European Commission

European equality law review

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

2019/2

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Justice and Consumers

EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Equality and Union citizenship
Unit D.1 Non-discrimination and Roma coordination
Unit D.2 Gender Equality

European Commission
B-1049 Brussels

EUROPEAN COMMISSION

European equality law review

Issue 2 / 2019

Directorate-General for Justice and Consumers

2019

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Luxembourg: Publications Office of the European Union, 2019

Print	ISSN 2443-9592	DS-AY-19-002-EN-C
PDF	ISSN 2443-9606	DS-AY-19-002-EN-N

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Introduction on the state of play

This is the tenth issue of the biannual European equality law review, produced by the European network of legal experts in gender equality and non-discrimination (EELN). This issue provides an overview of legal and policy developments across Europe and as far as possible reflects the state of affairs from 1 January to 30 June 2019. The aim of the EELN is to provide the European Commission and the general public with independent information regarding gender equality and non-discrimination law and, more specifically, the transposition and implementation of the EU equality and non-discrimination directives.

In this issue

This Law Review opens with four in-depth analytical articles. The first article, authored by Sophia Ayada from the European University Institute Florence, investigates the case law of the Court of Justice of the European Union concerning the access of female workers to the labour market. The second article, authored by Panagiota Petroglou, Greek gender equality expert of the European network of legal experts in gender equality and non-discrimination, examines the concepts of sexual harassment, and harassment related to sex, at work; and evaluates relevant EU law limits and potential for future EU legislative action. The third article is authored by Judy Walsh, the Irish non-discrimination expert of the Network, and explores the issue of primacy of national law over EU law with regards to a controversial provision of the Irish Equal Status Act. The final article is authored by Julie Ringelheim from the University of Louvain and examines the implementation of the shift of the burden of proof in non-discrimination cases, focusing on Belgium, France and Ireland. This Law Review also offers a section presenting the most recent case law of the Court of Justice of the European Union and of the European Court of Human Rights in the field of gender equality and non-discrimination, and closes with a section detailing the most recent developments in legislation, case law and policy at the national level.

Recent developments at the European level[1]

On 31 January 2019, the European Parliament adopted amendments to its Rules of Procedure taking gender mainstreaming a step further. Rule 228a now states that:

> 'The Bureau shall adopt a gender action plan aimed at incorporating a gender perspective in all Parliament's activities, at all levels and all stages. The gender action plan shall be monitored bi-annually and reviewed at least every five years.'[2]

Regarding the situation of Roma across Europe, the European Parliament adopted a Resolution in February 2019, calling on the EU and on Member States to adopt strong and effective strategies for the inclusion of Roma post-2020.[3] To improve the framework for Roma integration to be implemented once the current EU framework for Roma integration strategies has expired, the Resolution calls notably for a stronger focus on anti-Gypsyism and a specific goal on non-discrimination.

1 This section, as the rest of the Review, covers the period of 1 January to 30 June 2019.
2 European Parliament, decision of 31 January 2019 on the amendments to Parliament's Rules of Procedure, available at: http://www.europarl.europa.eu/doceo/document/TA-8-2019-0046_EN.html.
3 European Parliament *resolution of 12 February 2019 on the need for a strengthened post-2020 Strategic EU Framework for National Roma Inclusion Strategies and stepping up the fight against anti-Gypsyism* (2019/2509(RSP)), available at: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0075_EN.html.

To mark International Women's Day on 8 March 2019, the European Commission published the last annual report regarding the implementation of its Strategic engagement for gender equality which ends in 2019.[4] The Commission also released a statement on International Women's Day regarding women's rights in the EU in which it highlighted the successes the EU has achieved in creating one of the safest and most equal places in the world for girls and women, with high numbers of females in employment and female occupation of powerful positions. However, the Commission also expressed its concerns about current challenges, inequalities and threats faced by women, including the trivialisation of sexist hate speech online and in public discourse. Many of the current inequalities faced by women are related to the position of women at work and the Commission expressed its hope that the new work-life balance Directive would help to improve this situation.[5]

In March 2019, the European Commission published its third Annual Report on the implementation of the EU List of actions to advance LGBTI equality. The Report presents the measures taken by the Commission in 2018 in a wide range of areas to achieve the goals set by the List of actions.[6] The Commission's commitment to LGBTI equality was further confirmed on the International Day against Homophobia, Transphobia and Biphobia (17 May 2019), through public statements made by Commissioners Jourova and Timmermans, where the important role of Member States in enhancing the effectiveness of the Commission's List of actions was underlined.[7] A statement on this occasion was also released by the Fundamental Rights Agency together with 32 embassies, delegations and permanent diplomatic missions from across the world through the initiative 'Diplomats for Equality'.[8]

The ninth elections to the European Parliament were held between 23 and 26 May 2019, during which there was a slight rise in the ratio of female MEPs compared to the previous elections of 2014, from 37 % to 41 %.[9] However, men still account for the majority of MEPs and therefore gender balance in politics will continue to be an issue of high priority for the European Commission in the future.[10] Following the elections, it can also be noted that a majority of the elected MEPs represent political programmes that pay attention to migrant or refugee integration in one way or another. Within these programmes, most proposals and statements relate to diversity and anti-discrimination against migrants, refugees and/or racial or ethnic minorities, reflecting the current relevance of these issues.[11]

We are delighted at the EU's finalisation of the new Work-Life Balance Directive and the formal adoption of the Directive by the European Council on 12 June 2019.[12] The new Directive is an important step in the promotion of equality between women and men, and aims to increase the participation of women in the labour market as well as to involve fathers in care responsibilities by setting minimum standards for parental, paternity and carer's leave and the right to request flexible working arrangements. It is hoped that the new Directive will facilitate families to better combine caring responsibilities with their professional life, and that it will result in more equal sharing of caring responsibilities between men and women. The Directive shall apply to all workers, men and women, who have an employment contract

4 European Commission, Gender equality strategy, achievements and key areas for action, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/gender-equality-strategy_en.

5 European Commission, Statement by the European Commission on the occasion of International Women's Day 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_19_1494.

6 European Commission, Annual Report 2018 on the Implementation of the List of actions to advance LGBTI equality, DG Justice and Consumers (2019), available at: https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/2018_lgbti_annual_report_final_web_3.pdf.

7 The statements are available at: https://ec.europa.eu/commission/presscorner/detail/en/mex_19_2569.

8 The statement is available at: https://fra.europa.eu/en/news/2019/diplomats-equality-support-idahobit.

9 2019 European election results available at: https://election-results.eu/mep-gender-balance/2019-2024/.

10 European Commission, Statement by the European Commission on the occasion of International Women's Day 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_19_1494.

11 European Web Site on Integration, European Parliament Elections 2019 – What are political parties saying about integration?, available at: https://ec.europa.eu/migrant-integration/news/european-parliament-elections-2019---what-are-political-parties-saying-about-integration.

12 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1565697989462&uri=CELEX:32019L1158.

or employment relationship as defined by the law, collective agreements or practice in force in each Member State. The Work-Life Balance Directive is the first new legislation in this area in 10 years, and repeals the Parental Leave Directive 2010/18/EU.[13] Members States have until August 2022 to comply with this new Directive.

During the first half of 2019, a number of interesting reports were published regarding non-discrimination and gender equality in the EU. In February 2019, the European Parliament published a report on gender responsive EU budgeting; an update of the 2015 study regarding 'The EU Budget for Gender Equality'. The report investigates whether, and to what extent, progress has been made in gender budgeting in the EU since the publication of the 2015 Study.[14] In March 2019, the European Commission published 'She Figures 2018'. The report focused on (1) the presence of women in research across different sectors of the economy; (2) horizontal segregation by sex across different fields of research and development and research occupations; and (3) vertical segregation by sex in academia.[15] The FRA published a report in April 2019 concerning Roma women in nine EU Member States.[16] The report highlights the position of Roma women in education, employment and health. Additionally, it analyses the extent to which they experience hate-motivated discrimination, harassment and physical violence. In April 2019, the European Commission also presented a Mapping of research on Roma children in the EU 2014-2017, which attempts to identify, access and map the kind of research that is publicly available in countries and communities across Europe. The purpose of the Report is to help 'Roma and child-rights actors across Europe to advocate with and on behalf of Roma children.'[17] Finally, the European Disability Forum presented its third European human rights report, 'Ensuring the rights of persons with disabilities to equality and non-discrimination in the European Union'.[18] In addition to a presentation of the state of affairs in each of the EU Member States and at the EU level, the report contains a set of eight concrete and highly relevant recommendations for law and policy makers in Europe.

Network publications and activities

The Network has prepared a number of reports which are being finalised at the time of writing, including four thematic reports. The first is authored by Christopher McCrudden, senior expert of the European network of legal experts in gender equality and non-discrimination, and focuses on Gender-based positive action in employment in Europe by making a comparative analysis of legal and policy approaches in the EU and EEA. Secondly, a thematic report is being prepared by Colm O'Cinneide and Kimberly Liu, both of University College London, presenting and analysing the case law of the Court of Justice of the EU since 2012 related to the Racial Equality and Employment Equality Directives. Additionally, Marion Guerrero from the Vienna Academy for Education, is authoring a report on strategic litigation in gender equality at the national and EU level. Finally, Lilla Farkas, the senior expert on racial and ethnic origin for the Network, is authoring a thematic report together with Dezideriu Gergely, independent researcher and former Executive Director of the European Roma Rights Centre, exploring the issue of racial discrimination in education with a particular focus on segregation of Roma children. In addition to these thematic reports

13 Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010L0018.

14 Policy Department D: Budgetary Affairs, Directorate General for Internal Policies, Gender Responsive EU Budgeting Update of the study 'The EU Budget for Gender Equality' and review of its conclusions and recommendations, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2019/621801/IPOL_STU(2019)621801_EN.pdf.

15 European Commission, She Figures 2018, available at: https://publications.europa.eu/en/publication-detail/-/publication/9540ffa1-4478-11e9-a8ed-01aa75ed71a1/language-en.

16 European Union Agency for Fundamental Rights (FRA), Roma Women in Nine EU Member States, 2019, available at: https://fra.europa.eu/en/publication/2019/eumidis-ii-roma-women.

17 Byrne, K., Szira, J., *Mapping of research on Roma children in the European Union 2014-2017*, European Commission, DG Justice and Consumers, available at: https://ec.europa.eu/info/sites/info/files/mapping_of_research_of_roma_children_in_the_eu_2014_2017_final.pdf.

18 European Disability Forum, *European Human Rights Report, issue 3 – 2019, Ensuring the rights of persons with disabilities to equality and non-discrimination in the European Union*, available at: https://gallery.mailchimp.com/865a5bbea1086c57a41cc876d/files/f407f5b5-0784-4954-b570-2f56e8f10009/EDF_HUMANRIGHTSREPORT_iss3_accessible.pdf.

that will be published before the end of the year, the Network finalised and published the ninth issue of the European equality law review.

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

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Women's full access to the labour market: a fairy stereotyped tale?

Sophia Ayada*

Introduction

This paper investigates the case law of the Court of Justice of the European Union (the Court) concerning the access of female workers to the labour market. It argues that the Court regulates women's access to the labour market by paternalistic rules and gender stereotypes, by contrast to the recommendations of the European legislative institutions.

Defined by Rebecca Cook and Simone Cusack as a 'general view or preconception of attributes or characteristics possessed by, or the roles that should be performed by, members of a particular groups',[1] gender stereotypes reinforce gender inequalities, as they oppose the emancipatory choices available to members of under-privileged groups that would go against their traditionally ascribed characteristics. Cook and Cusack differentiate between sex, sexual, sex role, and compounded stereotypes, as follows:

> 'Sex stereotypes focus on the physical and biological differences between women and men. Sexual stereotypes centre on the sexual interaction of men and women. Sex role stereotypes are the roles and behaviour that are ascribed to and expected of men and women because of their physical, social and cultural constructions. Compounded stereotypes are gender stereotypes that interact with other stereotypes, which ascribe attributes, characteristics or roles to different subgroups of women.'[2]

For the last decade, legal scholarship has highlighted the study of gender stereotyping[3] –the process of ascribing attributes or characteristics to an individual because she belongs to a certain group – at the international level, focusing mostly on Human Rights Courts and institutions.[4] By contrast, the CJEU's reliance upon gender stereotypes has received less attention, with a few exceptions. Clare McGlynn has focused on the ideology of motherhood, which relies on gender stereotypes to ensure women's roles as mothers.[5] Julie C. Suk compared the reliance upon, or refusal of, gender stereotypes in US and EU case law, asking whether gender stereotypes could be considered as a tool for granting special rights to women.[6] Finally, Alexandra Timmer has highlighted the CJEU's inconsistency towards gender

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1 Cook, R.J. and Cusack, S. (2010) *Gender Stereotyping: Transnational Legal Perspectives,* University of Pennsylvania Press, p. 9.

2 Cook, R.J. and Cusack, S. (2010) *Gender Stereotyping: Transnational Legal Perspectives,* University of Pennsylvania Press, pp. 25-30.

3 Roman, D. (2013) 'Les Stéréotypes de Genre, "Vieilles Lunes" Ou Nouvelles Perspectives Pour Le Droit ?' in Hennette-Vauchez, S., Möschel, M. and Roman, D. (eds), *Ce que le genre fait au droit*, Dalloz.

4 Timmer, A. (2011) 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' *Human Rights Law Review* 11(4) p. 707; Brems, E. and Timmer, A. (eds), (2016) *Stereotypes and Human Rights Law*, Intersentia; Oja, L. 'Who Is the "Woman" in Human Rights Law : Narratives of Women's Bodies and Sexuality in Reproduction Jurisprudence' (unpublished doctoral thesis, European University Institute, 2018).

5 McGlynn, C. (2000) 'Ideologies of Motherhood in European Community Sex Equality Law', *European Law Journal* 6(1), p. 29.

6 Suk, Julie C. (2010) 'Are Gender Stereotypes Bad for Women – Rethinking Antidiscrimination Law and Work-Family Conflict' *Columbia Law Review* Vol. 110, No. 1.

stereotypes,[7] in which it is torn between reinforcing and contesting gender stereotypes based on the subject matter.[8]

This article finds a common stereotyping narrative in cases where Member States are relying upon the exceptions to gender equality provided by Directive 76/207.[9] Setting aside cases directly involving pregnancy, breastfeeding, or maternal or parental leave, the article is able to focus on the Court attitude towards women – and its assumptions about their roles on the labour market – in situations where it had the opportunity to ignore women's social roles as mothers and to consider them as non-gendered workers.

The article highlights the existence of sex and sex role stereotypes in the case law of the Court, despite the growing awareness of European institutions of the need to end gender stereotyping in order to achieve gender equality. Indeed, the Council of the European Union, the European Parliament and the European Commission have all called for the end of gender stereotypes that enshrine women's role as unpaid carers and domestic workers, in order to enhance their integration within the labour market.

By contrast, the Court has only acknowledged the importance of the fight against gender stereotypes on a few occasions,[10] despite the large number of cases involving national measures that stereotype women. An analysis of cases concerning women's access to male-dominated professions reveals that Member States have justified their unequal treatment by two main gender stereotypes. On the one hand, they suggested the need for men to exercise specific tasks for 'which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor' and which are assumed to be either too violent or too specialised to be accomplished by women, relying upon the exception to gender equality provided by Article 2(2) of Directive 76/207. This provision has been substituted by Article 14(2) of Directive 2006/54,[11] which provides for a similar exception if the gender-based 'characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.' On the other hand, Article 2(3) of Directive 76/207 – which permits the adoption of discriminatory measures aimed at the protection of women – allowed Member States to argue that the 'vulnerability' of women, notably because of their (potential) motherhood, was a justification for their 'protection' against dangerous and unhealthy lifestyles, in fact leading to their discrimination. This provision is now enshrined in similar terms in Article 28(1) of the Recast Directive.

This article claims that, although the Court's reasoning and the outcomes of some cases have evolved since the 1970s, a further look at its discourse reveals that it repeats similar preconceptions of the role of women in and out of the labour market. In half of the decisions, where women's access to the labour market is restricted, the Court uses an essentialist rationale – that is the view that differences between groups of people, such as women and men, are caused by their difference in nature, rather than being a social construct – replicating traditional gender roles. In the other half of the cases, where the Court has formally prohibited discriminatory measures, its discourses are not substantially emancipatory.

After a brief presentation of the EU legislative framework in relation to gender stereotypes (Section 1), Sections 2 and 3 analyse the case law and the Court's use of, and reliance upon, gender stereotypes. Section 4 demonstrates the Court's assumptions about women's non-violent 'nature' as well as their

7 Timmer, A. (2016) 'Gender Stereotyping in the Case Law of the EU Court of Justice', *European Equality Law Review*, Issue 1, p. 37.

8 The literature on this topic is not extensive. For research on specific case law concerning gender stereotyping of the CJEU, see, for instance, Rozof, Michelle I. (1998) 'Overcoming Traditional Gender Stereotypes in the European Union: The European Court of Justice's Ruling in *Hellmut Marschall v Land Nordrhein-Westfalen*' 12 *Emory International Law Review*.

9 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39.

10 Judgment of 2 August 1993, *Marshall*, C-271/91, ECLI:EU:C:1993:335, para 29-30; Opinion of 27 November 2007, in *Mayr*, C-506/06, ECLI:EU:C:2007:715, footnote 29.

11 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.

subordinate role in the labour market, supporting and reinforcing the ideology of motherhood as normative. The paper closes with a comparison between the case law and the (non-binding) recommendations of the European institutions, concluding that they have been disregarded by the Court.

1 Sex role stereotypes targeted by EU soft law

Since the 1980s, the European institutions have tackled the issue of gender stereotyping through a series of non-binding acts. First, the Council, followed by the European Parliament and then by the Commission, adopted strong statements on the need to fight gender stereotypes in order to end gender discrimination.

As early as 1984, the Council recommended that Member States should eliminate sex role stereotypes, 'based on the idea of a traditional division of roles in society between men and women', and hindering women's working opportunities.[12] The Council also encouraged the employment of women at higher levels of responsibility, as well as in decision-making bodies.[13] The Council reiterated its prescriptions in 1995 in the context of advertising and the media, adopting a resolution encouraging the making of TV 'programmes which challenge traditional images' and that 'present a full, realistic picture of women in society'.[14] It noted the need to bolster 'an image of women and men that was positive and free of prejudices or stereotypes',[15] and called on the Member States to 'promote a diversified and realistic picture of the skills and potential of women and men in society'.[16] Finally, in 2000, the Council adopted a resolution on the balanced participation of women and men in family and working life, where it evoked the necessity of countering gender discrimination 'arising from social practices which still presuppose that women are chiefly responsible for unpaid work related to looking after a family and men chiefly responsible for paid work derived from an economic activity'.[17]

More recently, the European Parliament adopted a specific resolution targeting gender stereotypes, which describes some of the contemporary gender stereotypes, as well as their impact on gender inequalities.[18] The resolution holds up the fight against gender stereotypes as a prerequisite to achieving gender equality, stating that

> 'gender stereotypes tend to perpetuate the status quo of inherited obstacles to achieving gender equality, and to limit women's range of employment choices and personal development, impeding them from realising their full potential as individuals and economic players'.

Moreover, the resolution acknowledges that 'the persistence of stereotypes acts as a barrier to the sharing of family and domestic responsibilities between women and men and hinders the achievement of equality in the labour market', notably by perpetuating the perception of women as 'passive or lesser beings than men', accurately stating that 'women [are] depicted as running the house and caring for children while men are depicted as wage-earners and protectors'.[19]

The persistence of gender stereotypes has finally been denounced by the European Commission. In its 2017-2019 EU action plan, 'Tackling the gender pay gap', one policy priority concerns the exposure

12 Council recommendation of 13 December 1984 on the promotion of positive action for women, 84/635/EEC, Section 1(a), OJ L 331/34.
13 Council recommendation of 13 December 1984 on the promotion of positive action for women, 84/635/EEC, Section 4, OJ L 331/34.
14 Resolution of the Council and the representatives of the Governments of the Member States, meeting within the Council of 5 October 1995, on the image of women and men portrayed in advertising and the media OJ C 296 du 10.11.1995, pp. 15-16, Recitals 4-5.
15 Resolution of the Council on the image of women and men portrayed in advertising and the media, Recital 8.
16 Resolution of the Council on the image of women and men portrayed in advertising and the media, Section II(1).
17 Resolution of the Council and of the Ministers for Employment and Social Policy, meeting within the Council of 29 June 2000 on the balanced participation of women and men in family and working life, OJ C 218, 31/07/2000, pp. 5-7, Recital 2.
18 European Parliament resolution of 12 March 2013 on eliminating gender stereotypes in the EU, 2012/2116(INI).
19 European Parliament resolution of 12 March 2013 on eliminating gender stereotypes in the EU, 2012/2116(INI), Recitals B-D.

of gender stereotypes.[20] According to the Commission, 'stereotypes persist about the role of men and women in society and, by extension, whether they should be on the labour market or at home'. To address that, the Commission adopted a series of objectives aimed at ending gender stereotypes, such as supporting transnational projects tackling stereotypes and segregation in education, training and in the labour market.

The relationship between gender stereotypes and gender inequalities is hence recognised by these three European institutions, which are addressing the issue. In contrast, the Court has not openly acknowledged the influence of gender stereotyping on gender equality. The following sections focus on a selection of cases and examine the approach taken by the Court with regards to gender stereotypes.

2 Women's 'nature' in the case law

This section analyses the Member States' and the Court's reliance upon sex and sex role stereotypes that essentialise women's skills and abilities by perceiving them as the product of nature rather than as social constructs. The section focuses on the interpretation of Article 2(2) of Directive 76/207, which provides an exception to the principle of equal treatment between women and men. Accordingly, unequal treatment is authorised in activities in 'which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor'.

2.1 Discrimination in armed forces

Women as objects of protection

The *Johnston* case concerned the UK refusal to renew the temporary employment contract of Mrs Johnston, a British policewoman.[21] Due to the political context of Northern Ireland in 1986, described by the British government and Advocate General Darmon as, 'the longest, most violent terrorist campaign ever known in the two parts of Ireland'[22] all members of the police force were required to hold firearms. As the legislation prohibited policewomen from carrying weapons, Mrs Johnston was dismissed from the police force, despite her personal ambition to learn the handling of firearms.

The British decision only to arm policemen, rather than all members of the police force was justified by three arguments. First, the decision aimed 'to prevent the risk of attacks on women officers which might enable assailants to steal their firearms', relying upon the difference in physical strength between women and men. Secondly, it sought 'to maintain the position of women officers in the community', that is in the social field with families and children. Finally, it was intended 'to maintain, as far as women officers were concerned, the ideal of an unarmed police force', building upon 'the probable public reaction if armed policewomen appeared on the streets'.

Indeed, according to the British Government, the authority of the police force was built on the representation of its agents, and on the perception of their authority by citizens, thus implicitly admitting that the British state authority could not be embodied by women. This element can also be found in the Chief Constable's certificate, explaining the exclusion of Mrs Johnston from the police force for the purpose of 'safeguarding national security'. According to this certificate, the second reason for the exclusion of Mrs Johnston was 'protecting public safety'.[23] Indeed, the global aim of the British policy

20 European Commission (2017) Communication to the European Parliament, the Council and the European Economic and Social Committee, *EU Action Plan 2017-2019 – Tackling the gender pay gap*, COM(2017) 0678 final.
21 Judgment of 15 May 1986, *Johnston*, C-222/84, ECLI:EU:C:1986:206.
22 Opinion of 28 January 1986, in *Johnston*, C-222/84, ECLI:EU:C:1986:44, para 1. This expression is a quote from the British government submission in the case: ECtHR, *Ireland v the United Kingdom*, no. 5310/71, para. 11.
23 Judgment of 15 May 1986, *Johnston*, C-222/84, ECLI:EU:C:1986:206, para 8.

was the fight against terrorism in Northern Ireland. But its underlying rationale was that national security could only be ensured by police*men*. The UK jurisdiction submitted several questions. In its first question, the national court asked the CJEU whether the safeguarding of national security or the protection of public safety or public order could justify the non-application of Directive 76/207 on women and men's equal access to the labour market on equal treatment, while questions 2 to 6 concerned the compatibility with the Directive of the British legislation limiting the access to the profession to men.

In order to interpret the Directive, the Court built its argumentation upon the threat to public safety. The Court 'demonstrated' that within the current political context in Ireland, the gender of Mrs Johnston constituted a determining factor. The Court assessed that if women were to be armed, they might be frequent targets for assassination contrary to the requirements of public safety,[24] without relying upon any empirical data or evidence determining the extent to which women were targeted more often than men.

Another element stemming from the Court's reasoning is its assumption that public safety relates to the protection of women, who allegedly need to be looked after by the state, rather than the protection of all British citizens. By doing so, the Court used the public safety exception *against* policewomen. Nevertheless, the public safety exception was never thought of as a means to limit the action of an individual in order to protect herself.[25] This exception was meant to protect individuals from the action of others. In contrast, in *Johnston*, the Court used the public safety exception in a patronising fashion, underlining the need for policewomen to be protected by the state, rather than to be trusted to protect the state.

This benevolent paternalism is based on the idea of the vulnerability of women requiring the state to protect them from their own actions. However, it also has harmful consequences, as the Court favourably received the British argument on the usefulness of women in 'family-related' fields, and thus that it was necessary to maintain the position of women officers in the community (that is in the social field with families and children), rather than as the 'point of the arrow head'.

Men as 'point of the arrow head'

The alleged inability of women to ensure national security is to be found too in the *Sirdar* case.[26] A female cook's request to join the Royal Marines was denied on the ground that her gender precluded any use of physical force in case of an unpredicted attack. As a consequence, the principle of interoperability between members of the Royal Marines 'that is to say, the need for every Marine, irrespective of *his* specialisation, to be capable of fighting in a commando unit' would not be assured.[27]

The Court did not question this assessment. Furthermore, it did not question the inconsistency between the policies of the UK navy and army on women, despite the fact that women could be soldiers within the land army, and thus be interoperable. Moreover, although the Court rightly required an assessment of the effectiveness of the national measure with regard to the protection of public safety,[28] it only undertook a swift evaluation of the necessity and proportionality of the measure. Concerning the 'necessity' to exclude women from the Royal Marines, the Court did not look upon its relevance regarding the effectiveness of women in the army. Instead of focusing on the relevance of the interoperability rule as such, the Court examined the relevance of the interoperability rule in the context of the Royal Marines and concluded that the measure was justified, because:

24 Judgment of 15 May 1986, *Johnston*, C-222/84, ECLI:EU:C:1986:206, para 36.
25 Koutrakos, Panos Nic Shuibhne, Niamh and Syrpis, Phil (2016) *Exceptions from EU Free Movement Law: Derogation, Justification, and Proportionality*, Hart Publishing.
26 Judgment of 26 October 1999, *Sirdar*, C-273/97, ECLI:EU:C:1999:523.
27 Judgment of 26 October 1999, *Sirdar*, C-273/97, ECLI:EU:C:1999:523, para 7 (emphasis added).
28 Judgment of 26 October 1999, *Sirdar*, C-273/97, ECLI:EU:C:1999:523, para 29.

> 'the organisation of the Royal Marines differs fundamentally from that of other units in the British armed forces, of which they are the "point of the arrow head". They are a small force and are intended to be the first line of attack. It has been established that, within this corps, chefs are indeed also required to serve as front-line commandos, that all members of the corps are engaged and trained for that purpose, and that there are no exceptions to this rule at the time of recruitment'.[29]

Interestingly enough, the Court does not investigate the exclusion of women from this corps. Indeed, the judgment does not examine the effectiveness and the necessity of the measure, nor does it question the fragility or physical weaknesses of women suggested by the British Government as the basis for women's exclusion from the Royal Marines. Rather, in a tautological fashion, the Court justified the exclusion of women from the Royal Marines by the peculiarity of this corps. The Court assumed that because of the physical imbalance between women and men, the former could not replace the latter in fighting, even though women were soldiers in many armies worldwide.

This assumption reveals the Court's perception of women, who are thought of as not physically strong enough to protect the country. Indeed, by choosing not to examine the possibility of women being as effective as men in the field, the Court assumed their inferiority and their status as accessories in comparison to men's superiority and status as principals. If women soldiers cannot be interchangeable with men soldiers, it means that they are not equal and thus, as only men can effectively protect the country, that women are second-class soldiers.

This assumption replicates a gendered and hierarchical division of labour, with, on the one hand, the finest of the army being the first line of attack and 'point of the arrow-head', and on the other hand, unspecialised and less necessary units, where women belong. For women to be part of a specific force is shown as unrealistic, and the excellence of the Royal Marine, which justifies the exclusion of women, is actually to be preserved by the exclusion of women.

Women as auxiliaries and entertainers

The *Kreil* case concerns the German prohibition on women entering the army, except in medical units and military-music services.[30] The German Government justified this prohibition under Article 2(3) of the Directive, which authorises the adoption of discriminatory provisions aimed at 'the protection of women, particularly as regards pregnancy and maternity'. The Government defended the need 'to prevent women from taking part in warfare', in order to 'ensure that women are on no account exposed to enemy fire as combatants' and thus not to be 'the object of attack' or susceptible to falling into enemy hands, unlike 'those who take part in hostilities using weapons or weapons systems'.[31]

By contrast, Advocate General La Pergola required the application of Article 2(2). The Advocate General considered that the only possibility to apply Article 2(3) would have been if 'the risks to which women would be exposed in units of the Bundeswehr that require the use of arms are any different from or greater than the risks faced by men carrying out those same duties', which was not the case.[32]

The applicability of Article 2(2) was equally argued by the Commission and the Italian Government, which claimed that if 'there can in principle be no objection to this kind of basic defence policy decision by a Member State', it is however necessary to 'distinguish between … posts that involve a specific risk, and technical activities which may be carried out behind the lines, do not involve specific risks and do not demand

29 Judgment of 26 October 1999, *Sirdar*, C-273/97, ECLI:EU:C:1999:523, para 30.
30 Judgment of 11 January 2000, *Kreil*, C-285/98, ECLI:EU:C:2000:2.
31 Opinion of 26 October 1999 in *Kreil*, C-285/98, ECLI:EU:C:1999:525, para 12.
32 Opinion of 26 October 1999 in *Kreil*, C-285/98, ECLI:EU:C:1999:525, para 13.

special physical strength'.[33] The German Government disagreed with this categorisation and claimed that women had to be excluded from all the army sectors, because of the risk of not being able to ensure the 'interoperability' of all soldiers 'without differentiating between front line and non-front-line duties'.

The Court examined whether the German measures had 'the purpose of guaranteeing public security' and their appropriateness and necessity in reaching this aim. Immediately, the Court noticed the scope of their exclusion, 'which applies to almost all military posts in the Bundeswehr'.[34] As Article 2(2) of the Directive only justifies the exclusion of women to specific activities, the Court noticed its inapplicability in the case at stake, before highlighting that 'the fact that persons serving in those forces may be called on to use arms cannot in itself justify the exclusion of women from access to military posts'.[35] The conclusion of incompatibility was hence purely justified by the fact that a blanket exclusion of all women from the army could not be justified by the specific nature of the tasks, which vary from sector to sector. Although one can regret the absence of a stronger anti-stereotyping reasoning of the Court, the outcome of the decision demonstrates the evolution of its vision towards women, who are now envisaged as able to be called on to use arms, 'in order to defend themselves and to assist others', a possibility that was not envisaged in *Johnston* and *Sirdar*.[36]

170 cm of muscle

Ruled on in 2017, the *Kalliri* case also concerned the physical (in)abilities of women to perform certain duties.[37] The Greek legislation imposed a minimum height of 1.70 m for applicants seeking to enter the police school. The referring jurisdiction found that a much larger number of women than men are of a height of less than 1.70 m, and thus that women were much more disadvantaged by the legislation than men. The Greek Government justified its indirectly discriminatory measure by the need 'to enable the effective accomplishment of the task of the Greek police',[38] which requires members of the police force to be of a certain height.

The Court first recognised that the concern to ensure the operational capacity and proper functioning of the police services did constitute a legitimate objective. Nevertheless, the appropriateness and the necessity of the measure was more difficult to assess. Concerning the operational necessity for members of the police force to be of a minimum height of 1.70 m to ensure the proper functioning of the police, the Court recognised that some police services did necessitate a certain amount of physical strength on the part of the agent.

Furthermore, the Court noticed that until 2003, the Greek legislation did provide for different minimum heights for women and men (165 cm and 170 cm respectively) who sought to join the police services. The Court also compared this legislation with the Greek laws on the minimum height for members of the armed forces, port police and coast guard, fixing a smaller minimum height to permit women access to those professions. Thus, the Court ruled that the aim of the legislation could be achieved with less restrictive measures, 'such as a pre-selection of candidates based on specific tests allowing their physical ability to be assessed',[39] although leaving the assessment of the legitimacy, appropriateness and necessity of the disputed legislation to the national jurisdiction.

Nevertheless, by acknowledging that some services, mainly administrative ones, did not require any muscular capacity, and by suggesting that agents who were less than 1.70 m could work in such services, the Court implied that these agents could not have the physical strength required for participating in

33 Opinion of 26 October 1999 in *Kreil*, C-285/98, ECLI:EU:C:1999:525, para 14.
34 Judgment of 11 January 2000, *Kreil*, C-285/98, ECLI:EU:C:2000:2, para 27.
35 Judgment of 11 January 2000, *Kreil*, C-285/98, ECLI:EU:C:2000:2, para 28.
36 Judgment of 11 January 2000, *Kreil*, C-285/98, ECLI:EU:C:2000:2, para 28.
37 Judgment of 18 October 2017, *Kalliri,* C-409/16, ECLI:EU:C:2017:767.
38 Judgment of 18 October 2017, *Kalliri,* C-409/16, ECLI:EU:C:2017:767, para 25.
39 Judgment of 18 October 2017, *Kalliri,* C-409/16, ECLI:EU:C:2017:767, para 42.

fighting units.[40] The Court criticised the general scope of the height limitation, which was imposed on all members of the police force without consideration of their services. However, by establishing a difference between services, the Court did not consider the fact that all individuals, without consideration of height, could have the required muscular capacity and physical strength so as to ensure the proper functioning of the police. As in *Johnston*, where the Court understood the UK gendered organisation of labour, the Court seemed to advise the Greek Government to impose height limitation only for non-administrative services, thus authorising them to exclude women from those services.

2.2 Discrimination in unarmed forces

Half trained, half involved

The *Rinke* case concerns a preliminary reference on the validity of an EU provision.[41] According to the German legislation implementing Article 34 of Directive 93/16 on the free movement of doctors and the mutual recognition of their diplomas, the qualification of general practitioner could be refused to any candidate who undertook a part-time general medical practice but who was unable to attend periods of full-time training. The compatibility of those provisions with the European principle of the prohibition of discrimination on the ground of sex was contested.

Based on the *travaux préparatoires* of the directive and the opinion of 'some experts in the sector itself [who] saw no objection to entirely part-time training in general medical practice, Advocate General Geelhoed argued that 'the need to include a full-time component in part-time training was not generally recognised'.[42] He then turned to the appreciation of the argument brought by the Commission and the Council, which justified the necessity of the contested legislation by three arguments:

> 'gaining the necessary experience of following patients' illnesses as they may develop over time; acquiring sufficient experience of the various situations which may occur in particular in general medical practice; and the differences between the profession of general medical practitioner and that of other medical specialists and the associated different training requirements.'

On the two first arguments concerning the doctors' experience, Advocate General Geelhoed underlined that, although all doctors – were they general practitioners or specialists – needed to be properly experienced, undergoing periods of full-time training in part-time studies was not required in the case of specialists. Moreover, Advocate General Geelhoed highlighted that 'the Court has not been satisfied with generalisations such as the presumed lesser involvement of part-time workers or the lesser ability of such workers to acquire skills and experience',[43] leading him to conclude that the measure was discriminatory.

By contrast, the Court based its reasoning solely on the very theoretical necessity to require periods of full-time training for the purpose of guaranteeing public health as a justification for the indirectly discriminatory measure, qualified as such by the overrepresentation of women in part-time professions and practices. Indeed, relying upon statistical data, the Court demonstrated that women were more targeted by this measure than men, an unbalance 'which can be explained in particular by the unequal division of domestic tasks between women and men'.[44] Nevertheless, when turning to the justification of the indirect discrimination, the Court ruled that the contested provision was legitimate as it aimed to protect public health, by contrast with the opinion of Advocate General Geelhoed, which submitted that the provision was neither justified nor legitimate.

40 Judgment of 18 October 2017, *Kalliri,* C-409/16, ECLI:EU:C:2017:767, para 38.
41 Judgment of 9 September 2003, *Rinke,* C-25/02, ECLI:EU:C:2003:435.
42 Opinion of 6 February 2003, in *Rinke*, C-25/02, ECLI:EU:C:2003:77, paras 63-64.
43 Opinion of 6 February 2003, in *Rinke*, C-25/02, ECLI:EU:C:2003:77, para 70.
44 Judgment of 9 September 2003, *Rinke,* C-25/02, ECLI:EU:C:2003:435, para 35.

The Court allowed the appropriateness of the measure because 'that requirement [enabled] doctors to acquire the experience necessary, by following patients' pathological conditions as they may evolve over time, and to obtain sufficient experience in the various situations likely to arise more particularly in general medical practice.' However, the Court did not assess how 'following patients' pathological conditions' could not be ensured by part-time training, as such training is not shorter over time. Likewise, the impossibility of acquiring 'sufficient experience in the various situations likely to arise' in part-time training can be criticised, given that part-time training will encompass the same hours of training in total, although allocated differently over time.

3 The 'protection' of women by the case law

According to Article 2(3) of Directive 76/207, the directive's application 'shall be without prejudice to provisions concerning the protection of women, *particularly* as regards pregnancy and maternity'. Admittedly, the Court has interpreted this provision restrictively, refusing to protect women who are not pregnant or are not mothers. Nevertheless, this section argues that the Court defines the scope of this provision by portraying maternity as a natural state, thereby reinforcing the role of women as mothers rather than workers, even in cases where the female applicants where neither pregnant nor mothers.

Night work for women

In the *Stoeckel* case, the Court was called upon to assess whether the French legislation, prohibiting women's night work, was meant to protect them – and thus justified under EU law.[45] The French and the Italian Governments relied upon the assumed physiological differences between women and men, showing the vulnerability of women and their necessity to be protected. Advocate General Tesauro described the arguments of the national legislations prohibiting night work to women in these terms:

> 'Female workers were ... regarded as physically weaker and thus more vulnerable to certain consequences of nightwork, such as the possibility of physical or mental problems. In addition, concern was expressed about the risks to which women might be exposed when going to their place of work at night and it was also regarded as somewhat 'inappropriate' that women should undertake nightwork in the company of workers of the opposite sex. An additional factor in the aversion to nightwork by female workers derived from deeply held convictions as to the social role of the woman as a mother and focal point of the family unit: the woman should preferably be at home, looking after the family. Nightwork was thus regarded as particularly disruptive to family life and harmful to society.'[46]

Advocate General Tesauro also relied on the history of women night work prohibitions throughout Europe, describing it as 'a victory for the working classes, forming part of legislation intended to protect in particular women and children, in other words those who were regarded as the weakest members of society, exposed to the most risks.' Although this 'victory' was indeed one for male workers, who faced less competition on the labour market where women earned a lower wage,[47] it has been argued that instead of being a protective measure for women, the prohibition of night work was a justification for their exclusion from the labour market, entrenching their social roles as wives and mothers that had been undermined by capitalism and its workforce needs.[48]

45 Judgment of 25 July 1991, *Stoeckel,* C-345/89, ECLI:EU:C:1991:324. The two cases C-13/93 *Minne* (3 February 1994) ECLI:EU:C:1994:39 and C-207/96 *Commission v Italy* (4 December 1997) ECLI:EU:C:1997:583, concerned the same facts and the Court relied upon its findings in *Stoeckel*.

46 Opinion of 24 January 1991 in *Stoeckel,* C-345/89, ECLI:EU:C:1991:29, para 5.

47 Pinchbeck, I. (1969) *Women Workers and the Industrial Revolution, 1750-1850* (revised edition) Cass.

48 Walby, S. (1986) *Patriarchy at Work: Patriarchal and Capitalist Relations in Employment,* Oxford, Polity Press in association with B Blackwell, pp. 110-111.

The Court refused to qualify the measure as protecting women, first because the risks faced by women in night work were, except in cases of pregnancy or maternity, inherently no different from men's.[49] Secondly, on the risks of attacks faced by women when going to work at night, the Court underlined the possibility of adopting appropriate measures, which would not undermine equal treatment between women and men,[50] such as measures that would target assailants rather than the victims. Finally, concerning the family responsibilities of women, the Court affirmed that 'the Directive [was] not designed to settle questions concerned with the organization of the family or to alter the division of responsibility between parents'.[51]

Thus, the Court ruled fiercely in favour of equality between women and men at work. However, it did not rule that although the measure was meant to be for the protection of women, it was disproportionate, as proposed by Advocate General Tesauro. The Court rather posited that 'the concern to provide protection, by which the general prohibition of night work by women was originally inspired, no longer appears to be well founded'.[52]

Undermining women

An action for infringement was brought by the Commission on the legality of the Austrian prohibition of women's employment in the underground mining industry and in all posts involving work in a high-pressure atmosphere.[53] These prohibitions were justified by women's alleged inabilities to perform physically demanding work. According to the Austrian Government, 'women do not have the same build as men and are physically weaker', and have inferior respiratory capabilities. Thus, it claimed the applicability of Article 2(3) of the Directive, as the prohibition concerned tasks that entailed 'greater physical strain on their part and exposes them to greater health risks than men'.[54]

Advocate General Jacobs refused to endorse this claim and noted that Article 2(3) was meant to 'protect a woman's need' in two sets of situations: first, during pregnancy and 'thereafter until such time as her physiological and mental functions have returned to normal after childbirth'; and secondly, 'to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth'.[55]

The Court built on the opinion and ruled the measure incompatible with EU law for the following reasons. First, a law could not exclude women from a certain profession because they are in average smaller and less strong than men, 'while men with similar physical features are accepted for that employment'.[56] Secondly,

> 'the ambit of the general prohibition [...] is very wide, inasmuch as it excludes women even from work that is not physically strenuous and that does not, therefore, present any specific risk to the preservation of a woman's biological capacity to become pregnant and to give birth, or to the safety or health of the pregnant worker or for one who is breast-feeding or who has recently given birth, or to the foetus'.[57]

Likewise, concerning the prohibition of the employment of women in diving work, the Court relied on the fact that the legislation excluded women 'from work that does not involve significant physical stress

49 Judgment of 25 July 1991, *Stoeckel,* C-345/89, ECLI:EU:C:1991:324, para 15.
50 Judgment of 25 July 1991, *Stoeckel,* C-345/89, ECLI:EU:C:1991:324, para 16.
51 Judgment of 25 July 1991, *Stoeckel,* C-345/89, ECLI:EU:C:1991:324, para 17.
52 Judgment of 25 July 1991, *Stoeckel,* C-345/89, ECLI:EU:C:1991:324, para 18.
53 Judgment of 1 February 2005, *Commission v Austria*, C-203/03, ECLI:EU:C:2005:76.
54 Opinion of 8 July 2004 in *Commission v Austria*, C-203/03, ECLI:EU:C:2004:423, para 39.
55 Opinion of 8 July 2004 in *Commission v Austria*, C-203/03, ECLI:EU:C:2004:423, para 41.
56 Judgment of 1 February 2005, *Commission v Austria*, C-203/03, ECLI:EU:C:2005:76, para 46.
57 Judgment of 1 February 2005, *Commission v Austria*, C-203/03, ECLI:EU:C:2005:76, para 47, (emphasis added).

and thus clearly goes beyond what is necessary to ensure that women are protected'.[58] A reasoning *a contrario* implies that, according to the Court, a law that would not have excluded women from 'activity in the fields of biology, archaeology, tourism and police work [...] that does not involve significant physical stress',[59] but merely from purely 'physical' activities, would have been compatible with EU law, as it would have aimed at the protection of women.

The Court also considered the biological arguments presented by the Austrian Government, claiming that 'women have lesser respiratory capacity and a lower red blood cell count'.[60] The argument was ruled out by the Court, relying upon the fact that the argument was based on average values 'with significant areas of overlap of individual values for women and individual values for men' and thus that they could not be reliable. One wonders what would have been the solution of the Court if indeed, the respiratory capacity and red blood cell count of women did not overlap with those of men. Indeed, the Court did not question the causal link suggested by the Austrian Government between physiological elements and the necessity for women to be protected.

The presumption that women need to be protected even outside the realm of pregnancy is hence not refuted by the Court and might restrict women's access to the labour market for 'protective reasons', demonstrating the Court's benevolent paternalism.

4 The persistence of and the emphasis on gender stereotypes in the Court's case law

4.1 Women and the exercise of official authority

From the four cases previously scrutinised which relate to the exercise of official authority by women, two enshrine the inaccessibility of either specific sections of the army (*Sirdar*) or the whole police force (*Johnston*) to women. In its two other decisions (*Kreil* and *Kalliri*) the Court found the national legislation incompatible with EU law, notably because the wide scope of application excluded women from either almost the entire army, or the whole police force. However, in all of the four cases, the Court portrays women with common traits indicating that the handling of firearms could better be assumed by men, building on traditional views of women.

It stems from the case law of the Court that the exclusion of women from police forces and armies is justified by the alleged necessity to ensure the national security. This justification reveals two assumptions shared by Member States and the Court. First, when concluding that national security cannot be safeguarded by female soldiers, women are seen as unable to ensure public safety.[61] In *Johnston*, the British Government excluded women 'to prevent the risk of attacks on women officers which might enable assailants to steal their firearms', while in *Sirdar*, it stated that women were not 'capable of fighting in a commando unit', without being contradicted by the Court. In *Kalliri*, the Court underlined that several units within the police did not necessitate a certain amount of physical strength on the part of their agents, relegating women to non-armed roles. The example of *Kalliri* additionally exposes the importance of the physical 'nature' of women to exclude them from armed roles. Without relying upon any statistical and/or physiological data, Member States and the Court use their preconceptions of women's muscular strength to deny women their capacity to effectively protect the state.

58 Judgment of 1 February 2005, *Commission v Austria*, C-203/03, ECLI:EU:C:2005:76, para 71.
59 Judgment of 1 February 2005, *Commission v Austria*, C-203/03, ECLI:EU:C:2005:76, paras 70-71.
60 Judgment of 1 February 2005, *Commission v Austria*, C-203/03, ECLI:EU:C:2005:76, para 73.
61 Coyle, S. (2018) 'Labour Rights as Natural Rights' in Martha Fineman and Jonathan W Fineman (eds), *Vulnerability and the legal organization of work*.

It is only when women's physical abilities are proved to be as good as men's that women are allowed to perform those functions,[62] as the analysis of *Kalliri* and *Sirdar* has shown. Men are conceived as the norm of the 'ideal worker', a norm which must be met by women in order to be considered good enough to enter the labour market.[63] Clearly, the 'ideal worker', in addition to being a man, is free to devote the majority of his time to the labour market, and thus does not need to provide domestic services such as (child)care and domestic labour. Therefore, women can only be seen as 'ideal workers' when they are childfree and/or not married. An example of this perception of female workers as 'non-ideal workers' is to be found in *Rinke*, where the Court ruled against the normalisation of part-time training, seeing part-time students as less-than-ideal workers.

Nevertheless, when permitted, female soldiers can join the army if they follow the rules set by male soldiers. A telling example of the implementation of such rules is shown in the many cases of sexual harassment suffered by female soldiers.[64] Although nowadays, no EU army is completely closed to women, several armies strictly prohibit the entry of women to certain units, such as the British Royal Marines or the French Foreign Legion. Furthermore, as previously presented in *Johnston* and *Sirdar*, denying women the exercise of official authority is often still authorised by the Court. In these decisions, the Court has argued that national security could not be ensured with women on board, as they could not be 'the point of the arrow head' but only back-ups in case of necessity – instead of being assumed to be capable of protecting public safety, *i.e.* that of civilians, women are automatically considered as part of the category of civilians to be protected.

Moreover, the very use of the expression 'point of the arrow head' to describe a unit that cannot welcome women because of its particularity, demonstrates the vision of the Court that particular jobs cannot be undertaken by women. Thus, the Court replicates and reinforces the stereotype according to which 'specialised' jobs belong to men, whereas women should stick to 'non-specialised' ones,[65] hence enshrining a gendered and unequal repartition of labour between women and men.

4.2 Women's confinement in second class jobs: the replication in the labour market of the public and domestic sphere divide

As shown in the previous section, the Court is enforcing a gender-based repartition of labour between men, who are 'the point of the arrow head', and women, who cannot be part of specialised units and are enjoined to enlist in non-fighting units, thus confining them to accessory status and to less valued occupational activities.

This categorisation recalls the traditional division between the private sphere – that of domesticity – devoted to women and family, and the public sphere – that of non-domestic affairs – devoted to men. Traditionally, while men were fully integrated within the paid labour market, women were confined within the realm of the private sphere, because of their overwhelming responsibility for unpaid household and care work.[66] This responsibility borne by women was acknowledged by the Court in *Rinke,* where it recognised their role as primary carer at home, and hence the time they allocated to unpaid care work.

62 This element is noticeable in *Kalliri*, with the argumentation of the Greek Government making the protection of public safety conditional upon male height.

63 Slaughter, Mary M. (1995) 'The Legal Construction of "Mother"' in Martha Fineman and Isabel Karpin (eds), *Mothers in law: feminist theory and the legal regulation of motherhood*, Columbia University Press.

64 Audoin-Rouzeau, S. (2011) 'Armées et Guerres : Une Brèche Au Coeur Du Modèle Viril?' in Alain Corbin, Jean-Jacques Courtine and Georges Vigarello (eds), *Histoire de la virilité*, Seuil; Settoul, E. (2017) 'Entre Domination Structurelle et Capital Symbolique Positif: L'expérience Des Femmes Militaires Issues de l'immigration' in Mireille Eberhard and others (eds), *Genre et discriminations*, Éditions iXe.

65 Walby, S. (1986) *Patriarchy at Work: Patriarchal and Capitalist Relations in Employment,* Oxford, Polity Press in association with B. Blackwell.

66 Pateman, C. (1989) *The Sexual Contract* (reprint) Polity Press.

With the entry of the majority of women into paid work,[67] the private/public divide has been extended into the labour market, enshrining a new repartition of labour between female and male workers,[68] still based on a stereotyped vision of women, including features such as their innate caring ability. Thus, women have been seen more fit for 'family-related' fields,[69] traditionally associated with low wages, and are excluded from top and governing positions.[70] This transformation of gender roles, to use the expression of Sylvia Walby,[71] has been described as representing the attempts 'by a given social group to maintain or enhance the privileges [either] by the process of subordination',[72] or by the very exclusion of women from certain fields.

Such logic of exclusion was clearly adopted by the Court in *Johnston*, where it accepted the state's logic, which sought to maintain the male police officer's hegemony within the police force. This logic accompanies the resistance many women have faced when seeking access to the army, and who are urged to join non-fighting sectors, a rationale shared by the Court in *Kalliri* and *Johnston.* As a consequence, the army and the police force remain gendered realms, with fighting sections composed of the majority of men, and non-fighting and 'care-related' units of the majority of women.[73]

Likewise, in *Rinke*, the Court ruled that the 'necessary experience' required in order to be a general practitioner could not be obtained with part-time training, due to the great responsibilities of general practitioners towards their patients. In this ruling, the Court operates a classification that differentiates between important tasks with great responsibilities, which cannot be taught part-time, and tasks without this level of importance, which can be learnt through part-time training. The first tasks, which are more important (and usually associated with higher wages) will often be attributed to men who can spend periods in full-time training during their late twenties, while women who cannot afford such time, will have to engage in 'less important' tasks, which are usually accompanied by lower wages. Thus, a gendered division of work within the labour market is clearly embraced in the Court's case law, and this gendered division of labour has explicit consequences for the private/public divide.

However, women's relegation to second-class jobs, when they are not totally excluded from the labour market as in *Sirdar*, *Johnston* or *Rinke*, is ultimately linked to their role of primary caretaker, and ultimately the institution of motherhood.

67 Bearing in mind that black and working-class women were already working, see *bell hooks (2015), Ain't I a Woman: Black Women and Feminism,* (Second edition), Routledge, Taylor & Francis Group.

68 Mair, J. (2017) 'The Breadwinner, the Homemaker and the Worker/Carer – New Stereotypes for Old?' in Anne MO Griffiths, Sanna Mustasaari and Anna Mäki-Petäjä-Leinonen (eds), *Subjectivity, citizenship and belonging in law: identities and intersections*, Routledge.

69 In France for instance, 'women are overrepresented in professions embodying the so-called "feminine values" (public administration, health, social policies, services to individuals: 97 % of home helps and secretaries, 90 % of nurses, 73 % of public service employees and 66 % of teachers are women'. Observatoire des inégalités (2014), 'Une répartition déséquilibrée des professions entre les hommes et les femmes' (An imbalance in the distribution of professions between men and women), 11 December 2014. https://www.inegalites.fr/Une-repartition-desequilibree-des-professions-entre-les-hommes-et-les-femmes?id_theme=22.

70 Again, in France, 'women are logically found at the bottom of the hierarchy of socio-professional categories: women represent 77 % of employees, 51 % of middle-level profession (in the fields of health, social work or education), against 16 % of company managers and 40 % of senior executives'. Observatoire des inégalités (2014), 'Une répartition déséquilibrée des professions entre les hommes et les femmes', 11 December 2014. https://www.inegalites.fr/Une-repartition-desequilibree-des-professions-entre-les-hommes-et-les-femmes?id_theme=22.

71 Walby, S. (1997) *Gender Transformations*, Routledge.

72 Parkin, F. (1974) 'Strategies of Social Closure in Class Formation' in Frank Parkin (ed), *The Social Analysis o Class structure,* Tavistock Publications.

73 Dandeker, C. (2003) '"Femmes combattantes ": problèmes et perspectives de l'intégration des femmes dans l'armée britannique' *Revue française de sociologie*, Vol. 44, p. 735.

4.3 The female 'nature', a hindrance to women's access to the labour market

Feminist scholars have written extensively on the construction of motherhood, arguing that the idea of 'motherhood' is the product of society rather than being natural.[74] Carol Smart defined motherhood as 'an institution that presents itself as a natural outcome of biologically given gender differences, as a natural consequence of (hetero)sexual activity, and as a natural manifestation of an innate female characteristic, namely the maternal instinct'.[75]

In the case law analysed here, although the applicants were not mothers, snippets of the ideologies of motherhood are to be found. First, the gendered repartition of labour demonstrated in the previous section builds on the essentialisation of women, perceived by essence as able to deal with family and children-related topics. As shown in the analysis of *Johnston, Commission v Austria* and *Kalliri*, the Court confines women to family-related fields, by acknowledging the innate female qualities for operating in social fields with families and children. By doing so, the Court reinforces the ideology of motherhood that has been depicted in other areas of gender equality law.[76]

Moreover, in *Commission v Austria*, the Court refused the exclusion of women from mine work based on pseudo-biological and health grounds. Although refusing this justification, the Court based its reasoning on the fact that the legislation applied to working conditions that did not 'present any specific risk to the preservation of a woman's biological capacity to become pregnant and to give birth', as well as to the safety and health of the pregnant worker or her foetus.[77] This justification suggests that *a contrario* the Court could favour the protection of the female biological reproductive system over women's individual and emancipatory choice to join the labour market.

This prioritisation of a potential unborn foetus over women's choices to join the labour market reinforces the discourse of motherhood as a compulsory component of women's lives.[78] Consequently, this normative motherhood notably impacts the gendered division of labour and the organisation of the family.

Conclusion

This article explored the reliance upon gender stereotypes in the case law of the Court concerning female workers seeking access to the labour market. The narrative adopted by the Court represents women either as mothers, or in non-violent and non-physical tasks, negating their ability to represent the state authority because of their 'vulnerability' and the necessity for them to be protected. The Court does not consider female workers as purely and solely workers, but rather as potential mother-workers, *for their own protection and that of their future offspring*, ultimately replicating the traditional public/private divide, but this time within the labour market. Women's (potential) parenthood is hence seen as an 'essential' hindrance to their economic empowerment.

It is true that the outcomes of some cases have evolved since the 1970s. Indeed, while older cases more often deny rights to women, more recent case law interprets the legislative exceptions more strictly.

Nevertheless, a further look at the discourses of the Court reveals that it actually repeats similar preconceptions about the role of women in society. Indeed, with the exception of *Kreil*, where both the outcome and the legal reasoning are definitely emancipatory, even in cases where the Court held the

74 Smart, C. (1996), 'Deconstructing Motherhood' in Elizabeth Bortolaia Silva (ed), *Good enough mothering? feminist perspectives on lone motherhood*, Routledge.
75 Smart, C. (1996), 'Deconstructing Motherhood' in Elizabeth Bortolaia Silva (ed), *Good enough mothering? feminist perspectives on lone motherhood*, Routledge, p. 37.
76 McGlynn, C. (2000) 'Ideologies of Motherhood in European Community Sex Equality Law', *European Law Journal* 6(1).
77 Judgment of 1 February 2005, *Commission v Austria*, C-203/03, ECLI:EU:C:2005:76, para 47.
78 Russo, N. F. (1976) 'The Motherhood Mandate', *Journal of Social Issues*, 32(3), p. 143.

incompatibility of the national legislation with the general principle of equal access to the labour market, its arguments are sometimes based on gender stereotypes and specific preconceptions of female work.

Such persistency of gender stereotypes – that is their articulation over time – in the discourse of judges, has specific consequences. As found by Cook and Cusack,

> 'conditions for social stratification and subordination of women … are exacerbated when the stereotypes are reflected or embedded in the law, such as in the implicit premises of legislation and the implications of judges' reasoning and language'.[79]

This rationale contrasts vividly with the recommendation of the EU legislative institutions, which have recommended the end of gender stereotyping for three decades. The Council, Commission and Parliament have targeted sex and sex-role stereotypes that limit women's access to the labour market by considering them inferior to men, less able to perform certain tasks, and more inclined to care for their family.

However, the Court has not followed in their footsteps, and still relies on gender stereotypes to regulate women's access to the labour market, by contrast with the opinions of various Advocate Generals, which could have opened the way for the end of gender stereotyping. Indeed, it must be highlighted that Article 2(2) and 2(3) of Directive 76/207 do not require *per se* the reliance on gender stereotypes. The Court is to some extent aware of this in respect of Article 2(3) of the Directive, as it refused to protect women in situations other than pregnancy or maternity. When it comes to the assessment of Article 2(2), the Court could refrain from relying on gender stereotypes. In cases concerning the use of armed forces for instance, a non-stereotyping rationale could easily have been chosen. Rather than relying on 'natural' gender attributes, the Court could have stated that national security can be guaranteed by all individuals. In the case of part-time work, the Court could also have followed the Advocate General's opinion, which differentiates between one's involvement in their work and the time devoted to it. Indeed, the Court could have avoided a gendered repartition of labour that is enshrined in the case law. Further, in several cases, by relying on gender stereotypes, the Court is forced to ignore its traditional reasoning. For example, its interpretation of the national security exemption, which is turned against the applicant, derogates the 'normal' use of this exemption. Therefore, a non-stereotyping approach could also lead to sounder legal reasoning in the Court's case law on sex equality.

79 Cook, R.J. and Cusack, S. (2010) *Gender Stereotyping: Transnational Legal Perspectives,* University of Pennsylvania Press, p. 22.

Sexual harassment and harassment related to sex at work: time for a new directive building on the EU gender equality acquis

Panagiota Petroglou*

1 Introduction

Although not new, the issues of sexual harassment and harassment related to sex at work have been brought to the fore in recent years in the context of global public debate in the media and widespread revelations about sexual harassment cases (in particular *#MeToo*).[1] It has been made clear that the real figures on these phenomena are higher than previously anticipated and that the standards for what is considered acceptable sexual behaviour in work contexts have been redrawn.

Sexual harassment primarily affects women – particularly young women. Research shows that it coexists and interrelates with forms of violence against women in areas other than work (e.g. domestic violence); paradoxically, it represents a substantial violation of human rights and fundamental freedoms of women even in countries that have otherwise achieved a high degree of gender equality.[2]

In the international setting, sexual harassment and harassment on the grounds of sex are recognised as forms of 'gender-based violence'. Although the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) does not address explicitly violence against women, a General Recommendation of the CEDAW Committee (1992)[3] defines gender-based violence as a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. The Beijing Declaration and Platform for Action explicitly refers to sexual harassment and intimidation at work as a form of violence against women.[4] Moreover, the Istanbul Convention

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1 The New York Times revelations on 5 October 2017 about the sexual abuse carried out by the film producer Harvey Weinstein, following a series of financial settlements made with a number of women in response to allegations of sexual harassment, led to an international media outcry about powerful men's abuse of women (and some men). In the weeks that followed the campaign, *#MeToo* and its national variants (e.g. *#balancetonporc* -#grass on your pig) allowed women (and a considerable number of men) to share their experiences and initiated multiple conversations on the causes of sexual harassment and the ways to address it. See, European Parliament (2018), 'Bullying and sexual harassment at the workplace, in public spaces and in political life in the EU' (Study for the FEMM Committee), available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282018%29604949.

