-up of a company due to business reasons. Several aspects of the new Act, primarily the regulation of fixed-term work and temporary work, work time and breaks, as well as dismissal, could potentially have an adverse impact on the position of women in the labour market and overall gender equality in labour relations. Based on previous studies and reports by the Ombudsperson for gender equality,[12] women in general, especially mothers, pregnant women, and single parents are shown to be the most vulnerable persons in employment relations. This is because they are often reluctant to instigate formal court proceedings for the protection of their rights, mostly due to the fear of victimisation and the length of the procedure.

CASE LAW

Three cases from the Ombudsperson for Gender Equality

Three cases before the Ombudsperson for gender equality, all reported in September 2014, are presented here as examples of the growing number of cases handled by this institution.

Gender

The first case concerns the right to maternity benefits granted to persons outside the labour market (unemployed persons). The Croatian Institute for Health Insurance (CIHI) demands that persons eligible for this benefit do not conclude service contracts during the time that they stand to receive this benefit, under threat of losing the benefit. The Ombudsperson for gender equality concluded that CIHI thus directly discriminates against pregnant women and issued a recommendation to stop this practice which puts this category of beneficiaries at a considerable disadvantage in comparison with other employed or self-employed beneficiaries. Furthermore, the Act on Maternity and Parental Benefits[13] does not in any way preclude pregnant women who receive maternity benefits from concluding service contracts during the time they receive this benefit.

The second case concerns the discriminatory tax treatment of a monetary donation made by a person to the Centre for female studies. The tax administration officer refused to grant tax relief on this donation, explaining that the Centre (the beneficiary of the donation) is actively promoting the right to abortion, which is, according to the reasoning of the officer, 'against the Constitution of the Republic of Croatia'. This case received a lot of media attention, and the officer was subsequently suspended. The Ombudsperson for gender equality issued a warning to the Tax Administration that it acted *ultra vires* and discriminated against the applicant. The contested decision violates Article 10 (h) and Article 16(1)(e) of the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), as well as Article 6(2) of the Gender Equality Act, which prohibits all discrimination on grounds of pregnancy and motherhood. The prohibition of discrimination is interpreted to include all issues of free will regarding family planning and access to information in connection therewith.

The third case was based on a complaint by a female client of a bank, who claimed that her loan application had been rejected solely because the bank gained knowledge of her pregnancy, even though she fulfilled all formal requirements for a loan. The Ombudsperson established that the bank unjustifiably categorised the client as an excessive risk, by taking into account the benefit she received while on pregnancy-related sick leave, and not her actual salary. The situation of pregnant women asking for loans was elaborated in a study conducted by the Ombudsperson for gender equality in 2013.

12 See, for example, Annual Report 2013 of the Ombudsperson for gender equality, http://www.prs.hr/index.php/izvjesca/izvjesce-o-radu-za-2013, accessed 20 August 2014.

13 *Zakon o rodiljnim i roditeljskim potporama*, Official Gazette of the Republic of Croatia *Narodne novine* nos. 85/08, 110/08, 34/11 and 54/13.

Internet link sources:
http://www.prs.hr/index.php/odluke-prs/prema-osnovi-diskriminacije/bracni-ili-obiteljski-staus/1375-preporuka-hzzo-u-vezano-za-ostvarivanje-prava-na-rodiljnu-naknadu;
http://www.prs.hr/index.php/priopcenja-prs/1388-rjesenje-porezne-ispostave-samobor-je-diskriminatorno;
http://www.prs.hr/index.php/priopcenja-prs/1268-priopcenje-vezano-za-diskriminaciju-trudnica-kod-odobravanja-kredita; and
http://www.prs.hr/index.php/izvjesca/izvjesce-o-radu-za-2013.

Cyprus

CASE LAW

A case on sexual harassment at the workplace

On 7 August 2014 the Industrial Disputes Tribunal published its decision in case No. 758/2005 in which the claimant Mrs S.A. asked for damages for sexual harassment and/or a failure to protect against sexual harassment and/or unequal treatment under the Equal Treatment of Men and Women in Employment and Occupational Training Law No. 205(I)/2002, as amended, plus legal interest.

The claimant had been working as a nursing officer at the Nicosia General Hospital (NGH) since 1993. In 2000 she was posted to the second operating theatre under the supervision of the defendant (Mr Ch.K.), who held the post of First Nursing Officer. After a one-year absence on study leave for training purposes, the claimant returned to work and was posted in the same position as from March 2003.

From that time the defendant (Mr Ch.K.) started to harass her sexually, and this lasted until March 2004, when she informed her husband of the sexual harassment. On 23 August 2004 she informed her superiors about the sexual harassment. On 22 September 2004 a disciplinary investigation started against Mr Ch.K. and he was asked to stay away from his job until 21 January 2005, when the investigation ended. When he resumed duties he was seconded to the Ministry of Health. The appropriate body that carried out the disciplinary hearing found him guilty of all the charges against him, and disciplined him with obligatory retirement, effective from 19 June 2007.

On 23 August 2014 the claimant officially submitted her complaint to the Director of the NGH and to the Director of Nursing Services. She also submitted a written complaint to the Permanent Secretary of the Ministry of Health. The claimant realised that none of the above officers knew what procedure to follow to deal with the complaint. In particular, the Permanent Secretary of the Ministry of Health did not appear to know of the existence of the law relating to sexual harassment.

The claimant testified before the Industrial Disputes Tribunal that the defendant harassed her with words, gestures, and acts, caressed her contrary to her will and insisted on kissing her. This behaviour caused her fear and embarrassment and adversely affected her professional, personal, and family life. She also testified that in the period between informing her husband of the harassment and the defendant's removal from the NGH, the defendant stopped the harassment but treated her with hostility and very often reprimanded her for trivial reasons.

Before the Court defendant 2 (who represented the employer) denied and rejected all the claims against defendant 1, and maintained that he took all necessary measures for the protection of the claimant as soon as he was informed of her complaint against defendant 1. He also maintained that the claimant subjected herself voluntarily to the situation of sexual harassment and accepted the behaviour of

defendant 1. Defendant 1 rejected the claimant's accusations and denied that he had sexually harassed her.

The Court accepted the claimant's evidence and rejected the evidence of defendants 1 and 2. The Court considered it very probable that defendant 1 discriminated against her and sexually harassed her. The Court also found that defendant 1 failed to convince the Court that there was no discrimination or sexual harassment against the claimant. The Court found that defendant 2 (as an employer) failed to take all necessary and effective measures to prevent discriminatory behaviour and sexual harassment in the workplace. Defendant 2 acted very late and declined to take action against defendant 1 for one month after the claimant submitted her complaint.

Under Law No. 205(I)/2002 the Industrial Disputes Tribunal can award just and reasonable damages in cases of sexual harassment. In this case the Court awarded the claimant the sum of EUR 5 000, plus costs.

Nicosia Assize Court convicts a Cypriot national of, *inter alia*, human trafficking and forced prostitution

Gender

In case No. 23076/13, the Nicosia Assize Court in its judgment of 3 July 2014 upheld the charges against D.N. from Bulgaria, and sentenced him to imprisonment.

The accused was charged with the following offences:
(a) trafficking of an adult person in violation of the Law on Preventing Trafficking in and Exploitation of Human Beings and Protecting of Victims, No. 87(I)/2007, punishable with imprisonment of up to 15 years;
(b) sexual exploitation of an adult person in violation of Law No. 87(I)/2007, punishable with imprisonment of up to 10 years;
(c) forcing an adult person into prostitution, punishable with imprisonment of up to 10 years; and
(d) exploitation of a prostitute in violation of Article 164 of the Penal Code, punishable with imprisonment of up to five years.

The offences were committed between 27 and 29 November 2013. The victim was a woman named S. from Bulgaria. S. was fully dependent on the accused and had very low self-esteem. She believed that she had no other choice than prostitution and worked as a prostitute for the benefit of the accused.

The Court, after hearing the witnesses for the prosecution and the witnesses for the defence and evaluating all the testimony presented before it, accepted the testimony of the prosecution and found the accused guilty of all the offences. The Court sentenced the accused to imprisonment for eight years for the first offence, to six years for the second offence, to six years for the third offence and to four years for the fourth offence. The penalties will run concurrently.

The judgment was published in the press and on the internet.

Internet source:
Available at http://www.cylaw.org, accessed 20 April 2015.

Supreme Court confirms public sector employment quota for persons with disabilities

Disability

The applicant was working as a teacher on the basis of a service contract (rather than as an officially appointed public servant), as the economic crisis has forced Cypriot authorities to freeze all official appointments in the public sector. When another person (A), listed as having a disability, was appointed as a teacher in the public service on the basis of the public sector employment quota for persons with

disabilities, the applicant applied to the Supreme Court for a judicial review of the decision to appoint A.[14] Firstly, the applicant claimed that the decision to appoint A had not been duly investigated and justified in particular with regard to A's condition constituting a disability in the sense of the Law on the Hiring of Persons with Disabilities in the Wider Public Sector.[15] In this regard, the applicant argued that A did not present any insufficiency or disadvantage causing permanent or indefinite physical, mental or intellectual disability. He also held that the person's appointment in the public sector constituted proof of his capacity to find work also in the private sector. Secondly, the applicant referred to legal precedents of the Supreme Court establishing that positive action violates the equality provision of the Constitution (Article 28)[16] to argue that the public employment quota law is unconstitutional in and of itself.

The respondents argued that A had supplied medical evidence of the nature and extent of the side-effects of the medication he was taking, rendering it difficult for him to continue working in the private sector. They also referred to the evaluation of the specific multi-thematic committee classifying A's condition as a disability based on the World Health Organisation's system of classification of functionality, disability and health.

The Supreme Court found that A's appointment in the public service was duly justified and that it was the result of an adequate investigation. It therefore rejected the application for a judicial review of the decision and ordered the applicant to pay all costs.[17] The Court did not examine the applicant's allegations that the public employment quota law violates the equality principle and the Constitution. It is however the first Court decision which does not express the position that quotas in the public sector in favour of persons with disabilities are discriminatory and thus in violation of the Constitution.

None of the parties invoked the law transposing the Employment Equality Directive which legitimises positive action and overrides all national laws including the Constitution. Similarly, the legitimate interest of the applicant to challenge the appointment decision was not raised, although it did not affect him personally.

Internet source:
http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2014/4-201409-1602-11.htm&qstring=%E4%E9%E1%EA%F1%E9%F3*%20and%202014

Supreme Court refuses to enforce an Equality Body decision on Muslim school holidays

Religion or belief

The English School in Nicosia is the only school in Cyprus which is attended by children from both the Turkish Cypriot and the Greek Cypriot communities and has for this reason been the target of far-right violence and tensions. In 2009 the Advisory Committee of the school suggested to the governing board that it should adopt one of the two days of the Muslim religious holiday known as *Bayram* as a holiday for the school, in addition to the Christian holidays that were already practised. The governing board agreed, specifying that a final decision would be made the following year as to whether this arrangement would become permanent or not. The practice of making one of the two days of *Bayram* a school holiday continued without a final decision being made, until 2013 when the governing board decided not to include the *Bayram* in the school's holidays. Instead, the Muslim students were allowed to be absent from school for one day and the teachers were instructed not to carry out tests or to teach new material during that day.

14 An official appointment in the public service has more benefits than a service contract such as that of the applicant.
15 Law on the Hiring of Persons with Disabilities in the Wider Public Sector (Special Provisions) of 2009 No. 146(I)/2009 (hereinafter 'the public employment quota law').
16 See for instance Supreme Court, *Charalambos Kittis et al v. the Republic of Cyprus*, Case No. 56/06, decision of 8 December 2006.
17 *Renos Pittalis v. Educational Service Committee*, judgement of 25 September 2014, Case No. 1602/2011.

A group of parents of Turkish Cypriot students filed a complaint before the Equality Body, claiming that the decision violated their own and their children's right to religious freedom. They also argued that it was discriminatory as it put Muslims in a disadvantageous situation compared to Christians attending the same school. The equality body recommended that the school should add the two days of *Bayram* as official school holidays to ensure equality but also as a symbolic act of religious tolerance and pluralism.[18] The governing board did not endorse this recommendation.

The applicants then filed an application with the Supreme Court for an order of *mandamus*,[19] seeking to compel the governing board to comply with the equality body's decision. The applicants referred in this regard to the law regulating the mandate of the equality body which provides that its decisions are legally binding.[20]

The Supreme Court rejected the application for an order of *mandamus*.[21] In this regard the Court noted that the equality body has a mandate to either (i) issue an order which is published in the Gazette, (ii) publish a report for the investigation it has carried out, (iii) issue a recommendation, (iv) impose a fine, or (v) enforce its recommendation. In the present case, the equality body only issued a recommendation for the governing board of the school, rather than issuing a legally binding order, as was within its power. In addition, the Court noted that the law regulating the running of the school[22] provides that 'the character of the school shall be Christian but non-dogmatic and all students including the Muslims shall be facilitated as regards the exercise *of their own religion*' (emphasis added by the Court). Had it been granted, the *mandamus* order would essentially have replaced the discretion of the equality body beyond the provisions of Law regulating its mandate and would have extended the existing legal obligations of the school.

Internet source:
http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2014/1-201409-160-2014.htm&qstring=%F6%F5%EB%E5%F4%E9%EA*

Supreme Court interprets the laws transposing Directive 2000/78 and setting out the mandate of the Equality Body

Age

The applicant was a former public servant who had opted to retire before reaching the age of 45 and who was therefore denied part of the retirement benefits available to other former public servants. She brought an action before the Supreme Court for judicial review of the decision of the Ministry of Finance which had denied her the entire retirement package. The Ministry of Finance had relied on the Law on Pensions which provides that public servants retiring before the age of 45 are entitled to the payment of a lump sum but not the pension, which is frozen until the retiring employee reaches the age of 55.[23]

In 2008 the Equality Body had ruled that the relevant provision of the Law on Pensions amounted to age discrimination prohibited by the Law on Equal Treatment in Employment and Occupation[24] transposing the Employment Equality Directive, and had proposed its amendment. The Attorney General to whom the Ministry of Finance had then applied for his opinion, did not share the Equality Body's position,

18 Report of the Anti-discrimination Authority regarding the Bayram holiday at the English School, File No. AKR 60/2013, dated 4 February 2014.
19 An order of mandamus is an order issued by a court of superior jurisdiction that commands an inferior court or a (legal or natural) person to perform an act or refrain from performing an act, the performance or omission of which is required by law as an obligation. Its purpose is to supplement defects of justice, where there is a specific legal right and no specific legal remedy, or where there is an alternative legal remedy but the mode of redress is less convenient, beneficial or effectual.
20 The Combating of Racial and Other Forms of Discrimination (Commissioner) Law No. 42(I)/2004.
21 Decision of the Supreme Court dated 24 September 2014 on the ex parte application of Costas Constantinou and Cenk Ahmet Nevzat for a permit to lodge an application for a mandamus order (Civil application No. 160/2014).
22 Law on the English School (Administration and Control) Cap.167, Article 3(1)(a)(ii).
23 Article 27(1) of the Law on Pensions No. 97(I)/1997.
24 Law No. 58(I)/2004.

considering that the Directive and its transposing law do not affect national arrangements as regards the retirement age.

Relying on this previous opinion of the Attorney General, the Ministry of Finance informed the applicant that the legislative provision on which it had relied in order to calculate her retirement benefits did not violate anti-discrimination law.

The Supreme Court considered the following questions:
- Whether the decisions of the Equality Body issued under the laws transposing Directive 2000/78 and defining the mandate of the Equality Body[25] were binding on the public administration; and
- Whether the relevant provision of the Law on Pensions amounts to discrimination on the ground of age in violation of the anti-discrimination Law and whether it ought to be amended.

As regards the first question, the law defining the mandate of the Equality Body provides that the Body must inform the Attorney General of any necessary legislative changes in order to comply with the anti-discrimination *acquis*. The Attorney General must then inform the Council of Ministers regarding measures to be taken. The Supreme Court concluded that the validity of the opinion of the Attorney General is thus subject to judicial review. It added that the Attorney General must inform the Council of Ministers regarding changes in the legislation deemed necessary by the Equality Body because the law contains unlawful discrimination. The Court stated that if the legislator had intended to give authority to the Attorney General to reject the recommendations of the Equality Body, the wording of the law would have explicitly provided that the Attorney General may adopt, amend or reject the recommendation.[26]

The Court further noted that the Equality Body enjoys exclusive jurisdiction to examine discrimination complaints and therefore any decision of the Equality Body can be reviewed by hierarchically higher bodies but not by the Attorney General. In the present case, the public administration had rejected the applicant's claim on the basis of the Attorney General's opinion which had interpreted the law incorrectly and ignored the Equality Body's recommendation; this procedure was therefore unlawful.

The Court ruled that the decision on the applicant's retirement package was wrongful and should not be applied. The applicant's request for the referral of a number of questions to the CJEU was therefore also rejected.

The procedure for judicial review of administrative acts which was followed by the applicant in this case did not allow further legal impact, as the Court's mandate is thus restricted to annulling or confirming an administrative act. Therefore, although the Court accepted that the Equality Body's recommendations are binding upon the Attorney General regarding the amendment of discriminatory provisions, it was not in a position to declare the relevant provision of the Law on Pensions null and void.

Internet source:
http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2014/4-201412-1695-09.htm&qstring=%E4%E9%E1%EA%F1%E9%F3*%20and%2058%28%E9%29#

25 Law No. 42(I)/2004.
26 Supreme Court, *Nicoletta Charalambidou v The Republic of Cyprus, the Finance Minister and the Attorney General,* Case No. 1695/2009, Judgement of 17 December 2014.

Discrimination on the ground of ethnic origin in access to public services regarding administrative procedure to register a marriage

Racial or ethnic origin

The equality body received a complaint from a Turkish Cypriot couple that the Department of Population Archives and Immigration (DPAI) refused to issue a marriage permit to them. As required by the law, the complainants had applied to the DPAI for a document certifying that there is no legal obstacle preventing the marriage but were informed that, based on express instructions from the Chief Immigration Officer, this document could not be issued to those who do not ordinarily reside in the Republic-controlled territories (i.e. Cypriots of Turkish origin living in the northern part of the country).

In October 2014, the equality body found that the differential and disadvantageous treatment as regards access to a public service for a category of persons, whose description essentially implies the Turkish Cypriots, amounted to indirect discrimination on the ground of ethnic origin,[27] which is prohibited by the Law on Equal Treatment (Race or Ethnic Origin).[28] The fact that the bureaucratic procedure prescribed for Turkish Cypriots made it essentially impossible for them to marry amounts to a denial of a service that is available to all other Cypriots. The equality body invoked the right to marry as well as the right to non-discrimination, referring to instruments such as the Constitution, the European Convention on Human Rights and the EU Charter of fundamental rights.

The equality body concluded that, although it is lawful for the competent authorities to request a marriage permit in order to avoid the risk of bigamy, which is a criminal offence, they are under a duty to consider the objective obstacles faced by Turkish Cypriots not residing in the Republic-controlled areas in obtaining such a document. Thus the equality body recommended that the Minister of the Interior should issue a circular providing that these Turkish Cypriots may submit either a marriage permit or an affidavit sworn before the Court or a statement made before the Marriage Officer. The equality body submitted its report to the Minister of the Interior and the Chief Immigration Officer.

Internet source:
http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/presentationsArchive_gr/presentationsArchive_gr?OpenDocument

Equality Body criticises the authorities' failure to prosecute racial discrimination in sport

Racial or ethnic origin

During two different football matches between Cypriot football teams, on 30 November and 14 December 2014, a footballer was subjected to racist insults by fans of the opposite teams. Despite an extensive legislative framework prohibiting racism in sport, no measures were taken against the perpetrators, by any authority.

The Equality Body initiated an *ex officio* investigation into the event, and published a report in December 2014.[29] The report noted that the spreading and reinforcing of racist tendencies or behaviours may lead to serious forms of discrimination against certain groups and to extreme forms of violence. For this reason, the state has an increased duty to act in order to prevent manifestations of racism and protect potential victims.

The Equality Body concluded that the incidents amounted to racial harassment and potentially to criminal offences. It regretted that no measures had been taken whatsoever, and concluded that the failure of the state to act in order to protect the victim and prosecute the perpetrators had created a climate of impunity and led to the degradation of public discourse as to whether the victim himself was responsible,

27 Report of the Antidiscrimination Authority regarding the discriminatory treatment of Turkish Cypriots in the exercise of the right to marry, File No. AKR 71/2013, of 6 October 2014.
28 Law on Equal Treatment (Race or Ethnic Origin) No. 59(I)/2004.
29 File No. AKRAYT.4/2014, 19 December 2014.

which contributed to feeding and multiplying the phenomenon. The report called on the Police Unit for the Combating of Discrimination to prosecute the perpetrators and to coordinate the actions of the police so as to investigate possible criminal offences.

The report highlighted that although sanctions are important they are not sufficient as preventive work must also take place on many different levels, including in schools, through the training of football professionals and a review of the regulatory framework to identify gaps, etc.

Presumably, the Equality Body consciously chose not to focus its report on harassment in the workplace because the sanctions foreseen under the law transposing the Racial Equality Directive[30] are significantly lower than those foreseen by the law transposing the Framework Decision on Combating Racism through Criminal Law.[31]

Internet source:
http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/presentationsArchive_gr/presentationsArchive_gr?OpenDocument

POLICY DEVELOPMENTS

Publication of the 2013 Annual Report of the Equality Authority

All grounds

The Equality Authority is the section of the Cypriot equality body which is competent to investigate discrimination complaints in the field of employment. The report notes a significant decrease in the number of employment-related complaints received in 2013. The trend is more prominent in the private than in the public sector and concerns mainly the ground of gender. The report mentions, however, that the Equality Body continues to receive a great number of telephone complaints about discrimination in the workplace, although very few of these are submitted in the form of formal complaints for investigation. The report further notes that very few complaints are filed by representatives of employees (professional organisations and trade unions) on behalf of their members.

The data on the total number of complaints received in the field of employment since the body's inception are as follows:

2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
33	84	68	115	93	103	121	166	106	63

Most complaints concerned the grounds of gender (35%) or national origin (30%), while 23% concerned disability and only 5% ethnic origin, 3% language and 1% "other". A majority of the complaints (78%) were directed against the public sector while 22% targeted the private sector.

As in previous years, the report focuses mainly on the body's activities in the field of gender discrimination.

Internet source:
http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/6A34E0F4E1771F8EC2257D8C0030F94C/$file/Pro%20Vasanist%202013%20GR%20electr%20edition.pdf?OpenElement

30 A fine of CYP 4 000 (approx. EUR 6 835) and/or six months' imprisonment.
31 A fine of EUR 10 000 and/or five years' imprisonment.

Publication of the 2013 Annual Report of the Anti-discrimination Authority

All grounds

The Anti-discrimination Authority is the section of the Cypriot equality body which is competent to investigate discrimination complaints outside the field of employment. The report is introduced by a brief note on the Authority's work, which involves mediation activities, the investigation of complaints and the submission of reports with recommendations, as well as awareness-raising activities. The Authority has also been developing a mechanism in cooperation with the Ministry of Education for the recording and addressing of racist incidents in schools.

The report lists the cases where a favourable outcome was reached for the claimant through the Authority's mediation activity, and provides general statistical data on the complaints received and investigated.

In 2013, the Authority received 88 complaints, out of which 54 were on the ground of national origin and 12 on the ground of race/ethnic origin. Significantly fewer complaints were recorded on the other grounds (disability 2; age 4; sexual orientation 4; gender identity 5; language 1; gender 2). By far the most common field of application is access to goods and services (41 out of 88 complaints) and in particular to public services.

Internet source:
http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/A45AC04AF19A05F2C2257D8C0030E481/$file/DIAKRISEON%202013%20GR%20electr%20edition.pdf?OpenElement

CZ Czech Republic

CASE LAW

Czech Supreme Court rules on part-time work of parents

Gender

The Supreme Court ruled in a case concerning an employee of a Czech town hall (a public authority).[32] The employee, who was the mother of a small child, worked as an officer for the city and because she could not leave her child for more than a certain number of hours at the kindergarten, she agreed with her employer to work part time for a total of 35 hours a week. After one of her colleagues (who usually took over her job for a few hours) retired, management authorities wanted her to switch to the full-time job of 40 hours a week. The woman refused and the employer reacted by abolishing the agreement on the reduction in her working hours, alleging serious operational reasons. The employee continued to leave her office about an hour earlier each day. For this behaviour, she was given her notice.

The District Court agreed with the employer; the Regional Court, on the other hand, ruled in favour of the employee. The municipality therefore turned to the Supreme Court, arguing that, because the woman left her office early, the workplace had to be prematurely closed or her work had to be taken over by another colleague, which constituted serious operational reasons for the employer.

The Supreme Court, in its decision, applied the Labour Code, which provides that if an employee caring for a child younger than 15 years requests shorter working hours or another suitable adjustment of the weekly working time, the employer is obliged to accommodate such a request. The only exception where the employer can revoke its decision, which had allowed employees with children shorter working hours, is where there are serious operational reasons. The Supreme Court, however, did not see in the above

32 Case No. 21 Cdo 1821/2013, judgment of 9 July 2014.

situation sufficiently serious operational reasons to enable the employer to refuse to reduce the working hours and to give the mother of a young child her notice.

This judgment could have some influence on the future behaviour of Czech employers who are still not very willing to meet the requests of employees who care for small children to reduce their working hours. According to statistics, in the Czech Republic only 8.5 % of women are working part time, while the EU average is nearly 32 %. In the Czech Republic, only 1.8 % of men work part time, whereas the average in the EU is 8 %.

This case, however, also reveals that Czech lawyers are still hesitant to use discrimination as a legal argument in a case if there are other possibilities to be used to argue and win the case. In the above case, discrimination was not even mentioned and the only argument was about the legal interpretation of 'serious operational reasons'.

Internet source:
www.nsoud.cz.

Denmark

DK

LEGISLATIVE DEVELOPMENTS

Ministry of Finance adopts Circular on maternity, adoption, and special childcare days

Gender

A Circular was adopted by the Ministry of Finance on 11 November 2014, containing binding rules on maternity, adoption and special childcare days. The circular is directed to all ministries. The rules have been applicable since 1 November 2014, despite the fact that the Circular was adopted on 14 November 2014. The previous Circular No. 9258 of 9 June 2008 on maternity leave, adoption, and special childcare days has been repealed.

Act No. 652 of June 12, 2013 amends the Danish Act on Entitlement to Leave and Benefits in the Event of Childbirth. The amendment concerned the rights of co-mothers and child leave. The Circular concerns these changes in the legislative amendment from June 2013. For instance, the previous rule of a registered partner's right to leave with remuneration for up to two weeks in connection with the child's birth, has been repealed.

