ISSN 2443-9606

European Commission

European equality law review

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

2021/1

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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 1 / 2021

Directorate-General for Justice and Consumers

2021

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Luxembourg: Publications Office of the European Union, 2021

Print	ISSN 2443-9592	DS-AY-21-001-EN-C
PDF	ISSN 2443-9606	DS-AY-21-001-EN-N

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Introduction on the state of play

The biannual European equality law review is produced by the European network of legal experts in gender equality and non-discrimination (EELN). 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, on the transposition and implementation of the EU equality and non-discrimination directives. The current issue provides an overview of legal and policy developments across Europe and, as far as possible, reflects the state of affairs from 1 July to 31 December 2020.

In this issue

This issue opens with four in-depth articles. The first article, by equality and non-discrimination consultant Niall Crowley, explores the independent assistance competences of equality bodies, with a particular focus on the Belgian, Croatian and Estonian equality bodies. The second article, by Ulrike Spangenberg from the German Institute for Gender-Equality-Based Practices and Strategies, examines tax policies in the EU from a gender equality perspective. The third article, by Elaine Dewhurst of the University of Manchester and coordinator for the ground of age for the EELN, analyses the existing protections against discrimination for the self-employed within EU law and the national law of Germany, Ireland and Sweden. The final article is authored by Jean Jacqmain, former gender equality expert for Belgium for the EELN, and Nathalie Wuiame, current gender equality expert for Belgium for the EELN. The article evaluates, from a gender equality perspective, two recently adopted directives concerning transparency, EU Directive 2019/1152[1] and EU Directive 2019/1937.[2] Similar to previous issues of this publication, the following section provides an overview of the relevant case law of the Court of Justice of the EU and of the European Court of Human Rights. The final section on national developments contains brief summaries of the most important developments in legislation, case law and policy at the national level in the 36 countries covered by the network.

Recent developments at the European level[3]

The second half of 2020 was marked by the continuing COVID-19 pandemic and by the measures taken at national level across Europe and the world to combat the spread of the virus.

Despite the pandemic, the European Commission was very active during this period in its work to combat discrimination, adopting several relevant policy documents. Notably, the long-awaited EU anti-racism action plan 2020-2025 was published on 18 September 2020,[4] tackling racist and discriminatory behaviours and their damage to people and society. The action plan set out a series of measures to 'step up action, to help lift the voices of people with a minority racial or ethnic background, and to bring together actors at all levels in a common endeavour to address racism more effectively and build a life free from racism and discrimination for all.'[5] Among other measures, the Commission committed to

1 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ *L*186, pp. 105-121.
2 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ *L*305, pp. 17-56.
3 This section, like the rest of the issue, covers the period from 1 July to 31 December 2020.
4 European Commission (2020) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Union of equality: EU anti-racism action plan 2020-2025*, Brussels, 18 September 2020, COM(2020) 565 final, available at: https://ec.europa.eu/info/sites/default/files/a_union_of_equality_eu_action_plan_against_racism_2020_-2025_en.pdf.
5 European Commission (2020) *A Union of equality: EU anti-racism action plan 2020-2025*, p. 2.

undertake a comprehensive assessment of the current legal framework and to explore the need for new legislation, in particular in relation to law enforcement as well as the role and independence of equality bodies. Beyond issues related to the legal framework, the action plan also had a strong focus on equality data, fighting hate speech and hate crimes, as well as addressing the risks of bias and discrimination built into artificial intelligence systems. Finally, the Commission committed to a series of actions to be taken by its own human resources division with the aim of leading by example in its role as an employer.

The Gender Equality Index (GEI) of the European Institute for Gender Equality (EIGE), was published on 28 October 2020.[6] The GEI provides insight into the current state of affairs and the progress made in the 27 EU Member States concerning gender equality in eight different areas: work, money, knowledge, time, power, health, violence against women and intersecting inequalities. The special focus of the GEI for 2020 was on digitalisation and its impact on women and men in the world of work, which was especially relevant given the enormous shift towards digital working as a result of the pandemic. The GEI reveals progress as well as setbacks, and explores where improvements can be made. This year, the average score in the EU was 69.9 out of a possible 100 points. If progress on gender equality in the EU continues at this speed, it is estimated that reaching complete gender equality is still 60 years away.