2 European Parliament (2018), 'Bullying and sexual harassment at the workplace, in public spaces and in political life in the EU'.

3 United Nations, CEDAW Committee (1992), General Recommendation No. 19 on Violence against Women, adopted at the eleventh session, 1992, A/47/38, 29 January 1992.

4 Article 113 of the Beijing Declaration and Platform for Action, adopted at the 16th Plenary session of the Fourth World Conference on Women in Beijing on 15 September 1995 defines violence against women within the general community as '(b) physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution'.

of the Council of Europe (2011)[5] acknowledges, *inter alia*, sexual harassment, as a form of violence against women and gender-based violence, which constitute a violation of human rights and a form of discrimination against women. Moreover, psychological violence and stalking, along with sexual harassment, are among the offences to be criminalised by the Parties to the Istanbul Convention.

At its centenary conference, in June 2019, the International Labour Organization (ILO) adopted Convention No. 190 concerning the elimination of violence and harassment in the world of work together with Recommendation No. 206, acknowledging that sexual harassment and harassment at work are forms of gender-based violence, disproportionately affecting women.[6] The Convention will enter into force 12 months after two Member States have ratified it. The recommendation, which is not legally binding, provides guidelines on how the Convention could be applied.

Historically, the protection against sexual harassment in EU law was based on the fundamental human right of dignity. Human dignity -the most fundamental right of all[7]- constitutes the basis and the core of all fundamental rights, which is why it is the first to be proclaimed in the EU Charter of Fundamental Rights (the Charter). Although dignity remains at the core of the relevant concepts and definitions, since 2002 sexual harassment and harassment related to sex have been explicitly acknowledged as forms of gender discrimination and unequal treatment,[8] as explained below.

This article aims: to examine the concepts of sexual harassment at work and harassment related to sex at work; to show the added value of combating these phenomena under the dual approach (both the human dignity and the anti-discrimination/gender equality approach); to evaluate relevant EU law limits and potential; and to suggest future EU legislative action from a gender equality perspective.

5 The Convention on Preventing And Combating Violence Against Women And Domestic Violence (Istanbul Convention) was adopted by the Council of Europe Committee of Ministers on 7 April 2001 and opened for signature on 11 May 2011. The EU signed the Convention in June 2017. All EU Member States have signed the Convention and 21 have ratified it.

6 ILO Convention No. 190 concerning the elimination of violence and harassment in the world of work, available at: https://www.ilo.org/ilc/ILCSessions/108/reports/texts-adopted/WCMS_711570/lang--en/index.htm, and its Recommendation 206, available at: https://www.ilo.org/ilc/ILCSessions/108/reports/texts-adopted/WCMS_711575/lang--en/index.htm. This is the first new convention agreed by the International Labour Conference since the 2011 Domestic Workers Convention No. 189. It was adopted by a large majority (439 votes for, 7 against and 30 abstentions). The convention explicitly refers to sexual harassment and harassment at work as forms of gender-based violence, inter alia: (a) in its preamble: 'Recognizing the right of everyone to a world of work free from violence and harassment, including gender-based violence and harassment', 'Recognizing that violence and harassment in the world of work can constitute a human rights violation or abuse, and that violence and harassment is a threat to equal opportunities … Acknowledging that gender-based violence and harassment disproportionately affects women and girls, and recognizing that an inclusive, integrated and gender-responsive approach, which tackles underlying causes and risk factors, including gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relations, is essential to ending violence and harassment in the world of work … Recognizing that violence and harassment … may prevent persons, particularly women, form accessing and remaining and advancing in the labour market'; (b) in Article 1: the term 'violence and harassment' in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment, which is defines as 'violence and harassment directed at persons because of their sex and gender, or affecting persons or gender disproportionally, and includes sexual harassment; (c) in Article 4: adoption of an inclusive, integrated and gender-responsive approach for the prevention and elimination of violence and harassment in the world of work; (d) in Article 7: adoption of laws and regulations to define and prohibit violence and harassment in the world of work, including gender-based violence and harassment; (e) in Article 9: adoption by employers of preventive measures against violence and harassment in the world of work, including gender based violence and harassment; (f) in Article 10(c): adoption of measures ensuring that victims of gender-based violence and harassment in the world of work have effective access to gender-responsive, safe and effective complaint and dispute resolution mechanisms, support, services and remedies.

7 Opinion of Advocate General Jacobs of 14 June 2001, *Kingdom of the Netherlands v Parliament & Council*, C-377/98 ECLI:EU:C:2001:329, para. 197. The ECJ, following Jacobs, acknowledged 'the fundamental right to human dignity and integrity' as part of EC law. See also Koukoulis-Spiliotopoulos, S. (2005), 'The amended Equal Treatment Directive (2002/73): An expression of constitutional principles/fundamental rights', *Maastricht Journal* 4 (2005), pp. 327-368.

8 According to Recital 6 of 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 Directive), OJ L 204, 26.7.2006, pp. 23-36: 'Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties.'

2 The concepts

2.1 Sexual harassment at work

The concept of sexual harassment as discrimination was developed by American activists and by the late 1970s it was acknowledged as discrimination by U.S. courts. It was originally restricted to relations between a superior and a subordinate covering the so-called *quid pro quo* sexual harassment (in French Canadian *donnant-donnant*): the victim gets better treatment in exchange for sexual favours. By the early 1980s, hostile environment cases were also regraded to amount to discrimination. From the beginning, sexual harassment was conceived as discrimination against women (the North American discriminatory approach). The term 'sexual harassment' was later transferred to Canada and Europe.[9]

The term 'sexual harassment' refers to unwanted conduct of a sexual nature. The most common forms of sexual harassment are: (a) non-verbal (e.g. sexually suggestive gestures, inappropriate, intimidating staring or leering, display of sexual material); (b) verbal (sexually suggestive, offensive comments or jokes, intrusive, offensive comments about a person's – in particular a woman's – physical appearance, inappropriate invitations to date, intrusive, offensive questions about private life); (c) physical (touching, hugging, kissing, rape); (d) offensive, sexually explicit e-mails or SMS messages, offensive inappropriate advances on social networking sites.[10]

According to the findings of the European Agency for Fundamental Rights (FRA) 2014 survey on violence against women (not limited to the field of employment),[11] 71 % of sexual harassment victims indicated a male perpetrator, 2 % a female harasser and 21 % both male and female harassers, which shows that sexual harassment is perpetrated mostly by men against women. About a third of the cases (32 %) happened at the workplace: the harasser was a colleague, a supervisor or a client. In the context of employment, the most common form of sexual harassment consists in intrusive and offensive questions about a woman's private life. Moreover, 33 % of all women who have experienced some form of sexual harassment since the age of 15, indicated that the most serious incident involved unwelcome touching, hugging or kissing. In 18 % of those cases the perpetrator was in the workplace (a colleague, supervisor or customer) and 86 % of the perpetrators were male.

The same survey shows that the majority of female victims had experienced more than one form of harassment in their lifetime (repeated victimisation by the same perpetrator or different perpetrators), which shows the burden imposed on some women by the persistent nature of many abusive acts. By age-group, the most vulnerable to sexual harassment are young women between 18 and 29 years (38 %), followed by women aged 30-39 (24 %), i.e. in total the rates for women aged 18-39 are above average.

The survey found that women with higher educational qualifications are more frequently sexually harassed than women with lower educational attainment: more than two thirds of all women who have a university degree (69 %) have been subjected to sexual harassment from the age of 15 (compared to 46 % of women with primary education alone). This can be attributed to the fact that women of a higher educational level are more likely to hold higher posts, to be better informed about relevant legal provisions and perhaps less likely to tolerate such forms of behaviour from colleagues and supervisors. Moreover, sexual harassment is more commonly experienced in the highest occupational groups: 75 % of women in the top management category have experienced sexual harassment in their lifetime. This

9 Zorbas, G. (2010), *Le Harcèlement, Droits européen, belge, français et luxembourgeois*, Larcier; Rubinstein, M. (1988), 'The Dignity of Women at Work: A Report on the Problem of Sexual Harassment in the Member States of the European Communities, Report to the European Commission', Office for Official Publications of the European Communities.

10 European Parliament (2018), 'Bullying and sexual harassment at the workplace, in public spaces and in political life in the EU'.

11 European Agency for Fundamental Rights (FRA), (2014) *Violence against Women: an EU-wide survey*, available at: https://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report.

could be also related to their greater exposure to situations in which harassment may occur (at work or when travelling for work) and in general to the under-representation of women in posts of responsibility (apparently due to the glass-ceiling phenomenon) in all fields,[12] especially in the business and finance sector. Women working in male-dominated jobs are also at higher risk than women in gender-balanced or female dominated workplaces. In addition, women with irregular or precarious employment contracts, which are common for many jobs in the services sector, are more susceptible to sexual harassment.[13]

While there is widespread knowledge amongst women about workplace sexual harassment, there is very little awareness at the most senior levels of employers about the extent of sexual harassment in their organisations. This lack of awareness is at least in part a symptom of the long-standing underrepresentation of women in leadership positions.[14]

Sexual harassment is still not regulated in contexts other than sex discrimination. However, given that sexual harassment, although now being defined separately, is still a specific type of harassment related to sex (conduct of a sexual nature), any harassing 'conduct of a sexual nature' on grounds other than sex (ethnicity, disability, sexual orientation etc.) will either be regarded as an integrated part of the broader concept of harassment on such grounds, or it will be dealt with as multiple or complex discrimination.[15]

2.2 Harassment at work

The concept of harassment has been studied for about 25 years. The definitions and categorisation of harassment, and more generally work-related violence, differ between institutions and researchers. The classifications used often overlap.[16] 'Harassment' is often considered to include 'bullying',[17] 'mobbing', 'psychological abuse', 'emotional abuse' (in French harassment is translated as '*harcèlement moral*', '*harcèlement psychologique*'), 'intimidation' and 'stalking'.

The most common classification of harassment differentiates between: 'work-related bullying' (e.g. persistent criticism of one's work and effort, allocating tasks with impossible targets or deadlines, ignoring one's opinions and views); 'personal bullying' (e.g. subjecting someone to humiliation or ridicule in connection with work, excessive teasing and sarcasm, spreading rumours and gossip); and 'social exclusion' (e.g. ignoring the person or socially excluding them from work teams or social events). In recent years, a new form of harassment has emerged: cyberharassment (cyberbullying, bullying or harassment by use of electronic means, e.g. sending unwanted, offensive e-mails or SMS messages, inappropriate, offensive advances on social networking websites or in internet chat rooms). This kind of harassment is of a greater risk for younger women, who are more active on the internet, including on social networking sites, and are therefore also more exposed to unwanted and inappropriate advances online; 53 % of all women who have experienced inappropriate advances on social networking sites are between 18 and 29 years of age.[18]

12 On average, in 2012, the shares of women in executive and non-executive decision-making positions were 10 % and 17 %, respectively. See European Commission, Directorate-General for Justice, 'Database: Gender balance in decision-making posts'. The EU average has been calculated based on 27 EU Member States.

13 All the above data can be found in FRA (2014) *Violence against Women: an EU-wide survey*.

14 Kjeruf Thorgeirsdóttir, H. (2019), 'Protection from victimisation in the workplace: Comparative EU-Icelandic perspectives', *European Equality Law Review* (EELR) 2019/1, available at: https://www.equalitylaw.eu/downloads/4930-european-equality-law-review-1-2019-pdf-1-051-kb.

15 Numhauser-Henning, A., Laulom, S. (2012), *Harassment related to Sex and Sexual Harassment Law in 33 European Countries – Discrimination versus Dignity*, European Network of Legal Experts in the Field of Gender Equality, European Commission, available at: https://eige.europa.eu/library/resource/aleph_eige000002382.

16 On the origin and the various definitions of harassment see European Agency for Safety and Health at Work (EU-OSHA), (2010) *Workplace Violence and Harassment: a European picture*, available at: https://osha.europa.eu/en/tools-and-publications/publications/reports/violence-harassment-TERO09010ENC; Zorbas, G. (2010), *Le Harcèlement*.

17 The ILO makes a distinction between bullying (offensive behaviour) and mobbing. 'Mobbing' is used to describe situations where someone is negatively treated by a group of people whereas the term 'bullying' is used in incidents with only one perpetrator.

18 European Parliament, (2018) 'Bullying and sexual harassment at the workplace, in public spaces and in political life in the EU'.

The Eurofound Sixth European Working Conditions Survey (EWCS) (2015)[19] showed that 5 % of respondents had been subjected to bullying and/or harassment over the past 12 months.

2.3 Some common traits

Sexual harassment and harassment related to sex do not occur only in the workplace in the strict sense, but may occur in circumstances related to work, including commuting to the workplace or external business meetings or business trips or even while working on mobile sites, in home-based offices or other places (teleworking).[20] Therefore, the term 'at work', 'work-related' or even 'in the world of work' (used by ILO Convention No. 190) is preferable to the term 'in the workplace'.

Sexual harassment and harassment related to sex at work also include offensive behaviour by third parties, e.g. customers, clients or patients receiving goods or services. Research[21] has shown that third party violence is more likely to occur in some occupational sectors (e.g. healthcare[22] and social work, education, commerce, transport, public administration, defence, hotels and restaurants).[23]

On 16 July 2010, the European social partners of commerce, private security, local governments, education and hospital sectors[24] reached an agreement on multi-sectoral guidelines aimed at tackling third-party violence and harassment at work; this agreement included cyberbullying as a new form of violence and harassment at work. According to the 2013 joint report on the follow-up and implementation of the guidelines, 2 % to 23 % of all workers have been subjected to third-party violence.[25] This figure can rise as high as 42 % when only workers having direct contact with members of the public are surveyed. Due to the concentration of female workers in the sectors where there is most contact with members of the public, women are more often confronted with third-party violence than men. One of the sectors with the highest risk of third-party violence is education.

Although sexual harassment and harassment related to sex at work are distinct phenomena, in real-life situations the distinction between the two may be unclear.[26] Moreover, these two phenomena often co-exist and interrelate: empirical evidence has shown that where harassment is widespread and employers/management go unpunished, sexual harassment may be rife as well.[27] Furthermore, it is often the case that when the sexual advances of the harasser are rejected by the victim, the behaviour of the perpetrator turns into 'plain' harassment: the perpetrator seeks the removal of the victim from the workplace by disqualifying and humiliating them under the common pretext of 'bad performance at work'.[28] Victimisation through harassment involves hostile behaviour not only towards an employee who has openly complained about discrimination in the workplace but also towards co-workers who have assisted a colleague with a previous discrimination concern.[29]

19 European Foundation for the Improvement of Living and Working Conditions (Eurofound), (2015), *Sixth EWCS* available at: https://www.eurofound.europa.eu/surveys/european-working-conditions-surveys/sixth-european-working-conditions-survey-2015.
20 EU-OSHA, (2010) *Workplace Violence and Harassment: a European picture.*
21 EU-OSHA, (2010) *Workplace Violence and Harassment: a European picture.*
22 According to EU-OSHA, (2010) *Workplace Violence and Harassment: a European picture*, on average, 9.9 % of nurses were often (at least once a week) exposed to frequent violent events from patients/their relatives whereas 19.5 % of nurses in France, 12.3 % in the UK and 11.5 % in Germany were frequently exposed to such events.
23 Zorbas, G. (2010), *Le Harcèlement*; Zorbas, A., Zorbas, G., (2016) *Risques Psychosociaux, harcèlement et violences au travail. Droits belge, français et luxembourgeois* (Psychosocial risks, harassment and violence at work), Larcier.
24 EPSU, UNI EUROPA, ETUCE, HOSPEEM, CEMR, EFEE, EUROCOMMERCE, COESS.
25 Available at: https://www.epsu.org/sites/default/files/article/files/Report-Follow-Up-Multisectoral-Guidelines-TPV-ALL-SECTORS-FINAL-22-11-13.pdf.
26 European Commission, European Network of Legal Experts in Gender Equality and Non-discrimination (EELN), (2018) *A comparative analysis of gender equality law in Europe*, available at: https://www.equalitylaw.eu/downloads/4829-a-comparative-analysis-of-gender-equality-law-in-europe-2018-pdf-807-kb.
27 European Parliament, (2018) 'Bullying and sexual harassment at the workplace, in public spaces and in political life in the EU'.
28 Zorbas, G. (2010) *Le Harcèlement*.
29 Kjeruf Thorgeirsdóttir, H., (2019) 'Protection from victimisation in the workplace: Comparative EU-Icelandic perspectives', *European Equality Law Review* (EELR) 2019/1.

In both cases, the perception of what kind of conduct constitutes the unwanted, offensive or intimidating behaviour is subjective. It is largely dependent on: gender cultures at work (such as the recognition of gender equality and non-discrimination on the ground of sex at the workplace versus a culture that 'permits' harassment in an organisation);[30] the prevalent social and cultural values, social norms and attitudes, which differ from country to country (higher prevalence of adverse social behaviour in the northern EU countries as opposed to the southern ones could be explained by cultural differences with regard to the type of behaviour that is considered adverse (e.g. when does 'playful teasing' turn into bullying?);[31] and the general level of awareness of the potential victims and information on their rights and existing laws in particular, which may also vary from country to country (even if people recognise that they are being harassed, they could feel that reporting is less socially desirable).[32]

Both sexual harassment at work and harassment related to work are underreported. According to the 2014 FRA survey,[33] of all women who experienced at least one serious incident of sexual harassment, 37 % did not talk about what happened to anyone before the survey. Of those who spoke to somebody or reported the most serious incident to some authority, 28 % spoke to a friend, 24 % to a family member or a relative and 14 % to their partner. Some 4 % of the victims contacted the police. Less than 1 % spoke to a lawyer about the most serious incident, approached a victim support organisation or contacted a trade union representative, although the majority of those who did, were either very satisfied or fairly satisfied. This shows that, while few sexual harassment incidents are considered by victims worth bringing to the attention of any authority, the incidents are serious enough for women to discuss with friends and family.

3 The EU legal background: the slow transition from health and safety and dignity at work to antidiscrimination and gender equality

Although the EU has taken firm positions on the need to eradicate violence against women and is funding specific campaigns and grassroots projects to combat it,[34] to date, EU law does not address violence against women in a comprehensive manner – it only addresses specific forms of violence,[35] such as sexual harassment and harassment related to sex at work[36] and in access to goods and services.[37] However, Declaration No 19 annexed to the Final Act of the 2007 Intergovernmental Conference that drafted the Lisbon Treaty confirms that domestic violence is a gender equality issue and that it is the obligation of the European Union and Member States to combat it in all areas.[38]

This issue was raised in the context of the proposed accession of the EU to the Istanbul Convention. On 13 June 2017, the Istanbul Convention was signed on behalf of the European Union on the basis

30 FRA, (2014), *Violence against Women: an EU-wide survey,* p. 97.
31 FRA, (2014), *Violence against Women: an EU-wide survey,* p. 99.
32 FRA, (2014), *Violence against Women: an EU-wide survey*, p. 100; Eurofound, (2015) *Sixth EWCS*; EU-OSHA, (2010) *Workplace violence and harassment: a European picture*.
33 FRA, (2014), *Violence against Women: an EU-wide survey*.
34 See Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, COM(2016) 111 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0111.
35 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA OJ L 315, 14.11.2012, p. 57-73 (the Victims' Rights Directive) and Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, OJ L 338, 21.12.2011, p. 2-18. Both directives also cover victims of sexual harassment if sexual harassment is criminalised in the Member States and are aimed at protecting victims by strengthening their rights whatever their nationality and wherever in the EU the crime takes place, including if the victims travel or move within the EU.
36 Article 2(1)(c) and (d), and (2)(a) of Directive 2006/54/EC (recast); Article 3(c) and (d) and Article 4(2) of Directive 2010/41/EU.
37 Article 2(c) and (d) and Article 4(2) and (3) of Directive 2004/113/EC.
38 Koukoulis-Spiliotopoulos, S. (2008), 'The Lisbon Treaty and the Charter of Fundamental Rights', *European Gender Equality Review* No 1/2008, pp. 15-24 (21).

of two Council decisions adopted on 11 May 2017, one with regard to asylum and non-refoulement,[39] based on Article 78(2) of the TFEU in conjunction with Article 218(5) thereof, and the other with regard to matters related to judicial cooperation in criminal matters,[40] based on Articles 82(2) and 83(1) of the TFEU, in conjunction with Article 218(5) thereof. By its Resolution of 12 September 2017, the European Parliament called for a broad EU accession to the Istanbul Convention without any limitations. It noted that violence against women is an obstacle to equality between women and men, which is one of the EU's founding values and aims, as laid down in Articles 2 and 3 of the Treaty on European Union, and that the EU has overall competence to protect fundamental rights. By its Resolution of 4 April 2019,[41] the European Parliament questioned the compatibility with the treaties of the Council decisions and decided to seek an opinion from the CJEU on the compatibility with the treaties of the proposed accession of the EU to the Istanbul Convention and the procedure for that accession.[42]

Given that violence against women is a violation of their human rights and an extreme form of discrimination, contributing to maintaining and reinforcing gender inequalities, the European Union has competence to address it under the legal basis: (i) of anti-discrimination and gender equality (Articles 2 and 3 TEU, Article 8 TFEU, Article 157 TFEU, Articles 21(1) and 23(1) of the Charter of Fundamental Rights of the European Union, hereafter the EU Charter); and (ii) of human dignity (Articles 1to 5 of the EU Charter on the right to human dignity, the right to life, the right to the integrity of the person and on the prohibition of inhuman or degrading treatment). Moreover Article 31(1) of the EU Charter proclaims the right to health and safety and dignity at work. From its wording and the explanations thereto it is obvious that dignity at work is closely associated with health and safety at work, sharing the same legal basis (the framework Directive 89/391/EC), as protection against psychosocial risks. The right to health and safety and dignity at work is considered a social right (included in the solidarity title of the EU Charter) whereas the rights to human dignity, non-discrimination and gender equality are fundamental human rights. In its recent case law in *Bauer et al.* and *Max Planck,*[43] the CJEU unequivocally held that the EU Charter rights, including social rights, may have horizontal direct effect (vis-à-vis private individuals).[44]

Within the European states, sexual harassment was originally dealt with through a 'dignity-harm approach', focusing on individual dignity, as opposed to the North American 'discriminatory approach',

39 Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, OJ L 131, 20.5.2017, p. 11, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:131:FULL&from=GA.

40 Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement, OJ L 131, 20.5.2017, p. 13, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:131:FULL&from=GA.

41 European Parliament resolution of 4 April 2019 seeking an opinion from the Court of Justice on the compatibility with the treaties of the proposals for the accession by the European Union to the Council of Europe Convention on preventing and combating violence against women and domestic violence and on the procedure for that accession (2019/2678(RSP)), available at: http://www.europarl.europa.eu/doceo/document/TA-8-2019-0357_EN.html?redirect.

42 In its Resolution of 4 April 2019, the European Parliament took the view that there is legal uncertainty as to whether the accession to the Istanbul Convention as proposed by the Council is compatible with the treaties, in particular as regards the choice of the appropriate legal basis for the decisions on the signing and on the conclusion by the European Union of the convention, and as regards the possible split into two decisions on the signing and on the conclusion of the convention as a consequence of that choice of legal basis; it also considered that, given the above questions as regards the choice of legal basis and the split into two decisions, there is also legal uncertainty as regards the compatibility with the treaties of the practice of a 'common accord' by the Council in its decision-making, which is applied in addition to or alternatively to the relevant decision-making procedure in the treaties, and, in this context, as regards the application of the principle of sincere cooperation in the light of the expressed objective of the European Union to conclude the Istanbul Convention.

43 CJEU, judgment of 6 November 2018, *Stadt Wuppertal v Maria Elisabeth Bauer* and *Volker Willmeroth v Martina Broßonn*, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871. CJEU, judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimuzu*, C-684/16, ECLI:EU:C:2018:874.

44 De Vries, S. (2019), 'The Bauer et al. and Max Planck judgments and EU citizens' fundamental rights: An outlook for harmony', *European Equality Law Review* 2019/1, available at: equalitylaw.eu/downloads/4930-european-equality-law-review-1-2019-pdf-1-051-kb.

which views sexual harassment as a form of discrimination to the detriment of women.[45] In the same context, harassment at work had long been considered as a mere health and safety issue – such a 'gender-blind' approach that lacks a gendered or gender sensitive perspective has been criticised by some researchers.[46] The EU legal framework has made a slow transition from a clear-cut health and safety (see under 3.1) and dignity-harm approach (see under 3.2) to a dual approach (both a dignity-harm and non-discrimination/gender equality approach) (see under 3.3). As explained below (under 4.2), albeit with a strong human rights connotation, the dignity-harm/health and safety approach addresses sexual harassment and harassment related to sex at work as isolated incidents by perpetrators against victims (individual discrimination) whereas the anti-discrimination/gender equality approach reveals the bigger picture of systemic discrimination due to deep-rooted structural barriers to equal opportunity, such as glass ceilings in companies or sex segregation in the workforce.[47]

3.1 The health and safety at work framework Directive 89/391

Directive 89/391[48] on health and safety at work (the framework directive), which defines the fundamental principles of the protection of workers, does not make any reference to harassment or sexual harassment.[49] In *Commission v Italy*,[50] the Court ruled that 'the occupational risks which are to be evaluated by employers are not fixed once and for all, but are continually changing in relation, particularly, to the progressive development of working conditions and scientific research concerning such risks'. It thus paved the way for an eventual recognition of psychosocial risks.[51] In this context, it is argued that Directive 89/391 applies also to psychosocial risks, qualified some years ago as 'emerging risks'.[52] However, to date, there has been no CJEU case law on sexual harassment and harassment at work as psychosocial (health and safety) risks.

In 2004, the European social partners[53] signed the Autonomous European Framework Agreement on work-related stress. This agreement did not deal with harassment and sexual harassment, as the work programme of the social partners envisaged the possibility of a specific negotiation on these issues (which was realised in 2007 as the Autonomous Framework Agreement on harassment and violence at work, as explained below under 3.2). However, it constituted a step forward towards the protection of workers from psychosocial risks.[54]

3.2 The early years of soft law (1986-2000): the focus on dignity

In June 1986, the European Parliament adopted a Resolution on violence against women.[55] In 1988, Rubinstein's report to the European Commission entitled 'The Dignity of Women at Work: A Report on the Problem of Sexual Harassment in the Member States of European Communities' was published. It

45 Numhauser-Henning, A., Laulom, S. (2012), *Harassment related to Sex and Sexual Harassment Law in 33 European Countries – Discrimination versus Dignity*.
46 Salin, D., Hoel, H. (2013), 'Workplace bullying as a gendered phenomenon', *Journal of Managerial Psychology*, 28, 235-51; European Parliament (2018) 'Bullying and sexual harassment at the workplace, in public spaces and in political life in the EU'.
47 Mercat-Bruns, M. (2018), 'Systemic discrimination: rethinking the tools of gender equality', *European Equality Law Review* 2018/2, p. 1; Mercat-Bruns, M. (2015), 'L'identification de la discrimination systémique' (The identification of systemic discrimination), *Rev. Droit Travail*, p. 672.
48 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, pp. 1-8.
49 For a detailed analysis on sexual harassment and harassment in the context of the health and safety EU legislation see Zorbas, G. (2010), *Le Harcèlement*.
50 CJEU, judgment of 15 November 2001, *Commission v Italy*, C-49/00, ECLI:EU:C:2001:611.
51 Zorbas, G. (2010) *Le Harcèlement*.
52 Zorbas, A., Zorbas, G. (2016) *Risques Psychosociaux, harcèlement et violences au travail. Droits belge, français et luxembourgeois*, Larcier.
53 BusinessEurope (then UNICE), European Association of Craft, Small and Medium-Sized Enterprises (UEAPME), European Centre of Employers and Enterprises providing Public Services (CEEP) and European Trade Union Confederation (ETUC) (and the liaison committee Eurocadres-CEC).
54 Zorbas, G. (2010) *Le Harcèlement*.
55 OJ C 176 14.7.1986, p. 79.

suggested, *inter alia,* that harassment should be qualified as sex discrimination according to Article 5 of the Equal Treatment Directive.[56] By its Resolution of 29 May 1990 on the protection of the dignity of women and men at work,[57] the Council affirmed that conduct based on sex affecting the dignity of women and men at work, including conduct of superiors and colleagues, constitutes an intolerable violation of the dignity of workers and trainees; it called on the Member States and the institutions and organs of the European Communities to develop positive action measures aimed at achieving a work environment free from: (a) unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work; (b) victimisation of a complainant or of a person wishing to give, or giving, evidence in the event of a complaint.

In 1992, the Commission adopted Recommendation 92/131/EEC[58] on the protection of the dignity of women and men at work, accompanied by a code of practice on measures to combat sexual harassment.[59] The Recommendation limited the protection to relations between workers and their superiors and colleagues.

Both the Council Resolution and the Commission Recommendation focused on the dignity of workers. However, a vague statement that 'in certain circumstances' sexual harassment can be contrary to the gender equality principle is made in the Recommendation (Article 1(c)).

The code of practice copies the definition of sexual harassment of the Recommendation, adding some conceptual specifications and focusing on preventive measures. It also opens the way for the transition to the discriminatory approach (see below under 3.3) by stating that:

> 'This code, however, focuses on sexual harassment as a problem of sex discrimination. Sexual harassment is sex discrimination, because the gender of the recipient is the determining factor in who is harassed. Conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work in some Member States already has been found to contravene national equal treatment law and employers have a responsibility to seek to ensure that the work environment is free from such conduct'.

It is obvious that in its early years (1986-2000) the EU (soft) law on sexual harassment focuses on dignity, adopting the dignity-harm approach, as opposed to the North American discriminatory approach. It took another 10 years following the 1992 Recommendation before sexual harassment and harassment related to sex at work were explicitly and unconditionally acknowledged as forms of gender discrimination by binding EU gender equality law in 2002.

56 Rubinstein, M. (1988) 'The Dignity of Women at Work: A Report on the Problem of Sexual Harassment in the Member States of the European Communities, Report to the European Commission'.

57 Council Resolution of 29 May 1990 on the protection of women and men at work (90/C 157/02), OJ C 157, 27.6.1990, p. 3.

58 Commission Recommendation 92/131/EEC of 27 November 1991 on the protection of the dignity of women and men at work, OJ L 49, 24.2.1992: 'It is recommended that the Member States take action to promote awareness that conduct of a sexual nature, or other conduct based on sex affecting the *dignity* of women and men at work, including conduct of superiors and colleagues, is unacceptable if: (a) such conduct is unwanted, unreasonable and offensive to the recipient; (b) a person's rejection of, or submission to, such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment, continued employment, salary or any other employment decisions; and/or (c) such conduct creates an intimidating, hostile or humiliating work environment for the recipient; and that such conduct may, in certain circumstances, be contrary to the principle of equal treatment within the meaning of Articles 3, 4 and 5 of Directive 76/207/EEC' (Article 1).

59 The code of practice clarified that sexual harassment can include unwelcome physical, verbal or non-verbal conduct; thus a range of behaviour may be considered to constitute sexual harassment. It provided that the essential characteristic of sexual harassment is that it is unwanted by the recipient, that it is for each individual to determine what behaviour is acceptable to them and what they regard as offensive. Sexual attention becomes sexual harassment if it is persisted in once it has been made clear that it is regarded by the recipient as offensive, although one incident of harassment may constitute sexual harassment if sufficiently serious. It is the unwanted nature of the conduct that distinguishes sexual harassment from friendly behaviour, which is welcome and mutual.

Surprisingly, the dignity-harm approach of the early years reappears in the autonomous framework agreement on harassment and violence at work,[60] adopted by the European social partners in 2007, i.e. five years after the adoption of Directive 2002/73 and one year after the adoption of Directive 2006/54.[61] This was the third autonomous framework agreement following the first on telework (2002) and the second on work-related stress (2004). Article 3 of this framework agreement defines harassment and violence at work in a limited way, excluding third-party violence. Moreover, it does not recognise harassment as gender discrimination, thus falling behind the international and EU gender equality *acquis*; it only refers to EU equality directives in a footnote. This autonomous framework agreement has been strongly criticised as not aiming at the protection of the fundamental rights, but rather at the respect of mutual dignity in the framework of EU policy for health and safety at work.[62]

3.3 The EU Gender Equality Directives: the focus on both gender equality and dignity

In 2000, the concept of harassment was introduced for the first time in two binding legal documents: Directive 2000/43 prohibiting discrimination on the grounds of racial or ethnic origin (the Racial Equality Directive)[63] and Directive 2000/78 prohibiting discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation (the Employment Equality Directive).[64] It is important to note that both the above Directives allow that the concept of harassment 'may be defined in accordance with the national laws and practice of the Member States'. This reference to national laws and practice creates incoherence and lack of legal certainty; it has been strongly criticised for being the result of a political compromise within the Council.[65]

Two years later, Directive 2002/73[66] on gender equality (the Equal Treatment Directive) was adopted, amending Directive 76/207.[67] It was the first directive to define sexual harassment and harassment related to sex at work, rendering them autonomous concepts with regard to national definitions: the Member States must adopt either the same definitions or ones that are more favourable for the victims. In contrast to Directives 2000/43 and 2000/78, Directive 2006/54 (2002/73) defines the concepts of 'sexual harassment' and 'harassment related to sex' at work without any reference 'to the national laws and practice of the Member States.' Most importantly, it explicitly acknowledged sexual harassment and harassment related to sex at work as forms of gender discrimination.

60 The agreement is 'autonomous' because it does not have to be implemented by a directive: it is incorporated within the national legal orders of the Member States by the social partners themselves according the internal procedures in each Member State. However, there is no consensus as to the binding nature of such an autonomous agreement. See Zorbas, A., Zorbas, G. (2016) *Risques Psychosociaux, harcèlement et violences au travail. Droits belge, français et luxembourgeois*, Larcier.

61 Autonomous European framework agreement on harassment and violence at work (2007), available at: https://www.etuc.org/sites/default/files/BROCHURE_harassment7_2__1.pdf. Article 3 reads: 'Harassment and violence are due to unacceptable behaviour by one or more individuals and can take many different forms, some of which may be more easily identified than others. The work environment can influence people's exposure to harassment and violence. Harassment occurs when one or more worker or manager are repeatedly and deliberately abused, threatened and/or humiliated in circumstances relating to work. Violence occurs when one or more worker or manager are assaulted in circumstances related to work. Harassment and violence may be carried out by one or more managers or workers, with the purpose or effect of violating a manager's or worker's *dignity*, affecting his/her health and/or creating a hostile work environment'.

62 Zorbas, G. (2010) *Le Harcèlement*.

63 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp. 22-26.'

64 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16-22.

65 Zorbas, G. (2010) *Le Harcèlement*.

66 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269, 5.10.2002 p. 15.

67 Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.2.1976, pp. 40-42.

In its report on the application of Directive 2002/73, the European Commission evaluated its impact in national legislations.[68] It also clarified that protection should not be limited to relations between workers and their superiors, but should also extend to co-workers or other third parties. This issue became the object of infringement proceedings against some Member States and led to amendments to their legislation (already in the administrative phase of the infringement enquiry by the Commission).

Directive 2002/73 was followed by Directive 2004/113,[69] concerning equal treatment between men and women in the access to and supply of goods and services, which defines sexual harassment and harassment related to sex as gender discrimination, using the same wording.

In order to consolidate EU law on equal treatment by bringing together, modernising and simplifying the provisions of previous directives and incorporating the Court's case law, Directive 2006/54 (the Recast Directive)[70] was adopted. Directive 2006/54 merged six previous directives[71] (including Directive 2002/73) and introduced some novel features.[72] Directive 2006/54 reproduces the definition of sexual harassment and harassment related to sex included in Directive 2002/73:

> '"Harassment": where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment ... "Sexual harassment": where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment'.

68 See the Commission's report to the Council and the European Parliament. European Commission (2009) 'Report on the application of Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions', COM(2009)409 final of 29 July 2009: '…The Directive defines harassment and, for the first time in Community law, sexual harassment as forms of discrimination. One mistake in transposing those provisions in some Member States consisted in confining protection to relations between workers and their superiors, thus excluding co-workers or other third parties. Over time and as progress has been made in the infringement procedures, some Member States have corrected their definitions of these forms of discrimination. The impact of these provisions also varied from one Member State to another. Legislation in some Member States already provided protection from harassment and/or sexual harassment before the adoption of Directive 2002/73/EC: for example, gender-specific harassment was already an offence in DK, SE and UK. In AT, gender-specific harassment became an offence following the adoption of the Directive. Nonetheless, the transposition of the Directive gave those Member States the opportunity to improve legal clarity or otherwise step up the protection (for instance, AT increased compensation in such cases, while the UK adjusted the rules on evidence) and to give more visibility to the issue (in the UK, for example, both the legislation and the case-law now cover harassment and sexual harassment). In other Member States, in addition to raising awareness, the Directive has brought more profound legislative changes: for instance, legislation prohibiting harassment and/or sexual harassment was introduced for the first time in CY, CZ, ES, IT, PL and SK, and they were recognised as a form of discrimination in FI, FR and PT.' See also Zorbas, G. (2010) *Le Harcèlement*, p. 138.

69 Article 2(c),(d) of 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, 21.12.2004, pp. 37-43, reads: 'Harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment' (Article 2(c); 'Sexual harassment: where any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment' (Article 2(d).

70 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 Directive), OJ L 204, 26.7.2006, pp. 23-36.

71 Council Directive 75/117/EEC, OJ L 45, 19.2.1975, p. 19; Council Directive 76/207/EEC, OJ L 39, 14.2.1976, p. 40; Directive 2002/73/EC of the European Parliament and of the Council, OJ L 269, 5.102001, p. 15; Council Directive 86/378/EEC, OJ L 225, 12.8.1986, p. 40; Council Directive 96/97/EC, OJ L 46, 17.2.1997, p. 20; Council Directive 97/80/EC, OJ L14, 20.1.1998, p. 6; Council Directive 98/52/EC, OJ L 205, 22.7.1998, p. 66.

72 The novel features of Directive 2006/54 concern: (1) the definition of pay (Article 2(1)(e); (2) the express extension of the application of equal treatment in occupational social security schemes to pension schemes for particular categories of workers, such as public servants (Article 7(2); (3) the explicit extension of the horizontal provisions (i.e. on defence of rights, compensation or reparation and burden of proof) to occupational social security schemes (Articles 17-19); and (4) the explicit reference to discrimination arising from gender reassignment (Recital 3).

Like Directive 2002/73, the Recast Directive explicitly stipulates that harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection or submission to such conduct, constitute gender discrimination.[73] It also prohibits sexual harassment and harassment related to sex at work *per se*, irrespective of whether they are linked to an act that is detrimental to the victim (non-recruitment, non-promotion, unilateral detrimental modification of employment conditions, dismissal).[74] Member States should encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion.

It is evident that all the above gender equality directives adopt the double approach:[75] the dignity-harm approach, by the inclusion of the term 'dignity' in the respective definitions ('with the purpose or effect of violating the dignity of a person'); and the anti-discrimination/gender equality approach, by the explicit recognition of sexual harassment and harassment related to sex at work as gender discrimination (for an evaluation of these approaches see below under 4.2).[76]

To date there has been no CJEU case law on sexual harassment or harassment related to sex at work under the gender equality directives. However, the CJEU, the Civil Service Tribunal and the General Court of the EU have dealt with several sexual harassment and harassment cases under the Staff Regulations of Officials of the EU.[77] In interpreting the relevant procedural provisions, which are of no interest to this article, the Civil Service Tribunal found psychological harassment to be a serious matter,[78] whereas the CJEU stressed that the identification of conduct that may constitute sexual harassment corresponds to an objective of general interest.[79]

4 Potential and limits of EU law

The potential of current EU gender equality law on sexual harassment and harassment related to sex at work can be identified in its broad scope (albeit with some exceptions) and, most importantly, in the recognition of these concepts as forms of gender discrimination, which encompasses specific substantive and procedural guarantees in favour of the victim, such as the no-fault requirement, the shift of the burden of proof, the protection against victimisation and the standing of NGOs, trade unions and other entities. On the other hand, its limits are shown by the limited reporting and access-to-justice rates, resulting in a lack of relevant CJEU case law under the gender equality directives, which may be attributed, at least in part, to the insufficiently comprehensive protection against victimisation both in law and in practice.

73 Article 2(2((a) of Directive 2006/54 reads: 'For the purposes of this Directive, discrimination includes: (a) harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct'.

74 Koukoulis-Spiliotopoulos, S. (2009), 'Introduction' in *Egalité des genres et combat contre le harcèlement sexuel: les politiques de l'Union Européenne* (Gender Equality and the fight against sexual harassment: the politics of the European Union), Association de Femmes de l'Europe Meridionale (AFEM), Sakkoulas/Bruylant.

75 Numhauser-Henning, A., Laulom, S. (2012) *Harassment related to Sex and Sexual Harassment Law in 33 European Countries – Discrimination versus Dignity*.

76 See below under IV.2 'The added value of acknowledging sexual harassment and harassment related to sex at work as forms of gender discrimination'.

77 Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to Officials of the Commission, OJ English Special Edition 1968(I), p. 30.

78 EU Civil Service Tribunal, F-42/10, *Skareby v Commission,* 16 May 2012, pp. 31, 84.

79 CJEU, judgment of 4 April 2019, *OZ v European Investment Bank*, C-558/17, ECLI:EU:C:2019:289, p. 66.

4.1 The scope

The prohibition of sexual harassment and harassment related to sex at work by Directive 2006/54 has a very broad scope, covering: (a) access to employment, self-employment or occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals and pay; (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations. Therefore, sexual harassment and harassment related to sex that occurs in universities, professional organisations (Bars, Chambers), trade unions and employers' organisations and/or access thereto is also covered. In this respect, EU law exceeds the scope of ILO Convention No. 190.[80]

However, the Recast Directive does not explicitly cover sexual harassment and harassment related to sex that occurs outside the workplace in the context of or in relation to work, e.g. while commuting to the workplace, on external business meetings, on business trips or while working in mobile sites, in home-based offices or other places (teleworking). In this respect, it falls short of the scope of ILO Convention No. 190, which deliberately covers not only the workplace but 'the world of work'. This is crucial given that the proliferation of flexible workplace structures (telework, independent work through company outsourcing, the need for more versatile workers, teamwork with less linear forms of management decision making) can render less effective the traditional anti-discrimination legislation, which was modelled with reference to the more rigid organisational structures of the past.[81]

The wording of Recast Directive 2006/54 (and of its predecessor Directive 2002/73) does not explicitly indicate who the perpetrators of sexual harassment and harassment related to sex may be. However, as mentioned above, in its report on the application of Directive 2002/73,[82] the European Commission clearly acknowledges that the scope of protection of the directive is not limited to relations between workers and their superiors, but extends to relations with co-workers or other third parties. In the author's opinion, given the lack of relevant CJEU case law, the protection against third-party sexual harassment or harassment related to sex at work should be explicitly provided in written law for the sake of legal certainty. This is imperative in the case of Member States that have implemented the provisions of the gender equality directives simply by copying their wording, without adopting specific legislation or more detailed rules on the prohibition of sexual harassment and harassment related to sex at work.[83]

80 ILO Convention No. 190 explicitly covers workers and other persons, including employees as defined by national law, as well as persons working irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants in both the public and the private sectors, in formal and informal economy, in urban or rural areas (Article 2); third-party harassment is referred to in a more nuanced way: the approach for the prevention and elimination of violence and harassment in the world of work 'should take into account violence and harassment involving third parties' (Article 4(2). Moreover, it covers violence and harassment occurring in the course of, linked with or arising out of work: in the workplace, including public and private spaces where they are a place of work; (b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities; (c) during work-related trips, travel, training, events or social activities; (d) through work-related communications, including those enabled by information and communication technologies; (e) in employer-provided accommodation; and (f) when commuting to and from work. The convention also recognises the impact of domestic violence in the world of work whereas the Recommendation sets out practical measures, including leave for the victims of domestic violence, flexible work arrangements and awareness-raising.

81 Mercat-Bruns, M. (2018) 'Systemic discrimination: rethinking the tools of gender equality', *European Equality Law Review* 2018/2.

82 COM(2009)409 final of 29 July 2009.

83 For the distinction between a formal transposition, which is incomplete, and a substantive transposition of the directives, see Zorbas, G. (2010), *Le Harcèlement*.

4.2 The added value of acknowledging sexual harassment and harassment related to sex at work as forms of gender discrimination

Although sexual harassment and harassment related to work are an attack on human dignity and dignity at work of the individual, identifying them as a dignity problem, in the same manner as labelling them a health and safety problem, depoliticises the issue: emphasis is put on the dignity of the targeted individual rather than on how sexual harassment and harassment related to sex at work are related to systemic discrimination against women, in competitive job markets. Unlike the dignity-harm approach, the approach of gender equality does not isolate the violent behaviour from the economy of the workplace, as it clearly recognises that women may be disproportionally affected by sexual harassment and harassment related to sex.[84]

The recognition of sexual harassment and harassment related to sex as forms of gender discrimination (as compared to the mere dignity approach or health and safety approach) offers the victim a complex of procedural and substantive protective provisions: *inter alia,* judicial remedies even after the employment relationship has ended; the shift of the burden of proof; the prohibition of victimisation; the standing of trade unions, NGOs and other legal entities; the establishment of specialised equality bodies; and most importantly, the no-fault requirement.

As to the latter, according to CJEU gender equality case law, in particular in the *Draehmpaehl*[85] and *Dekker*[86] cases, the finding of discrimination is not subject to the requirement of any kind of fault. This also applies to sexual harassment and harassment related to sex at work, which are explicitly recognised as forms of gender discrimination by the gender equality directives. The no-fault requirement also derives from the use of the terms 'with the purpose or effect' in the relevant definitions of gender equality directives.[87] Although within a different legal context, the no-fault rule was adopted by the CJEU and the Tribunal in their interpretation of the EU Staff Regulations, finding that it is not required that the 'reprehensible conduct' of the alleged harasser is 'committed with the intention of undermining the personality, dignity or physical or psychological integrity of a person'.[88]

4.3 Access to justice[89]

In practice, while access to courts as such is ensured in all Member States, the level of gender equality litigation overall is still very low in many Member States. Research has shown that the most frequently reported difficulties and barriers that victims of sex discrimination encounter and that may explain the low level of litigation, relate to: low levels of compensation; the cost and length of legal proceedings; overly short time limits for initiating proceedings; conditions for entitlement to legal aid; reluctance of unions and other associations to bring proceedings; 'stigma' of being a 'troublemaker' associated with such cases and fear of retaliation or victimisation, especially within small enterprises (where co-workers have hierarchical and often close relationships with the discriminating party) and small-scale communities (where the stigma associated with adverse treatment by the employer or with dismissal

84 Kjeruf Thorgeirsdóttir, H. (2019) 'Protection from victimisation in the workplace: Comparative EU-Icelandic perspectives', *European Equality Law Review* (EELR) 2019/1.

85 CJEU, judgment of 22 April 1997, *Draehmpaehl v Urania Immobilienservice OHG*, C-180/95, ECLI:EU:C:1997:208.

86 CJEU, judgment of 8 November 1990, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen*, C-177/88, ECLI:EU:C:1990:383.

87 Robert, E. (2009), 'Le cadre juridique européen en matière de lutte contre le harcèlement sexuel sur le lieu de travail' (The legal framework of combatting sexual harassment at work), in AFEM, *Egalité des genres et combat contre le harcèlement sexuel: les politiques de l'Union Européenne*, Sakkoulas/Bruylant, 2009.

88 European Union Civil Service Tribunal, F-42/10, *Skareby v Commission,* 16 May 2012, p. 69.

89 In this article, access to justice is examined under the scope of Gender Equality Directives. For access to justice of victims of violent crime, see: FRA (2019) *Victims' rights as standards of criminal justice – Justice for victims of violent crimes*, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-justice-for-victims-of-violent-crime-part-1-standards_en.pdf. Although the EU directives do not define sexual harassment as a violent crime, FRA covers it if the Member State concerned classifies the offence under this category.

is more evident); lack of confidence of claimants that they will be believed and difficulties of proof; lack of awareness and knowledge about equality law; lack of experience and of the habit to defend one's own rights; lack of skilled and experienced advice and assistance; deeply rooted traditional gender stereotypes that entail a greater degree of tolerance; the socio-economic crisis, with the ensuing high unemployment and long-term unemployment amongst women; and the low unemployment benefits that are subject to strict conditions.[90] The fear of unemployment haunts not only the victim, but also potential witnesses.[91] These deterrent factors apply in general to all gender equality cases.

4.4 Prohibition of victimisation

However, in cases of sexual harassment and harassment related to sex at work, the fear of victimisation is even higher than in other cases of discrimination. The lack of complaints and case law before the CJEU hitherto and the limited case law at national level[92] indicate that the 'old' culture of silence still lingers. Victimisation can range from dismissal, which is an overt and clear-cut retaliation by the employer, to less evident forms: in common practice, the victim is removed from the work post to another post 'in the interest of the service' instead of the perpetrator;[93] most importantly, victimisation through harassment, involving hostile behaviour towards an employee who has openly complained about discrimination in the workplace or towards the coworkers who have assisted her/him with a previous discrimination complaint. Victimisation through harassment remains an invisible, oppressive injustice as it is very difficult to prove, despite the rule on the shift of the burden of proof, which places the burden of proof that the alleged injustice is not based on the employee's demand for redress with the alleged discriminator.[94] Moreover, an employer's lack of response in accordance with the gravity of a given situation/complaint (as a well as a delayed or ineffective response) with no deterrent effect to the perpetrator may also result in hidden victimisation.

Article 24 of the Recast Directive prohibiting victimisation is to be read in the light of Recital 34 of its preamble, which provides that 'an employee defending or giving evidence on behalf of a person protected under this Directive should be entitled to the same protection'. In its recent *Hakelbracht* case, the CJEU made a broad interpretation clarifying that the protection against victimisation is not restricted to official witnesses, but also applies to 'employees who have informally supported the person who has been discriminated against'.[95]

The Recast Directive's anti-victimisation provision (Article 24) covers 'dismissal or other adverse treatment by the employer' as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment. The term 'other adverse treatment' has been criticised as a problematic grey area ('a hands-off approach'), whereas a more comprehensive protection in the form of a positive obligation of the employer to 'ensure' a safe working environment for individuals who may complain is needed.[96] In this context, it is argued that the ruling of the CJEU in the *Coote* case,[97]

90 European Commission, EELN, (2018) *A comparative analysis of gender equality law in Europe*.
91 Koukoulis-Spiliotopoulos, S. (2009) 'Introduction' in *Egalité des genres et combat contre le harcèlement sexuel: les politiques de l' Union Européenne*, AFEM, Sakkoulas/Bruylant.
92 See the Commission's report to the Council and the European Parliament on the application of Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, COM(2009)409 final of 29 July 2009: '…Many Member States underline people's lack of knowledge of harassment and sexual harassment and point out that raising awareness is still essential to fighting them. Special problems concern enforcement, since the victims are particularly vulnerable and rarely initiate judicial proceedings (most Member States quote a very low number of cases taken to court)'. See also Zorbas, G., *Le Harcèlement*, (2010).
93 Zorbas, G. (2010) *Le Harcèlement*.
94 Kjeruf Thorgeirsdóttir, H. (2019) 'Protection from victimisation in the workplace: Comparative EU-Icelandic perspectives', *European Equality Law Review* (EELR) 2019/1.
95 CJEU, judgment of 20 June 2019, *Tine Vandenbon and Others v WTG Retail BVBA*, C-404/18, ECLI:EU:C:2019:523.
96 Kjeruf Thorgeirsdóttir, H. (2019) 'Protection from victimisation in the workplace: Comparative EU-Icelandic perspectives', *European Equality Law Review* (EELR) 2019/1.
97 CJEU, judgment of 22 September 1998, *Coote* v *Granada Hospitality Ltd*, C-185/97, ECLI:EU:C:1998:424.

regarding the employer's obligation to provide a post-employment reference, amounts to an expansion of the anti-victimisation protection after the end of the employment relationship.[98]

However, victimisation is not restricted to employment conditions.[99] In practice, a serious aspect of victimisation is the legal (both penal and civil) retaliation by the perpetrator, who can be the employer or a superior, a co-worker or a third party. The victims' (and eventual claimants') fear of victimisation both against them and/or their witnesses is not limited to their employment conditions (dismissal, detrimental modification of working conditions, bad performance assessment). Most importantly, they fear that the perpetrator will sue them and/or their witnesses or potential witnesses for slander, defamation or insult and even go so far in some cases as to bring a 'blackmail' civil action for moral damages due to slander, defamation or insult against them and/or their witnesses or potential witnesses.[100] This kind of 'legal retaliation', which is quite common in practice, is not addressed by the Recast Directive:[101] first, it is questionable whether it falls under 'other adverse treatment' or whether the latter refers only to the deterioration of employment conditions; secondly, victimisation in the form of 'adverse treatment' is prohibited only by the employer and not by the perpetrator (in case these persons do not coincide, the perpetrator being a superior, co-worker or a third party).

The following three Greek judgments show quite clearly the seriousness of such a risk. In the first case, the female claimant, working as a secretary in a trade union, alleged that the termination of her employment relationship was a result of sexual harassment by the representative of the trade union. She won the action in the first instance court, but the defendant appealed the decision in the Court of Appeal while simultaneously suing the claimant's witness in the first instance court. This witness's testimony was the sole proof of the harassment, and when the penal court found him guilty, the case failed in both the Court of Appeal and the Supreme Civil Court, although there was significant *prima facie* evidence, which was not taken into account.[102]

The other two cases concerned sexual harassment at work against female employees by their male direct superiors (not the employer). In the second case the female employee brought a civil action against the male perpetrator (superior) seeking moral damages for sexual harassment; in retaliation the perpetrator (superior) brought a civil action against her for moral damages of EUR 200 000, alleging that by characterising him as a perpetrator of sexual harassment she had committed slander/defamation against him. The court found that sexual harassment had taken place. Accordingly, it dismissed the perpetrator's claim for EUR 200 000 against the victim and upheld the victim's claim against the perpetrator adjudicating moral damages of EUR 3 000 due to sexual harassment.[103]

In the third case, a female worker, who was a victim of sexual harassment at work by her superior, brought a labour law action against the employer (the company). She alleged that upon denouncing her superior as the perpetrator of sexual harassment at work, she was dismissed by the director of the company (her indirect superior), who thereby chose to offer coverage to the perpetrator (her direct superior). She sought the recognition of the nullity of the dismissal with an automatic result of her entitlement to full backpay. In retaliation, the director of the company brought against her a civil action for moral damages of EUR 400 000; he alleged that by blaming him in claiming that he offered coverage to her superior (the alleged perpetrator), she had committed slander/defamation against him. The court dismissed the director's action with the reasoning that the victim's allegations did not exceed the necessary measure for the exercise of her rights.[104]

98 Kjeruf Thorgeirsdóttir, H. (2019) 'Protection from victimisation in the workplace: Comparative EU-Icelandic perspectives'.
99 Kjeruf Thorgeirsdóttir, H. (2019) 'Protection from victimisation in the workplace: Comparative EU-Icelandic perspectives'.
100 Koukoulis-Spiliotopoulos, S. (2008), 'Gender equality in Greece and effective judicial protection', NZA 2/2008, p. 77.
101 Kjeruf Thorgeirsdóttir, H. (2019) 'Protection from victimisation in the workplace: Comparative EU-Icelandic perspectives'.
102 Supreme Civil Court, judgment No. 1655/1999.
103 Athens FICC (three-member chamber), judgment No. 796/2013.
104 Athens FICC (three-member chamber), judgment No. 1122/2013.

This risk of penal or civil retaliation measures by the perpetrator against the victim (and potential witnesses) is usually not counterbalanced by the prospect of successful judicial proceedings: unlike in the USA, in most EU countries the sums adjudicated for moral damages in cases of sexual harassment at work are very low,[105] as it is also shown by the Greek cases mentioned above.

Moreover, even in Member States where victimisation in the form of an unlawful dismissal is effectively prohibited (e.g. recognition of the nullity of the dismissal with the automatic results that the successful claimant is deemed never to have been dismissed and is entitled to full backpay, reinstatement not being necessary, as is the case in Greece), the victim of sexual harassment is commonly reluctant to return to the same workplace for fear of repeated adverse treatment by the harasser (victimisation by harassment). This situation is exacerbated in small and medium-sized businesses, where relationships are more personal.

All these factors, together with the greater difficulty of proving sexual harassment, discourage victims of sexual harassment and harassment related to sex at work from bringing their case to court (either in their own name or with the support of a trade union/NGO/equality body) with the belief that the fight may possibly entail a greater sacrifice than that caused by the initial, allegedly unlawful act.[106] This may explain why in the field of sexual harassment and harassment related to sex at work, strategic litigation has not worked, at least effectively, at CJEU level, as is shown by the total lack of relevant case law under the gender equality directives, and in several Member States, where the relevant national case law is rather limited.

5 Concluding remarks and proposals

The concept of 'inequality' is different in nature to and broader than the concept of 'discrimination'. It covers *de facto* situations affecting mainly women, due to 'prejudices and stereotypes' which infiltrate socioeconomic structures. Inequalities survive the repeal of discriminatory provisions.[107] Moreover, women are neither a group nor a minority, but one of the two forms of human beings and half of mankind, and they often suffer multiple inequalities. Gender equality is a positive and pro-active constitutional principle of the EU, a horizontal objective and fundamental right, not a mere prohibition of discrimination. Article 23(1) of the Charter, based on Article 3(2) TEU imposes on all Union institutions the positive obligation, in exercising their powers – including the power to enact legislation, interpret, apply it and control its implementation – in any area, to eliminate gender 'inequalities' and to 'actively promote' substantive gender equality. Member States are also bound by this obligation via their duty of 'sincere cooperation' (Article 4(3) TEU).

By acknowledging sexual harassment and harassment related to sex at work as forms of gender discrimination, the EU gender equality directives have made the landmark transition from the initial clear-cut dignity-harm approach to a dual approach (both the dignity-harm and the anti-discrimination approach). However, the hitherto absence of CJEU case law on sexual harassment and harassment related to sex at work under the EU gender equality directives and the rather limited national case law demonstrate that the current legal framework has not proven sufficiently effective in practice for combating these phenomena.

105 Zorbas, G. (2010) *Le Harcèlement*; Zorbas, A., Zorbas, G. (2016) *Risques Psychosociaux, harcèlement et violences au travail. Droits belge, français et luxembourgeois*.

106 Kjeruf Thorgeirsdóttir, H. (2019) 'Protection from victimisation in the workplace: Comparative EU-Icelandic perspectives', *European Equality Law Review* (EELR) 2019/1.

107 Koukoulis-Spiliotopoulos, S. (2008), 'The Lisbon Treaty and the Charter of Fundamental Rights', *European Gender Equality Review* No 1/2008, pp. 15-24 (21); Koukoulis-Spiliotopoulos, S. (2005), 'The amended Equal Treatment Directive (2002/73): An expression of constitutional principles/fundamental rights', *Maastricht Journal* 4(2005), pp. 327-368; Masse-Dessen, H. (2011), 'The place of Gender Equality in European Equality Law', *European Gender Equality Law Review* No 1/2011, pp. 6-12; McCrudden, Ch. (2019), 'Gender-based positive action in employment in Europe: A comparative analysis of legal policy approaches in the EU and EEA', EELN (to be published).

Practice has shown that it is not adequate to address sexual harassment and harassment related to sex at work simply as instances of individual discrimination and eventual individual litigation aiming at securing justice for the individual and penalising the perpetrator, i.e. under the individual rights approach.[108] These phenomena should be also addressed through the prism of systemic discrimination (glass ceilings, sex-segregated workforces, etc.), which offers a more holistic perspective.[109] Regulatory requirements should realise the positive obligation of enterprises to promote gender equality both in the field of prevention and of effective combat against these phenomena.[110]

In the wake of the *#MeToo* movement, the European Parliament in its Resolution of 26 October 2017, condemned sexual harassment as a form of violence against women and girls and as the most extreme yet persistent form of gender-based discrimination, proclaiming zero tolerance against sexual harassment and sexual abuse in the EU. The Parliament also called on the Commission to submit a proposal for a directive against all forms of violence against women and girls and against gender-based violence, including sexual harassment and sexual abuse against women and girls.[111]

In the author's view, it is high time for a new directive on sexual harassment and harassment related to sex at work, which will build on the international and EU gender equality *acquis* acknowledging these phenomena not only as a harm to the victim's dignity and an individual injustice, but, most importantly, as forms of gender discrimination, with the aim to eliminate not merely individual discrimination but also the systemic/structural discrimination created by persisting gender stereotypes and hierarchies to the detriment of women. The new directive should:

(i) explicitly prohibit sexual harassment and harassment related to sex at work not only by the employer, superiors and co-workers but also by third parties (such as clients, customers, service providers, users, patients and members of the public) in line with the European Commission's Report on the application of Directive 2002/73[112] (see under 4.1);
(ii) explicitly prohibit sexual harassment and harassment related to sex at work not only in the workplace but also in the context of or in relation to work, e.g. while commuting to the workplace, on external business meetings, on business trips or while working in mobile sites, in home-based offices or other places (teleworking) (see under 4.1);
(iii) explicitly prohibit victimisation not only of the victims and their official witnesses, but also of whistleblowers and 'employees who have informally supported the person who has been discriminated against' in line with recent CJEU case law[113] (see under 4.4);
(iv) address victimisation in a more comprehensive way: instead of the current mere prohibition of dismissal or other adverse treatment, a positive obligation on the employer to ensure a safe working environment for victims who may complain should be provided;[114] moreover victimisation in the form of 'legal retaliation' by the perpetrator should be also addressed (see under 4.4).