The Circular contains specific rules on pay and pensions with regard to employees in the Danish Government, and is defined as a supplement to the statutory rules. Thus, the Circular binds public authorities and supports the Danish Act on Entitlement to Leave and Benefits in the Event of Childbirth, and along with the legislation defines a co-mother as an employee who is registered as a co-mother. The co-mother can be a partner of the mother, a registered partner, or a spouse of the same sex. A co-mother now has the same right as a father to maternity leave with remuneration and benefits in connection with childbirth.

Internet link sources
http://hr.modst.dk/Service%20Menu/Love%20regler%20og%20aftaler/Circular/2014/~/media/Circular/2014/052-14.ashx
https://www.retsinformation.dk/Forms/R0710.aspx?id=167602

Legislative amendment removing the age exception in employment

Age

According to the current Act on the Prohibition of Discrimination on the Labour Market etc. employment can be automatically terminated when an employee reaches the age of 70 if it has been agreed upon in the individual employment contract or in an applicable collective agreement. The rule constitutes an exception to the general prohibition of age discrimination in employment.

In December 2014 new legislation was adopted by Parliament, stating that neither individual employment contracts nor collective agreements on the automatic termination of employment by the age of 70 can be entered into as of 1 January 2016. It also follows from the Act that previous individual contracts on automatic termination cannot be enforced after this date. Collective agreements on automatic termination are, however, valid until the time when the agreement in question can be repealed.

The objective of the amendment is to promote the participation of older workers in the labour market and to limit the barriers they face.

Internet source:
https://www.retsinformation.dk/Forms/R0710.aspx?id=167206

CASE LAW

Supreme Court ruling on workforce reduction and disability

Disability

The complainant had been a nursing assistant at a public psychiatric hospital since 1990, who had a flexible position because of incapacity in one arm. Her flexible position meant that she could not work for more than 16 hours per week and that she could not perform heavy lifting. In 2010 the hospital reorganised the psychiatric departments by closing certain units and dismissing a large number of employees, including the complainant. The hospital made a prioritisation of employees based on a number of general criteria including professional and personal qualifications.

According to the hospital, all employees who were retained should work at least close to full-time hours and should be able to handle severely troubled and physically strong patients. The complainant argued that she had been dismissed because of her disability.

The Supreme Court stated that physical strength and flexibility were necessary competences for the job as a nursing assistant at a psychiatric hospital. The Court also stated that the complainant did not meet these requirements and that the dismissal could not have been avoided by establishing reasonable accommodation according to section 2 (a) of the Act on the Prohibition of Discrimination in the Labour Market etc. Thus the Supreme Court concluded that direct discrimination because of disability had not taken place.
The Court also found that the criteria of psychical strength and flexibility put employees with a disability in a less favourable situation than other employees. However, the Court concluded that the differential treatment was legitimate because of the actual change in working tasks after the reorganisation. The Court concluded that the dismissal was a necessary means and that it did not constitute indirect discrimination because of disability.[33]

Internet source:
http://www.hoejesteret.dk/hoejesteret/nyheder/Afgorelser/Pages/Omgodtgoerelseefterforskelsbehandlingsloven.aspx

33 Supreme Court Judgment, Case No. 163/2013 of 12 September 2014.

Supreme Court judgment on compensation in cases of age discrimination

Age

The claimants were six former pilots between the age of 60 and 65 who had been dismissed together with 48 other pilots in the same age group because of a workforce reduction. The management and the pilots' union had agreed that the best solution was to dismiss those who were eligible for retirement benefits. Before the Board of Equal Treatment, the claimants argued that they had been discriminated against on the ground of age, and the Board decided in their favour, as did the City Court and the High Court on appeal. The Board and the City Court awarded each claimant nine months of salary in compensation whereas the High Court only awarded three months. For the Supreme Court only the amount of compensation was at stake.

The Supreme Court referred to case law on gender discrimination on the labour market stating that the pilots would be eligible for more than six months of salary in compensation. However, according to the Court there were a number of circumstances which meant that the compensation in these cases should be determined at a lower level. The Court therefore granted four months of salary in compensation to each of the pilots.

According to the Court the circumstances were the following:
- the dismissals were necessary because of work and workforce reductions,
- the criterion for dismissing the pilots (eligibility for retirement benefits) was collectively negotiated with the pilots' union,
- the criterion was the most humane and less intrusive in a situation where – no matter what – a number of pilots had to be dismissed.

Further, the Court took into consideration that the intention of the management and of the unions was to give social consideration to the younger pilots. The Court stated that the younger pilots had started families etc. and that they did not have the same type of social support as their colleagues between 60 and 65 years of age who would receive retirement benefits.[34]

Internet source:
http://www.hoejesteret.dk/hoejesteret/nyheder/Afgorelser/Pages/Godtgoerelserforovertraedelseraf forskelsbehandlingsloven.aspx

Eastern High Court decision of 10 November 2014 on different rates for women's and men's haircuts

Gender

This judgment concerns two leading cases on the different rates for women and men with regard to haircuts.

In an earlier decision (No. 169/2014), the Danish Board of Equality ruled that different prices for haircuts for men and women are discriminatory, and in contravention of Section 2(1) of the Danish Equality Act. In contrast, the High Court has now arrived at the opposite conclusion, and considered in the case at hand that two hairdressing businesses had proven that the principle of equality was not violated. The High Court considered that cutting men's hair and cutting women's hair amounts to providing different services, and that the designation of male and female haircuts is a historically-based tradition. Haircuts for women are technically more demanding, which justifies the difference in price. The Court therefore ruled that the difference in prices for women and men with regard to hairdressing does not conflict with the Danish Equality Act.

Internet link sources:
http://kammeradvokaten.dk/media/1807/dom-frisoersagen-an.pdf

34 Supreme Court judgment of October 1, 2014. Case 322/2012.

http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1445&type=Afgoerelse
http://menneskeret.dk/sites/menneskeret.dk/files/analyse_-_lige_adgang_til_varer_og_tjenesteydelser_for_begge_koen_final.pdf

Dismissal because of disability-related sickness absence

Disability

On 14 July 2008, the claimant was hired as a technical assistant, but already on 21 August she informed her employer that she had tenosynovitis in her right hand and that her doctor had told her to rest her arm. During the following month she gave her employer several doctor's notes documenting her incapacity for work. She was dismissed on 26 September with no explanation given.

During the case A explained that she had not had any spells of sickness since then but that she continuously had to be cautious with her arm.

The claimant argued that she was dismissed because of her disability. She referred to the CJEU's ruling in C-335/2011 and C-377/2011 (*HK Danmark*) and stated that in order to fall within the concept of disability her limitation should be "long-term". She argued that it is the prognosis for the duration of the physical limitation that is essential for the assessment of whether or not she had a disability when she was dismissed. She also argued that if a condition such as hers is latent, it is also long-lasting. Thus she argued that her limitation should be covered by the concept of disability, because of the fact that her symptoms would break out if reasonable corrective action was not taken.

In its argument, the Court also referred to its ruling in *HK Danmark*, and to medical records stating that the claimant would be completely healthy again and that she would not need to take special account of her condition in her future search for employment except for making sure that her future workplace was arranged in a reasonably ergonomic way. The Court therefore found that the claimant had not demonstrated that at the time of the dismissal she suffered from a medically diagnosed curable or incurable latent disorder. Thus she did not have a disability encompassed by the Act on the Prohibition of Discrimination on the Labour Market etc.[35]
The judgment established that a latent disorder does not constitute a disability if its occurrence can be prevented by the reasonable ergonomic design of a workplace.

Internet source:
http://domstol.fe1.tangora.com/Domsoversigt.16692/F-0007-10.1476.aspx

Colour blindness recognised as a disability

Disability

The claimant was employed as a seaman in 2012. The appointment was followed by a medical examination stating that he was suitable for ship service but unsuited to lookout service due to his colour blindness. A few months later, the claimant failed an extended lantern exam and was informed by the Danish Maritime Authority that he was not suitable for lookout services. He was then dismissed due to his colour blindness, which meant that he did not live up to the general legal requirements for the crew on the ship.

The claimant brought an action against the employer for discriminatory dismissal on the ground of his disability. The Maritime and Commercial Court stated that the claimant's colour blindness was a medically diagnosed illness which entailed a limitation hindering his full and effective participation in his professional life as a seaman on an equal basis with other seamen.[36] The Court argued that because of his colour blindness, the claimant was not able to or allowed by law to perform essential tasks on the

35 The Maritime and Commercial Court, F-7-10, judgment delivered on 1 December 2014.
36 The Maritime and Commercial Court, F-2-13, judgment delivered on 22 December 2014.

ship (the lookout tasks). Thus the Court concluded that he had a disability encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc. and the Employment Equality Directive.

The Court stated that the claimant was dismissed because of his disability and subsequently it examined whether the employer should have established reasonable accommodation. The employer was a small shipping company with few employees and there was no other job that the claimant could perform instead of his job as a seaman. The Court concluded that the only realistic accommodation – to hire an additional seaman during the two weeks when the claimant was at sea – would be unreasonable for the employer. Thus discrimination due to disability had not taken place.

The judgment established that legal requirements preventing individuals with a particular disorder from performing specific jobs does not mean that the disorder does not constitute a disability. The relevant assessment is whether the required special accommodation is reasonable or not for the employer in question.

Internet source:
http://domstol.fe1.tangora.com/Domsoversigt.16692/F-0002-13.1494.aspx

Refusal to sell football tickets constitutes indirect discrimination based on ethnic origin

Racial or ethnic origin

The complainants were seven football supporters who had tried to buy tickets for three games for their home team, against one Italian, one Spanish and one Turkish team. The complainants, together with 700 other supporters who had bought tickets for the same games, had non-Danish sounding names, and they were all informed via email that the sale of the tickets was annulled due to safety reasons. The email referred to UEFA Champions League rules stating that a home team can only sell tickets to home team supporters, and that supporters of the different teams must be placed in separate sections of the stadium. The complainants brought an action before the Board of Equal Treatment.
The Board found that it was legitimate based on safety considerations to make sure that individuals who had bought tickets for the home team sections were not in reality supporters of the visiting teams. However, the Board did not find that the chosen means to obtain this aim were appropriate and proportionate. The Board argued that using the criterion of non-Danish-sounding names would not result in the requested safety.

Thus the Board concluded that the complainants were victims of indirect discrimination because of ethnic origin.[37]

Internet source:
http://ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1474&type=Afgoerelse

Board of Equal Treatment decision on harassment in bank services

Racial or ethnic origin

The claimant is a refugee who has lived in Denmark since 2009 and who receives treatment for Post-traumatic Stress Disorder (PTSD) because of torture in his country of origin. In March 2014 he contacted his bank regarding a bank loan and claims that every time he called the bank, the advisor treated him in a racist way by refusing to speak English or to speak more slowly in Danish and by stating that he should learn Danish or move back to his home country.

The telephone conversations took place when the claimant was at his language school, which was confirmed in writing by his teacher. The claimant's psychologist furthermore described that the claimant was very shocked by the experience. After a meeting between the claimant and a bank manager, the

37 Decisions Nos 133/2014, 134/2014, 135/2014, 137/2014, 138/2014, 139/2014 and 140/2014 of 13 August 2014.

manager sent a letter expressing regret that the claimant had been met with an impolite attitude at the bank.

Before the Board of Equal Treatment, the claimant argued that he had been discriminated against because of his race and ethnic origin. The bank claimed that the advisor in question had not expressed herself in a racist or in any other degrading or discriminating way.

The Board stated that the claimant's description of the telephone conversations had been substantiated by the psychologist's patient records, by the observations of the language teacher as well as by the content of the letter from the bank manager.[38] On that basis, the Board concluded that the claimant had established facts of possible discrimination in the form of harassment, reversing the burden of proof, and that the bank had not proven that no harassment had taken place. The claimant was awarded compensation of DKK 10 000 (EUR 1350).

Internet source:
http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1555&type=Afgoerelse

EE Estonia

LEGISLATIVE DEVELOPMENT

Parliament adopts the Registered Partnership Act (RPA)

Gender

On 9 October 2014 Parliament adopted the Registered Partnership Act (RPA).[39]The RPA gives cohabiting (unmarried) couples the right to register their civil relationship and thus to regulate their legal relations. The RPA will enter into force from 1 January 2016 onwards. This time is given to make necessary amendments to related legal texts. Complications in implementation and additional regulations could appear due to the fact that a new coalition took office after the parliamentary elections in March 2015.

Internet source:
http://www.riigikogu.ee/?op=ems&page=eelnou&eid=ea84e71c-291a-4c91-88b0-bd64af650d21
https://www.riigiteataja.ee/en/eli/527112014001/consolide, accessed 15 April 2015.

POLICY DEVELOPMENTS

Estonia signs the Istanbul Convention

Gender

On 2 December 2014, Estonia signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210). The Convention still needs to be ratified by the Estonian Parliament.

The ratification of the Convention would oblige Estonia to fully address gender-based violence in all its forms and to take measures to prevent it, to protect its victims and to prosecute the perpetrators. A separate law on domestic violence does not exist in Estonia. In 2013, the Cabinet started the coordination and consultation process for implementing the Istanbul Convention requirements. Existing legal texts will be amended, taking the requirements of Directive 2012/29/EU ('the Victims' Rights Directive') into account. Amendments to the Penal Code and to the Victim Support Act have been initiated.

38 Board of Equal Treatment decision No. 214/2014 of 10 December 2014.
39 Kooseluseadus (Registered Partnership Act), RT I, 16.10.2014, 1.

Internet source:
http://www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm
http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=&DF=&CL=ENG,
accessed 15 April 2015.

Gender Equality and Equal Treatment Commissioner implements the project 'Promoting Gender Equality through Empowerment and Mainstreaming'

Gender

Between 2013 and 2015 the Gender Equality and Equal Treatment Commissioner has been implementing the project 'Promoting Gender Equality through Empowerment and Mainstreaming' financed by Norway Grants within the framework of the gender equality and work-life balance programme operated by the Ministry of Social Affairs. The project has two sets of activities: increasing the effectiveness of legal protection against gender-based discrimination by raising rights awareness and helping victims of discrimination directly through strategic litigation, and by increasing the capacity of officials assisting discrimination victims; and the intensified promotion of gender equality and the enhancement of mainstreaming gender into policies and practices.

The Commissioner has organised awareness-raising workshops in every county, and issued a series of newsletters and a handbook on gender mainstreaming. The handbook offers guidelines on the implementation of a horizontal theme of gender equality in national action plans and European Structural Funds projects.

Internet source:
http://www.vordoigusvolinik.ee/wp-content/uploads/2013/10/Sooloime-kasiraamat.pdf

Finland

FI

LEGISLATIVE DEVELOPMENT

New anti-discrimination legislation passed by Parliament

All grounds

On 30 December 2014, the reform of the Finnish Non-discrimination Act (2004) and related legislation, which had been first proposed by the Government in May 2014,[40] was adopted. The revised Non-discrimination Act prohibits discrimination on the basis of age, origin, nationality, language, belief, opinion, political activity, industrial activity, family ties, state of health, disability, sexual orientation and other reasons related to a person. The scope of application of the revised act is all public and private activity except legal acts falling within the scope of private affairs and family life or the practising of religion. The Act entered into force on 1 January 2015.

The Government's proposal for a comprehensive reform of the anti-discrimination legal framework was significantly amended in Parliament due to strong criticism from academics, equality bodies and NGOs heard in Parliamentary committees. Thus, the proposed weakening of protection against direct discrimination (in areas where EU anti-discrimination directives are not applicable) was rejected by Parliament. Consequently, differential treatment is only allowed if it has an acceptable aim *from the perspective of human rights* and the means used are appropriate and necessary for achieving this aim. Furthermore, no justification for differential treatment is allowed when using public authority or in education in addition to the areas governed by the directives. The main principle of the legislative reform was to expand the protection provided for all grounds of discrimination by levelling up the protection

40 Government Bill HE 19/2014 vp. See also *Anti-Discrimination Law Review*, Issue 19, pp. 61-62.

as provided previously to ethnic minorities. Accordingly the responsibility for the public authorities and employers with more than 30 employees to draw up a plan for fostering equality was extended to all discrimination grounds.

The amended Act also amends the Act on Equality by adding under Section 1 of the Act the explanation that the aim of the act is to prevent discrimination based on gender identity and the expression of gender identity. Section 3, which contains definitions, now includes the definitions of gender identity and the expression of gender identity. Gender identity is defined as a person's own experience of his or her gender (Section 3 (5)); and the expression of gender identity is defined as the 'expression of gender by dress, behaviour, or in a corresponding manner' (an example of the latter being a manner of speech) (Section 3(6)).

The positive duty of educational institutions to promote equality and to undertake equality planning was extended to the institutions of mandatory primary education. Under the new provisions, all educational institutions have the duty to promote equality between the sexes in a manner that takes into account the age and development of the children.

The positive duty of employers to undertake equality assessments ('equality planning') was made stricter by new provisions, especially those on 'pay mapping', which is to be undertaken by employers with 30 or more employees. Under the new formulation, 'pay mapping' requires that every second or third year, an employer is to prepare, in cooperation with persons nominated by the employees, an equality plan. This equality plan should show how women and men are charged with different tasks in the workplace. The equality plan aims to ensure that there are no unjustified pay differentials among women and men doing equal work or work of equal value. One of the new provisions (Section 6(b) of the Act on Equality) further explains how employees are to be grouped for wage comparison. A further new provision (Section 6(c)) obligates authorities, educational institutions, and employees to prevent discrimination on the basis of gender identity or the expression of gender identity.

The pre-existing Ombudsman for Minorities is replaced by a new Non-discrimination Ombudsman whose mandate is extended to provide all grounds with the same protection as previously provided to ethnic minorities. The new Non-discrimination Ombudsman will have the power to assist victims of discrimination in all fields as required by the Racial Equality Directive, including the field of employment. Thus, Parliament has reacted to the pending infringement procedure against Finland regarding the lacking competences of the equality body.

Similarly, the mandate of the pre-existing Non-discrimination Tribunal is also extended to all grounds, while this previous body is merged together with the pre-existing Gender Equality Board (concerned with gender equality) into one new National Discrimination and Equality Tribunal and given a broader mandate.[41] The new Tribunal has the competence to handle cases under both the Non-Discrimination Act and the Act on Equality. However, a victim of gender discrimination (unlike a victim of discrimination based on other prohibited grounds) does not have the right to bring a case before the new Tribunal, as the Act on Equality limits this right to the Equality Ombudsman and the main social partners. Concerning gender discrimination, the mandate of the new Tribunal is limited to the prohibition of the continuation of a discriminatory act, therefore it remains similar to that of the previous Gender Equality Board. The new Tribunal has broader competence over issues covered by the Non-Discrimination Act (concerning all other discrimination grounds): to confirm conciliation between the parties (Section 20 of the Non-Discrimination Act). On the other hand, the Tribunal has a mandate on employment-related gender discrimination, but no mandate in employment-related discrimination based on other discrimination grounds, as these are monitored by Occupational Health Authorities. These differences may complicate the process of

41 The Finnish name of this new body is Yhdenvertaisuus ja tasa-arvolautakunta, which could be translated as "Discrimination and Equality Board". However, in the absence of an official English translation of the amended legislation, we refer to the English name of this new body as indicated on its website, available at: http://www.syrjintalautakunta.fi/en/front_page, accessed 18 May 2015.

handling cases of intersectional discrimination under the new equality legislation. In its statement, the Constitutional Committee requested the Employment and Equality Committee (the reporting standing committee) to consider both the disparity of the remedies available to the victim of discrimination depending on the ground of discrimination, and the disparate mandate of the new Discrimination and Equality Tribunal to deal with various discrimination grounds. The Constitutional Committee also noted that the proposed mandate and working process of the Tribunal put victims of multiple discrimination in a disadvantageous position.

Internet source:
http://www.eduskunta.fi/triphome/bin/vex3000.sh?TUNNISTE=HE+19/2014

CASE LAW

Labour Court rules on pay during maternity leave

The Finnish Labour Court in a recent decision[42] refers to a preliminary ruling by the Court of Justice of the EU.[43] The case confirmed that the correct interpretation of the collective agreement is that an employee is entitled to pay during maternity leave even when the new maternity leave begins during childcare leave. It also applies when a female worker wishes to return to paid maternity leave from unpaid family-related leave, even though the collective agreement which entitles an employee to pay during maternity leave expressly limits the right to paid maternity leave in such cases. Pay during maternity, parental or so-called home-care leave is not mandatory under Finnish law, but many collective agreements contain a condition under which the employee is entitled to pay during maternity leave. A person on parental leave is entitled to an income-related benefit, while a much longer childcare leave (or home-care leave) only entitles a person to a flat-rate benefit. The collective agreement in this case contained a condition that limited the right to pay during maternity leave for persons whose maternity leave starts during childcare leave.

The CJEU decided that such a condition in a collective agreement violates the effective impact of the Parental Leave Directive,[44] and the Finnish Labour Court formulated its decision so as to follow the preliminary ruling.

There has long been disagreement on the interpretation of collective agreements which provide pay during maternity leave in cases when a new maternity leave begins immediately after family-related leave. Employers tend to see situations where a woman on family-related leave wishes to interrupt such leave in order to return to maternity leave during a new pregnancy as unfair to the employer, especially when a collective agreement provides pay during maternity leave. Finnish case law tended to agree with the employers.

A previous request for a preliminary ruling in the *Kiiski* case tested the then standard interpretation in Finnish collective agreements according to which a pregnancy did not constitute an unforeseeable and justifiable ground for interrupting childcare leave.[45] The interpretation was backed up by a widely shared opinion among employers that, as pay during maternity leave is not mandatory but is based on a collective agreement, it is unfair to return to paid maternity leave directly from childcare leave. The CJEU held that a

42 Labour Court Decision TT:2014:115, 22 August 2014. The Labour Court decided to refer the case to the CJEU in 2011. Decision of the Labour Court TT:2011-108.

43 Joined Cases C-512/11 and C-513/11 (*Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Terveyspalvelualan Liitto ry (C-512/11) and Ylemmät Toimihenkilöt (YTN) ry v Teknologiateollisuus ry and Nokia Siemens Networks Oy (C-513/11*), [2014] ECR n.y.r. The decisions concern two different collective agreements which both required that an employee who exercises her right to unpaid parental leave renounces her right to paid maternity leave in advance.

44 Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC OJ L 145 of 19 June 1996, pp. 4-9.

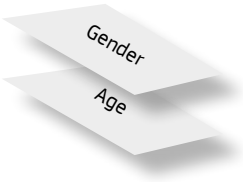
45 Case C-116/06 *Sari Kiiski v Tampereen kaupunki* [2007] ECR I-07643.

pregnancy is an unforeseeable event comparable to the loss of a child or the other parent. The employee had a right to interrupt childcare leave in those circumstances. Pregnancy prevented Ms Kiiski from looking after her first child. The refusal to allow an interruption of childcare leave in order to begin maternity leave constituted direct discrimination on grounds of sex. After *Kiiski*, collective agreements were reformulated so as to expressly limit access to paid maternity leave for persons on unpaid leave. The new ruling of the CJEU and the Labour Court decision prevent the use of this type of limiting condition.

MK Former Yugoslav Republic of Macedonia

LEGISLATIVE DEVELOPMENT

Amendments to the Law on Labour Relations concerning the age of retirement



On 24 July 2014, without any wider and/or public debates, Parliament adopted amendments to the Law on Labour Relations concerning the retirement age. The amended Article 104 of the Law on Labour Relations[46] states that an employee by means of a written statement to an employer may seek to extend the contract of employment up to the age of 67 years (men) or 65 years (women). These changes were to be followed by changes in several other laws (Law on civil servants, Law on public servants etc.).

A comparison of the amended Article 104 of the Law on Labour Relations with the original version of the Article shows that the previous formulation ('Employer terminates the employment contract of an employee when the employee turns 64 years of age and 15 years of service') was gender-neutral.

At the first meeting of the newly created Parliamentary Commission on Equal Opportunities between Women and Men (established after the elections in April 2014), a discussion about the proposal for a new Law on the prevention of, combating and protection from domestic violence was conducted. The Law was prepared and passed through all other Parliamentary commissions and was submitted for the Parliamentary plenary session on 1 September 2014. NGOs claim that they were not involved at all in the preparation of the proposed Law on the prevention of, combating and protection from domestic violence; that their amendments (developed in meetings without the presence of the government) were not considered in the final version; and that the Law would not make any change in either the fight against domestic violence or in the protection of women.

In the six months prior to the procedures on this Law, more than 120 laws on all kinds of issues were amended (mostly concerning short procedures). None of the numerous amendments, in some cases directly affecting women, were subject to debate in the Parliamentary Commission on Equal Opportunities between Women and Men. Neither were they discussed in the Club of Women Parliamentarians, nor were they the subject of any wider public debate.

Internet sources:
http://www.sobranie.mk/materialdetails.nspx?materialId=96b43c77-727c-4142-a102-46037d2c4c21
http://www.sobranie.mk/sessiondetailsrabotni.nspx?sessionDetailsId=e8fcac34-4e27-4038-a872-301237601368
http://www.sobranie.mk/materialdetails.nspx?materialId=3447572f-67f9-42e1-9b93-4903ae77d6e5
http://www.glasprotivnasilstvo.org.mk/04-09-2014-pres-konferentsija-predlog-zakon-za-preventsija-sprechuvan-e-i-zashtita-od-semejno-nasilstvo/#
http://www.radiomof.mk/zakonot-za-semejno-nasilstvo-se-krchka-bez-nevladinite-organizatsii/

46 Official Gazette of the Republic of Macedonia No. 113/2014.

CASE LAW

Harassment on grounds of sexual orientation in the field of education in state-approved textbooks

Sexual orientation

The claimant is an NGO network which brought an action before the Commission for Protection against Discrimination (CPAD) against three state-approved textbooks in use in University courses in the fields of medicine and psychology. The disputed content of the textbooks represented homosexuality as a mental disorder, (an 'inversion of the sexual urge'), whereas 'normal sexual activity' is defined as sexual activity between persons of the opposite sex. Furthermore, in their submission, the claimant network highlighted the fact that one of the textbooks (published in 2004) refers to the criminal provision outlawing homosexual relations as if it was still in force, although this provision was repealed in 1996.

The equality body found that the content of the textbooks amounted to harassment on grounds of sexual orientation.[47] This is the third decision of the CPAD regarding content in state-approved textbooks relating to sexual orientation. After having found harassment in the first of these three decisions in 2011,[48] the CPAD then found in the second case in 2012 that expressing a scientific position reached following scientific research cannot entail discrimination.[49] This third case brings the CPAD back to its initial position which reads such texts as discriminatory and with a potential to spread homophobia.