On European Equal Pay day, 10 November 2020, vice-president Jourova and commissioners Schmit and Dalli made a joint statement reiterating that the eradication of the gender pay gap remains a top priority for the European Commission. They also referred to the impact of the COVID-19 pandemic on gender equality, the exacerbation of structural gender inequalities and the increased risk of a life in poverty for many women. The pandemic has illustrated that women remain overrepresented in front-line, low paid jobs, and unfortunately also to a large degree in informal jobs, which are not covered by social welfare systems. Progress in this area is moving too slowly and at this rate it will take decades to eradicate the gender pay gap. One of the most recent actions taken by the European Commission, which will hopefully help to reduce the gender pay gap, is the adoption of the proposed EU Directive on adequate minimum wages on 28 October 2020.[7] The aims of the Directive are to support vulnerable groups living in poverty and to reduce wage inequality. Since more women than men earn a minimum wage, it is expected that the Directive will also help to reduce the gender pay gap.[8]

Another highly anticipated policy document that was adopted by the Commission during this period is the LGBTIQ Equality Strategy 2020-2025, which was published on 12 November 2020.[9] The strategy is built on four pillars: (1) tackling discrimination against LGBTIQ people, (2) ensuring LGBTIQ people's safety, (3), building LGBTIQ inclusive societies and (4) leading the call for LGBTIQ equality around the world. In addition to setting out a series of targeted actions, the strategy contained a commitment to enhanced equality mainstreaming in all EU policies, legislation and funding programmes, paying attention to specific LGBTIQ concerns.

In 2020, the EU Framework for National Roma Integration Strategies up to 2020 was concluded, thus ending the ten-year period during which the Commission's priorities for the Roma were aimed primarily at tackling their socioeconomic exclusion. On 7 October 2020, the new EU Roma strategic framework was presented, shifting the focus to effective equality, socioeconomic inclusion and meaningful participation

6 European Institute for Gender Equality (EIGE) (2020) *Gender Equality Index 2020 Report*, 28 October 2020, available at: Gender Equality Index 2020 Report | European Institute for Gender Equality (europa.eu).

7 Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, Brussels, 28 October 2020, COM(2020) 682 final available at; https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0682&from=EN.

8 European Commission (2020) 'Advancing the EU social market economy: adequate minimum wages for workers across Member States', press release 28 October 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1968.

9 European Commission (2020) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Union of Equality: LGBTIQ Equality Strategy 2020-2025*, Brussels, 12 November 2020, COM(2020) 698 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0698&from=EN.

of Roma people.[10] The Commission underlined the importance of this new framework in a context where more and faster progress is needed, notably in relation to the segregation of Roma pupils in education, inadequate and segregated housing as well as anti-Gypsyism and hate crime against Roma. The new framework set out common objectives and targets at EU level, while calling on national Governments to develop strong national Roma strategic frameworks to make long-term commitments. The new framework followed calls from civil society as well as the European Parliament, which adopted a resolution in September 2020 demanding equal access for Roma to education, employment, healthcare and housing with legally binding targets and a monitoring mechanism at EU level, supported by adequate funding.[11] The need for a new and improved framework was further demonstrated in November 2020, when the EU Fundamental Rights Agency (FRA) published a report presenting the findings from a survey on Roma and Travellers in Belgium, France, Ireland, the Netherlands, Sweden and the UK.[12] The survey included interviews with almost 4 700 Roma and Travellers and its results presented a 'bleak but familiar picture of discrimination and deprivation'. FRA further proposed a monitoring framework based on indicators to monitor the objectives of the new EU framework.[13]

On 25 November 2020, the international day for the elimination of violence against women, the EU's new Action Plan on Gender Equality and Women's Empowerment in External Action 2021–2025 (GAP III) was launched by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy.[14] Despite the progress that has been made so far, no country in the world is on track to reach the targets for gender equality and empowerment of women and girls by 2030. Moreover, since women have been disproportionally affected by the health and socioeconomic consequences of the COVID-19 crisis, a global rise in poverty rates amongst women has become evident. GAP III provides the EU with a policy framework with five pillars of action for accelerating progress towards meeting international commitments and a world in which everyone has space to thrive. It makes the promotion of gender equality a priority in all external policies and actions by: 'offering a roadmap for working together with stakeholders at national, regional and multilateral levels'; 'stepping up action in strategic thematic areas'; 'calling for the institutions to lead by example', and; ensuring 'the transparency of the results'.