108 McCrudden, Ch. (2019) 'Gender-based positive action in employment in Europe: A comparative analysis of legal policy approaches in the EU and EEA', EELN (to be published).
109 Mercat-Bruns, M. (2018) 'Systemic discrimination: rethinking the tools of gender equality', *European Equality Law Review* 2018/2; Mercat-Bruns, M. (2015) 'L' identification de la discrimination systémique', *Rev. Droit Travail*.
110 McCrudden, Ch. (2019) 'Gender-based positive action in employment in Europe: A comparative analysis of legal policy approaches in the EU and EEA', EELN (to be published).
111 Resolution of 26 October 2017 on combating sexual harassment and abuse in the EU (2017/2897/(RSP)), OJ C 346, 27.09.2018, p. 192. See in its preamble: 'D… sexual violence and harassment are contrary to the principle of gender equality and equal treatment and constitute gender-based discrimination' and 'I… the persistence of gender stereotypes, sexism, sexual harassment and abuse is a structural and widespread problem throughout Europe and the world … gender stereotypes and sexism, including sexist hate speech, offline and online, are root causes of all forms of violence against women'.
112 COM(2009)409 final of 29 July 2009.
113 CJEU, judgment of 20 June 2019, *Tine Vandenbon and Others v WTG Retail BVBA*, C-404/18, ECLI:EU:C:2019:523.
114 Kjeruf Thorgeirsdóttir, H. (2019) 'Protection from victimisation in the workplace: Comparative EU-Icelandic perspectives', *European Equality Law Review* (EELR) 2019/1.

Furthermore, along with effective combating, focus should be placed on prevention (these phenomena are easier to prevent or, at least, to deal with at early stages):[115] mandatory preventive measures together with intervention and rehabilitation measures, including internal procedures, should be provided; in this context the rule of the shift of the burden of proof should be applied while the principles of privacy, confidentiality and impartiality and the respect of the defence rights of alleged offenders should also be taken into account.[116] The effectiveness of these measures should be strictly monitored, and statistical data should be collected.

A directive, as a legally binding instrument, is preferable to a recommendation (although the latter would be the easier method).[117] Experience has shown that a mere recommendation and a code of practice are not sufficient: 27 years have passed since the adoption of Recommendation 92/131 whereas five years after its adoption, the Recommendation 2014/124 on pay transparency[118] has not yet been implemented by all Member States and has yet to be considered at all in at least some of them.

The adoption of a new directive could be an EU response to *#MeToo* and equivalent movements. However, even if it is not adopted, the proposal for a new directive will contribute to a much more intense debate at the national level on this issue, as the Commission's proposed directive on gender balance on company boards has had, even without adoption.[119]

The *#MeToo* movement has again brought the problem of sexual harassment and harassment related to sex at work to the fore and has reopened the public debate on the issue. ILO Convention No. 190 and its Recommendation No. 206 have shown that there is an international consensus for addressing these phenomena using the gender equality perspective through legally binding instruments. In the author's view, the time has come to rethink the EU law on sexual harassment and harassment related to sex at work through the lens of systemic discrimination, in order to combat a long-lasting silence and tolerance of misconduct.

115 Zorbas, G. (2010) *Le Harcèlement*; Zorbas, A., Zorbas, G. (2016) *Risques Psychosociaux, harcèlement et violences au travail. Droits belge, français et luxembourgeois*.

116 CJEU, judgment of 9 November 2006, *Commission v De Bry,* C-344/05, ECLI:EU:C:2006:710, p. 37; judgment of 14 June 2016, *Marchiani v Parliament*, C-566/14, ECLI:EU:C:2016:437, p. 51; General Court, judgment of 29 June 2018, *HF v Parliament*, T-218/17, ECLI:EU:T:2018:393, p. 69.

117 On the difficulties envisaged by the Commission for the adoption of binding legislation, see Zorbas, G. (2009), *Brèves observations concernant l'évolution du cadre legislatif européen* (Brief observations concerning the evolution of the European legislative framework) in AFEM, *Egalité des genres et combat contre le harcèlement sexuel: les politiques de l'Union Européenne*, Sakkoulas/Bruylant, 2009.

118 Commission Recommendation 2014/124/EU of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency, OJ L 69, 8.3.2014, pp. 112-116.

119 McCrudden, Ch. (2019) 'Gender-based positive action in employment in Europe: A comparative analysis of legal policy approaches in the EU and EEA', EELN (to be published).

Primacy of national law over EU law? The application of the Irish Equal Status Act

Judy Walsh*

1 Introduction

The Equal Status Acts 2000-2018 prohibit discrimination in the field of goods and services within Ireland.[1] Covering 10 discriminatory grounds, they constitute the primary domestic legislation implementing the Racial Equality Directive 2000/43 and the Gender Equal Access to Goods and Services Directive 2004/113.[2] The Equal Status Act (hereafter ESA) is invoked frequently before a cost-free and relatively accessible quasi-judicial body called the Workplace Relations Commission.[3] While its personal scope and available enforcement mechanisms compare favourably with other EU jurisdictions, the material scope of the ESA is substantially restricted by Section 14(1)(*a*), which provides:

> 'Nothing in this Act shall be construed as prohibiting—
> (*a*) the taking of any action that is required by or under—
> (i) any enactment or order of a court,
> (ii) any act done or measure adopted by the European Union, by the European Communities or institutions thereof or by bodies competent under the Treaties establishing the European Communities, or
> (iii) any convention or other instrument imposing an international obligation on the State…'

As Fennelly notes, it 'is one of the most important and far-reaching exemptions in the legislative scheme'.[4] It removes significant fields of public sector activity from the ambit of anti-discrimination law, raising compliance with Directive 2000/43 in particular. The picture is complicated by ambiguities in the definition of 'service' and by court judgments concerning how the ESA interacts with government policy and with other legislation.

This article assesses the application of Section 14(1)*(a)* in practice. It focuses on the exemption for actions required by 'any enactment' under Subsection (i) since that element of the provision has had the greatest impact and compromises the primacy of EU law. The article opens with a brief account of

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1 Ireland, Equal Status Act 2000, 26.03.2000, http://www.irishstatutebook.ie/eli/2000/act/8/enacted/en/html.

2 The grounds are gender, race (including nationality), Traveller community, age, disability, religion, sexual orientation, civil status and family status. A further 'housing assistance' ground was added in 2015 to prohibit discrimination in providing rental accommodation to people who receive social protection benefits. See European Network of Legal Experts in Gender Equality and Non-Discrimination (2018), *Ireland Country Report: Non-Discrimination 2018*, Luxembourg: Publications Office of the European Union, https://publications.europa.eu/en/publication-detail/-/publication/cfbb9e0c-cdc9-11e8-9424-01aa75ed71a1/language-en/format-PDF/source-101905503.

3 In 2018, 595 complaints were referred to the WRC; 668 referrals were made in 2017: Workplace Relations Commission (2019) *Annual Report 2018*, p. 21, https://www.workplacerelations.ie/en/news-media/workplace_relations_notices/annual-report-2018.pdf.

4 Fennelly, D. (2012), *Selected Issues in Irish Equality Case Law 2008-2011*, Dublin: Equality Authority, p. 71.

its legislative history (Section II), going on to analyse case law that applies the exemption (Section III). Section IV considers whether the provision complies with EU law and how a recent judgment of the Court of Justice of the European Union (CJEU) could impact the provision's operation in the future.[5]

2 Legislative background

The exemption was set out in the Equal Status Act 2000, Ireland's first legislative instrument to address discrimination in the field of goods and service provision. Parliamentary debate on the adoption of Section 14(1)*(a)* was very limited.[6] One *Teachta Dála* (elected representative) objected that the subsection would, in tandem with a narrow definition of services, operate to exclude many public service activities from scrutiny under the new law. In response, the Minister for Justice, Equality and Law Reform stated:

> Under Section 14, actions which are required to be done by or under statute are exempt from the legislation. Distinctions in the tax code based on marital status or in social welfare legislation based on age – for example, pensions – will not be regarded as discrimination under the Equal Status Bill. I stress that this exemption applies only to actions which are mandatory under the relevant statute and not to the discretionary actions of statutory bodies or public officials.
>
> Lest there be doubt, even where a particular matter is exempt under Section 14 the obligation not to discriminate will apply to the interaction between officials and the public in the delivery of the relevant statutory function. For example, the fact that the requirements of the tax code are exempt does not allow Revenue officials to discriminate in granting access to buildings and information or in providing advice or other forms of assistance.[7]

There was no further parliamentary debate on the provision at that juncture. However, the adoption of EU equality directives necessitated amendments to the domestic legal framework.[8] Ireland's specialised equality body, the Equality Authority, undertook a comprehensive analysis of the changes required to align the ESA and the Employment Equality Act 1998 with Directive 2000/43, Directive 2000/78 and Directive 2002/73.[9] It argued that the statutory exemption 'should be deleted as the Race Directive does not permit this exemption'.[10] According to the Equality Authority, compliance would also require a revised definition of service to specifically include State functions concerning social protection, social advantages and education. These recommendations were not followed in the Equality Act 2004.[11]

5 Judgment of 4 December 2018, *Minister for Justice and Equality v Workplace Relations Commission*, C-378/17, http://curia.europa.eu/juris/document/document.jsf?text=&docid=208381&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=152514.

6 The provision may have been modelled on equivalent exemptions under UK law. An exception for acts done with statutory authority, which applied under Section 41(1) of the Race Relations Act 1976, was removed by Schedule 22 of the UK Equality Act 2010.

7 162 *Seanad Debates* Col 586, Equal Status Bill, 1999: Second Stage, 23.02.2000, https://www.oireachtas.ie/en/debates/debate/seanad/2000-02-23/4/.

8 Article 13 of the Treaty of Amsterdam, now Article 19 of the Treaty on the Functioning of the European Union (TFEU), granted the European Community competence to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. In June 2000, the Council of Ministers adopted Directive 2000/43, which is generally referred to as the 'Racial Equality Directive' or the 'Race Directive'. And in November of that year, Directive 2000/78, known as the 'Framework Directive', was adopted. It covers discrimination on the grounds of religion or belief, disability, age and sexual orientation in the field of employment and occupation. The Framework Directive is implemented in Irish law through the Employment Equality Acts 1998-2015: Ireland, Employment Equality Act 1998, 18.06.1998, http://www.irishstatutebook.ie/eli/1998/act/21/enacted/en/print.

9 Equality Authority (2003), *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000 in light of the Transposition of the European Union 'Race' Directive (RD), Framework Employment Directive (FED) and the Gender Equal Treatment Directive (GETD)*, Dublin: Equality Authority.

10 Equality Authority (2003), *Overview of the Employment Equality Act 1998 and the Equal Status Act 2000 in light of the Transposition of the European Union 'Race' Directive (RD), Framework Employment Directive (FED) and the Gender Equal Treatment Directive (GETD)*, Dublin: Equality Authority, p. 28.

11 Ireland, Equality Act 2004, 18.07.2004, http://www.irishstatutebook.ie/eli/2004/act/24/enacted/en/print.html.

The political environment was not receptive to the expansion of equality protections.[12] Indeed, while the Equality Bill 2004 was before the Oireachtas (Irish Parliament), the Government deployed the Section 14 exemption to reverse a successful equal status challenge. A man who was refused a travel pass under the non-statutory Free Travel Scheme for his cohabiting male partner successfully settled an action taken against the Department of Social and Family Affairs in 2003.[13] The Department accepted that the decision amounted to unlawful discrimination on the sexual orientation ground in contravention of the 2000 Act. Statutory social welfare schemes were immune to challenge, because of the exemption for any measures required by an enactment, but, as an administrative scheme, the Free Travel Scheme was covered by the ESA. In March 2004, the Oireachtas amended the principal social welfare statute so that the pre-existing definition of 'spouse' or 'qualified adult', which encompassed only married and opposite-sex cohabiting couples, would also apply to specified administrative social welfare schemes, including the Free Travel Scheme.[14] The amendment was designed to ensure that for those schemes same-sex couples would essentially be treated as single persons as a matter of law. An alliance of civil society organisations described the move as a 'shameful' one, which ran counter to ECHR case law on sexual orientation discrimination and meant that Ireland was the only EU country to have introduced deliberately discriminatory legislation against lesbian and gay people for over a decade.[15]

The change to the social welfare code was subsequently reversed upon the introduction of civil partnership.[16] But the statutory exemption remains in place. Consequently, the application of the ESA to activities of public bodies is frequently contested in litigation, as discussed in the next section. Moreover, successful ESA case outcomes could be reversed again in the future by giving the discrimination a legislative underpinning.

3 Case law

3.1 Introduction

The exemption has generated a substantial body of case law.[17] All of the cases emanate from the first instance forum for determining complaints under the ESA, formerly the Equality Tribunal and now the Workplace Relations Commission (hereafter WRC). Most of the decisions concern grounds that fall outside the personal scope of the current EU equality directives. There are, however, some significant Traveller community ground cases which are revisited in Section IV. Having analysed decisions on its ambit in the next section, I examine the substantive areas affected by the exemption using the material scope of the Racial Equality Directive as a reference point.

In cases involving public sector bodies, Section 14(1)*(a)*(i) is often invoked alongside arguments to the effect that the activities concerned do not constitute services as defined under the ESA. The legislation expressly covers the public sector. Under Section 2(1) ESA, the 'persons' who must not discriminate in the supply of goods and services include legal persons, such as organisations, public bodies or other entities.

12 See Baker, J., Lynch, K., and Walsh, J. (2015), 'Cutting back on equality', in Meade, R., and Dukelow, F. (eds), *Defining events: Power, resistance and identity in 21st century Ireland.* Manchester: Manchester University Press, pp. 191-199; Crowley, N. (2006), *An Ambition for Equality*, Newbridge: Irish Academic Press.

13 Equality Authority (2004), *Annual Report 2003*, Dublin: Equality Authority, pp. 32-33, https://www.lenus.ie/handle/10147/44973.

14 Ireland, Section 19, Social Welfare (Miscellaneous Provisions) Act 2004, 25.03.2004, http://www.irishstatutebook.ie/eli/2004/act/9/enacted/en/print#sec19.

15 Equality Coalition (2004) *Submission on the Social Welfare (Miscellaneous) Bill 2004*, https://www.iccl.ie/wp-content/uploads/2017/11/Equality-Coalition-Submission-on-the-Social-Welfare-Miscellaneous-Bill-2004-March-2004-1.pdf.

16 In 2011, the social welfare code was amended following the introduction of civil partnership: Social Welfare and Pensions Act 2010, 21.12.2010, http://www.irishstatutebook.ie/eli/2010/act/37/enacted/en/print. The sections dealing with civil partners were commenced by the Social Welfare and Pensions Act 2010 (Sections 15 to 26) (Commencement) Order 2010 (SI 673/2010).

17 The author has identified 54 first instance cases in which the enactment was considered since the legislation was enacted (20 of these were decided in the past 3 years). All 9 applicable grounds, bar sexual orientation, feature in that case law. Thirteen complaints were referred on several grounds. In the single-ground cases, disability was invoked most often (15), followed by race (8, 4 of which concerned the nationality element of the ground), and Traveller community (4).

The problem lies with the definition of 'service'.[18] 'Service' includes 'facilities for – (i) banking, insurance, grants, loans, credit or financing, (ii) entertainment, recreation or refreshment, (iii) cultural activities, or (iv) transport or travel…'. As noted above, contrary to the advice of the Equality Authority, the legislature opted not to specifically include social protection, healthcare, social security or social advantages in that definition. Complainants, who are often unrepresented and cannot access legal aid,[19] have thus met with significant obstacles in establishing that they are entitled to mount discrimination challenges in the context of accessing many public services.

3.2 Ambit of the exemption

The exemption only applies to actions that are required by or under any enactment or by an order of a court. Several decisions have examined the meaning of 'enactment', which was not defined in the 2000 Act, as well as the phrase 'required by or under'.

While it was evident from the outset that acts of the Oireachtas were 'enactments', the position with secondary legislation was uncertain. An early Tribunal decision suggested that in light of the law's remedial social purpose, the definition of enactment might be construed narrowly to exclude statutory instruments.[20] Subsequently, Section 2(1) of the Interpretation Act 2005 defined 'enactment' to mean 'an Act or statutory instrument or any portion of an Act or statutory instrument'.[21] And 'statutory instrument' was defined as 'an order, regulation, rule, bye-law, warrant, licence, certificate, direction, notice, guideline or other like document made, issued, granted or otherwise created by or under an Act…'.[22] Case law has since clarified that secondary legislation is covered,[23] thereby removing the vast bulk of social protection measures from the reach of the ESA (see below).

To be saved, the impugned action must be 'required by or under' an enactment. On the whole, the WRC adopts a stringent approach and 'will not permit reliance on very general provisions of legislation to exempt conduct, which would otherwise constitute discrimination under the Acts, from their scope where those provisions do not impose a clear or specific requirement on the respondent to take the measures which it seeks to stand over.'[24] For instance, in a case concerning refusal to admit a woman and her infant child to a cinema, the respondent tried to rely on Section 12 of the Safety, Health and Welfare at Work Act 2005.[25] Section 12 provides that: 'Every employer shall manage and conduct his or her undertaking in such a way as to ensure, so far as is reasonably practicable, that in the course of the work being carried on, individuals at the place of work (not being his or her employees) are not exposed to risks to their safety, health or welfare.' The equality officer did not accept that this provision made it necessary

18 Section 2(1) ESA.

19 See European Commission against Racism and Intolerance (2019), *ECRI report on Ireland (fifth monitoring cycle)*, CRI(2019)18, https://rm.coe.int/fifth-report-on-ireland/168094c575, at paras 14 and 17.

20 *McClean v The Revenue Commissioners*, DEC-S2004-016, 05.02.2004, https://www.workplacerelations.ie/en/cases/2004/february/dec-s2004-016-full-case-report.html.

21 Ireland, Interpretation Act 2005, 17.10.2005, http://www.irishstatutebook.ie/eli/2005/act/23/section/2/enacted/en/html#sec2.

22 Section 2(1), Interpretation Act 2005, http://www.irishstatutebook.ie/eli/2005/act/23/section/2/enacted/en/html#sec2.

23 The Interpretation Act was applied in *Dowd v Minister for Finance*, DEC-S2011-061, 15.12.2011, https://www.workplacerelations.ie/en/cases/2011/December/dec-s2011-061-full-case-report.html to find that tax regulations were enactments and so immune from challenge under the ESA. See also *Dowd v Gilvarry and HSE West*, DEC-S2011-060, 15.11.2011, https://www.workplacerelations.ie/en/cases/2011/december/dec-s2011-060-full-case-report.html.

24 Fennelly, D. (2012), *Selected Issues in Irish Equality Case Law 2008-2011*, Dublin: Equality Authority, p. 74.

25 *Flanagan Talbot v Casino Cinemas Limited t/a Killarney Cineplex Cinema*, DEC-S2008-053, at paras 4.8-4.12, 11.09.2008, https://www.workplacerelations.ie/en/cases/2008/september/dec-s2008-053-full-case-report.html. See also e.g. *Collins v Drogheda Lodge Pub, Finglas*, DEC-S2002-097/100, at para 7.17, 31.07.2002, https://www.workplacerelations.ie/en/cases/2002/july/dec-s2002-097-100.html; *Ms A (on behalf of her sister Ms B) v Aer Lingus*, DEC-S2009-038, at para 5.13, 03.06.2019, https://www.workplacerelations.ie/en/cases/2009/june/dec-s2009-038-full-case-report.html; *Smith v Department of Social Protection*, DEC-S2015-014, 20.10.2015, https://www.workplacerelations.ie/en/cases/2015/october/dec-s2015-014.html; *A Couple v The Intercountry Adoption Services*, DEC-S2010-002, 07.01.2010, https://www.workplacerelations.ie/en/cases/2010/january/dec-s2010-002-full-case-report.html; *Ms A (on behalf of her son Mr B) v A Community School*, DEC-S2009-008, 30.01.2009, https://www.workplacerelations.ie/en/cases/2009/january/dec-s2009-008-full-case-report.html.

to impose a blanket ban on the admittance of children under the age of two years, when accompanied by a parent or adult, to an afternoon screening of a children's film.

Furthermore, where some element of discretion exists in providing access to a service, the statutory exemption is inapplicable.[26] Thus, in a 2013 case concerning the payment of rent allowance (a social protection benefit), the Equality Tribunal upheld a complaint of discrimination because the statutory instrument in question, S.I. 412 of 2007 Social Welfare (Consolidated Supplementary Welfare Allowance) Regulations 2007, allows the deciding officer to take account of exceptional circumstances. That discretion was exercised in a manner which gave rise to both direct and indirect discrimination on the gender ground.[27]

To date, just one decision has addressed an action required by court order.[28] In that case, a separated father argued that several measures adopted by the school his child attended amounted to discrimination on the gender and civil status grounds.[29] Section 14(1)*(a)*(ii) was alluded to by the WRC in finding that the respondent did not discriminate in requiring written permission from the custodial parent to remove the child from school. Such a practice was required because a court order was in place that determined custody of the child. Furthermore, separated parents were not in a comparable situation to non-separated parents for the purposes of a direct discrimination claim.

3.3 Areas of application

This section examines the primary areas that have generated case law on the exemption, using the fields listed under Article 3 of the Racial Equality Directive as a reference point.

Access to and supply of goods and services which are available to the public, including housing

Private sector service providers have primarily sought to avail of the exemption in relation to compliance with laws on health and safety and the prevention of criminal offences. Several respondents operating premises such as pubs have argued that complainants were ejected or denied access because of concerns for the health and safety of staff or other customers. In the vast bulk of these cases, the WRC found that reliance could not be placed on very general legal obligations to rebut prima facie cases of direct discrimination.[30] A private security company that requested proof of residence from a man who

26 Such an argument was first advanced in a 2006 settlement of a social welfare case. The Department of Social and Family Affairs sought to rely on Section 14(1)*(a)*(i) in refusing an adult dependent allowance to a gay man who had left paid employment to care for his partner. Following intervention by the Equality Authority, the allowance was paid on an *ex gratia* basis. The Authority pointed out that Section 2(2) of the Social Welfare (Consolidation) Act 2005 allowed the minister to specify persons to be adult dependents. It argued that the minister's failure to exercise that discretion to designate the claimant and his partner as a couple amounted to sexual orientation ground discrimination under the ESA: Equality Authority (2007) *Annual Report 2006*, Dublin: Equality Authority, p. 30, https://www.lenus.ie/handle/10147/45595.

27 *Mr A v Community Welfare Service, Department of Social Protection*, DEC-S2013-010, 11.10.2013, https://www.workplacerelations.ie/en/cases/2013/october/dec-s2013-010.html.

28 *A Complainant v A School*, DEC-S2012-003, 16.01.2012, https://www.workplacerelations.ie/en/cases/2012/january/dec-s2012-003-full-case-report.html.

29 Under Section 2(1) ESA, civil status 'means being single, married, separated, divorced, widowed, in a civil partnership within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 or being a former civil partner in a civil partnership that has ended by death or been dissolved.'

30 See e.g. *Collins and others v Drogheda Lodge Pub, Finglas*, DEC-S2002-097/100, 31.07.2002, https://www.workplacerelations.ie/en/cases/2002/july/dec-s2002-097-100.html; *Roche v Alabaster Associates Ltd. t/a Madigans*, DEC-S2002-086, 01.08.2002, https://www.workplacerelations.ie/en/cases/2002/august/dec-s2002-086.html; *Travers and Maunsell v Ball Alley House*, DEC-S2003-109/110, 12.09.2003, https://www.workplacerelations.ie/en/cases/2003/september/dec-s2003-109-110_full_case_report.html; *James v Stanalees Services Ltd. t/a The Traders Pub, Dublin*, DEC-S2004-208, 22.12.2004, https://www.workplacerelations.ie/en/cases/2004/december/dec-s2004-208-full-case-summary.html. In other cases, the exemption was pleaded but not applied since the complainants failed to establish a prima facie case: *Mongan and Reilly v Kingston Inns Limited t/a Downey's Pub*, Dublin, DEC-2003-030-033, 01.05.2003, https://www.workplacerelations.ie/en/cases/2003/may/dec-2003-030-033_full_case_report.html; *Smyth v Regdale Limited t/a 79 Inn, Dublin*, DEC-S2003-047, 30.05.2003, https://www.workplacerelations.ie/en/cases/2003/may/dec-2003-047_full_case_summary.html; *Murphy v Spawell Centre*, DEC-S2004-036, 19.04.2004.

was queuing to board an aircraft conceded that it had done so because of his nationality. Yet none of the applicable security regulations required such differential treatment and his discrimination complaint succeeded.[31] Airlines have raised safety regulations in the treatment of disabled passengers. Asking a prospective customer to obtain medical clearance before flying was not saved by exemption in one case since no law required it.[32] An airline company successfully invoked the exception in *Kane v Eirjet Ltd.*[33] A man with Down syndrome was asked to vacate a seat located in an emergency exit row. The equality officer had regard to Irish and EU safety regulations, which require that airlines have procedures in place to ensure that passengers are seated where they may best assist and not hinder evacuation from the aircraft. The regulations provide that certain categories of passenger, such as children, persons who are 'substantially blind or substantially deaf' and those who have 'an obvious physical or mental handicap' [*sic*] should not be allowed to occupy such seats. Having regard to the nature of the complainant's disability and in light of the obligations that were imposed upon airline operators, the equality officer found that the actions of the respondent complied with the safety obligations and so did not amount to discrimination on the disability ground. A complaint of harassment about how staff carried out their duties in complying with the law was, however, upheld.

Criminal law matters have been raised most frequently by retail banks. All of the four banking cases have been on the race ground,[34] with one of those referred on the religion ground as well.[35] In each case, the respondents argued that the impugned treatment of non-Irish national customers was required by enactments aimed at preventing money laundering or the prevention of terrorism. And while many of the measures taken were saved by the exemption, in three instances the banks were found liable for discrimination because they had gone beyond what was 'required' under the enactments in question. In a recent decision, the WRC did not permit a pharmacy to avail of the exemption.[36] The complainant, an Algerian national and Muslim, referred a direct discrimination claim on the race and religion grounds when staff questioned him about purchasing hydrogen peroxide and ultimately refused to sell the product to him. The respondent claimed that its employees acted pursuant to legal obligations concerning transactions for defined substances.[37] However, the WRC declined to apply Section 14(1)*(a)* since the regulations in question did not apply to products, such as that sought by the complainant, containing hydrogen peroxide in concentration levels below 12 %. It proceeded to find that the pharmacy engaged in discrimination on the race ground, aided by the fact that, at the complainant's request, his friend, an Irish national, sought to purchase the same product later that day and was served without question.

The exemption was also applied to defeat an age discrimination complaint concerning access to licensed premises. Denying entry to a pub was legitimate since the complainant produced a student ID card and under the provisions of the Intoxicating Liquor Act 2000 the respondent was entitled to only accept a Garda Age Card as valid proof of age.[38]

31 *Sabherwal v ICTS (UK) Ltd*., DEC-S2008-037, 11.06.2008, https://www.workplacerelations.ie/en/cases/2008/june/dec-s2008-037-full-case-report.html.

32 *Ms A (on behalf of her sister Ms B) v Aer Lingus*, DEC-S2009-038, 03.06.2019, https://www.workplacerelations.ie/en/cases/2009/june/dec-s2009-038-full-case-report.html.

33 *Kane v Eirjet Ltd*, DEC-S2008-026, 18.04.2008, https://www.workplacerelations.ie/en/cases/2008/april/dec-s2008-026-full-case-report.html.

34 *A Complainant v A Respondent*, ADJ-00008685, 22.05.2018, https://www.workplacerelations.ie/en/cases/2018/may/adj-00008685.html; *Complainant v Respondent*, ADJ-00008947, 22.05.2018, https://www.workplacerelations.ie/en/cases/2018/may/adj-00008947.html; *A Nigerian National v A Financial Institution*, DEC-S2005-114, 19.08.2005, https://www.workplacerelations.ie/en/cases/2005/august/dec-s2005-114-full-case-report.html. See also *A Syrian Refugee v A Bank*, ADJ-00013897, 25.03.2019, https://www.workplacerelations.ie/en/cases/2019/march/adj-00013897.html, in which the complainant objected to the respondent bank's attempt to raise the exemption concerning its treatment of a refugee who was declined permission to open a bank account. The WRC did not consider whether the exemption applied and upheld a direct discrimination complaint on the race ground.

35 *Hassan v Western Union Financial Services,* DEC-S2006-004, 01.03.2006, https://www.workplacerelations.ie/en/cases/2006/march/dec-s2006-004-full-case-report.html.

36 *Mahmoudi v Boots Retail (Ireland) Limited*, ADJ-00011671, 11.09.2018, https://www.workplacerelations.ie/en/Cases/2018/September/ADJ-00011671.html.

37 European Union (Marketing and Use of Explosive Precursors) Regulations 2014, S.I. 611 of 2014.

38 *Thornton v Turner's Cross Tavern*, DEC-S2004-142, 11.10.2004, https://www.workplacerelations.ie/en/cases/2004/october/dec-s2004-142-full-case-report.html.

Providers of accommodation and associated facilities are expressly bound by the ESA.[39] Case law establishes that social housing, public grants and accommodation-related welfare supports fall within the legislation's scope.[40] Currently, there are two salient decisions in the field of housing, both of which raise compliance concerns with the Racial Equality Directive and are discussed in Section IV.[41]

Education

Private and public 'educational establishments', spanning all levels of the education system, are expressly subject to the ESA.[42] The Department of Education and Skills and other entities involved in providing facilities or setting policies in the area of education are also covered.[43] To date, there are four relevant cases in this domain. The first, discussed above, exempted a school practice that was taken to comply with a court order concerning parental custody of a pupil.[44] A respondent school in a second case could not rely on the exemption to defeat a gender discrimination complaint concerning its school dress code.[45] The Equality Tribunal readily dismissed an attempt to argue that, because the school's code of behaviour was formulated using powers conferred on it by statute, it was thereby immune from scrutiny under the ESA. Two further complaints pertained to qualifying criteria for educational grants[46] and failed since the criteria were set out in statutory instruments.[47]

Social advantages

In its explanatory memorandum on the draft Racial Equality Directive, the Commission explains that 'social advantages' are meant to comprise 'benefits of an economic or cultural nature' granted either by public authorities or private organisations, including such things as 'concessionary travel on public transport, reduced prices for access to cultural or other events and subsidised meals in schools for children from low income families'.[48] The concept has been 'afforded an extremely broad definition' in the context of EU law on free movement of persons.[49]

While the term 'social advantage' is not deployed in ESA, Tribunal and WRC decisions have established that 'service' encompasses a broad category of benefits provided by public and private actors such as

39 Section 6 ESA.

40 To date, there is no CJEU guidance as to what is covered by the term 'housing' under the Racial Equality Directive. According to Ellis and Watson, it should apply to the allocation of public housing: Ellis, E., and Watson, P. (2012), *EU Anti-discrimination Law*, 2nd edition, Oxford: Oxford University Press, p. 366.

41 *A Member of the Travelling Community v A County Council*, ADJ-00008050, 26.04.2018, https://www.workplacerelations.ie/en/cases/2018/april/adj-00008050.html and *Michael and Anne O'Donoghue and their children v Clare County Council*, DEC-S2018-002, 27.02.2018, https://www.workplacerelations.ie/en/cases/2018/february/dec-s2018-002.html.

42 Section 7 ESA.

43 See e.g. *Two Named Complainants v Minister for Education and Science*, DEC-S2006-077, 03.11.2006, https://www.workplacerelations.ie/en/Cases/2006/November/DEC-S2006-077-Full-Case-Report.html, and *A Mother on behalf of her Son v Department of Education & Skills/State Examinations Commission*, DEC-S2016-040, 09.06.2016, https://www.workplacerelations.ie/en/Cases/2016/June/DEC-S2016-040.html.

44 *A Complainant v A School*, DEC-S2012-003, 16.01.2012, https://www.workplacerelations.ie/en/cases/2012/january/dec-s2012-003-full-case-report.html (discussed above in section on 'ambit of the exemption').

45 *Ms A (on behalf of her son Mr B) v A Community School*, DEC-S2009-008, 30.01.2009, https://www.workplacerelations.ie/en/cases/2009/january/dec-s2009-008-full-case-report.html.

46 According to the European Commission, 'education' under the Racial Equality Directive encompasses access to education 'based on the award of grants and scholarships': European Commission (1999), *Explanatory Memorandum to COM(1999)566 – Principle of equal treatment between persons irrespective of racial or ethnic origin*, https://www.eumonitor.eu/9353000/1/j4nvhdfdk3hydzq_j9vvik7m1c3gyxp/vi8rm2y8wxx4, p. 8. This position was confirmed by the CJEU in its judgment in Case *C-457/17 Maniero*, paras 39-40, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CJ0457.

47 *Maher Brosnan v The Department of Education*, DEC-S2016-060, 30.09. 2016, https://www.workplacerelations.ie/en/cases/2016/september/dec-s2016-060.html; *Poisett v Co. Clare Vocational Educational Committee*, DEC-S2013-005, 25.06.2013, https://www.workplacerelations.ie/en/Cases/2013/June/DEC-S2013-005-_Full_Case_Report.html.

48 European Commission (1999), *Explanatory Memorandum to COM(1999)566 – Principle of equal treatment between persons irrespective of racial or ethnic origin*, https://www.eumonitor.eu/9353000/1/j4nvhdfdk3hydzq_j9vvik7m1c3gyxp/vi8rm2y8wxx4, p. 7.

49 European Union Agency for Fundamental Rights (2018), *Handbook on European non-discrimination law – 2018 edition*, Luxembourg: Publications Office of the European Union, p. 123.

free travel passes on public transport,[50] and sports scholarships.[51] However, a Circuit Court judgment concerning an *ex gratia* payment scheme, set up by the Irish Government to compensate people affected by the liberalisation of the taxi industry, casts some doubt on the applicability of anti-discrimination law to social advantages provided by the public sector.[52] The Court found that 'the Tribunal had no jurisdiction to entertain the complaint because to do so was "in effect, to purport to review a decision of the Government, which… falls outside the scope of the powers conferred on it by the 2000 Act"'.[53] In light of this judgment, it is not clear whether national law complies fully with the Racial Equality Directive.

The enactment exemption exacerbates concerns about failure to secure the primacy of EU provisions on discrimination vis-à-vis social advantages. Several complaints about potentially discriminatory tax credit provisions fell outside the ambit of the ESA.[54] In one of the first such cases, the Equality Tribunal determined that it could not assess a disability discrimination claim because the medical criteria used to set eligibility for a Primary Medical Certificate were set out in regulations issued by the Minister for Finance.[55] The certificate would enable the complainant to avail of a tax concession to adapt a car to suit his needs as a passenger with a disability. In essence, he sought to argue that the criteria gave rise to discrimination as between people with different disabilities. A similar argument succeeded in the *Quigley* case discussed below.

Social advantages that are provided for under administrative schemes or delineated in circulars may be the subject of an ESA complaint since they are not governed by an enactment.[56] *Quigley v Health Service Executive*[57] involved a successful claim of direct discrimination about the operation of the Mobility Allowance Scheme. The Mobility Allowance was a means-tested monthly payment payable by the Health Service Executive to disabled people who are unable to walk or use public transport. The Tribunal found that because 'the mobility allowance is governed by a Department of Health Circular No.15/79, and there is no primary legislation governing its specific application, [the] defences set out in Section 14 of the Acts are not applicable'.[58] The complainant was affected by schizophrenia, agoraphobia and depression in such a manner that he was unable to use public transport. Instead, he relied on two taxi drivers he was personally familiar with to travel to outpatient services. He contended that he was treated less favourably than a person with a different form of disability would be treated when his application for Mobility Allowance was refused. The equality officer agreed:

> The concept of mobility in the circular is construed in such a narrow manner that it fails to recognise that in some severe cases a person's intellectual and/or psychological health may restrict their mobility as effectively as some physical disabilities do. I find that this is a clear omission and it is obvious that the Mobility Allowance has not been updated to comply with the requirements set out in the Equal Status Acts (enacted in October 2000). The complainant, in order for him not to

50 *Thompson v Iarnród Éireann*, DEC-S2009-015, 02.03.2009, https://www.workplacerelations.ie/en/Cases/2009/March/DEC-S2009-015-Full-Case-Report.html.

51 *MacMahon v Department of Physical Education and Sport, University College Cork,* DEC-S2009-014, 02.03.2009, https://www.workplacerelations.ie/en/Cases/2009/March/DEC-S2009-014-Full-Case-Report.html.

52 Circuit Court, *Pobal v Hoey*, unreported judgment, 14.04.2011.

53 Fennelly, D. (2012), *Selected Issues in Irish Equality Case Law 2008-2011*, Dublin: Equality Authority, p. 91.

54 *Merry v Office of the Revenue Commissioners*, DEC–S2016–076, 29.11.2016; *McGirr v Revenue Commissioners*, DEC-S2016-026, 16.05.2016, https://www.workplacerelations.ie/en/cases/2016/june/dec-s2016-026.html; *Mackey v Minister for Finance*, DEC-S2016-021, 06.04.2016, https://www.workplacerelations.ie/en/cases/2016/april/dec-s2016-021.html; *Power v Minister for Finance*, DEC-S2016-019, 18.03.2016, https://www.workplacerelations.ie/en/cases/2016/march/dec-s2016-019.html; *Dowd v Minister for Finance*, DEC-S2011-061, 15.12.2011, https://www.workplacerelations.ie/en/cases/2011/December/dec-s2011-061-full-case-report.html; *Dowd v Gilvarry & HSE West*, DEC-S2011-060, 15.12.2011, https://www.workplacerelations.ie/en/cases/2011/december/dec-s2011-060-full-case-report.html.

55 *Dowd v Gilvarry & HSE West*, DEC-S2011-060, 15.12.2011, https://www.workplacerelations.ie/en/cases/2011/december/dec-s2011-060-full-case-report.html.

56 Circulars are not law and are used relatively extensively by some Government departments to set policy and to provide direction to public bodies as to how public powers should be exercised. See also Morgan, D.G., Daly, P. and Hogan, G. (2012), *Hogan and Morgan's Administrative Law*, 4th edition, Dublin: Thomson Round Hall, pp. 39-51.

57 DEC-S2009-012, 09.02.2009, https://www.workplacerelations.ie/en/cases/2009/february/dec-s2009-012-full-case-report.html.

58 *Quigley v Health Service Executive*, DEC-S2009-012, para 5.3.

> have been less favourably treated than a person with a physical disability, should have had his psychological ability in relation to his mobility assessed. (para 5.7)

Mr Quigley was awarded EUR 1 500 for the effects of the discrimination and the equality officer further ordered that the HSE re-assess his application in light of the broad definition of disability set out under the ESA. On appeal, the Circuit Court overturned the Tribunal's decision, but the HSE did not dispute the finding of disability discrimination as such. Instead, the appeal addressed a technical matter, that is, whether the HSE had acted as agent for the Department of Health in applying the terms of the circular.[59]

In a similar 2009 decision, the equality officer also found in favour of the complainant.[60] The Ombudsman relied on these findings in an investigation of a complaint about the upper age limit used in the Mobility Allowance Scheme.[61] She found that confining eligibility to people aged under 66 ran counter to the ESA and recommended that 'the Department of Health completes its review of the Mobility Allowance scheme and, arising from that review, revises the scheme so as to render it compliant with the Equal Status Act 2000'.[62] The Government did not, however, 'equality proof' the scheme. Rather, it was closed to new entrants in 2013. A replacement 'Transport Support Scheme' is yet to be established at the time of writing.[63]

Social protection

As noted above, the ESA does not specifically refer to social protection, social security or healthcare. However, the definition of 'service' has been interpreted to include social protection measures from the outset.[64] For example, cases have upheld discrimination concerning social welfare payments, such as rent supplement,[65] and established that allowances for people with disabilities are 'services'.[66] Healthcare is also covered, whether provided on a commercial basis or not.[67] But this broad approach to delineating services is undercut by the enactment exemption.

The exemption has been used quite extensively to prevent challenges to putative discrimination in relation to social protection measures.[68] In 2016, for example, the WRC determined that it did not have

59 *Health Service Executive v Quigley* (Circuit Court Dublin, Linnane J., unreported, 26 April 2010).

60 *A Complainant v Health Service Executive (South)*, DEC-S2009-011, 05.02.2009, https://www.workplacerelations.ie/en/cases/2009/february/dec-s2009-011-full-case-report.html.

61 Office of the Ombudsman (2011), *Too Old to be Equal? An Ombudsman Investigation into the Illegal Refusal of Mobility Allowance to People over 66 Years of Age*, Dublin: Office of the Ombudsman.

62 Office of the Ombudsman (2011), *Too Old to be Equal? An Ombudsman Investigation into the Illegal Refusal of Mobility Allowance to People over 66 Years of Age*, p. 23.

63 https://www.citizensinformation.ie/en/travel_and_recreation/transport_and_disability/mobility_allowance.html.

64 The foundational case on the definition of 'service' is *Donovan v Donnellan,* DEC-S2001-011, 17.10.2001, https://www.workplacerelations.ie/en/cases/2001/october/dec-s2001-011.html; applied in e.g. *McQuaid v Department of Social Protection*, DEC-S2014-015, 02.10.2014, https://www.workplacerelations.ie/en/Cases/2014/October/DEC-S2014-015.html.

65 *Mr A v Department of Social Protection*, DEC-S2013-010, 11.10.2013, https://www.workplacerelations.ie/en/Cases/2013/October/DEC-S2013-010.html. As discussed above, this case succeeded because of the discretion afforded deciding officers employed by the respondent department.

66 *Mrs X (on behalf of her daughter, Ms Y) v The Minister for Social and Family Affairs*, DEC-S2009-039, 10.06.2009, at 5.1-5.2, https://www.workplacerelations.ie/en/Cases/2009/June/DEC-S2009-039-Full-Case-Report.html.

67 A person detained in a mental health institution can avail of the ESA to contest the nature of the facilities provided there: *A Patient v Health Service Provider and A Hospital*, DEC-S2010-053, 01.12.2010, https://www.workplacerelations.ie/en/Cases/2010/December/DEC-S2010-053-Full-Case-Report.html.

68 State pensions: *A Complainant v A Government Department*, ADJ-00001425, 24.03.2017, https://www.workplacerelations.ie/en/Cases/2017/March/ADJ-00001425.html; *An Individual v A Government Department*, ADJ-00002310, 16.11.2017, https://www.workplacerelations.ie/en/cases/2017/november/%20adj-00002310.html; *A Citizen v A Government Department*, DEC-S2017-013, 22.03.2017, https://www.workplacerelations.ie/en/cases/2017/march/dec-s2017-013.html; *A Complainant v Department of Social and Family Affairs*, DEC-S2008-013, 19.02.2008, https://www.workplacerelations.ie/en/cases/2008/february/dec-s2008-013-full-case-report.html; social welfare benefits: *Halbherr v Department of Social Protection*, DEC-S2017-031, 25.09.2017, https://www.workplacerelations.ie/en/cases/2017/september/dec-s2017-031.html; *Da Rocha Campos v Department of Social Protection*, DEC-S2016-007, 01.02.2016, https://www.workplacerelations.ie/en/cases/2016/february/dec-s2016-007.html; *A Complainant v Department of Social Protection*, DEC-S2011-053, 18.11.2011, https://www.workplacerelations.ie/en/cases/2011/november/dec-s2011-053-full-case-report.html; *Mrs X (on behalf of her daughter, Ms Y) v The Minister for Social and Family Affairs*, DEC-S2009-039, 10.06.2009, https://www.workplacerelations.ie/en/cases/2009/june/dec-s2009-039-full-case-report.html; healthcare: *Donaghy v Department of Health*, DEC-S2016-024, 19.04.2016, https://www.workplacerelations.ie/en/Cases/2016/April/DEC-S2016-024.html.

jurisdiction to assess a discrimination complaint on the civil status ground about eligibility for a medical card because the criteria are set out in legislation.[69] A medical card enables qualifying individuals to access primary healthcare, medicines and other healthcare services free of charge.

The statutory criteria used to determine eligibility for various statutory pensions are also immune from challenge. For instance, in *A Complainant v Department of Social and Family Affairs,*[70] the equality officer found that the ESA could not be used to challenge the method of calculating Pay Related Social Insurance (PRSI) contributions for the Old Age Contributory Pension. The scheme in question is governed by statute.[71] Similarly, a complaint about the Invalidity Pension, a weekly payment to people who cannot work because of a long-term illness or disability, was dismissed as it was covered by the exemption.[72] Furthermore, the criteria used to determine eligibility for child benefit payments may not be assessed for compliance with the ESA.[73]

3.4 Analysis

Attempts by private sector entities to deploy the exemption have met with limited success, but its application has meant that discrimination by public bodies concerning social protection and many social advantages is virtually immune from challenge.

The blanket exemption for any action required by law operates as a crude means of removing crucial state activities from the purview of anti-discrimination law. The legislature should instead adopt a fine-grained approach to exceptions and exemptions, including delineating with greater precision the contours of positive action provisions.[74] Positive action is usefully considered in this context not as a 'soft' supplement to the core provisions on discrimination but as a crucial element of the legislative framework, which should operate to safeguard measures that treat people differently in order to advance equality of opportunity. With respect to other exceptions, several ESA provisions seek to 'save' actions taken for particular purposes in defined contexts. Section 4(4), for instance, makes provision for treating people with disabilities differently where their disability could cause harm to themselves or others, and the difference in treatment is reasonably necessary to prevent such harm.[75] Such a course is more appropriate than blanket immunity. It entails legislators proactively considering the rationale behind differential treatment and justifying why such treatment should not amount to discrimination in a legislative process that is open to public scrutiny and contestation.

The application of Section 14(1)(*a*)(i) has also given rise to interpretive ambiguities. In some decisions, adjudicators have relied on the exemption, when the facts perhaps warranted finding that the impugned actions were not 'services' under the ESA.[76] And in many cases, compliance with legal provisions could be used to demonstrate that the conduct in question was not connected to a discriminatory ground, which

69 *Donaghy v Department of Health*, DEC-S2016-024, 19.04.2016, https://www.workplacerelations.ie/en/Cases/2016/April/DEC-S2016-024.html.

70 *A Complainant v Department of Social and Family Affairs*, DEC-S2008-013, 19.02.2008, https://www.workplacerelations.ie/en/cases/2008/february/dec-s2008-013-full-case-report.html.

71 Section 108 of the Social Welfare Consolidation Act 2005 (as amended by Section 8 of the Social Welfare Law Reform and Pensions Act 2006).

72 *An Individual v A Government Department*, ADJ-00002310, 16.11.2017, https://www.workplacerelations.ie/en/cases/2017/november/%20adj-00002310.html.

73 *Da Rocha Campos v Department of Social Protection*, DEC-S2016-007, 01.02.2016, https://www.workplacerelations.ie/en/cases/2016/february/dec-s2016-007.html.

74 The ESA contains multiple ambiguous provisions that seem to be aimed at preserving 'benign' measures alongside specific positive action provisions. For a detailed discussion of these provisions see Walsh, J. (2012), *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services*, Dublin: Blackhall, Chapter 2.6, Chapter 8.

75 See e.g. *Connery v Coiste An Asgard,* DEC-S2006-034, 12.05.2006, https://www.workplacerelations.ie/en/cases/2006/may/dec-s2006-034-full-case-report.html.

76 See e.g. *A Parent v A Police Force*, ADJ-00001491, 19.06.2018, https://www.workplacerelations.ie/en/cases/2018/june/adj-00001491.html; *A Parent v An Garda Síochána*, DEC-S2018-016, 19.06.2018, https://www.workplacerelations.ie/en/cases/2018/june/dec-s2018-016.html; *McLarnon v Tusla*, DEC-S2015-026, 15.12.2015 https://www.workplacerelations.ie/en/cases/2015/december/dec-s2015-026.html.

is the third element of a prima facie case of direct discrimination. Legal obligations could also form the basis for an objective justification defence to an indirect discrimination claim.

In sum, there are alternatives to Section 14(1)(*a*)*(i)* that would better preserve the integrity of anti-discrimination law. In the next section, I consider whether such alternatives are required as a matter of EU law.

4 Compatibility with EU law

The Racial Equality Directive does not envisage any blanket exemption for discriminatory measures required by law. Nor is such an exemption provided for under the Gender Goods and Services Directive. Although the material scope of both Directives is uncertain,[77] the exemption is manifestly too broad since it covers any action required by law across *all* fields and grounds. On its face, then, the Oireachtas should remove or qualify the exemption at least for the race, Traveller community and gender grounds.

To date, the provision's compliance with EU law has not been addressed in litigation. The complainant in one WRC referral sought to assert the primacy of EU law. She argued that the manner in which social insurance contributions were calculated for the State Pension (Contributory) contravened Directive 79/7/EEC,[78] in effect arguing that the exemption should be disapplied.[79] The WRC, however, did not address the EU law argument; it declined jurisdiction with reference to Section 14(1)*(a)* and a High Court judgment on the interaction between the ESA and other legislation (discussed below).[80]

In several of its decisions on the exemption, the WRC observes that complainants seeking to challenge enactments should have recourse instead to judicial review proceedings, which must be instigated before the High Court.[81] This stance was reinforced by a 2009 High Court judgment on the Equality Tribunal's jurisdiction.[82] It found that only a court, as constituted under Article 34 of the Irish Constitution, could determine whether a domestic legal provision conflicted with EU law. Thus, while the WRC could

77 Both apply within the limits of the powers conferred upon the Union. The scope of Directive 2004/113 is far more restrictive than that of the Racial Equality Directive, as it excludes education and does not explicitly apply to social advantages, for example. See Ringelheim, J. (2010) 'The Prohibition of Racial and Ethnic Discrimination in Access to Services under EU Law', *European Anti-Discrimination Law Review* 10, pp. 11-14; http://hdl.handle.net/2078.1/118296. The primary CJEU judgment to date on the material scope of the Racial Equality Directive determined that it does not encompass all national rules and public functions. It underlined that the Council was unwilling to take into account an amendment, proposed by the European Parliament, to the Directive proposal whereby 'the exercise by any public body, including police, immigration, criminal and civil justice authorities, of its functions' would be included in the list of activities listed in Article 3(1) of that Directive and thus come within its scope. The Court determined that while the scope of Directive 2000/43 'cannot be defined restrictively', it does not follow that the concept of 'service' encompasses national rules governing the manner in which surnames and forenames are to be entered on certificates of civil status: Judgment of the Court (Second Chamber) of 12 May 2011, *Runevič-Vardyn and Wardyn v Vilniaus miesto savivaldybės administracija and Others*, C-391/09, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-391/09.

78 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.

79 *A Complainant v A Government Department*, ADJ-00001425, 24.03.2017, https://www.workplacerelations.ie/en/Cases/2017/March/ADJ-00001425.html.

80 *G v Department of Social Protection* [2015] IEHC 419, 07.07.2015 (High Court): http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/ce885d9fe65b899b80257e7e00504287?OpenDocument.

81 *An Individual v A Government Department*, ADJ-00002310, 16.11.2017, https://www.workplacerelations.ie/en/cases/2017/november/%20adj-00002310.html; *Michael and Anne O'Donoghue and their children v Clare County Council*, DEC-S2018-002, 27.02.2018, https://www.workplacerelations.ie/en/cases/2018/february/dec-s2018-002.html; *Maher Brosnan v The Department of Education*, DEC-S2016-060, 30.09.2016, https://www.workplacerelations.ie/en/cases/2016/september/dec-s2016-060.html; *Merry v Office of the Revenue Commissioners*, DEC-S2016-076, 29.11.2016.

82 High Court, *Minister for Justice, Equality and Law Reform and anor. v Director of the Equality Tribunal and ors.* [2009] IEHC 72, 17.02.2009, http://www.courts.ie/Judgments.nsf/0/56ED2DFBACF3ABA28025757600581C87. This case was the culmination of lengthy legal proceedings concerning the jurisdiction of the first instance forum that hears discrimination law complaints. Between 2005 and 2007, three individuals were refused entry to train as members of the police force (An Garda Síochána) because they were outside the upper age limit of 35 set out in the Garda Síochána (Admissions and Appointments) (Amendment) Regulations, 2014. They subsequently lodged age discrimination complaints under the Employment Equality Acts 1998-2015 with the Equality Tribunal. The minister sought to have the Tribunal's jurisdiction to disapply a statutory instrument determined as a preliminary issue, but the Tribunal declined to do so and set a date for hearing in 2008. The minister then issued judicial review proceedings before the High Court.

interpret the ESA in light of EU law principles,[83] it was denied the capacity to accord EU law primacy.[84] Fahey's trenchant critique of the judgment argued that it exposed litigants to 'extraordinary expense and inconvenience' based on a 'misinterpretation of EC law'.[85] On appeal, the Supreme Court essentially upheld the High Court's reasoning with respect to domestic law, but it decided to make a reference under Article 267 of the Treaty on the Functioning of the European Union.[86] In December 2018, the CJEU determined that the WRC must have the authority to disapply national law where it conflicts with EU law.[87]

Case C-378/17 also calls into question a further High Court judgment. *G v Department of Social Protection* addressed social protection payments to a woman who had a child by way of a surrogacy arrangement.[88] The High Court found that the appellant was precluded from seeking redress for discrimination under the ESA because the payment she was seeking was created by statute, thus taking it outside the scope of the ESA. The Court's finding was not based on the exemption set out under Section 14(1)*(a)*.[89] Rather, Ms Justice O'Malley found that the ESA could not be used to assess the lawfulness of other legislation, here the Social Welfare Acts 2005-2015, since to do so 'would have effect of elevating the Equal Status Act to all-but Constitutional level, permitting the legitimacy of all other legislation to be assessed by reference to it.'[90] The judgment suggests that, as a matter of domestic law, even if Section 14(1)*(a)* were repealed, the ESA could not be used to challenge discriminatory legislative provisions. As confirmed in Case C-378/17, this position cannot hold for cases with an EU law dimension: 'anything which in effect splits the competence to disapply national rules which conflict with obligations imposed by virtue of EU law violates the principle of supremacy.'[91]

Following a decade of uncertainty, it is now clear that complainants before the WRC can argue that a domestic provision should be disapplied where it is necessary to vindicate a right conferred under an equality directive. Section 14(1)*(a)*(i) is potentially such a provision. Disapplication of the exemption may have been warranted in two WRC determinations issued in 2018.

In the first case, the complainants lost their home on a halting site as a result of an arson attack.[92] The discrimination complaint pertained to their subsequent dealings with the local authority as to their housing situation. The respondent council advised the family to return to the halting site where their caravan was burned down, which they refused to do because of safety concerns given the previous

83 See e.g. *McLoughlin v Paula Smith Charlies Barbers*, ADJ-00011948, 12.07.2018, https://www.workplacerelations.ie/en/cases/2018/july/adj-00011948.html (interpreting the gender ground to include discrimination based on 'transgender status' in light of EU law); *Lindberg v Press Photographers Association of Ireland*, DEC-S2011-041, 05.10.2011, https://www.workplacerelations.ie/en/cases/2011/october/dec-s2011-041-full-case-report.html (employing the wording of the directives to the effect that there shall be 'no discrimination whatsoever' to hold that if any element of discrimination is made out, the complainant must be successful).

84 The High Court judgment was applied in e.g. *A Citizen v A Government Department*, DEC-S2017-013, 22.03.2017, https://www.workplacerelations.ie/en/cases/2017/march/dec-s2017-013.html; cited by the respondent in tandem with Section 14(1)*(a)*(i) in *McGirr v Revenue Commissioners*, DEC-S2016-026, 16.05.2016, https://www.workplacerelations.ie/en/cases/2016/june/dec-s2016-026.html.

85 Fahey, E. (2009), 'A Constitutional Crisis in a Teacup: The Supremacy of EC Law in Ireland', *European Public Law* 15(4), pp. 515-522, p. 520.

86 Supreme Court, *Minister for Justice, Equality and Law Reform v The Workplace Relations Commission and ors.* [2017] IESC 43, 15.06.2017, http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/7b97206199a365a480258141004d3f72?OpenDocument. The Supreme Court pointed out that the jurisdiction of tribunals is derived from Article 37.1 of the Constitution. In accordance with that provision, the powers and functions that can be conferred on a tribunal or a body that is not a court in the constitutional sense must be limited. A significant power to disapply duly enacted legislation could not be described as a limited power and so, as a matter of national law, the WRC could not exercise such a power.

87 Case C-378/17, *Minister for Justice and Equality v Workplace Relations Commission*, 04.12.2018.

88 High Court, *G v Department of Social Protection* [2015] IEHC 419, 07.07.2015, http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/ce885d9fe65b899b80257e7e00504287?OpenDocument.

89 For a critical appraisal of the judgment see Cousins, M. (2016), 'Surrogacy, Equal Status and Social Welfare Benefits', *Irish Journal of Legal Studies* 6(1), pp. 106-123.

90 *G v Department of Social Protection* [2015] IEHC 419, at para 143.

91 O'Sullivan, C.E. (2019), 'Ireland's Non-Compliance with the Principle of Supremacy and the Definition of Court or Tribunal for the Purposes of Article 267 TFEU: A Review of the Recent Case Law', *Irish Jurist* 61, pp. 159-173, p. 170.

92 *O'Donoghue v Clare County Council*, DEC-S2018-002, 27.02.2018, https://www.workplacerelations.ie/en/Cases/2018/February/DEC-S2018-002.html.

incident. Instead, the complainants resorted to parking by the side of the road and were issued with notices from the respondent to desist from this. While the adjudication officer expressed considerable sympathy for the complainants, a discrimination complaint could not be made out. He found that the WRC was precluded from investigating the notices to move from roadside encampments since these were issued under an enactment and thus covered by the Section 14(1)*(a)*(i) exemption.[93] The enactment in question is one of the primary legislative provisions used to evict Travellers.[94] Unlike other eviction mechanisms, it is explicitly aimed at the Traveller community. Because of the exemption, potential direct discrimination falling within the personal and material scope of the Racial Equality Directive could not be assessed under the law that implements that Directive.

The second salient decision for the purposes of this article also addressed discrimination on the Traveller community ground concerning an application for social housing.[95] The complainant family had been living for two years in the respondent local authority's geographic area by the roadside in a caravan lacking basic facilities. They applied unsuccessfully to the respondent county council to be placed on the council's housing list. Under the Housing Acts, local authorities are required to make a scheme setting out the order of priority to be given to applicants for social housing, known as a housing list.[96] Applications are assessed with reference to criteria set out in the Social Housing Assessment Regulations 2011.[97]

Ireland's national equality body, the Irish Human Rights and Equality Commission (hereafter IHREC), provided legal assistance to the complainants in referring a complaint to the WRC. It was found that the council had discriminated in disproportionately applying a qualifying criterion not provided for under the 2011 regulations to members of the Traveller community. However, a challenge to the actual regulations was not considered because of Section 14(1)*(a)*(i). Specifically, the complainants sought to argue that certain criteria set out in the regulations indirectly discriminated on the Traveller community ground. Applicants must apply to the local authority in which the household 'normally resides' or with which it has a 'local connection'. 'Local connection' is determined with reference to, *inter alia*, a household member residing in the area for a 'continuous 5-year period' and their 'place of employment'. These requirements, it was argued, would put Travellers at a particular disadvantage since they 'place an emphasis on applicants with a settled life style' and 'in circumstances where members of the Travelling community face such high levels of unemployment'. Because of the exemption, the WRC adjudication officer concluded that he was precluded 'from expressing any opinion on whether any legislative provision is discriminatory or not.' Again, Section 14(1)*(a)*(i) meant that an allegation of discrimination falling within the personal and material scope of Directive 2000/43 could not be heard by the primary body charged with applying that law. According to the CJEU, 'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to disregard national legislative provisions which might prevent directly applicable EU rules from having full force and effect are incompatible with the requirements which are the very essence of EU law'.[98] In this case, it would appear that the Section 14 exemption impaired the effectiveness of EU law.

93 *O'Donoghue v Clare County Council*, DEC-S2018-002, paras 4.14-4.15.