POLICY DEVELOPMENTS

Publication of the two National Human Rights Institutions' annual reports for 2013

All grounds

The Commission for Protection against Discrimination (CPAD) and the Ombudsperson are both National Human Rights Institutions with competences related to protection against discrimination, including the receipt and investigation of individual complaints.

The CPAD's annual report shows that the equality body received 84 complaints in 2013, which is an increase compared to the previous year when it received 75 complaints. The most prevalent ground of discrimination was ethnicity (21) while the remaining complaints were spread out across a multitude of grounds including health status, belonging to a marginalised group, personal or social status and disability. Although some complaints related to several grounds, no specific data was published as to the grounds involved in multiple discrimination complaints. Most of the complaints concerned the field of employment and labour relations (36).

According to the Ombudsperson's annual report, 63 discrimination claims were filed at this institution in 2013, which means that the Ombudsperson receives less complaints of discrimination than of any other category of breaches of rights. The Ombudsperson found discrimination in 15 cases, all of which were in the area of labour law and on grounds of ethnicity.

Internet sources:
http://ombudsman.mk/upload/Godisni%20izvestai/GI-2013.pdf
http://kzd.mk/mk/dokumenti/2013?download=51:gi2013

47 Full reference of the decision is not yet available. Press release of the Macedonian Helsinki Committee available at http://www.mhc.org.mk/announcements/204#.VR2hylyZaZy (last accessed 31 March 2015).

48 Case No. 02-27/11 *Coalition for sexual and health rights of marginalised communities v Ministry of Education and Science, Marija Kostova, PhD, Aneta Barakovska, PhD and Eli Makazlieva*, decision of 19 May 2011.

49 Case No. 07-375/9 *Coalition for sexual and health rights of marginalized communities v Faculty of Security and Professor Liljana Batkovska*, of 29 August 2012.

Health Insurance Fund to start implementing a new process to pay maternity and parental leave

Gender

On 15 October 2014, the Health Insurance Fund of the former Yugoslav Republic of Macedonia announced publicly that it would start implementing the project 'Faster Payment of the Birth-Related Compensations and Leave', by presenting the project to the Association of Commerce Chambers of Macedonia. This project was launched by one of the ruling political parties during the parliamentary elections (in April 2014). During these elections, for almost six months the project was not debated nor offered to the public in any way; hence it has not undergone any transformation from a political party's project to a State project. However, the Director of the Fund announced that the procedure for granting approval by the Cabinet has started.

The main change to the current practice of this Project is that the obligation of immediate payment for maternity and parental leave is shifted from the Fund to the employers. Once this is completed, employers have the right to request refunds from the Fund. According to the authors of the Project, the main improvement is that paper applications will be replaced by electronic applications, and in that process there is no need for other appended documents (which will be gathered by the Fund *ex officio*). There is no explanation of the correlation between this improvement and the shifting of the obligation to pay onto the employers.

However, the final phase – refunding the employer – is not clearly explained. According to the Project, the procedure for a refund is completed by the Fund providing information to the Ministry of Finance. In addition, there is no mention of the changes which are necessary to the relevant laws.

The critical reaction of the expert public is based on the fear that the shift of the payment obligation would seriously endanger private employers, and particularly small and medium-sized businesses because until they are refunded, they would have to pay both the health insurance and for the birth-related forms of leave; this therefore amounts to a serious financial burden. Furthermore, having in mind that in other (tax and revenue) cases the Government has prolonged the period for a refund even to six months, the logical way out for the employers would be to avoid any possibility of employing or hiring women seen as likely to become pregnant (e.g. because of their age, marital status, etc.).

As very few men in the former Yugoslav Republic of Macedonia make use the possibility of parental leave, the possibility of gender discrimination related to pregnancy and birth if / when the described Project is implemented, is increasingly likely.

The requests from NGOs to abort this project seem to be well founded.

Internet sources: (all accessed 1 November 2014)
First mention of the project during the last elections:
http://vistina.mk/?p=60745
Media reactions:
http://plusinfo.mk/vest/2092/porodilnoto-kje-go-plakjaat-firmite
http://www.makdenes.org/content/article/26666177.html
Information by the Macedonian Chambers of Commerce:
http://www.sojuzkomori.org.mk/?ItemID=8605A93493AD594B92102937EFE36D12;
http://ssk.mk/?ItemID=443A14073EB5654FB23B8E4116E0FE36
An explanation of the project given by the Health Insurance Fund of Macedonia:
http://www.sojuzkomori.org.mk/WBStorage/Files/fzom.pdf
Reaction of the Network of NGOs for protection from discrimination:
http://novatv.mk/index.php?p=1&navig=8&cat=2&vest=17810

France

FR

LEGISLATIVE DEVELOPMENTS

Executive order postpones the implementation of accessibility for persons with disabilities

Disability

The Law on Disability was adopted in 2005 and provides, in addition to requirements for the accessibility of new constructions, for the obligation to ensure the accessibility of existing "buildings receiving the public" and public transport, with a maximum delay of 10 years. The deadline was thus to be reached on 1 January and 13 February 2015.[50]

Due to delays in implementing the law and the impossibility of abiding by the planned schedule, in September 2013 the Prime Minister launched a consultation of stakeholders in order to redefine the implementation conditions of the accessibility programme of the law of 2005. Further to this consultation, the Prime Minister confirmed in February 2014 the postponement of the 2015 deadlines. In exchange, operators of public places and transporters (i.e. private and public managers, mayors, public transport networks) formally undertook to abide by a specific calendar for each type of works, providing for a delay of between three months and nine years depending on the type of works. This calendar provides for detailed deadlines for preparing and programming the works, taking the form of "agendas of programmed accessibility".

In July 2014, new legislation was adopted to enable the Government to adopt legislative measures by way of executive order to determine the conditions and the schedule for the implementation of the accessibility of public places and transport, housing and roads.[51]

On this basis, the Government then adopted an Executive Order in September 2014, providing the possibility to adopt decrees to specify schedules for each type of works (buildings, roads and public transport) and to proceed by undertakings taking the form of "agendas of programmed accessibility".[52] Three decrees were adopted to specify the implementation conditions of these agendas, one for each type of works.[53]

The Government has given assurances to stakeholders representing disabled persons that this schedule will be closely managed and enforced and that it will ensure the effectiveness of the accessibility programme promoted by the Law of 2005. However, the mobilisation of public building and public transport managers and the lobbying of mayors for the postponement of the initial agenda have generated a considerable lack of trust among representatives of disabled persons towards public operators and political actors in relation to the enforcement of this Agenda.

The national equality body (*Défenseur des droits*) and the Human Rights Consultative Committee, as well as all stakeholders representing disabled persons in France, have repeatedly taken a stand against the postponement. After the adoption of the Law postponing the deadlines, a consensus was reached among these actors alerting the Government of the necessity to be firm as a condition for the enforcement of the accessibility Agendas.

50 Law on Disability, No. 2005-102 of 11 February 2005.
51 Law No. 2014-789 of 10 July 2014.
52 Executive Order No. 2014-1090 of 26 September 2014.
53 Decree Nos 2014-1320 of 5 November and 2014-1321 of 6 November 2014 relate to public transport, and Decree No. 2014-1327 of 5 November 2014 relates to public buildings and places open to the public. In addition, Decree No. 2014-1326 of 6 November 2014 was adopted to review standards of adaptation works relating to the accessibility of existing buildings.

Internet sources:
Law No. 2014-789 of 10 July 2014:
http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029217888&categorieLien=id
Executive order No. 230014-1090 of 26 September 2014:
http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029503268&categorieLien=id

New Law on 'real equality between women and men'

Gender

After months of discussions, the Law on 'real equality between women and men' was promulgated on 4 August 2014 after its approval by the Constitutional Council, which declared the Bill to be constitutional. No MP voted against the law; however, most right-wing MPs abstained.

The Law broadly aims to pursue 'real' and concrete equality between women and men in all aspects of life. According to the French Minister for Women's Rights, Najat Vallaud-Belkacem, the Law has three main objectives: to ensure the full efficiency of women's rights already recognised in, for instance, professional life or parity in elections; to recognise rights in new areas to address sources of inequality; and to trial new tools.

The Law is divided into five titles that cover all aspects of social life: equality in working life; the fight against precarity; the protection of women against violence, including domestic violence; action against gender stereotypes; and the political representation of women.

The most important measures in the Law are the following:
- Women's rights at work: the reform of parental leave to encourage more fathers to take parental leave. The right to parental leave remains unchanged, but the Law amends the conditions of the social benefit for the parent who takes parental leave. Namely, the 'supplement for a free choice of working time' will now be paid for a further six months for a family's first child if both parents decide to share the parental leave, in which case families are entitled to a period of one year of paid parental leave for the first child. For subsequent children, the allowance will be reduced from three years to two and a half years, but it will be paid for three years if the parental leave is shared. The new rules do not apply to single families.
- Recognition of fathers' rights: fathers now enjoy the same protection from dismissal as mothers during the four weeks that follow the birth of the child. An employer is now also prohibited from dismissing a father in the four weeks following the birth of his child, except in cases of gross misconduct or if the dismissal has nothing to do with the birth.[54] The father is now also entitled to obtain leave to attend a maximum of three prenatal medical examinations with the mother.

In addition, the Law also addresses employee-employer relationships. For example, it modifies Article L. 1225-57 of the Labour Code to redefine the content of a meeting that the employer must organise at the end of an employee's parental leave. The Law also merges together the obligation of the employer to negotiate annually on both the gender pay gap, and professional equality.

Other commendable changes introduced by the Law include:
- Abolishing the requirement that women must prove to be in 'distress' in order to have the right to abort. Women now only have to show that they do not want to continue being pregnant.
- The removal of some gender-loaded language, such as 'the good family man', from the Civil Code, and the equalisation of the rights of married couples and the rights of couples engaged in a civil union ('PACS').
- A specific measure to protect single mothers will be trialled for 18 months, and then evaluated: For single mothers who do not receive regular child support from the father of their children, a public trust will be granted to women to protect them from a financial loss while measures to recover child support will be taken.

54 New Article L.1225-4-1 of the Labour Code.

- Better protection for women who suffer from domestic violence, better protection against violence for immigrants, and the extension of the prohibition of sexual harassment to the military.
- Extending the authority of the French media regulator (the *Conseil Supérieur de l'Audiovisuel*) to ensure that women are equally represented and not diminished by sexist statements or images.
- Increasing fines for political parties that do not meet equal representation objectives. Some provisions also apply to sport federations.

It is still too early to analyse the impact of the Law. However, even though the Law attempts to adopt a transversal approach to equality, the vast numbers of additional and different types of measures at times present an impression of incoherence.

Internet sources:
Law No. 2014-873 of 4 August 2014 on real equality between women and men (*pour l'égalité réelle entre les femmes et les hommes*):
http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029330832&categorieLien=id, accessed 14 March 2015.
Decision No. 2014-700 DC of 31 July 2014:
http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2014/2014-700-dc/decision-n-2014-700-dc-du-31-juillet-2014.142036.html, accessed 14 March 2015.

CASE LAW

Supreme Court plenary session decision in the 'Baby Loup' case

Religion or belief

The *Baby Loup* case raises the issue of private sector employers' power to restrict their employees' freedom to express their religious beliefs. The case concerned the association Baby Loup which ran a day-care centre for underprivileged children, and which dismissed an employee for wearing the Islamic veil at work in violation of internal regulations.[55] The decision of the Supreme Court adopted in March 2013 attracted a great deal of media attention when the Court quashed the lower courts' rulings and found that the principle of secularity, which was invoked by the association's internal regulations, does not apply to private sector employees who are not operating a public service.[56]

When the case was sent back to the Court of Appeal of Paris in October 2013, however, the Court did not follow the ruling of the Supreme Court but held that the association's aim of providing children with a neutral environment and protecting their freedom of religion could be found to constitute an ethos based on a belief in secularity.[57] In addition, the internal regulations respected the right to non-discrimination and were appropriate and proportionate to the legitimate purpose of providing a neutral environment for children. The case was then sent to the Supreme Court to be adjudicated before a plenary session including all the chambers of the Court. In the meantime, in December 2013, the Council of State adopted an opinion on the principle of secularity beyond the public sphere. It then reiterated that in private employment restrictions on the expression of religious freedom cannot be justified by the secularity of the State or by the principle of the neutrality of the public service, but only by the specific tasks to be accomplished provided these restrictions are proportionate.[58]

55 See *European Anti-Discrimination Law Review*, issue 17, p. 57 and issue 18, pp 60-61.
56 Court of Cassation, *Baby Loup Association*, No. 536, Case No 11-28.845 of 19 March 2013.
57 Court of Appeal of Paris, Decision No. S 13/02981 of 27 October 2013.
58 Opinion of the General Assembly of the Conseil d'Etat, 19 December 2013, see also *European Anti-Discrimination Law Review*, issue 18, pp 60-61.

The plenary session of the Supreme Court adopted its final decision on 25 June 2014.[59] The Court rejected all possible arguments based on genuine and determining occupational requirements as well as a potential exception for employers with an ethos based on religion and belief, as France has transposed neither of the relevant provisions of the Employment Equality Directive into national law.[60] Furthermore, the Court excluded all arguments holding that the principle of secularity is in any way applicable to private employers. It further decided that the day-care centre is not an organisation with an ethos to be protected pursuant to Article 9 of the European Convention on Human Rights, since its main purpose is not to promote or hold religious convictions, but to structure an action towards the care of small children.

The Court did not discuss whether or not the dismissal amounted to discrimination, either direct or indirect, or whether or not it was justified. Instead, it concluded that the dismissal of the claimant was lawful as it constituted a legitimate restriction of a fundamental freedom imposed by the employer through its internal regulations.[61] Moreover, the Court based its reasoning entirely on the facts of the case, evaluating whether or not the restrictions are legitimate given the circumstances of the execution of the employment contract. The Court considered the size and conditions of the day-care centre, where all employees were in direct contact with the parents and the children, and found that the employer had demonstrated that the proposed limitation on religious freedom was, in this case, justified by the nature of the function and proportionate to the legitimate objective pursued.

Thus, the Court's reasoning did not address the legal framework prohibiting discrimination provided by the Employment Equality Directive.

Internet sources:
http://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/612_25_29566.html

A case on pregnancy and dismissal

Gender

According to Article L. 1225-5 of the Labour Code, the dismissal of a woman worker is void if the worker sends a medical certificate to her employer confirming her pregnancy within 15 days of being formally notified of her dismissal. In the case at hand, a woman was dismissed on 15 October 2009, and sent her certificate on 30 October 2009. However, the Court of Appeal did not apply Article L. 1225-5 of the Labour Code because according to the medical certificate, the pregnancy had not started before 16 October 2009, meaning that the woman was not pregnant when she was dismissed.

The Supreme Court (*Cour de Cassation*) reversed the decision, and considered that the Court of Appeal had wrongly applied an additional condition to the operation of Article L.1225-5 of the Labour Code – that the certificate must show that the woman was pregnant at the time of her dismissal.

The *Cour de Cassation* strictly applied Article L. 1225-5 of the Labour Code, which is intended to protect pregnant women. The fact that the precise date of the beginning of pregnancy is difficult to determine is likely to be the reason why the *Cour de Cassation* avoided such a debate.

As a consequence of the nullified dismissal, the applicant has the right to be reinstated in her job.

59 Plenary session of the Court of cassation, No. 612, Case No. 13-28.369 of 25 June 2014.

60 Article 4(4) of the Directive, providing an exception for genuine and occupational requirements, has been transposed into national law but the legislator has only adopted a list of occupations covered by this exception with regard to discrimination on the ground of sex, and none with regard to discrimination on any other ground, including religion. France has not transposed Article 4(1) of the Directive.

61 Articles L1121-1 and L1321-3 of the Labour Code authorise employers to impose legitimate restrictions on rights and freedoms through the adoption of internal regulations.

Internet sources:
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000029199650&fastReqId=558519389&fastPos=1, accessed 25 March 2015

Council of State decision on the conformity of travelling documents and of fines attached to their control to the ECHR

Racial or ethnic origin

A French Traveller first petitioned the Minister of the Interior to repeal the decree of 1970 which implements fines relating to a failure to comply with obligations to control 'travelling papers'.[62] Given the failure of the Minister to answer this request, the claimant filed a motion to quash the Minister's implicit decision refusing to repeal the Decree.

The case was brought before the Supreme Administrative Court (*Conseil d'Etat*), which stated on 19 November 2014 that the requirement that persons who have had no domicile or residence for more than six months must hold specific travelling papers pursues the administrative and social purposes of providing a mechanism to maintain the relation between the State and these persons and to allow for their identification, despite their lack of a permanent residence.[63]

Therefore, this measure pursues a legitimate purpose based on an objective difference in the situation of Travellers and other French residents that does not constitute discrimination based on origin. In addition, the Court considered that this limitation on the freedom of movement is justified by the necessity to protect public order in accordance with Article 2, para. 3 of Protocol No. 4 to the ECHR, and proportionate to this objective. Therefore, there is no violation of Article 14 of the Convention in conjunction with Article 2 of Protocol No. 4 protecting freedom of movement.

However, the Court decided that the provisions of Articles 10 and 12 of the decree, imposing penal fines on persons who circulate without being in a position to present such travelling papers on demand, violate the freedom of movement protected by Article 2 of Protocol No. 4 to the ECHR, such a restriction being disproportionate to the objectives pursued.

The implicit decision of the Minister of the Interior refusing to repeal these provisions is therefore illegal and the Court ordered the Minister to repeal them within two months.

This decision of the Administrative Supreme Court intervened after the Constitutional Council had decided in 2012 that such fines did not conform with certain requirements of the Constitution,[64] and after condemnation by the UN Committee for Human Rights earlier in 2014 for a violation of Article 12 of the International Covenant on Civil and Political Rights (freedom of circulation).[65]

The French Government has repeatedly promised to review the status of Travellers but has failed as of yet to pursue the many legislative proposals filed by the Ecologist and Socialist Parties in Parliament.[66] Considering the failure of the Government to reform the status of Travellers, and following the decision of the Supreme Administrative Court, the equality body (the Defender of Rights) addressed a formal Recommendation to the the Government on 26 November 2014 requesting that it proceed to the promised legislative reform.[67]

62 Decree No. 70-708 of 31 July 1970, implementing Articles 5 and 6 of Law No. 69-3 of 3 January 1969.
63 *Conseil d'Etat*, 19 November 2014, No. 359223.
64 Constitutional Council, QPC No. 2012-279 of 5 October 2012, see also *European Anti-Discrimination Law Review*, Issue 16 (2013), p. 61.
65 Decision of the Committee for Human Rights of 28 March 2014, available at: http://www.fnasat.asso.fr/dossiers%20docs/condamnation%20ONU/Docs/ComOnu_20140506_CCPR.pdf (last accessed 6 March 2015).
66 The latest such proposal is Legislative Proposal No. 1610 filed by the MP Dominique Raimbourg on 5 December 2013, available at http://www.assemblee-nationale.fr/14/propositions/pion1610.asp (last accessed 6 March 2015).
67 Defender of Rights, Recommendation No. MLD-MSP 2014-152 of 26 November 2014.

Internet sources:
http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000029781213&fastReqId=1369858907&fastPos=19

DE Germany

LEGISLATIVE DEVELOPMENT

Statutory gender quota on company boards

Gender

In the autumn of 2014, a draft law on a statutory gender quota on company boards presented by the Ministry for Family, Senior Citizens, Women and Youth was discussed by the respective federal ministries. The draft provides for a statutory 30 % gender quota for supervisory boards of all private companies which are listed *and* subject to full co-determination,[68] and binding published target quotas for executive and supervisory boards as well as for the highest management level of listed *or* fully co-determined private companies. Moreover, the Statute on Bodies within Federal Control and the Federal Equality Statute are to be amended to increase the number of female leaders in public and state-owned companies. The law is intended to enter into force in 2016.

Internet sources:
http://www.bmfsfj.de/BMFSFJ/gleichstellung,did=210072.html

CASE LAW

Federal Labour Court decision on duty of neutrality of religious community employer

Religion or belief

The claimant was a nurse who wished to continue her work in a hospital after maternity leave wearing an Islamic headscarf, arguing that she had changed her beliefs in this respect during her leave. The hospital was closely linked to the Protestant Church and prohibited its staff from wearing such religious signs, and dismissed the complainant.

In September 2014, the Federal Labour Court (*Bundesarbeitsgericht*) decided that it is in principle permissible for an employer who is part of a religious community – here the Protestant Church – to require 'neutral behaviour' from its staff during working hours.[69] This duty of neutrality can justify the prohibition to wear an Islamic headscarf. As it was unclear whether the hospital was in fact part of the charitable organisations of the Protestant Church and could therefore legitimately impose such a duty of neutrality, and whether the claimant was in fact – due to health reasons – capable of working, the Court remanded the case to the lower instance for reconsideration.

The Court followed the legal argument that religious communities enjoy the freedom to ask their employees to adhere to particular duties because of the religious orientation of these communities. That the claimant as a nurse served no spiritual functions was without importance in this respect.

Internet sources:
http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2014&nr=17591&pos=0&anz=47&titel=Islamisches_Kopftuch_und_Annahmeverzug#druck

68 For an explanation of the concept of co-determination in German labour law see Page, R. (5th ed. 2011), *Co-determination in Germany—A beginner's guide,* available at: http://www.boeckler.de/pdf/p_arbp_033.pdf.
69 Federal Labour Court, case No. 5 AZR 611/12 of 24 September 2014.

Federal Labour Court decision on preferential treatment of older workers

Age

The claimants challenged the regulation of an employment contract that provided for additional holidays for employees older than 58, arguing that it constituted discrimination on the ground of age of younger employees.

In October 2014, the Federal Labour Court (*Bundesarbeitsgericht*) noted that the unequal treatment of employees younger and older than 58 was based on the increased needs of rest of older employees in this particular area of work (shoe production). The Court thus found that it was justified and proportionate in accordance with Article 10 of the General Equal Treatment Law.[70]

Internet sources:
http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2014&nr=17674&pos=1&anz=57&titel=Zus%E4tzliche_Urlaubstage_nach_Vollendung_des_58._Lebensjahres

Sexual harassment

Gender

On 20 November 2014, the Federal Labour Court decided that sexual harassment by touching the breast of a female member of the cleaning staff generally justifies an extraordinary dismissal without notice but that the consideration of the circumstances of the individual case might require less severe means.[71]

The case was brought to court by the harasser who had been dismissed without notice. The applicant worked as a car mechanic. One day after work, he met a female member of the cleaning staff in the area of the changing rooms and washing facilities. He talked to her while washing his hands and face. He had the strong feeling that she was flirting with him. Unexpectedly, he said to her that she had a beautiful bosom and touched one of her breasts very shortly. When she told him that she did not like it, he immediately apologized and left the room. The applicant admitted his behaviour to his employer and apologized again. He initiated a victim-offender mediation and paid compensatory damages to the harassed cleaner who accepted his apology and declared that in her view the matter had been settled. The employer decided to dismiss the applicant without notice. The applicant claimed that his inexcusable behaviour had been a one-time misconduct and therefore, an official warning would have been sufficient.

The Court stated that telling the cleaner that she had a beautiful bosom and touching one of her breasts constituted verbal and physical sexual harassment and that each of these actions could generally justify an extraordinary dismissal without notice. But considering the circumstances, the Court agreed that a warning would have been sufficient because it was to be expected that the applicant would not show such misconduct again. The Court emphasized that dismissals are not sanctions but preventive measures against future disturbances in the workplace. The justification of extraordinary dismissals without notice would depend on several factors such as weight, effect, and risk of repetition of the misconduct, the degree of fault, the duration of the labour relationship and previous behaviour.

Although the Court emphasised the importance of the circumstances of the individual case, several commentators publicly announced that 'bosom groping' would not justify an extraordinary dismissal without notice. Such kinds of misunderstandings show the inherent problems with sexual harassment court proceedings in Germany. The vast majority of the very few cases dealing with sexual harassment in the workplace are brought by the harassers after their dismissal. Thus, the courts have to focus on individual misbehaviour, degree of fault and proportionality from the viewpoint of the harasser. The structural dimension of sexual harassment in the workplace as well as the questions of gender discrimination cannot come into view. The resulting court decisions are proper and lawful. But they cannot contribute to

70 Federal Labour Court, case No. 9 AZR 956/12 of 21 October 2014.
71 Federal Labour Court, judgment of 20 November 2014, 2 AZR 651/13.

public and legal disputes on sexual harassment as one possible manifestation of discrimination on the grounds of sex, nor to a debate on the necessary means to tackle this discrimination.

Internet source:
http://juris.bundesarbeitsgericht.de/zweitesformat/bag/2015/2015-03-30/2_AZR_651-13.pdf

POLICY DEVELOPMENT

Prosecution of non-consensual sexual acts

Gender

The Council of Europe Convention on preventing and combating violence against women and domestic violence, which Germany has not yet ratified, obliges State Parties to make engaging in non-consensual sexual acts a criminal offence without further requirements. In Germany, only 5-10 % of all sexual assaults are reported, attrition rates continue to rise and only 8 % of all investigation procedures lead to a conviction.[72] Criminal law requires not only the lack of consent but additionally force, serious threat, or an especially vulnerable situation of the victim. And in the majority of cases when the perpetrator is a person close to the victim and/or the victim does not fight back, state prosecutors and judges do not identify the sexual assault as covered by criminal law or they do not believe the victim.

The Federal Association of Women's Advice Centres and the Women's Emergency Hotline demand an amendment of the Criminal Code to implement the Council of Europe Convention and to combat and prosecute sexual violence effectively. The Federal Ministry of Justice has shown reluctance to fully implement the Convention. In the media, a chairman of judges at the Federal Court of Justice, Thomas Fischer, actively campaigns against the prosecution of non-consensual sexual acts without further requirements. The National Human Rights Institution identified the need for some amendments from a human rights perspective. Further discussions of this topic with representatives of the Ministry of Justice and of human and women's rights organisations took place in October, and continued through November and December 2014.