Network publications and activities

During the second half of 2021, the network published two thematic reports with parallel focus areas. The first report, by Peter Dunne of the University of Bristol, who is also the coordinator for the ground of sexual orientation for the network, analysed protections against sexual orientation discrimination in areas beyond the labour market, exploring whether (and to what extent) any such protections exist in the 27 EU Member States and the United Kingdom. Similarly, and in parallel, the second thematic report was written by Elaine Dewhurst of the University of Manchester, who is the coordinator for the ground of age for the network. This report analysed and compared age discrimination laws outside the employment field in EU Member States and under the European Convention on Human Rights. In addition to these thematic reports, the network published two issues of the European equality law review and organised

10 European Commission (2020) Communication from the Commission to the European Parliament and the Council, *A Union of Equality: EU Roma strategic framework for equality, inclusion and participation*, Brussels, 7 October 2020, COM(2020) 620 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0620&qid=1615293880380.

11 European Parliament resolution of 17 September 2020 on the implementation of National Roma Integration Strategies: combating negative attitudes towards people with Romani background in Europe, P9-TA(2020)0229, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0229_EN.html.

12 EU Agency for Fundamental Rights (2020), *Roma and Travellers in six countries – Roma and Travellers Survey*, available at: https://fra.europa.eu/en/publication/2020/roma-travellers-survey.

13 EU Agency for Fundamental Rights (2020), *Monitoring framework for an EU Roma Strategic Framework for Equality, Inclusion and Participation: Objectives and indicators*, available at: https://fra.europa.eu/sites/default/files/fra_uploads/2020-portfolio_of_indicators_working-paper_en.pdf.

14 European Commission (2020) 'Gender Action Plan – putting women and girls' rights at the heart of the global recovery for a gender equal world', press release, 25.11.2020, available at: Gender Action Plan III – a priority of EU external action (europa.eu).

its annual legal seminar which was – for the first time in the history of the network – held online due to the COVID-19 pandemic.

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

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Setting and achieving standards: Independent assistance competences of the equality body

Niall Crowley*

Introduction

The independent assistance competences of equality bodies are examined, in this article, on the basis of European standards developed in relation to equality bodies, and the situation in three equality bodies that offer diverse settings for these competences. This article has been informed by the input, in relation to these three equality bodies, of four experts from the European network of legal experts in gender equality and non-discrimination.[1]

This article sets out the relevant European standards for independent assistance competences of equality bodies, before applying them to the three equality bodies selected as study sites. In applying the standards, use is made of the indicators being developed by Equinet, the European network of equality bodies, to measure implementation of these standards. A number of issues are then identified and explored before drawing conclusions and offering some recommendations.

European standards

Standards specifically directed at the establishment and operation of equality bodies have been established at a European level by the European Commission and by the European Commission against Racism and Intolerance (ECRI) of the Council of Europe. Both standards address the independent assistance competences of equality bodies. They provide the framework within which to scope and analyse the manner in which these competences are provided for and exercised. Independence, effectiveness and accessibility are overarching parameters suggested by the standards for such a review.

The European Commission Recommendation on standards for equality bodies establishes standards in relation to: mandate (grounds, scope, and functions); independence and effectiveness (independence, resources, and complaint submission, access and accessibility); and coordination and cooperation.[2] Independent assistance is addressed, in the European Commission's standard, as one of five key functions to be covered by the mandate of an equality body (Article 1.1.2). This standard sets out the need for an equality body to have competences to: receive and handle individual or collective complaints; provide legal advice to victims, including in pursuing their complaints; engage in activities of mediation and

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1 Emmanuelle Bribosia and Isabelle Rorive in Belgium; Ines Bojić in Croatia; and Vadim Poleshchuk in Estonia. The information in this article which relates to the national level in these three jurisdictions is based on a questionnaire completed by these three experts and further information provided by them on request.

2 Commission Recommendation of 22.6.2018 on Standards for Equality Bodies, C(2018)3850 final, Brussels, 2018, available at: https://ec.europa.eu/info/sites/info/files/2_en_act_part1_v4.pdf.

conciliation; represent complainants in court; and act as *amicus curiae* where required (Article 1.1.2(1)). It further identifies that independent assistance could encompass competences: to engage or assist in litigation addressing structural discrimination in their own name or in the name of victims or representative organisations; and to issue recommendations or legally binding decisions in cases of discrimination and to follow these up to ensure their implementation (Article 1.1.2(2) and (3)).