94 Section 10 of the Housing (Miscellaneous Provisions) Act 1992 (as amended by the Housing (Traveller Accommodation) Act, 1998), http://www.irishstatutebook.ie/eli/1992/act/18/section/10/enacted/en/html. In 2015, the European Committee of Social Rights found that the provision violated Article 16 of the European Social Charter: European Committee of Social Rights (2016), *European Roma Rights Centre (ERRC) v Ireland, Complaint No. 100/2013*, http://hudoc.esc.coe.int/eng?i=cc-100-2013-dmerits-en, paras 145-147. See also Department of Housing, Planning and Local Government (2019), *Traveller Accommodation Expert Review*, https://www.housing.gov.ie/sites/default/files/publications/files/2019_july_expert_review_group_traveller_accommodation-final_reportrt_00.pdf.

95 *A Member of the Travelling Community v A County Council*, ADJ-00008050, 26.04.2018, https://www.workplacerelations.ie/en/cases/2018/april/adj-00008050.html.

96 Section 60, Housing Act 1966, http://www.irishstatutebook.ie/eli/1966/act/21/section/60/enacted/en/html#sec60.

97 S.I. No. 84/2011 – Social Housing Assessment Regulations 2011, http://www.irishstatutebook.ie/eli/2011/si/84/made/en/print.

98 Case C-378/17, *Minister for Justice and Equality v Workplace Relations Commission*, 04.12.2018, para 36.

5 Conclusion

The IHREC has raised concerns about the 'limitations placed on the equality framework' by the Section 14 exemption.[99] Noting that the exemption prevented it from providing assistance in claims of discrimination against Government departments, the Equality Authority (the Commission's predecessor equality body) consistently called for its amendment in the 2000s.[100] In the face of governmental inertia, Case C-378/17 opens a path for contesting the continued application of the exemption with a possible role for the IHREC.

The primacy of EU law may now be directly asserted in first instance proceedings. With respect to the ESA, a complainant could request the WRC to disapply Section 14(1)*(a)* in an appropriate case. As suggested above, laws that enable the eviction of Travellers, as well as putative indirect discrimination against that community under social protection instruments, should at least be examined for compliance with the Racial Equality Directive.[101] Were such a complaint referred to the WRC, it could exercise its discretion to request a preliminary ruling from the CJEU.[102] The prospect of such a reference is perhaps increased by two factors: the dearth of CJEU case law on the material scope of the Directive; and the absence of a procedural mechanism enabling the WRC to refer a question of law to the High Court. The litigation would not be straightforward, imposing an onerous burden on an individual complainant. Notably, the IHREC has legal standing to commence own-name proceedings before the WRC, where it appears that 'prohibited conduct' … 'is being generally directed against persons'.[103] This power has not been employed to date.[104] Its use in this context would be especially welcome in light of the complex legal arguments that would need to be advanced in asserting the primacy of EU law.

99 Irish Human Rights and Equality Commission (2017), *Ireland and the Convention on the Elimination of All Forms of Discrimination Against Women Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's Combined Sixth and Seventh Periodic Reports*, p. 36, https://www.ihrec.ie/app/uploads/2017/02/Ireland-and-the-Convention-on-the-Elimation-of-All-Forms-of-Discrimination-Against-Women.pdf. See also the IHREC's press release issued on 08.07.2015, 'IHREC recommends changes to Equal Status Acts following High Court decision on maternity benefit claim', https://www.ihrec.ie/ihrec-recommends-changes-to-equal-status-acts-following-high-court-decision-on-maternity-benefit-claim/.

100 See e.g. Equality Authority (2003), *Annual Report 2002*, Dublin: Equality Authority, https://www.lenus.ie/handle/10147/44971, p. 22; Equality Authority (2004), *Annual Report 2003*, Dublin: Equality Authority, https://www.lenus.ie/handle/10147/44973, p. 34; Equality Authority (2008), *Annual Report 2007*, Dublin: Equality Authority, pp. 60-61.

101 On the entrenched inequalities experienced by Travellers in the field of housing, see Grotti, R., Russell, H., Fahey, E., and Maître, B. (2018), *Discrimination and Inequality in Housing in Ireland*, https://www.ihrec.ie/app/uploads/2018/06/Discrimination-and-Inequality-in-Housing-in-Ireland..pdf.

102 In Case C-378/17, the CJEU confirmed that the WRC is a 'court or tribunal' for the purposes of Article 267 TFEU and so is entitled to request a preliminary ruling (para 47). In so doing, the Court cited a previous case in which the Equality Tribunal (the WRC's predecessor) used the preliminary reference mechanism: Case C-363/12, *Z v A Government Department*, 18.03.2014, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-363/12.

103 Section 23(1)*(a)*(i) ESA.

104 In 2019, the IHREC successfully engaged in own-name proceedings before the WRC for the first time. The case concerned discriminatory advertising, which is provided for under Section 23(1)*(b)* ESA: *Irish Human Rights and Equality Commission v Daft Media Limited t/a Daft.ie*, ADJ00005960, 06.08.2019, https://www.workplacerelations.ie/en/cases/2019/august/adj-00005960.html.

The burden of proof in anti-discrimination proceedings. A focus on Belgium, France and Ireland

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Introduction

The difficulty of proving discrimination in court is a longstanding concern in anti-discrimination law. The causes of the problem are well known: in all jurisdictions, in civil litigation, it falls on the claimants to establish the facts they allege, but in many cases, discrimination leaves no material traces. Furthermore, when documents that could constitute evidence of the discriminatory character of a measure do exist, they are often in the hands of the discriminator. For instance, where an employer does not want to hire a 50-year-old job applicant because of her age or where a landlord refuses to let his apartment to a black applicant because of his skin colour, it may be easy for them to mask their real motivation and put forward some alternative, acceptable, reason for their decision. Similarly, if workers with a certain ethnic background are paid less than their fellow employees for work of equal value, various pieces of information and documents that are internal to the company will usually be necessary to establish that the pay system in place unfairly disadvantages workers of a certain ethnic origin. The standard rule on the burden of proof thus ignores the inequality between the parties in accessing the proof that typically characterises discrimination cases. As a result, it jeopardises the effectiveness of the protection against discrimination: ever since discrimination has been prohibited by law, lack of proof has been a recurrent cause of failures of legal action.

This problem was recognised by the Court of Justice of the European Union (CJEU) in the late 1980s in its case law on sex discrimination. In *Danfoss*, the Court acknowledged the necessity of adjusting national rules on the burden of proof in order to ensure the effective implementation of the principle of equality.[1] This was further elaborated in *Enderby*, where the Court articulated the principle of a shift in the burden of proof once certain conditions are met: '[w]here there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay.'[2] This principle was justified by the imperative of the effectiveness of the protection against discrimination: 'Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory'.[3] The requirement of an adaptation of the burden of proof in national law was first codified in Article 4 of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in sex discrimination cases (the Burden of Proof Directive). A similar provision was then inserted in the Racial

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I wish to thank Sébastien Van Drooghenbroeck for insightful discussion on the topic of this article.

1 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting on behalf of Danfoss)*, C-109/88, ECLI:EU:C:1989:383, para. 14.

2 Judgment of 27 October 1993, *Enderby v Frenchay Health Authority and Secretary of State of Health*, C-127/92, ECLI:EU:C:1993:859, para. 18.

3 *Enderby*, para. 18; see also para. 14.

Equality and Employment Equality Directives adopted in 2000,[4] as well as in the 2004 Gender Equality in Access to Goods and Services Directive[5] and the 2006 Recast Gender Directive.[6] The wording of this provision is identical in all these instruments and reads as follows:

> 'Member states shall take such measure as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

The provision specifies that this rule will not apply to criminal procedures. Member States need not apply it to proceedings in which it is for the court or competent body to investigate the facts of the case.[7] Moreover, Member States are not prevented from introducing rules of evidence that are more favourable to claimants.

The principle that in discrimination litigation, once a claimant establishes a prima facie case of discrimination, the onus should shift to the respondent, who is responsible for proving that no discrimination has occurred, is now firmly anchored in EU anti-discrimination law. As noted in the preambles to both the Racial Equality Directive and the Employment Equality Directive, the rationale for this requirement is to ensure the effective application of the principle of equal treatment.[8] All Member States have had to insert this rule in their national procedural law. It has also been imported by the European Court of Human Rights in its case law on discrimination.[9] Yet, it appears from the various reports on the implementation of the anti-discrimination directives that the application of the burden of proof provision remains a major source of difficulty.[10] In most countries, the problem seems to result not so much from the way in which the rule has been transposed in domestic legislation, as from its implementation in court proceedings.[11]

4 Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (*Racial Equality Directive*), Article 8; Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (*Employment Equality Directive*), Article 13.

5 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 (*Gender Equality in Access to Goods and Services Directive*), Article 9.

6 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) (*Recast Gender Directive*), Article 19. Note that this directive repeals the Burden of Proof Directive.

7 In France and Belgium, the anti-discrimination legislation provides that the special rule concerning the burden of proof is applicable to administrative law proceedings in addition to civil and social law proceedings.

8 Racial Equality Directive, Recital 21 and the Employment Equality Directive, Recital 31.

9 See Henrard, K. (2018), 'Sharing of the Burden of Proof in Cases on Racial Discrimination: Concepts, General Trends and Challenges before the ECtHR', in Bribosia, E. and Rorive, I. (eds), *Human Rights Tectonics. Global Dynamics of Integration and Fragmentation*, Intersentia, Cambridge, pp. 271-301.

10 See Foubert, P. (2017), *The enforcement of the principle of equal pay for equal work or work of equal value. A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway*, European Network of Legal Experts in Gender Equality and Non-discrimination, European Commission, pp. 50-52; Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, European Network of Legal Experts in the Non-discrimination field, European Commission, December, pp. 59-71; EU Fundamental Rights Agency (FRA) (2012), *Access to justice in cases of discrimination in the EU. Steps to further equality*, Luxembourg: Publications Office of the European Union, pp. 43-44; Milieu (2011), *Comparative study on access to justice in gender equality and anti-discrimination law*, *Synthesis Report*, pp. 23-26.

11 Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, p. 74. For instance, the French Court of Cassation disregarded the national provision on the burden of proof in a case where discrimination based on illness was alleged. The complainant had been dismissed by her employer following repeated absences from work due to illness. Her employer alleged that his decision was not motivated by her illness but by the disturbance that her absences had caused within the company, obliging him to recruit a new employee. This latter allegation however was proved to be materially false. This should have been sufficient to establish a presumption that the dismissal was directly based on the employee's illness. Yet, the Court held that additional elements had to be adduced by the complainant to demonstrate the causal link between her dismissal and her illness (Court of Cassation, No. 14-10.084, 27 January 2016. See Mouly, J. (2016) 'Licenciement pour maladie sans remplacement définitif du salarié: pas de discrimination automatique', *Droit social*, No. 4, April 2016, pp. 384-386). Although illness as such is not a prohibited ground of discrimination under EU law, it has been recognised by the CJEU that where an illness meets certain characteristics, it can be covered by the concept of 'disability' within the meaning of Directive 2000/78/EC (judgment of 11 April 2013, *HK Danmark (acting on behalf of Jette Ring) v Dansk almennyttigt Boligselskab*, C-335/11, ECLI:EU:C:2013:222,

This rule continues to be misunderstood by national judges and uncertainties persist as to how it should be applied. In practice, proving discrimination in legal proceedings remains a significant obstacle for claimants across Member States.

This article aims to clarify the meaning and operation of the special rules governing proof of discrimination under EU law and discusses some of the difficulties that they raise. In addition to the text of the directives, it looks at the guidelines provided by the CJEU and at the application of these rules at the domestic level, focusing on three Member States: Belgium, France and Ireland. Section 1 describes the basic operation of the burden of proof provision, clarifies the respective obligations it entails for claimants and respondents and highlights differences resulting from whether direct or indirect discrimination is at stake. Section 2 considers in more detail the means of proof that can be used to establish a prima facie case of discrimination, with particular emphasis on statistics and situation testing. Section 3 examines the issue of complainants' access to information held by the alleged discriminator and Section 4 offers conclusions.

1 The division of the burden of proof between the complainant and the respondent

The notion of a shift in the burden of proof does not mean that complainants in discrimination cases are exempt from providing evidence of their claims. However, their task is alleviated: as stated in the anti-discrimination directives, what is required from them is, to 'establish facts from which it may be *presumed* that there has been direct or indirect discrimination'. It is only when this condition is met that the burden of proof moves to the respondent, who may rebut this presumption by proving 'that there has been no breach of the principle of equal treatment.' EU anti-discrimination law thus provides a *sharing* of the burden of proof: rather than resting exclusively on the complainant, the burden is divided between both parties.[12]

The application of the rule entails a two-stage test.[13] The court must first examine whether the complainant is able to establish a prima facie case of discrimination. If it finds that this is the case, it must, in a second stage, ascertain whether or not the elements provided by the respondent allow a reversal of the presumption. If not, the court will arrive at a finding of discrimination. In practice, as is apparent from national case law, both the question of what amounts to a prima facie case of discrimination and that of how a presumption of discrimination can be rebutted continue to provoke debate.[14]

1.1 Establishing a presumption of discrimination

To establish a prima facie case of discrimination, complainants must adduce facts that are adequate and sufficient to raise a suspicion of discrimination. They have to 'convince the court of the likeliness or probability that they suffered discrimination.'[15] As the Court of Appeal of England and Wales indicated in *Igen v Wong*, the claimant has 'to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act

para. 41. See also judgment of 18 January 2018, *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA, Ministerio Fiscal*, C-270/16, ECLI:EU:C:2018:17, para. 28-30).

12 On the concept of burden of proof and the difference between the burden of production of evidence and the burden of persuasion, see Kokott, J. (1998), *The Burden of Proof in Comparative and International Human Rights Law*, Kluwer, The Hague, London, Boston.

13 See Palmer, F. (2006), 'Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof', *European Anti-Discrimination Law Review* (4) pp. 23-29.

14 Henrard, K. (2019), 'The Effective Protection against Discrimination and the Burden of Proof. Evaluating the CJEU's Guidance Through the Lens of Race', in Belavusau U. and Henrard K. (eds), *EU Anti-Discrimination Law Beyond Gender*, Hart, Oxford, Portland, p. 101.

15 Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, p. 34. See also Palmer, F. (2006), 'Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof', p. 25.

of discrimination against the claimant [...]'.[16] In a similar vein, the Irish Labour Court held in *Mitchell v Southern Health Board* that 'a claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.'[17] In a subsequent case, it specified that '[a]t the initial stage the complainant is merely seeking to establish a prima facie case. Hence, it is not necessary to establish that the conclusion of discrimination is the only, or indeed the most likely, explanation which can be drawn from the proved facts. It is sufficient that the presumption is within the range of inferences which can reasonably be drawn from those facts.'[18]

The facts that a complainant may rely upon to establish a presumption of discrimination will of course vary from case to case, but they should be of such character as to substantiate the claim that the constitutive elements of discrimination are fulfilled. These constitutive elements depend on what kind of discrimination is alleged.

Direct discrimination is defined in EU law as arising where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on grounds of a protected characteristic.[19] Where complainants allege direct discrimination, they must convince the court of two things: first, that they suffered harm in the form of unfavourable treatment (for instance, they were fired from their job, their application to rent an apartment was rejected or they are paid less than their colleagues for work of equal value); and secondly, that there is a causal relation between this unfavourable treatment and a protected characteristic – in other words that they were disadvantaged *because* of their sex, race or another discrimination ground.[20] In practice, it is often that causal link between the adverse treatment and the protected characteristic that complainants struggle to demonstrate, and it is at this point in particular that sharing of the burden of proof becomes useful. According to Lilla Farkas and Orlagh O'Farrell, the 'key effect of the reversal of the burden of proof is that it alleviates the burden on plaintiffs to show a clear causal link between the protected ground and the harm. Consequently, the burden of proof shifts even if the causation between the protected ground and the harm is only probable or likely.'[21] The question of how this connection is to be proved, however, is the subject of debate. Notably, under the Hungarian anti-discrimination legislation, it is enough for complainants to establish that they have been disadvantaged and that they possess – or are assumed by the perpetrator to possess – a protected characteristic for the causal link between the two to be presumed, thereby triggering the shift of the burden of proof to the respondent.[22] However, this approach is rare: in most Member States, complainants are required to provide facts to substantiate to some extent the causal link between the adverse treatment and the discrimination ground.[23] The Belgian Constitutional Court has held that in order to raise a prima facie case of discrimination, '[it] is not enough for a person to prove that she suffers unfavourable treatment. This person must also prove facts that seem to indicate that this unfavourable treatment was dictated by illicit motives.'[24] In a similar vein, Irish courts have stated that membership

16 Court of Appeal of England and Wales, *Igen Ltd (formerly Leeds Careers Guidance) and Others v Wong, Chamberlin* and *Another v Emokpae* and *Webster v Brunel University* (2005) IRLR 258, para. 76. Available at http://www.bailii.org/ew/cases/EWCA/Civ/2005/142.html.

17 Irish Labour Court, *Mitchell v Southern Health Board*, DEEO11, 15 February 2001, https://www.workplacerelations.ie/en/cases/2001/february/dee011.html.

18 Irish Labour Court, *McCarthy v Cork City Council*, EDA0821, 16.12.2008, https://www.workplacerelations.ie/en/cases/2008/december/eda0821.html.

19 See e.g. Racial Equality Directive, Article 2(a) and Employment Equality Directive, Article 2(1)(a).

20 Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, pp. 38-52. See also Henrard, K. (2019), 'The Effective Protection against Discrimination and the Burden of Proof. Evaluating the CJEU's Guidance Through the Lens of Race'.

21 Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, p. 47.

22 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Article 19. See Kadar, A. (2018), *Country Report – Non Discrimination – Hungary*, European Network of Legal Experts on Gender Equality and Non-Discrimination, p. 112.

23 Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, p. 75. In practice, the Hungarian Supreme Court has interpreted the Hungarian legislation as requiring complainants to prove a causal link between the protected ground invoked and the disadvantage suffered, despite the fact that this condition does not appear in the text of the law. See Decision No Kfv.II.37.053/2010/8 of the Supreme Court.

24 Belgian Constitutional Court, Decision No. 17/2009 of 12 February 2009, B. 93.3, available at https://www.const-court.be/public/f/2009/2009-017f.pdf. On the case law of Belgian lower courts in this respect, see Sine, F. and Verhelst, I. (2017), 'Tien

of a protected group and evidence of adverse treatment is not sufficient to shift the burden of proof in direct discrimination cases. Complainants must also produce evidence of a connection between the treatment complained of and the prohibited ground invoked.[25] However, this does not hold in relation to the dismissal of pregnant women: 'the special protection afforded to pregnant woman against dismissal in European law requires that where a pregnant woman is dismissed the employer must bear the burden of proving that the dismissal was grounded on exceptional circumstances unrelated to pregnancy or maternity. Hence, in every case in which pregnancy related dismissal is in issue, the factual combination of the dismissal and the woman's pregnancy must, in and of itself, place onus of proving the absence of discrimination firmly on the Respondent.'[26]

The Belgian legislation provides examples of facts that enable a presumption of discrimination. In demonstrating a presumption of direct discrimination, it mentions two types of facts: elements revealing a certain recurrence of unfavourable treatment towards persons sharing a protected characteristic, such as repeated reports of discrimination to the equality body or to an anti-discrimination NGO, and elements revealing that the situation of the claimant is comparable to that of a person who does not present the protected characteristic and was treated better.[27] This latter method, based on the use of a comparator, is a common way to establish prima facie discrimination. In *Brunnhofer*, for instance, the CJEU held that where a female worker proves that the pay she receives from her employer is less than that of a male colleague and that they both perform the same work or work of equal value, she is prima facie the victim of discrimination.[28] However, it may not always be easy for complainants to obtain information about how other workers, housing applicants or goods or service consumers of a different sex, race or other characteristic have been treated. This raises the issue of complainants' access to information, which is examined in Section 3. In any case, the use of a comparison with the treatment afforded to another individual is by no means the only way of showing the probability of a causal link between the respondent's conduct and the prohibited ground. The definition of direct discrimination allows for the use of a hypothetical comparator. Courts have also accepted that a presumption of discrimination can be inferred from other types of facts that raise the suspicion that the adverse treatment was determined by a prohibited ground. Thus, Irish courts have recognised in some cases that this causal link could be inferred from the fact that the respondent's conduct diverged from standard practice in relation to the service in question.[29] In Belgium, in the case of the manager of a fitness centre who was fired the day after he had informed his employer and colleagues by email that his newly born child was disabled, the Leuven Employment Tribunal took account of the temporal proximity of the announcement made by the claimant and his dismissal in establishing a presumption of disability discrimination by association.[30] The French Court of Cassation has stated that proving the existence of discrimination does not necessarily require a comparison of the situation of the complainant to that of other employees: where a tribunal finds that employers took advantage of the fact that their domestic employee was a foreign national and in an irregular situation to disregard her contractual and legal rights, it may legitimately conclude that she was discriminated against based on her origin.[31]

jaar antidiscriminatiewetgeving voor de Belgische arbeidsgerechten: wat maakt het verschil?', *Orientatie* 2017/5, pp. 11-12.

25 Irish Labour Court, *Melbury Developments Ltd. v Valpeters*, EDA 0917, 16.09.2009, https://www.workplacerelations.ie/en/cases/2009/september/eda0917.html.

26 Irish Labour Court, *Wrights of Howth Seafood Bars Limited v Murat,* EDA1728, 26.10.2017, https://www.workplacerelations.ie/en/cases/2017/october/eda1728.html.

27 Belgium, Federal Act pertaining to fighting certain forms of discrimination of 10 May 2007 (the General Anti-Discrimination Federal Act), Article 28(2); Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia as amended by the 10 May 2007 Federal Act (the Racial Equality Federal Act), Article 30(2) and Federal Act pertaining to fighting against discrimination between women and men of 10 May 2007 (the Federal Gender Act), Article 33(2).

28 Judgment of 26 June 2001, *Susanna Brunnhofer v Bank der österreichischen Postsparkassse AG*, C-381/99, para. 58.

29 For instance, in *A Nigerian National v A Financial Institution,* a Nigerian citizen complained that his application for a term loan was refused although he met the applicable criteria. This raised an inference of discrimination on the race ground that was not rebutted by any evidence presented by the respondent. See DEC-S2005-114, https://www.workplacerelations.ie/en/cases/2005/august/dec-s2005-114-full-case-report.html.

30 Leuven Employment Tribunal, 12 December 2013, AR 12/1064/1.

31 Court of Cassation, Social Chamber, No. 10-20.765, 3 November 2011, https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&fastReqId=1647684556&fastPos=1.

Often, it is through a combination of factors that the likeliness of the connection between the adverse treatment and a protected ground can be shown. The Court of Justice emphasized in the *CHEZ* case that a national court should 'take account of *all the circumstances* surrounding the practice at issue, in order to determine whether there is sufficient evidence for a finding that the facts from which it may be presumed that there has been direct discrimination on grounds of ethnic origin have been established'.[32] The case at stake concerned the practice of an electricity supplier of placing electricity meters for all consumers in a district inhabited mainly by persons of Roma origin at a height of between 6 and 7 metres, whereas in the other districts they were placed at a height of 1.7 metres. The Court indicated to the referring court some of the elements that it could take into account when assessing whether a presumption of discrimination could be established, namely: that it was common knowledge that the company had established the practice at issue only in urban districts known to be inhabited mainly by Roma; statements made by the company suggesting ethnic stereotypes or prejudices against Roma; the fact that this company, notwithstanding requests to this effect, had failed to adduce evidence of the alleged damage, meter tampering and unlawful connections as well as the compulsory, widespread and lasting nature of the practice.[33] The Irish case *McGreal v Cluid Housing*[34] provides another example of reasoning based on a combination of factors. The Irish Equality Tribunal found that the eviction of an older tenant without giving reasons for the decision and inviting the complainant to respond amounted to direct discrimination based on age. The equality officer had regard to the fact that the procedure adopted was 'extraordinary' and at variance with standard practice in social housing. Moreover, it followed a complaint of elder abuse made by the complainant and other tenants. For those reasons, the tribunal considered that it was for the respondent to demonstrate that their actions were untainted by discrimination on the grounds of age. Similarly, the French Court of Cassation has ruled that complainants satisfy their evidential burden where they establish facts which, *taken as a whole*, lead to a presumption of discrimination.[35]

Indirect discrimination is defined as resulting from an apparently neutral provision, criterion, or practice which would put persons possessing a protected characteristic at a particular disadvantage compared with other persons.[36] Thus, in order to establish a prima facie case of indirect discrimination, complainants need to establish that the contested measure imposes a disadvantage and that this disadvantage – despite the fact that the measure is not directly based on a prohibited ground – is likely to affect *in particular* persons possessing a protected characteristic compared to other persons. As illustrated by the case law of the CJEU on sex discrimination, one important way of demonstrating this particular disadvantage is to produce statistics showing that the provision, criterion or practice at stake has an adverse impact on a significantly higher number of members of a protected group than members of other groups. For instance, the provision of significant statistics disclosing 'an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men'[37] permits the establishment of prima facie discrimination, or where a collective wage agreement allows employers to exclude part-time employees from the payment of a severance grant on termination of their employment, showing that a considerably higher percentage of women than men work part time, permits a presumption of indirect discrimination based on sex.[38]

When the notion of indirect discrimination was first codified in the 1997 Burden of Proof Directive, it was actually defined by reference to a statistical criterion: it was described as resulting from 'an apparently neutral provision, criterion or practice [that] disadvantages a *substantially higher proportion* of members

32 Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria AD*, C-83/14, European Court of Justice (Grand Chamber), ECLI:EU:C:2015:48, para. 80, (emphasis added).
33 *CHEZ Razpredelenie Bulgaria AD*, paras. 81-84.
34 Irish Equality Tribunal, DEC-S2011-004, 20.01.2011, https://www.workplacerelations.ie/en/cases/2011/january/dec-s2011-004-full-case-report.html.
35 Court of Cassation, Social Chamber, No.17-18190, 19 December 2018, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000037851016.
36 See e.g. Racial Equality Directive, Article 2(b) and Employment Equality Directive, Article 2(2)(b).
37 *Enderby*, para. 19.
38 Judgment of 27 June 1990, *Kowalska v Freie und Hansestadt Hamburg*, C-33/89, ECLI:EU:C:1990:265, para. 16.

of one sex [...]'.[39] However, a different definition was inserted in the Racial Equality and Employment Equality Directives adopted in 2000: this definition centres on the criterion of 'particular disadvantage' (see above) and has been extended to the field of sex discrimination, replacing the previous one.[40] This does not mean that statistics can no longer be used as a means of proof. Statistical data remain perfectly relevant to show the 'particular disadvantage' caused by an apparently neutral measure (see Section 2), but the current definition allows the demonstration of this particular disadvantage through other means, in particular, by showing that the measure, by its very nature, in light of facts that are common knowledge, has an adverse impact mainly or especially on members of a protected group. The Belgian anti-discrimination legislation specifies that the facts that would allow prima facie indirect discrimination to be established include not only statistics relating to the situation of a group to which the complainant belongs, but also facts that are common knowledge, as well as the use of a distinction criterion that is intrinsically suspect.[41] This was also acknowledged by Irish courts. For instance, in *Noonan Services v A Worker*, the Irish Labour Court held that a requirement to have competence in English is clearly likely to place persons whose native language is other than English at a disadvantage relative to English native speakers. Hence a requirement of competence in English was deemed to constitute prima facie indirect discrimination.[42] In the foundational case of *NBK Designs v Inoue*, the Irish Labour Court insisted that statistical data are not always necessary to establish indirect discrimination: '[i]t would be alien to the ethos of this Court to oblige parties to undertake the inconvenience and expense involved in producing elaborate statistical evidence to prove matters which are obvious to the members of the Court by drawing on their own knowledge and experience.'[43] In the case at stake, it found that a requirement to work full time had an obviously disproportionate impact on women.[44] Nevertheless, in *Stokes*, the Irish Supreme Court in effect ruled that statistical evidence was *required* to establish prima facie indirect discrimination.[45] This, however, is not in conformity with the EU definition of indirect discrimination.[46]

1.2 Rebutting the presumption

Once a presumption of discrimination has been established, the onus shifts to the respondent, who is responsible for demonstrating that no discrimination has occurred. There are two ways in which the respondent can rebut this presumption. First, they can try to invalidate the elements established prima facie by the complainant, by proving that the latter did not in fact receive unfavourable treatment or that the treatment they complained of was not determined by a protected ground (in direct discrimination cases), or that the contested measure did not impose any particular disadvantage on a protected group (in indirect discrimination cases). The second way in which a respondent can demonstrate the absence of discrimination is by showing that the contested measure rests on a legitimate justification under EU law. Where indirect discrimination is at stake, the contested provision, criterion or practice will not be deemed discriminatory if the respondent proves that, despite the particular disadvantage it entails

39 Burden of Proof Directive, Article 2(2), (emphasis added).
40 Equality in Access to Goods and Services Directive, Article 2(b) and Recast Gender Directive, Article 2(1)(b).
41 Belgium, General Anti-Discrimination Federal Act, Article 28(3); Racial Equality Federal Act, Article 30(3); Federal Gender Act, Article 33(3). The legislation also mentions 'statistical material revealing an unfavourable treatment'.
42 Irish Labour Court, *Noonan Services v A Worker*, EDA1126, 29.07.2011, https://www.workplacerelations.ie/en/cases/2011/july/eda1126.html.
43 Irish Labour Court, *NBK Designs v Inoue,* EED0212, 25.11.2002, https://www.workplacerelations.ie/en/cases/2002/november/eed0212.html.
44 See also Irish Equality Tribunal, *McDonagh v Navan Hire Limited*, DEC-S2004-017, 06.02.2004, https://www.workplacerelations.ie/en/cases/2004/february/dec-s2004-017-full-case-report.html (on indirect discrimination against Travellers).
45 Irish Supreme Court, *Stokes v Christian Brothers High School, Clonmel*, [2015] IESC 13, 24.02.2015, http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument. The Court overturned an earlier decision of the Equality Tribunal that held that a school admission policy that prioritised former pupils' children constituted indirect discrimination against Travellers. It deemed that the evidence presented by the complainant was not adequate to demonstrate that the school's policy placed Travellers at a particular disadvantage.
46 Since then, the wording of national indirect discrimination provisions was amended by the Equality (Miscellaneous Provisions) Act 2015: in line with EU directives, the word '*puts*' a person at a particular disadvantage was replaced with '*would put*' persons at a particular disadvantage. This change militates against a shift towards 'requiring' statistical evidence. See O'Farrell, O. and Walsh J. (2018) *Country Report: Non Discrimination. Ireland* – 2018, European Network of Legal Experts on Gender Equality and Non-Discrimination, p. 37.

(or could potentially entail) for persons belonging to a protected group, it 'is objectively justified by a legitimate aim' and that 'the means of achieving that aim are appropriate and necessary.'[47] Where a prima facie case of direct discrimination is at issue, proving that the measure is justified will generally be more difficult for the respondent as anti-discrimination directives only admit a limited range of possible justifications, which vary depending on the discrimination ground concerned, with sex, race and ethnic origin enjoying the highest level of protection.

2 Providing evidence of discrimination: statistics, situation testing and other means of proof

Determining what means of evidence can be used in discrimination proceedings is in principle a matter left to domestic authorities. Both the Racial Equality and Employment Equality Directives provide in their preambles that 'the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice.'[48] Commonly accepted means of evidence, such as, written documents, witness statements and audio and video recordings (i) are of course used in litigation relating to discrimination but, given the specificities of discrimination, this type of evidence is often not available to alleged victims of discrimination. Accordingly, particular evidentiary tools have been developed to help complainants establish a prima facie case. These include statistics (ii) and situation testing (iii). Additionally, the special issue of public declarations revealing discriminatory predisposition in contexts where no victim of discrimination has made themselves known deserves attention, as it was at the centre of two cases brought before the CJEU, *Feryn* and *Accept* (iv).

2.1 Ordinary means of proof

Commonly accepted means of proof include written documents, witness statements, and audio or video recordings.[49] One issue raised by audio and video recordings is whether recordings that were made secretly by complainants, without the respondent's knowledge or consent, can be admitted. This has been accepted in some cases relating to discrimination in Ireland[50] and Belgium.[51] In France, while the production of a phone conversation recorded in such conditions has been admitted in criminal proceedings,[52] the social chamber of the Court of Cassation has held that the recording of a private phone conversation made without the knowledge of the person being recorded is an unfair method that cannot be admitted as means of proof, although it found that messages left on an answering machine are admissible.[53] Nonetheless, in May 2019, in a harassment case, the Toulouse Court of Appeal ruled that an audio recording made secretly by the complainant was admissible considering that it was necessary to the exercise of the claimant's 'right to proof' (*droit à la preuve*) and that the restriction of the respondent's privacy was proportionate to the aim pursued.[54]

47 See the definition of indirect discrimination, e.g. the Racial Equality Directive, Article 2(b) and the Employment Equality Directive, Article 2(2)(b).
48 Racial Equality Directive and Employment Equality Directive, Recital 15. See also the Recast Gender Directive, Recital 30.
49 Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, p. 36.
50 See e.g. *Laurentiu v The Central Hotel,* DEC-E2010-147, https://www.workplacerelations.ie/en/cases/2010/august/dec-e2010-147-full-case-report.html and *McDonagh v McHale*, DEC-S2011-025, 30.06.2011, https://www.workplacerelations.ie/en/cases/2011/june/dec-s2011-025-full-case-report.html.
51 Bruges Labour Tribunal, 10 December 2013, *Centrum voor gelijkheid van kansen en voor racismebestrijding and B.D. c. V.H.K. and B.V.B.A.*, RG No. 12/25521/A and 12/2596/A, https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-du-travail-de-bruges-10-decembre-2013.
52 Court of Cassation, Criminal Chamber, Decision No. 04-87354, 7 June 2005.
53 Court of Cassation, Social Chamber, 6 February 2013, No. 11 23738, https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027052467&fastReqId=1477888016&fastPos=1.
54 Toulouse Court of Appeal, Decision No. 2019/315, RG 17/02966, 10 May 2019. On the concept of the 'right to proof', see Bergeaud, A. (2010), *Le droit à la prevue*, LGDJ, Paris.

2.2 Statistics

As already noted, statistical evidence is especially used in the context of indirect discrimination cases in order to show that the contested provision, criterion or practice entails a particular disadvantage for persons belonging to a protected group. Recital 15 of the Racial and Employment Equality Directives specifies that national rules on evidence 'may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.' Both the Irish[55] and Belgian[56] anti-discrimination legislation explicitly provides that statistics are admissible as means of proof. In France, the admissibility of statistics as means of evidence has been recognised by the Court of Cassation[57] and by the Council of State.[58]

Statistics may also be relevant as means of proof of direct discrimination. Statistical data showing a pattern of discrimination by the respondent may contribute to a presumption of direct discrimination where they corroborate and reinforce other evidence adduced by the complainant. For instance, where a complainant alleges discrimination in hiring based on his ethnic origin, statistical data showing that the employer, over a significant period of time, has recruited no workers of the same origin – or very few – can contribute to the creation of a presumption of direct discrimination.[59] In a landmark case concerning allegations of ethnic profiling in police checks, the French Court of Cassation held that research findings showing that discriminatory identity checks carried out by French police on persons belonging to certain ethnic minorities are especially frequent can constitute a contextual element which, combined with witness reports, may lead to a shift in the burden of proof.[60]

In order to be conclusive, statistics must meet certain conditions. In *Enderby*, in the context of indirect discrimination, the CJEU noted that '[i]t is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.'[61] Ascertaining whether the statistical data adduced by a complainant are adequate to establish the alleged detrimental effect of the contested measure on a protected group may raise difficult methodological questions, such as how to choose the pool of comparators and what constitutes a statistically significant disparate impact.[62]

In its case law on sex discrimination in employment, the Court has specified that in order to determine whether a national law affects a considerably higher number of women than men, national courts must take into account all workers subject to this legislation and that the best approach to the comparison of statistics is to compare the proportion of male workers who are affected and who are not affected by this regulation and the same proportions among female workers.[63] A common problem encountered by complainants, however, is that relevant statistical data on the impact of a specific law may be broadly inaccessible or not available at all. This issue was brought to the attention of the Court in *Minoo*

55 Ireland, Equal Status Acts 2000-2018, Section 3(3A); Employment Equality Acts, Sections 22(1A) and 19(4).
56 Belgium, General Anti-Discrimination Federal Act, Article 28(3); Racial Equality Federal Act, Article 30(3); Federal Gender Act, Article 33(3).
57 Court of Cassation, Social Chamber, No. K 10-15873, *Airbus*, 15 December 2011 (case of ethnic discrimination in employment); Court of Cassation, First Civil Chamber, Nos 15-24.207 to 15-25.877, 9 November 2016 (liability of the state for racial profiling in police identity checks), https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/relatifs_contr_35473.html.
58 Council of State, No. 16-102017, 16 October 2017 (age discrimination case).
59 See Court of Cassation, Social Chamber, No. K 10-15873, *Airbus*, 15 December 2011.
60 Court of Cassation, First Civil Chamber, Decision No. 15-25873, 9 November 2016. In Ireland, complainants in direct discrimination cases occasionally use statistical data in attempting to establish a pattern of discrimination. See *Cleary v UCD,* DEC-E2018-009, 26.03.2018, https://www.workplacerelations.ie/en/cases/2018/march/dec-e2018-009.html (age discrimination case).
61 *Enderby*, para. 17. See also: CJEU, judgment of 9 February 1999, *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, C-167/97, ECLI:EU:C:1999:60, para. 65.
62 See Schiek, D., Waddington, L., Bell, M. (eds) (2007), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Hart, Oxford and Portland, pp. 397-422.
63 *Seymour-Smith*, para. 59; judgment of 6 December 2007, *Voss v Land Berlin*, C-300/06, ECLI:EU:C:2007:757, para. 40.

Schuch-Ghannadan. The complainant alleged that the Austrian legislation that allowed universities to set different maximum durations of successive fixed-term work contracts for full-time workers and part-time workers entailed indirect discrimination against women. She presented statistical data on the Austrian employment market in general, which showed that a considerably higher proportion of women than men were working part time. However, she was unable to provide specific data on workers employed by Austrian universities subject to the contested legislation as she had no access to such data. The Court acknowledged that the unavailability or inaccessibility of specific statistical data may compromise the achievement of the objective of the special rule on the burden of proof. Considering the need to ensure the effectiveness of this rule, it held that where workers alleging indirect discrimination have no access or little access to statistics or facts on workers specifically concerned by the national legislation at stake, they should be allowed to present general statistical data on the employment market of the Member State concerned.[64]

The production of statistics to substantiate a discrimination claim may moreover be hampered by the fact that certain discrimination grounds – in particular racial and ethnic origin, religion, sexual orientation and disability – constitute sensitive data under personal data protection law. Accordingly, the treatment of such data is restricted and subject to stringent conditions. Moreover, in some countries, such as France and Belgium, there is significant resistance towards collecting data on self-identified race or ethnicity.[65] In France in 2007, the Constitutional Council held that studies relating to diversity of origin, discrimination and integration can be based on 'objective' information – which, in the Council's view, includes an individual's name, geographic origin or national origin – but could not, without infringing Article 1 of the Constitution, which guarantees equality, be based on the processing of data on race or ethnicity.[66] In Ireland by contrast, since 2006, the census has included a question on race and ethnicity.

In practice, statistics are used relatively often by complainants in Ireland, mainly in indirect discrimination cases. In France, statistics based on a comparison between the situation of employees working for the same employer are frequently used in labour law proceedings. One particular statistical method, called the 'panel method', was developed in France in the 1990s to serve as an evidential tool in discrimination cases. Initially created in the context of trade union discrimination, it consisted in comparing the career development of workers employed by the same employer to determine whether one or several given workers have experienced a drop or difference in development compared to the average worker, from the point at which they were elected as a union representative.[67] It was subsequently applied *mutatis mutandis* in cases concerning sex discrimination and, to a lesser extent, in cases on discrimination based on origin.[68] It has been recognised by the Court of Cassation and the Council of State as a valid basis on which to infer a presumption of discrimination.[69]

2.3 Situation testing

Situation testing consists of a real-life experiment aimed at testing the selection practices of employers or providers of goods or services in order to ascertain whether they are tainted by discrimination. It requires the selection of pairs of individuals who have similar profiles for all the characteristics relevant for accessing the job, goods or service in question, but who differ with regard to one protected ground, such

64 Judgment of 3 October 2019, *Minoo Schuch-Ghannadan v Medizinische Universität Wien*, C-274/18, ECLI:EU:C:2019:828, para. 55-57.

65 Ringelheim, J. and De Schutter, O. (2010), *Ethnic Monitoring. The Processing of Racial and Ethnic Data in Anti-Discrimination Policies: Reconciling the Promotion of Equality with Privacy Rights,* Bruylant, Brussels.

66 French Constitutional Council, Decision No. 2007-557 DC November 15h 2007, para. 29. See also the explanatory comment of this decision published in the *Cahiers du Conseil constitutionnel* n°23.

67 Chappe, Vincent-Arnaud (2011), 'La preuve par la comparaison: méthode des panels et droit de la non-discrimination', *Sociologies pratiques*, 23(2), pp. 45-55.

68 See Paris Court of Appeal, Decision of 31 January 2018 (discrimination of Moroccan workers by the French National Train Company *SNCF*, the 'Chibanis' case).

69 Court of Cassation, Social Chamber, *P+B Fluchère, Dick and CFDT v SNCF*, No. 1027, 28 March 2000; Council of State, No. 16-102017, 16 October 2017.

as sex, origin or disability. Each pair responds to the same job vacancy or attempts to access the same goods or service. The experiment is repeated for dozens or hundreds of times. If a significant number of members of the 'experimental group' are treated less favourably than members of the 'control group', this can be interpreted as revealing discrimination: insofar as the two groups have equivalent profiles, the difference in treatment can only be explained by the protected ground.[70] This method was initially developed in the 1960s by British social scientists who sought to document discrimination in specific sectors, such as employment and housing.[71] It was later used as a means of proof of discrimination in litigation. In various countries, including the United Kingdom, the Netherlands, France, Denmark, Finland and Sweden it has been admitted as a valid form of evidence.[72]

There are two ways in which situation testing can serve as means of proof in discrimination litigation. The first possibility is where a complainant – who did not participate in a situation test, but was refused a job he was applying for or goods or a service he was trying to access – invokes, among other evidence, a situation test documenting the discriminatory behaviour of the same employer or goods or service provider. In this case, the findings of the situation test serve to corroborate other evidence adduced by the complainant. The second possibility is where a person who took part in a situation test and was refused a job, goods or a service in this context – or an equality body or an NGO acting on their behalf – sues the 'tested' organisation for discrimination. In this case, the test constitutes the central evidence on which the complaint is based.

In France, the use of situation testing as evidence of discrimination has been admitted in criminal proceedings by the Court of Cassation in 2005.[73] In 2006, Article 225-3-1 was inserted in the Penal Code.[74] This provision indicates that the fact that the victim sought access to goods, an act, service or contract *with the aim of demonstrating the existence of a discriminatory behaviour*, does not impede a finding of discrimination if proof of this behaviour is provided. It thus expressly allows for the use of situation testing in the second hypothesis identified above. In practice, this tool has been mainly used by anti-racism NGOs and the equality body. Situation tests have been invoked in proceedings relating to race or ethnic origin as well as in those relating to disability and age discrimination, to a lesser extent. However, in order to support a finding of discrimination, the situation testing must be deemed reliable and conclusive by the court. The case law is quite strict in this regard. Courts generally consider that the results of a test must be supported by other sources of evidence in order to lead to a finding of discrimination.[75]

Interesting developments relating to situation testing have also taken place in Belgium.[76] Previous anti-discrimination legislation, adopted in 2003, explicitly mentioned the findings of a situation test as one example of facts on the basis of which a presumption of discrimination could be established,[77] but this law was replaced by the 2007 law, which no longer refers to situation testing. However, it mentions among the facts upon which a presumption of discrimination could be established, 'elements revealing a certain recurrence of unfavourable treatment towards persons sharing a protected characteristic', as well as 'elements revealing that the situation of the plaintiff is comparable to that of a person who does

70 Bendick, M. (2007), 'Situation Testing for Employment Discrimination in the United States of America', *Horizons stratégiques*, 5(3), pp. 17-39, esp. pp. 20-22.
71 Bendick, M. (2007), 'Situation Testing for Employment Discrimination in the United States of America', p. 31.
72 Rorive, I. (2009) *Proving Discrimination Cases. The Role of Situation Testing,* Center for Equal Rights and Migration Policy Group, Brussels.
73 Court of Cassation, Criminal Chamber, Decision No. 04-87354, 7 June 2005. See also Court of Cassation, Criminal Chamber, Decision No. 15-87378, 28 February 2017. https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000034140789&fastReqId=1149594191&fastPos=1. On the practice of situation testing in France more generally, see du Parquet, L., Petit, P. (2019), 'Discrimination à l'embauche: retour sur deux décennies de testings en France', *Revue française d'économie*, 34(1), pp. 91-132.
74 France, Law No. 2006-396 on Equal Opportunities of 31 March 2006, Article 45.
75 See Paris Court of Appeal, *Billau v SOS Racism*, Decision No. 07.04974, 17 March 2008.
76 See Ringelheim, J. and van der Plancke, V. (2018) 'Prouver la discrimination en justice', in Ringelheim, J. and Wautelet, P. (eds), *Comprendre et pratiquer le droit de la lutte contre les discriminations*, Anthemis, Brussels, pp. 137-173, pp. 158-165.
77 This legislation however required the adoption of a royal decree to regulate the practice of such tests. This royal decree was never adopted.

not present the protected characteristic and was treated better'. In practice, situation testing that is conclusive would be a combination of these two elements. It should thus still be admitted under current Belgian legislation as a fact leading to the establishment of a presumption of discrimination. Yet, the question of the conditions to be respected in the operation of such a test in order for it to be admitted as valid evidence remain debatable. In a 2017 ordinance, the Brussels Region explicitly recognised that where a situation test is conclusive, it constitutes a fact on the basis of which a presumption of direct or indirect discrimination can be established. The ordinance also specified the conditions to be met.[78] Such testing – called 'discrimination test' in this legislation – may be carried out by civil servants designated by the regional government, by victims themselves or by an equality body or NGO acting in support of a victim. It cannot amount to provocation within the meaning of criminal law. This implies in particular that the test 'cannot have the effect of creating, reinforcing or confirming a discriminatory practice where there was no strong indication of practices likely to be characterised as discrimination'.[79] In order to be admissible in court as means of proof, the testing cannot be carried out randomly; the decision to carry out a test must be based on elements raising a suspicion of discriminatory behaviour on the part of a given employer or in a specific activity or sector. Furthermore, where the test is carried out by civil servants or an NGO,[80] it can only be used 'following complaints or reports of discrimination and based on strong indication of practices likely to be characterised as discrimination within one employer or activity sector'.[81] The same ordinance also allows regional labour inspectors to carry out such discrimination tests in the context of their general employment regulations monitoring. At the federal level, a law adopted in 2018 has authorised social inspectors to carry out – under certain conditions – situation testing in order to monitor compliance with criminal provisions of the anti-discrimination legislation.[82] This law, however, remains silent about the issue of the admissibility of such tests as means of evidence in courts.

In Ireland, the legislation is silent about situation testing and it has not been used in court in discrimination cases.

2.4 Discriminatory public statements

It has become rare for employers or service providers to express a discriminatory inclination publicly. As a matter of course, where this is the case, a person who alleges that they have been discriminated against by such an employer or service provider could adduce these statements in court as evidence in support of their case. The Court of Justice, however, has been faced with the peculiar situation where an employer or a person assumed to represent an employer was sued for discrimination after having made discriminatory declarations, but where no identified victim had made herself known. In the *Feryn* case,[83] a Belgian employer who advertised a job vacancy had declared in a press interview that he would not recruit applicants of Moroccan origin and the legal proceedings were initiated by the Belgian equality body. In *Accept*,[84] a man who presented himself and was perceived by the public as playing a leading role in a Romanian football club stated in an interview that the club would not hire a homosexual footballer – here, the case was brought by an NGO defending lesbian, gay and transgender rights. In both cases, the Court of Justice held that such public declarations were sufficient to establish a prima facie case

78 Belgium (Brussels-Capital), Ordinance of 4 September 2008 relating to the fight against discrimination and equality of treatment in the field of employment, Article 22(3)(2), inserted by the 16 November 2017 Ordinance aimed at fighting discrimination in the field of employment in the Region of Brussels-Capital.

79 Belgium (Brussels-Capital), Ordinance of 30 April 2009 relating to the monitoring of regulations in the field of employment which fall within the competence of the Region of Brussels-Capital, Article 4/3(4)(1), inserted by the 16 November 2017 Ordinance (our translation).

80 Belgium (Brussels-Capital), Ordinance of 4 September 2008, Article 22(3)(3).

81 Belgium (Brussels-Capital), Ordinance of 30 April 2009 relating to the monitoring of regulations in the field of employment which fall within the competence of the Region of Brussels-Capital, Article 4/3(4)(2).

82 Belgium, Social Criminal Code, Article 42/1(1), inserted by the Law of 15 January 2018 containing diverse provisions in the field of employment.

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

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

of discrimination despite the fact that there was no identified victim: 'public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory.'[85]

3 Complainants' access to evidence held by the respondent

Victims of discrimination face a particular difficulty in that in many cases the only documents or information that would allow them to substantiate their claim are in the hands of the discriminator. Typically, a worker who believes her job application was rejected because of her ethnic origin does not have access to information about the person who was recruited. Comparing her qualifications to that of the successful applicant may, however, be crucial to giving credence to her claim that she was treated less favourably due to her origin. As emphasised by Advocate General Mengozzi in *Meister*, an employer who refuses to disclose information may 'in that way, make his decisions virtually unchallengeable. In other words, the employer continues to keep in his sole possession the evidence upon which ultimately depends the substance of an action brought by the unsuccessful job applicant and, therefore, its prospects of success.'[86] On the other hand, giving alleged victims of discrimination a right to obtain any information that they request may not only upset the balance between complainants and respondents regarding the burden of proof, but may also affect the right to confidentiality and the protection of personal data of third parties mentioned in the documents submitted.[87]

Accordingly, the question arises whether complainants in discrimination proceedings have the right to require the disclosure of certain information retained by the respondent. A further issue is whether the respondent's refusal to provide the requested information may be taken into account to establish a presumption of discrimination. These questions were raised before the CJEU on two occasions. In *Kelly*, a teacher who was unsuccessful in his application for a place on a vocational training course at a university complained of sex discrimination, arguing that he was better qualified than the least-qualified female candidate to be offered a place. During the proceedings before national courts, he requested copies of the application files and 'scoring sheets' of the candidates who had been successful.[88] In *Meister*, a Russian national who held a Russian degree in systems engineering, the equivalence of which had been recognised by German authorities, responded to a job advertisement in a German company. Although her qualifications matched the job offer, her application was rejected. Not long afterwards, the same company published a new advertisement with identical content. Ms Meister re-applied and was again unsuccessful. She was not invited for an interview and received no information on the reasons for the rejection of her application. She sued the company for discrimination on the grounds of sex, origin and age, and requested that it produce the file of the person who was recruited.[89]

In both cases, the domestic court asked the Court of Justice to clarify whether complainants in discrimination cases are entitled under EU law to obtain from the respondent the disclosure of information capable of constituting facts from which it may be presumed that there has been discrimination, such as information on whether another applicant was recruited or on the qualifications of other applicants. The Court responded that EU anti-discrimination directives do not provide such a right.[90] Nevertheless, it acknowledged that in some circumstances a respondent's refusal to disclose information may risk compromising the achievement of the objectives pursued by the directives and deprive the burden of

85 *Feryn*, para. 34. See, mutatis mutandis, *Accept*, para. 53, in which the Court also highlights the fact that the club had not distanced itself from the public declarations.
86 Opinion of Advocate General Mengozzi, 12 January 2012, *Galina Meister v Speech Design Carrier Systems GmbH*, C-415/10, ECLI:EU:C:2012:8, para. 32.
87 *Meister*, Opinion of Advocate General Mengozzi, 12 January 2012, para. 23.
88 Judgment of 21 July 2011, *Patrick Kelly v national University of Ireland (University College, Dublin)*, C-104/10, ECLI:EU:C:2011:506.
89 Judgment of 19 April 2012, *Galina Meister v Speech Design Carrier Systems GmbH*, C-415/10, ECLI:EU:C:2012:217.
90 *Kelly*, para. 38 and 48; *Meister*, para. 46.

proof provision of its effectiveness.[91] Accordingly, it accepted that such an attitude on the part of the respondent could be one of the factors to be taken into account when establishing facts from which it may be presumed that there has been direct or indirect discrimination.[92] However, it insisted that 'all the circumstances of the main proceeding' had to be taken into consideration by the referring judge.[93] Thus, the respondent's unwillingness to grant access to information is not sufficient in and of itself to trigger a presumption of discrimination; it must be combined with other contextual elements to have this effect, such as the fact that the complainant's qualifications fitted with the job advertisement and that, notwithstanding this, she was not invited to a job interview.[94]

The Court further observed that in assessing the respondent's attitude, national judges need to have regard to personal data protection norms.[95] In this respect, there was an important difference between the two cases: in *Kelly*, the university had provided Mr Kelly access to redacted information and the refusal concerned disclosure of confidential data concerning individual, identifiable applicants' qualifications,[96] while in *Meister*, the respondent denied access to *any* information. The Court's rulings suggest that disclosing only partial information may be justified by personal data protection requirements, but where the respondent refuses access to any information, even in redacted form, this may constitute an element to be taken into account in establishing a presumption of discrimination.[97]

However, in the *Danfoss* case in the specific context of alleged pay discrimination, the Court had taken a firmer stance on the issue of what inference can be made from an employer's lack of transparency. At stake was the wage policy of a business that was paying the same basic wage to employees in the same wage group, but that awarded individual pay supplements calculated on the basis of various criteria (such as mobility, training and seniority). The claimant had shown that as a result of this system, in two wage groups, a man's average wage was higher than that of a woman's. However, the system of individual supplements was implemented in such a way that employees were unable to find out the reasons for pay differences between them. The Court ruled that 'where an undertaking applies a system of pay which is totally lacking in transparency', 'if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men', these two elements combined trigger a shift in the burden of proof: 'it is for the employer to prove that his practice in the matter of wages is not discriminatory.'[98]

Be that as it may, in many cases, victims of discrimination remain in an uncomfortable situation regarding access to information.[99] Two elements at the national level may however mitigate this situation.

First, some judicial authorities have investigatory powers allowing them to order the delivery of certain documents. In Ireland, the Workplace Relations Commission (WRC), which is competent to hear complaints under the Employment Equality Acts 1998-2015 and the Equal Status Acts 2000-2018, has an investigative role. It has significant powers to carry out its functions, including the power to obtain information and to seek court orders directing that persons cooperate with investigations. Adjudication officers need not rely exclusively upon material introduced by the parties to arrive at a decision. In practice, they often request additional factual information from the parties, notably when seeking to establish whether or not a pattern of differential treatment can be demonstrated.[100] Such material can assist in establishing a prima facie case and, therefore, in shifting the burden of proof. The WRC can

91 *Kelly*, para. 39 and 54; *Meister*, para. 40. See also *Minoo Schuch-Ghannadan*, para. 55.
92 *Meister*, para. 45. See also *Kelly*, para. 39 and 54.
93 *Meister*, para. 42.
94 *Meister*, para. 45.
95 *Kelly*, para. 55.
96 Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, pp. 28-31 and 51-57.
97 *Meister*, para. 44.
98 *Danfoss*, para. 16.
99 Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, p. 57.
100 See, for example, *MacMahon v Department of Physical Education and Sport, University College Cork*, DEC-S2009-014, at para. 4.14. CCTV footage was sought by the adjudication officer in *A Customer v A Nightclub*, ADJ-00001797.

formally order the production of information needed from recalcitrant respondents.[101] In France and Belgium, rules of civil procedure entitle the civil judge to order certain 'investigative measures' (*mesures d'instruction*), including the disclosure of a document by one of the parties or by a third person.[102] However, the issuing of such an order is conditional on the existence of other evidence.

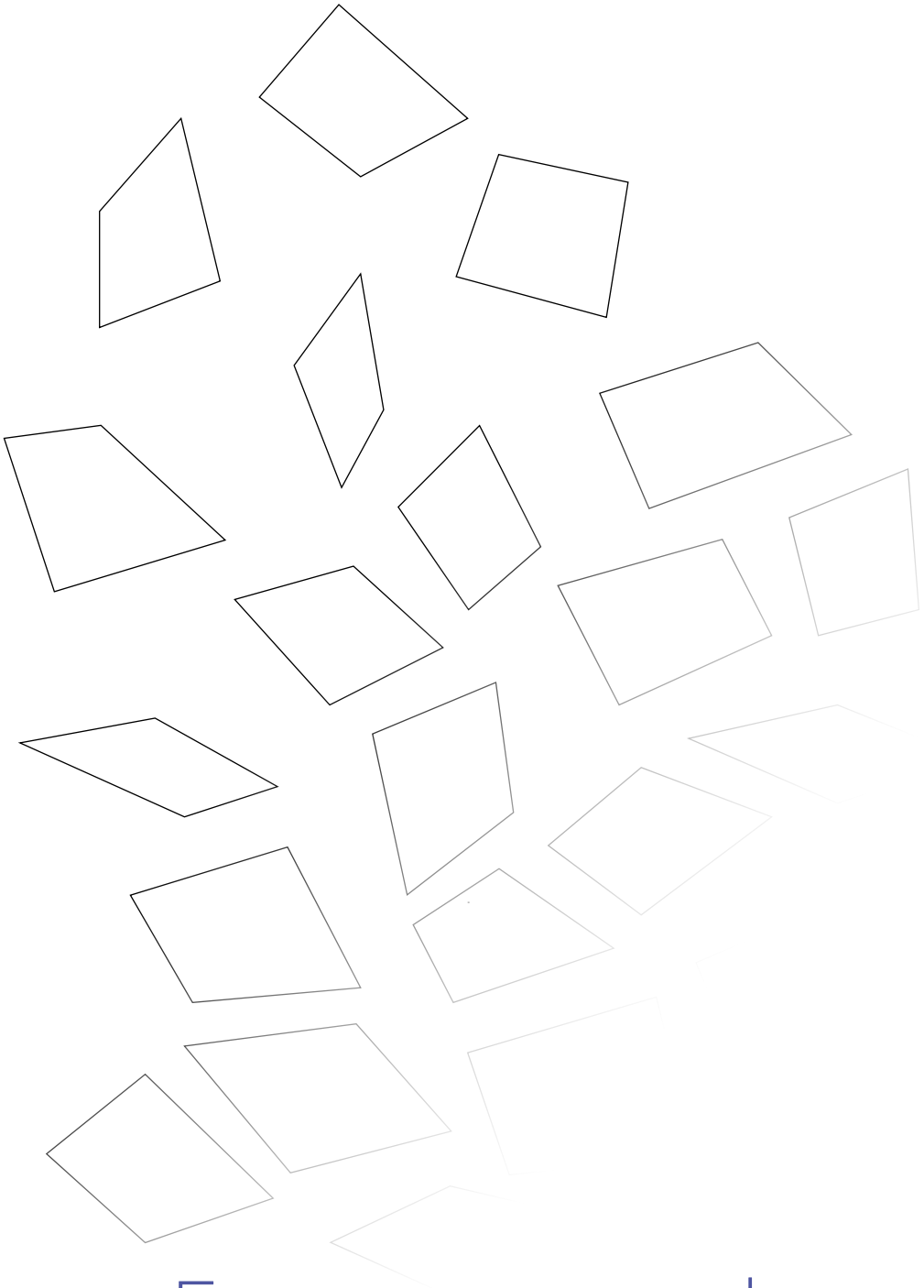
Secondly, in some countries, including Ireland and the United Kingdom, a person who thinks that they have been discriminated against may resort to a formal information-seeking procedure (called a 'questionnaire procedure' in the United Kingdom): prior to starting a legal action, they can contact the alleged discriminator and seek clarification of his or her conduct through the submission of a standardised questionnaire. Courts may draw inferences from the answers provided to such a questionnaire or a lack of response.[103] This tool can be useful to help complainants marshal the evidence required to establish a prima facie case.[104] In Ireland, Section 76 of the Employment Equality Act (EEA) allows a person seeking redress for discrimination to request information from the person who may have discriminated against them. Regulations prescribe the forms to be used in asking such questions and in replying to them.[105] The Director General of the WRC or the circuit court may draw such inferences as are appropriate from a failure to supply the information sought under Section 76.[106] In practice, however, there seem to be few cases in which adjudicators explicitly drew an inference from a failure to supply information.[107] Instead, the WRC officers tend to state that they have taken note of the omission.[108] In addition, under the Equal Status Act (ESA), complainants have a mandatory obligation to notify respondents in writing, within two months of the occurrence, of the nature of the allegation and of their intention to seek redress under ESA.[109] The complainant 'may in that notification [...] question the respondent in writing so as to obtain material information and the respondent may, if the respondent so wishes, reply to any such questions.'[110] The Director General of the Workplace Relations Commission may draw such inferences as are appropriate from a failure to reply to the notification or to supply the information sought in this context.[111]

4 Conclusion

The requirement of a lightening of the burden of proof weighing on claimants in discrimination cases has been part of EU anti-discrimination law since the late 1980s. Initially articulated by the CJEU, it is now enshrined in the various anti-discrimination directives. By providing that when claimants establish facts from which it can be presumed that discrimination has occurred it falls upon the respondent to prove that there has been no discrimination, the system arranges a sharing of the burden of proof between both parties. However, probably because it constitutes a derogation from the standard rule applicable in civil proceedings, its implementation at the domestic level is not without difficulties. Nonetheless,

101 See e.g. *A University Lecturer v A University*, ADJ-00002790, 21.08.2018, https://www.workplacerelations.ie/en/cases/2018/august/adj-00002790.html.
102 France, Civil Procedure Code, Articles 143 to 154; Belgium, Judicial Code, Article 877.
103 Farkas, L. and O'Farrell, O. (2014), *Reversing the burden of proof: Practical Dilemmas at the European and national level*, pp. 36-37.
104 Palmer, F. (2006), 'Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof', p. 28.
105 Ireland, S.I. No 321 of 1999, Employment Equality Act 1998 (Section 76 – Right to Information) Regulations 1999, http://www.irishstatutebook.ie/eli/1999/si/321/made/en/print.
106 Ireland, Employment Equality Act (EEA), Section 81.
107 See in particular Irish Labour Court, *Irish Ale Breweries Ltd v O'Sullivan*, EDA 0611, 18.08.2006, https://www.workplacerelations.ie/en/cases/2006/august/eda0611.html. The employer failed to provide the information requested under Section 76 and offered no explanation for that omission at the hearing. The Labour Court inferred that the information, if given, would have provided evidence of 'like work' between the complainant and her comparator.
108 See in *Kennedy v ADC Plasticard Ltd*, DEC-E2010-019, paras 5.7 https://www.workplacerelations.ie/en/Cases/2010/February/DEC-E2010-019-Full-Case-Report.html. See also *Cleary v UCD,* DEC-E2018-009, 26.03.2018, https://www.workplacerelations.ie/en/cases/2018/march/dec-e2018-009.html. On the ability to draw inferences more generally, see High Court, *Iarnród Éireann v Mannion* [2010] IEHC 326, 27.07.2010, http://www.courts.ie/Judgments.nsf/0/5F91DF4D09234675802577AE004A9E7B.
109 Ireland, Equal Status Act (ESA), Section 21(2).
110 Ireland, ESA, Section 21(2)(b).
111 Ireland, ESA, Section 26.

as the examples of Belgium, France and Ireland show, the special rule governing the burden of proof in discrimination litigation has had an impact on the practices of domestic judges. It has given rise to a sophisticated case law at the national level, which contributes to enriching the understanding of this rule. Combined with CJEU judgments, this case law helps to clarify the operation of the rule and in particular, the kind of facts that have the potential to form the basis of a presumption of direct or indirect discrimination. Interesting developments have also taken place at the national level regarding means of evidence that can be used to establish a prima facie case of discrimination. Statistics and situation testing are two specific tools that have been developed to counterbalance the fact that in many cases ordinary means of proof, such as witness statements or written documents, are unavailable to victims of discrimination. Questions remain, however, regarding the use of these tools in court and especially the conditions under which situation testing can be admitted as valid means of proof. Another thorny issue is that of the complainant's access to information held by the respondent. The Court of Justice clearly denied that EU law provides complainants in discrimination cases with the right to obtain specific documents or information from the other party. At the same time, however, it acknowledged that the respondent's refusal to disclose certain information, when considered in conjunction with other circumstances, may constitute a fact from which a presumption of discrimination could be inferred. The CJEU thereby attempts to conciliate contradictory imperatives, although the guidelines that it provides to domestic authorities remain vague. However, Member States may offer victims of discrimination a higher level of protection regarding access to information. In particular, this is the case where potential claimants have the right to seek clarification from the alleged discriminator through a standardised procedure, such as the 'questionnaire procedure' or where judges have the power to order the production of documents needed to decide a case.