Internet sources:
https://www.frauen-gegen-gewalt.de/vergewaltigung-verurteilen.html
http://www.institut-fuer-menschenrechte.de/aktuell/news/meldung/article/menschenrechtswidrige-schutzluecken-schliessen-policy-paper-zu-menschenrechtlichem-aenderungsbedar.html

GR Greece

LEGISLATIVE DEVELOPMENTS

Inclusion of all grounds of discrimination in the new antiracist Law

All grounds

In September 2014 Parliament voted in favour of adopting a new anti-violence Law, amending the previous anti-racism law by specifically including all grounds of discrimination except age.[73] The Law explicitly prohibits any intentional incitement, causing, inducing or instigation of acts or actions that may lead to discrimination, hatred or violence against a person or a group of persons identified on the basis of

72 See Lovett, J., Kelly, L. (2009), *Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe* Child and Women Abuse Studies, pp. 55-69, http://kunskapsbanken.nck.uu.se/nckkb/nck/publik/fil/visa/197/different; Lembke, U. 'Vergebliche Gesetzgebung. Die Reform des Sexualstrafrechts 1997/98 als Jahrhundertprojekt und ihr Scheitern in und an der sog. Rechtswirklichkeit', *Zeitschrift für Rechtssoziologie 34* 2014/1+2 pp. 253-283.

73 Law No. 4285/2014, adopted on 9 September 2014.

race, colour, religion, descent, national or ethnic origin or disability, sexual orientation or gender identity, so as to endanger the public order or pose a threat to life, freedom or physical integrity.

According to Article 5 of this Law, these acts are to be prosecuted *ex officio* and the victim is exempted from paying the relevant fee to the State at the time of the complaint, as well as when he/she is present at the trial as claimant. Article 4 outlines the responsibilities of legal entities or groups of persons regarding the commission of these offenses. Moreover, the penalties for hate-motivated crimes are increased compared to the penalties provided for by the previous law.

Human rights NGOs welcomed the introduction of the new anti-racist Law and they believe that the implementation of most of its provisions is an important step in addressing racism and discrimination.

Internet sources:
http://www.hellenicparliament.gr/UserFiles/bcc26661-143b-4f2d-8916-0e0e66ba4c50/%20t-l328-pap.pdf

Exclusion of Muslim minority teachers from minority schools

Religion or belief

In November 2014, Parliament adopted an amendment to a bill of law proposed by the Minister of Education, according to which members of the Muslim minority in Thrace are no longer allowed to fill teaching positions for the Greek-language programme of minority primary schools.[74] According to the new provisions, teachers who are Greek citizens and have graduated from Greek universities' education departments are in practice divided into groups based on their religious beliefs and their ethnic origin rather than on their qualifications, professional skills and knowledge.

The new provision appears to violate Article 21 of the Charter of Fundamental Rights of the EU as well as both Directive 200078/EC and Directive 2000/43/EC. Therefore, the new provision seems to be inconsistent with Anti-Discrimination Law 3304/2005 incorporating the two Directives in the Greek legal order.

Although the new provision is primarily an issue of discrimination in the field of employment on the grounds of ethnic origin and religion, it could be argued that there also is discrimination in the field of education since due to this new development students of minority suffer from discrimination because they are denied the presence and assistance of teachers in the Greek-language education programme who know their mother tongue.

Internet sources:
http://www.hellenicparliament.gr/UserFiles/bcc26661-143b-4f2d-8916-0e0e66ba4c50/e-etean-pap.pdf

CASE LAW

Council of State ruling on race/ethnic origin discrimination in access to military schools

Racial or ethnic origin

The claimants before the Council of State sought the annulment of the decision by the Minister of Defence that candidates participating in the competition for admission to Higher Military Educational Institutions as well as the Military Academy do not need to be of Greek ethnic origin as long as they have the Greek nationality. In addition, they sought the annulment of the decision by the Minister of Education ratifying the lists of successful candidates for these same military institutions.

74 Law adopted on 27 November 2014.

In October 2014 the Plenary of the Council of State adopted its decision and held that any provision requiring "as a qualification for access to public functions not only Greek nationality but also Greek origin" would be contrary to Article 4 of the Constitution on equality of citizens.[75]

Supreme Administrative Court judgment No. 1113/2014 and the preliminary question it referred to the CJEU

Gender

In December 2010, a male judge requested the nine-month parental leave for his child who was born in October 2010. At the time, it was granted by the Judges' Code to mothers only. This leave was refused to him on the ground that the Judges' Code provided it (at the time) for mothers only. The Supreme Administrative Court (CS), by judgment No. 2060/2011, relying on Directive 96/34/EC, annulled this refusal and referred the case to the author of the refusal, the Ministry of Justice, for a new, lawful decision. However, the Ministry of Justice again refused the leave, in September 2011, this time relying on a provision of the Civil Servants Code (CSC) which deprived fathers of the leave if the mother did not work or did not exercise a profession, except if the mother, due to a serious illness or handicap, was unable to look after the child. The Ministry considered that this provision was also applicable to judges.

The applicant sought the annulment of this second refusal before the CS. The CS, in judgment No. 1113/2014, referred extensively to EU law. The CS then noted that, in view of its established case law, whenever there is no provision in the Judges' Code on a matter of parental leave, those provisions of the CSC which are suitable for judges are applicable, with a view to complementing this Code. The CS then considered that the provision on the basis of which parental leave was refused to the applicant is among the CSC provisions applicable to judges.

The CS further mentioned that parental leave 'also aims at promoting equality of opportunities and treatment between men and women in matters of employment and occupation, which is guaranteed by Directive 2006/54/EC. Further, with a view to achieving the above aims of parental leave, an "individual right" to this leave is recognised for "working parents", who at the same time bear the obligation to raise their children, so that, firstly, the combination of their professional obligations with their family obligations is enabled in practice (CJEU, *Chatzi*, Paragraphs 36 and 39) and, secondly, "the participation of women in active life" is promoted and men are encouraged "to assume an equal part of family obligations" (see Paragraphs 7 and 8 of the General Considerations of the Framework Agreement). However, it is not fully clear, nor has it been clarified by the CJEU case law, whether the aforementioned provisions of Directives 96/34/EC, 2006/54/EC and 2006/54/EC, as they apply to the instant case, have the meaning that national provisions like the impugned provision of Article 53(3)(c) of the CSC (...) are incompatible with them.'

Consequently, the CS considered it necessary to postpone the issuance of a final judgment in the instant case and to submit to the CJEU the following preliminary question: 'Do the provisions of Directives 96/34/EC and 2006/54/EC, as they apply to the instant case, have the meaning that they prohibit national provisions which, like the impugned provision of Article 53(3)(c) of Act 3528/2007 [the Civil Servants Code], provide that, if the wife of the civil servant does not work or exercise any profession, the husband is not entitled to parental leave, except if, due to a serious illness or handicap, she has been found to be unable to cope with child-raising needs?'[76]

Meanwhile, the impugned provision was repealed, following a letter of warning by the Commission. Moreover, the Judges' Code granted parental leave to both parents, on a transferable basis. However, a gender-neutral provision was introduced into the Judges' Code, which deprived judges of parental leave when their spouse does not work, or exercise a profession, except if the spouse, due to a serious illness or handicap, is unable to look after the child. Therefore, even if the CJEU judgment is favourable to the

75 Council of State, decision No. 3317/2014 of 6 October 2014.
76 Case C-222/14 *Maistrellis* v. *Minister of Justice, Transparency and Human Rights*.

applicant, it will have no *effet utile*; the applicant will be refused parental leave, for the third time, on the basis of the gender-neutral provision; he will then have to have recourse to the CS for a third time and the CS may make a second preliminary reference to the CJEU. By the time the case is solved, the child will have exceeded the age up to which parental leave is granted and the eventually successful applicant, although having requested the leave well in time, will not be able to enjoy it at all.

POLICY DEVELOPMENTS

End of Roma school segregation in Aspropyrgos

Racial or ethnic origin

In May 2014, the Greek State finally decided to close the 12th Primary School of Aspropyrgos,[77] to end school segregation of Roma which had been recognised in two consecutive rulings of the European Court of Human Rights.[78] The students of the closed school should now be enrolled and integrated in the 11th Primary School, according to their wishes as stated by their legal representative before the ECtHR.

The suggestion of relocating the children of the 12th Primary School to the 11th, which operated with 8 of its 14 classrooms empty, and then merging the two schools, encountered strong opposition of non-Roma residents and local government. Some 10 Roma parents appealed to the ECtHR against the school and won the case. However, when the Greek State failed to implement the decision, about 40 new appeals to the ECtHR by Roma parents were filed and Greece was again convicted in December 2012. It is now up to the local authorities to ensure the relocation and integration of the Roma children into their new school.

It is noteworthy that the Minister of National Education informed Parliament in July 2014 that another segregated Roma school which has caused Greece to be convicted by the ECtHR in *Lavida and others v. Greece*,[79] will remain operational and that the students will not be relocated, despite the European Court's decision.[80] To this end, the Minister refers to a number of arguments invoked by the Government before the ECtHR, such as the fact that Roma students had been grouped together on the demand of the Roma parents themselves and that relocating them differently would be in violation of the law on school districts. With regard to this specific school district, the Ministry had taken certain steps in 2011-2012 to combat Roma segregation, but had met with strong opposition from local authorities and parents' associations.

Ombudsman's advisory Opinion on discriminatory age requirement in access to public employment

Age

In 2014 the Greek Ombudsman was informed about the procedure of an official 'announcement invitation' of the Greek Naval Chamber (NEE) concerning the transfer of administrative employees within the public sector, which had set an upper age limit (40) among the requirements for filling the advertised positions. The Ombudsman intervened *ex officio*, as a promotional agency for the principle of equal treatment when it is violated by public services and addressed its advisory Opinion to the NEE.

The Ombudsman pointed out that discriminating against persons, *inter alia* on the ground of age, is prohibited in the field of employment and work, in accordance with the principle of non-discrimination and that any possible discrimination due to age can be justified only when specific and stringent conditions are met.[81] According to the Ombudsman, such conditions for justification were not met in the case at hand.

77 Decision No. 72624/D4 of the Assistant Minister of Finance and the Deputy Minister of Education, of 12 May 2014.
78 *Sampanis and others v. Greece* (application No. 32526/05), judgment of 5 June 2008; and *Sampanis and others v. Greece* (application No. 59608/09), judgment of 11 December 2012.
79 ECtHR (application No. 7973/10), judgment of 30 May 2013.
80 Response of 29 July 2014 to the parliamentary question with application No. 587/30-6-2014.
81 Advisory opinion of 11 August 2014.

The NEE responded positively to the Ombudsman's Opinion and recalled the controversial announcement, interrupting the relevant procedure. Consequently, the NEE issued a new official invitation, without setting any age restriction.

National Commission of Human Rights' recommendations on amendments of protection against age discrimination

Age

The National Commission for Human Rights (NCHR), which is an independent consultative body that is competent to provide the Greek Government with its opinion on issues concerning fundamental rights, has adopted a set of recommendations regarding the protection against discrimination on the ground of age, noting that the existence of a coherent legal framework for protection against such discrimination is of fundamental importance.

According to the NCHR, in Greece, under Anti-Discrimination Law No. 3304/2005, a general framework for combating discrimination in employment is established, in accordance with the Employment and Racial Equality Directives. However, the NCHR did not find that the legislative framework is adequate for combating age discrimination. The NCHR stressed that it has already identified the need to amend several articles of the law concerning the scope of equal treatment, positive action, occupational requirements and differences of treatment on the ground of age, in order to make these provisions consistent with the Employment Equality Directive.[82] Moreover, according to the NCHR, the amendment of several articles of the law is necessary so as to facilitate the legitimisation of NGOs in judicial and administrative proceedings and the recognition of favourable judicial precedent. It is in this broader context that the Government should address the issue of discrimination against aged persons.

The NCHR expressed its concern regarding the application of the principle of equal treatment in Greece especially during the economic crisis, as many of the adopted austerity measures are age-related or have a disproportionate effect on either very young or older workers.

Internet sources:
http://www.nchr.gr/images/pdf/apofaseis/Hlikiomena_atoma/apofashEEDA_hlikiomenoi.pdf

National Commission of Human Rights' opinion on draft law for special education of children with disabilities

Disability

In July 2014, the National Commission of Human Rights (NCHR), examined a draft law regulating the function of a Special Educational System for children with disabilities. In its Opinion, the NCHR noted that, although the issue of special education for children with disabilities has repeatedly been the object of various government initiatives, Greek legislation has over time been characterised by institutional gaps, as it is not consistent in its entirety with the guaranteed right to education for children with disabilities.[83] However, according to the NCHR, it is not only the Greek legislation's content, but also its poor implementation that is problematic.

According to the NCHR, the State's inadequate and belated response to reactions by some parts of the school community aiming to prevent the integration of children with disabilities in general education also raised serious concerns. The State's responsibility for combating the marginalisation of children with disabilities has a greater scope than the one usually assumed. The large discrepancy between the enrolment rates of children in special education and children in mainstream education as far as both

82 In its previous relevant Recommendations (2003 and 2010), the NCHR had stressed that Law 3304/2005 in order to incorporate in a technically correct way Directive 2000/78 should repeat provisions included in Law 3051/2002 according to which a maximum limit of age for hiring persons in job positions is abolished in both public and private sector (with exceptions).

83 Advisory opinion of 10 July 2014.

kindergarten classes and primary school classes are concerned is another factor that causes concern.[84] The lack of specific quality indicators in this direction does not allow for a clear delineation of factors that discourage parents to enrol their children in kindergarten, resulting in important aspects of the phenomenon of marginalisation in education of children with disabilities being left invisible. The NCHR believes that the new draft law was not the product of an effective deliberation between the Ministry of Education and the interested collective bodies, in violation of Article 7 of the UN Convention on the Rights of Persons with Disabilities (CRPD).

According to the NCHR, it is not new legislation but rather the identification of measurable objectives, proportional increase and rational absorption of the resources required for the effective implementation of special education that is needed. The NCHR does not find that the draft law could effectively serve the professed purpose, with the risk of failing to effectively integrate the CRPD. The Commission also found that with the draft law the State does not seem to take the opportunity to improve the educational system in such a way that different educational needs per type of disability and across the country could be taken into account. Also it does not show concern for organising early intervention for the promotion of which the creation and staffing of integrated public day centres are necessary which will be responsible for designing and implementing early intervention for children of a few months up to 5 years old.

The NCHR emphasises that Article 21, Paragraph 7 of the draft law stipulates that teachers who have a loss of vision or hearing and are quadriplegics or paraplegics may teach only in schools with students having the same disability as they have. In violation of the principle of equal treatment and of the duty to provide reasonable accommodation, this specific category of teachers cannot be employed in mainstream schools nor in special education schools with children who have disabilities different from their own.

In the end, the proposed draft law was not submitted to a vote in Parliament due to other urgent bills pending.

Internet sources:
http://www.nchr.gr/images/pdf/apofaseis/amea/SxN%20Eidiki%20ekpaideysi%202014.pdf

Hungary HU

LEGISLATIVE DEVELOPMENT

Municipality adopts discriminatory legislation to prevent Roma from moving into town

In May 2014, the Municipal Council of Miskolc amended its Decree on Social Housing,[85] introducing a limitation on receiving financial compensation for the termination of social housing for those who live in 'low comfort' social housing. The Decree as amended stipulates that the authorities can only provide financial compensation (approx. EUR 6 400 - HUF 2 000 000) for the termination of low comfort social housing if the tenants agree to be relocated outside of the municipality. Tenants of higher quality social housing, however, are provided with the possibility of receiving compensation when being relocated within Miskolc. This amendment therefore *de facto* allows the authorities to 'expel' from the territory of Miskolc tenants living in low comfort social housing. In practice these tenants are almost exclusively Roma, who would therefore no longer be able to access social services in Miskolc (as under Hungarian law, social services are provided by the local government on whose territory a person has a registered

Racial or ethnic origin

84 In Greece, children with disabilities who are not enrolled in special education are generally not enrolled in school at all, which is why low enrolment rates in special education raises concerns.

85 Decree No. 25/2006 (VII.12).

place of residence). The fact that the measure has a disparate impact on Roma is also known to the authorities, as was revealed by the Mayor who in an interview stated that 'By the end of August it is expected that the undereducated and – let us not be afraid to say it – Roma families settled by the Socialists will have moved out from 105-110 flats.'[86]

In response to the Miskolc Decree, the Municipal Council of a neighbouring municipality adopted a Decree stating that those who purchase real estate in the municipality with the support of any other municipal council shall not be entitled to any social benefits, allowances and aids, nor be entitled to purchase or rent any real estate owned by the Municipal Council or to receive any advantages in relation to accessing public employment.[87]

The Notary (legal service) of this municipality warned that the Decree was in contradiction with the pertaining laws, which do not allow municipal councils to differentiate between their residents on any such basis. However, the Mayor stated during a council meeting that the Council refused to take into account 'legal aspects', and only looked at the matter from a 'social, sociological' point of view.[88] The Mayor emphasised that a potential legal procedure challenging the Decree could be prolonged for three to five years, by which time the problem might lose its relevance.

According to information arriving after the cut off date, the municipality withdrew the problematic legislation.

CASE LAW

Curia qualifies racist speech of Mayor as harassment

Racial or ethnic origin

In 2009, the Mayor of Kiskunlacháza made several statements in relation to the murder of a young girl giving the impression that in his view the murder had been committed by Roma. Based on an *actio popularis* claim by the Hungarian Helsinki Committee, the Equal Treatment Authority established that this constituted harassment. Following several instances and procedures, the Curia (Hungary's Supreme Court) ordered in 2013 that the court proceedings be restarted.[89]

In June 2014, the Metropolitan Administrative and Labour Court upheld the Equal Treatment Authority's conclusion that the Mayor had violated the requirement of equal treatment.[90] The Court concluded that when a Mayor makes a public statement in this capacity, he/she exercises a protocol function that creates a sufficiently strong link between him/her and the residents to make such instances fall under the scope of the Equal Treatment Act. Furthermore, the Court stated that although the definition of harassment refers to actions creating a hostile environment with regard to a single person, it is obvious that harassment can also be committed against a group of persons. In arriving at this conclusion, the Court referred to the explanatory memorandum of the Equal Treatment Act and to the *Feryn* decision of the CJEU, which also interpreted a provision formulated in singular terms [Directive 2000/43/EC, Article 2(2)(a)] to refer to a group of persons. Finally, quoting relevant decisions of the Hungarian Constitutional Court and the ECHR's *Feret v. Belgium* judgment,[91] the Court concluded that the Mayor's statements had contributed to the creation of a hostile, threatening environment around the Roma residents of Kiskunlacháza, particularly because his powers within the community gave significant weight to his

86 Interview published on 21 August 2014, available at http://magyarhirlap.hu/cikk/3086/Miskolcon_folytatodik__a_nyomortelepek_teljes_felszamolasa.
87 Decree 11/2014 (VII. 14) of the Municipality of Sátoraljaújhely on Local Measures related to Financial Allowances Provided by Other Municipal Councils with the Aim of Supporting Moving Out, 14 July 2014.
88 Minutes of the Sátoraljaújhely Municipal Council meeting available at http://www.satoraljaujhely.hu/varos2/files/letoltesek/onkormanyzat/jegyzokonyvek/2014/testuleti_jkv_20140710_nyilt.pdf.
89 See *European Anti-Discrimination Law Review*, issue 18, p. 66 and issue 15, pp. 63-64.
90 Metropolitan Administrative and Labour Court, decision No. 20.K.33988/2013/10 of 17 June 2014.
91 ECtHR, *Feret v. Belgium* (application No. 15615/07, judgment of 16 July 2009.

words. Considering the special responsibility of public office holders, the Court came to the conclusion that the Mayor could not rely on the freedom of speech to exempt the violation of the requirement of equal treatment. Based on the above, the Court stated that the Authority's decision establishing the existence of harassment by the Mayor was well-founded.

The defendant again submitted the case for review by the Curia, which adopted its final decision in this case in October 2014.[92] The Curia confirmed the findings of the Metropolitan Administrative and Labour Court and, ultimately, of the equality body. In addition, the Curia added that the Equal Treatment Act must be interpreted in light of the Fundamental Law of Hungary, which stipulates that the exercise of the freedom of expression shall not aim to violate the dignity of the Hungarian nation or of national, ethnic, racial or religious groups. Thus, harassment is clearly prohibited not only with regard to individuals but also to groups of persons.

Police ban of LGBTQ demonstration amounts to discrimination and harassment

In 2011 the Budapest Police banned the Gay Pride March arguing that it would have obstructed traffic. This decision was overturned by the Metropolitan Court that found the arguments of the police unfounded.[93] Yet, a year later, on 5 April 2012, the Budapest Police again banned the Budapest Pride March with the exact same arguments. Furthermore, during the year between the two decisions several demonstrations were allowed to take place for the same route with a significantly larger number of participants than the expected 1 000 people at the Budapest Pride. Such demonstrations included the pro-government Peace March with over 100 000 participants. The competent Metropolitan Court again overturned the ban,[94] and the March took place in July 2012.

Sexual orientation

However, an NGO, acting on behalf of the LGBTQ community in general, together with an individual complainant, launched a civil lawsuit, claiming that the police ban amounted to direct discrimination and harassment based on sexual orientation. The NGO's legal standing was based on the possibility of *actio popularis* claims, while the individual claimant was an LGBTQ activist who had participated in most similar marches, including the 2012 event.

In January 2014, acting as a first instance court, the Metropolitan Court (Budapest) agreed with the claimants and decided that the ban by the Budapest Police amounted to direct discrimination, i.e. the police treated the claimants less favourably than participants of other demonstrations that had not been banned.[95] The first instance court also found that the ban amounted to harassment, since the decision of the Budapest Police contributed to creating and strengthening a degrading, hostile and threatening environment based on sexual orientation. The Court emphasised that the discriminatory decision of the police amplified the hostility towards the gay community already present in society, which manifests itself in violent counter-demonstrations. The Court also pointed out that authorities have an increased responsibility, as their decisions set examples to the public as to the manner in which legal norms are to be complied with.

The Court ordered the Budapest Police to issue a letter of apology and refrain from future violations. The Court rejected however the individual claimant's claim for non-pecuniary damages, concluding that the violation's impact on his personal integrity was too indirect to substantiate such damages (although it was established that his dignity and right to non-discrimination had been violated by the police). The Budapest police appealed and the claimants submitted a 'supplementary appeal' to challenge the verdict with regard to the damages.

92 Curia, decision No. Kfv.III.37.848/2014/6 delivered on 29 October 2014.
93 Metropolitan Court, decision No. 27.Kpk.45.188/2011/4.
94 Metropolitan Court, decision No. 27.Kpk.45.385/2012/2.
95 Metropolitan Court (Budapest), decision No. 22.P.26.019/2012/10 of 16 January 2014.

In September 2014, the Metropolitan Court of Appeal (Budapest) noted that the police could not put forward any legitimate argument as to the reasons why it had treated the Pride March differently from all other similar events. Therefore, it upheld the decision of the lower instance court that the police had committed direct discrimination and harassment based on sexual orientation when banning the Budapest Pride March in April 2012.[96] However, the Court also arrived at the conclusion that the individual claimant did not have standing in this case and fully rejected his claim (not only in relation to the damages). In this regard, the Court applied jurisprudence in defamation as well as hate speech cases, finding that the individual claimant lacked legal standing as he was not personally involved in the ban of the march (neither as organiser nor as someone specifically referred to in the banning order).

Internet sources:
http://en.hatter.hu/news/court-reaffirms-that-police-discriminated-when-banning-the-budapest-pride-march-in-2012

Refusal of school to admit pupils raised by a lesbian couple amounts to discrimination

Sexual orientation

The claimants were a same-sex couple who brought an action before the Equal Treatment Authority against a school that refused to enrol their 13-year old son 'due to their family situation'.

The school argued that their decision was not based on the interest of the other children in the class, but rather on the interest of the rejected boy, as the school wished to prevent bullying of the child, from which they could not have protected him. The Authority fully rejected the argumentation of the school, and stated that: 'Being admitted to a community of students cannot be rejected by arguing that since the child lives in a family different from the majority, the community would not accept him, and the teacher would not be able to handle the conflict. It should be one of the aims of schools to teach children tolerance towards each other [...]. The school's behaviour ran against acceptance and inclusion, and the inability of a teacher to handle such a conflict cannot serve as a ground for exemption.'

The Equal Treatment Authority consequently found that the school had committed direct discrimination by association and ordered a fine of approx. EUR 165 (HUF 50 000).[97]

Internet sources:
http://en.hatter.hu/news/equal-treatment-authority-fines-budapest-school-for-discriminating-against-child-with-lesbian-m

Cases on discrimination based on pregnancy before the Equal Treatment Agency

Gender

According to the website of the Equal Treatment Agency, in 2014 only seven cases were published regarding discrimination based on pregnancy, motherhood, and fatherhood, and none concerning sex discrimination. Out of seven cases, only in three cases did the ETA hold that the rules of equal treatment had been violated by the respondent, and imposed sanctions. In four cases the ETA endorsed the settlement concluded by the parties.

In Case No. EBH/379/2014 the ETA established that the employer could not prove a legitimate reason for terminating a pregnant employee's employment relationship during the probationary period, which therefore amounted to direct sex discrimination. It was proved that the employer first decided to continue the employment relationship of the claimant until the end of the six-month probationary period. This decision however, was revisited two days after the claimant was sent on sick leave due to her pregnancy and was dismissed with immediate effect. It is long-established case law of the ETA that the employer must prove a legitimate reason of dismissal if the employee claims that the dismissal was discriminatory, even

96 Metropolitan Court of Appeal (Budapest), decision No. 18.Pf.20.436/2014/8 of 18 September 2014.
97 Equal Treatment Authority decision No. EBH/366/2014.

though the general rules of probation do not require the employer to include justification into the letter of dismissal. As in this case no legitimate reason supported the dismissal of the claimant, therefore the action of the employer amounted to direct sex discrimination and the ETA imposed sanctions against the employer (a fine equal to EUR 4000, and a prohibition on any further infringement of equal opportunities laws, issued under the Act on Administrative Procedure).

In Case No. EBH/189/2014 the ETA established that the employer did not renew the contract of the employee after the employee asked for a physically less demanding job title due to her pregnancy. The employer attempted to support his decision by arguing that there was no need for more cashiers and the termination was due to the seasonal fluctuation of the workforce demand. This argument was refused by the ETA since during the same period of time the employer placed job advertisements seeking cashiers and the workforce statistics did not show any seasonal pattern either. As the dismissal was based on the pregnancy of the employee, it constituted direct sex discrimination and the employer was obliged to pay a fine equal to EUR 2000.

Settlements were endorsed in the following cases: a public transportation company did not accommodate the specific needs of a mother travelling with a pram; a predefined benefit was not provided to an employee who was on maternity leave; and a foundation informed an applicant for a research grant that it would be considered a disadvantage in the evaluation process if she intended to also bring her child.

Internet sources:
http://www.egyenlobanasmod.hu/article/view/379-2014-megallapito-terhesseg,
http://www.egyenlobanasmod.hu/article/view/ebh-189-2014
http://www.egyenlobanasmod.hu/jogesetek/hu/231-2014.pdf
http://www.egyenlobanasmod.hu/article/view/157_2014_egyezseg_anyasag

Iceland

IS

CASE LAW

Municipality in breach of Gender Equality Act in case concerning pay equality

Gender

The large municipality of Kopavogur was found in breach of the Gender Equality Act when it paid a man higher wages than a woman in a similar job, in the town's education sector. The Gender Equality Complaints Committee was of the opinion[98] that the municipality had not been able to prove that the pay inequality was based on factors other than gender. It was the municipality's employee association that on behalf of the woman submitted the case to the Gender Complaints Committee. The employee association stressed that despite 'good intentions' in the area of gender equality, the town authorities had not reacted to the decision of the Gender Complaints Committee in this case, despite reiterated requests to do so.

98 Case No. 1/2014, 21. October 2014, *A gegn Kópavogsbæ*.

IE Ireland

LEGISLATIVE DEVELOPMENTS

Formal establishment of Irish Human Rights and Equality Commission

All grounds

On 11 July 2014, the Irish Parliament (*Oirechtas*) adopted the Irish Human Rights and Equality Commission Act, which came into effect with the establishment of the Irish Human Rights and Equality Commission on 1 November 2014. The Chief Commissioner and the 14 members of the Commission were nominated following an independent selection process, and formally appointed by the President.

Under this Act, the previous Equality Authority and the Irish Human Rights Commission are dissolved and merged into the new Commission, which resumes the functions previously exercised by both bodies.

The functions of the newly established Commission are to:
- promote and protect human rights and equality;
- encourage the development of a culture of respect for human rights, equality, and intercultural understanding in the State;
- promote understanding and awareness of the importance of human rights and equality in the State;
- encourage good practice in intercultural relations, promote tolerance and acceptance of diversity in the State and respect for the freedom and dignity of each person;
- work towards the elimination of human rights abuses, discrimination and prohibited conduct.

The Commission carries out its functions by:
- providing information to the public generally;
- keeping under review the adequacy and effectiveness of law and practice;
- presenting recommendations to the Government on measures to strengthen, protect and uphold human rights and equality;
- examining any legislative proposal and reporting its views on any implications for human rights or equality;
- providing legal assistance to people initiating legal proceedings to vindicate their rights (subject to certain conditions);
- initiating legal proceedings to vindicate human rights in the State;
- consulting with relevant national and international bodies;
- providing or assisting in the provision of education and training;
- carrying out equality reviews and preparing equality action plans;
- conducting enquiries into possible violations of human rights or equality of treatment obligations in the State;
- participating in the Joint Committee of Representatives of members of the Commission and members of the Northern Ireland Human Rights Commission

According to the establishing Act, public bodies are required to have regard for equality and human rights in carrying out their functions.[99] They are therefore required to make an assessment of equality and human rights issues of relevance to their functions in their strategic plans and to set out policies, plans and actions already in place or to be put in place to address these issues. This mirrors the mainstreaming approach of the 2014 Intergovernmental Rome Declaration on Non Discrimination, Diversity and Equality. The positive duty on public bodies has been welcomed by NGOs as a promising new aspect of legislation.

The anti-discrimination and equality legal framework remains unchanged, as neither the Employment Equality Acts 1998–2011 nor the Equal Status Acts 2000–2012 have been amended. Thus, the prohibited

99 Irish Human Rights and Equality Commission Act (2014), Section 42.

grounds of discrimination remain gender, civil status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community. Discrimination on these grounds is prohibited in the fields of employment, vocational training, advertising, collective agreements, and the provision of goods and services. Goods and services include professional or trade services, health services, access to accommodation and education, and facilities for banking, transport and cultural activities.

Internet sources:
http://www.ihrec.ie/download/pdf/ihrec_act_2014.pdf

Transposition of Directive 2010/41/EU in respect of assisting spouses and civil partners of self-employed persons

Gender

The Social Welfare and Pensions Act of 17 July 2014, which transposes Directive 2010/41/EU, provides that the spouse or civil partner of a self-employed person who carries out the same or ancillary tasks and earns over EUR 5 000 will be entitled to pay 'Pay Related Social Insurance' (more usually called 'PRSI') and will therefore be entitled to various entitlements (maternity and adoptive leave benefit and state pension) in due course. This provision applies where there is no formal partnership in place (e.g. a family business).

Internet sources:
http://www.oireachtas.ie/viewdoc.asp?DocID=26812&CatID=87
http://www.welfare.ie/en/Pages/Change-to-Self-Employed-Social-Insurance.aspx

Italy IT

LEGISLATIVE DEVELOPMENT

Delegation Act No. 183 of 10 December 2014 concerning the protection of motherhood and fatherhood

Gender

Delegation Act No. 183 of 10 December 2014 provided for another comprehensive reform of the labour market. The Delegation Act, which has been approved by Parliament, states the criteria for the reform which will be implemented by a series of decrees issued by the Government.

The Act includes one Article. Paragraph 8 of this Article includes the support of both parenthood and reconciliation of working life and family care duties. A preliminary analysis of the protection of maternity guaranteed to different categories of workers has been provided, with the aim of extending it to all female workers. Also, an examination of the protection of motherhood and fatherhood has been provided, with the aim of ensuring more flexibility and further opportunities for reconciliation, while at the same time taking into account the needs of the enterprise. Another criterion regards the possibility of allowing people working for the same employer to transfer the additional days of rest provided by collective agreements to the parent of children who need continuous care and the parent's presence for health reasons. The extension of new types of incentives for reconciliation measures to the public sector is also an objective of the reform, although it is to be achieved without any further costs.

The reform will also strengthen the right to maternity allowance of workers who work on a project basis. The so-called principle of automaticity will be enforceable for them, so they will receive the allowance even if the employer does not pay the contribution.

A tax credit to boost working mothers' participation in the labour market will be recognized to both subordinate and independent female workers with under-age or seriously disabled children, on certain revenue conditions. Also a harmonization of the spouses' tax allowances will be provided. Further measures to improve reconciliation regard incentives for collective agreements including schedule flexibility and the use of production bonuses in this field, and telework, as well as the improvement of the integration of different care services.

A totally new measure regards the support for women victims of gender-based violence where a period of leave will be awarded to those who are under a protection programme certified by local social services.

Finally, the Government will also have to provide for the simplification and rationalization of different Equal Opportunities Bodies in the field of labour and their respective jurisdictional competences, including the procedure for the promotion of positive actions.
A different chapter of the reform could also affect, although indirectly, the issue of care. Article 1 Paragraph 5 of the Delegation Act, which regards the objectives of simplification and rationalization of the procedures for hiring and staff management, includes the validation of resignation. Simplified procedures should be provided to guarantee both the certainty of the date of the resignation and the workers' free will.

The Delegation Act is to be welcomed as regards the protection of fatherhood and motherhood and the promotion of reconciliation, although it is quite generic. The main problem will probably be the financing of these measures. In fact, the draft Decree which will implement a large part of Article 1 Paragraph 8, recently approved on 20 February 2015, only provides for a temporary intervention (safe incentives for collective agreements promoting reconciliation measures). The possible extension of the new regulations to the Public Administration is also provided with no costs, which can raise some doubts about its effectiveness.

As regards the reform of the resignation procedure, which is aimed at simplifying staff management, this risks resulting in a lack of specific and stronger protection of parents, where the validation of the resignation is required in front of an officer of the State to assure the free will of the worker.

Internet source
http://www.normattiva.it/ricerca/semplice

CASE LAW

A case on sexual harassment and the partial reversal of the burden of proof

Gender

The Tribunal of Pistoia in its judgment of 8 September 2012 (only very recently made public), found gender discrimination in a sexual harassment case. The claimants were two women employed under short-term contracts, who were dismissed after refusing their employer's advances.

Three other female employees who had suffered similar harassment by the same employer provided depositions, which the Tribunal considered. This evidence demonstrated that the defendant, a boss of a small enterprise, behaved as a 'serial harasser' towards his young employees on several occasions. These facts were considered to be sufficiently serious, precise, and unanimous to evidence a finding of discrimination. The judge enforced a reversal of the burden of proof, and the employer failed to provide any contrary evidence.

The Regional Equality Adviser also submitted an independent action for gender discrimination. The Tribunal considered that the employer's behaviour also affected the public interest protected by the

Equality Adviser, as it represented a manifest and serious infringement of the ban on discrimination because it was clearly grounded on the victims' gender.

The Tribunal ordered the employer to pay moral damages to the two victims and to the Regional Equality Adviser. At the request of the Equality Adviser, the Tribunal also ordered the employer to inform the other three employees, also victims of the same discrimination, of their right to apply for damages.

The Tribunal ruled that the dismissal of one of the claimants was null and void, as it had been proved that the dismissal was grounded on sex discrimination. The other claimant, who resigned as a consequence of the harassment, only received moral damages. The Tribunal considered that the worker's resignation was only induced rather than totally forced by the harassment. However, majority case law recognises the right of the employee to immediately interrupt the working relationship, without any notice, in case of sexual harassment. The Tribunal awarded this claimant a higher amount in moral damages (approximately EUR 40 000, compared to EUR 25 000 awarded to the other claimant), although she had worked only for 5 days. The employer was also ordered to pay the Equality Adviser EUR 25 000.

Italian law does not provide for any specific criteria to quantify the amount of moral damages, so it is significant that in this respect the Tribunal referred to Article 18 of Directive 2006/54. The Tribunal expressly referred to EU principles on the necessity to 'ensure real and effective compensation or reparation [...] in a way which is dissuasive and proportionate to the damage suffered' to justify amounts of compensation that are considered quite remarkable compared with other cases.[100]

Internet sources:
Articles 26, 37, 40 of the Code of Equal Opportunities, Decree No. 198 of 11 April 2006, in OJ No. 125 of 31 May 2006, OS No. 133:
http://www.parlamento.it/leggi/deleghe/06198dl.htm, accessed 15 March 2015.

A case of reversed discrimination concerning childcare leaves

Gender

On 5 July 2013, the Tribunal of Milan ruled Article 4 of the national collective agreement of public transport workers to be discriminatory on the ground of sex.[101] The decision was only published in late 2014.

The Article entitles female employees to 10 days of remunerated leave in case of illness of a child up to the age of three, whereas male employees are entitled to the same leave only if the mother does not take it. This rule provides for much better conditions for female employees, as they are automatically entitled to it on contracts regulated by the collective agreement, irrespective of the 'job conditions' of the father (subordinated, autonomous, or unemployed). In contrast, male employees can use the leave only if the following two conditions are satisfied: the mother is entitled to it through her work contract, and the mother chooses not to take it.

The Tribunal deemed this exception to the principle of equal treatment to be discriminatory; it does not have an objective and necessary justification, and it is grounded on gender. In addition, it does not encourage parents to share care duties, and because it lacks the required proportionality between the exception and its effects it cannot be classified as a positive action measure.

The Tribunal ordered the employer to remove the discrimination, by entitling male employees to 10 days of remunerated leave in case of illness of a child up to the age of three on the same conditions that apply to women.

100 See further: *Tribunale di Pistoia*, 8 September 2012, published in *Rivista Italiana di Diritto del Lavoro* 2013, II, 25 ff, comment by Riccardo Del Punta 'An exemplary judgment on sexual harassment at work'.
101 *Tribunale di Milano* 5 July 2013, published in *Rivista Critica di Diritto del Lavoro*, 2014, 171.

In this case the influence of the CJEU's case law was evident. The Tribunal referred to CJEU case law throughout its reasoning on the potential justification of differential treatment, the notion of positive action, and the concluding order to extend the benefit to men on the same conditions as those that apply to women.

Internet sources:
Articles 25-28 and 42 of the Code of Equal Opportunities, Decree No. 198 of 11 April 2006, in OJ No. 125 of 31 May 2006, o.s. No. 133, available at
http://www.parlamento.it/leggi/deleghe/06198dl.htm

Discriminatory statement about hiring policy found to constitute direct discrimination[102]

Sexual orientation

A well-known lawyer made a public statement to a very popular broadcaster that he would not hire gays and would carefully scrutinize each new application to avoid any recruitment of gays. Moreover he said that the presence of gays in his office would have disturbed his law firm's 'environment'. An NGO introduced a claim that Professor Taormina had violated the prohibition of direct discrimination.

The Tribunal upheld the request of the claimant and rejected the arguments of the defendant that at the moment of the interview no selection was in progress and that the contested statements had a jocular character and were an expression of the defendant's freedom of thought. The Tribunal quoted several paragraphs of the CJEU judgment in *Accept* (C-81/12), noting in particular that direct discrimination may occur even when there is not an identifiable complainant who claims to have been the victim of such discrimination. In addition, discriminatory statements such as those made by the defendant were likely to strongly dissuade certain candidates from submitting their applications and, accordingly, to hinder their access to the labour market. Moreover the discriminatory effects of the statements were greater due to the defendant's popularity. The Tribunal ordered him to publish the judgment in a newspaper with state-wide coverage and to pay EUR 10 000 in compensation for damages and EUR 5 000 for legal costs. The compensation for damages constituted a 'dissuasive sanction' in accordance with Article 28 of Legislative Decree 150/2011, which is a form of punitive damages as such harm had been effectively suffered by one or more identified victims. This type of sanction is applied very rarely since it is often found to be contrary to general principles of civil liability.

Internet sources:
http://www.altalex.com/index.php?idnot=68849

Right to be assisted at school by a support teacher

Disability

A nursery school reduced the number of hours of access to a support teacher for a child from 25 hours a week to 12, despite the decision of a local committee granting 25 hours a week to the child. The parents took the case to court and won in first and second instance; the school was ordered to grant the total amount of hours and to pay EUR 5000 in compensation for non-pecuniary damage. The school appealed the judgment before the Supreme Court.

The Supreme Court noted that the right to education is one of the fundamental rights of persons with disabilities, recalling the relevant international legal instruments such as the UN CRPD and the provisions on equality and non-discrimination in the EU Treaties and in the EU Charter on Fundamental Rights. According to the Court, support teachers play a fundamental role to ensure the integration of children with a disability and the individual plan agreed by the competent local committee cannot be disregarded or changed by the schools on the ground of its economic costs. Therefore the reduction made by the school to the hours to be taught by the support teacher constituted indirect discrimination on ground of disability.

102 Tribunal of Bergamo, 6 August 2014.

The judgment is mostly dedicated to ascertaining the jurisdiction of the ordinary court, as required by the anti-discrimination provisions, as opposed to that of the regional administrative courts where claims against the public administration are brought but where the proceedings are longer and more expensive.

Internet sources:
http://dirittocivilecontemporaneo.com/2014/11/per-le-sezioni-unite-la-mancata-attuazione-del-piano-educativo-individualizzato-elaborato-per-il-sostegno-scolastico-dellalunno-in-situazione-di-handicap-costituisce-una-discriminazione-indiretta/

POLICY DEVELOPMENTS

Equality body providing financial support to victims of discrimination to cover legal costs

All grounds

The National Lawyers' Association (*Consiglio Nazionale Forense*) and the National Equality Body (UNAR) have agreed on a Protocol of Cooperation aimed at strengthening the legal defence of victims of discrimination. In this framework they will manage together a solidarity fund for access to justice for victims of discrimination for the years 2014-2016, financed by the Department for Equal Opportunity of the Presidency of the Council of Ministers (the Department to which UNAR belongs). The Fund was created to provide victims of discrimination with financial support anticipating the legal costs of actions brought to courts (EUR 600 for each instance). If the case is won, the sums should be refunded to UNAR.

This system aims to facilitate access to justice, taking into consideration the low number of legal actions compared to the number of complaints brought to UNAR. Applications should be sent to the National Lawyers' Association by individuals or by bodies having the right to legal standing (a maximum of three each year). A steering committee consisting of lawyers and public officials of UNAR will decide the allocation of the financial support, which is alternative to the legal aid provided by the State for those who are eligible on the basis of their low income.

Internet sources:
http://www.consiglionazionaleforense.it/site/home/naviga-per-temi/fondosolidarieta.html

Proposal to set up a separate bus line for Roma

Racial or ethnic origin

In October 2014, the Mayor of Borgaro backed a controversial plan to create a separate bus route only for a Roma camp located on the outskirts of the town. According to the plans, a new bus line would be put in place, parallel to an existing bus line which had a stop at the Roma camp.

The creation of a parallel bus line was prompted by repeated incidents of violence occurring on the existing bus 69, supposedly committed by Roma people living in the camp. The aim would be to guarantee the safety of the passengers by deviating the existing line so that it would no longer take passengers to the camp, forcing those living there to take the new bus line. The proposal raised harsh criticism by NGOs and a minority of left-wing oriented politicians and was finally revoked. Instead, the local public transport company and the 'local committee for public order and security' (a public body created by the authorities competent to ensure public security at local level) implemented higher levels of control and security on the existing bus line (a ticket collector and a local policeman present at all times on the buses).

LV Latvia

LEGISLATIVE DEVELOPMENTS

Parliament adopts amendments to Labour Law

Gender

On 23 October 2014 the Latvian Parliament (*Saeima*) finally adopted the amendments to the Labour Law.[103] They were to enter into force on 1 January 2015. The adopted amendments had been part of the legislative process since 3 October 2013, when they were submitted to Parliament by the Cabinet of Ministers.

The amendments related to gender equality will implement the following changes:
- The special maternity protection with regard to breastfeeding will be limited to the moment that the child reaches the age of two. Currently special maternity protection with regard to breastfeeding is unlimited, i.e. it lasts for as long as breastfeeding is provided.
- Article 147 is amended to regulate short-term absences on account of a child's illness, or the necessity to see a doctor with a child when such a visit outside working time is not possible.
- Parents who have fewer than three children will be granted one extra day of paid annual leave. Currently only parents having three or more children are provided three extra paid holidays.
- Foster families will also be entitled to parental leave.
- The Labour Law will regulate the situation of unexpected return from parental leave. However it will concern only situations where the right to such leave has ceased to exist.

In general the amendments related to gender equality extend the protection of employees with childcare obligations. However, the norm limiting the right to enjoy special maternity protection on account of breastfeeding until a child reaches the age of two will reduce the respective rights. The drafter (Minister of Welfare) in the explanatory note simply states that amendments are necessary to balance the interests of the employers and the rights of the employees.[104] According to unofficial information, such amendments were proposed in order to fight the misuse of rights. For example, according to Article 146 of the Labour Law a parent may have at least a 30-minute break in any 3-hour period for the feeding of a child.

Internet sources:
Explanatory Note to Legislative Proposal No. 756/Lp11, available in Latvian at the homepage of the Parliament (*Saeima*) at:
http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/1016FA82F40AC4EFC2257BC50037F713?OpenDocument#b

Changes to parental allowance

Gender

Previously the amount of parental allowance was 70 % of the gross salary,[105] which corresponds to the real salary, because persons in active employment after the deduction of taxes are entitled to approximately 69 % of the gross salary.[106] One of the parents has the right to parental allowance until

103 Amendments to the Labour Law, OG No. 225, 12 November 2014.
104 Explanatory Note to Legislative Proposal No. 756/Lp11.
105 The Law on Maternity and Sickness Insurance (*Likums Par maternitātes un slimības apdrošināšanu*), OG No. 182, 23 November 1995.
106 The income tax for employee salaries is 24 % (the Law on Residents' Income Tax; *likums 'Par iedzīvotāju ienākuma nodokli'*, Official Gazette No. 32, 1 June 1993); statutory social security contributions constitute 34.09 %, but employees only have to pay 10.5 % and 23.59 % must be contributed by the employer (the Law on Statutory Social Security; *likums 'Par valsts sociālo apdrošināšanu'*, Official Gazette No. 274/276, 21 October 1997). After taxes and social security contributions have been deducted, employees are therefore entitled to approximately 69 %.

the child reaches the age of 12 months. Currently, a parent who wishes to receive parental allowance may not remain in active employment (or self-employment).

Since 1 October 2014, there have been some changes.[107] First, the amount of parental allowance was reduced. It now amounts to 60 % of the gross salary (social insurance contribution salary) for parents who choose to stop working until the child reaches the age of 12 months. If a parent (who has stopped working) would like to receive parental allowance until the child reaches the age of 18 months, then the amount of that allowance is 43.75 % of the gross salary, i.e. the same amount of money will be paid over an extended period of time.

Second, the system has become more 'friendly' regarding the work–life balance, because when a parent decides to stay in full-time or part-time employment, he or she will also be entitled to parental allowance. The amount for working parents will be rather small; they will be entitled to 30 % of the full allowance (the full allowance being the amount that they would be entitled to if they were to discontinue working).[108] However, they will be entitled to some support at least.

CASE LAW

Supreme Court decision of 12 November 2014 on the dismissal of a worker upon return from parental leave

Gender

In this case, the applicant's permanent employment contract for the position of senior officer at the Ministry of Education and Science was terminated immediately after her return from parental leave, because the employer had abolished her post. The employer abolished the post on account of structural reforms. The post occupied by the applicant was unique, i.e. there were no other posts involving the same work duties and qualifications. Consequently, there was no obligation to assess and compare the applicant's skills and work results with other colleagues performing the same work in order to decide which employee had to be given the preference to continue the employment, as would be required by the previous interpretation of the obligations under Latvian labour law and the EU law according to the findings of the CJEU in *Riežniece*.

The Senate of the Supreme Court of Latvia decided that the norm requiring the provision of the same or equivalent work after return from parental leave is a mandatory legal norm. This norm is not subject to any exceptions provided by the Labour Law. For example, in other cases such as the return from annual or sick leave, an employer is not under the duty to provide the same or equivalent post if the only post of a particular character is to be abolished. The CJEU in the *Riežniece* case confirmed that under the Framework Agreement (Directive 2010/18/EU, ex 96/34/EC) an employer is not prohibited from dismissing a worker who has taken parental leave provided that the worker was not dismissed on the grounds of the application for, or the taking of, parental leave. It follows that, in substance, EU law does not prohibit a dismissal of a worker after return from parental leave on the grounds of other reasons than the application for, or the taking of, parental leave. So far, the Latvian courts had interpreted the law in accordance with the ruling of the CJEU. However in the decision at issue here, the Senate of the Supreme Court of Latvia decided to set stricter obligations under Latvian law than under the Framework Agreement. In particular, the Senate interpreted the obligation to provide the same or equivalent work after return from parental leave as an absolute obligation which has no exceptions, even if the post is abolished on account of structural, organisational or other objective reasons.

107 The Law on Maternity and Sickness Insurance (*Likums Par maternitates un slimības apdrošināšanu*), OG No. 182, 23 November 1995, respective amendments OG No. 228, 22 November 2013.

108 Example: if a parent's gross salary were EUR 1 000, then the amount of parental allowance for parents who stop working would be EUR 600, which amounts to 60 % of the social insurance contribution salary. If, however, a parent were to decide to stay in active employment he/she would be entitled to 30 % of the parental allowance, i.e. 30 % of EUR 600 (or the normal parental allowance), which would amount to EUR 180).

LI Liechtenstein

LEGISLATIVE DEVELOPMENTS

Amended Law of Names published in the Official Gazette

Gender

On 30 October 2014 the amended Law of Names was published in the Official Gazette[109] as part of the Civil Code and the Marriage Act. This reform created a modern law of names in Liechtenstein.

A common family name for both spouses is still possible, but each spouse will also have the possibility to keep their own name after marriage if they want to. The possibility of a double name still exists. Children shall receive the common family name of the spouses or one of the parents' names if they keep their own name after marriage. In the latter case, the parents can freely choose the child's family name. To keep the union of names between mother and child, the child of non-married parents shall receive the family name of the mother (if she was married before and took the name of her former husband) not the birth name of the mother.

Internet sources:
Official Gazette No. 271/2014 Civil Code, https://www.gesetze.li/chrono/0/pdfs/2014271000, accessed 1 April 2015;
Official Gazette No. 272/2014 Marriage Act, https://www.gesetze.li/chrono/0/pdfs/2014272000, accessed 1 April 2015.

Proposed amendments to the provisions on abortion in the Criminal Code

Gender

Discussions regarding the regulation of abortion have been going on for more than 10 years in Liechtenstein, at the institutional, governmental, and parliamentary levels. Until now no new norms have been adopted. Liechtenstein is in the middle of a legislative procedure concerning the amendments of the Criminal Code with regard to abortion. In this procedure, the Government and Parliament have been exchanging documents over a rather long period of time, where opinions are discussed and future amendments to existing laws are formulated and again reformulated and then proposed. The report and proposal of the Government (No. 111/2014, dated 21 October 2014, first reading in session of 5 December 2014) addressed the proposed amendments of the Criminal Code with regard to abortion.

The main measures of the proposed amendments to criminal law are: decriminalisation of abortion under certain circumstances (e.g. danger for the life or health of a pregnant woman, or when the pregnant woman is not older than 14 years, or if she is a victim of rape; in all these cases abortion must be performed by a doctor), as well as the abolition of the criminalisation of abortion abroad. These measures shall be in line with the constitutional norms.

Internet sources:
Reports and proposals of the Government to Parliament during legislative procedure published on the Internet, available at
http://bua.gmg.biz/BuA/default.aspx?nr=4&year=2015&content=1960736006
http://bua.gmg.biz/BuA/default.aspx?nr=111&year=2014&content=ges, accessed 26 February 2015.

109 No. 2014/271.

Lithuania LT

LEGISLATIVE DEVELOPMENT

Amendments to the Equal Opportunities Act for Women and Men

Gender

On 15 July 2014 the Lithuanian legislature introduced several amendments to the Equal Opportunities Act for Women and Men (EOAWM)[110] with the aim of improving the existing legislation.[111] Firstly, the addressee of the obligation to ensure equal opportunities has been defined more specifically. The law always addressed the employer as a person who is responsible for the implementation of non-discrimination provisions.

The law was amended so as to include the 'employer's representative' alongside the 'employer'. The distinction between the two is not so important from the legal point of view because there is no evidence that it has created problems in imposing administrative liability so far. With the amendment the language of equality legislation on the responsibility of natural persons will be brought in line with the analogous language used in administrative law.

The second amendment concerns the broadening of the scope of the EOAWM. One of the features of Lithuanian equality legislation is the inclusion of the education sector in the scope of non-discrimination legislation. The law was amended so as to include the obligations of universities and other institutions of education and higher education to protect employees and students from harassment and sexual harassment and to protect them from adverse treatment in response to a complaint against discriminatory actions of the institution. Such actions were already prohibited in the field of labour law and the obligation to protect will now be imposed, in express terms, on institutions of education.

The third amendment concerns the time limitation of the investigations by the Office of Equal Opportunities Ombudsperson. The procedural term of an investigation was increased from two months to three months to address the problem of increased numbers of more sophisticated investigations. The prolongation of the period will increase the chances of successful investigation but is clearly not sufficient, given the scope of competence and limited human resources within the Office.