European case law update

This section provides an overview of the main latest developments in gender equality and non-discrimination cases pending or decided by the Court of Justice of the EU and the European Court of Human Rights, from 1 January to 30 June 2019.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE GENERAL OPINIONS

Case C-171/18, *Safeway Ltd v Andrew Richard Newton, Safeway Pension Trustees Ltd*, Opinion of Advocate General Tanchev delivered on 28 March 2019, ECLI:EU:C:2019:272

Gender

This Advocate General Opinion follows a request for a preliminary ruling submitted by the *Court of Appeal* (UK), and concerns the effective enforcement of the principle of equal pay for equal work between men and women with regard to pension schemes. More specifically, the question concerns the equalisation method of the pensionable age between men and women and whether EU law prohibits retrospectively introducing equality in retirement ages even if such a change is permissible under national law.

In the wake of the Court's judgment in *Barber,*[1] in 1991 *Safeway Limited* ('the Appellant'), the principal employer of a pension scheme in the UK, announced the equalisation of the retirement age of men and women by applying the same retirement age of men to women (levelling down from 60 to 65 years). According to the *Barber* judgment, until the institution of measures by a pension fund to secure such equalisation, men were to be treated as favourably as women, by imposing the retirement age of women on both men and women (levelling up to 60 years). This transition period is known, at least in the UK, as the '*Barber* window'. In the case under discussion, the Appellant announced the equalisation of the pensionable age under their pension scheme by letter in December 1991 ('Announcement'). The Announcement further stated that the Trust Deed and Rules are the legal basis of the scheme, but that this Announcement represented an alteration of the terms and conditions of employment. However, no amendment was made by deed, until 2 May 1996. According to that deed, the equalisation was to have retrospective effect from 1 December 1991 (the date of effect specified in the 1991 Announcement). The question which arises, however, is whether the equalisation, by means of levelling down, is allowed retrospectively, considering that the case law of the Court prohibits retroactive levelling down through equalisation of the retirement age.

The AG noted that, in order to answer this question, it first has to be established whether the situation is indeed one of retroactivity. This would not be the case if the 1991 Announcement had full legally binding force providing a remedy to secure an equal pensionable age effective both in practice and in law. In accordance with the Court's case law, equalising the pensionable age to 65 for both men and women is lawful after closure of the *Barber* window. However, if no effective remedy was put in place until 2 May 1996, the date on which the Trust Deed was implemented, the *Barber* window would still be open until that date, and the prohibition on retroactive levelling down would apply. However, it is up to the referring court to decide on these questions.

The AG further noted that establishing the point in time at which the *Barber* window was actually closed is essential to resolving the dispute in the main proceedings, and therefore suggests that the Court reformulates the referred question in such a way as to also include what factors are to be taken into account in determining the date on which a pension fund has taken prospective measures concerning periods of service that have taken place after the *Barber* judgment to enforce the principle of equal pay for equal work between men and women under Article 157 TFEU with respect to normal pension age. Also, whether the prohibition under EU law on retroactive levelling down applies during the period between which a written announcement – provided by a pension scheme in accordance with national

1 C262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, Judgment of 17 May 1990, Barber EU:C:1990:209.

law – proclaimed intended changes regarding the equalisation of the pensionable age of women and men, and the date when the Trust Deed is actually amended.

AG Tanchev proposes the Court reply to the first part of the reformulated question by reiterating that due regard is to be afforded to the fact that Member State law must ensure that equal treatment with respect to normal pension age is a binding obligation which should be fully enforceable both in practice and in law, and that the legal remedies provided by Member State law to guarantee equal pay under Article 157 TFEU with respect to normal pension age do not render this right impossible in practice or excessively difficult to enforce. At the same time, the remedial scheme to secure equal treatment with respect to normal pension age must be the same as that applicable to analogous claims of a purely domestic nature. Regarding the second part of the question, the AG reiterates that the prohibition under EU law regarding retrospective levelling down continues to apply during a period in which the *Barber* window remains open.

Case C-396/18 *Gennaro Cafaro v DQ*, Opinion of Advocate Gneral Szpunar delivered on 26 June 2019, ECLI:EU:C:2019:541

This Advocate General Opinion follows a request for a preliminary ruling by the Italian *Corte di Cassazione* (Supreme Court of Cassation), which enquired whether a Member State can prohibit pilots who have reached a given age from carrying on their profession in light of the principle of non-discrimination on grounds of age.

In this case, the applicant was an aircraft pilot employed by an air transport company engaged in covert secret service activities. He was notified by his employer that his employment contract would terminate on 19 September 2012 because he would have reached the age of 60 years. According to national law, only pilots of aircraft operated for commercial transport are allowed to perform their activity until they have reached 65 years. The referring court asked whether Directive 2000/78 and Article 21(1) of the Charter preclude national legislation imposing the automatic termination of the employment relationship of pilots of aircrafts associated with protecting national security, when they reach the age of 60 years.

AG Szpunar noted that under Article 4(1) of Directive 2000/78, a difference of treatment on grounds of age does not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. The AG further noted that Italian legislation aims to ensure air traffic safety and protect national security, both regarded as legitimate objectives within the meaning of Directive 2000/78.

Further, he noted that there are no standards of reference in national law or in international law which can challenge the consistency of the provision setting out the automatic termination of the employment relationship, once a pilot reaches the age of 60 years, on security grounds. This measure is indeed considered proportionate by AG Szpunar, who emphasised that, since pilots' physical capabilities diminish with age, it is appropriate to establish a maximum age to carry on certain activities in order to guarantee air traffic safety and national security. Another issue is whether that measure does not go beyond what is necessary to achieve the legitimate aims pursued. In this regard, the AG held that a less restrictive measure would not ensure air traffic safety and public security in the same way as automatic termination of the employment relationship, in particular, as a result of that company's limited resources.

AG Szpunar therefore concluded that Article 4(1) of Directive 2000/78 must be interpreted as not precluding legislation allowing the termination of the employment relationship of pilots operating aircrafts that protect the national security when they reach the age of 60 years where, as a result of

that company's limited resources, less restrictive measures would not guarantee the achievement of the objectives pursued by the law.

REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

Case C-258/17, *E.B. v Versicherungsanstalt öffentlich Bediensteter BVA*, Grand Chamber judgment of 15 January 2019, ECLI:EU:C:2019:17

Sexual orientation

This request to the Court of Justice for a preliminary ruling concerned the applicability of Article 2 of Directive 2000/78 to a final disciplinary decision, adopted before the entry into force of that directive, ordering the compulsory early retirement of a civil servant, accompanied by a reduction in his pension entitlement. The Court was also called to examine whether, and to what extent, Directive 2000/78 obliges the national court to review the legal effects of the disciplinary decision at issue.

The claimant was a retired federal police officer who was sentenced on 10 September 1974 to a suspended custodial sentence for an attempted offence of same-sex indecency committed on two minors. At the time, he was serving as a police officer and as a result of the conviction, he retired on 1 April 1976. In accordance with Austrian law, he would have been eligible to receive a retirement pension from 1 January 2008. The claimant's pension entitlement was calculated by considering his retirement with effect from 1 April 1976 and the 25 % reduction imposed by the disciplinary authority.

The referring court highlighted that the disciplinary decision of 10 June 1975 was based on the differentiation between the incitement of a minor aged between 14 and 18 to perform male homosexual acts and the incitement to perform heterosexual or lesbian acts. Such a differentiation would not be permissible after the entry into force of Directive 2000/78, given that the claimant committed a criminal offence punishable by the law, at that time, due to its male homosexual nature. Moreover, the acts committed by the claimant could not justify the compulsory retirement imposed by the disciplinary authority.

The Court found that although the disciplinary decision of 10 June 1975 took place before the entry into force of Directive 2000/78, that directive brought the effects of the decision at issue within the scope of EU law, from the expiry of the time limit for transposing it, namely from 3 December 2003. Article 2 of Directive 2000/78 must therefore be interpreted as applying – after the deadline for transposition into national law – to the future effects of the disciplinary decision adopted before the entry into force of that directive.

Furthermore, the Court noted that the disciplinary decision was based on a difference of treatment on the grounds of sexual orientation and constituted direct discrimination for the purposes of Article 2(2)(a) of Directive 2000/78. As a consequence, the Court concluded that the directive must be interpreted as obliging the national court to review, with respect to the period starting on 3 December 2003, the 25 % reduction of the claimant's pension entitlement and calculate the amount he would have received in the absence of any discrimination on the grounds of sexual orientation.

Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, Grand Chamber judgment of 22 January 2019, ECLI:EU:C:2019:43

Religion or belief

The request for a preliminary ruling was submitted by the Supreme Court of Austria and concerned the interpretation of the Employment Equality Directive regarding religious holidays in employment. The case before the referring court concerned a provision of Austrian law which stipulates that Good Friday is a (paid) public holiday for members of four specific churches, and that only the members of those churches are entitled to double pay if they do work on that day. The claimant does not belong to any of

the four churches covered by the provision at hand and sued his employer when he did not receive double pay for working on Good Friday in 2015. The referring court enquired whether the relevant provision of national law amounted to discrimination on the grounds of religion or belief, whether the measure could be justified with regard to the protection of rights and freedoms of others or whether it could amount to 'positive action', but also invited the Court to be quite specific regarding the direct consequences of any incompatibility with the Directive.[2]

The Court noted firstly that the provision at hand amounted to a difference in treatment based directly on religion and then examined whether such treatment affects categories of employees who are in comparable situations. The Court pointed out that the grant of the paid public holiday only depended on formal membership of one of the four specific churches, regardless of the employee's actual duty or need to celebrate Good Friday. Underlining that the relevant requirement is one of comparability of situations – rather than identity – the Court concluded that in this specific regard, the situation of all employees working on Good Friday was comparable, irrespective of their religious memberships. The national legislation at issue has the effect of treating comparable situations differently on the basis of religion and amounts to direct discrimination on grounds of religion within the meaning of Article 2(2)(a) of Directive 2000/78. In this regard, the Court's conclusion is in line with the AG opinion.

Secondly, the Court was called to determine whether such direct discrimination may be justified on the basis of either Article 2(5) or Article 7(1) of Directive 2000/78. The Court emphasised that the relevant provision granted a 24-hour rest period on Good Friday to employees who are members of one of the four specific churches, while employees belonging to other religions can be absent from work and celebrate religious festivals only if they are expressly authorised by their employer, who are under a specific duty of care in this regard. As such an arrangement was considered sufficient for members of other religious groups, the legal provision at hand could not fulfil the requirement of necessity and was therefore not proportionate to the aim of protecting rights and freedoms of others as foreseen by Article 2(5). Similarly, the national measure was not found to be proportionate to the aim of ensuring full equality in practice, which is inherent to positive action measures under Article 7(1), as it amounted to a 'difference in treatment between employees who are subject to comparable religious duties that does not guarantee, as far as is possible, observance of the principle of equal treatment.' The direct discrimination caused by the national provision at hand could therefore not be justified under EU law.

With regard to the practical consequences of the finding of non-compliance with EU law and the issue of levelling-up or levelling-down of rights, the Court concluded that the national court must set aside any discriminatory provision of national law contrary to EU law and must apply to disadvantaged individuals the same advantages as those enjoyed by the favoured category. Therefore, in this case, until the national legislature has restored equal treatment by amending the relevant legal provisions, employers have the obligation to grant a paid public holiday to all employees who seek prior permission to be absent from work on Good Friday. In this regard the Court did not agree with the Advocate General, who had found that the burden to 'compensate' disadvantaged employees should not fall on the employers but rather on the State.[3]

Case C-49/18, *Carlos Escribano Vindel v Ministerio de Justicia*, Judgment of 7 February 2019, ECLI:EU:C:2019:106

This case followed a request for a preliminary ruling from the Spanish *Tribunal Superior de Justicia de Cataluña* concerning whether the general principle of EU law prohibiting all discrimination must be interpreted as precluding a national rule providing for different percentage reductions of the salary of the members of the judiciary.

2 For a summary of the Opinion of Advocate General Bobek delivered on 25 July 2018, please see *European equality law review*, Issue 2019/1, pp. 62-63.

3 *Ibid*, p. 63.

The claimant was a judge who argued that those measures amounted to indirect discrimination on grounds of age and/or length of service, because the rate of salary reduction introduced by that legislation is higher for ordinary judges (pay grade 5) and for senior judges sitting in single-judge courts (pay grade 4) in comparison with other categories of judges.

The Court found that Article 21 of the Charter and Articles 2(1) and (2)(b) of Directive 2000/78 must be interpreted as not precluding national legislation, adopted to eliminate an excessive budget deficit, which provides for different percentage reductions for basic salary and additional remuneration, when those members of the judiciary on two lower pay grades receiving a lower salary, are generally younger and have a shorter length of service than the other categories concerned.

Case C-24/17, *Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst v Republik Österreich*, Judgment of 8 May 2019, ECLI:EU:C:2019:373

Age

This request for a preliminary ruling concerned the lawfulness of the new Austrian federal system for the remuneration and advancement of contractual public servants, aiming to end discrimination on the grounds of age,[4] with Articles 1, 2, 6 and 17 of Directive 2000/78.

The new system, which is applicable retroactively, requires that the classification of a contractual servant on the remuneration scale and his subsequent advancement in grade are determined according to 'seniority' on that scale. In this regard, contractual servants are classified on a level of the new system based on the previous remuneration. Moreover, their seniority is calculated according to a 'transition amount' corresponding to the salary grade that determined the remuneration paid by the employer for February 2015, considered as the 'transition month'.

The claimant was a trade union representing contractual public servants of the civil service of the Republic of Austria. The trade union brought an action before the Supreme Court claiming that discrimination on the grounds of age is still maintained by the new system, because remuneration payable for February 2015 is considered as a reference point for the reclassification of the public servants concerned for salary purposes.

The Court found that Articles 1, 2 and 6 of Directive 2000/78, read in combination with Article 21 of the Charter, must be interpreted as precluding national legislation which retroactively enters into force to end discrimination on grounds of age and provides the transition of contractual public servants to a new remuneration and advancement system which allows the initial grading of public servants to be calculated, according to the last remuneration paid under the previous system.

Secondly, the Court concluded that when national provisions cannot be interpreted in line with Directive 2000/78, the national court must ensure the legal protection and the full effectiveness of that directive and, if necessary, disapply any incompatible provision of national legislation. In this case, the restoration of equal treatment requires granting contractual public servants, treated unfavourably under the previous legal scheme, the same benefits as those enjoyed by the contractual public servants treated favourably. As a result, the periods of service completed before the age of 18 must be recognised and advanced on the salary scale and, consequently, compensation must be granted to contractual public servants who have been discriminated against. Financial compensation consists of the difference between the salary which a civil servant would have received in the absence of discrimination and the amount of remuneration they actually received.[5]

4 The previous remuneration and advancement system had been found to be discriminatory on the grounds of age by the CJEU in its judgments dated 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381), and 11 November 2014, *Schmitzer* (C-530/13, EU:C:2014:2359).

5 On the same day, the same Chamber of the Court delivered its judgment in Case C-396/17 *Martin Leitner v Landespolizeidirektion Tirol* (ECLI:EU:C:2019:375), which concerned the same issue and similar facts.

Case C-161/18, *Violeta Villar Láiz v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*, Judgment of 8 May 2019, ECLI:EU:C:2019:382

This request for a preliminary ruling was submitted by the Spanish *Tribunal Superior de Justicia de Castilla y León* in the proceedings between Ms Violeta Villar Láiz and the INSS and the TGSS, Spain, with regard to Ms Villar Láiz's retirement pension. The request concerned the interpretation of Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 4 of Council Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

The complainant was granted a retirement pension by the INSS to be paid from 1 October 2016. The value of her pension was calculated in accordance with national law by multiplying the basic amount[6] by a reduction factor of 53 %, considering Ms Villar Láiz had worked part-time for a significant part of her working life. In practice this meant that, while the claimant's pension was already reduced compared to a full-time worker (because her salary and related social security contributions were lower), her pension suffered a second reduction by the application of the 'reduction factor'. The complainant's request that her periods of part-time work would be taken into consideration in the same way as her periods of full-time work, was dismissed. Consequently, Ms Villar Lá iz claimed that the difference in treatment established by the national legislation gave rise to indirect discrimination on the grounds of sex, since the majority of part-time workers were women.

The referring Court states that in cases of periods of part-time work, Spanish law has, in most cases, an adverse effect on part-time workers compared to full-time workers in the calculation of the retirement pension. It further explains that the detrimental effect primarily affects women since, according to the National Institute of Statistics, 75 % of part-time workers in the first quarter of 2017 were women, and therefore it amounts to indirect discrimination on the grounds of sex. It further ascertained that the provisions do not serve a legitimate social policy objective, or at least, are not proportionate to such an objective. The referring court noted that the national legislation which applies to this case cannot be set aside by a Spanish court, unless the court has made a reference for a preliminary ruling to the Court of Justice, or has referred a preliminary question of unconstitutionality to the Constitutional Court. Therefore, the referring court decided to stay the proceedings and refer to the Court for a preliminary ruling regarding the questions of whether the national legislation at hand is contrary to Article 4(1) of Directive 79/9, and to Article 21 of the Charter, and whether it should thus refrain from applying the disputed provisions of national law, without requesting or awaiting the prior setting aside of the provisions by legislative or other constitutional means.

The Court held that the applicable Spanish law does not discriminate directly on the basis of sex since it applies equally to both men and women, and that it is up to the referring court to establish if the national legislation amounts to indirect discrimination by placing women at a particular disadvantage to men. The Court reiterated that such indirect discrimination is contrary to Article 4(1) of Directive 79/7 unless it is justified by objective factors, unrelated to discrimination on the grounds of sex, which must be necessary and appropriate. The Court finds that the application of a reduction factor relative to part-time work in addition to the pro-rata temporis of the time worked, goes beyond what is necessary to attain the objective of protecting a social security system that relies on contributions.

The Court held that Article 4(1) of Directive 79/9 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, to the extent that such legislation places women at a particular disadvantage in comparison to men.

6 The basic amount is derived from the average of the contribution bases, calculated according to the wages actually received for the hours worked and for which contributions were made over a number of years preceding retirement.

Case C-486/18, *RE v Praxair MRC*, Judgment of 8 May 2019, ECLI:EU:C:2019:379

Gender

This request for a preliminary ruling was submitted by the *Cour de cassation* (France) and concerns the interpretation of Article 157 TFEU and clauses 2.4 and 2.6 of the framework agreement on parental leave concluded on 14 December 1995 ('the framework agreement'). The request was made in proceedings between RE and Praxair MRC SAS, concerning compensation for dismissal and redeployment leave allowance.

The claimant had a full-time permanent employment contract with Praxair MRC. After her maternity leave had come to an end, she took part-time parental leave during which she was dismissed as part of a collective redundancy procedure. The complainant brought proceedings to contest her dismissal and claimed outstanding redundancy pay and outstanding redeployment leave allowance.

According to the referring court, national legislation relies on a calculation taking into account the periods of full-time work and the periods of part-time work to establish the amount of compensation for dismissal. However, the referring court questions whether it should calculate the final amount of compensation owed based on payment for work carried out on a full-time basis only in the case of the take up of part-time parental leave. Essentially, the referring court asks whether clauses 2.4 and 2.6 of the framework agreement must be interpreted as precluding a compensation calculation determined by the reduced salary of the employee at the time of dismissal due to part-time parental leave. Additionally, the referring court asks whether Article 157 TFEU precludes the above-mentioned, in circumstances when a far greater number of women than men choose to take part-time parental leave.

The Court holds that clause 2.6 of the framework agreement indeed precludes the calculation of compensation for dismissal based on part-time parental leave when a full-time worker is dismissed. The compensation for dismissal should not be determined based on the reduced salary based on part-time parental leave when being dismissed. Additionally, the Court holds that Article 157 TFEU precludes the above-mentioned, 'in circumstances when a far greater number of women than men choose to take part-time parental leave and when that difference in treatment which results therefrom cannot be explained by objective factors unrelated to any sex discrimination.'

Case C-404/18, *Jamina Hakelbracht and Others v WTG Retail BVBA*, Judgment of 20 June 2019, ECLI:EU:C:2019:523[7]

Gender

This request for a preliminary ruling concerns the interpretation of Article 24 of Directive 2006/54/EC. The request was made by the *arbeidsrechtbank Antwerpen* in the proceedings between Ms Hakelbracht ('the applicant'), Ms Vandenbon ('the branch manager') and the *Instituut voor de Gelijkheid van Vrouwen en Mannen* (Institute for Equality of Women and Men) ('the Institute'), against WTG Retail BVBA, and co.

The applicant was rejected on grounds of her pregnancy by WTG Retail after applying to a sales position at a local branch of the clothes company. The branch manager (employed by WTG Retail) found the applicant to be the most suitable candidate, but was explicitly told by the human resources manager that she was not to be hired as a salesperson due to her pregnancy. The branch manager objected to this decision, arguing that rejection based on pregnancy was prohibited by law, and informed the applicant of the company's decision. Subsequently, in September 2015, the applicant filed a complaint with the Institute, for discrimination based on sex.

Several months after the complaint was filed, WTG Retail dismissed the branch manager on grounds of mismanagement. Consequently, the branch manager also lodged a complaint with the Institute relying on the protection against retaliation, claiming that she appeared as a witness in the investigation

7 This case is also discussed in the national developments section, see below p. 72.

of the complaint lodged by the applicant and had therefore been dismissed. However, the protection against retaliation, under Belgian law, is limited solely to official witnesses for whom signed and dated documents can be provided (which was not the case for the branch manager). The *arbeidsrechtbank Antwerpen* questioned whether Article 24 of Directive 2006/54 precludes such legislation, which merely offers protection to official witnesses, and asked whether such protection should be extended to persons who defend or support the person who has lodged a complaint of discrimination on grounds of sex.

The Court emphasises that the wording of Article 24 of Directive 2006/54 does not limit the protection offered. Instead, Article 24 should be interpreted as also protecting those who are likely to be disadvantaged by their employer due to the support they provided to a person who has been discriminated against. Thus, Article 24 of Directive 2006/54 must be interpreted as precluding national legislation which merely offers retaliation protection to those who can formally be identified as a witness in the context of an investigation concerning discrimination on the grounds of sex.

European Court of Human Rights

Case of *Ēcis v Latvia,* Application No. 12879/09, Judgment of 10 January 2019

Gender

This case originated in an application of a Latvian male prisoner claiming that the Latvian Law regulating prison regimes discriminates on the basis of sex.

Under the Latvian prison system, all male prisoners convicted of serious and particularly serious crimes have to be placed in closed prisons. Consequently, they are not entitled to prison leave until they are transferred to a partly-closed prison – a transfer they might become eligible for after serving half of the imposed sentence. In contrast, female prisoners who have been convicted of the same crimes are placed in partly-closed prisons from the very beginning of their sentence.

In 2001, the applicant was convicted and sentenced to twenty years of imprisonment for kidnapping, aggravated murder and extortion. He was placed in a closed prison at the maximum-security level and after a period of time, was transferred to the medium-security part of the closed prison. In 2008, the applicant's request for prison leave to attend his father's funeral, was denied because he was not eligible for such leave due to the fact that he was staying in a closed prison. Only prisoners serving their sentence at the medium- or minimum- security level in partly-closed prisons were entitled to such leave.

The applicant complained about difference in treatment between men and women convicted of the same crimes in relation to the respective applicable prison regimes, in particular, with regard to the right to prison leave, which had led to a refusal to attend his father's funeral. The Court considered the application from the standpoint of Article 14 ECHR taken in conjunction with Article 8 ECHR. The Court underlined that in cases of individual application, it is not up to the Court to examine the domestic legislation. Instead, the Court must examine the manner in which the legislation was applied to the applicant in the particular circumstances of the case.

The Government of Latvia argued in its defence that male and female prisoners were not sufficiently similar to be compared to each other. However, the Court found that the applicant could indeed claim to be in an analogous position to that of female prisoners. The Court argued that certain divergences in the approaches towards male and female prisoners may be justified, if they are objective and reasonable. However, the refusal to attend his father's funeral, on the basis of the prison regime to which he was subjected owing to his sex, had no objective or reasonable justification.

Therefore, the Court concluded that his treatment was discriminatory. Accordingly, a violation of Article 14 ECHR, read in conjunction with Article 8 ECHR had occurred. The applicant was to receive EUR 3 000 in respect of non-pecuniary damage.

Deaconu v Romania, Application No. 66299/12, Judgment of 29 January 2019

Age

The case originated in an application by two Romanian nationals who complained that they suffered discrimination on grounds of age regarding the award of compensation for nonpecuniary damage related to their sister's death. They relied on Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 to the Convention.

The case concerns the request for compensation for damages by the applicants in the criminal proceedings for involuntary manslaughter against the driver of the car that caused the applicants' sister's death. In

this regard, the Bucharest District court had awarded each civil party, including the applicants, their mother and each of their two older siblings, EUR 100 000 in compensation for nonpecuniary damage. By contrast, the Bucharest Court of Appeal dismissed the applicants' claim for non-pecuniary damages by stating that their young age (11 and 13 respectively) at the time of their sister's accident had made them unaware of the negative consequences of her death. The court also decreased the awards to EUR 25 000 each in relation to the claims lodged by the older siblings. The Government justified the difference in treatment by arguing that the applicants and their older brothers were not in similar situations. The Government submitted that the applicants, compared to their older brothers, had not suffered any mental suffering as they had not been affected by their sister's death.

The ECtHR found that the Bucharest Court of Appeal set an arbitrary minimum age of 14 years to assess when the claimants could start to feel pain and be negatively affected by the loss of their sister. The national court thus failed to base its findings on expert reports or any psychological evaluations of the applicants and to objectively justify the difference of treatment between the applicants and their older brothers. The Court also noted that when the accident took place, the applicants were not only close to the minimum age of 14 years, but they were also capable of feeling and understanding complex emotions. Therefore, the Court concluded that, in the absence of any reasonable justification, the dismissal of the applicants' claims for compensation on the sole grounds that they did not suffer as much as their older brothers owing to their young age amounted to discrimination under Article 14 of the Convention.

Lingurar v Romania, Application No. 48474/14, Judgment of 16 April 2019

The case originated in an application against Romania lodged with the Court by four Romanian nationals.

Racial or ethnic origin

The applicants complained that police officers had ill-treated them during a raid and that the investigation of the relevant authorities into those events had not been effective, relying on Articles 3, 6 and 14 of the Convention. They argued that the authorities justified the police intervention by using stereotypical arguments and referring to the general attitude against the Roma community and other unrelated incidents involving Roma. The applicants emphasised the institutional racist bias faced by Roma, which was exhibited during the police interventions and procedures against their communities. The Romanian Government instead argued that the police organised the raid in order to reduce and prevent criminal activities and to identify individuals without identity documents, suspected of having committed several crimes, and to recover stolen goods.

Firstly, regarding the alleged ill-treatment, the Court considered that the domestic courts and the Government failed to demonstrate that the force employed by the law-enforcement officers during the raid was proportionate to the applicants' behaviour. Accordingly, the Court found a breach of Article 3 of the Convention which prohibits torture.

Secondly, in relation to the alleged racial motives for the organisation of the police raid, the Court noted that the authorities identified the ethnic origin of the targeted community and referred to the alleged anti-social behaviour of ethnic Roma and the high criminality among their community when planning the police intervention. The Court also observed that the authorities attributed to the whole Roma community the criminal behaviour of a few of their members because of their ethnic origin. The police acted in a discriminatory manner since the applicants were considered as criminals on the sole grounds of their common ethnic origin. The Court therefore concluded that there had been a violation of Article 14 of the Convention taken in conjunction with Article 3.

Thirdly, as regards the alleged lack of an effective investigation, the Court highlighted that member States have the positive obligation to apply a higher standard of response to alleged bias-motivated incidents in cases of evidence of violence and intolerance against an ethnic minority. By contrast, national authorities

and courts dismissed the allegations of discrimination against Roma without providing a comprehensive analysis of all the relevant circumstances of the case. The evidence submitted by the parties showed the existence of a widespread institutionalised racism and an excessive use of force by the law-enforcement authorities against the Roma communities. The Court therefore found a violation of Article 14 of the Convention taken in conjunction with Article 3 in its procedural aspect.

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

This section provides an overview of the main latest developments in gender equality and non-discrimination law (including case law) and policy at the national level in the 28 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia and Turkey, from 1 January to 30 June 2019.

AL Albania

CASE LAW

Equality Body decision on disability discrimination in the provision of healthcare

Disability

The national equality body Commissioner for Protection from Discrimination (CPD) examined the complaint of a patient who was diagnosed with Haemophilia B and whose impairment had been qualified as a disability by the Medical Commission for Determining Disability at Work.

The complainant is treated with a coagulant but argued that he had never received the appropriate amount of medication, due to insufficient supply at the University Hospital Centre of Tirana where he is being treated, as evidenced by documents provided by the hospital and by the Ministry of Health and Social Protection. The insufficient amount of medication has caused the complainant's disability to increase by 50 %, preventing him from participating in social life and other activities. The complainant alleged that the hospital and the Ministry had discriminated against him (and against other haemophilic patients) on the grounds of 'health status', contrary to the Law on Protection from Discrimination (LPD).

On 5 February 2019, the CPD decided that the treatment of the complainant by the Ministry and by the Hospital amounted to discrimination, without specifying which form of discrimination was found.[1] The CPD underlined notably that the complainant's insufficient medical treatment has accelerated his partial disability. The equality body held that the responsible institutions should have taken the necessary measures to forecast and request the budget needed to provide sufficient medication for Haemophilia B patients, particularly considering that there is a high likelihood of patients with this disease having or developing disabilities.

On 18 June 2019, the First Instance Administrative Court of Tirana dismissed the appeal of the Ministry against the Commissioner's decision, confirming the finding of discrimination.[2]

Online source:
https://kmd.al/wp-content/uploads/2019/05/Vendim-nr.-17-date-05.02.2019-B.N.-kunder-QSUT-etj_.pdf

AT Austria

LEGISLATIVE DEVELOPMENT

Parliament adopts ban on headscarves in primary schools

Religion or belief

On 15 May 2019, Parliament amended the School Education Act by inserting a new Section 43a which prohibits pupils 'until the end of the school-year in which they reach ten years of age' from wearing 'clothing that is influenced by belief or religion and which encompasses a covering of the head' (*eine Verhüllung des Hauptes*).

It is foreseen that a violation of the new provision is followed by a compulsory discussion with the legal guardians of the child in question and that a refusal to attend the discussion, or a further violation, is

1 Albania, Commissioner for Protection from Discrimination (CPD), decision No.17, dated 05.02.2019.
2 Albania, First Instance Administrative Court of Tirana, decision No.1240, dated 11.04.2019.

punishable with an administrative fine of up to EUR 440. The amendment was adopted with the votes of the two governing parties against all other parties represented in Parliament.

The Parliamentary Sub-committee on Education further issued an explanatory statement clarifying that only such headgear that covers the hair fully or to a large extent shall be prohibited, which – in their interpretation – shall not include the Jewish kippa and the Sikh patka.

It is stipulated that the measure shall:

> '(…) serve the social integration of children according to the local traditions and customs, safeguard the constitutional basic values and the objectives of education in the federal constitution as well as the equal status of men and women.'

Despite attempting to create an impression of neutrality, it is clear that the legislation is targeting Muslim girls, which was also evidenced by the public and parliamentary discussions leading up to the adoption.

The Islamic Faith Community announced immediately that it will seek legal review by the Constitutional Court, where it is highly likely that the provision will be found to constitute direct or (at least) indirect discrimination.

Online source:
https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00612/fname_751626.pdf

Belgium

BE

LEGISLATIVE DEVELOPMENT

Conditions for positive action in employment in the private sector

Under the triple set of Federal anti-discrimination Acts of 10 May 2007,[3] an identical provision in all three Acts (Article 16 in the Gender Equality Federal Act and Article 10 in the other two Acts) allows for positive action. In accordance with this provision, positive action should comply with four conditions[4]; it should be a response to situations of *manifest inequality;* the removal of such situations should be identified as a target worth pursuing; the 'corrective measures' must be of a temporary nature; and, finally, these corrective measures should not unduly restrain the rights of others. Within these terms, the hypotheses and conditions under which a positive action can be implemented remained to be determined by way of an ancillary Royal Decree.

All grounds

This ancillary Royal Decree (RD) was finally adopted on 11 February 2019[5] and entered into force on 11 March 2019. This RD is only applicable to positive action relating to employment in the private sector. Its main purpose is therefore to provide private employers with a secure legal framework within which positive action may be undertaken.

3 The 'Gender Equality Federal Act' (implementing all the EU gender directives), the 'Racial Equality Federal Act' (implementing Directive 2000/43/EC) and the 'General Anti-Discrimination Federal Act' (implementing Directive 2000/78/EC but adding health, wealth and language as protected grounds in addition to those covered by the directive).
4 Belgium, Constitutional Court (*Cour d'Arbitrage/Grondwettelijk Hof*), 27.01.1994, Case No. 9/94.
5 Belgium, Royal Decree of 11.02.2019 setting the conditions of positive actions, *Moniteur Belge/Belgisch Staatsblad*, 1.03.2019, p. 21169.

A positive action plan may be adopted either through a collective agreement or through an employer's 'deed of accession', conditional on complying with a format annexed to the RD.

Article 5 of the RD reiterates that positive action should only be adopted in the case of a *manifest inequality* (to be documented by any means by the company or the sector); should clearly describe the objectives, steps and expected outcome; may be pursued for a maximum of three years; should be submitted to a proportionality test and approved by the competent Minister (i.e. the Collective Relations Directorate of the Department of Employment).

Employers may also devise positive action plans under forms other than a collective agreement or 'deed of accession'; in which case, plans for information to the Minister in charge of Employment must be communicated. The RD fails to provide a definition of the term 'employers', thereby causing uncertainty as to its scope, at least for autonomous public economic bodies covered by the Act of 21 March 1991. It seems that they can use that latter route to implement a positive action plan.

Implementation of the RD will be assessed every two years by the Collective Relations Directorate jointly with the National Labour Council.

Online source:
http://www.ejustice.just.fgov.be/eli/arrete/2019/02/11/2019200431/justel

CASE LAW

Reinforcing the protection of witnesses of discrimination

All grounds

The Labour Court of Antwerp referred to the European Court of Justice for a preliminary ruling regarding a recent case on the protection against victimisation. The case concerned a pregnant woman, Ms Hakelbracht ('the applicant'), who applied for a fixed part-time position in the local branch of a clothes chain company. The local branch manager, Ms Vandenbon ('the branch manager') found her to be the most suitable candidate for the job, regardless of her being three months pregnant. Therefore, she informed the human resources manager of the company of her intention to hire the applicant. However, the human resources manager informed the branch manager that the company was not in favour of this candidate because of her pregnancy.

The branch manager informed the applicant that the company did not want to hire her because of her pregnancy. After the branch manager informed the applicant of this decision, she filed a complaint with the Institute of Equality for Women and Men (the gender equality body), for discrimination on the grounds of sex.

A few months after the complaint was introduced by the applicant, the branch manager was dismissed by her employer on the grounds of mismanagement. The trade union of which the branch manager was a member challenged those grounds.

The Labour Court in Antwerp considered that the applicant was a victim of direct discrimination on grounds of sex. As for the branch manager, she relied on the protection against retaliation[6] guaranteed by Article 22(9) of the Gender Act, as she was a witness in the investigation of the complaint lodged by the applicant. However, the Labour Court noted that the requirements of the Gender Act were not met: the branch manager could not produce any dated and signed document relating to her witness's statement.

6 'Protection against retaliation' is equal to the concept 'protection against victimisation' used in EU Law.

The Labour Court referred to the European Court of Justice for a preliminary ruling regarding the compatibility of Article 24 with Directive 2006/54 of the restrictive protection of witnesses (which applies only to persons who report the facts in a signed and dated document) under the Gender Act. The Court of Justice, in its decision on Case C-404/18 of 20 June 2019 stated that, indeed, Article 24 of Directive 2006/54 must be interpreted as meaning that it precludes legislation, such as the Belgian Gender Act, to protect an employee:

> 'who has supported a person who believed to be discriminated against on ground of sex, solely if that employee has intervened as a witness in the context of the investigation of that complaint and that the employee's witness statement satisfies formal requirements laid down by that legislation.'[7]

The decision of the CJEU regarding the protection of witnesses was eagerly expected as the current Belgian legislation has been identified by independent experts as not complying with EU Law because the requirement to report the facts in a signed and dated document are considered too formalistic an approach to the protection of witnesses.

The issue related to the interpretation of the protection of witnesses of discrimination is in fact broader than the field of discrimination relating to sex and gender. The other two anti-discrimination Acts of 10 May 2007 – the 'Race Act' and the 'General Act', which implement Directives 2000/43/EC and 2000/78/EC respectively – both contain the same provision relating to the protection against retaliation of persons who act as witnesses of discrimination. Clearly all three Acts will have to be amended accordingly.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Unia and the Institute for the Equality of Women and Men sign a cooperation protocol

Unia (the national equality body dealing with discrimination on the grounds of, inter alia, racial or ethnic origin, religion or belief, disability, age and sexual orientation) and the Institute for Equality between Women and Men (IEFH) signed a Cooperation Protocol on 20 March 2019. The aim of this protocol is to formalise the collaboration between these two institutions to fight against discrimination.

All grounds

The Cooperation Protocol aims at promoting mutual information and strengthening the collaboration between the two institutions and foresees notably the organisation of joint meetings and joint initiatives. The institutions undertake to inform each other when processing reports that fall within the other's remit, with the possible consequence of overcoming the institutional obstacles to tackling situations of multiple discrimination. Until now, there has been no joint strategic litigation of both bodies to tackle multiple or intersectional discrimination.

The protocol formalises a cooperation that has existed for years in practice and attempts to stimulate increased and valued exchanges.

Online source:
https://www.unia.be/fr/publications-et-statistiques/publications/protocole-daccord-relatif-a-la-collaboration-entre-linstitut-pour-legalite

7 Court of Justice of the European Union (CJEU), Case C-404/18, *Jamina Hakelbracht, Tine Vandenbon, Instituut voor de Gelijkheid van Vrouwen en Mannen v WTG Retail BVBA*, 20 June 2019. See also above, p. 72.

Creation of a Federal Institute for the Protection and the Promotion of Human Rights

On 25 April 2019, the Belgian Federal Chamber of Representatives adopted a legislative Act allowing the creation of a Federal Institute for the Protection and the Promotion of Human Rights.[8] This is the first Institute transversally competent for Human Rights, unlike the several different specialised bodies such as Unia, competent for discrimination; Myria, dealing with migrants' rights; and IEFH, competent for gender equality, etc. The respective jurisdictions of these existing bodies will remain untouched.

All grounds

The project of the creation of a 'national mechanism of Human rights', in conformity with the United Nations 'Paris Principles', was first initiated under the former federal government, and then included in the current Federal Governmental Agreement in 2014. The Federal Minister of Justice and the Federal Secretary of State for Equal Opportunities started elaborating a draft, but the process was blocked by the N-VA, the biggest Flemish political party in the federal government.

Meanwhile, since 2014, Unia launched a collaborative network in the field of Human Rights and, in 2015, a Protocol of collaboration, accessible to the citizens, was signed between all Federal and Regional independent public bodies that are active in the field of human rights, in order to foster cooperation in this field and exchange good practices (i.e., Federal Ombudsmen, Walloon Ombudsman, Ombudsman of the German-speaking Community, General Delegate to the Rights of the Child, Commission for the Protection of Privacy, High Council of Justice, Institute for the Equality of Women and Men, Standing Police Monitoring Committee, etc.). This platform for Human Rights gathers on a monthly basis with a rotating chair and served as a starting point for the future national mechanism of Human rights.

Belgium was under political pressure to accelerate the process, at both national and international level, and it was ultimately the political crisis at the end of 2018 and the departure of the N-VA (New Flemish Alliance, the largest political party in Flanders) from the federal government that enabled the relaunch of the process at the beginning of 2019.

To bring the project to a successful conclusion before the end of the term of office in April 2019, a pragmatic approach was adopted to prioritise an institute for the protection and promotion of human rights at the federal level, while expecting that it should become 'inter-federal' at a second stage, to cover the areas of competence of the regional entities. In order to achieve an overall coverage of fundamental rights, it was decided to define the competences of the new Institute in a 'complementary' or 'residual' way. Thus, this new Federal Institute would be competent to ensure the respect of all fundamental rights, in the federal fields not covered by an existing specialised body. The Institute should work in close cooperation with the specialised public bodies active in the field of human rights and take part in the platform for Human Rights. At the time of writing it is not entirely clear which role the Institute is going to play in the field of discrimination as it will have to define its action in complementarity with the mandates of Unia and of the Institute for the Equality of Women and Men.

The Institute will have a consultative role and will be able to intervene in front of the judiciary and the Constitutional Court, but will not be able to receive individual complaints, which highly diminishes its action ability.

Online source:
http://www.lachambre.be/FLWB/PDF/54/3670/54K3670001.pdf

8 Belgium, Legislative Act to create a Federal Institute for the Protection and the Promotion of Human Rights of 20.03.2019, adopted by the House of Representatives on 25.04.2019, DOC 54 3670/001.

Bulgaria

LEGISLATIVE DEVELOPMENT

New rights-based legislation governing social services provision

On 7 March 2019, Parliament adopted a Social Services Act which was announced by the government as a key measure for equal access to quality social services (for persons with disabilities, inter alia) and deinstitutionalisation. It is the last of a set of three laws aimed at guaranteeing the rights of persons with disabilities,[9] and will enter into force on 1 January 2020.

The wording of the Act is rights-based, and it proclaims the principles of availability and accessibility of social services, individualised support, prevention of institutionalisation, and respect for the rights of users and guaranteeing their active part in decision-making. It prohibits direct and indirect discrimination in the provision of social services, on the basis of all the grounds covered by the Protection Against Discrimination Act.[10] It further prohibits any infringements on the freedoms, dignity and personal inviolability of social service users.

Social services are defined as support aimed at preventing or eliminating social exclusion and at realising rights. Social work is defined as being based on human rights and social justice. The Act posits an individualised approach by placing a person's specific needs, capabilities and possibilities at the centre of support work, based on an individualised needs assessment. The law proclaims a right to social services for each person in need of support regardless of their age, health status, education, income, or social and property status. Each child is entitled to social services corresponding to her/his best interests, age, physical and mental state, development level and individual needs. Social services are defined by personal choice.

Under the new Act, residential care is an option only where there are no more possibilities for home-based or community-based care and must not isolate users from the community. It must be limited to a fixed time period and is subject to the written request of the user. As far as children are concerned, residential care is subject to court control. As a protection measure, child residential care cannot exceed two years and is subject to individual re-assessment every six months. It is only where the child cannot be reintegrated in a family that the duration can be prolonged.

Service providers have a duty to create possibilities for the users to participate in decision-making regarding the organisation of their daily life and the quality of care, by creating user councils.

Finally, the Act provides a timetable for the closing of existing institutions (for persons with disabilities and for children without parental care), from 2021-2035. The creation of new institutions is explicitly prohibited, and the current users are to be transferred to individualised social services.

Online source:
https://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=135546

9 The two other laws were the Persons with Disabilities Act and the Personal Assistance Act, both adopted on 18 December 2018.

10 The relevant grounds are: sex, race, national origin, ethnicity, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or social status, disability, age, sexual orientation, family status, property status or any other ground provided for by law or by international treaty to which Bulgaria is a party.

CASE LAW

Supreme Administrative Court sanctions anti-Roma hate speech by the former Deputy Prime Minister

Racial or ethnic origin

On 15 January 2019, the Supreme Administrative Court (SAC) ruled that the former Deputy Prime Minister (2017-2018), was not liable for harassment against the Roma by means of public statements made in 2014 when he was a Member of Parliament. The statements included:

> '[*Roma] have become brazen, presuming, and brutalized human-like [creatures], demanding a right to salary without doing work, wanting sickness assistance without being sick, child assistance for children who play with pigs in the street, and maternity assistance for women with the instincts of stray bitches*'.

The complainant is of Roma origin and had lodged a complaint with the equality body, claiming that the statements amounted to harassment and incitement to discrimination against himself and the Roma community. The equality body agreed and imposed a fine of EUR 500 (BGN 1 000), as well as an injunction to abstain from making further such statements.[11] The ruling was confirmed by the Sofia City Administrative Court.[12]

On appeal by the respondent, the SAC repealed the lower court's ruling on grounds that the impugned statements did not target a particular individual (i.e. the complainant), and held that the law did not intend to ban abstract, generalised statements.[13] In addition, the Court noted that the respondent had not intended to cause the complainant harm. The Court further held that no negative environment had been created, while the law required a concrete environment, such as a workplace or a place of study. The SAC held that the equality body's reasoning to the effect that negative stereotyping of minorities was unlawful, including generalised information about criminal incidents, constituted 'aggressive moralising expression'. Furthermore, the Court found that it was 'bewildering' and 'unacceptably set two ethnic groups one against the other' when the equality body held that the negative stereotyping of Roma as criminals and of Bulgarians as their victims constituted unwanted conduct. According to the Court, the equality body's reasoning amounted to an 'imaginary' ban on victims of crime informing the public of crimes committed against them by individuals from other ethnic groups.

The SAC held that the constitutional limitations on freedom of expression did not apply to the impugned statements, as the respondent had not targeted a specific individual, i.e. the complainant, and therefore had not infringed anyone's rights or reputation. The respondent had not aimed to incite hatred, either, and his choice of words was a matter of personal freedom. According to the Court, any opinion was constitutionally protected, and not merely 'correct' ones. Otherwise, restrictions would amount to censoring that would be unacceptable in a democratic society. By ruling that the ban on harassment implied that hate speech was not covered by the scope of the constitutionally protected freedom of speech, the equality body had exaggerated its interpretation of the law. The Court held that 'the existing antagonism between equality law and civil freedoms may not be resolved to the detriment of the latter, as that would pervert the aims of [equality] law' and 'would turn [the latter] into a means of oppression of civil liberties, in particular, freedom of expression'.

Online source:
http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/211a54167a5a1cb5c225837e0034a472?OpenDocument

11 Bulgaria, Protection Against Discrimination Commission, decision No. 119 of 29.03.2017.
12 Bulgaria, Sofia City Administrative Court, decision No. 564 of 23.03.2018.
13 Bulgaria, Supreme Administrative Court, decision No. 636 of 15.01.2019 in case No. 7229/2018.

Supreme Courts' joint interpretative ruling on jurisdiction in discrimination cases filed directly with courts (no prior equality body proceedings)

On 16 January 2019, the Supreme Court of Cassation and the Supreme Administrative Court rendered a joint interpretative ruling to the effect that, in all cases where no prior proceedings had been carried out before the equality body, the Protection Against Discrimination Commission, all discrimination claims are to be heard by the civil courts, as opposed to the administrative courts.[14] The latter are only competent to hear compensation claims against public bodies in cases resolved by the equality body in terms of a finding of discrimination. This ruling is in line with a literal reading of the Protection Against Discrimination Act (as admitted in the ruling itself). Prior to that, in 2015, the two supreme courts had interpreted the law conversely, to the effect that the administrative courts, and not the civil courts, were competent to hear discrimination claims against public bodies regardless of whether there had been prior equality body proceedings or not. The new ruling expressly invalidates this 2015 construction, admitting that it was overly broad and lacked legal grounds.

All grounds

The case law has been contradictory on this point for years. It is to be hoped that the present ruling will contribute to clarifying the matter in a sustainable manner, as litigants are burdened by protraction of their matters due to jurisdiction disputes between the courts.

Online source:
http://www.vks.bg/Dela/2016_01_VKS_VAS_постановление.pdf

Appeals Court denies incitement of discrimination against non-traditional faith group

The appeals court in Sofia has ruled in a civil case brought by minority believers against an employee and activist of a Bulgarian Orthodox Church entity. The non-traditional faith group, Shri Chinmoy Centre, had filed a claim against a pro-Orthodox, anti-minority advocate who had successfully instructed various service providers to deny the minority group access to renting premises for faith-related concerts and other indoor gatherings. The advocate had done so by publishing and propagating an article against the minority group and by directly engaging with providers of premises to convince them not to rent their venues to the group. The first-instance civil court had ruled in favour of the minority claimants, finding incitement to discrimination on grounds of belief and ordering the respondent to terminate, and abstain from, the impugned conduct. Each of the two claimants had been awarded the equivalent of EUR 175 as damages.

Religion or belief

The appeals court found that the facts did not amount to incitement of discrimination as the respondent was entitled to publish and propagate her article as a part of her right to free expression. The Court further concluded that the article had not contained hate speech and therefore had not contained incitement (implicitly including instruction) to discriminate. Finally, the claimants had not proven that the respondent had treated them less favourably as compared to any third parties.[15]

This ruling amounts to a declaration that a finding of incitement to discriminate (including instruction to discriminate) requires intent as well as less favourable treatment compared to third parties, while the content of the impugned expression must amount to hate speech.

14 Bulgaria, Supreme Court of Cassation and Supreme Administrative Court, Joint Interpretative Ruling No. 1/2019 of 16.01.2019.
15 Bulgaria, Sofia City Court, decision No. 553 of 24.01.2019 in case No. 16814/2017.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Government to fund employers to provide accessible jobs and reasonable accommodation for persons with disabilities

Disability

Under the new Persons with Disabilities Act (PDA, in force as of 1 January 2019),[16] the Persons with Disabilities Agency may fund employers for purposes of reasonable accommodation of workplaces for persons with disabilities, of securing access to such workplaces, of equipping (creating) such workplaces, and of training and retraining, inter alia. To benefit from such funding, employers shall hire persons with disabilities for no less than three years, and the funding is to be governed by a National Programme for Employment of Persons with Disabilities. On 10 June 2019, the Minister of Labour and Social Policy (MLSP) adopted such a Programme (valid for the duration of 2019).

Under the new Programme, employers may receive:

- up to EUR 5 000 (BGN 10 000) for purposes of securing access to workplaces for persons with disabilities;
- up to EUR 5 000 (BGN 10 000) for purposes of reasonable accommodation of existing workplaces for persons with disabilities;
- up to EUR 5 000 (BGN 10 000) for equipping new workplaces; and
- up to EUR 100 (BGN 200) per person per day for the purpose of training and retraining of persons with disabilities.

A call for tender will be published by the Persons with Disabilities Agency under the new Programme, and any employer registered under domestic legislation is eligible. A total of EUR 2.25 million (BGN 4.5 million) is earmarked for accessible jobs in 2019.

The Programme is not based on any precedent and is considered as a pilot programme by Ministry officials.

Online source:
https://www.ahu.mlsp.government.bg/portal/page/83

HR Croatia

POLICY AND OTHER RELEVANT DEVELOPMENTS

Results of empirical research on gender equality in employment

Gender

Two independent reports, presenting similar results concerning the position of women in the business world and on the labour market, were published in 2019. One of the reports was based on research conducted jointly by the Croatian Employers' Association and Deloitte ('Women in the Business World') and the other by the World Bank Group ('Croatia Country Gender Assessment'). The reports show that there have not been any significant improvements concerning the position of women in the business world in general, despite the relatively well developed general anti-discrimination and gender equality legal framework in Croatia.

16 See *European equality law review*, Issue 2019/1, pp. 79-80.

The study 'Women in the Business World' was conducted from October to December 2018 and compares the findings with the research conducted with the same group in 2013, revealing that there were no substantial changes and that women still face more obstacles than men in their careers. Examples identified by the respondents included: women are paid less than their male counterparts as top executives (reported by roughly 60 % of respondents); during job interviews, women are more often subject to personal questions about family circumstances and family planning, despite this being prohibited by law; and men advance more quickly in their careers. Compared to the 2013 research, the share of respondents who believe that women have to invest more than men to reach the same levels in the company has risen, from 77 % to 80 %. It is no surprise then, that the share of women on management boards of the listed companies in Croatia was around 18.8 % in 2017, and this share, with minor oscillations, has remained stable for years.[17]

The World Bank Country Gender Assessment report is based on a combination of literature review, quantitative and qualitative data, and roundtable discussions with targeted groups conducted in 2018, as well as the findings of the Systematic Country Diagnostic from the World Bank. The assessment includes a broad analysis of different fields, such as employment, entrepreneurship, education, social protection, sexual and gender-based violence, political representation, etc. In summary, concerning the labour market and entrepreneurship, the assessment reveals that despite legislative and institutional improvements, there are persistent inequalities in the field of economic opportunities and earnings between men and women. On average, 61 % of women as opposed to 71 % of men participate actively in the labour market, and despite the fact that women start their careers at comparable employment levels to men, their labour market participation rate drops with age. This is the result of traditional gender norms and arrangements concerning the family, household and caring obligations, as well as discrimination faced by women during their reproductive years (25-40), who frequently experience discriminatory treatment at job interviews or upon their return to work after giving birth. The research shows that 32 % of Croatian women aged 25-64 are inactive due to care responsibilities. In addition, the majority of housework falls upon women, as only about one tenth of men (11.9 %) perform housework.[18]

Cyprus CY

CASE LAW

Supreme Court decision concerning equal treatment between men and women in relation to survivors' pensions

Gender

The President of the Republic submitted a Recourse to the Supreme Court alleging the unconstitutionality of an amendment to the law on social insurance which extended the entitlement to a survivor's (widower) pension to all survivor men irrespective of the date of their wives' or cohabitants' death. Until July 2018, national law had differentiated criteria regarding access to a survivor's pension: female survivors were entitled to a benefit inasmuch as they were cohabiting with the deceased spouse and were dependent on him for subsistence, while male survivors could access the benefit only if, in addition to cohabitation and dependence, they were permanently unable to sustain themselves. In July 2018, the government presented a law to the House of Representatives which gave men equal access to survivors' benefits; the law was to be applied for deaths occurring on and after 1 January 2018. The House of Representatives

17 Women in the Business World (*Žene u poslovnom svijetu*), Deloitte and the Croatian Employers' Association, 2019, available at: https://www2.deloitte.com/content/dam/Deloitte/hr/Documents/about-deloitte/hr_Zene_u_poslovnom_svijetu_2019.pdf.

18 Investing in Opportunities for All, Croatia Country Gender Assessment, World Bank Group, 2019, available at: http://documents.worldbank.org/curated/en/237711560532005820/pdf/Investing-in-Opportunities-for-All-Croatia-Country-Gender-Assessment.pdf.

adopted the law but with a broadened personal scope by removing the temporal restriction and thus making the law applicable to all survivors, irrespective of their spouses'/cohabitants' date of death. The President of the Republic alleged that the extension of personal scope was unconstitutional due to Article 80.2 of the Constitution, which restricts the parliament's power to propose legislation which has the effect of incrementing the State Budget. The Supreme Court struck down the amendment introduced by the parliament on 1 March 2019.[19]

In its statements to the Supreme Court, the House of Representatives argued that while extending the law's personal scope increases the state budget and is thus against Article 80.2 of the Constitution, such extension is justified as a matter of EU law obligation and in particular, that flowing from Article 157 TFEU on equal pay between men and women. The Court said that according to CJEU case law, Article 157 TFEU applies to pay which includes survivors' pensions inasmuch as such pensions are paid by the ex-employer to the surviving spouse/cohabitant due to the existence of an employment relationship between the employer and the deceased. Under Cypriot law, the survivor's pension is granted by the state irrespective of the existence of an employment relationship between an employer and the deceased spouse/cohabitant. In this sense, it does not constitute pay for the purpose of Article 157 TFEU. In addition, since Directive 79/7/EEC on equal treatment between men and women in matters of social security does not apply to survivors' benefits, it is difficult to see how EU law could be triggered in this case.

POLICY AND OTHER RELEVANT DEVELOPMENTS

ECRI conclusions on the implementation of its recommendations regarding the Equality Body

Racial or ethnic origin

All grounds

In June 2019, ECRI published its conclusions on the Cypriot government's implementation of the recommendations issued by ECRI in June 2016. ECRI's conclusions expressed concern over the fact that the office of the Commissioner for Administration (Ombudsman), which is also the national equality body, continues to be unable to appoint its own members of staff, as this remains, by virtue of the Constitution, the responsibility of the Public Service Commission. The operating budget of this office was slightly increased from 2016 to 2017 but no further data was made available as regards subsequent years. The report noted with concern that the Office has not carried out any activities aimed at supporting vulnerable groups or any communication activities and has not issued any publications or reports, including annual reports, or recommendations on discrimination issues since 2016.[20] ECRI stated that it will follow up on these matters in its sixth monitoring cycle.

In response, the Ombudsman rejected ECRI's criticisms, arguing that it had carried out an information campaign targeting the police regarding human rights violations and that it participates in a project regarding homophobia awareness in schools.[21] She added that the annual report for the year 2017 had been published and that the 2018 report is currently being prepared.[22]

Earlier in the year, the Ombudsman had issued a press statement in response to criticisms from a member of parliament because of the Ombudsman's refusal to examine a complaint about an incident of racial harassment. The Ombudsman's response clarified that there is no longer an Anti-discrimination

19 Cyprus, Supreme Court, decision on Recourse No. 6/2018, *President of the Republic v House of Representatives*, 1.03.2019 available at: http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2019/3-201903-6-18anaf.htm&qstring=%F3%F5%ED%F4%E1%EE%2A%20and%20%F7%E7%F1%E5%E9%2A.