CASE LAW

Court of Appeal judgment in a case of dismissal of a pregnant woman

Gender

On 4 September 2014 the Lithuanian Court of Appeal delivered its judgment in a case on the dismissal of a pregnant woman from the position of translator at an embassy.[112] The woman was dismissed during her period of probation after several months of employment on the ground that she was not suitable for the work. The decision on dismissal was taken on the day after she had informed her employer about her pregnancy. The prohibition of dismissal of pregnant women during a probationary period was not clearly stipulated in the Labour Code – the unsuitability of an employee could be perceived as a separate ground for dismissal (stipulated in the Code's subsection 'Conclusion of the Contract') and not covered by the general ban on the dismissal of pregnant woman (stipulated in the subsection 'Termination of the Contract').

110 Law No. VIII-947, State Gazette, 1998, No. 112-3100, available (in English) at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=421709, accessed 12 April 2015.

111 Law No. XII-1023; Register of Legal Acts, No. 2014-10423, available (in Lithuanian) at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=478103&p_tr2=2, accessed 12 April 2015.

112 Ruling of 4 September 2014 of the Lithuanian Court of Appeal in case No. 2A-1219/2014.

After three years of litigation at various levels, the Court of Appeal confirmed the unjustified discriminatory nature of the dismissal and awarded pecuniary and non-pecuniary damages to the victim. Since there is no such practice in other cases, it was not surprising that the Court refused to award the future salary which the victim would have received until the pensionable age. Instead it awarded compensation of approximately EUR 14 500 to cover the salary from the day of dismissal in 2008 until the day of the judgment (more than five years). The Court stressed that the award would be dissuasive, proportionate and just. In addition, the court awarded compensation of approximately EUR 2 900 to cover non-pecuniary damages.

The ruling allows several conclusions to be drawn which are of significant importance for future practice:
1. a prohibition on terminating the employment relationship with a pregnant woman (Section 132 (1) of the Labour Code) will also be effective in cases where the termination is based on the negative results of the probationary period; and
2. embassies and diplomatic institutions are also covered by Lithuanian labour legislation and may be respondents in Lithuanian courts if the employee is engaged in the activity under a contract of employment and not public service.[113]

The ruling of the Court is in line with the interpretation of Directives 2006/54/EC[114] and 92/85/EC.[115] The strong protection of pregnant women is characteristic of the Lithuanian legal system and the victim has received satisfaction that is even higher than that which is usually awarded in cases of unlawful dismissal on other grounds.

POLICY DEVELOPMENT

Leadership crisis within the Equal Opportunities Ombudsperson

All grounds

The post of the Equal Opportunities Ombudsperson (head of the national equality body) has been vacant since November 2013, when the former head of the institution passed away and the Board of Parliament (*Seimas*) appointed the Ombudsman of the Rights of the Child as a temporary substitute. However, the temporary Ombudsman can only maintain the functioning of the institution without making any impact on its activities or its staff.

In December 2013 and November 2014 two consecutive candidates were proposed and rejected to fill the vacant post. The first was a professor of international law while the other had a PhD in the field of non-discrimination and 10 years of legal practice as an attorney. Although no doubts regarding their professional qualifications were raised, both candidacies were rejected.

The minutes of both parliamentary sittings in which the two candidates were rejected reveal the sensitivity that some Members of Parliament relate to the post of the Ombudsperson.[116] Both candidates were asked explicitly about their views on same-sex marriage and partnerships, their relationship with LGBT organisations, their attitude towards 'genderism ideology', and their views on 'homosexual propaganda' and abortion. Both candidates demonstrated firm commitment to the mandate of the institution (including protection against discrimination on the ground of sexual orientation) and to Lithuania's international commitments with regard to fundamental rights. No comments or remarks regarding their professional qualities, knowledge or sufficiency of experience were raised.

113 The doctrine of restricted state immunity from foreign jurisdiction is applied, following the European Court of Human Rights judgment of 23 March 2010 in Case No. 15869/02 (*Cudak v. Lithuania*).

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

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

116 Stenographs of Parliament plenary sittings of 17 and 23 December 2013 and of 20 and 25 November 2014.

Luxembourg LU

POLICY DEVELOPMENT

Implementation of gender quotas in politics and the economy

Gender

On 16 September 2014 the Minister of Equal Opportunities presented her strategy regarding gender balance in politics and in the economy. In this strategy a law introducing financial cuts for political parties is announced. Political parties receive public financial support for their campaigns in national and European elections. The new law will cut this support for political parties which present unbalanced lists of candidates. The cuts will be progressive. The quota that has to be reached will be 40 % of the underrepresented sex. Political parties will receive 100 % of the public financial support if they reach the quota; 75 % if the percentage reached is between 35 and 39 % of candidates of the underrepresented sex; 50 % if the percentage reached is between 30 and 34 %; and 25 % of the financial support if the percentage of the underrepresented sex reached is less than 30 %.

The strategy excludes legal quotas concerning gender balance for the private economic sector. But the Government will organise a campaign in order to motivate companies to take non-mandatory measures. The only measure announced so far has been the intention to implement the 40 % quota, as mentioned above. Regarding the nominations of board members which are made by the Government in public companies, the Government will guarantee a quota of 40 % of the underrepresented sex.

The coalition programme does not present any details on the other projects. So far, it has been impossible to analyse how these different legislative changes will be implemented.

Malta MT

White Paper on reform of the equality and non-discrimination framework, including the mandate and set-up of the Equality Body

All grounds

On 10 December 2014 the Minister for Social Dialogue, Consumer Affairs and Civil Liberties presented a White Paper entitled 'Towards a Robust Human Rights and Equality Framework', launching a consultation process on a potential reform of the legal framework regarding equality and non-discrimination. The legislative initiatives discussed emerged from the consultations carried out earlier in 2014[117] and concern reforms of the gender equality and non-discrimination legislation on the one hand and of the legal framework of the Equality Body on the other hand.

A proposed 'Equality Act' would replace the current Equality for Men and Women Act (Cap. 456) which no longer serves its purpose as it has created an unwanted hierarchy of grounds. The new Equality Act would entail a less fragmented legal framework as it would contain a general provision against discrimination on all grounds and would cover all spheres of life. It would contain positive equality duties and obligations, specific provisions to tackle intersectional discrimination and to allow NGOs to submit cases on behalf of victims as well as the possibility of class actions. Finally, provisions allowing for dissuasive sanctions in cases of proven discrimination are also proposed. The ultimate aim of this proposed Equality Act is to have all the relevant provisions of the following EU Directives included in one, comprehensive act of legislation: Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC.

117 See *European Anti-Discrimination Law Review*, Issue 19, p. 75.

A proposed 'Human Rights and Equality Commission Act' would create a new Equality Body to replace the current National Commission for the Promotion of Equality (NCPE). The new HREC would be based on the Paris Principles and should address human rights issues and violations; monitor and advise on human rights priorities; focus on potential and actual systematic violations of human rights; and contribute to the prevention of such violations. The HREC should raise public awareness of its role and the services it provides and also provide for accessible complaints procedures. It should establish proper collaborations with different stakeholders, including the National Commission for Persons with Disability and the Commissioner for Children, but should remain fully independent and should therefore manage its own budget, to be allocated independently from government finances. The Commission should be directly responsible to Parliament which would also be responsible for the approval of its members. The HREC should be vested with the ability to issue opinions, make legislative and policy proposals and also criticise the Government or any of its entities, on human rights and equality matters, and to perform investigations when necessary instead of relying fully on complaints of individual victims.

Internet sources:
http://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Pages/Consultations/HumanRights.aspx

NL The Netherlands

CASE LAW

Age Discrimination Act not applicable to recruitment website functioning as an intermediary

Age

The claimant was a self-employed person who filed a complaint with the equality body Netherlands Institute for Human Rights (NIHR) against a website functioning as a recruitment intermediary (a 'bulletin board') enabling contacts between self-employed persons and potential clients. The website had published a job advertisement which contained a potentially discriminatory age requirement without mentioning a possible objective justification. During the proceedings before the NIHR, the respondent claimed that they did not bear responsibility for the advertisement and that the statutory provisions on age discrimination did not apply to his company.

Unlawful age distinctions in the context of employment are prohibited by Article 3 of the Age Discrimination Act (ADA), throughout the entire employment process (including advertising). The ADA is addressed not only to private and public employers, but also to organisations of employers, employment offices, job agencies, universities, etc. However, the ADA does not cover the field of goods and services.

The NIHR decided that in this case, the age discrimination legislation did not apply to the website, as its activities were strictly limited to posting job advertisements and excluded any further activity to connect self-employed persons and clients.[118] Providing the website constitutes provision of a service, but this service is not covered by the ADA. In a similar case, the NIHR found that another intermediary website did fall under the scope of the ADA, as it offered various services to employers and held workshops for job seekers.[119]

Internet sources:
http://www.mensenrechten.nl/publicaties/oordelen/2014-82/detail

118 NIHR decision No. 2014-82, of 4 July 2014.
119 NIHR decision No. 2013-116, of 18 September 2013.

Council of State overturns district court decision regarding *Zwarte Piet*

Racial or ethnic origin

In the last few years, a fierce debate has been raging in the Netherlands on the allegedly racist character of *Zwarte Piet* (Black Peter), one of the central figures in the Dutch Saint Nicholas festivities. *Zwarte Piet*'s black face, red lips and curly hair led opponents to argue that he forms an offensive caricature of black people and a throwback to slavery.

In July 2014, the Amsterdam District Court found that the municipality of Amsterdam, when granting a permit for the traditional Saint Nicholas festivities, had not considered whether these festivities would violate Article 8 of the ECHR (right to private life), as held by the claimants. It therefore ruled that the municipality should reconsider its decision.[120]

In November 2014, the Council of State (the Supreme Administrative Court) gave a ruling after an expedited procedure, overturning the District Court's decision.[121] It ruled that when municipalities decide whether or not to grant permits for public demonstrations such as festivities, they are not empowered to take into account whether granting a permit would stereotype certain groups of people, but should only evaluate the effects of the festivity on public order and security.

The ruling means that administrative courts 'cannot and will not answer' the question whether the *Zwarte Piet* character violates Dutch non-discrimination law. The Council of State however stated that claims may be brought to civil courts on the grounds of the general torts provision (6:162 Civil Code) and that people may report discrimination to the police.

The Council's ruling followed only one week after the Netherlands Institute for Human Rights (NIHR) judged in a non-binding opinion that the Saint Nicholas festivities contain discriminatory features.[122] In a case lodged by a parent against a primary school board, the NIHR found that schools have a duty of care to ensure that discriminatory stereotypes are removed from the *Zwarte Piet* character.

Internet sources:
http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2014:4117

Netherlands Institute for Human Rights (NIHR): lower insurance benefit for woman constitutes discrimination on the ground of sex

Gender

A Dutch-Turkish 10-year old girl was the victim of a traffic accident. She became disabled as a result of the accident, in such a way that she would never be able to work. The motor driver's insurance company was liable for the girl's damages and offered her an insurance benefit to cover the harm caused by the accident. In its calculations, the insurance company, on the basis of actuarial statistics about the average number of years of labour market participation of Dutch-Turkish women, reasoned that the girl would work full time from the age of 17 until 26, stop working after having her first child, only to re-enter the labour market at the age of 37. She would then work half time until the age of 67. Consequently, the amount of the insurance benefit offered was considerably lower than the amount claimed by the girl's parents.

The girl's parents did not accept the insurance company's offer and decided to go to court. The District Court of The Hague, however, accepted the insurance company's reasoning, which caused major commotion in the Dutch media.[123] Subsequently, her parents decided to bring the case to the Netherlands

120 Decision of the District Court of Amsterdam in case No. AMS 13/6350, of 3 July 2014.
121 Council of State, decision No. 201406757/1/A3, of 12 November 2014.
122 NIHR Opinion No. 2014-131, of 4 November 2014.
123 The Hague District Court 26-07-2013, ECLI:NL:RBDHA:2013:9276. See further: Holtmaat, R., 'The Netherlands' in: *European Gender Equality Law Review 2014/1*, pp. 90-94, European Commission 2014, available at: http://www.cite.gov.pt/pt/destaques/complementosDestqs/DSAB14001ENN_002.pdf.

Institute for Human Rights (NIHR), claiming that the insurance company, in its calculations, had made a forbidden distinction on the ground of gender (no claim was made as regards discrimination on the ground of ethnic origin).[124]

The Dutch Government has always interpreted the grounds of exception under Article 5 Section 2 of Directive 2004/113/EC[125] in such a way that the use of gender-related statistics to determine insurance premiums and benefits is allowed, as long as they are based on trustworthy and accurate data. The NIHR, in 2012, reported on the use of statistics in estimating insurance benefits, only focusing on distinctions made on the ground of gender, and agrees with the Government on this point in the conclusions of its report, although it warns against outdated stereotypes and gender discrimination.[126]

In this case, the NIHR decided that the insurance company had discriminated on the ground of gender. It deemed it highly improbable that the insurance company would have used similar statistics in the case of a man, found the statistics used to be inaccurate, and therefore accepted the presumption that the insurance company had made a forbidden distinction. The insurance company had been unable to deliver evidence to the contrary, and had not referred to any objective justification grounds. The NIHR's opinions are non-binding, but it is expected that this opinion will play a role in the continuation of the negotiations on the final amount of the insurance benefit.

In this decision and the accompanying press release, the NIHR emphasised in stronger language than before that the use of statistics relating to labour participation creates a large difference between men and women as regards insurance benefits. It calls upon insurance companies to eliminate this inequality and use fair assumptions.

Internet sources:
Opinion 2014-97 of the NIHR, 19 August 2014, available at:
https://mensenrechten.nl/publicaties/oordelen/2014-97/detail, accessed 28 August 2014.

Community sentence for refusing an internship applicant on the ground of skin colour

Racial or ethnic origin

The claimant had applied for an internship and then mistakenly received an email from the employee who had reviewed his CV. and which was intended to be sent internally. In the email, the employee advised his superior to refuse the application by writing:

> 'Had another look, is nothing. Firstly a darkly coloured (nigger). And little to no experience with computers et cetera on his CV.'

The claimant published the email on social media, which led to a wave of reactions and a public debate on racial discrimination during recruitment processes. The claimant reported the incident to the police.

The Public Prosecution Service decided to press charges against the employee who sent the discriminatory email under the anti-discrimination provisions in the Criminal Code.

The District Court of Gelderland found that the email constituted discrimination as prohibited under Article 137g Criminal Code.[127] The defendant's argument that his email was in fact intended to be funny was rejected by the Court. He was sentenced to 40 hours of community service. The claimant, in

124 Opinion 2014-97 of the NIHR, 19 August 2014, available at: https://mensenrechten.nl/publicaties/oordelen/2014-97/detail, accessed 28 August 2014.
125 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 373 of 21 December 2004, pp. 37-43.
126 The NIHR's report was published in 2012 under the name *Verkennend onderzoek letselschade* and is available at: https://mensenrechten.nl/publicaties/detail/17392, accessed 28 August 2014.
127 District Court of Gelderland decision in Case No. 05/800112-14, of 27 August 2014.

addition, received compensation amounting to EUR 485.67 for material damage as well as EUR 500 for immaterial damage.

Internet sources:
http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBGEL:2014:5457

Municipal policy on trailer parks found to be discriminatory

Racial or ethnic origin

The Netherlands Institute for Human Rights (NIHR) has found that a policy implemented by a local government that would eventually put an end to 'trailer parks' amounted to discrimination on the ground of race (ethnic identity).[128]

In the Netherlands, many Roma and Traveller people live in caravans or trailers, situated on officially designated trailer parks. In one small town where approximately 60 persons were living on a total of thirteen trailer parks, the municipal council referred to the costs of maintaining these parks and started dismantling each individual spot which became unoccupied, either because the former inhabitants moved or because they passed away. This policy, referred to as 'passive zero' because eventually it would passively reduce the number of trailer parks to zero, rendered it effectively impossible for (the children of) current residents to move to another spot. Thus, it threatened their way of living.

Residents of the parks brought cases before the NIHR against the municipal council and against a housing association which owned two of the parks, challenging the policy.

In its decisions, all rendered on 19 December 2014, the NIHR found that the passive-zero policy affected the core of the caravan culture. The financial costs did not explain why all thirteen locations had to disappear, and the municipality moreover refused to search for an alternative solution, such as selling the spots to the residents. Due to the fact that the policy affected only one homogenous group of individuals, which for cultural reasons wants to live in trailers, the NIHR found that the policy amounted to direct discrimination on the ground of race. The NIHR will bring its decisions – which are not binding – to the attention of the Association of Dutch Municipalities and the Minister of Housing.

Internet sources:
http://www.mensenrechten.nl/publicaties/oordelen/2014-165/detail
http://www.mensenrechten.nl/publicaties/oordelen/2014-166/detail
http://www.mensenrechten.nl/publicaties/oordelen/2014-167/detail

POLICY DEVELOPMENTS

Listed companies fail to meet Dutch non-binding gender quota, sparking renewed debate on a compulsory gender quota

Gender

In advance of the European quota (which is still being negotiated), the Netherlands introduced a legal target to ensure that at least 30 % of both executive and supervisory board members are women. In September 2014, the yearly Dutch Female Board Index was published. This index provides an overview of the presence of women on the executive and supervisory boards of Dutch companies, covering all 87 listed companies. Of the 658 directors (executives and non-executives combined) 99 were women (15 %, as opposed to 13.3 % in 2013). Almost one fifth of the non-executive directors is female (19.5 %, compared to 17.5 % last year). The percentage of women on executive boards has also increased, but continues to be very low, with only 6.0 % as opposed to 4.7 % in 2013. The Index shows that presently only one listed company meets the legal target of 30 %.

128 Decisions 2014-165, 2014-166 and 2014-167, all rendered on 19 December 2014.

The most important consequence of the publication of the Dutch Female Board Index 2014 is undoubtedly that it has sparked a renewed debate on the introduction of a compulsory gender quota. Minister Bussemaker (Education, Culture and Science; Labour Party) has consistently stated that she opposes such a binding norm, but has also made it clear that the current situation would give her 'no choice'. In a reaction to the publication, Minister Bussemaker stated that she does not exclude the imposition of a legally binding quota if listed companies consistently fail to meet the existing quota.

Internet sources:
The Index is available at:
http://www.tias.edu/docs/default-source/Kennisartikelen/femaleboardindex2014.pdf?sfvrsn=6, accessed 27 October 2014.
The Minister's quote is available at:
http://fd.nl/economie-politiek/891203/bussemaker-dreigt-met-wet-vrouwenquota, accessed 27 October 2014.

Parliament replies to report on the social security position of domestic workers

Gender

A report on the social security position of domestic workers was published in 2014.[129] This report examined ways to improve the position of domestic workers within the context of ratifying the Convention concerning Decent Work for Domestic Workers (International Labour Organisation Convention No. 189), which would require amending the current Dutch legislation.
The Dutch Government has now replied to the committee's report.[130] It agrees with the authors that the current legal position of domestic workers needs to be strengthened, but finds that the alternatives are inadequate. The current legislation therefore remains in place, which implies that ILO Convention No. 189 will not be ratified by the Netherlands in the near future.

The Government's stance on this point can be best explained by the fact that alternatives, such as the service cheque system implemented in Belgium, seem to lack sufficient political backing in the Netherlands as they would require substantial financial support from the Government, which is considered to be unfeasible in times of severe budget cuts. The legal protection offered to domestic workers therefore remains weak.

Internet sources:
The Committee's report can be found at:
http://www.rijksoverheid.nl/nieuws/2014/03/27/positie-huishoudelijk-werkers-kan-beter.html

NO Norway

LEGISLATIVE DEVELOPMENT

Constitutional amendment including protection against differential treatment

All grounds

On 20 June 2014 the Council of Ministers approved and announced the Parliamentary decision amending Chapters E and F of the Constitution, which now contain a new Section 98 with the following wording: 'Everyone shall be equal before the law. No person shall be subject to unjust or disproportional differential treatment'.

129 See further: Holtmaat, R., 'The Netherlands' in European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review 2014-2* at p. 90, European Commission 2014, available at: http://ec.europa.eu/justice/gender-equality/document/files/egelr_2014_2_final_web_en.pdf.
130 Tweede Kamer 2014-2015, *Kamerstukken* 29 427, No. 100.

The Norwegian Constitution was adopted on 17 May 1814, and previously did not contain any provision regarding discrimination or equality, only including a general reference to human rights (Section 92). The amendment is based on the work of a Constitutional Committee,[131] and was adopted by Parliament (*Stortinget*) in relation to the Bicentenary of the Norwegian Constitution.

Despite the vague and all-encompassing wording of the new Constitutional clause, it may offer protection to groups and characteristics that are not protected by the current anti-discrimination legislation, such as obesity.

Internet sources:
http://lovdata.no/artikkel/statsrad_20__juni_2014/1441

CASE LAW

Equality and Anti-Discrimination Tribunal finds that a private company may prohibit employees from wearing religious signs when wearing the company uniform

Religion or belief

The case concerned the legality of regulations of a private security company responsible for the security at several of the larger Norwegian airports. The regulations prohibited staff from wearing either 'jewellery that indicates political or religious messages' or 'religious headgear and veil' while in uniform. The Equality and Anti-Discrimination Ombud when assessing the case had found the regulations to be in violation of the prohibition against direct discrimination because of religion as well as in violation of the prohibition against indirect discrimination because of gender.

The Equality and Anti-Discrimination Tribunal quashed the decision of the Ombud on both of these points.[132] The case was assessed as a case of multiple discrimination (religion and gender).

The Tribunal assessed the case in light of international human rights obligations, in particular of the ECtHR's case law. Although the Tribunal found that a prohibition against religious headwear does constitute direct discrimination because of religion and indirect discrimination because of gender, it found that this regulation was justified, as its objective was to ensure the neutrality required to create an atmosphere of respect and order at the airport security gates. The Tribunal found that the regulation was necessary due to the business profile of the firm and that it was proportional as an acceptance of the use of the hijab might in practice lead to the introduction of gender-segregated security checkpoints, which is not desired. Value-neutral uniform regulations protect individuals against social and religious pressure.

Internet sources:
http://www.diskrimineringsnemnda.no/fullvisning/?id=2115152431&module=articles&smId=2099826752&smTemplate=2013-fullvisning

POLICY DEVELOPMENT

First large-scale survey from the Equality and Anti-Discrimination Ombud on discrimination against parents expecting a child or taking parental leave

Gender

The Equality and Anti-Discrimination Ombud performed its first large-scale survey on the discrimination of parents who are either expecting a child or who are on parental leave.

131 Report on human rights in the Constitution, from the Constitutional Committee to the Parliament, Chapter 6, available at http://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf.
132 Equality and Anti-Discrimination Tribunal decision in Case No. 2/2014, of 1 April 2014.

The survey was conducted with the assistance of market research company TNS Gallup, in the period of 2-10 October 2014. The survey covered 2 014 respondents, and was limited to persons who became parents in the period 2008-2014.

The results are the following:
- 55 % of female and 22 % of male employees had experienced one or several forms of discrimination related to pregnancy or parental leave.
- Women are at higher risk of experiencing discrimination compared to men.
- 37 % of the female respondents experienced not receiving important information about their workplace, such as reorganisations or pay negotiations, while they were on parental leave.
- 14 % of the female respondents experienced not getting a job because they were on parental leave.
- 21 % of female employees in permanent positions had been left out of pay negotiations because they were on parental leave or had been taking parental leave during the relevant period.

The Ombud stated that the survey results confirm familiar knowledge from the complaints submitted to the Ombud, as pregnancy or parental leave form the basis of the majority of such complaints.

Internet sources:
http://www.ldo.no/nyheiter-og-fag/nyheiter/nyheiter-2015/gravide-diskrimineres/

PL Poland

LEGISLATIVE DEVELOPMENT

Draft law amending the provisions on parental leave for single fathers taking care of their children

Gender

The Ministry of Labour and Social Policy presented to Parliament on 16 October 2014 a draft law amending inter alia the Law on financial benefits from social security in case of sickness and maternity. It aims to allow single fathers to take advantage of parental leave and to collect benefits in a case when the mother is dead or has left the child, when a court has decided that she is unable to provide for herself, or when her health prevents her from taking care of the child.

Currently, the father is only entitled to parental leave in situations where the mother is working, and the father uses the first 14 weeks of the mother's maternity leave. Therefore, the father's right to parental leave is conditional on the right of the mother. If the mother is not entitled to the leave, then the father, even if he is paying insurance premiums, cannot take advantage of it. However, this draft law only partially resolves the problem, since the father's right to take parental leave still remains conditional.

Internet sources:
Draft law has been passed and will enter into force 14 August 2015,
http://isap.sejm.gov.pl/DetailsServlet?id=WDU20150001066
http://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?id=6CA0D87385E1F714C1257D780046A203

CASE LAW

Case regarding different appearance standards for men and women in the police force brought to the European Court of Human Rights

Gender

A case has been brought to the European Court of Human Rights by Zbigniew Wawrzańczak, a policeman who was subjected to disciplinary punishment for failing to execute a service order regarding cutting his hair. The case was backed by the NGO Helsinki Foundation for Human Rights. As already mentioned in previous reports, the regulations of the Chief Commander of the Police regarding the length of hair treat women and men serving in the Police differently. Unlike men, female police officers may wear their hair longer than shoulder length and are only obliged to keep it tightly pinned up while performing their duties. Neither the District Administrative Court, nor the Chief Administrative Court found that the provisions had a discriminatory character and rejected the complaint of the policeman. In the application to the European Court, the argument was raised that the right to private life had been violated (Article 8 of the Convention) in connection to the prohibition of discrimination with regard to sex (Article 14 of the Convention). According to the claimant, by refusing him to keep his hair long, the state authority made a distinction on account of gender, which had neither an objective nor a rational justification and constituted a disproportionate breach of his rights.

Internet sources:
http://www.hfhrpol.waw.pl/dyskryminacja/home/strona-5

An ambiguous judgment from the Warsaw Court of Appeal on access to insurance compensation and equal treatment

Sexual orientation

A judgment of 26 June 2014 from the Warsaw Court of Appeal (Civil Division) concerned the case of *R.G. v. Bank S.A.M* on the protection of personal goods and payment of damages.[133]

The Court of Appeal rejected the ruling of the Warsaw District Court of 30 August 2013.[134] In this case, the claimant, R.G., claimed that the defendant bank had refused him access to complex family accident insurance once the bank learned that the claimant's partner (cohabitant) had the same sex as R.G. The claimant demanded from the bank the amount of EUR 2 500 (PLN 10 000) in damages for discrimination, and the publication of an apology in the press. However, the District Court did not find that the dignity of the claimant had been violated, either by the refusal of the bank to accept him and his partner for family insurance, or by further correspondence in this matter.

The Court of Appeal expressed a different opinion on this subject. The Court of Appeal underlined that the denial of entitlement to the family accident insurance due to the fact that the applicant's partner was of the same sex was unlawful, and should be regarded as discrimination on the grounds of sexual orientation with respect to Polish law and the recent case law of the Supreme Court. The meaning of the term 'cohabitant' used in the general terms of service could therefore not be narrowed by the bank to only heterosexual relationships.

In the opinion of the Court of Appeal, the bank had violated the dignity of the applicant. Despite this opinion the Court still rejected the appeal. The Court found the legal basis for claiming damages by the claimant to be Article 448 of the Civil Code. This Article provides that the precondition for damages is an action of the perpetrator that is not only unlawful but also culpable (undertaken intentionally or unintentionally).

133 Case No. I ACa 40/14.
134 Case No. I C 996/12.

The Court found that the defendant did not act intentionally, because in order to do so the bank would have had to be aware of the harmful effect of its actions. In the opinion of the Court of Appeal, the defendant's harmful actions were also not committed *un*intentionally, because the bank did not have reason to suspect its actions would violate the claimant's personal rights. When considering the chronology of the development of the term 'cohabitation' by the Supreme Court's case law, it should be noted that the refusal to accept the claimant and his partner for insurance occurred when the current, wider definition was introduced.

This ruling appears to have strengths and weaknesses. On the one hand the Court of Appeal presented the facts objectively and decided that the term 'cohabitant' should be interpreted in accordance with the current case law of the Supreme Court, the European Court of Human Rights, and the Polish Constitution. On the other hand, the Court seems to fail to recognise the fact that in order to adjudicate damages for discrimination there is no need to determine the fault of the perpetrator.

This ruling demonstrates the shortcomings of the Polish regulations regarding discrimination. Article 13 of the Anti-Discrimination Act[135] states that in case of discrimination everybody has the right to damages. However, the same Act requires the use of the provisions of the Civil Code in such discrimination cases. The provisions of the Civil Code are guided by different rules than the anti-discrimination procedure. In this case of the Court of Appeal, the Court does not refer to the Anti-Discrimination Act at all, and it therefore missed the chance to determine the relationship between these regulations and the provisions of the Civil Code in the context of claims for damages when the rule of equal treatment is violated.

Internet source:
http://orzeczenia.ms.gov.pl/content/$N/154500000000503_I_ACa_000040_2014_Uz_2014-06-26_001

PT Portugal

CASE LAW

Two Constitutional Court decisions on reasonable accommodation of religion

Religion or belief

In September 2014, the Constitutional Court adopted two decisions regarding the right to freedom of religion and the accommodation of religious beliefs in employment.

Both cases concerned employees working in shifts who claimed that their shifts should take into account their necessary absences from work as required by their religious beliefs. The first case concerned the unlawful dismissal of an employee due to absences from work motivated by her religious beliefs.[136] The second case was brought by an employee who claimed that the interpretation of Article 14(1)(a) of the Law on Religious Freedom which only allowed workers on a flexible schedule to be suspended from work on a weekly rest day as prescribed by their religious beliefs was unconstitutional.[137]

In both cases, the Constitutional Court concluded that the constitutional protection of religious freedom goes beyond the principles of freedom of religion and non-discrimination, by also requiring the creation of conditions for the effective implementation of the right to religious freedom, including measures of positive action and reasonable accommodation of working hours.

135 Law of 3 December 2010, JoL 2010.254.1700 with further amendments.
136 Constitutional Court case No. 544/2014 of 23 September 2014.
137 Constitutional Court case No. 545/2014 of 29 September 2014.

This means that Article 14(1)(a) of the Law on Religious Freedom applies not only to employees working on a flexible schedule but also those whose work is performed in shifts.[138]

Internet sources:
https://dre.pt/home/-/dre/57547753/details/maximized?p_auth=9YlN1ErP&serie=II&parte_filter=32&dreId=57547689
https://dre.pt/home/-/dre/57301957/details/maximized?p_auth=hh6r7nER&serie=II&parte_filter=32&dreId=57301875

Romania

RO

CASE LAW

Court of Appeal confirms fine for the President for discriminatory statements against nomadic Roma

Racial or ethnic origin

In 2011, a Roma rights NGO filed a complaint before the National Council for Combating Discrimination (NCCD) claiming that statements made by the Romanian President in November 2010 while in Slovenia 'breach the dignity [of the Roma community] and generate a degrading, humiliating and offensive environment.' Proceedings followed, notably regarding the territorial jurisdiction of the NCCD, with the NCCD initially finding the complaint inadmissible, but finally the NCCD adopted its decision on the merits of the case in February 2014, ordering the President to pay a fine of approx. EUR 134 (RON 600).[139] The decision was challenged before the Court of Appeal.

In June 2014, the Court of Appeal of Bucharest adopted its decision in the case, confirming the fine ordered by the equality body.[140]

On procedural issues, as the President claimed that no administrative sanction could be applied as more than six months had passed since the act (this being the general term of prescription), the Court referred to the judgment of the Court of Justice in C-81/12 and noted the special status of the provisions of the Anti-Discrimination Law regarding statutory limitations. The delay in imposing the fine had not been caused by undue delays in solving the petition but by the legal exercise of the right to challenge the NCCD and court decisions in what proved to be a long process.

On substantive matters, the Court of Appeal confirmed the reasoning of the NCCD in finding that the statements concerned infringed Articles 2 and 15 of Governmental Ordinance 137/2000. The Court took note of the defence of the President that he did not intend to discriminate or to create a degrading and humiliating environment for nomadic Roma but emphasised that Article 15 of Governmental Ordinance 137/2000 in prohibiting discrimination perpetrated as a violation of the right to dignity does not require discriminatory intent. The Court emphasised that the offence provided by Article 15 (violation of the right to dignity) is not one of outcome but one of 'danger', and therefore does not require that the perpetrator has effectively violated the claimant's right to dignity, given the preventive nature of the anti-discrimination legislation. The Court of Appeal applied the ECHR test to see if the statements of the President fell under the exercise of freedom of expression and concluded that the limitation of freedom of expression was both legitimate and proportionate as well as necessary in a democratic society. Regarding the defence of immunity invoked by the President, the Court of Appeal decided that

138 The Constitutional Court thus overruled a previous decision of the Supreme Administrative Court, STA 1078/11 of 14 December 2011.
139 NCCD, decision No. 117 of 10 February 2014. See also *European Anti-Discrimination Law Review*, issue 19, pp 83-84.
140 Court of Appeal of Bucharest, civil decision No. 2051 of 27 June 2014.

even if the statement was part of a general interest discussion and part of political discourse, this did not mean that 'any statement, no matter the content or the outcome enjoys the protection recognized to political opinions in the field of freedom of expression.' Consequently, the Court of Appeal rejected the appeal of the President and maintained the decision of the NCCD.

Equality body criticises sexist campaign

Gender

At the beginning of July 2014, the *Consiliul National pentru Combaterea Discriminarii* (equality body, CNCD) penalised the Mayor of Constanta for discrimination with respect to the content of the public campaign '*Mamaia Style*', designed to promote the Romanian seaside.

The *Mamaia Style* campaign included images and messages that were objectionable to women and incited sexual harassment against them. For example, an item called 'bird watching' suggested that tourists are encouraged to stalk women who are sunbathing on the beach (i.e. by watching them through binoculars). Moreover, women are called 'birds' – which is derogatory to women in the Romanian language. The CNCD qualified the content of the public campaign as 'sexist', 'misogynistic' and 'discriminatory against women'.[141] According to the CNCD, this behaviour was encouraged by the Mayor of Constanta, the main town at the Romanian seaside, who ordered the campaign. At the press conference launching the campaign, Mayor Radu Mazare declared to the media that 'young ladies are like gazelles that need to be hunted'.

Despite the nature of the messages and the fact that it was a nationwide campaign, the CNCD only punished the authors of the public campaign with a warning instead of an administrative fine, even though the higher administrative sanction was available to the national equality body. This is particularly worrying in the context of the recent decision of the Court of Justice of the European Union finding in another case on Romanian Anti-Discrimination Law that warnings were not commensurate with the seriousness of a breach of the principle of equal treatment within the meaning of Directive 2000/78/EC, if warnings were generally only imposed in Romanian law for very minor offences.[142]

This case is a good example of how the legal standing of non-governmental organisations stipulated in Romanian Anti-Discrimination Law works in practice in the field of discrimination on the ground of sex. A group of five NGOs working on women's rights and gender equality, the Gender Equality Coalition, filed a complaint to the CNCD using the legal standing in cases of discrimination affecting a group of persons or a community.[143] In these cases, there is no need for a power of attorney from actual or potential victims, only the proof that the NGO is promoting human rights or has an interest in the field of equality and non-discrimination which is usually shown in the organisation's by-laws or activity report.

The above-mentioned provision, which is stipulated in Article 28 of the Anti-Discrimination Law, is more generous than the equivalent one in the recently amended Gender Equality Law.[144] On 4 December 2012, the Government limited solely to administrative procedures the right of trade unions, human rights organisations and other entities to represent or assist a person exposed to discrimination on the ground of sex. The previous version of this paragraph was much broader and in compliance with the defence of rights under the relevant EU directives (for example Article 9(2) of Directive 2010/41/EU); it used to recognise a legal standing for these entities in both judicial and administrative procedures, similar to cases of discrimination on other grounds.

141 CNCD, Decision No. 376 of 2 July 2014.
142 CJEU, Case C-81/12 *Asociația ACCEPT* v. *Consiliul Național pentru Combaterea Discriminării*, WLR [2013] at Paragraph 70.
143 Government Ordinance No. 137/2000 regarding the prevention and sanctioning of all forms of discrimination (*Ordonanța Guvernului nr.137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), republished in Official Journal No. 99 of 8 February 2007, Article 28.
144 Law 202/2002 on equal opportunities between women and men (*Legea 202/2002 privind egalitatea de sanse intre femei si barbati*), Article 35(2), republished in Official Journal No. 326 of 5 June 2013.

Internet sources:
http://www.romanialibera.ro/actualitate/eveniment/radu-mazare--sanctionat-de-cncd--dupa-ce-a-spus-ca-femeile-trebuie-%E2%80%9Dvanate-ca-niste-gazele%E2%80%9D-342050

High Court of Cassation and Justice quashes NCCD decision on genuine and determining occupational requirements

Racial or ethnic origin

The claimant complained in 2012 to the national equality body the National Council for Combating Discrimination (NCCD) regarding a job advertisement issued by the Mayor of Valea Crișului and the National Agency for Public Servants requiring the candidates to have a good knowledge of Hungarian. The claimant considered that this condition amounted to discrimination in favour of ethnic Hungarians. In 2012, the NCCD noted that the population of the village contained more than 20 % ethnic Hungarians and took into account that the specific position (secretary of the local Council) implied direct contact with the population on administrative and legal issues. The NCCD therefore decided that the linguistic requirement was lawful.[145]

The NCCD decision was challenged before the Court of Appeal which confirmed the NCCD decision.[146] The claimants appealed before the High Court of Cassation and Justice, which then had to determine whether the language requirement was 'genuine and determining' for the specific position, as provided by Article 9 of Governmental Ordinance 137/2000 or whether it amounted to discrimination of the Romanian-speaking population.

The High Court recognised the right of citizens belonging to a minority to use their mother tongue when addressing local public administration,[147] and therefore noted that a requirement to know the language spoken by an important minority (more than 20 % of the population) can be justified for certain public positions in local administration. The Court stated however that 'knowledge of Hungarian, as an occupational requirement can be objectively justified only when the specificity of the task of work with the public (...) makes it mandatory to have skills in using Hungarian in direct conversations with the Hungarian-speaking citizens.' The High Court considered that the position of council secretary does not entail direct work with the citizens, noting that the position has a managerial function and that potential aspects of the position which would require direct contact with the public can be delegated and do not have to be directly exercised by the secretary. The High Court also invoked Article 13 of the Constitution providing that Romanian is the official language of the State.[148]

The Court accepted the appeal and quashed the NCCD's decision, obliging the NCCD to pay approx. EUR 225 (RON 1 000) as compensation for non-pecuniary damage and approx. EUR 1 126 (RON 5 000) to cover legal fees. In awarding compensation, the High Court noted that the NCCD's decision by not recognizing a case of discrimination as alleged affected the claimant's 'honour, reputation, professional dignity and the right to access to a public position of leadership'.

Sex segregation and sex discrimination in recruitment for the military

Gender

Case development: Seventeen NGOs that promote women's rights filed a collective complaint to the National Council for Combating Discrimination (CNCD).[149] The NGOs complained of sex segregation and discrimination by the Ministry of National Defence, which had re-introduced a sex-segregated recruitment policy for the school year 2014-2015 in all higher education schools for the military. In this year, the Ministry offered significantly fewer places for female candidates than for male candidates (e.g.

145 NCCD, decision No. 56 of 22 February 2012.
146 Court of Appeal of Bucharest, decision No. 4847 of 10 September 2012.
147 Article 76 of Law 215/2001 on local public administration, Article 108 of Law 188/1999 on the statute of public servants and Article 15 of the Governmental Decision 1206/2001 on Norms for enforcing the provisions regarding the right of citizens belonging to a minority to use their mother tongue in relation with local public administration.
148 High Court of Cassation and Justice, Decision 1438 in file 3683/2/2012 of 20 March 2014.
149 National Council for Combating Discrimination, Decision No. 568 of 8 October 2014.

the Academy of Land Forces – Sibiu: 130 places for men and 37 places for women; the Academy of Marine Forces – Constanța: 26 places for men and 2 places for women).

The Ministry of National Defence argued that this measure was justified by determining occupational requirements for military professions that are physically extremely demanding. The Ministry also argued that such professions are unsuitable for the female anatomy; therefore women occupy non-combatant (administrative) positions in the military.

The CNCD found that the very low numbers of places offered for women in comparison to men amounted to discrimination on the ground of sex in access to education. It found sex segregation in recruitment to be legitimate due to determining occupational requirements for military professions, but disproportionate because of the significant difference in numbers for the two sexes. Therefore, the CNCD issued a written warning and recommended the Ministry to respect the principle of non-discrimination and equal opportunities for women and men; and to make different allocations of places depending on the type of military force based on objective, real, determining, legitimate, and proportional justifications.

Key points of analysis: Although originating in the field of education, this case is also relevant for the field of employment due to the fact that members of the military are only hired after having completed higher military education. In this case, the CNCD decided that evidence showing sex segregation in the recruitment for higher military education does not automatically lead to a presumption of sex discrimination. In order to establish this presumption, the CNCD looked at additional circumstantial evidence, such as the recruitment practice in previous years, where the sex segregation was abolished and statistical data showing similar numbers of women and men graduating from the military high schools.

In the national expert's opinion, determining occupational requirements must be supported by significant evidence subjected to strong scrutiny when it comes to differences between women and men. In this sense, the national expert criticizes the CNCD's decision for accepting sex as determining occupation requirement in this case without requesting evidence that supports the assertions of the Ministry of Defence that (1) the military professions involve extreme physical strains, with which (2) the female anatomy cannot cope. The national expert also criticises the decision that symbolic sanctions such as the warning that was ordered in the case by the CNCD are not effective and proportionate remedies in the context of a discriminatory practice at the national level. Moreover, the recommendation made to the Ministry is so general that it cannot be enforced; the CNCD should have described a minimum set of legitimate criteria to be considered by the Ministry when allocating the number of places for women and men in the higher education military schools. No publicity or information campaign amongst potential candidates followed the CNCD's decision. These are all reasons to consider the warning a symbolic sanction, not an effective and proportionate remedy for this case of discrimination.

Courts of Appeal confirm sanctions against 39 mayors failing to ensure accessibility of public transportation

Disability

In April 2014, the National Council for Combating Discrimination (NCCD) issued sanctions against 39 mayors of main cities in Romania as well as the relevant national authority (the National Agency for Payments and Social Inspection), following an *ex officio* investigation regarding the accessibility of public transportation.[150] In its decision, the NCCD had found that failure to ensure access to public transportation for persons with disabilities amounted to direct discrimination by limiting access to services and violating the right to dignity.

Some of the mayors challenged the decision before the competent Courts of Appeal. They argued, respectively, (1) that the legal obligation is not to ensure the accessibility of all means of public transportation but is limited to ensuring the possibility for access to public transportation to persons with

150 NCCD decision No. 251 of 30 April 2014. See also *European Anti-Discrimination Law Review*, issue 19, p. 84.

disabilities; (2) that they could not be held liable considering the limited mandate of mayors and that their interest in securing the rights of persons with disabilities is proved by the fact that relevant provisions are included in the procurement documentation and contracts concluded by the public transport service; and (3) that they could not be held liable as the management of the public transportation system had been delegated and that the NCCD decision was adopted later than provided by the law and that in some cities a limited number of means of public transportation were accessible, hence the duty to ensure accessibility was complied with.

Both Courts of Appeal rejected the arguments invoking the mayors' lack of liability, indicating that the Law 215/2001 clearly established that their mandate includes the attributions regarding public services provided to the citizens. The Courts dismissed the actions of each claimant, noting that observing this obligation does not entail any investments as it is merely an obligation of diligence with regard to the negotiation of contracts for transportation. Thus, as long as the claimants did not meet their legal obligations, the sanctions imposed by the NCCD were lawful.[151]

Internet sources:
http://portal.just.ro/46/SitePages/Dosar.aspx?id_dosar=4600000000035053&id_inst=46

POLICY DEVELOPMENTS

Report of Commissioner for Human Rights of the Council of Europe on Romania

In July 2014, the Council of Europe Commissioner for Human Rights released a report highlighting his main findings and concerns following his most recent visit to Romania. The report prioritises the rights of persons with disabilities, the rights of children and the rights of Roma.

Racial or ethnic origin
Disability

With regard to rights of persons with disabilities, the report voiced concerns regarding the number and the treatment of persons with disabilities interned in state institutions, mentioning 'the inadequate living conditions, social marginalisation and ill-treatment faced by children and adults with disabilities in institutions, as well as the reported lack of access to justice for these persons.' Also a notable concern was mentioned in relation to 'barriers to independent living faced by persons with disabilities, including the poor accessibility of the built environment and of mainstream services open to or provided to the public' leading to an excessively high rate of unemployment. As a particular concern the report noted 'the large share of children with disabilities [who] are educated according to special programmes, in special or mainstream schools' and the low level of accessibility of higher education institutions. Concerns regarding the implementation of the UN CRPD were also mentioned.

With regard to the rights of Roma, the Commissioner mentioned his particular concern about 'the long-standing, institutionalised anti-Gypsyism in Romania characterised by a virulent, anti-Roma rhetoric in public discourse, including at the highest political level.' The large number of Roma living below the poverty line, the fact that only 35 % of Roma are employed, the 'lack of basic amenities, overcrowded spaces, segregation and a high risk of eviction' characterising the housing situation of Roma were also mentioned.

Internet sources:
https://wcd.coe.int/ViewDoc.jsp?id=2208933&Site=COE

151 Courts of Appeal of Pitești and of Alba, decisions of 21 October 2014.

Labour Inspectorate monitoring campaign

Gender

From 24 to 26 September 2014, the Labour Inspectorate organised a national-level campaign to check the compliance of employers with the provisions stipulated in the Gender Equality Law.[152]

The local media reported on the results of this monitoring campaign. The objectives of the campaign were to carry out a thorough check of the conformity with the Gender Equality Law in all its dimensions – gender equality in recruitment, working conditions, remuneration, with respect to the protection against dismissal of pregnant women, sexual harassment, and so on. The results of the campaign in all reporting counties showed that the Labour Inspectorate penalised employers for not having explicit provisions in their internal regulations forbidding and penalising sex discrimination in the workplace, and not informing employees about their rights with respect to gender equality and non-discrimination.

Article 8 of the Gender Equality Law stipulates that all employers must adopt provisions in their internal regulations forbidding and sanctioning gender discrimination in the workplace and inform all employees about their rights with respect to gender equality and non-discrimination.

It is commendable that the Labour Inspectorate focused on gender equality among the other issues that fall under its mandate of monitoring employers' compliance with labour law. The employers' legal obligations stipulated in Article 8 of the Gender Equality Law are the basic measures in gender equality that an employer must implement: to adopt provisions in their internal regulations forbidding and penalising discriminatory behaviour on the ground of sex, and inform their employees in this respect.

It has been more than ten years since the Gender Equality Law entered into force, and it is therefore very worrying that employers continue to disregard such basic legal obligations. Furthermore, the Labour Inspectorate limits itself within a national campaign on gender equality to only the monitoring and penalising of these basic elements of the Gender Equality Law; it does not examine the details of the other legal provisions stipulated in the Gender Equality Law in order to properly audit the way in which employers actually respect this Law. A more substantive approach like this would indeed further inform employers on the meaning of gender equality, rather than simply fining employers for not fulfilling the formal requirement to include a standard text in internal rules of conduct.

Internet sources:
http://www.gazetabt.ro/local-campanie-nationala-privind-egalitatea-de-sanse.html,
http://www.aradon.ro/sapte-din-zece-angajatori-sanctionati-pentru-discriminare/1464411,
http://radioconstanta.ro/2014/10/01/controale-privind-discriminarea-intre-sexe-la-locul-de-munca/,
http://olt-alert.ro/index.php/component/k2/item/500-itm-olt-controale-la-angajatori-pentru-descurajarea-discriminarii-sexuale-la-locul-de-munca,
http://expressdebanat.ro/femeie-sau-barbat-ai-aceleasi-drepturi-campania-itm-a-descoperit-ca-nu-peste-tot-e-asa/,
http://www.diacaf.com/stiri/local/neamt/egalitate-intre-sexe-doar-pe-hartie-la-locul-de_14552438.html,
http://www.botosaninecenzurat.ro/20141006-femeie-sau-barbat-ai-aceleasi-drepturi-itm-a-descoperit-ca-la-botosani-nu-peste-tot-e-asa.html.

152 Law No. 202/2002.

Slovenia SI

LEGISLATIVE DEVELOPMENT

Legislation adopted implementing the Act on Equal Opportunities for People with Disabilities

Disability

In October 2014, the implementing act 'Rules on technical devices and adapting vehicles for persons with sensory disabilities' was passed and entered into force.[153] This implementing act regulates in detail the technical tools, conditions and methods for adapting vehicles for persons with visual and/or hearing impairments, and defines the beneficiaries and the conditions they have to meet.

Four implementing acts are needed for the 2010 Act on Equal Opportunities for People with Disabilities to become operational in practice, and were to be adopted within 12 months after the entry into force of the Act.[154] The implementing act adopted in October 2014 was the first to be adopted. The purpose of the 2010 Act is to prevent and eliminate discrimination of people with disabilities and to encourage equal opportunities of people with disabilities in all areas of life. In addition to already existing legal provisions in other laws, this act additionally prohibits any discrimination on the grounds of disability in procedures before state bodies, bodies of local government, holders of public authorities and other bodies carrying out public services. It also specifically prohibits discrimination in the access to goods and services available to the public and sets out an obligation to provide appropriate accommodation and remove physical, information and communication barriers that prevent the access of people with disabilities to goods and services. With the adoption of the Act, the provisions of the UN Convention on the Rights of People with Disabilities were transposed into national law.

Internet sources:
http://www.uradni-list.si/1/content?id=118993#!/Pravilnik-o-tehnicnih-pripomockih-in-prilagoditvi-vozila

CASE LAW

Supreme Court decision on homophobic crime

Sexual orientation

In June 2009 a group of people attacked a café in Ljubljana which was known as gay-friendly, severely injuring one person. Three of the perpetrators were identified and prosecuted. The District Criminal Court of Ljubljana convicted the three defendants of public incitement of hatred, violence or intolerance. The defendants were sentenced to one year and six months of imprisonment respectively.[155] In June 2011, the High Court of Ljubljana deciding on the defendants' appeals confirmed the content of the first instance judgment, but reduced the sentences to seven months and five months of imprisonment respectively.[156] One of the defendants filed a request for protection of legality before the Supreme Court, which in July 2014 overturned the decision of the High Court due to procedural irregularities regarding the retention of one of the offenders' DNA (on the basis of which the offenders had been identified), and remanded the case to the first instance court.
This ruling followed a decision of the Constitutional Court which had found that the provision of the Police Act under which the perpetrators had been identified was unconstitutional.[157]

153 Act adopted on 3 October 2014, Official Journal of the Republic of Slovenia No. 71/2014.
154 Act on Equal Opportunities for People with Disabilities (Official Journal of the Republic of Slovenia No. 94/10 and 50/14, available at http://www.uradni-list.si/1/content?id=100876 and http://www.uradni-list.si/1/objava.jsp?urlurid=20142080.
155 See *European Anti-Discrimination Law Review*, issue 12, p. 71.
156 See *European Anti-Discrimination Law Review*, issue 14, p. 66.
157 Constitutional Court, decision No. U-I-312/2011 of 13 February 2014.

It remains to be seen whether the prosecution will submit any new admissible evidence, on the basis of which the attack could be sanctioned. If not, one of the most serious homophobic attacks in Slovenian history will remain unpunished.

Internet sources:
http://www.sodnapraksa.si/?doc-2012032113068168

ES Spain

LEGISLATIVE DEVELOPMENTS

Andalusia approves a Law for non-discrimination on the ground of gender identity and for the recognition of the rights of transsexual persons

Gender

There is no law in Spain that specifically protects the rights of transsexual people. However, the Autonomous Community of Andalusia has approved Law 2/2014 of 8 July 2014, which prohibits discrimination on the ground of gender identity. The Law has a territorial limitation and applies only in the Autonomous Community of Andalusia. However, it is still an extremely significant piece of legislation, as it expressly recognises for the first time in Spain the right to non-discrimination on the ground of sexual identity.[158] In addition, it establishes measures for the promotion and specific protection of this collective right.

Some of the most significant provisions are the following:
- Article 5 establishes that the public administration must respect the human right to self-determination of gender identity;
- Article 7 stipulates that the Government of the Autonomous Community of Andalusia will conduct outreach campaigns to combat discrimination and violence related to gender identity;
- Article 10 provides that the public health system will provide free healthcare for sex reassignment; and
- Article 15 establishes that the necessary measures should be taken in the field of education to eliminate attitudes with prejudice on the grounds of sexual identity.

Internet sources:
http://www.juntadeandalucia.es/boja/2014/139/1, accessed 23 March 2015.