20 The footnote of the ECRI report contains a broken link from the website of Equinet which is presumably this: http://equineteurope.org/author/cyprus_ombudsman/.

21 The project is 'HOMBAT'. The partner for Cyprus is the NGO 'Accept LGBT Cyprus', https://www.hombat.eu/partnership/.

22 Untitled article (2019) of 6.06.2019, available at: https://omegalive.com.cy/h-epitropos-dioikhsews-aporriptei-tis-anafores-ecri-gia-to-grafeio-ths.

Authority or Equality Authority, but merely an extension of the mandate of the Ombudsman to cover 'discrimination and human rights violations'.[23]

The fact that the Authorities are no longer seen as distinct bodies has aggravated an existing long-term problem: the fact that the Equality Body and its special powers and competencies are not known to vulnerable groups or to the public at large, who are only familiar with the ombudsman mandate related to the administration. Furthermore, the Annual Report for 2017 referred to by the Ombudsman is in fact no longer a separate annual report for the Equality Body but a single report covering all the Ombudsman's mandates. It includes a chapter on discrimination which provides very limited data compared to previous years, focusing rather on five very brief case summaries without specifying if the list is exhaustive. The case summaries lack legal analysis based on laws transposing the equality acquis and no clear position is taken.

Online source:
https://rm.coe.int/interim-follow-up-conclusions-on-cyprus-5th-monitoring-cycle-/168094ce05

Czech Republic CZ

LEGISLATIVE DEVELOPMENT

Proposed amendment to the Anti-Discrimination Act

All grounds

A group of 12 members of the Chamber of Deputies of the Czech Parliament proposed an amendment to the Anti-Discrimination Act on 12 March 2019. The bill would introduce two significant changes: establishing class actions in Czech non-discrimination law and extending the rules on reversing the burden of proof.

Currently, Czech law does not envisage any class actions in non-discrimination law. The proposed amendment would introduce a right to file a class action for legal entities that are either, according to their statutes, established to protect victims of discrimination, or effectively active in that area. A class action could be filed in a situation where an infringement of non-discrimination laws may relate to a higher or undefined number of victims or where such infringement could interfere with the public interests. The aim of the class action would be for a court to determine that discrimination has occurred, and to rule that the respondent has to refrain from discrimination and remedy any consequences of the discriminatory act. Based on the proposal, the claimant would not be able to claim any compensation of damages. In cases where (a) particular victim(s) of discrimination would be identified, the filing of such a lawsuit would be subject to their approval.

The current rules regarding reversed burden of proof mirror the applicable EU directives: The burden of proof may be shifted onto a respondent in cases dealing with discrimination:

- on the grounds of racial or ethnic origin in all areas covered by the Anti-Discrimination Act;
- on the grounds of gender, religion, belief, physical or mental disability, age and sexual orientation in the employment field;
- on the grounds of gender in the field of goods and services.

23 Ombudsman (2019), Press release of 25.04.2019, available at: http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/C9564C0C48A8033AC225827F00276D77?OpenDocument.

The current amendment proposes to extend the reversed burden of proof to cover the full material scope of the Anti-Discrimination Act and all discrimination grounds.

On 8 April 2019, the Government discussed the bill and approved a neutral stance to it, meaning that it did not issue any recommendation for Parliament in this regard. At the time of writing, the bill was pending before the Chamber of Deputies.

Online source:
https://www.psp.cz/sqw/text/tiskt.sqw?O=8&CT=424&CT1=0

DK Denmark

CASE LAW

Dismissals of teachers because of religion

Religion or belief

The complainants in both cases were teachers who on the basis of their religion or belief declined to comply with their employers' instructions and were consequently dismissed.

The first complainant was a member of Jehovah's Witnesses and therefore did not celebrate Christmas. In September 2017, she informed her employer that she could not participate in the dance around the Christmas tree during the end of season celebration at the school in December. The teacher perceived the dance as an active religious act violating her religion. She suggested that she could take a holiday that particular day or that she could perform other tasks during the actual dance around the Christmas tree. When she continued to refuse to participate in the dance, she was dismissed.

The other complainant was a Seventh Day Adventist and it was a crucial part of his belief not to work on Saturdays. In the autumn of 2017, his school planned for an open house on a Saturday and the complainant was asked to teach at the event. The teacher refused, arguing that another member of his team could do it, similar to what had been organised the previous year. When the teacher did not show up on the day of the event, he was dismissed.

In both cases, the Board of Equal Treatment made the assessment that there was a clear correlation between the teachers' religious convictions and their refusal to comply with their respective employers' instructions. Thus, the circumstances were encompassed by the Act on Prohibition of Discrimination in the Labour Market, etc. Assessing whether the dismissals constituted indirect discrimination because of religion or belief, the Board found that both employers' requirements were legitimate and appropriate.

Examining then whether the requirements were necessary, the Board noted that both employers had, without any dialogue, rejected the complainants' various suggestions for alternative solutions. Thus, the Board found that the employers could not prove that the principle of equal treatment had not been violated and concluded that both complainants had been discriminated against on the grounds of religion or belief. The complainants received compensation equivalent to 12 and 9 months of salary, respectively.[24]

These decisions are the first where the Board of Equal Treatment decides in favour of complainants who claim to have been dismissed from employment due to their religion or belief.

24 Denmark, Board of Equal Treatment, decision No. 9192 of 28.02.2019, available at: https://www.retsinformation.dk/Forms/R0710.aspx?id=207738; and decision No. 9193 of 28.02.2019, available at: https://www.retsinformation.dk/Forms/R0710.aspx?id=207739.

Online sources:
https://www.retsinformation.dk/Forms/R0710.aspx?id=207738
https://www.retsinformation.dk/Forms/R0710.aspx?id=207739

Supreme Court ruling on dismissal of office worker in flex-job and possible discrimination based on age and disability

Disability

Age

The claimant was an office worker with a reduced ability to work, who therefore had a 'flex-job' with reduced working hours and whose employer received a subsidy from the local municipality according to the flex-job legislation. The claimant was dismissed from his position when he reached the state pension age (65 years), as the employer automatically stopped receiving the flex-job subsidy from the municipality at that time.

The claimant would have wanted to continue working, however, with a part-time position corresponding to his ability to work, and argued notably that the dismissal constituted discrimination based on his age and disability.

The Supreme Court made clear that a flex-job arrangement contains two elements – certain conditions of employment and a subsidy from the municipality. The Court also stated that a flex-job must be considered to be an employment-creating arrangement, which is allowed according to section 9(2) of the Act on Prohibition of Discrimination in the Labour Market, etc. This provision allows for positive action for older employees and persons with disabilities. The Court argued that the termination of such positive action when the subsidy stops could not be considered discrimination because of age nor disability.[25]

Referring to the employment contract between the claimant and the employer, the Supreme Court noted that it was an obvious condition for the employment in question that the employer had received a flex-job subsidy from the municipality. The basis for the employment therefore lapsed when the claimant reached the state pension age and the subsidy was discontinued.

On that basis, the Court did not find that the dismissal constituted discrimination because of age or disability in violation of the Act on Prohibition of Discrimination in the Labour Market, etc.

Online source:
http://domstol.fe1.tangora.com/Domsoversigt-(Højesteretten).31478.aspx?recordid31478=1745

First cases dealing with disability discrimination adjudicated under the 2018 Act on the Prohibition of Discrimination due to Disability

Disability

On 23 May 2019, the Board of Equal Treatment decided on three complaints of alleged disability discrimination outside the labour market, as test cases. These were the first cases where the Board made substantive decisions according to the Act on the Prohibition of Discrimination due to Disability of 2018,[26] which in Denmark extended the protection against discrimination on the ground of disability beyond the employment field.

The first case dealt with a family who were denied access to a restaurant due to their two-year-old son's baby carriage which served as his wheelchair. The restaurant argued that it did not allow baby carriages due to fire safety regulations, but the Board concluded that the restaurant had not lifted the burden of proof that it was necessary to reject the family on this basis. The Board concluded that indirect

25 Denmark, Supreme Court, judgment in Case No. BS-25958/2018-HJR of 17.04.2019. The Maritime and Commercial Court had reached the same conclusion in its judgment of 28.06.2018 in case No. F-5-17.
26 Denmark, *Lov om forbud mod forskelsbehandling på grund af handicap,* Act No. 688 of 8.06.2018.

discrimination because of disability had taken place and the complainant was awarded compensation of EUR 670 (DKK 5 000).[27]

The second case dealt with a complainant who was denied access to a café accompanied by his guide dog. Despite the complainant's visual impairment, the café argued that dogs were not allowed inside for the sake of guests with possible allergies. The Board found that the café had not, by reference to other guests' possible allergies, lifted the burden of proof that it was objectively justified to reject the complainant. The Board concluded that indirect discrimination due to disability had taken place and the complainant was awarded compensation of EUR 670 (DKK 5 000).[28]

The third case dealt with a complainant who approached an ultrasound and x-ray clinic to book an appointment. The complainant was blind and arrived with his guide dog but was informed that the clinic did not allow dogs in the examination room because of hygiene and other patients' possible allergies. The Board found that the indirect discrimination due to disability was objectively justified because of the purpose of ensuring allergy-free and hygienic examination rooms in the clinic. When examining whether it was necessary to refuse the complainant's access on that basis, the five members of the Board did not agree. Four Board members considered that there was such ambiguity about the course of events and the detailed content of the conversations that a decision on whether there had been illegal discrimination because of disability required evidence in the form of oral witness statements. Such evidence cannot be submitted to the Board but must be done by the courts. These members therefore voted in favour of dismissing the complaint. One Board member assessed that the clinic had not lifted its burden of proof and voted in favour of the complainant. In accordance with the majority's assessment, the Board dismissed the complaint.[29]

Before the adoption of the Act on the Prohibition of Discrimination due to Disability in 2018, there was no protection against discrimination outside the labour market for people with disabilities in Denmark, and the discrimination experienced in these cases would not have been illegal.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Shadow report to the UNCRPD Committee

Disability

On 13 February 2019, the Danish Institute for Human Rights published a report to the UN Committee on the Rights of Persons with Disabilities in order to assist the Committee in the preparation and adoption of the list of issues under the simplified reporting procedure in its 21st session. The report contains suggested inquiries on select areas protected within the scope of the UNCRPD, which the CRPD Committee should present to the Danish government.

As to the human rights situation for persons with disabilities in Denmark, the Danish Institute for Human Rights' Disability Index shows that in 9 out of 10 indicators, persons with disabilities are in a disadvantageous position when compared to the rest of the population.[30] The nine indicators are: (1) equality and non-discrimination, (2) violence, (3) accessibility and mobility, (4) freedom and personal integrity, (5) living independently and being included in the community, (6) education, (7) health, (8) employment, and (9) social protection.

27 Denmark, Board of Equal Treatment, decision No. 9468 of 23.05.2019. See: https://www.retsinformation.dk/Forms/R0710.aspx?id=209360.

28 Denmark, Board of Equal Treatment, decision No. 9470 of 23.05.2019. See: https://www.retsinformation.dk/Forms/R0710.aspx?id=209362.

29 Denmark, Board of Equal Treatment, decision No. 9467 of 23.05.2019. See: https://www.retsinformation.dk/Forms/R0710.aspx?id=209359.

30 Numbers are available in Danish at https://handicapbarometer.dk/. The Disability Index mainly builds on a survey called SHILD, Survey of Health, Impairment and Living Conditions in Denmark, conducted by SFI, the Danish National Centre for Social Research, See https://www.vive.dk/en.

Moreover, the development in recent years appears to be going in the wrong direction. In several indicators, the numbers show that the situation for persons with disabilities has worsened from 2012 to 2016. This is the case in terms of, for example, freedom and personal integrity, accessibility and education.

In particular, with regard to work and employment, in 2016, only 56 % of working age persons with disabilities in Denmark were employed. The corresponding number for persons without disabilities was 77 %.

The Danish Institute for Human Rights suggests a number of inquiries that the CRPD Committee should present to the Danish government. In the area of employment, which is the most relevant area in light of the EU directives, the Danish government should be asked to provide information about:

- Plans to investigate the reasons for the inequality for persons with disabilities in terms of employment rates; and
- Measures taken to increase the percentage of persons with disabilities working in the open labour market.

Online source:
https://menneskeret.dk/nyheder/instituttet-efterlyser-dansk-handicappolitisk-handlingsplan-rapport-fn

Finland

FI

CASE LAW

Displaying swastika flag in a window-opening found to be harassment prohibited in the Non-Discrimination Act

Religion or belief

The National Non-Discrimination and Equality Tribunal considered that suspending a swastika/Nazi flag from a window-opening of an apartment amounted to harassment[31] on grounds of religion as prohibited in the Non-Discrimination Act. The Tribunal prohibited the tenant of the apartment who had displayed the flag from repeating the harassment.[32]

The Non-Discrimination Ombudsman claimed in her application to the Tribunal that public displaying of the swastika flag infringed the human dignity of Jewish people as the flag symbolises their persecution by the Nazis. The Ombudsman attached a written statement of the chairperson of the Jewish Community of Helsinki stating that the presence of the flag in the window for several months without the intervention of the authorities had caused the Jewish community fear and concern. The Ombudsman named the chairperson as the victim in the application.

The Tribunal was unanimous in finding that the behaviour of the defendant had infringed the human dignity of the victim and that the respondent's behaviour related to religion. With 13 votes to 1, the Tribunal found that the behaviour had also created a degrading or humiliating, intimidating, hostile or offensive environment for the victim.

31 Harassment is defined in Section 14 of the Non-Discrimination Act as 'The deliberate or de facto infringement of the dignity of a person is harassment if the infringing behaviour relates to a reason referred to in Section 8(1), and as a result of the reason, a degrading or humiliating, intimidating, hostile or offensive environment towards the person is created by the behaviour.'

32 Finland, National Non-Discrimination and Equality Tribunal, decision No. 393/2018 of 19.12.2018.

One interesting aspect of this case is related to the issue of legal standing of the Non-Discrimination Ombudsman. Under the current Non-Discrimination Act, the Ombudsman cannot bring a case to the Tribunal without identifying a victim of discrimination or harassment and obtaining their consent. Under the previous Non-Discrimination Act (in force until the end of 2014), no such requirement existed and it may be that this change in legislation was unintended.[33] The Ombudsman has demanded in her report to the Parliament that the previous legal state in this regard should be restored.[34] The criticism against the new requirement of identifying a victim may have had an effect on what kind of relationship the majority of the Tribunal required between the behaviour of the defendant and the consequences directly to the victim.

Online source:
https://www.yvtltk.fi/material/attachments/ytaltk/tapausselosteet/jFpTF4RIt/YVTltk-tapausseloste-_19.12.2018-hairinta-hakaristilippu._L.pdf

POLICY AND OTHER RELEVANT DEVELOPMENTS

New Government Programme promises amendments of gender equality law

Gender

The new Government Programme, presented on 6 June 2019, promises that the Government will promote gender equality in various ways.[35] Under the economic and social objectives, the Programme aims to make Finland a leading country for gender equality by means of a separate gender equality programme to be presented in due course.

The Government Programme promises to introduce gender impact assessments to all Ministries and that pay equity will be promoted by adopting further legislation on pay transparency. The Act on Equality between Women and Men will be amended by increasing the right of the personnel, employee representatives as well as individual employees, to access pay information. The traditional tripartite Equal Pay Programme should become more effective and carry out a study of the impact of all collective agreements on equal pay. Stricter legislation will also be introduced regarding discrimination based on use of family-related leave and on pregnancy, referring to the problems encountered in the context of fixed-term employment.

Additionally, the Government Programme promises that a reform of family-related leave regulation is to be carried out, under which mothers and fathers will have an equal number of non-transferable months of family-related leave, without shortening the current leave for mothers. Both parents are promised a higher benefit during part of their leave period. At the moment, the benefit paid to mothers for the first part of leave is higher than that of fathers. The reform shall fulfil the requirements of EU law on family-related leave. The Government Programme thus promises an increase of leave that is covered by income-related benefits. The period available for fathers will also be extended.

There will be no reform of leave related to home care for children and the related flat rate benefits. The home care leave, which may be taken until a child is three years old, has been considered to have a negative impact on women who have difficulties in finding work outside the home, such as women with a low level of education and migrant women in particular.

33 See page 51 in the report of the Non-Discrimination Ombudsman to the Parliament: https://www.syrjinta.fi/documents/14490/0/The+report+of+the+Non-Discrimination+Ombudsman+to+the+Parliament/9b16017c-b442-4805-8927-9f60f1d5c681.

34 See page 50 in the report of the Non-Discrimination Ombudsman to the Parliament.

35 Prime Minister Antti Rinne's Government's Programme of 6.6.2019, *Participatory and knowledgeable Finland* (*Pääministeri Antti Rinteen hallituksen ohjelma 6.6.2019 Osallistava ja osaava Suomi*), available at: https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161662/Osallistava_ja_osaava_Suomi_2019_WEB.pdf?sequence=1&isAllowed=y.

The Programme also promises measures to combat violence against women. A new action plan is to be introduced, services to victims will be improved, a task of an independent rapporteur on violence against women will be established, and the implementation of the Istanbul Convention enhanced. An Act on assisting victims of human trafficking will be drafted, and the provisions on sexual and violent crimes assessed in light of the proportionality of the sanctions. Moreover, the definition of rape is to be based on the absence of mutual consent.

Online source:
https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161662/Osallistava_ja_osaava_Suomi_2019_WEB.pdf?sequence=1&isAllowed=y

France

FR

LEGISLATIVE DEVELOPMENT

New Decree on gender pay gap in France[36]

Gender

On 8 January 2019, the new decree on the Gender Pay Gap was adopted.[37] It implements the law of 5 September 2018,[38] Chapter IV articles 104-107, which provides that in companies with more than 50 employees, the employer must publish, on a yearly basis, indicators relating to the pay gap between women and men and provide information on the actions implemented to eliminate this gap. The decree also defines the methodology used to establish the indicators.[39]

The general obligation to eliminate the gender wage gap entered into force on 1 January 2019 for companies with more than 250 employees and will enter into force on 1 January 2020 for those with between 50 and 250 employees.[40]

The requirement to publish the wage disparity indicators will come into force on 1 September 2019 for companies with between 250 employees and 1 000 employees, and 1 March 2020 for those with between 50 and 250 employees.[41]

For companies with more than 250 employees, the following indicators are required;

- The gender wage gap between the company's female and male workers, calculated in reference to the average wage of the company's female workers compared to the average wage of male workers, calculated by age cohort and category of equivalent jobs.
- The disparities in individual pay rises (that do not reflect promotions) between the company's female and male workers.
- The rate of disparities in promotions granted to the company's female and male workers.
- The percentage of employees who benefited from a pay rise during the year of their return from maternity leave if wage increases were granted at the company's level during their leave.

36 For a more detailed description and analysis of this development please see the full report on; https://www.equalitylaw.eu/downloads/4859-france-new-decree-on-gender-pay-gap-in-france-pdf-106-kb.
37 France, Decree No. 2019-15 of 8.01.2019, on the application of provisions to eliminate wage disparities between women and men in companies and relating to sexual violence and sexism in the workplace, available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037964765&categorieLien=id.
38 France, Law No. 2018-771 of 5.09.2018, on the freedom to choose one's career path, available at: https://www.legifrance.gouv.fr/eli/loi/2018/9/5/MTRX1808061L/jo/texte.
39 France, Article L. 1142-8 of the Labour Code.
40 France, Article L. 1142-7 of the Labour Code.
41 France, Articles D. 1142-2 and D. 1142-2-1 of the Labour Code.

– The number of workers of the under-represented sex among the 10 employees which earn the highest wages in the firm.

For companies with between 50 and 250 employees, the criteria for companies of more than 250 employees apply, except the criterion on the rate of disparities in promotions of male and female workers.

To calculate the wage disparity, the employees are categorised in accordance to equivalent jobs and age groups.[42] Regarding the methodology of calculation, the indicators can be calculated within a reference period of 12 consecutive months. Companies with fewer than 250 employees can opt for a pluri-annual period of reference including two or three previous years.[43] Article L 1142-9 of the Labour Code sets out adequate and relevant measures of correction to be implemented by companies in case a pay gap is found. The results are presented by socio-professional categories, levels, or hierarchical pay grades or other rankings according to jobs. If the indicators cannot be calculated, the employer must explain why.

Financial sanctions are imposed when the time limit is reached.[44] In companies of at least 50 employees, if the indicators-based score is under 75 points, the company has three years to comply by reducing the wage disparities. If the company achieves a score of 75 points before the three-year deadline, then a new time limit of three years is awarded to correct the remaining disparities.[45]

Finally, the decree foresees sanctions for companies which do not comply within the three-year-time limit. Justifications put forward by the company to explain noncompliance with its obligations under the Gender Pay Gap Decree (economic hardship, company restructuring or merger, bankruptcy) may be taken into consideration.[46]

Online source:
https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037964765&categorieLien=id

CASE LAW

Liability of employer for harassment by volunteers

Gender

The claimant is a woman employed by a tennis club in the context of a tutored social integration contract.[47] She was a victim of harassment by volunteers on the occasion of an event organised by the club. Some of the volunteers directed sexist remarks and threw garbage at her, while her tutor who was present did not interfere. Subsequently, when the claimant addressed a written complaint to her employer, the volunteers were called to order. She subsequently instituted an action before the labour court alleging that the employer had failed to assume its obligation of protecting her against discriminatory harassment. She alleged intersectional harassment on the grounds of sex and economic vulnerability. The Court of appeal had dismissed the case on the grounds that the employer had no supervisory duty over the volunteers.

42 The age groups are the following: under 30, 30-39, 40-49 and 50 years and above. Additionally, the equivalence of jobs will be determined by the employer after consulting work councils according to the level or the hierarchy (grade) related to the classification in the sector of activity.
43 The results of the company in view of the indicators are published each year on the website of the company, or in the absence of such website, the indicators are circulated to employees by any means (Article D. 1142-4 of the Labour Code). Works councils are, for instance, granted access to these indicators, available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037964765&categorieLien=id.
44 France, Article L. 1142-10 of the Labour Code.
45 France, Article D. 1142-8 of the Labour Code.
46 France, Article D. 1142-11 of the Labour Code.
47 This is an employment contract with specific tutoring in order to accompany the return to employment of persons in a very precarious situation.

The Court of Cassation decided that in the context where the tutor was present and had the duty to monitor and support the conditions of integration of the employee, the fact that he did not interfere was sufficient to trigger the employer's liability. In this regard, the Court underlined that the duty to protect the employee against sexist harassment was amplified by the context of her particular vulnerability and the obligations related to the social insertion contract. Strengthening further its intersectionality approach, the Court emphasised the existence of a combination of harms, reflecting a situation of abuse of power. The case was sent back to the Court of appeal.[48]

In this case, the Court asserted the obligation of employers to take effective measures to protect their employees when it is in a situation to exert de facto authority on non-salaried persons who are responsible for the sexist harassing behaviour. The Court specifically pointed out the lack of 'reaction' of the tutor, which triggered the liability.

Online source:
https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000038112097&fastReqId=1554383201&fastPos=1

Conditions of enforcement of emergency order of evacuation of land occupied by Roma families

Racial or ethnic origin

In 2012, the city of Bobigny installed caravans on its property to the benefit of 200 Roma persons living in slums, in the context of a temporary insertion project for three years. In 2015, the city consequently sold the plot to a municipal corporation which initiated an action to evict the occupants before the High Judicial Court of Bobigny. The action was dismissed by a judgment of 14 December 2015 on account of the failure of the Corporation to establish the emergency considering that the occupants had been settled there at the initiative of the city. The appeal was postponed and never heard due to the failure of the appellant to file its conclusions.

In the meantime, on 15 May 2017, the Mayor adopted an order to evacuate the premises in 48 hours. The order was quashed by a decision of the Administrative Tribunal of Montreuil of 9 June 2017 in the absence of any measure taken to relocate the occupants.

In October 2018, the Corporation instituted a new action to evict the occupants before the High Judicial Court of Bobigny and the Mayor issued a new order of evacuation within seven days. The Prefect refused to provide the support of the police to enforce the Mayor's evacuation order.

The occupants initiated an emergency motion to quash the Mayor's order to evacuate which was dismissed by the Montreuil Administrative Court on 22 November 2018. It was followed by an emergency motion to suspend the execution of the Mayor's order, which was also dismissed on 11 December 2018. The occupants appealed this decision before the Council of State (*Conseil d'Etat*, Supreme Administrative Court).

Before the appeal to the Council of State was heard, the Bobigny High Court rendered a decision on 31 January 2019 maintaining the Corporation's action to evacuate, while awarding a 17 months' delay to the execution of the evacuation. The Court held that since there was no established emergency to evacuate, this period of time was necessary to take all necessary measures to secure the rights and relocation of occupants.

The Defender of Rights presented observations before the Council of State, to draw the Court's attention to the dangers of contradictory decisions between the judicial and administrative courts, and to the

48 France, Court of Cassation, Social chamber, decision No.17-28905 of 30.01.2019.

requirements to be met before ordering an evacuation, as defined by the jurisprudence of the European Court of Human Rights and the Ministerial instructions taken in application thereof dated 26 August 2012 and 25 January 2018.[49]

In its decision dated 13 February 2019, the Council of State first underlined that the land site constitutes the claimants' domicile considering that they have lived there, at the initiative of the city, since 2012. Article L. 2212-2 of the City and Towns Act provides that the Mayor can only adopt an order to evacuate persons from their domicile in case of imminent danger. The Mayor does not establish that the situation has changed since the last order, which was quashed due to lack of imminent danger. In addition, all measures taken to prepare the evacuation have been limited to temporary shelters which do not offer a permanent alternative domicile to protect the occupants' rights. Hence, this order constitutes a serious violation of the occupants' rights to private life and the protection of one's domicile and is manifestly illegal. The evacuation order is suspended indefinitely, insuring the families against any measure of emergency evacuation.[50]

This decision intervenes after eight years of massive governmental evacuation policy, during which local authorities have systematically failed to honour their obligation to prepare evacuations and offer long-term relocation to persons who were evacuated. As a result, despite continuous evictions measures, the amount of illegally occupied land has not diminished, and the occupants' rights have been massively violated.

Online source:
https://www.legifrance.gouv.fr/affichJuriAdmin.do;jsessionid=4B8116330BCFF04DC838B446306461F0.tplgfr25s_1?oldAction=rechExpJuriAdmin&idTexte=CETATEXT000038135472&fastReqId=614933702&fastPos=264

Access to sign language interpretation before the Court for deaf persons

Disability

The claimant presented a motion before the Paris administrative court to annul the decision of the Prefect of the Paris region, refusing to issue a parking authorisation for disabled persons in his favour.

The claimant, who has congenital deafness, submitted a formal request two weeks before the hearing to be assisted by a sign language interpreter at the hearing. Two days later, the administrative court rejected his request without further explanation, inviting him to come to the hearing with a person who would be in a position to act as interpreter. The claimant was not able to find the required assistance and was not able to present his observations before the court at the time of the hearing. On the substance, the Court dismissed his motion and he appealed this decision.

On 15 March 2019, the Council of State found that the decision of the Paris administrative court was null and sent back the claimant's motion before the first instance court. It decided that the fundamental principles of justice require the respect of a contradictory procedure and the rights of the defence. Hence, a deaf person must be put in a position to come before the court with the proper assistance of a person who has command of a means, be it a language or a technical device, in order to ensure proper communication with him or her and proper conduct of the hearing.[51] The Court rejected arguments based on material difficulties of the Court to meet its obligations.

Article 76 of the law of 11 February 2005 stipulates that all deaf persons heard before a civil, penal or administrative court and who request assistance shall benefit from the means of adapted communication

49 France, Defender of Rights, decision in case No. 2019-040, of 6.02.2019, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=27540&opac_view=-1.
50 France, Council of State, decision No. 427423 of 13.02.2019.
51 France, Council of State, decision No. 414751 of 15.03.2019.

of their choice, in due time and at the expense of the State. Failure to meet this obligation entails the irregularity of the decision, unless the court establishes that its failure has not altered the capacity of the claimant to present their observations before the court and after the hearing, if written observations ensued.

Online source:
https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2019-03-15/414751

Burden of proof of claimants challenging the legality of differential treatment between employees resulting from collective and negotiated agreements

Further to the regrouping of two working sites by the regional agricultural credit bank, the employer negotiated a collective agreement stipulating benefits for employees who had accepted a transfer to a particularly remote site before June 2011. The claimant was transferred to the remote site in August 2012 and was denied the benefit.

All grounds

The first instance court dismissed her claim on the basis that the provision resulted from an agreement negotiated with the representative trade union.[52]

The Court of Appeal applied long-standing jurisprudence regarding the presumption of validity of negotiated agreements,[53] stating that the claimant has the burden to establish that the differential treatment created arbitrary differences in treatment of persons in comparable situations that was foreign to any professional consideration. It decided that the claimant had satisfied this burden and granted the appeal.

Further to the recourse of the Bank, the Court of cassation dismissed the recourses and put aside the illegal provision. In a very detailed reasoning (which is exceptional for the Court of cassation), it expressly revisited long-standing case law on the burden of proof of the claimant in cases challenging the conformity to the principle of equality of differential treatment between employees resulting from collective and negotiated agreements.

The Court decided that the presumption of validity imposed a burden on the claimant that was contrary to requirements of EU law as provided by the jurisprudence.[54] Hence, it does not apply in cases relating to areas of competence of EU law, such as the principle of equal treatment, the principle of non-discrimination as provided by the EU Directives, and freedom of movement.

The Court therefore concluded that mobility benefits raised issues relating to the free movement of workers within the EU and that the employer had the burden to establish that the principle of non-discrimination had not been violated.

Online source:
https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000038373553

52 While the claimant did not invoke non-discrimination legislation, the finding of the Court is directly applicable and relevant for discrimination cases.
53 France, Court of Cassation, Social chamber, decision No. 07-42675 of 1.07.2009; Court of Cassation, Social chamber, decision No. 13-22179 of 27.01.2015.
54 The Court of Cassation referred notably to the CJEU judgments in cases C-406/15, *Milkova* of 9.03.2017; C-313/02, *Wippel* of 12.10.2004; and C-414/16, *Egenberger* of 17.04.2018.

Civil and criminal liability of a Mayor for refusal to register Roma children in elementary school

Racial or ethnic origin

A Mayor has been prosecuted before the penal court for discrimination on the grounds of ethnic origin and place of residence, for having refused to register in elementary school, five Roma children who were living in a camp that was under an evacuation order made by the Mayor a few weeks earlier, on the basis of safety and sanitary requirements.

In her defence, the Mayor alleged that she had only requested the filing of required legal documents, and that these documents were necessary.

The Criminal Court dismissed the case. The public prosecutor did not appeal and only the civil parties (the children and their parents) brought the case in appeal, which was dismissed by the Paris Court of Appeal.

Further to the dismissal of the Court of Appeal of Paris, the civil parties to the penal case brought the case before the Criminal chamber of the Court of cassation.

On 23 January 2018, the Criminal chamber of the Court of cassation quashed the decision of the Court of appeal despite the absence of the public prosecution. The Court concluded that the refusal of a mayor to register children in school, when those children are in fact living in a precarious camp and are members of the Roma community, constitutes the offence of refusal of the benefit of a right as defined by Article 432-7 of the Penal Code. The Court further concluded that this offence and the failure to comply with her duties as mayor also constitute a civil fault for which the Mayor is liable to the civil parties, and referred the case back to the Court of Appeal for a further decision.

In accordance with the decision of the Court of cassation, the criminal chamber of the Versailles Court of appeal concluded that there had been discrimination based on the place of residence and the Roma origin of the children, as well as refusal of the benefit of a right on the same grounds by the Mayor.[55]

The Court stresses that the fundamental right to education, guaranteed by many provisions of national and international law, must be interpreted in such a way as to provide the Roma and Travellers an effective access to rights.

The Court goes so far as stating that particular attention must be drawn to ensuring access to rights of the members of the Roma and Traveller communities, who cannot provide the usual justifications of residence but have a right of access to school that is independent of their conditions and period of residence on the territory of the town.

The Court condemned the Mayor herself to pay EUR 1 000 to each child plus EUR 500 of costs for each child.

This is the first conviction of a Mayor by a criminal court for the refusal to give the benefit of a right in relation to school registration.

Moreover, by stating that the right of children to have access to education must be enforced regardless of the means by which they will establish residence, the Court actually affirms that denying them this right is a criminal offence under French law.

55 France, Court of Appeal of Versailles, decision No. 18/01049 of 19.06.2019, return decision further to the decision of the Court of Cassation, Criminal chamber of 23.01.2018, No. 17-81369.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Publication of NGO annual report relating to Roma evacuations in 2018

On 18 March 2019, CNDH Romeurope[56] published its annual results collected by 48 NGOs, presenting civil society's national survey of Roma evacuations in 2018.

Racial or ethnic origin

In 2018, 9 688 persons were evicted from 171 different living areas. The number of persons who were evacuated has slightly decreased in 2018 (by 5 %), but the number of operations of evacuation have massively increased (+45 %). In total, approximately 65 % of all persons living in slums or squats were evicted from their homes in 2018. The highest number of evacuations was recorded in October, just before the winter interruption, when 1 884 persons were evicted from 29 living areas, i.e. 20 % of all evictions in 2018.

Some 77 sites were public property while 48 sites were owned by private persons. At least 8 189 persons (i.e. approximately 85 %) received no shelter or housing proposition after being evicted. At least 25 evacuations occurred without known legal basis, with public authorities generally alleging *flagrante delicto*.

Some stable housing solutions were proposed to persons who had been living in slums in some parts of the country. These operations had been prepared in advance, in collaboration with local authorities and NGOs in the context of specific reinsertion projects with selected individuals, in application of the inter-ministerial instruction of 25 January 2018.[57]

The massive increase of the number of evacuations reflects the 'fragmentation' of living areas resulting from the Government's systematic policy of repeated evictions since 2011, with dramatic consequences for the persons themselves, such as living on the street, wandering and attempting to organise successive places to live after the destruction of their belongings, interruption of schooling, etc...

Online source:
https://www.romeurope.org/wp-content/uploads/2019/03/Expulsions-bidonvilles-squats-2018-Note-détaillée-VF.pdf

Germany DE

CASE LAW

Dismissal of clinic director because of remarriage

Religion or belief

The complainant is of catholic belief and worked as a clinic director in one of the hospitals of an independent legal entity controlled by the Catholic Church, created with the purpose of providing health services. The complainant and his employer concluded an employment contract including internal regulations of the Catholic Church on special duties of loyalty of the employees. This internal regulation provides that conclusion of a marriage that is invalid according to catholic belief is regarded as a breach of such duties of loyalty. The complainant married his first wife according to catholic religious prescriptions.

56 CNDH Romeurope is the NGO monitoring and coordinating the action of local NGOs in support of the rights of foreign Roma in France.

57 France, Inter-ministerial instruction of 25.01.2018, available at: http://circulaire.legifrance.gouv.fr/index.php?action=afficherCirculaire&hit=1&r=42949.

After the divorce from his first wife, he married a second time, this time only on the basis of civil law. The complainant was dismissed when his employer took notice of his second marriage which violated religious laws. After a preliminary reference to the CJEU and the subsequent CJEU ruling,[58] the Federal Labour Court implemented the judgment of the CJEU.

The Federal Labour Court decided on 20 February 2019 that the dismissal of the complainant was not justified.[59] Remarriage cannot be regarded as a breach of the complainant's duties of loyalty. The respective provisions in the employment contract are null and void according to section 7.2 of the Equal Treatment Act, as they discriminate against the complainant, in comparison to other employees, because of his religious belief. There is no justification according to section 9.2 of the Equal Treatment Act which transposes Article 4(2) of the Employment Equality Directive. The duty not to conclude a marriage that is invalid according to the Catholic church does not form a genuine and determining, legal, and justified occupational requirement for a clinic director.

The Court noted that EU law specifies the conditions under which institutions directed by the church are allowed to treat their employees unequally on the grounds of their religion and noted that German constitutional law is not violated by these rules of EU law. The Court underlined that the CJEU did not act *ultra vires* but within its competences when handing down the judgment in IR v JQ.

Online source:
https://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2019&nr=21974&pos=0&anz=10&titel=Kündigung_des_Chefarztes_eines_katholischen_Krankenhauses_wegen_Wiederverheiratung

Permissibility of wearing Islamic headscarf in courtroom

Religion or belief

The case concerns the complaint of an Islamic religious community against a statutory provision in the *Land* Bavaria prohibiting judges and prosecutors from wearing any visible clothes or other items with religious or ideological meaning. Given a particular procedural possibility in Bavaria, a religious community enjoys legal standing to file such a complaint.

On 14 March 2019, the Constitutional Court of Bavaria ruled that such a prohibition does not violate the freedom of religion or the guarantee of equality as provided for by the Bavarian constitution.[60] It argued that the prohibition protects the neutrality of the state that is essential for public order, rejecting the argument that this amounted to unequal treatment considering that crucifixes are still displayed in courtrooms in Bavaria. The Court held that the crucifixes are a measure by the administration and therefore do not put the neutrality of the judges and prosecutors into question, as would their wearing of religious symbols.

Online source:
https://www.bayern.verfassungsgerichtshof.de/bayverfgh/

Constitutional complaint against implementation of CJEU decision in *Egenberger*

Religion or belief

The *Diakonie* which is part of the Protestant Church in Germany has lodged a constitutional complaint against the decision of the Federal Labour Court[61] implementing the decision of the CJEU in the case *Egenberger*.[62]

58 CJEU, Case C-68/17, *IR v JQ*, judgment of 11.09.2018. See also *European equality law review*, Issue 2019/1, pp. 66-67.
59 Germany, Federal Labour Court, decision No. 2 AZR746/14 of 20.02.2019.
60 Germany, Constitutional Court of Bavaria, decision No. Vf. 3-VII-18 of 14.03.2019.
61 Germany, Federal Labour Court, decision No. 8 AZR 501/14 of 25.10.2018.
62 CJEU, Judgment of 17.04.2018, C-414/16, *Egenberger*. See also *European equality law review*, Issue 2018/2, pp. 98-99.

The constitutional complaint argues that the decision of the Federal Labour Court impermissibly limits the autonomy of religious organisations which is guaranteed by Article 4 of the German Basic Law. The complainant argues that the CJEU did not properly assess the German constitutional law and acted beyond its competences (*ultra vires*) by restricting the autonomy of religious organisations through the application of EU anti-discrimination law.

The constitutional complaint presents a fundamental challenge to the supremacy of EU law in the area of anti-discrimination law and may thus have far-reaching ramifications for the relation between EU law and national law.[63]

Online source:
https://www.ekd.de/diakonie-klagt-vor-bundesarbeitsgericht-44274.htm

Greece

EL

LEGISLATIVE DEVELOPMENTS

Abolition of age limit for the postgraduate education of public employees

Age

The provision of paragraph 1 of Article 36 of Law 1943/1991[64] stipulated that a public employee could not participate in a programme of postgraduate education that would result in the improvement of his/her status within the hierarchy of the public administration[65] if he/she had reached the age of 45 (maximum age limit). A Code of Employees (Law 2683/1999)[66] was later adopted in 1999 changing the age limit from 45 to 50, while the current Code of Employees (Law 3528/2007)[67] does not refer to any such age limit. However, the initial provision of paragraph 1 of Article 36 of Law 1943/1991 was codified in more recent legislation (paragraph 1 of Article 43 of Presidential Decree 57/2007[68] on '*Codification of legal provisions concerning the National Centre of Public Administration and Local Authority in a unified text*'), causing confusion regarding the applicability of the age limit.

In January 2019, the issue was finally settled, and all potential doubts were dissipated, when paragraph 1 of Article 37 of Law 4590/2019[69] explicitly abolished both paragraph 1 of Article 36 of Law 1943/1991 and paragraph 1 of Article 43 of Presidential Decree 57/2007. It is now clear that according to the current legal framework, no age limit is prescribed for the participation of public employees in programmes of postgraduate education.

63 Contrary to the Diakonie, the archdiocese of Cologne has decided not to file a constitutional complaint against the decision of the Federal Labour Court implementing the decision of the CJEU in the case *IR v JQ* (see above, pp. 101-102). The archdiocese has stated, however, that it will use the opportunity of the proceedings in the *Egenberger* case before the Federal Constitutional Court to outline its fundamental position concerning the autonomy of religious organisations in labour relations. For further information, see: https://www.erzbistum-koeln.de/news/Keine-Verfassungsbeschwerde-im-Chefarzt-Fall/.

64 Greece, Law 1943/1991 on the modernisation of planning and function of public administration, upgrade of its personnel and other relevant provisions; OJ 50 A/11.04.1991.

65 The age limit concerned specific programmes that are relevant for the needs of the specific position and would result in a different work status.

66 Greece, Law 2683/1999 on the ratification of the Code for the status of public employees and employees of legal entities of public law and other provisions; OJ 19 A/09.02.1999.

67 Greece, Law 3528/2007 on the ratification of the Code for the status of public employees and employees of legal entities of public law and other provisions; OJ 26 A/09.02.2007.

68 Greece, P. D. 57/2007 on Codification of legal provisions concerning the National Centre of Public Administration and Local Authority in a unified text; OJ 59 A/14.03.2007.

69 Greece, Law 4590/2019 on 'strengthening of the Highest Council for Selection of Personnel, empowerment and upgrade of public administration and other provisions'; OJ 17/07.02.2019.

Online source:
https://www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/10915773.pdf

Act 4604/2019 on substantive equality entered into force on 26 March 2019

On 26 March 2019, the new Act 4604/2019 on substantive equality (hereafter 'New Act') entered into force.[70]

Gender

Sexual orientation

Transgender

The New Act amends the definitions of direct and indirect discrimination and sexual harassment on the grounds of sex (and gender identity), which were previously provided by Act 3896/2010,[71] implementing Directive 2006/54,[72] and provides new definitions for positive measures and positive action, which all fall within the scope of Directive 2006/54. The New Act also provides new definitions of direct and indirect discrimination and sexual harassment on the grounds of sexual orientation, without amending the definitions given by Act 4443/2016,[73] implementing Directives 2000/43 and 2000/78.

Definitions of direct and indirect discrimination on the grounds of sex, sexual orientation and gender identity are given both in Article 2 and in Article 22 of the New Act. However, the definition of direct discrimination in Article 2[74] differs from that in Article 22[75] in that the words 'sexual orientation and gender identity' are omitted at the end of its last phrase. Moreover, and most significantly, they fall short of the definitions of both Act 3896/2010, implementing Directive 2006/54, and Act 4443/2016, implementing Directives 2000/43 and 2000/78. In the definition of direct discrimination, the requirement of 'evidently' less favourable treatment is introduced and is restrictive in comparison to the wording of the above Directives, which do not use the word 'evidently'. Moreover, the definition of direct discrimination adopted by the New Act uses only the present tense ('excludes or puts in an inferior position'), omitting the past perfect tense and the conditional tense ('is, has been or would be treated in a comparable situation') used by the above Directives and the above Laws that implemented them; thus, no comparison to a past or hypothetical comparator is allowed. In the definition of indirect discrimination, the use only of the present tense ('excludes or puts in an inferior position') falls short of the wording of the above Directives ('would put (...) at a particular disadvantage'), which also covers the possibility of creating a particular disadvantage.

In view of the above, the New Act causes regression in the protection of the right to gender equality (including gender identity) and prohibition of discrimination on the grounds of sexual orientation,

70 Act 4604/2019 'on the promotion of substantive gender equality, prevention and fight against gender-based violence – Provisions on the award of nationality – Provisions on the elections for the local authorities'; OJ A 50/26.03.2019, available at: https://www.synigoros.gr/resources/20190416-n4604-2019.pdf.

71 Greece, Act 3896/2010, 'Implementation of the Principle of Equal Treatment of Men and Women in Matters of Employment and Occupation. Harmonisation of Existing Legislation with Directive 2006/54/EC of the European Parliament and the Council of 5.07.2006 and other provisions'; OJ A 207/08.12.2010, entered into force as of 8.12.2010.

72 Directive 2006/54/EC of the European Parliament and of the Council, 5.07.2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

73 Act 4443/2016 'i) Implementation of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation and of Directive 2014/54/EU establishing a general framework for equal treatment in employment and occupation etc.'' *(I) Ενσωμάτωση της Οδηγίας 2000/43/ΕΚ περί εφαρμογής της αρχής της ίσης μεταχείρισης προσώπων ασχέτως φυλετικής ή εθνοτικής τους καταγωγής, της Οδηγίας 2000/78/ΕΚ για τη διαμόρφωση γενικού πλαισίου για την ίση μεταχείριση στην απασχόληση και την εργασία και της Οδηγίας 2014/54/ ΕΕ περί μέτρων που διευκολύνουν την άσκηση των δικαιωμάτων των εργαζομένων στο πλαίσιο της ελεύθερης κυκλοφορίας των εργαζομένων*'), OJ A 232/9.12.2016.

74 Greece, Article 2(6)(a) of Act 4604/2019: '"direct discrimination": any act or omission that excludes or places in an evidently inferior position persons because of sex, sexual orientation and gender identity; moreover, any instruction, instigation or systematic encouragement of persons to discriminate in an unfavourable or unequal way against other persons on the grounds of sex, sexual orientation and gender identity.'

75 Greece, Article 22(2)(a) of Act 4604/2019: '"direct discrimination": any act or omission that excludes or places in an evidently inferior position persons because of sex, sexual orientation and gender identity; moreover, any instruction, instigation or systematic encouragement of persons to discriminate in an unfavourable or unequal way against other persons on the grounds of sex.'

prohibited by EU law (see Article 27 of Directive 2006/54). This is even more significant, as the New Act is intended to ensure that the objective pursued by Directive 2006/54 may be attained.

Moreover, Article 22(1) of the New Act amended Article 2(d) of Act 3896/2010 transposing Directive 2006/54 and replaced its definition of 'sexual harassment' by a definition which, compared to the definition of the Directive, is narrower in that it does not stipulate 'with the purpose or effect' as the Directive does.

Furthermore, Article 2 of the New Act distinguishes between 'positive action' and 'positive measures', providing a different definition for each of these concepts. However, the only term used in Article 116(2) of the Constitution and in Act 3896/2010 (Article 19), as well as in Article 157(4) TFEU and Article 23(2) of the EU Charter of Fundamental Rights, is 'positive measures'. Confusion and legal uncertainty are thus created, inter alia because it is only the term 'positive measures' that appears further in the Act, while the term 'positive action' does not appear in any other provision of the Act. Moreover, these definitions limit the scope of the above concepts to the public sector only. Contrary to Article 116(2) of the Constitution and Article 19 Act 3896/2010, the definitions are narrower because they do not stipulate that positive measures do not constitute discrimination. This is a serious regression with respect to the gender equality acquis in Greece.

Finally, the right of intervention in favour of the victim of discrimination before the courts at all stages, provided by Article 23 of the New Act, is restricted to trade unions and excludes women's NGOs. The relevant provision of Article 22(2) of Act 3896/2010 (which is still in force) provides the right of intervention before any administrative authority and any court for any legal entity with a relevant legitimate aim (i.e. not only for trade unions but also for women's NGOs and non-profit unions for human rights). Therefore, it may create legal uncertainty as to whether the right of NGOs to intervene in favour of the victim of discrimination in such procedures is still valid.

The New Act, to the extent that it amended or rephrased the existing definitions of direct and indirect discrimination on the grounds of sex, sexual orientation and gender identity has led to confusion and legal uncertainty due to its inconsistencies. By omitting any reference to Directives 2006/54 and 2000/78, it is in clear violation of their implementation requirements. Most importantly, the New Act is a serious regression with respect to the gender equality and anti-discrimination acquis in Greece.

Online source:
https://eshop.forin.gr/laws/law/3731/n-4604-2019#!/?article=33831

Positive action; Adoption of a gender quota for European, Parliamentary, Regional and Municipal Elections in Greece

Gender

Article 15 (paragraph 1.2) of the recent Act 4604/2019[76] of 26 March 2019, raised the gender quota in favour of the under-represented sex from one third to 40 % for candidates at the parliamentary, regional and municipal elections and the European elections.

More specifically, Article 15(1) of the New Act amended the provision of Article 34(6)(b) of the Presidential Decree 26/2012 regarding 'Codification in a single document of the provisions of the legislation for parliamentary elections'[77] providing that the number of candidates of each sex presented in the parliamentary elections by each party must correspond to 40 % (instead of the previously provided quota

76 Greece, Act 4604/2019 'on the promotion of substantive gender equality, prevention and fight against gender-based violence – Provisions on the award of nationality – Provisions on the elections for the local authorities'; OJ A 50/26.03.2019, available at: https://www.synigoros.gr/resources/20190416-n4604-2019.pdf.

77 Greece, Presidential Decree 26/2012 regarding 'Codification in a single document of the provisions of the legislation for parliamentary elections'; OJ A 57/15.03.2012.

of one third') of the total number of its candidates in the voting region (and not in the whole country, as was previously provided). This new provision was applied in the regional and municipal elections of 26 May 2019 (first round) and of 2 June 2019 (second round) for the 13 Regions and the 331 Municipalities.

Article 15(2) of the New Act amended the provision of Article 3(3)(c) Act 4255/2014,[78] providing that the number of candidates of each sex presented in the European elections by each party must correspond to 40 % (instead of the previously provided quota of one-third) of the total number of its candidates. This new provision was applied in the regional and municipal elections of 26 May 2019 for the 21 seats for Greece at the European Parliament.

According to the data presented by the General Secretariat for Gender Equality, in the European Elections of 26 May 2019, 40 political parties and coalitions of parties participated in the European Elections;[79] among the total of 1 195 candidates, 685 (57.3 %) were male and 510 (42.7 %) were female. More specifically, in 17 parties the percentage of female candidates was 40 %, in 13 parties the percentage of female candidates was between 41 % and 45 %, in 6 parties the percentage of female candidates was between 46 % and 49 %, in 2 parties the percentage of female candidates was 50 % and in 2 parties the percentage of female candidates was above 50 %.

Online sources:
https://eurogender.eige.europa.eu/posts/gender-aspect-greek-candidates-european-elections-2019
https://eurogender.eige.europa.eu/posts/female-identity-results-european-and-local-administration-elections-greece-265-and-262019

Repeal of criminal provision regarding discriminatory provision of goods and services

Racial or ethnic origin
Religion or belief
Disability
Sexual orientation
Transgender
Other ground

The new Criminal Code in Greece, which was introduced by Law 4619/2019[80] and comes into force on 1 July 2019, repealed Article 361B which concerned criminal liability for the provision of goods and services when based on discrimination grounds. The repealed provision stipulated that:

> 'Whoever supplies goods or offers services or announces through a public call the supply of goods or provision of services by excluding out of disdain individuals based on characteristics of race, colour, national or ethnic origin, genealogical origin, religion, disability, sexual orientation, identity or gender characteristics, shall be punished with imprisonment of a minimum of 3 months and a fine of at least EUR 1 500.'

The provision targeted notably activities of racist groups, such as 'distribution of food as a charity *only for Greeks'*.

However, this repeal does not affect the general prohibition of discrimination in the area of access to goods and services as stipulated notably in Article 3(2)(d) of the general anti-discrimination Law 4443/2016.

Online source:
https://www.lawspot.gr/nomikes-plirofories/nomothesia/poinikos-kodikas-nomos-4619-2019

78 Act 4255/2014 'Election of members of the European Parliament and other provisions' (*Εκλογή μελών του Ευρωπαϊκού Κοινοβουλίου και άλλες διατάξεις*), OJ A 11 April 2014.
79 Greece, Supreme Civil and Criminal Court (Areios Pagos), decision No. 65/2019, available at: http://www.areiospagos.gr/.
80 Greece, Law 4619/2019 'on ratification of Criminal Code'; OJ 95A/11.06.2019.

CASE LAW

Sanctions against private company for discrimination on grounds of disability

Disability

A private employee, with a contract of part-time employment for an indefinite period, was dismissed from her employment on 22 June 2018. The claimant submitted a complaint with the local department of the Labour Inspectorate Body, mentioning that she was informed by the company that the dismissal was caused by her (lack of) efficiency and highlighted that, although she had recrudescing multiple sclerosis – a fact that the company was aware of – her disease had not affected her work performance at all during all her working years. She added that due to the treatment she endured in her workplace, which was described in her complaint, her health status worsened severely, and she had to be transferred to hospital by ambulance.

The claimant declared that since her disease had occurred, in 2011, she had repeatedly asked to work in a different office with different duties – in which she had already been successfully working before her disease appeared. The employer did not take this solution into consideration, however, even on a test basis. The employer argued before the Labour Inspectorate Body notably that:

> 'the employee was not treated unfavourably because of her alleged chronic disease … the company made for a long time all the necessary efforts in order to maintain the employee in her workplace, despite her inefficiency…and therefore it would not be possible to rehire her'.

The claimant also submitted a complaint to the Ombudsman, who asked the employer to reconsider its decision to dismiss the claimant, and to consider taking measures to provide reasonable accommodation. The employer refused.

Therefore, the Ombudsman adopted an Opinion to (1) recall the meaning of Article 5 of Law 4443/2016 which imposes a duty on employers to provide reasonable accommodation to employees and job seekers with disabilities, and (2) emphasise that taking or preserving special measures aiming to prevent or counterbalance disadvantages of disability or chronic disease does not constitute an act of discrimination. The Ombudsman thus found that the dismissal of the claimant amounted to a violation of Article 2 of Law 4443/2016 and was therefore null and void. The Ombudsman transmitted its official Opinion to the local department of the Labour Inspectorate Body and recommended the imposition of administrative sanctions.[81]

On 5 February 2019, the Labour Inspectorate Body consequently imposed a fine of EUR 8000. The claimant also filed a motion in court which is pending at the time of writing.

Online source :
https://left.gr/news/gia-tin-apolysi-ergazomenis-me-sklirynsi-kata-plakas-prostimo-toy-sepe-sta-leroy-merlin

Confirmation by appeal court of conviction of a doctor who had posted an anti-Semitic sign at the front door of his office

Religion or belief

Racial or ethnic origin

A 14-month prison sentence, suspended for 3 years, was imposed by the second Three-Member Misdemeanour Court of Thessaloniki on a doctor who was charged because he had placed an anti-Semitic sign stating 'Jews are not welcome' at the front door of his medical office.

81 Greece, Ombudsman Opinion No. 246643/51899/2018 of 19.11.2018.

By examining his appeal against the judgment at first instance by the One-Member Misdemeanour Court which had convicted him to a 16-month sentence, the Three-Member Misdemeanour Court confirmed on 18 April 2019 that he was guilty of 'inciting racial discrimination' (and thus of violating Article 1 of the antiracist Law 927/1979), as well as for possessing weapons, due to the fact that knives were found in his residence.

Online source:
https://racistcrimeswatch.wordpress.com/2019/04/18/3-54/

HU Hungary

CASE LAW

Discriminatory practice at the maternity clinic of a public hospital in Miskolc (the 'visitors' attire' case)

Gender

Racial or ethnic origin

In 2017, the European Roma Rights Centre (ERRC), an international public interest law NGO which is registered in Hungary, filed an *actio popularis* claim against a public hospital in the city of Miskolc, because of a policy of the maternity clinic which affected socio-economically disadvantaged Roma women disproportionately.

Miskolc is located in the region of North-Hungary (Észak-Magyarország), which is one of the least economically developed regions of the EU,[82] with a large Roma population.[83] ERRC was informed by local pro-Roma activists that the public maternity clinic in Miskolc hospital charges the companions of women, who arrive to give birth in the hospital, with a relatively high fee (c. EUR 10-15) for so-called 'visitor attire' (a disposable hygienic suit, to be worn in the delivery room) which is not affordable for families living in poverty. Thus, in many cases, Roma mothers (among them young girls under the age of 18 years) are forced to endure the hours of labour and childbirth without a supporting companion. This means also that they are hindered in exercising their right provided by the Act on Health Care, i.e. that women are entitled to be accompanied during childbirth by a person of their choice (an adult family member, a relative, a friend or a doula, etc.).[84]

The first instance court, the Regional Court of Miskolc, found direct discrimination based on pregnancy/maternity and on social/economic status (these are protected grounds in the Hungarian anti-discrimination legislation),[85] and indirect discrimination based on (Roma) ethnicity.

According to the judgment, the hospital's practice amounts to direct discrimination based on maternity/pregnancy, because of the principle developed by the ECtHR in *Thlimmenos v Greece*,[86] i.e. that the right not to be discriminated against may be violated when groups of persons whose situations are significantly different are not treated differently. In this case, the situation of the group of birthing women was compared with the group of other patients. According to the Miskolc Regional Court, the legislator had the

82 2015 GDP per capita in 276 EU regions, *Eurostat Newsrelease*, no. 52 (2017), https://ec.europa.eu/eurostat/documents/2995521/7962764/1-30032017-AP-EN.pdf/4e9c09e5-c743-41a5-afc8-eb4aa89913f6.

83 See the map published by the Library of the Hungarian Parliament on the dispersion of Roma population in Hungary: http://mtatkki.ogyk.hu/terkepek.php?map=2011_roma_cigany. In Hungary, among the Roma population, the percentage of the socio-economically disadvantaged families are significantly higher than the national average. See the Hungarian National Social Inclusion Strategy for 2011-2020, p. 6, available at: http://romagov.hu/download/hungarian-national-social-inclusion-strategy-ii/.

84 Hungary, Article 11(5) of Act CLIF of 1997 on Health Care, dated 23.12.1997.

85 Hungary, Article 8 Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities, dated 28.12.2003.

86 European Court of Human Rights (ECtHR), *Thlimmenos v Greece*, No. 34369/97 of 6.04.2000, para 44.

firm intention to provide birthing women (unlike other patients) with the special right to be accompanied in the hospital, as 'childbirth is not a pathological event, but a physiological process, and a psychical and social event as well'. Moreover, the practice of the hospital amounts to direct discrimination based on social/economic status, as the fee of the mandatory 'visitors' attire' may not be affordable for families living in poverty. In addition, because Roma families are over-represented among the poor families in the region, the practice is to be considered as indirect discrimination based on (Roma) ethnicity.

In its judgment of October 2018,[87] the Regional Court of Miskolc ordered the hospital to cease the unlawful and discriminatory practice (of charging a fee for the mandatory hygienic attire) and to pay a public fine of EUR 17 000 (c. HUF 5 million).

This judgment of the first instance court was upheld on appeal by the Debrecen Court of Appeal in January 2019, although the fine was decreased to EUR 6 800 (c. HUF 2 million).[88] In its reasoning the court of appeal emphasised that the practice of the hospital was unlawful because the enjoyment of a patient's rights cannot be made conditional on payment.

Online source:
http://www.errc.org/uploads/upload_en/file/5106_file1_anonymised-version-of-the-judgment-in-hungarian-2018.pdf

Second instance court decision on Ministry's responsibility for failing to act against school segregation

Racial or ethnic origin

In 2009, the Chance for Children Foundation (CFCF) initiated an *actio popularis* lawsuit against the Ministry of Education and Culture (now Ministry of Human Capacities), as the entity ultimately responsible for the management of the Hungarian education system.

In its first instance judgment,[89] the Metropolitan Court concluded that by not taking effective action – directly and/or through the administrative bodies responsible for the operation of educational institutions – against segregation of Roma children in 28 elementary schools, the Ministry had failed to fulfil its obligations stemming from the Equal Treatment Act and the Act on National Public Education, and thus violated the segregated Roma pupils' right to equal treatment. The Ministry was ordered to ban the 13 schools where segregation was still in place from admitting new first graders and to instruct the competent Government Offices to find other places for those first graders. The Court further ordered the Ministry to instruct the entities operating the concerned schools to prepare desegregation plans and to continuously monitor the implementation of those schools' desegregation plans for five years and publish the results on its website. The Ministry was also ordered to amend its guidelines for school inspections to enable data collection on the basis of perceived ethnicity to estimate the proportion of pupils of Roma origin, and to instruct the competent Government Offices to carry out such data collection. Finally, the Ministry was ordered to pay a public interest fine of EUR 159 000 (approximately HUF 50 million) to be spent on the civil monitoring of desegregation programmes within the next five years. The Ministry appealed against the first instance decision.

On 14 February 2019, the Metropolitan Appeals Court agreed with the first instance decision's assessment that the Ministry had failed to take action against segregation in several schools, although it had been aware of its widespread existence, and that this failure had amounted to a violation of the requirement of equal treatment.[90]

87 Hungary, Regional Court of Miskolc, judgment No. 10.P. 22.249/2017/19, available at: http://www.errc.org/uploads/upload_en/file/5102_file1_hungary-miskolc-court-decision-october-2018.pdf.
88 Hungary, Debrecen Court of Appeal, judgment No. Pf.I.20.749/2018/8, available at: http://www.errc.org/uploads/upload_en/file/5106_file1_anonymised-version-of-the-judgment-in-hungarian-2018.pdf.
89 Hungary, Metropolitan Court, decision No. 40.P. 23.675/2015/84 of 18.04.2018.
90 Hungary, Metropolitan Appeals Court, decision No. 2.Pf.21.145/2018/I of 14.02.2019.