Catalonia approves the first comprehensive law in Spain on LGBTI rights[159]

Sexual orientation

In October 2014, the Catalan Parliament adopted the 'Law to guarantee the rights of lesbian, gay, bisexual, transgender and intersex people and to eradicate homophobia, biphobia and transphobia', with the aim of ensuring that the rights of LGBTI persons and of their organisations are real and effective; facilitating their participation and representation in all areas of social life; and contributing to overcoming stereotypes.

The Law defines direct discrimination, indirect discrimination, discrimination by association, discrimination by error,[160] and multiple discrimination. It furthermore defines instructions to discriminate, harassment

158 In Andalusian legislation both terms (gender identity and sexual identity) relate to the same situation (sexual orientation) –*identidad de género* and *identidad sexual*.
159 Law 11/2014, of 10 October 2014, to guarantee the rights of lesbian, gay, bisexual, transgender and intersex people and to eradicate homophobia, biphobia and transphobia.
160 The law defines 'discrimination by error' as a 'situation in which a person or group of people are discriminated against based on sexual orientation, gender identity or gender expression as a result of an erroneous assessment' (Article 4.d).

on grounds of sexual orientation, gender identity or gender expression, victimisation and secondary victimisation[161].

It creates the National (Catalan) Council for Lesbian, Gay, Bisexuals and Transgender as a platform for public participation on duties and rights of LGBT persons and as a consultative body of Catalan administrations in this field. A coordinating body of LGBTI policies is also created within the Government of Catalonia to provide an adequate and coordinated response to the needs of people who suffer, have suffered or are at risk of suffering violence or discrimination because of sexual orientation, gender identity or gender expression.

The Law specifies actions in various fields: Training and awareness and the duty to intervene of professionals who work in sensitive areas; education; culture and sport; the media; health; social action; public order and deprivation of liberty; the labour market; and LGBTI families. It also provides a number of mechanisms to ensure equal treatment: administrative and judicial redress; institutions, associations and organisations that have legally constituted among their purposes the protection and promotion of human rights, trade unions, professional associations and consumer organisations have legal standing to act (in court) for the defence of the right to equality of LGBT people; and a right to legal assistance and reversal of the burden of proof. It also sets rules for right of admission (to restaurants, nightclubs, etc.) and establishes specifically that 'the right of admission cannot involve in any case discrimination based on sexual orientation, gender identity or gender expression'. The Law also establishes mechanisms to improve statistics on the situation of LGBTI people in Catalonia.

The Law establishes a system of offences and penalties. Sanctions for very serious offences can reach a fine amounting to ten times the sufficiency rate in Catalonia (i.e. EUR 5 690 in 2014); up to two years without public subsidies and up to three years without being able to contract with public administrations in Catalonia.

The Law was prepared with the collaboration and consensus of NGOs working in this field, and is the first of its kind in Spain.

Internet sources:
http://portaldogc.gencat.cat/utilsEADOP/PDF/6730/1376346.pdf

POLICY DEVELOPMENT

The Women's Institute is transformed into the Institute for Women and Equal Opportunities

Article 17 of Law 15/2014 of 16 September 2014 (in force since September 2014) for the rationalisation of the public sector and other measures of administrative reform, amends Articles 1 to 5 of Law 16/1983 of 24 October 1983 (Law of the Women's Institute). The main objective of Law 15/2014 is to achieve a more efficient functioning of the public sector through generally restructuring the public administration. Many public entities and public administrations (the former being those entities that are entirely or almost entirely owned by the State) have changed their names and structures. This includes the old Women's Institute, which is now called the 'Institute for women and equal opportunities'. The scope of the new entity's objective will be expanded to include the fight against discrimination on the grounds of birth, sex, racial or ethnic origin, religion or ideology, sexual identity, sexual orientation, age, disability, or any other personal or social condition or circumstance. Previously, it only addressed issues of sex discrimination.

All grounds

161 The law defines 'secondary victimisation' as 'additional mistreatment exercised against [LGBTI] found in any of the situations of discrimination, harassment or victimisation as a direct or indirect consequence of the lack of interventions carried out by the responsible agencies, and also by the actions of other agents involved' (Article 4.i).

The extended scope of the new Institute may result in less attention paid to issues of gender equality, as the extension in scope has not been accompanied by a budget increase.

Internet sources:
Law 15/2014 of 16 September 2014, for the rationalisation of the public sector and other measures of administrative reform, available at:
http://boe.es/boe/dias/2014/09/17/pdfs/BOE-A-2014-9467.pdf, accessed 26 February 2015.

SE Sweden

LEGISLATIVE DEVELOPMENTS

New proposed legislation on active duties to combat discrimination

All grounds

In June 2014 a legislative inquiry commission presented a white paper proposing to the Government a set of amendments to the Discrimination Act and the School Act, with regard to the 'active duties' to combat discrimination and promote equality through general measures in the fields of employment and education.[162]

In the field of employment sexual orientation and disability are currently exempted from employers' active duties, while age and transgender identity or expressions are exempted in the field of education. The proposal suggests extending the existing duty to cover all seven protected grounds (sex, sexual orientation, ethnicity, religion, disability, age and transgender identity or expressions), in both fields.

The proposed legislation prescribes a model for employers and for education providers to abide by. They shall:
1. investigate if there are risks of discrimination or victimisation within their organisation;
2. analyse the causes of such risks and any obstacles in dealing with them;
3. take the promotion measures that can reasonably be demanded to counteract such risks; and
4. monitor and evaluate the work done.

This model is supposed to apply to every form of discrimination and should include surveys of the wages of women and men and the combating of wage discrimination. Employers with 25 or more employees shall document on a yearly basis all efforts taken to combat all forms of discrimination, while employers with 10-24 employees will only need to document the wage surveys.

The proposal transfers all regulations regarding active duties in education from the Discrimination Act to the School Act and gives the School Inspectorate the authority to exercise control (such control is currently exercised by the Equality Ombudsman).

There are currently almost no cases on active duties, partly due to the very vague wording of the current legislation. The proposal would make the duties clearer and more strongly oriented towards the process. The legislation is proposed to enter into force on 1 January 2016, allowing for some time for public debate before the Government presents a legislative proposal to Parliament.

Internet sources:
http://www.regeringen.se/sb/d/108/a/242515

162 New regulations on active duties against discrimination, SOU 2014:41.

Addition of a new form of discrimination: lack of accessibility

Disability

In June 2014 Parliament adopted legislation amending the Discrimination Act by adding a new form of discrimination – lack of accessibility – to the existing five (direct and indirect discrimination, harassment (sexual and other harassment), instructions to discriminate and victimisation).[163]

Lack of accessibility is defined as 'the disfavouring of an individual through lack of action to make reasonable adaptation to improve access for persons with disabilities so that they are placed in a similar situation to a person without a disability and which is reasonable with regard to accessibility requirements established by laws and other regulations where such requirements are applicable, and taking into consideration economic and practical considerations, the durability and extent of the contact between the provider of the activity and the individual concerned and other relevant circumstances.' The key elements are disfavour, lack of action, and comparable situation.

Following this amendment, the duty to provide reasonable adaptation measures is no longer limited to the fields of employment and education but extends to most areas covered by the Discrimination Act, excluding however access to employment and housing. In the area of goods and services it will not apply to companies with fewer than 10 employees. In practice however the effects of the amendment will be limited, as the reasonableness of an adaptation measure shall be evaluated in relation to accessibility requirements in existing laws and regulations.

The most important consequence of the introduction of lack of accessibility as a separate form of discrimination is that compensation will now be available to victims in accordance with the Discrimination Act. Previously a conditional fine (paid to the State if the necessary adaptation measure was not adopted within the provided timeframe) was often the only consequence of not fulfilling the existing accessibility requirements.

The amendment entered into force on 1 January 2015.

Internet sources:
http://www.regeringen.se/sb/d/11043/a/236826

POLICY DEVELOPMENT

New Government, new gender policies

Gender

Following the September general elections, in October 2014 a new social-democratic/green Government was formed in Sweden. This implies some new ambitions regarding gender policies and gender-related legislation. These were expressed in the 2015 Budget, which was presented to the Swedish Parliament in November, and in the Declaration of Government,[164] which was presented upon entering office in October. Due to the delicate political balance in the Swedish Parliament (a minority Government) it cannot be predicted that everything will go according to government plan, however.

In its Declaration of Government the Government declared itself 'a feminist Government'. Gender mainstreaming will be strengthened, victims of gender violence will receive more support, rape legislation will be reformed, the pay gap shall be reduced and wage planning made every year, three months of parental leave will be reserved for each parent instead of only two, the so-called childcare support (a kind of minimum support for non-economically active parents voluntarily decided on at municipal level) will

163 SFS 2014:958, Act Amending the Discrimination Act (2008:567), adopted on 26 June 2014. See also *European Anti-Discrimination Law Review*, issue 19, pp. 86-87.
164 Governmental Bill 2014/2015:1.

be abolished, and if women do not make up at least 40 % on company boards by 2016 quota legislation will be introduced.

It is too early to say anything concrete about the outcome of these declarations, but they have the potential to contribute to ensuring substantive equality between women and men.

Internet sources:
Government webpage: www.regeringen.se, accessed 1 April 2015.

TR Turkey

CASE LAW

Constitutional Court decision on discrimination and the right to religious freedom[165]

Religion or belief

The applicant is a female lawyer wearing a headscarf. She filed an individual petition with the Constitutional Court against a lower court decision which barred her from representing her client in a divorce case on the ground that she wore a headscarf in the courtroom.

Before the Constitutional Court, the applicant cited the judgment of the 8th Chamber of the Council of State issued on 5 November 2012, which held that lawyers are not public servants but self-employed professionals providing public services, to whom the constitutional and legal rules regulating the attire of public servants do not apply. The applicant inter alia invoked Articles 24 and 10 of the Constitution concerning the freedom of religion and conscience and the prohibition of discrimination.

The Constitutional Court held that the lower court had violated the applicant's freedom of religion and conscience and had discriminated against her on the basis of her religious beliefs. With regard to the judgment of the European Court of Human Rights in *Leyla Sahin*,[166] invoked by the lower court, the Constitutional Court held that the ECtHR's judgment did not bar Turkey from making legislative changes to advance the scope of human rights and liberties or to remove existing barriers against them.

With regard to the discrimination claim, the Constitutional Court held that in barring lawyers whose heads are covered from representing their clients in the courtroom, the lower court had discriminated against the applicant on the basis of her religious beliefs. The Court found that the lower court erred in its reasoning that 'the headscarf was a strong religious and political symbol against laicism' in the absence of any material finding showing that the applicant, in wearing a headscarf, posed a threat to the rights and freedoms of others or to the protection of public order.

The Constitutional Court sent the case back to the lower court for the rectification of its decision and the remedy of the violation against the applicant to enable her to represent her client in the court.

With this precedent-setting judgment, the Constitutional Court reversed its prior case law, which had formed the sole legal basis for the headscarf ban in Turkey.[167] While the 8th Chamber of the Council of State had in November 2012 exempted lawyers from rules concerning the dress code of public servants, and the Government had on 8 October 2013 amended the regulatory rules concerning the dress code in public offices, removing the headscarf ban imposed on select public service providers, the Constitutional Court's case law on the headscarf was still standing. This is also the first time the Court

165 Constitutional Court, decision of 25 June 2014 on Application No. 2014/256.
166 ECtHR, *Leyla Şahin v. Turkey* (Grand Chamber), Application No. 44774/98, 10 November 2005.
167 Turkish Constitutional Court, E.1989/1, K.1989/2, K.T. 7/3/1989; and E.1990/36, K.1991/8, K.T. 9/4/1991.

found discrimination in a case brought through the individual petition mechanism which was introduced by the Turkish Parliament in September 2012.

Internet sources:
http://www.kararlaryeni.anayasa.gov.tr/BireyselKarar/Content/d6210a91-8f0a-4a2f-bcb8-5b56407fb522?wordsOnly=False

POLICY DEVELOPMENTS

Government lifts the ban on wearing a headscarf in middle and high schools

Religion or belief

In September 2014, the Government announced its decision to lift the headscarf ban in middle and high schools.[168] The government spokesperson justified the amendment on the basis of demands from female students who 'have yearned' for the ban being ended and stated that the amendment was necessary to put into effect the democratic reforms announced by the Government on 30 September 2013.[169] The decision provoked a new heated debate in Turkey, and a teachers' union filed a petition with an administrative court for the annulment of the amendment.

Internet sources:
http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2014/09/20140923.htm&main=http://www.resmigazete.gov.tr/eskiler/2014/09/20140927.htm

The use of public funds to support the development of minority cultures and languages

Racial or ethnic origin

An 'Institute on the Study of Roma Language and Culture' has been opened at the University of Trakya.[170] The Institute is expected to contribute to the development of government policies related to the Roma community. It has the mandate to conduct academic research and produce publications, to partner with national and international institutions pursuing similar goals, and engage in training, consulting, monitoring and data collection activities.

The decision to open a university institute on the Roma was announced as part of the 'democratization package' launched by the Prime Minister on 30 September 2013.[171] The opening of the new Institute has been welcomed cautiously by the Roma associations, which expect the Institute, as a matter of priority, to collect data on the needs and problems of the Roma community.

Internet sources:
http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2013/11/20131106.htm&main=http://www.resmigazete.gov.tr/eskiler/2013/11/20131106.htm

Kurdish national movement clashes with the Government to provide education in Kurdish

Racial or ethnic origin

In September 2014, in protest of the Government's failure to recognise the Kurds' demands for education in their mother tongue, the Kurdish civil society commenced a civil disobedience campaign to provide alternative education without authorisation from the central authorities. Three Kurdish non-governmental organisations established private elementary schools in three designated pilot areas in Turkey's Kurdish region. Opened, funded and run by the civil initiative of three NGOs, the schools were immediately closed down by the judicial authorities upon the instruction of the Ministry of Interior. Furthermore,

168 Regulation on the Clothing of Students at Schools tied to the Ministry of National Education, as revised on 22 September 2014 and published in the Official Gazette on 27 September 2014.
169 See *European Anti-Discrimination Law Review*, issue 18, p. 85.
170 Council of Ministers' decision No. 2014/6070, 6 March 2014, published in the Official Gazette No. 28950, 23 March 2014.
171 See *European Anti-Discrimination Law Review*, issue 18, p. 85.

criminal investigations were initiated against school administrators on charges of opening educational institutions without authorisation and committing offences in the name of a terrorist organisation. On three occasions within one week, the schools were closed down by the Government and opened again by the Kurdish community. Violent clashes occurred and a number of public schools in the area were set on fire by Kurdish protestors. The Minister of Education and other high-level government officials condemned the civil disobedience as unlawful and stated that they will not allow the opening of any school without authorisation from the Ministry of Education.

While a new law adopted on 2 March 2014 by the Turkish Parliament now allows education in minority languages,[172] this right is limited to the secondary level in private schools and does not extend to elementary schools or to public schools. Furthermore there is a content restriction on the education students can receive in Kurdish in secondary schools, excluding subjects such as history, Turkish language and literature, history of revolution and Ataturkism, geography, social sciences, religion and ethics, and other courses related to the Turkish language. These legislative changes were put into effect through amendments made on 5 July 2014 in the Regulation on Private Educational Institutions.[173]

Parliament establishes a parliamentary commission on violence against women

Gender

On 25 November 2014, the Turkish Parliament established a parliamentary commission of inquiry into the problem of violence against women in Turkey. The commission will conduct research and publish a report on its findings, which will be discussed in Parliament.

This is a welcome development. Violence against women is a serious problem in Turkey. The human rights group Bianet has reported that in 2014, 281 women in Turkey were murdered, which represents a 31 % increase on the previous year. Domestic violence, sexual assault, so-called 'honour killings', and trafficking persist in Turkey.

Internet sources:
http://www.resmigazete.gov.tr

UK United Kingdom

LEGISLATIVE DEVELOPMENT

Equal pay audits regulations come in force

Gender

In June 2014 the Government published the draft Equality Act 2010 (Equal Pay Audits) Regulations 2014, which came into force on 1 October 2014. The Regulations would apply only where an employer has been found to be in breach of equal pay legislation. They would require employment tribunals to order employers which had lost an equal pay claim to carry out and publish a pay audit unless an exception applies. Where a pay audit is ordered it must identify any differences in pay between the men and women specified in the order 'and the reasons for those differences' and must 'include the reasons for any potential equal pay breach identified by the audit' and 'the respondent's plan to avoid equal pay breaches occurring or continuing'.

172 Law on the Teaching of and Education in Foreign Languages and the Learning of Different Languages and Dialects by the Turkish Citizens, No. 2923, as revised on 2 March 2014. See *European Anti-Discrimination Law Review*, issue 19, pp 88-89.

173 The Regulation on Private Educational Institutions, as revised on 5 July 2014, available at http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2014/07/20140706.htm&main=http://www.resmigazete.gov.tr/eskiler/2014/07/20140706.htm.

Among the cases in which no equal pay audit would be required to be performed is where it is clear without such an audit 'whether any action is required to avoid equal pay breaches occurring or continuing'. The strange thing about this exception is that the Government is in the process of trying to repeal the power of tribunals to adopt wide-ranging recommendations in the event of successful discrimination claims, while it appears that the Regulations envisage the making of such a recommendation instead of a pay audit order.

Internet sources:
http://www.legislation.gov.uk/ukdsi/2014/9780111116753

CASE LAW

Compatibility of Employment Tribunal fees with EU law

The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 introduced employment tribunal fees for the first time.[174] By reason of the Order, individuals bringing a discrimination claim must pay either £250, followed by £950 prior to hearing (a total of EUR 1400). Remission of fees is available but the large majority of those bringing claims would be ineligible for remission.

All grounds

There have been a number of legal challenges to the 2013 Order. In *Re Fox Solicitors Ltd* the High Court in Scotland (the Court of Session) refused to grant an interim injunction (prior to the hearing of the full claim in this case) prohibiting the introduction of the fees in Scotland. In view of an undertaking given by the Lord Chancellor that the fees paid by any individual would be reimbursed in the event that the challenge eventually succeeded the Court accepted that the balance of convenience lay with the Lord Chancellor and declined to grant the injunction.[175] The full hearing on the merits of this case was stayed however pending the outcome of another case, brought before the English High Court (*R (UNISON) v. Lord Chancellor*).

In February 2014, the English High Court rejected UNISON's challenge in the second case. One of the arguments on which UNISON sought to rely was that the fees imposed made it virtually impossible, or excessively difficult, to exercise non-discrimination rights conferred by EU law. The High Court ruled that, taking into account the remission system for those who could not pay the fees and the fact that the fees were paid in two blocks, with a period of time in between, it appeared that prospective claimants even of modest means could pay them, and that a claim on this basis would require more evidence about how the system operated in practice.[176]

A month after the UNISON challenge failed, official statistics were published showing that employment tribunal applications fell by 79 % in the first six months after fees were imposed.[177] Official statistics also show that those tribunal claims which have been brought since the fees were introduced were broadly as likely to fail or succeed as those brought previously. In view of these statistics, the Court of Appeal granted UNISON leave to appeal the decision of the High Court, but this appeal was stayed pending the outcome of another challenge brought by the same complainant ('UNISON No. 2').

The High Court decided, in *UNISON (No. 2)* that the introduction of tribunal fees did not breach the principle of effectiveness and was not otherwise unlawful.[178] The Court accepted that the statistics showed that the

174 Employment Tribunals and Employment Appeal Tribunal Fees Order 2013 of 28 July 2013, available at: http://www.legislation.gov.uk/uksi/2013/1893/made.
175 *Re Fox Solicitors Ltd* [2013] Scottish Court of Sessions, decision of 11 July 2013, available at: http://www.bailii.org/scot/cases/ScotCS/2013/2013CSOH133.html.
176 *R (UNISON) v. Lord Chancellor* [2014] EWHC 218 (Admin) [2014] ICR 498, England and Wales High Court of Justice, decision of 7 February 2014, available at: http://www.bailii.org/ew/cases/EWHC/Admin/2014/218.html.
177 *Tribunal Statistics (quarterly): October to December 2013*, Ministry of Justice, March 2014: https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-october-to-december-2013.
178 England and Wales High Court of Justice, decision of 17 December 2014, available at: https://www.unison.org.uk/upload/sharepoint/Toweb/UNISON%20ET%20fees%20final%20judgment.pdf.

fees had made claimants less willing to bring claims, but ruled that, in the absence of evidence that they had made any *particular* individual unable to bring a claim, it was not open to the Court to conclude that the fees rendered any EU employment rights ineffective. The Court did not accept, either, that the fees had been shown to disproportionately disadvantage any group defined by reference to a protected characteristic such as sex, ethnicity or disability. If they did have this effect, the Court was satisfied that they were nevertheless justified by the legitimate objectives of (1) transferring one third of the cost of running tribunals to those who used them; (2) making tribunals more efficient and effective by removing unmeritorious claims and (3) encouraging alternative methods of employment dispute resolution.

The Court in *UNISON (No. 2)* made reference to a number of hypothetical scenarios considered by the Court in the first *UNISON* challenge. According to these, low-paid individuals would be required to utilise as much as 160 % of their disposable monthly income to bring a discrimination claim to the Tribunal and 197 % to appeal to the Employment Appeal Tribunal, even where they benefited from the remission scheme designed to ease the burden on the very poorest. The Court in the first challenge concluded, in view of the deadlines for payment, that such individuals had 'a sufficient opportunity … to accumulate funds to pay the fees' and that '[p]roceedings will be expensive but not to the extent that bringing claims will be virtually impossible or excessively difficult'.

Internet sources:
www.parliament.uk/briefing-papers/SN07081.pdf

Duty of reasonable adjustment does not apply where the disability is that of the employee's child, rather than the employee herself

Disability

The claimant was a civilian teacher employed by the Ministry of Defence and stationed in Germany. She sought adjustment by way of a transfer to the UK because the educational facilities which were available to her in Germany were not suitable for the education of her daughter, by reason of her disability. The claimant accepted that Section 20 of the Equality Act 2010 providing for the duty to provide reasonable adjustment, on which she relied, referred clearly to the disability of the employee but argued that the provision had to be read in accordance with Directive 2000/78. An Employment Tribunal rejected her claim, ruling that the concept of associative discrimination recognised in *Coleman v. Attridge Law* did not extend to the duty to make reasonable adjustments. The Employment Appeal Tribunal refused her appeal and she appealed to the Court of Appeal.

The claimant argued before the Court of Appeal that Article 5 of the Directive, which provides that an 'employer shall take appropriate measures, when needed in the particular case, to enable a person with a disability to have access to, participate in or advance in employment or to undergo training', required that an adjustment be made to her (the claimant's) working arrangements to enable her daughter to undergo appropriate training. The Court of Appeal did not agree, ruling that the focus of Article 5, and of Recitals 16 and 20, was on the accommodation of actual and prospective employees and trainees and that any other interpretation would be unworkably vague.[179] The Court also rejected her argument based on the UN CRPD, as it found that the Convention also distinguished between education and employment rights, which were expressly concerned with the rights of persons with disabilities, and rights concerned with wider social protection and living standards, which expressly referred to the rights of the families of disabled persons.

Internet sources:
http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2014/763.html&query=Hainsworth+and+v+and+Ministry+and+of+and+Defence&method=boolean

179 *Hainsworth v. Ministry of Defence,* Court of Appeal, 13 May 2014.

Transgender woman's access to pension

Gender

Women in the UK currently qualify for the state pension at 60, whereas men qualify at the age of 65. Both ages of entitlement will increase over time, and the Government is gradually equalising these ages.

The claimant in this case was a transgender woman who had, when she was still living as a man, married a woman. When the claimant transitioned to living as a woman she did not apply for recognition under the Gender Recognition Act 2004 because it would have required her to divorce her wife, which she was not willing to do. As a result of not being certified in her acquired gender she was treated as male rather than female for the purposes of the state pension age, and was thus refused the pension when she reached 60. She challenged this at the Court of Appeal, relying on Council Directive 79/7/EEC.

The legal challenge failed. The Court of Appeal (relying on the decision of the ECtHR in *Hämäläinen v. Finland*[180]) decided that it was not disproportionate to require the applicant to convert her marriage into a registered partnership as a precondition to legal recognition of an acquired gender. This was a genuine option that provided legal protection for same-sex couples, which is almost identical to that of marriage. However, the Court of Appeal did not accept that the requirement of divorce as a pre-condition to gender certification was discriminatory and contrary to the principle of equal treatment in the Directive.

As of 13 March 2014, with the implementation of the Marriage (Same-Sex Couples) Act 2013, divorce is no longer a pre-requisite for gender certification if both partners to the marriage wish to remain married.

Internet sources:
http://www.bailii.org/ew/cases/EWCA/Civ/2014/1112.html, accessed 23 March 2015.

POLICY DEVELOPMENT

Equality and Human Rights Commission guidance on gender segregation in universities

Gender

In July 2014 the Equality and Human Rights Commission (EHRC) published guidance on gender segregation in universities. The guidance resulted from an uproar in December 2013 over the publication the previous month by Universities UK, the representative body of UK universities, of guidance which appeared to condone the gender segregation of students. That guidance was directed at the management of controversial external speaker events on campus. It contained a number of case studies, one of which suggested that a speaker's demand to speak only to a gender-segregated audience (i.e. one in which women and men were physically separated) could be accommodated if it was religiously motivated. The guidance did not condone, much less advocate, gender segregation of students during their studies, but suggested that gender segregation at the behest of an external speaker could be permitted if, for example, women and men were seated separately side by side rather than men at the front and women at the back.

News coverage of Universities UK's guidance resulted in the publication of reports of a number of incidents of threats and physical force being employed to police gender segregation at university events and the guidance was withdrawn and subsequently republished in amended form. Universities UK said at the time that it would work with the Equality and Human Rights Commission.

The EHRC's guidance now suggests that voluntary segregation is lawful but warns that it is not straightforward to ensure and prove (in the event of a challenge) that segregation is truly voluntary 'both at the booking stage and during the event'. This requires, it is suggested, that 'all attendees would need to be at liberty freely to choose where they wished to sit without any direction, *whether explicit or*

180 [2014] ECHR application No. 37359/09.

merely an implicit expectation' (emphasis added). 'Thus, attendees must have the freedom to choose where they may sit (except where specific seating is designated for speakers, or space is designated for other legitimate reasons, for example to meet childcare or disability access requirements).'

In July 2014 the EHRC also published guidance on the equality law framework within which appointments to boards must be made. The guidance is intended for companies, nomination committees, search firms and recruitment agencies in England, Scotland and Wales.

Internet sources:
http://www.equalityhumanrights.com/publication/gender-segregation-events-and-meetings-guidance-universities-and-students-unions
http://www.equalityhumanrights.com/publication/appointments-boards-and-equality-law

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