However, the court of second instance significantly weakened the measures that the first instance court had prescribed with the aim of putting an end to segregation. The Court thus held that the Ministry could not be obliged to order a ban on admitting new students to the schools concerned without a detailed, individualised examination taking local specificities into account. The appropriate form of such an examination is the creation of a desegregation plan that relies on a careful mapping of the local situation and is based on the cooperation of experts, teachers, local politicians and parents.

While the second instance court maintained the Ministry's obligation to order the school operators to prepare desegregation plans, it quashed the Ministry's obligation to monitor their implementation and to publish the conclusions of the monitoring on its website. In this regard, the Court noted that such monitoring generally belongs to school district centres and government offices rather than the Ministry.

The appeals court also quashed the Ministry's obligation to amend its guidelines for inspections with regard to data collection, considering that the prescription of such an obligation would exceed the framework of the actual lawsuit (which concerned 28 specific schools).

Finally, while the court of second instance confirmed the prescription of the public interest fine, it held that courts do not have a statutory authorisation to determine what the public interest fine must be used for. The amount paid will thus flow into the general state budget.

Online sources:
http://cfcf.hu/sites/default/files/23675-2015-84-I%20%C3%ADt%C3%A9let%20Es%C3%A9lyt%20a%20H%C3%A1tr%C3%A1nyos%20-%20Nemzeti%20Er%C5%91forr%C3%A1s%20_.pdf
https://birosag.hu/aktualis-kozlemenyek/fovarosi-itelotabla-dontes-az-egyenlo-banasmod-kovetelmenyenek-megsertese

Differentiation in social benefits based on long-term illness

Other ground

In December 2018, the municipal council of the village where the complainant lived decided to pay a one-time aid of EUR 50 (HUF 15 000) to each pensioner living in the settlement. At that time the complainant had been under hospital treatment for five months (beginning in August 2018) at the hospital of a nearby town and was therefore qualified by the municipal council as not living in the village. Therefore, he was not granted the one-time aid.

The Equal Treatment Authority concluded that the complainant was in a comparable situation with other pensioners whose registered official address was in the village, and he was subjected to differential and disadvantageous treatment on the ground of his health status (long-term illness) due to which he had to be hospitalised, and was absent from the village for a longer period of time.[91] The Authority emphasised that the municipal council is also under the obligation of equal treatment with respect to voluntarily given ex gratia social benefits.

The Authority established that direct discrimination based on health status had taken place and obliged the municipal council to provide the one-time benefit to the applicant. The municipality complied with the obligation.

The decision has two noteworthy aspects: the recognition of long-term illness (hospitalisation) as a protected ground and the conclusion that public bodies falling under the requirement of equal treatment must comply with this principle when providing voluntarily undertaken ex gratia benefits.

91 Hungary, Equal Treatment Authority decision in case No. EBH/12/2019 of 22.03.2019.

Online source:
https://www.egyenlobanasmod.hu/hu/jogeset/ebh122019

Transgender woman refused access by employer to changing room in accordance with her gender identity

Gender

A transgender woman filed a complaint with the Equal Treatment Authority, claiming that her employer prevented her from using the changing room in line with her gender identity. The 41-year-old complainant, Ms. Aliz Medgyesi, started to work in a small-town factory in the Eastern part of Hungary in 2016. In the summer of 2018, she officially changed her name and gender, and underwent several male-to-female gender reassignment surgeries during the autumn. When she returned to her workplace with her new ID card, and wanted to use the women's changing room, her employer denied her request, and obliged her to use a separate area in the women's toilet for the purpose of changing her dress. According to the reasoning of the employer, this measure was necessary 'to avoid unrest'.

The employer did not deny that the measure amounted to direct discrimination (based on gender identity) and declared to be ready to stop this discriminatory practice. The dispute ended in an agreement: the employer apologised to the complainant and undertook to provide her, and all other employees, access to changing rooms which correspond to their gender. Moreover, the complainant was invited to talk about gender identity issues at a panel discussion to be organised by the employer. During the procedure, the complainant was supported with legal representation by an LGBTQI organisation, Háttér Society (*Háttér Társaság*).

The Equal Treatment Authority endorsed the settlement in a decision after the hearing was held on 21 March 2019.[92]

According to available information, this was the first time in Hungary, when a legal dispute arose regarding this issue, i.e. transgender individuals' access to bathrooms/changing rooms. As for the context: during empirical research conducted by the Háttér Society in 2016, 43 % of the transsexual participants claimed to have lost a job because of their gender identity, of which 63 % had decided to leave the workplace because of the transphobic atmosphere there.[93]

Online source:
Háttér Society *(Háttér Társaság)* (2019) *EBH-ügy: Biztosítani kell a transzneműeknek az öltözőhasználatot* (case with the Equal Treatment Authority: Access to changing room should be provided for transgender individuals), 29 March 2019, available at: http://hatter.hu/hirek/ebh-ugy-biztositani-kell-a-transznemueknek-az-oltozohasznalatot.

Second instance court decision on the harassing practices of the Municipality of Miskolc

Racial or ethnic origin

Miskolc, the third largest city in Hungary, has been openly hostile towards its Roma inhabitants for years. Following an *actio popularis* claim submitted by NGOs, the Miskolc Regional Court concluded in December 2018 that the combination of a number of the Municipal Council's practices and actions targeting the local Roma population amounted to harassment based on ethnicity. The Municipal Council of Miskolc was notably ordered to publish an apology on the municipal website and to pay a public interest fine of EUR 31 000 (HUF 10 million) to be spent on integrative housing measures in the city. The municipality

92 According to the press release issued by Háttér Society *(Háttér Társaság)* (2019) *EBH-ügy: Biztosítani kell a transzneműeknek az öltözőhasználatot* (case with the Equal Treatment Authority: Access to changing room should be provided for transgender individuals), 29.03.2019, available at: http://hatter.hu/hirek/ebh-ugy-biztositani-kell-a-transznemueknek-az-oltozohasznalatot.

93 Háttér Society *(Háttér Társaság)* (2017) *A kirekesztés arcai: A transz emberek foglalkoztatási és munkahelyi hátrányos megkülönböztetése* (Faces of exclusion: Discrimination of trans individuals in the field of employment and at workplaces), Budapest, Háttér Társaság, available at: http://hatter.hu/sites/default/files/dokumentum/kiadvany/kirekesztesarcai.pdf.

submitted an appeal against the decision and the mayor declared publicly that he had no intention of changing his policies.[94]

In May 2019, the Debrecen Appeals Court fully upheld the judgment, confirming that the development of a humiliating and intimidating environment for the population of the segregated areas was not only an unintended side-effect, but actually the intended impact of the municipality's practices.[95] The Court emphasised that the obligation to respect the laws is especially important for public authorities vested with the task of enforcing them. The violations committed by some individuals belonging to the group concerned by the inspections do not authorise public authorities to break the law themselves, and especially to treat and stigmatise the whole community as a group conducting a criminal way of life and being unable to integrate into mainstream society. The Court also stressed that the municipality was responsible for direct discrimination and harassment, and therefore, the public interest fine of EUR 31 000 (HUF 10 million) was not excessive.

Online source:
https://tasz.hu/a/files/img-520123850-0001.pdf

Budapest Mayor's Office fined for blocking access to LGBTQI websites

Sexual orientation

Transgender

In March 2019, the Mayor's Office of Budapest was reported in media to be blocking access to LGBTQI-themed websites from its local network, meaning that neither the staff of the Office, nor local council members could access such pages. Several NGOs brought a complaint to the national equality body.

During the procedure, the main argument presented by the Mayor's Office was that staff do not need access to these websites for their work, although evidence showed that several other types of websites, such as entertainment videos and internet auctions, were not blocked. Furthermore, staff at the Office do need access to publications and press materials from the organisations of discriminated groups to achieve their commitment to equal opportunities. This was supported by the fact that the websites of other vulnerable groups, such as Roma, women and people living with disabilities were available from the network.

The Equal Treatment Authority found that the conduct of the Mayor's Office amounted to discrimination based on sexual orientation and gender identity. The Authority pointed out that the conduct also caused harm to the entire LGBTQI community, as it limited the possibility of having their interests represented, and humiliated them. In the words of the Authority: 'Based on the categories blocked it can be ascertained that gay, lesbian and bisexual content was treated similarly to harmful, deviant, even illegal content that is clearly not suitable for work.' The Authority found that this 'condones and strengthens existing social prejudices.'

The Authority ordered the Mayor's Office to discontinue its unlawful practice, forbade such conduct in the future, imposed a fine of EUR 3 000 (approximately HUF 1 million), and ordered its decision to be published on its own website, as well as the opening webpage of the city. The Mayor's Office has requested judicial review; the case is pending before the court.

Online source:
http://en.hatter.hu/news/equal-treatment-authority-fines-budapest-mayors-office-for-blocking-lgbtqi-websites

94 For further information, see *European equality law review*, Issue 2019/1, pp. 97-98.
95 Hungary, Debrecen Court of Appeal, decision no. Pf.I.20.059/2019/4 of 9.06.2019.

POLICY AND OTHER RELEVANT DEVELOPMENTS

The 'Family Protection Action Plan'

Gender

The Family Protection Action Plan, as it was announced by the Hungarian Prime Minister (within the framework of his annual 'State of the Nation' address, delivered on 10 February 2019),[96] includes seven key elements: (1) Preferential housing loan, or Baby-Waiting Allowance (*'babaváró támogatás'*); (2) Extension of the housing benefits, or Home-Creation Scheme for Families (*'CSOK');*[97] (3) Extension of the mortgage loan relief programme; (4) Lifetime income tax break for mothers of four (or more) children; (5) Car purchase programme; (6) Comprehensive crèche service; (7) Childcare allowance for working grandparents.

The elements of the Plan have been implemented by several legal measures:

- The Government Decree on the Baby-Waiting Allowance[98] provides a preferential, interest-free loan: up to EUR 31 000 (HUF 10 million), for married couples who are ready for childbearing. The allowance is available for parents to children born after 30 June 2019. Upon the birth (or adoption) of the first child, the repayment will be suspended for three years. Upon the birth (or adoption) of a second child, the amount of debt will be reduced by 30 %. Upon the birth (or adoption) of the third child, the loan will transform into a non-repayable grant (the debt will be cancelled). If no child arrives within five years, either by birth or by adoption, the spouses should repay the (released) interest, and the preferential loan transforms into a commercial loan.
- The Government Decree No. 1056 45/2019. (III. 12.) on the allowance provided for large families for car purchase[99] sets the eligibility criteria and conditions. The allowance is non-repayable. The allowance may be requested until 31 December 2022. Families with three or more children (foetuses from the 12th week of the pregnancy included) are eligible; married couples, common law partners and single parents also. It should be spent on new cars, with at least seven seats. The maximum amount of the allowance is EUR 7 700 (HUF 2.5 million).
- The Government Decree on the amendment of certain government decrees relating to home-renovation allowances[100] provides for the extension of the Home- renovation Scheme for Families ('CSOK', a preferential credit and non-repayable grants for families with at least two children): the grant may be spent on buying older property or on extending the family home with an additional storey. Moreover, this Decree provides an extension of the mortgage loan relief programme for families: EUR 3 100 (HUF 1 million) relief upon the birth of the second child; EUR 12 400 (HUF 4 million) relief upon the birth of the third child, and an additional EUR 3 100 (HUF 1 million) relief after every further child.
- The Government Resolution on governmental measures to be taken within the framework of the Family Protection Action Plan[101] addresses the plan of a comprehensive crèche service: on the national level, 70 000 crèche places will be available (in day care centres, providing services for children up to the age of three years) by 30 June 2022. Moreover, this resolution provides that mothers of at least four children (including adopted children) will not have to pay personal income taxes from 2 January 2020.

96 For the whole speech, see: Prime Minister Viktor Orbán's 'State of the Nation' address, available at: http://abouthungary.hu/speeches-and-remarks/prime-minister-viktor-orbans-state-of-the-nation-address/.
97 CSOK is the abbreviation of the phrase *'családok otthonteremtési kedvezménye'* (Home-Creation Scheme for Families).
98 Hungary, Government Decree No. 44/2019 (III. 12.) on the Baby-Waiting Allowance, of 12.03.2019.
99 Hungary, Government Decree No. 1056 45/2019 (III. 12.) on the allowance provided for large families for car purchase, of 12.03.2019, entered into force on 1.07.2019.
100 Hungary, Government Decree No. 1068 46/2019 (III. 12.) on the amendment of certain government decrees relating to home-creation allowances, of 12.03.2019.
101 Hungary, Government Resolution No. 1110/2019 (III. 12.) on governmental measures to be taken within the framework of the Family Protection Action Plan, of 12.03.2019.

- The Act XXXII of 2019 on the legislative changes necessary for the introduction of the Family Protection Action Plan (entered into force on 1 July 2019)[102] addresses two elements of the Action Plan: the Baby-Waiting Allowance (provisions on the role of the Hungarian State as guarantor regarding the loans provided within this allowance scheme), and an amendment of the Act on Personal Income Tax;[103] (Article 1); the car purchase programme (amendment of the Act on Personal Income Tax).
- Bill no. T/6191 on the amendment of certain acts relating to the introduction of the childcare allowance for grandparents was submitted on 21 May 2019 by the Government:[104] according to the bill, working grandparents will be entitled to leave to take care of their grandchildren (until the second birthday of the child; in cases of twins, up to the third birthday) and for childcare allowance (employment-conditional, the amount of the fee depends on the income of the grandparent), from 1 January 2020.

In the case of the Baby-Waiting Allowance (the flagship measure of the Family Protection Action Plan), only married couples are eligible. Thus, since marriage is an eligibility criterium for the allowance, in the event of a divorce the loan contract will be terminated, and the released interest should be repaid. All the other measures of the Family Protection Action Plan are available for single parents or for common law partners as well, including same-sex couples (according to Hungarian Law, marriage can only be concluded between a man and a woman).[105]

According to the eligibility criteria of the Baby-Waiting Allowance, only one year of employment within the framework of the Public Work Scheme is recognised when calculating the required three years of employment.[106] This criterion may disproportionally affect those families who live in the economically disadvantaged regions of the country.

Online source:
http://csalad.hu/csaladvedelmiakcioterv/hirek

Successful procedure launched by civil society organisation to enforce equality body decision on providing accessibility

Disability

In 2016, a complainant with a disability initiated a case with the Equal Treatment Authority because in the course of a major reconstruction of one of the busiest Budapest tramway lines, accessibility of some tram stops was not guaranteed. The Authority concluded that the requirement of equal treatment had been breached and obliged the Budapest Public Transportation Company (BKK) to guarantee the accessibility of two tram stops and inform the Authority thereof by 15 July 2018.[107] However, as this had not happened by January 2019, the National Federation of Disabled Persons' Associations requested information from the Equal Treatment Authority about what measures had been taken to enforce the decision.

When the Authority informed the Association that BKK referred to budgetary difficulties as the reason for non-compliance, the association officially requested the launching of an enforcement procedure. Since 1 January 2018, the National Tax and Customs Authority has been vested with the task of enforcing administrative decisions, including those of the Equal Treatment Authority. Upon official notification from

102 Hungary, Act XXXII of 2019 on the legislative changes necessary for the introduction of the Family Protection Action Plan, of 1.04.2019, available at: https://mkogy.jogtar.hu/jogszabaly?docid=A1900032.TV#.
103 Hungary, Act CXVII of 1995 on Personal Income Tax, of 22.12.1995, Annex 1, Point 7, available at: https://net.jogtar.hu/jogszabaly?docid=99500117.TV.
104 Hungary, Bill No. T/6191 on the amendment of certain acts relating to the introduction of the childcare allowance for grandparents, of 21.05.2019, available at: https://www.parlament.hu/irom41/06191/06191.pdf.
105 The eligibility of same-sex couples was confirmed by the Ministry of Human Resources in relation to the Home-Creation Scheme for Families ('CSOK'), in 2016, after a dispute with an NGO. See the press release of Háttér Society, *'Meleg és leszbikus pároknak is jár a CSOK'* (Lesbian and gay couples are also eligible for the Home-Creation Scheme), 22.07.2016, available at: http://hatter.hu/hirek/sajtokozlemeny-meleg-es-leszbikus-paroknak-is-jar-a-csok.
106 Hungary, Article 4(2) Point (d) of Government Decree No. 44/2019 (III. 12.) on the Baby-Waiting Allowance, of 12.03.2019.
107 Hungary, Equal Treatment Authority, decision No. EBH/439/2017.

the Equal Treatment Authority, the tax authority called on BKK to voluntarily comply with the decision and secure the accessibility of the tram stops by 30 June 2019. (In the absence of voluntary compliance, the tax authority can impose fines on the obliged entity until the respective administrative decision is complied with.) Although this deadline has not been met either, the transportation company informed the concerned authorities and the association in June 2019 that it had launched the public procurement in April 2019 for the necessary construction work and that once the procurement procedure was completed the works could commence, which means that the tram stops will be accessible before the end of the year.

The case shows the difficulties of enforcing the decisions of the Equal Treatment Authority that require sufficient financial resources to comply with and also how – in the absence of sufficient human resources – it may be difficult for the Authority to follow up on the enforcement of its decisions. However, it is also an example of how effective action by CSOs can build on and complement the work of the authority.

Online source:
http://www.meosz.hu/blog/villamosmegallok-akadalymentesitese/

Ireland

POLICY OR OTHER RELEVANT DEVELOPMENTS

Extension of parental leave

The Parental Leave (Amendment) Act 2019[108] increasing parental leave, has been signed by the President on 22 May 2019 and is awaiting the relevant orders from the Minister for Justice and Equality to bring it into effect.

Under Irish legislation there is 26 weeks paid maternity leave and 16 weeks unpaid additional maternity leave; 24 weeks paid adoptive leave and 16 weeks unpaid adoptive leave; 2 weeks paid paternity leave and presently parental leave of 18 weeks to be increased to 22 weeks effective 1 September 2019 and to 26 weeks from 1 September 2020. The children's age limit up to which parental leave may be taken is to increase from 8 years to 12 years.

In addition, the Minister for Employment Affairs and Social Protection has announced that parents will be entitled to a number of weeks of paid parental leave as of 1 November 2019. It provides that all new parents will be entitled to two weeks paid parental leave in the first year following their baby's birth or placement by adoption. This applies to all parents whether employed or self-employed. Initially, there will be two weeks leave rising to seven weeks paid leave over a number of years. This leave is non-transferable, and it is on a 'use it or lose it' basis. The rate will be EUR 245 gross per week. It is envisaged up to 60 000 parents will be able to benefit from it over the next few years. The General Scheme of the Parental Leave and Benefits Bill 2019 has been published to put such leave and benefits into effect.

The legislation extending parental leave commenced as a Private Members' Bill in 2017 by an Opposition member of the *Oireachtas* (parliament) and was accepted by government. Prior to the passage of that legislation, the Minister for Employment Affairs and Social Protection announced that for the first time, there would be paid parental leave, effective 1 November 2019. It is to be introduced on a staggered

108 Ireland, Parental Leave (Amendment) Act 2019, of 22.05.2019, available at; https://www.oireachtas.ie/en/bills/bill/2017/46/.

basis. For the first time, the self-employed will have an entitlement to parental leave, i.e. the paid parental leave.

Online source:
http://www.justice.ie/en/JELR/General_Scheme_of_the_Parental_Leave_and_Benefit_Bill_2019.pdf/Files/General_Scheme_of_the_Parental_Leave_and_Benefit_Bill_2019.pdf

National equality body requests local government bodies to conduct a review of compliance in the field of accommodation for the Traveller community

Racial or ethnic origin

On 28 June 2019, the Irish Human Rights and Equality Commission (the equality body, IHREC) announced that it has instigated equality reviews of Traveller accommodation provision by requesting all local government authorities to conduct an audit on the level of equality of opportunity and/or discrimination that exists in relation to members of the Traveller community who wish to avail of Traveller specific accommodation. The bodies must also review their practices, procedures and other relevant factors, and report back to IHREC within 10 weeks.

This development marks a rare use of the Commission's power to trigger equality reviews. In this instance, the Commission has formally invited every local authority to address Traveller accommodation provision, which falls under the ambit of the Equal Status Acts 2000-2018 which prohibit discrimination in the field of housing on the Traveller community and race grounds.

According to the IHREC, the review was prompted by failures on the part of local authorities to use funding set aside for Traveller specific accommodation, as well as by evidence of persistent discrimination in its legal case work. Mirroring previous years, in 2018, local authorities drew down just EUR 6.264 million of the EUR 12 million funding allocated by the government for the provision of such accommodation.[109] In June 2019, the European Commission against Racism and Intolerance was 'shocked' that this pattern of under-spending continues 'while many Travellers continue to live in squalor and deprivation'.[110] Moreover, the European Committee of Social Rights upheld a complaint against Ireland in 2015, finding that a shortfall in sufficient accommodation for Travellers, as well as inadequate site conditions, violated Article 16 of the European Social Charter.[111]

Local authorities are due to conduct the equality reviews by September, at which time the IHREC may take further compliance and/or enforcement actions. It has the option of inviting or directing the bodies to undertake an equality action plan. If a local authority declines to undertake an equality review, the IHREC may conduct one instead and it ultimately has the power to issue notices seeking compliance with the terms of an equality action plan.

Online source:
https://www.ihrec.ie/human-rights-and-equality-commission-launches-national-review-into-council-traveller-accommodation-provision/

109 Ireland, Minister of State at the Department of Housing, Planning, Community and Local Government, Damien English TD, Written Answers, Housing, 28.05.2019, *Dáil* Éireann, https://www.oireachtas.ie/en/debates/question/2019-05-28/504/#pq_504.

110 European Commission against Racism and Intolerance (2019) *ECRI report on Ireland (fifth monitoring cycle)*, CRI(2019)18, at 67, available at: https://rm.coe.int/fifth-report-on-ireland/168094c575.

111 European Committee of Social Rights (2016) *European Roma Rights Centre (ERRC) v Ireland, Complaint No. 100/2013*, available at: http://hudoc.esc.coe.int/eng/?i=cc-100-2013-dmerits-en.

Italy IT

LEGISLATIVE DEVELOPMENT

The Budget Act for 2019 on maternity, paternity leave and smart working

Gender

The Budget Act for 2019 provided for some changes regarding the protection of motherhood and fatherhood and introduced priority criteria for categories of people to be granted permission to perform smart working.[112] Smart working has been promoted by Act No 81/2017, of 22 May 2017 (Provisions for self-employed and flexible employees), with the aim of improving productivity for companies and to facilitate the reconciliation between work and private life. The principle of smart working is that an employee can choose where, how, and sometimes also when, the work is performed. Smart working is mainly established by an individual and voluntary agreement between the employer and the worker.

Under the Budget Act 2019, the compulsory paternity leave, to be taken within the first five months after the child's birth, is raised from four to five days in 2019.[113]

Article 1 paragraph 485 modified Article 16 of Decree No 151/2001 on the Protection of Motherhood and Fatherhood, stating the worker's right to postpone the whole period of the compulsory maternity leave until after the birth of the child, subject to the condition that both the specialist of the National Health Service and the doctor in charge of health surveillance in the company certify that this choice is not detrimental to the health of the mother or of the child.

The continuation of the measure regarding compulsory paternity leave for 2019, shows continued attention to the sharing of care duties among parents, as this measure has not only been confirmed but also extended, with an additional day of leave. Nevertheless, a real change of direction in this sense would require both a remarkable increase in the length of the period of leave and its confirmation as a permanent measure, in accordance with the ongoing developments at EU level.

With regard to smart working, which has recently been regulated by Act No 81/2017,[114] scholars already highlighted some critical aspects, including concerns regarding the respect of the principle of equality. Article 1 paragraph 486 of the new Bill provides that certain categories of employees are to be given priority when requesting the right to smart working conditions in order to be able to reconcile private and work life.[115] Other categories, such as working fathers or disabled workers, are not entitled to the same priority.

The choice of the legislator to entitle only working mothers – instead of both working mothers and fathers – to a priority in accessing smart working arrangements is remarkable, especially if we recall the clear equality principles stated by the case law of the Constitutional Court,[116] which progressively extended to fathers the mothers' right to take care of children, and which have finally been transcribed in the Act on Protection of Motherhood and Fatherhood.

112 Italy, Act No. 145 of 30.12.2018, OJ No. 302 of 31.12.2018, ordinary supplement No. 62.
113 Italy, Article 1 para 354 of Act No. 145/2018 (the Budget Act 2019).
114 Italy, Act No. 81 of 22.05.2017, OJ No. 135 of 13.06.2017.
115 The two categories are: working mothers within three years after the end of the compulsory maternity leave and working parents of seriously disabled persons in line with requirements of Act No. 104/92.
116 See among others: Constitutional Court decisions No.1 of 19.1.1987 and No. 385 of 14.10.2005.

After the Budget Act came into force, the main trade unions and the Public Administration, as well as some national companies, signed agreements concerning smart working, which only provide the priority criteria granted by Article 1 paragraph 486, without any extension to other categories of workers.[117]

CASE LAW

A case of gender discrimination in redundancy procedures

Gender

A female employee was dismissed by a company as part of a redundancy procedure during which a large number of women were dismissed. She brought a case of indirect discrimination to the court and complained that her dismissal was unfair as the percentage of dismissed women was higher than what is allowed by law regarding her job classification. In fact, the other two male employees performing the same job, had not been dismissed.

The Tribunal of Palermo ruled on 10 May 2018[118] that the dismissal was unfair as it infringed Article 5 Paragraph 2 of the Act on Collective Redundancy Procedures.[119] This Article provides that, in the case of collective redundancy procedures, there is a cap to the number of female employees that may be dismissed by a company employing a certain percentage of female workers performing the same job. In this case, the judge ruled that the percentage of female dismissals was too high, regarding the specific job classification. In fact, if the company had respected Article 5 Paragraph 2, the plaintiff would not have been dismissed. The judge deemed the dismissal to be null and void and applied the special remedy of reinstatement.

Following the reasoning of the Tribunal, Article 5 Paragraph 2 of the workers' statute regarding redundancy procedures[120] is not a criterion on the basis of which workers can be chosen to be dismissed (these criteria are fixed by Article 5 Paragraph 1 or by collective agreements), instead it is a real ban on dismissal aimed at tackling gender discrimination. It states an absolute presumption of the discriminatory nature of dismissal for which the burden of proof does not rest on the plaintiff. This interpretation has to be appreciated as it clearly points out the *ratio* of the ban on dismissal, allowing the enforcement of the stronger remedy of reinstatement. Article 18 of the Worker's Statute provides for this remedy of reinstatement for individual discriminatory dismissals.[121] This includes the payment of a minimum of a five-month salary, plus the reimbursement of possible further damages and welfare contributions from the dismissal until the reinstatement. Alternatively, with regard to the latter, the worker can choose to ask for an allowance of 15-months' salary to be reckoned on the last total remuneration, which is not subject to social contributions, in addition to the reimbursement of damages mentioned above.

POLICY AND OTHER RELEVANT DEVELOPMENTS

The Government's commitment in tackling gender-based and domestic violence

Gender

A bill on the improvement of criminal and redress protection of victims of domestic violence has been approved by the Chamber of Deputies on 3 April 2019 by a large majority and is standing for approval at the Senate. The Bill is called the 'Red Code', referring to the colour red as a reminder of the bill's

117 Italy, Agreement on the Experimentation of Smart Working signed by the National Labour Inspectorate on 8.01.2019, published on https://www.ispettorato.gov.it/it-it/progetti/Documents/Protocollo-intesa-INL-OO-SS-per-avvio-sperimentazione-lavoro-agile-08012019.pdf; Agreement on Smart Working signed by the Revenue Agency on 10.01.2019, published on https://www.fisaccgilaq.it/wp-content/uploads/2019/01/Smart-working-10-gen-2019.pdf; Agreement on Smart Working signed by the Postal Services Company on 23.01.2019.

118 See comment by Cataudella M.C. (2019), in *Orientamenti di giurisprudenza del lavoro nn. 2018*, p. 572.

119 Italy, Act No. 223 of 23.07.1991, Workers' Statute, OJ No. 175 of 27.07.1991, o.s. No. 43.

120 Italy, Article 5 of Act No. 223 of 23.07.1991 on Collective redundancy procedures, OJ No. 175 of 27.07.1991, o.s. No. 43.

121 Italy, Article 18 of Act. No. 300 of 20.05.1970, on the Workers' Statute, OJ No. 131 of 27.05.1970.

necessity, as the problem of domestic and gender-based violence is still widespread in Italy. The Bill is also aimed at accelerating legal proceedings regarding domestic violence and gender-based violence and consequently regulating the issue of emergency orders for preventing violence.

The bill is a further step towards full implementation of the Istanbul Convention,[122] as it strengthens and completes numerous laws implementing the Istanbul Convention which were passed over the last years regarding amendments to the penal code and the code of criminal procedure. In particular, the bill's aim is to accelerate legal proceedings regarding domestic violence against women and to improve privacy in these cases. Specific crimes are also introduced by this bill and include reputational damage and online revenge porn. Compulsory professional training is provided for police forces regarding domestic and gender-based violence. The 'Red Code' also intends to fill the gap of the absence of specific provisions on online violence and online harassment of women and girls.

The bill largely takes the advice of the Parliamentary Commission which was set up in 2017 in order to investigate the scale and the causes of femicide and violence against women. The Commission, in light of the principles of the Istanbul Convention, recommended the improvement of criminal legislation in relation to child witnesses; the establishment of emergency orders to prevent gender-based violence, reputational damage and femicide; the promotion of education regarding gender-based violence; professional training of the police, social services and physicians; the development of guidelines for the media on how to report on gender-based violence; the adoption of specific norms regarding online violence and online harassment; and the improvement of psychological assistance to male perpetrators of violence.

On the whole, this new bill will mark a step forward in tackling gender violence, as changes regarding substantial and procedural criminal law focus both on the protection of the victim (with the 'urgency procedure', the improvement of precautionary measures, and the introduction of new crimes) and to the prevention of gender-based violence (providing for professional training of experts, and health and social assistance aimed at the rehabilitation of the perpetrator).

Online sources:
https://temi.camera.it/leg18/temi/tl18_il_contrasto_alla_violenza_contro_le_donne.html
http://www.pariopportunita.gov.it/wp-content/uploads/2018/03/testo-piano-diramato-conferenza.pdf
http://www.senato.it/documenti/repository/commissioni/femminicidio/DocXXII-bis_9.pdf

Update of the guidelines on the promotion of equal opportunities and the fight against gender discrimination and gender violence in the Civil Service

Gender

At the end of June 2019, the Minister of Public Administration published Directive No. 2/2019, stating guidelines for the promotion of equal opportunities in the Public Sector and strengthening the role of the Guarantee Committee for Equal Opportunities, Employee Wellbeing and Non-Discrimination at Work (the CUG).[123]

The guidelines recall different bans on gender discrimination and ask Public Administrations to ensure the enforcement of these provisions, in particular regarding the implementation of the compulsory three-year positive action plans, gender balance on boards of examination during hiring procedures in the public sector, and tackling the gender pay gap. Additionally, the guidelines recognise that gender mainstreaming is not yet sufficiently taken into consideration in the Public Sector. The guidelines highlight professional training as a central measure to bring about a real change regarding women's representation in high-

122 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), signed by Italy on 27.09.2011 and ratified by Act No. 77 of 27.06.2013.
123 The Directive will replace the Directive of 23 May 2007 on the promotion of Equal Opportunities and will update some guidelines already provided for by the Directive of 4 March 2011 on the functioning of the CUG.

level positions in the Public Sector, to promote a better conciliation between working and private life, and to tackle gender violence.

Moreover, the guidelines strengthen the role of the CUG, concerning its composition and tasks. The CUG, which has a branch in each Public Administration, consults, supports and monitors the promotion of equal opportunities, enhances employee wellbeing and prevents discrimination. The guidelines also establish a Network of CUG, mainly aimed at sharing best practices, and a coordination with other institutions, such as Equality Bodies. Moreover, the CUG has to provide the competent Minister with an annual report on the implementation of the three-year positive action plan and an analysis of gender equality in working conditions, considering issues of gender representation on boards of examination for hiring procedures in the public sector, gender pay gap, conciliation between working and private life, and gender violence.

Finally, the guidelines specify the procedures regarding the monitoring of the implementation of the Directive, which is entrusted to a Group of eight representatives.[124] These representatives, in collaboration with the National Equality Advisor, must also provide the necessary support to different Public Administrations in implementing the Directive, as well as propose possible amendments or integrations.

Online source:
http://www.funzionepubblica.gov.it/articolo/dipartimento/27-06-2019/direttiva-n219-materia-di-promozione-della-parita-e-delle-pari

LV Latvia

LEGISLATIVE DEVELOPMENT

Legal amendments regarding adoption leave

Gender

On 6 June 2019, the Parliament adopted the amendments to the Labour Law and the Law on Maternity and Sickness Insurance providing the right to adoption leave and entitlement to social insurance allowance during such leave.[125] In particular, one of the parents will have the right to a 10-day long paid adoption leave in the case of adoption of a child up to 18 years old. The amendments entered into force on 1 September 2019.

Previous regulations provided for the same right of adoptive parents – by which one of the parents is entitled to 10-day adoption leave with the right to social insurance allowance. However, they were only entitled to this if the adoptive child is not older than three years of age. The new legal regulation lifts the age limit of the adoptive child to 18 years. In substance, adoptive leave is granted under the same terms as paternal leave – both are 10 days and a parent is entitled to statutory social insurance allowance corresponding to 80 % of the average social security contribution salary. With regard to the right to parental leave, adoptive parents have the same rights as biological parents, so they are entitled to the parental leave and receive parental allowance on the same terms.

124 From the eight representatives, four are from the Equal Opportunities Department and four from the Department of the Civil Service, both set at the Prime Minister's Office.

125 Latvia, Amendments to the Labour Law (*Grozījumi Darba likumā*), OG No. 123, 19.06.2019, available at: https://likumi.lv/ta/id/307632-grozijumi-darba-likuma; and Amendments to the Law on Maternity and Sickness Insurance (*Grozījumi likumā "Par maternitātes un slimības apdrošināšanu"*), OG No. 123, 19.06.2019, available at: https://likumi.lv/ta/id/307625-grozijumi-likuma-par-maternitates-un-slimibas-apdrosinasanu-.

Online sources:
https://likumi.lv/ta/id/307632-grozijumi-darba-likuma
https://likumi.lv/ta/id/307625-grozijumi-likuma-par-maternitates-un-slimibas-apdrosinasanu-

CASE LAW

Ombudsman issues recommendations to supermarket and security company in an alleged racial discrimination case

Racial or ethnic origin

On 29 May 2019, the Ombudsman issued an opinion in a verification case concerning alleged racial discrimination by a security guard in a supermarket.[126]

The complaint was submitted by a man of South Asian origin who was in a supermarket when he was approached by a security guard who shouted at him, using offensive language related to his ethnic origin. The complainant also claimed that he had not been served by the supermarket personnel, who had allegedly referred to his skin colour and the fact that he was an immigrant.

The Ombudsman attempted to examine whether racial discrimination or hate speech had taken place, notably on the basis of the surveillance video. As the video had no sound, however, the Ombudsman noted that the security guard had targeted the complainant among all the customers but could not confirm nor refute the allegedly abusive comments or the alleged refusal to provide goods. Concerning the security company, the Ombudsman concluded (on the basis of written materials he received from the company and from the specific case) that he was not convinced that 'the company is able to identify the principle of prohibition of discrimination, its forms and types, inform their staff accordingly, as well as conduct preventive actions to avoid discrimination.'

The Ombudsman issued the following recommendations:

1) To the supermarket – to train its personnel on prevention of discrimination within six months following the receipt of the opinion, and to submit to the Ombudsman relevant training materials or copies of internal regulations.
2) To the security company – to submit training materials or copies of internal regulations to the Ombudsman within three months, to substantiate that the company did provide information to their personnel on potential situations which can lead to discrimination.
3) To both respondents – to provide documents testifying that the security guard no longer works in the supermarket chain.

Although racial discrimination could not be established, this is one of the rare cases when the Ombudsman has issued a lengthy opinion which goes into some detail regarding the relevant concepts of racial discrimination.

Online sources:
http://www.tiesibsargs.lv/uploads/content/atzinumi/28052019_atzinums_maxima_g4s_1559301727.pdf
https://likumi.lv/doc.php?id=23309

126 Latvia, Ombudsman (2019), Opinion in verification case No. 2019-21-26A, of 29.05.2019.

MT Malta

POLICY AND OTHER RELEVANT DEVELOPMENTS

Gender balance in Parliament

Gender

A consultation document *'Gender Balance in Parliament: Reform'*, drafted by the Technical Committee for the Strengthening of Democracy, was presented with the aim of tackling the under-representation of women in parliament. The document contains legislative proposals for Constitutional amendments.

It proposes a Gender Corrective Mechanism which respects the current electoral system which is established by the Constitution of Malta and regulated by the General Elections Act.[127] The Constitutional amendments being proposed in this consultation document seek to introduce a mechanism that is triggered once the already established electoral process is concluded. This is done in order to get a clear and complete picture of the proportion of seats held by Members of Parliament on the basis of sex, in order to establish the percentage of the under-represented sex. The proposed amendments refer to 'the under-represented sex' in a way that they do not interpret the current scenario in Malta which, up until now, was always the female sex, as a general rule. This principle made it possible to draft Constitutional amendments that are applicable according to necessity and according to social trends which the country may be experiencing at that particular moment in time, thereby ensuring that, irrespective of the under-represented sex at the time, this mechanism will ensure a more balanced gender representative Parliament.

The proposal suggests that additional seats (or top-up seats) be allocated in the eventuality that the under-represented sex obtains a percentage of less than 40 %. The proposed mechanism is to be applied in such a way to bring the percentage representing the under-represented sex nearer to 40 %. Nevertheless, in each election, the maximum number of additional seats proposed is 12. In the eventuality that the under-represented sex obtains a percentage equivalent to, or more than 40 %, the proposed mechanism will not be needed. This proposal requires Constitutional amendments.

Online source:
https://meae.gov.mt/en/Public_Consultations/OPM/Pages/Consultations/GenderBalanceinParliament.aspx

NL Netherlands

LEGISLATIVE DEVELOPMENT

Law on statutory protection for transgender- and intersex persons adopted by Parliament

Gender

The law proposal to include a prohibition on discrimination on the grounds of sex characteristics, gender identity and gender expression in the General Equal Treatment Act (GETA) was accepted on 3 July 2018 by the Second Chamber of Parliament and on 12 March 2019 by the First Chamber. It will enter into force on a date which has yet to be decided.

127 Malta, General Elections Act, Chapter 354, Laws of Malta, available at: http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8824&l=1.

The inclusion into the GETA of the prohibition on discrimination on the grounds of sex characteristics, gender identity and gender expression is mainly symbolic, as discrimination based on these grounds was already forbidden. Nevertheless, it is now explicitly forbidden by law.

Online source:
https://www.eerstekamer.nl/wetsvoorstel/34650_initiatiefvoorstel_bergkamp

POLICY AND OTHER RELEVANT DEVELOPMENTS

Law proposal on equal pay for women and men

Gender

On 7 March 2019, a law proposal entitled 'Act on Equal Pay of women and men' was submitted to Parliament jointly by four political parties. The most important articles of the proposed law are the following:

- Reversal of the burden of proof. Employers with 50 or more employees should apply for a certificate which shows that they apply the standard for equal pay. If they do not have such a certificate and a person states that he or she is not paid equally, the assumption is that this is indeed the case. The employer may try to refute this assumption.
- Any employer with 50 or more employees will have to provide information in its annual report about differences in pay between employees who carry out work of (almost) equal value. If unequal pay exists, this must be reported in the annual report together with information on the way in which these differences will be eliminated.
- The Labour Inspectorate will be given the task of monitoring the application of the law and of imposing fines in cases of non-compliance.
- Employees in companies of 50 or more employees will get the right to ask for (anonymised) information about the salary of colleagues who do the same work or work of (almost) equal value.

The proposed Law is important because the gender pay gap in the Netherlands is decreasing at a very slow pace, and the existing legislation and policies appear to have little effect. Moreover, there is almost no case law, and very few cases are brought to the Equality Body. Transparency and the burden of proof are problematic when equal pay is concerned. At present, an employee who thinks she might be paid unequally first has to establish how much her colleagues earn and must subsequently prove in court that she performs equal work or work of equal value compared to her colleague(s). Only once this has been established, the burden of proof shifts to the employer. The proposed law aims to amend this situation, and to include the Labour Inspectorate which, at present, has no role in the field of pay discrimination. Moreover, a reporting requirement will be introduced.

Online source:
https://zoek.officielebekendmakingen.nl/dossier/35157

Job vacancies at Technical University Eindhoven for women only

Gender

The board of the Technical University of Eindhoven (TU/e) announced on 17 June 2019, that as of 1 July 2019, job vacancies for permanent academic staff will be open to women only for a period of six months. If no suitable female candidate is found within these six months, the vacancy will be opened up to men as well, after which the requirement will apply that at least one man and one woman are to be employed. The female academics appointed will be given an extra grant of EUR 10 000 to perform research and they will be granted a mentor. The procedure will be evaluated by the end of 2020, after which the TU/e will decide on a yearly basis which job vacancies will initially be open for women only.

The aim of this measure is to improve the TU/e gender balance. In 2018, the TU/e was, as during the previous years, the university with the lowest number of female professors in the Netherlands (12.6 %). This number is increasing (it was 5.7 % in 2011), but at a very slow pace. At present, there is room for an active policy, as there will be 150 academic job vacancies in the coming years. Moreover, the Dutch Government will allocate an additional EUR 60 million to research in the field of science and technology.

The number of female professors in the Netherlands is rather low and is only very slowly increasing, therefore more radical measures appear to be necessary than the soft law initiatives that have been taken so far.

The compatibility of the TU/e policy with EU law has been the subject of debate. In 2011, the Equality Body ruled that the nomination by the University of Groningen of 17 female senior lecturers for a future appointment as a professor, conflicted with CJEU case law. In this case, only female senior lecturers were asked to submit their file with a view to an appointment as a professor.[128] In an opinion from December 2012, however, the Equality Body reached a different view in a case concerning the (technical) University of Delft, which also concerned an increase in the number of female professors.[129] The University of Delft had reserved 10 tenure tracks for female academics. The Equality Body ruled that in this specific case this was allowed, as the disadvantageous position of women at the University was persevering and structural and the University Board had already taken many measures to change this situation, but without any significant effect. The Technical University Eindhoven takes the view that its situation is comparable to the situation in Delft, and plans for job vacancies to be opened up to men as well after six months.

Online source:
https://www.tue.nl/en/working-at-tue/scientific-staff/irene-curie-fellowship/

MK North Macedonia

LEGISLATIVE DEVELOPMENTS

New law on Prevention and Protection against Discrimination adopted

All grounds

On 16 May 2019, the Assembly of the Republic of North Macedonia (hereinafter the Parliament) adopted a new Law on Prevention and Protection against Discrimination (new ADL).[130] This law will replace the 2010 Law on Prevention and Protection against Discrimination (old ADL). There were many reasons for adopting a new law, but the main ones were that the previous law was not fully in line with the EU acquis and it did not provide a framework for effective protection against discrimination.

Overall, the new ADL brings some much-needed improvements compared to the previous laws. The most important changes brought by the new law are:

The grounds of discrimination

The old ADL: (1) did not include sexual orientation and gender identity among the explicitly protected discrimination grounds; (2) limited the scope of disability to 'mental and physical disability' alone; and (3) included an open-ended provision, but the wording went beyond 'any other ground' and into a ground arising from another national law or ratified international treaty (Article 3). The new ADL resolves all of

128 Netherlands, Institute for Human Rights, Opinion No. 2011-198, available at www.mensenrechten.nl. See also *JAR* 2012/78 with a comment by E. Cremers-Hartman.
129 Netherlands, Institute for Human Rights, Opinion No. 2012-195, available at www.mensenrechten.nl. See also *JAR* 2013/41 with a comment by E. Cremers-Hartman.
130 North Macedonia, Law on Prevention and Protection against Discrimination, Official Gazette No. 101/2019 of 22.05.2019.

these issues. Article 5 of the new ADL: (1) explicitly includes sexual orientation and gender identity and maintains all other grounds protected by EU directives, including by (2) using a wider formulation of disability as just 'disability'; and (3) ends the open-ended provision in 'any other ground'. In addition, the new ADL defines a person with a disability as a 'person having a long-term physical, intellectual, "mental" or sensory impairment, which in interaction with various social barriers may prevent the person's full and effective participation in society on an equal basis with others' (Article 4, paragraph 1, point 3).

The forms of discrimination

The old ADL (1) had a complicated definition of direct discrimination; (2) did not include several forms of discrimination, such as segregation, assumed and associated discrimination, and traditions and traditional practices harmful to women and girls as a particular form of discrimination; (3) had discrimination in relation to certain fields of application of the law defined as separate forms of discrimination, such as 'discrimination in access to goods and services', whereas there were no mirroring articles for the other fields; and (4) while including multiple discrimination, it did not explicitly include intersectional discrimination. The new ADL (1) replicates fully the definition of direct discrimination from the 2000/43 and 2000/78 directives; (2) prohibits and defines segregation, assumed discrimination, associated discrimination; (3) removed 'discrimination in access to goods and services' as a separate form of discrimination; and (4) included explicitly intersectional discrimination. The law failed to include traditions and traditional practices harmful to women and girls as a separate form of discrimination.

The exceptions

The old ADL was consistently criticised for its extensive list of exceptions. The new ADL provides a much more concise and clear scope of exceptions, which are titled not as exceptions but as 'Measures and actions which are not discrimination'. In Article 7, the new ADL provides a definition of affirmative action, and prescribes that different treatment of Macedonian citizens compared to non-citizens, and the genuine and determining occupational requirement (which replicates the current Article 14(2)), will not be considered to be discrimination.

The equality body

The old ADL also raised issues with regard to the equality body – the Commission for Protection against Discrimination (CPAD), the main ones being: (1) the appointment criteria for the Commissioners were too general; (2) the criteria for dismissal of the Commissioners were not clear; and (3) Commissioners were not appointed full time and the establishment of an administrative support unit was prohibited. Under the new ADL, these matters are resolved. The newly titled Commission for Prevention and Protection against Discrimination (CPPD) will (1) be composed of members appointed against a list of criteria which explicitly ask for five years of experience in equality and non-discrimination matters; (2) the criteria for dismissal are clearly stated in a separate article; and (3) the Commissioners are full-time appointees who will work with the support of an administrative unit.

The sanctions

The sanctions in the old ADL were criticised for not holding up to EU standards of being dissuasive, effective and proportionate. The new ADL will change this but will still not resolve the overall issue with misdemeanour sanctions in the country, which remain fundamentally flawed, in terms of not adequately reflecting the nature of the misdemeanour.

Procedural matters

The old ADL (1) did not provide for situation testing as an accepted method for proving discrimination; (2) contained a contested definition of the shifting of the burden of proof requesting facts and proofs about the alleged discrimination; and (3) did not explicitly allow for actio popularis. The new ADL resolves all of these points: (1) by explicitly defining situation testing and prescribing that the courts can use situation testing as means for proving discrimination; (2) it brings the shifting of the burden of proof in

line with EU acquis; and (3) it explicitly allows actio popularis. In addition, the new ADL lifts court fees for discrimination cases, thus increasing the accessibility to courts as forums for seeking protection against discrimination.

Other matters

The old ADL did not prescribe an obligation for existing laws regarding discrimination to be brought in line with the ADL. This resulted in an unharmonised national legal framework on non-discrimination. The new ADL prescribes such an obligation under Article 51.

New Law on Social Protection Adopted

All grounds

On 22 May 2019, the Assembly of the Republic of North Macedonia (hereinafter the Parliament) adopted a new Law on Social Protection (LSP).[131] This law will replace the 2009 Law on Social Protection (the old law). The LSP entered into force on 23 May 2019. The adoption of the new law is the result of a thorough overhaul of the social protection system with the participation of relevant Civil Society Organisations. This forms the core of the social reform which the current government has set out to complete during its four-year mandate. It includes complete de-institutionalisation; improvement of the services and an increase in the effectiveness of the measures which are to take and keep people out of poverty. The reform is led and coordinated by the Ministry of Labour and Social Policy.

Several provisions of the law are of importance for equality and non-discrimination. The LSP applies to all citizens and foreigners who reside in the country, as well as asylum seekers, refugees, persons under subsidiary care, as well as citizens and foreigners with temporary residence under conditions established under the law (Articles 13 and 14). The law stipulates that all its provisions should be understood as being gender neutral, applying equally to men and women (Article 5).

The LSP contains a chapter on principles applicable to the field of social protection. One of the principles is 'equal treatment and non-discrimination' (Article 16). According to this Article, the beneficiary of social protection has a right to equal treatment. Every form of discrimination in relation to securing a right to monetary assistance, or any other right or service provided for under this law, is prohibited on the grounds of race, colour, origin, national or ethnic belonging, sex, gender, sexual orientation, gender identity, belonging to a marginalised group, language, citizenship, social origin, education, religion or religious belief, political belief, other belief, disability, age, family or marital status, property status, health status, personal or other social status, or any other ground. This replicates fully the list of grounds from the new Law on Prevention and Protection against Discrimination (ADL), adopted on 16 May 2019.

The law does not go into defining the different forms of discrimination or introducing any other equality law provisions. Instead, it refers to the ADL. This is a much-welcomed change which can help secure the position of the ADL as a lex specialis on equality and non-discrimination matters. It is also in line with Article 51 of the ADL which foresees that all laws and bylaws that contain provisions on prevention and protection against discrimination will be aligned with the ADL within two years.

It is also worth mentioning that the LSP defines a person with disabilities as a 'person having a long-term physical, intellectual, "mental" or sensory impairment, which in interaction with various barriers may prevent the person's full and effective participation in society on an equal basis with others' (Article 4, paragraph 1, point 5). This definition replicates the definition from the ADL (Article 4, paragraph 1, point 3), with a difference in 'barriers' in the ADL being specified as 'social barriers', whereas in the LSP these are just 'barriers'. The preparatory materials do not state why this omission was made. It is possible that it was made in order to avoid more narrow interpretations which may arise in a context of social

131 North Macedonia, Law on Social Protection, Official Gazette No. 104/2019 of 22.05.2019.

protection (for example, whether a barrier in an individual house would fall within this scope for the purposes of providing mobility assistance).

POLICY AND OTHER RELEVANT DEVELOPMENTS

The annual reports of the Equality Body and of the Ombudsperson show higher reporting rates in 2018

All grounds

The two national Human Rights institutes with competences on equality and protection against discrimination – the Commission for Protection against Discrimination (CPAD) and the Ombudsperson – published their annual reports for 2018.[132] Overall, compared to 2017, both institutions report a rise in the number of cases received. Neither of the institutions discusses possible reasons behind the rise in reporting.

In 2018, the CPAD reports receiving 132 cases, which is a significant increase from 2017 when it received 59 cases. The reporting in 2018 per discrimination ground has been as follows:

> 'personal or other social status 25 %; political affiliation 21.97 %; health status 9.09 %; sex 9.09 %; belonging to a marginalised group 8.33 %; ethnicity 7.58 %; age 6.06 %; "mental" or physical disability 3.79 %; gender 3.03 %; family or marital status 3.03 %; religion or religious belief 2.27 %; sexual orientation 2.27 %, etc.'.[133]

The reported distribution per field is as follows: 49.24 % in employment and labour relations; 19.70 % in access to goods and services; 8.33 % in judiciary and administration; 6.82 % in education, science and sport; 3.79 % in social security; 2.27 % in public information and the media; 0.76 % in housing; 3.79 % no field stated and 6.82 % in other fields established under the law.[134]

In 2018, the Ombudsperson received 77 cases regarding non-discrimination and equitable representation, which represents 2.23 % of the total number of cases filed (3 458 cases, which is an increase from 2017, when the number of cases was 3 224). This is the highest percentage of cases in this category since the Ombudsperson started to report them separately in 2015. Under the separate category of cases of 'persons and children with disabilities', the Ombudsperson reports having received 21 cases or 0.61 % (compared to 5 cases or 0.16 % in 2017, and 15 cases or 0.4 % in 2016). As was the case in the previous year, the Ombudsperson did not publish detailed statistics on the grounds and fields in which the cases were filed. However, it noted a continuing trend from previous years in that employment remained the dominant field. It also reports that political affiliation is the dominant discrimination ground, followed by ethnic affiliation. Harassment reporting remained high.[135]

Online sources:
https://www.sobranie.mk/materialdetails.nspx?materialId=a554ee4c-74e0-44a2-a5bb-04b4e411c353
http://ombudsman.mk/upload/Godisni%20izvestai/GI-2017/GI-2018.pdf

132 Both reports were submitted to Parliament, as required by law. In addition, the Ombudsperson published the report on its website and held a press conference for the occasion. The CPAD's report can be found on the Parliament's website.
133 The CPAD reported the distribution of cases by discrimination ground in percentages and did not provide a full list (the sentence ends with 'etc.'), as can be seen from this quote.
134 North Macedonia, Commission for Protection against Discrimination (2019), *Annual Report for 2018*, available at: https://www.sobranie.mk/materialdetails.nspx?materialId=a554ee4c-74e0-44a2-a5bb-04b4e411c353.
135 North Macedonia, Ombudsperson (2019), *Annual Report for 2018*. Available at: http://ombudsman.mk/upload/Godisni%20izvestai/GI-2017/GI-2018.pdf.

NO Norway

LEGISLATIVE DEVELOPMENT

Amendments to the Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (AOT) and Gender Equality- and Anti-Discrimination Act (GEADA)

Gender

On 11 June 2019, Parliament approved the amendments to the Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (AOT)[136] and Gender Equality- and Anti-Discrimination Act (GEADA).[137]

The amendment of the AOT has given the Equality- and Anti-Discrimination Tribunal the authority to enforce Article 13 regarding the prohibition against sexual harassment in the Gender Equality and Discrimination Act (GEADA), and to impose redress in cases of sexual harassment in the workplace and compensation in other contexts. The Tribunal will be the only administrative complaint mechanism to treat individual complaints on sexual harassment. The Tribunal will also be given power to award redress or compensation for non-monetary damage in cases where a breach of the anti-discrimination legislation on sexual harassment is found in a workplace, or in less complicated cases (simple matters). The Tribunals decisions will be directly enforceable in cases where compensation has been awarded. The Tribunal will, as it has been up to now, be organised as a collegial tribunal without full-time employees, but with the support of part-time staff or secretariat. The members of the tribunal must, as they did previously, all have formal judge qualifications, meaning a law degree and relevant experience.

The Tribunal is now divided into departments, each led by their head of department. One member of the Tribunal is appointed as administrative manager of the entire tribunal.

The amendment of GEADA has strengthened the Equality and Anti-Discrimination Ombud's authority to provide assistance and guidance in cases of sexual harassment and equality in general. An important new task of the Ombud is to follow up on the duty of public and private employers' duties to promote equality, and report on equality and non-discrimination (including equal pay). It is specified in AOT that the Ombud can cooperate with companies to develop a common approach to how the company can achieve gender equality. The Ombud is entitled to review gender equality reports produced by both public and private employers, analyse the findings and propose improvements and initiatives concerning gender equality policies. The Ombud can also make so-called follow-up visits to the companies.

Provisions have also been adopted to strengthen the employer's obligations to report on equality matters to the authorities. The duties of public and private employers are now more concrete and specified in GEADA, especially when it comes to gender equality. For example, according to the amendment of GEADA Article 26(a), employers shall report on a yearly basis on the current situation regarding gender equality in the company and what actions the company has undertaken to achieve gender equality (for example, in the area of equal pay).

Online source:
https://www.stortinget.no/no/Saker-ogpublikasjoner/Vedtak/Beslutninger/Lovvedtak/2018-2019/vedtak-201819-085/

136 Norway, Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (AOT), No. 50 of 16.06.2017, available at: https://lovdata.no/dokument/NLE/lov/2017-06-16-50.
137 Norway, Act on Gender Equality and Anti-Discrimination, No. 51 of 16.06.2017, available at: https://lovdata.no/dokument/NLE/lov/2017-06-16-51.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Attitudes in the Norwegian population towards equality and anti-discrimination issues, hate speech and the instruments of equality policy

A report on attitudes in the Norwegian population regarding discrimination issues, hate speech and the instruments of equality policy was commissioned by the Directorate for children, youth and family affairs and executed by an independent social science research foundation. The analyses are based on a nationwide survey that was conducted in spring 2018 among 4 443 respondents.[138]

Men and women

There is broad support among the population for gender equality although there is considerably more disagreement between different groups when it comes to whether the Norwegian society has achieved equality, and whether it is necessary to continue with equality policies. People without higher education were more likely to respond that they do not believe that men and women are treated equally in the labour market today, but less likely to express support for gender equality measures, than people from a higher education background.

All grounds

In general, however, some 82 % of respondents across all groups agreed, in whole or partly, that it is an advantage for society if men take paternity leave. This is the only gender equality policy that received equal support among both men and women.

Generally speaking, the report appears to show a significant increase in support for measures promoting gender equality for the population as a whole, compared to previous surveys since the 1980s.[139] Yet more than every third man and every fifth woman agreed that so much emphasis today is placed on helping weak groups that society ends up discriminating against white Norwegian men.

Ethnic and religious minorities

Ethnic and religious minorities (Roma, Romani and Muslims) are the groups that most people believe to be the victims of discrimination in Norway and are also the least popular (among the groups protected under the Equality and Anti-Discrimination Act) as a potential prime minister, neighbour or spouse. While 38 % say that they would rather not have Roma as neighbours, every sixth respondent said that they would not like to have Muslims as neighbours.

One in four stated that they agree fully or in part that some 'races' are smarter than others. As it was impossible for the respondents to say whether they supported the term 'race' as valid or not, the report has been criticised for methodological clumsiness regarding this question, and the author of the report has agreed that one should be careful as to which conclusions can be drawn from this, and edited the report after publication, in order to remedy this.

One out of three respondents stated that they sometimes feel afraid if they have to walk past a group of Muslim men on the street. This unease around Muslims is the single factor with the greatest explanatory power in a regression analysis of attitudes to immigration.

People with disabilities

People are more supportive of measures to prevent discrimination (and of formal sanctions in cases where discrimination or hate speech has been found) against people with disabilities than any of the other groups protected by the Equality and Anti-Discrimination Act. There appears to be little knowledge among

138 Tyldum, G., *Attitudes towards discrimination equality and hate speech in Norway, Fafo report No. 14 2019* www.fafo.no/images/pub/2019/20723.pdf (English summary on pages 14-18).

139 As the surveys were conducted somewhat differently, the results should be interpreted with care.

the population, however, about the experiences of people with disabilities in terms of discrimination and hate speech.

This discrepancy between the will to use resources for equality measures and the unwillingness to recognise that this group is discriminated against can be understood in light of the type of common stereotypical prejudice about people with disabilities. They are often understood as a group for whom we have low expectations but who are not considered to be particularly threatening. According to the researcher, their low degree of participation is thus perceived as 'natural' and not as a consequence of a lack of facilitation, discrimination and other structural constraints.

Sexual orientation, gender identity and gender expression

There are significant differences between different social groups in terms of their attitudes as to whether same-sex couples should be allowed to adopt. The differences are particularly large between age groups; opposition to same-sex couples adopting is more than twice as high for those over 34 compared to those below, and women are far more open to gay adoption than men. There is greater scepticism towards transgender people than homosexuals, both as neighbours, potential prime ministers or family members, although a relatively significant proportion of respondents answered that they did not know what their opinions were with regard to questions related to transgender people.

Policies for promoting equality

There is broad support for a publicly funded policy of equality and anti-discrimination in Norway, and only 7 % say that they do not think that it is right for the government to use resources to promote equality and fight discrimination for any of the groups that are currently protected under the Equality and Anti-Discrimination Act. There is more disagreement about which groups should be targeted by such an equality policy; support is highest for equality measures for people with disabilities and lowest for transgender people.

Online source:
www.fafo.no/images/pub/2019/20723.pdf

PL Poland

LEGISLATIVE DEVELOPMENT

Social security retirement benefits for mothers; the 'Mama 4 Plus' programme

Gender

On 31 January 2019, the lower chamber of the Parliament passed the Law on a parental supplementary benefit (Act on Parental Supplementary Benefit, hereafter: 'Mama 4 Plus').[140] The Act drafted by the Ministry of the Family, Labour and Social Policy introduces a new benefit in the form of a mother's retirement pension, paid from the general retirement fund organised by the Social Insurance Institution (ZUS) or from the special Agricultural Insurance reserved for farmers and their family members (KRUS). All mothers who gave birth to at least four children and stayed at home to raise them, instead of performing paid work, will be entitled to this pension.

The purpose of the benefit is to provide the necessary means of subsistence for retired women, who have resigned from employment or other forms of gainful activity, in order to care for their children. The 'Mama 4 Plus' benefit, in the monthly amount of EUR 290 (PLN 1 100 gross), will be paid to mothers, after reaching

140 Poland, Act on Parental Supplementary Benefit of 31.01.2019, JoL 2019 available at: http://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=2864.

the age of 60 years, who gave birth and raised their own children, children of their spouse, adopted children, or children in foster care (with the exception of professional foster families). The pension may also be granted to the father, after reaching the age of 65 years, who raised at least four children, but only in the case of death of the mother, if the mother abandoned the children, or ceased to provide care for them for a prolonged period. The pension is not payable if a person is entitled to a regular retirement benefit or disability pension in the amount equal to at least the lowest pension. If the person concerned already receives a retirement benefit lower than the lowest pension, the 'Mama 4 Plus' benefit will supplement the collected pension up to EUR 255 (PLN 1 100 gross). The benefit may be granted to persons, who resided in Poland for a period of at least 10 years (after the age of 16) in the meaning of the act of 26 July 1991 on personal income tax.[141] It is estimated that 'Mama 4 Plus' retirement pensions will cover over 80 000 people.

The provision of the 'Mama 4 Plus' retirement, that benefits only mothers, is discriminatory to men and strengthens the stereotypical division of social gender roles. The new law may also cause a feeling of unjust treatment amongst parents, who reconcile their family and professional life, in order to secure their retirement benefits.

Online sources:
http://orka.sejm.gov.pl/proc8.nsf/ustawy/3157_u.htm
https://dziennikzachodni.pl/program-mama-4-plus-sejm-przyjal-ustawe-1-100-zl-dla-matki-z-czworka-dzieci-dzis-ustawa-trafi-do-senatu-emerytura-matczyna-1-2/ar/13465019
http://www.sejm.gov.pl/sejm8.nsf/opinieBAS.xsp?nr=3157
https://www.pulshr.pl/wynagrodzenia/emerytura-dla-matek-4-plus-dyskryminuje-ojcow-dzieci-rzecznik-ma-watpliwosci,60965.html

Budgetary Law for 2019 entails further cuts in the budget of the Equality Body

On 16 January 2019, the lower chamber of Parliament passed the Budgetary Law for 2019. The Office of the Commissioner for Human Rights (RPO), which is the Equality Body in Poland,[142] has once again received less money for its activities than required. The budget cuts regarding this office thereby undermine the infrastructures responsible for, amongst other things, the elimination of discrimination.

All grounds

The RPO applied for a budget for the year 2019 amounting to EUR 11.2 million (PLN 48.1 million). Such an amount was included in the draft budgetary act for the upcoming year. Compared to 2018, this sum was larger by about EUR 2 million (PLN 8.6 million). Additional resources are needed, amongst other things, to carry out the tasks arising from the Presidential Amendment to the Act on the Supreme Court (of 8 December 2017 JoL 2018 Item 5), which granted the Commissioner for Human Rights the competence to lodge so-called extraordinary complaints (the office has already received more than 2 400 requests for such submissions) or for the operation of the National Mechanism for the Prevention of Torture, whose task is to counteract torture and inhuman treatment. In the 2019 budget, there is a slight increase compared to the 2018 budget, but the overall amount is still approximately EUR 1.6 million (PLN 7.2 million) lower than requested.

Online sources:
https://konkret24.tvn24.pl/polityka,112/budzet-rzecznika-praw-obywatelskich-mniejszy-choc-wiekszy,889707.html
https://www.rpo.gov.pl/en/content/parliamentary-committee-justice-issued-negative-opinion-chr%E2%80%99s-draft-budget-2018
https://www.rpo.gov.pl/pl/content/poslowie-komisji-za-obnizeniem-budzetu-rpo

141 Poland, Act on Personal Income Tax of 26.07.1991 (*Ustawa o podatku dochodowym od osób fizycznych. Consolidated text: Dziennik Ustaw Rzeczpospolitej Polskiej (Dz.U.)*), JoL 2019, Item 1387.
142 The Office of the RPO was designated as equality body, pursuant to Article 18 of the Anti-discrimination law of 3.12.2010 (Unified text: OJ 2016, Item 1219).

CASE LAW

Constitutional Tribunal ruling on prohibition of discrimination in access to services

Sexual orientation

All grounds

In June 2016, the Constitutional Tribunal delivered a ruling regarding the constitutionality of Article 138 of the Code of Petty Crimes, which prohibited discrimination in access to services.[143] The constitutional complaint follows the case of a small printing company which refused to print a roll-up banner of the Civil Society Organisation LGBT Business Forum. In light of the violation of Article 138, a fine of EUR 45 (PLN 200) was imposed on the company by the District Court in a simplified procedure.[144] Upon an appeal by the respondent, the decision was upheld but the punishment was waived.[145] The subsequent appeals of the accused, the public prosecutor and of the auxiliary prosecutor (CSO Campaign Against Homophobia) were rejected by the second instance Regional Court.[146] The Prosecutor General/Minister of Justice then challenged the Court decision before the Supreme Court, which confirmed that although freedom of conscience and religion may justify a refusal to provide a service, a balance between this freedom on the one hand and the prohibition of discrimination on the other should always be struck in light of the circumstances of the case. In the given case, the Supreme Court held that the accused had no legitimate reason to refuse to perform a service motivated by their convictions.[147]

Following this final decision in the case, the Prosecutor General challenged Article 138 of the Code of Petty Crimes before the Constitutional Tribunal as being contrary to the principle of a democratic state of law expressed in the Constitution (Article 2: 'The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.').

In its decision dated 26 June 2019, the Constitutional Tribunal (CT) held by a majority of three to two votes that the challenged provision is unconstitutional.[148]

The Prosecutor General formulated three allegations.[149]

1. The lack of proportionality between the purpose of the challenged provision and the burdens and restrictions imposed on the service provider (Article 2 of the Constitution).
2. By penalising the refusal to provide a service without a *just cause*, where the principles of faith and conscience are not understood as such a *just cause*, Article 138 disproportionately restricts the constitutional freedom of conscience and religion (Article 53 paragraph 1 Constitution).
3. Article 138 constitutes a disproportionate restriction on the freedom of economic activity of persons who are or represent *professional service providers* (Articles 20 and 22 of the Constitution).

In assessing the first (widest) of the allegations, the Tribunal stated that penalising the refusal to provide services by *a professional service provider* (even *deliberately*, *without just cause*) is inadequate to the

143 Poland, Article 138 of the Code of Petty Crimes reads as follows: '*Anyone who, being a professional service provider, demands or collects payment higher than that in force, or deliberately refuses to provide the service without just cause, shall be subject to a fine*'.

144 Procedure where there is no hearing, and where the sanction is based only on a motion filed by the Police. District Court for Łódź-Widzew, *Police v Printing house*, decision dated July 2016.

145 Poland, District Court for Łódź-Widzew, decision of 31.03.2017.

146 Poland, Regional Court for Łódź, decision of 26.05.2017.

147 Poland, Supreme Court decision No. II KK 333/17 of 14.06.2018. The written reasoning of the decision is not available. The information here is thus based on the information available on the website of the Supreme Court, see: http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=229-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach.

148 Poland, Constitutional Tribunal decision No. K 16/17 of 26.06.2019. At the time of writing, the written reasoning of the decision is not yet available. The present summary has thus been prepared on the basis of the information available on the website of the Constitutional Tribunal, see: http://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/10679-odmowa-swiadczenia-uslugi-ze-wzgledu-na-wolnosc-sumienia-i-religii-uslugodawcy/.

149 The motions submitted in the constitutional complaint case (K 16/17) by the Prosecutor General, the Ombud (opposing the complaint) and the Parliament (supporting the complaint), are available at: https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2016/17.

legislative objective sought, and thereby violates Article 2 of the Constitution. In the Tribunal's view, doubts are related in particular to the notions of 'being obliged to provide a service' or 'unjustified refusal to provide a service'. The imprecise nature of these concepts may lead to various interpretations, including such broad ones that would not be justified by constitutional principles and values. The Tribunal held that such doubts cannot be removed by way of interpretation in accordance with the Constitution, and the relevant provision is therefore found to be unconstitutional and is no longer in force.

Following this finding of unconstitutionality, the court proceedings in the original case may be resumed.

Online sources:
http://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/10679-odmowa-swiadczenia-uslugi-ze-wzgledu-na-wolnosc-sumienia-i-religii-uslugodawcy/
https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2016/1
http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=229-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach
http://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/10679-odmowa-swiadczenia-uslugi-ze-wzgledu-na-wolnosc-sumienia-i-religii-uslugodawcy/

Romania RO

POLICY DEVELOPMENT

National survey on attitudes and perceptions of discrimination in Romania

All grounds

On 26 February 2019, the National Council for Combating Discrimination (NCCD) released its survey on attitudes and perceptions of the population regarding discrimination in Romania.[150] The survey was developed together with the Institute for Public Policies as a part of a project funded by the EU.[151] The survey shows a rise in homophobia, as well as xenophobia and anti-Semitism.

The key findings of the survey are that the phenomenon of discrimination is recognised as a problem by 71 % of the population while 63 % consider that the frequency of discrimination in Romania is very high or high. One third of the interviewees experienced discrimination directly and 29 % have an indirect experience through media, 9 % through internet and 9 % through family.

The highest levels of lack of trust are manifested in relation to homosexuals (74 %), Roma (72 %), migrants (69 %), Muslims (68 %), persons living with HIV/AIDS (58 %), persons of a different religion (58 %), Hungarians (53 %) and Jews (46 %). The least accepted group is the LGBT community with large shares of respondents stating that they would not accept an LGBT person as a relative (59 %), a friend (52 %), a co-worker (37 %), or a neighbour (27 %). Two thirds of the respondents do not accept same-sex marriages (72 %).

Some 62 % of respondents think that Muslims are potentially dangerous and 52 % think that migrants should be stopped before entering Europe. Regarding social distance, 39 % of the respondents would not accept having a Muslim relative, 28 % would not accept a Muslim friend and 19 % a Muslim co-worker.

150 The presentation of the findings is available at: http://api.components.ro/uploads/1d3a0bf8b95391b825aa56853282d5da/2019/02/Sondaj_de_opinie_NoIntoHate_2018.pdf. The report discussing findings is available at: http://api.components.ro/uploads/1d3a0bf8b95391b825aa56853282d5da/2019/02/Raport_Proiect_NoIntoHate_2018.pdf.

151 Rights, Equality, Citizenship, 2014 – 2020, Grant Contract no. 809349 – NoIntoHate2018 – REC-AG-2017/REC-RRAC-HATEAG-2017.

The study was carried out at the end of 2018, in the aftermath of the constitutional referendum in October 2018, which aimed to restrictively define the concept of 'family' in the Romanian Constitution.

Online sources:
http://api.components.ro/uploads/1d3a0bf8b95391b825aa56853282d5da/2019/02/Sondaj_de_opinie_NoIntoHate_2018.pdf
http://api.components.ro/uploads/1d3a0bf8b95391b825aa56853282d5da/2019/02/Raport_Proiect_NoIntoHate_2018.pdf
http://cncd.org.ro/2019-02-26-comunicat-de-presa-referitor-la-conferinta-de-lansare-a-raportului-10-ani-de-decizie-cadru-privind-prevenirea-infractiunilor-romania-angajata-pentru-imbunatatirea-mecanismelor-de-raportare-si-inregistrare-referitoare-la-infractiuni-motivate-de-

National equality body publishes annual activity report for 2018

All grounds

The Annual report for 2018 of the National Council for Combating Discrimination (NCCD) shows that out of the 822 petitions received (a significant increase compared to the 682 petitions received in 2017), the highest number concerned the grounds of 'belonging to a social category' (302), while 81 petitions were received on grounds of disability. The NCCD received 56 petitions on grounds of nationality and 52 on ethnicity, while 43 petitions were received on grounds of gender, 29 on age, 17 on language, 13 on sexual orientation and 11 on religion or beliefs. Some 365 petitions concerned access to employment while 177 were related to the area of 'personal dignity', 160 concerned access to public services, 50 concerned access to education, and 22 concerned access to public spaces.

In 2018 the NCCD found discrimination in 97 cases (compared with 112 cases where discrimination was found in 2017). Compared to the previous year, there was an increase in the remedies ordered by the NCCD: 86 fines, 56 warnings, 41 recommendations, 7 decisions to continue monitoring the situation and in 46 cases the perpetrators were ordered to publish briefs of the NCCD decision in the media. The highest fine applied in a case was of EUR 6 300 (approximately RON 30 000). The 86 fines issued in 2018 cumulatively amounted to EUR 100 000 (approximately RON 475 000) compared to 2017, when the corresponding amount was approximately EUR 44 000.

The report also indicates that in 2018, some 422 NCCD decisions were challenged before the administrative courts. In 138 of those cases the courts decided in favour of the NCCD, and against it in 37 cases, while the remaining cases were still pending at the time of writing. The success rate indicated by the NCCD is of 80 % in 2018.

The NCCD has a legal obligation to participate as an expert institution in civil cases brought under the anti-discrimination legislation and in this regard, the institution participated in 862 cases in 2018, compared to 723 in 2017. While not providing information on the resolution of these civil cases, the report mentions that 1 135 civil complaints had been admitted and 1 382 were dismissed by the courts. The workload of the courts in discrimination cases seems to be in an ascending trend.

In 2018, the annual budgetary allocation was of EUR 1.2 million (approximately RON 5 704 000) with a small decrease compared to approx. EUR 1.3 million in 2017. The executed budget was of EUR 1.14 million (approximately RON 5 424 000). Out of the 96 staff positions needed, only 70 were budgeted for but the institution had to function with only 64 employees, a situation similar to prior years when the human resources were not increased to match the needs generated by the increased workload and the increased mandate.

Serbia RS

CASE LAW

Equality Body's first Opinion on victimisation in employment

Racial or ethnic origin

All grounds

The complainant is a psychologist working in a primary and secondary school where she claimed that she was being victimised for having reported on the actions of two teachers against a pupil of Roma origin. To punish the pupil for events that had taken place in the classroom, the two teachers allegedly insulted her due to her ethnic origin and humiliated her in a violent manner. Another pupil who had witnessed the events reported them to the complainant, who then approached the principal of the school and urged him to investigate the allegations and possibly impose sanctions on the two teachers. The complainant claims that the principal then obstructed her work and forbid her from speaking with the victim and the witness.

Following the failure of the principal to take action, the complainant firstly informed the Team for the protection of pupils against violence, abuse and neglect (which she was formally coordinating) and then also the city administration, the Ministry of Education, Science and Technological Development, the school administration and the Centre for social work. She was subsequently removed from the additional positions she was holding (notably as Team Coordinator to protect pupils from violence, abuse and neglect) and her employment contract was amended to expire at the end of the school year. In addition, the complainant claimed that the principal, as well as other teachers, attempted to destroy her professional reputation, isolated her within the school and occasionally insulted her.

While the principal stated that the complainant was not discriminated against in any way, he also explained that the reason for removing her from her coordinator position was that she 'constantly reports and sues the school where she is employed'. He claimed further that she had herself to blame if other teachers behaved differently towards her.

The Commissioner for the Protection of Equality published its Opinion in April 2019, finding that the complainant had made probable that an act of discrimination had occurred. Applying the provisions on the shift of the burden of proof, the Commissioner further found that the respondent had failed to establish that the changes in the complainant's working status and position were not caused by the fact that she had reported discriminatory treatment. The CPE thus found that the treatment of the complainant amounted to victimisation as prohibited by Article 9 of the Law on Protection against Discrimination and recommended the school principal to take all measures within his jurisdiction to eliminate the consequences of the victimisation and to send a written apology to her.[152]

Online source:
http://ravnopravnost.gov.rs/294-18-misljenje-sa-preporukum-po-prituzbi/

Equality Body Opinion finding segregation of Roma children in education

Racial or ethnic origin

The complaint was submitted before the national equality body and claimed that an elementary school in Bujanovac, the local administration of the municipality, as well as the Ministry of Education, Science and Technological Development, violated the Law on the Prohibition of Discrimination (LPD) as they did not implement adequate and effective measures to prevent and eliminate the formation of special Roma classes in the school.

152 Serbia, Commissioner for the Protection of Equality, Opinion in case *J.J from P. v The School for primary and secondary education*, complaint No. 07-00-303/2018-02, published on 15.04.2019.

The complaint concerned the formation of segregated classes in the school year 2018/19, although the complainant organisation pointed out that segregation has existed for many years; that separate Roma classes exist in almost all grades; that there is an evidently disproportionate under-representation of Roma pupils and their parents in the Student Parliament, the Parents' Council and on the School Board; that the annual plans of the school contain stereotypical and discriminatory statements; and that the local environment is not supportive for the members of the Roma community.

The school claimed that out of five classes in the first grade, two Roma classes were formed at the request of parents that their children stay in the same groups as in preschool. The Ministry argued, among other things, that parents of children of Serbian ethnicity delivered a petition that their children should be placed in three mixed classes instead of five. It was further stated that several meetings were unsuccessfully organised with parents, whose children protested by not attending class. The Ministry thus invoked 'the protection of the right to education as a higher interest' and requested the school administration to consider 'the conditions in which the school works' and the number of Roma pupils, which led to the formation of three mixed classes and two Roma classes.

The Commissioner for the Protection of Equality published its opinion in May 2019, finding that the municipal administration, the school and the Ministry, each within the limits of their competence, had failed to implement adequate and effective measures to prevent and eliminate the formation of segregated classes for Roma pupils.[153] The body found that this is a case of direct discrimination (violation of Article 6 of the LPD), and recommended the school to prepare a detailed and comprehensive desegregation plan, to take all necessary actions to ensure that all school employees undergo non-discrimination training, as well as to take all the necessary measures within its jurisdiction to develop a spirit of tolerance and acceptance of diversity. Furthermore, the Commissioner recommended to the municipality to provide assistance and support to the school, and to the competent authorities in order to prepare Roma children at preschool age for attending preschool in Serbian with children of other ethnicities. The body further recommended the Ministry to monitor the implementation of measures in the school and to provide them with the necessary support in the implementation of the imposed measures.

This is the first case of Roma segregation in education where the Commissioner found a violation of the LPD.

Online source:
http://ravnopravnost.gov.rs/1135-18-misljenje-po-prituzbi-protiv-os-oubujanovac-i-mpntr-zbog-segregacije-romske-dece-u-oblasti-obrazovanja-cir/

POLICY AND OTHER RELEVANT DEVELOPMENTS

Annual report of the Commissioner for Protection of Equality for 2018

All grounds

In 2018, the Commissioner (CPE) received 947 complaints (compared to 532 in 2017) and issued opinions in 115 cases, finding discrimination in 81 cases (compared to 32 in 2017).[154] In most cases where discrimination was found, the recommendations issued were fulfilled by the respondents (78.2 %). However, it is worrying that certain media and public officials do not act on recommendations when they concern discrimination based on sexual orientation, whereas they do when the recommendations concern persons with disabilities.

153 Serbia, Commissioner for the Protection of Equality, Opinion in case *Organisation P. v Elementary school B.R. from B., Local administration of Bujanovac municipality, Ministry of education, science and technological development and School management from Vranje*, complaint No. 07-00-1328/2018-02, published on 27.05.2019.

154 Serbia, Commissioner for the Protection of Equality, *Regular annual report of the Commissioner for Protection of Equality for 2018*, Belgrade, 15.03.2019.

Most of the complaints submitted in 2018 concerned discrimination based on disability (26.4 %), age (16.5 %), and sex (10.7 %), followed by complaints of discrimination based on birth (10.6 %), health status (6.1 %), ethnic origin (6.0 %), marital and family status (4.9 %) and sexual orientation (4.2 %). The majority of complaints concerned alleged discrimination in relation to access to public services and facilities (27.6 %), followed by discrimination in recruitment and in the workplace (20.8 %), in proceedings before public authorities (17.7 %) and in the area of social protection (13.1 %).

In addition, the CPE provided 37 opinions on draft laws and general acts; initiated 1 lawsuit for a strategic case, 3 criminal charges and 1 misdemeanour charge; and issued 17 warnings, 24 announcements and 300 general recommendations.[155] Some 88 cases were concluded by mediation.

The Report also contains findings in relation to discrimination of the most vulnerable groups in Serbia. Thus, the CPE finds that persons with disability are among the most discriminated groups in Serbia, facing many barriers in accessing public buildings, areas and services, information and communication, as well as in employment and education. Therefore, the CPE recommends intensifying work on removing barriers for persons with disability in society, and to continue the process of deinstitutionalisation. The CPE also highlights the situation of children with disabilities in education, recommending that all necessary measures be taken to provide teaching assistants for children who need additional support in education, and to remove from textbooks all inadequate, discriminatory and stigmatising terms and content. Age discrimination and prejudice is also an issue of concern for citizens aged above 50.

Discrimination based on gender is still very present, especially in the business sector where women are mainly discriminated against based on their family status, notably when returning from maternity leave. In 2018, a significant number of fathers also addressed the CPE claiming that they were discriminated against in divorce proceedings, where the court acted in accordance with opinions issued by centres for social work, entrusting the mother with child custody. The CPE found that these decisions are mainly based on deeply rooted prejudices on gender roles, and recommended the improvement of the system of social protection and the strengthening of the support capacities of centres for social work. The CPE further recommended placing gender equality issues at the centre of any planned actions, including legislation, policies and programmes, in all areas and at all levels, and to support women's entrepreneurship.

Roma are still facing discrimination, especially in relation to access to personal identification documents, adequate housing, health, social services and employment, as well as in education. The CPE recommended securing admission to primary and secondary education, as well as to higher education, for Roma and members of other vulnerable groups. The CPE also recommended that all necessary measures be taken to ensure that the composition of state bodies, local authorities and other public authorities corresponds to the ethnic composition of the population.

Overall, the CPE concluded that Serbia has established a satisfactory legal framework for combating discrimination and achieving equality but underlined that some amendments to the LPD are still necessary to bring national law in line with the EU *acquis*. In this regard, the slight differences between wording regarding the definitions of direct and indirect discrimination can be mentioned, as well as the failure of the national legislator to create a duty for employers to provide reasonable accommodation for people with disabilities.

Online source:
http://ravnopravnost.gov.rs/izvestaji/

155 The Commissioner uses 'warnings' to draw attention to dangerous phenomena and 'announcements' to inform the public about some changes in the law and practice, about the position of certain groups (e.g. women on International Women's Day). In the complaint procedure, the Commissioner issues an 'opinion', finding if discrimination occurred or not, and issues specific 'recommendations' to the discriminator on how to correct the situation. The Commissioner can also issue general 'recommendations', mostly to public authorities.

Survey on the wellbeing and safety of women in Serbia

Gender

The OSCE conducted a survey on the Wellbeing and Safety of Women in Serbia, with the aim of providing comparable data in the region (Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, Moldova and Ukraine).

The survey revealed a number of trends and findings about the prevalence of violence against women (VAW) in Serbia, confirming that it is a significant concern. More than 25 % of interviewed women personally know someone who has been subjected to VAW. 22 % of women surveyed said that they had experienced physical or sexual violence by their partner or someone else since the age of 15, and 18 % of women by their ex-partner. 10 % of women with current partners said they had experienced physical or sexual violence at the hands of their current partner.

Very few women who have experienced violence have reported it to the police. 30 % of the women believe domestic violence is a private matter and nearly 25 % hold the victim responsible or believe that they exaggerate claims of abuse or rape. They are also prevented from reporting, due to feelings of shame and fear or mistrust of the police, social workers and healthcare professionals, caused by the perceived stereotypes among representatives of these professions. Shame, mistrust of services, but also economic dependence and fear of retaliation by the perpetrator, are the main barriers to reporting.

The survey showed that women of all ages, from each income group and in all parts of the country are exposed to VAW. Many of the women surveyed have heard of services to help affected women (73 %) but only a few women have accessed those services and only in cases of the most serious incidents of physical and/or sexual violence. Only 3 % contacted a women's shelter and 1 % a victim support organisation. The survey revealed that numerous barriers prevent women from accessing services. Particularly in rural areas, support services are simply not available, while other women face physical barriers to access, or lack long-term and practical support with respect to housing and money. Where support services exist, they are insufficient, and their consistency and quality need to be improved. The key experts, who were interviewed for this study, shared that there is a need for pluralism in service provision and advocated for partnership between the state and civil society organisations.

The four main conclusions that can be derived from this survey are:
1. Cultural norms and attitudes contribute to gender inequality and violence against women;
2. Violence against women is under-reported;
3. Provision of services needs to be improved, including multi-sectorial cooperation;
4. There are gaps in the implementation of legislation and in data collection.

Online source:
https://www.osce.org/sr/secretariat/419756

Slovakia AT

LEGISLATIVE DEVELOPMENT

Slovak Parliament approves capping retirement age at 64

A constitutional amendment introducing a cap to the retirement age was passed by Parliament on 28 March 2019 and entered into force on 1 July 2019.[156] The minimum retirement age in Slovakia will be capped at the age of 64. Women will be able to retire earlier if they have raised a child. Women who raised one child would be able to retire at the age of 63.5, while those with two children, at the age of 63 and those with three or more children, at the age of 62.5. The amendment was supported by 91 MPs, with 37 against and 15 abstentions.

Gender

The background of this constitutional amendment is as follows. The Slovak social security system was newly defined by the Act on Social Insurance,[157] effective as of 1 January 2004. The pensionable age was gradually increased and was equalised for women and men at 62 years of age, although the Act contained some exceptions to the general provision and provided for a gradual equalisation of the diversified pensionable ages for women depending on the number of children raised. As of 1 January 2017, the method for determining the pensionable age has changed. The pensionable age of Slovak nationals born after 31 December 1954 gradually increased every year by a stipulated number of days depending on the increase of the average life expectancy. The pensionable age in 2018 was 62 years and 139 days.

At the end of 2017, trade unions in Slovakia demanded that a maximum ceiling on the increase in the retirement age be imposed. They collected signatures for a petition demanding a cap on the retirement age.

MPs from the biggest party in the coalition (Smer-SD) presented a first draft in May 2018 that proposed adding to the Constitution that:

> 'The age threshold required to claim an old-age pension must not exceed 64 years. In order to support the family and maternity, everyone who raised a child has the right to a reasonable reduction of the maximum pensionable age threshold',[158]

with the details to be laid down by the law.

According to the Explanatory Report:

> 'lowering the pensionable age for persons who have raised children expresses the state's support for child-upbringing, which is considered a fundamental precondition for positive demographic development and for the sustainability of the pension system itself. In accordance with Article. 7 paragraph 1(a)(b) Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (79/7/EEC), this reduction will be applicable to parents and other persons entrusted with child custody by decision

156 Constitutional Act No. 99/2019 Coll amending the Constitution of the Slovak Republic No. 460/1992 Coll. as amended (*Ústavný zákon č.*99/2019, *ktorým sa mení a dopĺňa Ústava Slovenskej republiky č.* 460/1992 *Zb. v znení neskorších predpisov*) available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2019/99/20190701.html.

157 Act No. 461/2003 Coll. Act on Social Insurance, as amended (*Zákon č.* 461/2003 *Z.z. o sociálnom poistení, v znení neskorších predpisov*) available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2003/461/20150901.html.

158 Draft of Constitutional Act … 2018 amending the Constitution of the Slovak Republic no. 460/1992 Coll. as amended (*Návrh Ústavného zákona z .... 2018, ktorým sa mení a dopĺňa Ústava Slovenskej republiky č.* 460/1992 *Zb. v znení neskorších predpisov*) available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=452968.

> of the competent authorities, irrespective of their sex. The law will set out details of these rights, including the definition of child-upbringing to meet the conditions for lowering the retirement age.'[159]

The condition posed by the coalition parties – as well as some opposition parties – to pass a cap on the retirement age, was that women must be entitled to retire earlier, based on their number of children. Therefore, Smer-SD MPs revised the draft (in October 2018) and proposed to add to the Constitution that:

> '[t]he age threshold required to claim an old-age pension must not exceed 64 years. A woman has the right to a reasonable reduction of the maximum age threshold necessary to qualify for an old-age pension:
> (a) 6 months if she has raised one child,
> (b) 12 months if she has raised two children;
> (c) 18 months if she has raised three or more children.'[160]

However, the Explanatory Report was not changed, so it does not reflect the new wording of the constitutional amendment, which was adopted.

Online sources:
https://www.ustavnysud.sk/ustava-slovenskej-republiky
https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2019/99/20190701.html
https://spectator.sme.sk/c/22086519/pensions-retirement-age-cap-constitutional-amendment.html
https://newsnow.tasr.sk/policy/kazimir-retirement-age-caps-against-sustainability-of-public-finance/
https://www.etrend.sk/klucove-slova/23603-dochodkovy-strop.html

CASE LAW

First instance court: State authorities have no obligation to take measures on the elimination of segregation of Roma children in a local primary school

Racial or ethnic origin

A local human rights NGO filed an *actio popularis* lawsuit under the domestic Anti-Discrimination Act with the District court in Prešov, against the Ministry of Education and the District office in Prešov, concerning documented segregation of Roma children at a local primary school. The claimant argued that some Roma children faced segregation due to decisions adopted by the responsible state authorities setting up the school catchment area for the given locality, and also due to their inactivity to prevent existing segregation. The authorities arguably did not take into account the limited space capacities of the school and set up the local school catchment area in such a way that the school was unable to accommodate all Roma children from a nearby village with the majority children, and had to start educating some Roma children in the second afternoon shift and in separate Roma-only classes. The claimant pointed at the capacities of some other nearby schools to accept more children and asked the court to oblige the state authorities to adopt effective measures that would eliminate and prevent segregation of Roma children at the given school. The Public Defender of Rights provided its submission as a third party to the Court by mapping the situation in this locality, supporting the reasoning of the claimant.

159 Explanatory report (*Dôvodová správa*) available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=452969.
160 Article 39 Section 3 of Constitution of the Slovak Republic No. 460/1992 Coll. as amended (*Ústava Slovenskej republiky č.* 460/1992 *Zb. v znení neskorších predpisov*) available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/20190701.html.

The District court dismissed the lawsuit.[161] It stated that the claimant failed to sustain its burden of proof as it did not prove that the disputed decisions of the state authorities on the school catchment area had violated the principle of equal treatment and had disadvantaged Roma children in comparison to children from the majority. In this regard it further reasoned that the decisions were not discriminatory since they related to all children, including non-Roma children. The court also essentially concluded that the state authorities were not eligible to interfere with the organisation of the educational process that was fully the competence of the school. The court further noted that discrimination of Roma children could be found in the concerned school only if they were placed in separate classes due to their Roma ethnic origin, which was not proved.

The Court disregarded the fact that the decisions of the state authorities on the school catchment area had a negative impact on the situation at the school, which was overcrowded and unable to resolve the problem without the active intervention of the state institutions responsible for public education. The court also failed to consider relevant decisions of the ECtHR and of domestic courts concerning discrimination of Roma children in mainstream education and segregation of Roma in general. The claimant appealed against the decision and also proposed that the Appeal Court refer the case to the Court of Justice of the EU for a preliminary ruling on interpretation of the EU law in this case.

From a procedural point of view, the court explicitly confirmed that NGOs are eligible to file *actio popularis* lawsuits and that the general courts have jurisdiction to deal with such discrimination cases.

Online source:
https://www.poradna-prava.sk/sk/dokumenty/rozhodnutie-okresneho-sudu-v-presove-tykajuce-sa-namietanej-zodpovednosti-statnych-organov-za-segregaciu/

POLICY AND OTHER RELEVANT DEVELOPMENTS

Current situation regarding exclusion and discrimination of persons living in marginalised Roma communities

Racial or ethnic origin

In January 2019, the Ministry of Finance of the Slovak republic published a research interim report titled *'Revision of expenses for groups threatened by poverty and social exclusion.'* The report provides a comprehensive analysis and evaluation of public expenses and policy measures impacting social inclusion of socially disadvantaged Roma children and persons living in marginalised Roma communities. Its introductory chapter provides a general overview on the situation of persons threatened by poverty and social exclusion in Slovakia in perspective of other EU states. The second chapter gives broader insight into public expenses for social inclusion in Slovakia. The remaining chapters evaluate the impact of public spending on inclusion of socially disadvantaged Roma children in education and access of marginalised Roma to social security, employment and health care services.

Based on a wide range of quantitative research data, the report highlights serious shortcomings in the effectiveness of a number of policy measures aiming at the inclusion of marginalised Roma in Slovakia. It also identifies obstacles that marginalised Roma still face in access to education, employment and health care and points at their ongoing discrimination.

The report concludes that the Slovak educational system remains unable to provide sufficient inclusion of socially disadvantaged Roma children. They are under-represented in pre-primary education, over-represented in special schools for children with mental disabilities and as such, excluded from

161 Slovakia, District court in Prešov, *Poradňa pre občianske a ľudské práva (Centre for Civil and Human Rights) v Ministry of Education, Science, Research and Sport of the Slovak republic and the District Office in Prešov*, decision in case No. 29C/14/2016, delivered on 13.03.2019.

mainstream education. It pointed out that exclusion of Roma children from within mainstream education into separate classes and schools in Slovakia is more widespread than in other EU countries with a sizeable Roma population. More than 16 % of Roma children are educated in special education, which is five times more than the overall Slovak population. Less than half of socially disadvantaged Roma children continue in education after completing compulsory school attendance. Only 4 % of them study at universities, while the overall average in Slovakia is 31 %.

The report states that differences between marginalised Roma and the majority in education lead to abysmal differences on the labour market. Moreover, marginalised Roma have several times lower chances to get employed in comparison to the majority society, even if the same level of education is considered. Marginalised Roma also have limited access to effective tools of state support on the labour market.

The report further emphasises that socially disadvantaged groups suffer from worse health conditions, which also decrease their chances to succeed in education and on the labour market. Public expenses on health care of marginalised Roma are significantly higher than in the overall population, particularly among younger people, which implies lower prevalence of using preventive health care and existing obstacles to access it. The average life span of marginalised Roma is six years lower than in the overall population. Mortality of infants in marginalised Roma communities is almost three times higher than in the overall population.

This interim report will be followed by a final one which will include additional chapters covering areas of early intervention and housing in relation to marginalised Roma, as well as an evaluation of public expenses and policy measures for the inclusion of other disadvantaged groups – people with health disadvantages, single parent families with children, and homeless persons. The final report will also propose specific measures to improve the inclusion of disadvantaged groups of people with an aim to contribute to effective budgeting in public administration.

The report was produced by an analytical unit of the Ministry of Finance in collaboration with several other ministries and individual experts. It relies on a wide range of research data and can provide an important basis for introducing more effective policies and measures on inclusion of marginalised Roma in Slovakia in the future.

Online source:
https://www.finance.gov.sk/sk/financie/hodnota-za-peniaze/revizia-vydavkov/ohrozene-skupiny/

Implementation of policies and measures on integration of persons living in marginalised Roma communities

Racial or ethnic origin

On 17 January 2019, the Slovak Government adopted the updated action plans of the Strategy of the Slovak republic for integration of Roma up to 2020 for the period of 20192020 in the areas of education, employment, health, housing and financial inclusion.[162] The updated action plans were prepared and proposed by the Office of the Plenipotentiary of the Government of the Slovak Republic for Roma Communities (The Office of the Roma Plenipotentiary). The proposals of the action plans followed from the work of thematic working groups that also included representatives of civil society organisations.

The updated action plans aim to supplement the existing Strategy for the integration of Roma up to 2020. They elaborate on the strategic scopes of the existing Strategy and react to the programme of the current Government.

162 Slovakia, Resolution of the Government of the Slovak republic No. 25/2019 of 17.01.2019, available at: http://www.rokovania.sk/Rokovanie.aspx/RokovanieDetail/998.

The action plans contain 26 goals divided into 5 thematic areas and contain 52 concrete measures and 93 detailed activities. The plans are backed by an overall financial investment of EUR 215 million for the given two years. The updated plans mostly provide for continuation of those integration programmes already running. Its concrete measures are linked to quantitative indicators, which will enable the monitoring and evaluation of the implementation of these measures.

The Office of Roma Plenipotentiary in its press release highlights some of the most important priorities of the updated action plans. In the area of education, it is a measure supporting the introduction of compulsory preschool education, as well as increased funding for education of marginalised Roma children in primary schools. In the area of employment, it is continuous support of field social work and community centres. As for the area of health, it is a measure to improve access to drinkable water, and to improve the work of health assistants. Almost half of the whole budget is allocated for the area of housing and this funding will be used, among other things, for supporting a multi-stage system of social housing and building infrastructure.

Online source:
http://www.rokovania.sk/Rokovanie.aspx/RokovanieDetail/998

Slovenia SI

POLICY AND OTHER RELEVANT DEVELOPMENTS

Increased capacities of Slovenian equality body

All grounds

The Advocate of the Principle of Equality, the Slovenian equality body, increased its capacity in terms of staff and budget allocated for 2019. The new equality body was established and the new chair nominated in October 2016. Starting with no employees, it currently operates with 20 full-time employees and an annual budget of EUR 1.1 million. This capacity enables the Advocate to implement the majority of tasks allocated by the 2016 Protection against Discrimination Act (PADA). In 2019, the equality body initiated field visits to local communities, meeting mayors, businesses, social and employment institutions and non-governmental organisations.[163] It also regularly conducts structured dialogues with the representatives of civil society organisations focusing on individual discrimination grounds.[164]

The statistical report for the work of the Advocate of the Principle of Equality shows that in 2018, the Advocate dealt with 223 cases, 149 of which were closed and 74 continued in 2019.[165] In 2018, the Advocate received 93 new cases, while it still dealt with 130 ongoing cases that were transferred to 2018 from previous years.[166] The cases comprise both discrimination complaints as well as requests for assistance by victims of alleged discrimination. In 53 % of the closed cases, no discrimination was found. Out of 149 closed cases, 8.8 % referred to disability; 8.3 % to race, ethnicity or ethnic origin; 4.7 % to gender; 4.1 % to religion or belief; 2.9 % to age and 2.9 % to sexual orientation. In terms of fields of discrimination, 26.6 % of closed cases concerned employment conditions; 24.8 % concerned access to employment; 24.8 % related to access to goods and services; 14.7 % to education; 6.4 % to social

163 See, for instance, the visits to Velenje on 6.02.2019, http://www.zagovornik.si/zagovornik-nacela-enakosti-obiskal-salesko-dolino/, to Goriška region on 4.06.2019, http://www.zagovornik.si/zagovornik-nacela-enakosti-miha-lobnik-na-terenskem-obisku-na-goriskem/, and to a Roma settlement on 23.04.2019 http://www.zagovornik.si/zagovornik-nacela-enakosti-obiskal-romsko-naselje-brezje-zabjek/.

164 The list of all meetings with civil society organisations is available at: http://www.zagovornik.si/uporabne-povezave/nevladne-organizacije/.

165 Slovenia, Advocate of the Principle of Equality, Annual Report for 2018, p. 94.

166 Ibid.

protection, including health care; 1.8 % to social benefits and 0.9 % related to membership in workers' or employers' organisations.[167]

The Advocate regularly uses different media outlets to raise awareness about the concept of discrimination, provide information about the Advocate's work and inform the general public about ways to tackle discrimination.

Online source:
http://www.zagovornik.si/wp-content/uploads/2019/05/RS-Zagovornik-na%C4%8Dela-enakosti-Redno-letno-poro%C4%8Dilo-za-leto-2018.pdf

ES

Spain

LEGISLATIVE DEVELOPMENT

New Decree on gender equality between women and men in employment and occupation approved by Government

Gender

On 1 March 2019, the Spanish Government approved, through Royal Decree Law (RDL) 6/2019, a package of measures aimed at guaranteeing effective equality between women and men in terms of employment and occupation.[168] The main objective of the Royal Decree is to complement the Organic Law 3/2007, regarding 'equality between women and men'[169] and to give it effectiveness in terms of employment and occupation.

The RDL introduces important developments in various aspects including the introduction of the concept of work of equal value; establishing a reporting obligation for employers regarding average remuneration; the establishment of the presumption that there is a prima facie case of discrimination when, in companies with more than 50 workers, the average remuneration of workers of one sex is at least 25 % higher than the salaries of workers of the other sex; and the creation of so-called 'parental permits' containing regulations regarding care of breastfeeding infants.

In order to include same-sex families, the name of maternity and paternity leave has changed to 'birth leave'. The new birth leave will have the same duration for both parents (16 weeks, extendable in the case of disability of the child or of multiple births). However, the equalisation in the duration of the leave between both parents will only be reached in 2021, because the RDL establishes a transitional period in which the father's birth leave will be gradually increased. Immediately after the RDL, the birth leave for the father (or the other parent) increased from six weeks to eight weeks. As was previously envisaged for maternity and paternity leave, the new birth leave also applies in the case of adoption, legal guardianship and foster care.

The RDL also provides new regulations regarding the protection against unfair dismissal of pregnant workers. Contractual termination during the probationary period of a pregnant worker without acceptable

167 Ibid., p. 42.
168 The Royal Decree Law affected the content of six important pieces of legislation regarding gender equality: Organic Law No. 3/2007 of 22.03.2007, for the effective equality between women and men; Royal Legislative Decree No. 2/2015 of 23.10.2015, approving the Workers' Statute; Royal Legislative Decree No. 5/2015 of 30.10.2015, approving the Basic Statute of Public Employers; Royal Legislative Decree No. 8/2015 of 30.10.2015, approving the General Law Of Social Security; Law No. 2/2008 of 23.12.2009; and Law No. 20/2007 of 11.07.2007, approving the Self Employed Statute.
169 Spain, Organic Law No. 3/2007 of 22.03.2007, for Effective Equality between Women and Men, available at: https://www.coe.int/t/pace/campaign/stopviolence/Source/spain_constitutionalact3_2007_en.pdf.

cause shall be nullified. In case of collective dismissals, the company must specify for each position the reason for dismissal.

The right to flexible working arrangements for workers with care responsibilities for children under 12 years of age or dependents is also established by the new RDL. A reasonable adjustment between the needs of the worker and the organisational needs of the company will have to be found and, in any case, the employer must justify their refusal.

Furthermore, the RDL states that the State will pay the social security contribution for people who are dedicated to the care of highly dependent people.

Finally, the RDL aims to be a transversal complement of the Organic Law 3/2007, of effective equality between women and men, but in reality, its content is quite narrow because it is limited to establishing ad hoc corrections in labour regulations. More encompassing measures are needed to ensure a more effective protection against gender discrimination in employment and occupation.

Online source:
https://www.boe.es/diario_boe/txt.php?id=BOE-A-2019-3244

CASE LAW

The Supreme Court rules that a lack of consent to sexual relations qualifies as rape

Gender

A judgment of the Supreme Court of 21 June 2019, has revoked the judgment of the Provincial Court of Navarra of 20 April 2018 known as the judgment of 'La Manada'.[170] During the proceedings of this case, footage was shown of a woman being raped by five men. Both the Provincial Court and the Superior Court of Justice of Navarra held that the use of clear violence and intimidation are mandatory requirements for acts to qualify as rape, and (when those requirements are not fulfilled) in cases where mutual consent to sexual relations is absent, this qualifies as sexual assault only (which is a less serious crime and entails a less severe criminal sanction). However, the Supreme Court, in its judgment of 21 June 2019, revoked the ruling of the Provincial and Superior Court and convicted the five assailants for rape. The ruling of the Supreme Court does not admit appeal.[171]

The Supreme Court explains in this judgment that the victim of this case was clearly intimidated and that a lack of consent to sexual relations qualifies as rape. The requirement established by the previous Courts to demonstrate express and clear opposition in order to qualify rape is contrary to Spanish law and case law, according to the Supreme Court. The Court reiterates that it does not establish a change of doctrine, but simply clarifies the concept of rape. The ruling of the Supreme Court applied two aggravating factors to the crime of rape: degrading treatment of the victim and joint action by two or more persons. As a consequence, the judgment of the Supreme Court sentenced four of the five aggressors to 15 years in prison for rape, and one of them to 17 years in prison for rape and robbery, since he stole the victim's mobile phone.

The main point of interest of the judgment of the Supreme Court, is that it clearly states that the acts committed in this case qualify as rape rather than sexual assault, despite the fact that there was no clear evidence of opposition from the victim. The absence of clear consent on behalf of the victim was of key importance. Article 36.2 of the Istanbul Convention establishes that 'Consent must be given voluntarily

170 Spain, Provincial Court of Navarra, judgment of 20.04.2018, available at: https://www.eldiario.es/norte/navarra/DOCUMENTO-sentencia-integra-manada_0_765024296.html.
171 Spain, Supreme Court, judgment of 4.07.2019, appeal number 396/2019, available at: http://www.poderjudicial.es/search/openDocument/83c2e5bfb97cf31a/20190708.

as the result of the person's free will assessed in the context of the surrounding circumstances.'[172] After the Supreme Court judgment of 21 June 2019, it could be established that the Spanish Criminal Code is actually in compliance with the Istanbul Convention, qualifying sex without mutual consent as rape.

Online source:
http://www.poderjudicial.es/search/openDocument/83c2e5bfb97cf31a/20190708

TR Turkey

CASE LAW

The dismissal of a female employee for requesting her employer to provide childcare

Gender

Article 15 of the Regulation on the Employment Conditions of Pregnant and Breastfeeding Women and Nursing Rooms and Childcare Centres requires employers to establish nursing rooms and childcare centres under certain conditions.[173] If between 100 and 150 women are employed, a nursing room has to be provided by the employer for children of 0-1 years of age. If more than 150 women are employed, a childcare centre has to be opened by the employer for children of 0-6 years of age. The applicant of this case was working for a bank which did not establish a childcare centre despite the fact that it employed a few thousand female employees. As a result, the female employee, who was on family-related leave, sent an official warning to her employer, requesting the establishment of a childcare centre, arguing that the absence of a childcare centre might constitute a just cause for her to terminate her employment contract under the Employment Act Article 24/II. However, the employer did not comply with the demands of the employee and rejected her claims. Moreover, the employee was refused the right to return to her workplace after her family-related leave. The bank regarded her warning for a possible resignation as an actual resignation. In the action brought by the applicant, the labour court decided in favour of the employer. The employee then filed an appeal against this decision with the Court of Cassation 9th Division.

The Court of Cassation ruled that the employer was not able to prove that the employee had actually resigned. Therefore, it concluded that by not allowing the female employee to return to the workplace after her family-related leave, the employee's employment contract was terminated without just cause (Employment Act Article 25) and the applicant should receive her severance pay (Employment Act Additional Article 14) and notice pay (Employment Act Article 17).[174]

There is evidence that many large workplaces do not fulfil their obligation to establish a childcare centre, and there is a lack of legal enforcement. Moreover, the requirement to establish nursing rooms and childcare centres applies only to establishments where at least 100 women are employed, irrespective of their age or marital status. The fact that it is only the number of female employees that triggers this statutory requirement causes employers to employ fewer women than the number stipulated by the provision, to escape the obligation. Consequently, job opportunities for women are reduced, and discriminatory practice is ingrained. Therefore, the obligation to open a nursing room and a childcare centre should be determined by taking the total number employees into account, male and female. According to Article 16 of the Regulation, children of male employees can make use of the nursing rooms and the childcare centres in the father's workplace only if their mothers are dead or the children

172 Council of Europe, Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), CETS No. 210, 2011.
173 Turkey, Regulation on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries, OJ of 16.08.2013, and Employment Act (No. 4857), OJ of 10.06.2003.
174 The decision has not been published, but it was reported on 23.06.2019 in media.

are under the guardianship of the father. This regulation is a reflection of the prevailing assumptions regarding traditional gender roles. This does not enhance equality between men and women and is contrary to the principle of equal sharing of family responsibilities.

Online source:
http://www.hurriyet.com.tr/ekonomi/yargitaydan-cok-onemli-karar-buna-itiraz-eden-tazminat-alabilecek-41252542

United Kingdom

CASE LAW

Comparison in equal pay cases *Asda Stores Ltd v Brierley* CA [2019] EWCA Civ 44

Gender

This case concerns an equal pay claim by thousands of female supermarket staff wanting to compare themselves with men working in a network of warehouses and distribution centres. The latter are operating under a different management structure. In this appeal by Asda Stores Ltd, the Court of Appeal held on 31 January 2019 that 'common terms' were observed and that satisfied applicable national laws (so that they could rely on Section 79(4)(c) Equality Act 2010 – or, as regards the period covered by the Equal Pay Act 1970, that they were in the same employment as defined in Section 1(6)). The claimants would, it was held, also be entitled to draw a comparison under EU law as there was a 'single source' for the terms of employment of the claimant and the comparator.

The Court of Appeal explained the established test for 'common terms' necessary for a claim under the Equality Act 2010 Section 79. Lord Justice Underhill summarised the existing authorities[175] and dispelled any confusion around whether and with whom comparisons should be made for the purpose of Section 79(4) of the Equality Act – confounded by a re-wording of that section which was found in the original Equal Pay Act of 1970 (Section 1(6)), following the enactment of the Equality Act in 2010. The Court of Appeal explained the test in hypothetical terms and stated that it was unnecessary for claimants to provide evidence of actual terms of employment vis-à-vis their comparators.[176]

Online source:
http://employmentlawbulletins.com/wp-content/uploads/2019/01/Asda.pdf

Dismissal by a faith-based nursery of a teacher for cohabitation

Religion or belief

Gender

The claimant was a teacher at a private Orthodox Jewish nursery school affiliated to the Chabad Lubavitch Hasidic movement. She was dismissed because she was cohabiting with a man (whom she later married). Although the school took the view that matters of private life were not its concern, the school had asked the claimant to confirm, when asked, that she did not live with her boyfriend, even though this was untrue. The claimant refused to comply with this request and was dismissed. The Employment Tribunal held that the nursery had discriminated directly and indirectly against the claimant because of religion. In interviews with the school management leading up to her dismissal, other comments were made which were found by the Employment Tribunal to be discriminatory on grounds of sex (e.g. that time was passing for the claimant to have children).

175 United Kingdom, *Leverton v Clwyd County Council* [1989] AC 706, *British Coal Corporation v Smith* [1996] ICR 515 and *North v Dumfries and Galloway Council* [2013] UKSC ICR 993.
176 United Kingdom, England and Wales Court of Appeal, *Asda Stores Ltd v Brierley CA*, EWCA Civ 44, of 31.01.2019.

The Employment Appeal Tribunal upheld the finding of sex discrimination.[177] In relation to religious discrimination it found, however, that there was no discrimination. The Nursery acted because of its own beliefs and because of the claimant's refusal to live in accordance with those beliefs, rather than because of the beliefs of the claimant. Thus, any less favourable treatment was because of the beliefs of the employer. The employer would have treated anyone who cohabited with a partner outside of marriage the same way, regardless of their religion or belief. Therefore, there was no less favourable treatment of the claimant in comparison with others with other beliefs. The effect of the decision is that the Equality Act 2010 does not prohibit discrimination on the basis of the discriminator's religion or belief. The Employment Appeal Tribunal rejected the argument that the claimant was dismissed due to a lack of belief in a religious rule forbidding cohabitation. The employer's concern was with the risk of harm to the reputation of the nursery, rather than a free-standing concern that the claimant's beliefs were not the same as its own.

The Employment Appeal Tribunal confirmed that there could be discrimination where both parties shared the same religion.

Online source:
https://www.gov.uk/employment-appeal-tribunal-decisions/gan-menachem-hendon-ltd-v-ms-zelda-de-groen-ukeat-0059-18-oo

Shared parental leave – is it sex discrimination to pay men less on SPL than women are paid on maternity leave?

Gender

Two cases joined in an appeal regarding shared parental leave (SPL). In *Ali v Capita Customer Management Ltd* – Mr Ali claimed that a decision to pay him less (on SPL) than would have been paid to a woman taking maternity leave (after the two weeks compulsory leave) amounted to direct sex discrimination. In *Hextall v Chief Constable of Leicester Police*, Hextall argued that the policy of paying women on maternity leave more than those on shared parental leave indirectly discriminated against men.

The Shared Parental Leave Regulations (2014) allow parents to share leave entitlement following the birth of a child. The mother must take two weeks leave immediately after the birth in order to recover from childbirth,[178] but the remaining leave entitlement can be shared between the parents. In relation to pay: statutory maternity pay is, during the first 6 weeks of leave, paid at 90 % of the mother's average weekly earnings (with no upper limit) and, thereafter, paid at a basic rate (GBP 140.98 per week or 90 % of salary if that is lower) for the remaining 33 weeks leave entitlement. SPL is paid, from day one, at the statutory rate (GBP 140.98 per week). Employers are able to 'top up' the statutory entitlement to both maternity pay and shared parental leave by paying some or all of it at a higher rate if they wish to do so.

On 24 May 2019, the Court of Appeal held that paying a man on shared parental leave less than a woman on maternity leave would be paid amounted to neither direct nor indirect discrimination. The Court held that a woman who had given birth cannot be compared with a man who has not.

In relation to *Ali v Capita*, the judges suggested that to argue for equality in pay amounted to an 'attack against the whole statutory scheme' under which special treatment is given to women on maternity leave and that the 'predominant purpose' of the leave is 'not childcare but other matters exclusive to the birth mother resulting from pregnancy and childbirth and not shared by the husband or partner' (paragraph 72). The Court felt that it helps women prepare and cope with the later stages of pregnancy, recuperate

177 United Kingdom, Employment Appeal Tribunal, *Gan Menachem Hendon Ltd v Ms Zelda De Groen* UKEAT/0059/18/OO, of 12.02.2019.
178 United Kingdom, Employment Rights Act 1996 S.72(1); Maternity and Parental Leave Regulations 1999 (Reg. 8).

from giving birth, bond with their child, breastfeed and care for their new-born. Shared parental leave was predominately, they suggested, about childcare.[179]

In *Hextall v Chief Constable of Leicester Police*, the Court decided that the facts are such that it is not a straightforward case of indirect discrimination but a case of equal pay. However, because there was no evidence that men taking SPL were any worse off than women taking SPL, the Court held that there could not, in any event, be indirect discrimination because enhanced maternity pay was a proportionate means of achieving a legitimate end. Moreover, because the terms are specific to pregnancy and maternity, they are excluded from equal pay claims. Hence there was, according to this judgment, no challenge possible.

Online link source:
https://www.bailii.org/ew/cases/EWCA/Civ/2019/900.html

Discrimination on grounds of perceived disability

Disability

The claimant was a police constable who applied for a transfer to work for a different police force. At the time of her earlier employment, she underwent a medical examination which indicated mild sensory-neural hearing loss with tinnitus. However, the level of hearing loss did not affect her ability to do the job and she was employed having passed a hearing functionality test. Her application for transfer to a new police force was rejected, despite medical evidence that her hearing had not deteriorated and that she would pass a practical functionality test. The reason for the rejection was that, although she was not disabled at the time, her recruitment would risk increasing the pool of police officers who might be restricted in future, in terms of the duties they could cover. In effect, this was a perception about a risk of future disability.

The claimant accepted on the facts that her condition did not amount to a disability due to the low level of the impairment, but claimed that the rejection of her application amounted to direct perception discrimination (by assumption), in that the discrimination was because of the employer's perception about her disability. The first level tribunal ruled on 19 January 2016 that she had been subject to direct perception discrimination, a decision that was upheld by the Employment Appeal Tribunal.[180] The case was appealed at the Court of Appeal.

The Court of Appeal upheld the finding of perception discrimination,[181] confirming that direct discrimination included discrimination on the basis of perception. Discrimination could be 'because of' a characteristic, whether the person discriminated against has the characteristic or not. Here the perception was as to the progressive nature of the impairment, with the case confirming that progressive conditions are protected under the Equality Act 2010.

The decision that disability discrimination includes discrimination due to a perception about disability, or even about future disability, confirms the breadth of the protection for disability discrimination. In its judgment, the Court of Appeal confirmed that a perception regarding disability does not have to involve knowledge on the part of the discriminator of the legal definition of disability, just their perception as to facts which constitute the disability. The case also confirmed that activities which are relevant to working life are included within the definition of 'normal day-to-day activities'.

Online source:
https://www.bailii.org/ew/cases/EWCA/Civ/2019/1061.html

179 United Kingdom, England and Wales Court of Appeal, *Ali v Capita Customer Management Ltd (Rev 2)*, EWCA Civ 900, of 24.05.2019.
180 United Kingdom, Employment Appeal Tribunal, *The Chief Constable of Norfolk v Coffey*, UKEAT 0260/16/1912, of 19.12.2017.
181 United Kingdom, England and Wales Court of Appeal, *The Chief Constable of Norfolk v Coffey*, EWCA Civ 1061, of 21.06.2019.

Positive action in access to housing for a religious community

Religion or belief

The Agudas Israel Housing Association Ltd provides social housing to members of the Orthodox Jewish community. The claimant was a single mother who required social housing, but whose name was not put forward to the housing association by the local authorities as she was not from the Orthodox Jewish community. It was not disputed that this was direct discrimination on religious grounds, and on grounds of race or ethnic origin, but the question arose as to whether the discrimination was lawful positive action, on the basis that it was a proportionate means to compensate a disadvantaged community. The Divisional Court[182] accepted that there was a correlation between poverty and deprivation in the Haredi community and their religion, and found that the discrimination was lawful as a proportionate means of compensating for that disadvantage. The claimant appealed.

The Court of Appeal held that the Divisional Court was entitled to find that the policy was proportionate to the aim of compensating disadvantage.[183]

In assessing proportionality, the first instance court had considered a large amount of demographic and sociological evidence. The effect of the housing policy was to reduce the amount of potential housing available by around 1 %. Thus, the disadvantage to those who do not share the protected characteristic was minuscule. In contrast, the needs of the Orthodox Jewish community, linked to the protected characteristic, were many and compelling. Moreover, if the housing were to be open to those outside the Orthodox Jewish community, the charitable objects of the housing association would be entirely undermined. As a result, the practical effect of the policy was proportionate.

Online source:
https://www.bailii.org/ew/cases/EWCA/Civ/2019/1099.pdf

POLICY AND OTHER RELEVANT DEVELOPMENTS

Pregnancy and Maternity Discrimination: Consultation on extending redundancy protection for women and new parents

Gender

Currently, under Regulation 10 of the Maternity and Parental Leave, etc. Regulations (1999), before making an employee on maternity leave redundant, employers have an obligation to offer them a suitable alternative vacancy, where one is available with the employer (or an associated employer). This gives a woman on maternity leave priority over other employees who are also at risk of redundancy. An alternative vacancy must be both suitable and appropriate for the woman to do in the circumstances, and the terms and conditions must not be 'substantially less favourable' than her previous role. This protection applies while the woman is on ordinary or additional maternity leave.

Evidence from reports undertaken by the Equality and Human Rights Committee and the Department of Business, Energy and Industrial Strategy (EHRC/BIS 2016) and later, the House of Commons Women and Equalities Select Committee (W&Eq 2016), demonstrates that new mothers are being forced out of work when they seek to return following leave. The Government has sought views on whether an extended period of additional protection against redundancy might be the best way to address this issue.[184]

182 United Kingdom, High Court of Justice, *R. (on the application of Z and others) v Hackney London Borough Council and Agudas Israel Housing Association*, EWHC 139 (Admin), of 4.02.2019.
183 United Kingdom, England and Wales Court of Appeal, *Z & A v another, R (on the application of) v London Borough of Hackney and Agudas Israel Housing Association Ltd*, EWCA Civ 1099, of 27.06.2019.
184 The deadline for responding was 5 April 2019. See https://www.gov.uk/government/consultations/pregnancy-and-maternity-discrimination-extending-redundancy-protection-for-women-and-new-parents.

It is proposed that the simplest way of achieving additional protection, and creating a more consistent approach, is to extend the scope of the current protection against redundancy provided for those on maternity leave. This would mean that pregnant women and new mothers who had recently returned to work had the same protection as that enjoyed by those on maternity leave. The Government's provisional view is that six months would be an appropriate length of time, on the basis that it is a long enough period to allow a new mother to re-establish herself in the workplace. In terms of defining when in a pregnancy additional protection against redundancy should begin, the Government believes that this can best be defined as the point when a woman informs her employer, in writing, that she is pregnant.

The Government is also consulting regarding the impact of extending the redundancy protection into the 'return to work' period for mothers, to other groups who are taking extended periods of leave for similar purposes – i.e. that are akin to maternity leave – e.g. adoptive leave, parental leave, shared parental leave.

The Government intends to form a technical task group to work through certain issues: extending protection into a 'return to work' period can create challenges in terms of the interactions of different forms of leave. For instance, when would the 'return to work' period start (i.e. when would the six-month period of additional redundancy protection begin) where a period of maternity leave is followed immediately by a period of annual leave, special leave or a career break? There is also the question of how any extended redundancy protection would work with shared parental leave, where parents choose to take that in multiple blocks (i.e. a period of shared parental leave, followed by a period at work, followed by a further period of shared parental leave).

The Government is also seeking views regarding the promotion of awareness of legal rights and protections during pregnancy and maternity. The consultation closed on 5 April 2019.

Online source:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/773179/extending-redundancy-protection-for-pregnant-women.pdf

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