This standard identifies that equality bodies need to be enabled to gather relevant evidence and information, and, where they have the competence to take binding decisions, to issue adequate, effective, and proportionate sanctions (Article 1.1.2(4) and (5)). This latter point differs from the equal treatment Directives which provide that sanctions should be effective, proportionate, and dissuasive.[3]

The standard emphasises accessibility in relation to the submission of complaints (Article 1.2.3). It points to the importance of: submission of complaints through various channels and languages; procedures that are free of charge; confidentiality offered to witnesses and whistle-blowers and, as far as possible to complainants; accessible premises, information and communication, in particular for people with disabilities; availability of local or regional offices or outreach initiatives; and resources for adequate awareness-raising initiatives.

The General Policy Recommendation No. 2 on equality bodies to combat racism and intolerance at the national level, of ECRI, establishes standards in relation to: establishment of equality bodies; institutional architecture; functions; promotion and prevention competences; support and litigation competences; decision-making competences; power to obtain evidence and information; independence and effectiveness; and accessibility.[4] This standard, while aligned with that of the European Commission, takes a different approach in one key instance. It separates the independent assistance competences across two functions of an equality body: support and litigation function; and decision-making function (Article 10). It identifies, in its explanatory memorandum, concerns in relation to the attribution of the two functions to the one equality body, in that stakeholder trust in its impartiality as a decision-making body may be affected (Point 45) or implementation of its support and litigation function may be impaired (Point 47). It recommends that, where these two functions are located in the one equality body, they each be implemented by a different staff unit (Article 11).

The ECRI standard identifies that the support and litigation function includes competences to: receive complaints and provide personal support and legal advice and assistance to complainants; have recourse to conciliation procedures; represent complainants in court; bring cases to court in their own name; intervene as *amicus curiae*, and monitor execution of relevant decisions made by the courts (Article 14).

The standard identifies that the decision-making function includes competences to: receive, examine, hear, conciliate, and make decisions on individual and collective complaints; decide if there has been a breach of the legislation; issue legally binding decisions and dissuasive sanctions; and ensure the execution of their decisions (Article 17). It provides that equality bodies that cannot issue legally binding decisions and sanctions should have competences to issue non-binding recommendations and to seek to ensure their implementation.

The standard provides that equality bodies should be accessible, encompassing: accessible premises and services; local outreach and local and regional offices; submission of complaints orally, online or in written form with a minimum of admissibility conditions; engagement for the complainant in a confidential way and in a language of proficiency; and adjustments in premises, services, procedures and practices to take account of all forms of disability (Article 40).

3 See, for example: Article 15 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

4 ECRI General Policy Recommendation No. 2: Equality Bodies to Combat Racism and Intolerance at National Level, Adopted 7 December 2017, CRI (2018)06, Strasbourg, 2018, available at: https://rm.coe.int/ecri-general-policy-/16808b5a23.

Both standards identify the importance of the adequacy of the resources: the European Commission sets out that Member States should ensure the equality body is provided with the human, technical and financial resources, premises and infrastructure necessary to perform its tasks and exercise its powers effectively (Article 1.2.2(1)); and ECRI sets out that equality bodies should be provided with sufficient staff and funds to implement all their functions and competences with a real impact (Article 28).

More broadly, both standards address the institutional architecture for equality bodies. This focus addresses issues in relation to multi-mandate bodies, multi-function equality bodies, and multi-ground/ single ground equality bodies, which can have a relevance for the implementation of independent assistance competences.

Implementing the standards

Equinet, the European network of equality bodies, is developing a series of detailed indicators for the implementation of these standards. In this ongoing initiative, indicators have been developed for the mandate of the equality body,[5] and the independence of the equality body.[6]

Those Equinet indicators for the mandate of an equality body, relevant to independent assistance competences, are applied to the three equality bodies selected as study sites, with a subsequent assessment of independence, effectiveness, and accessibility in relation to these competences. The equality bodies are:

- Unia, in Belgium: an equality body with a single equality mandate that encompasses a number of grounds of discrimination. It has a support and litigation function but does not have a decision-making function.[7]
- The People's Ombudsperson, in Croatia: a multi-mandate body with a specific equality mandate that encompasses a number of grounds of discrimination. It has a decision-making function alongside a support and litigation function.[8]
- The Gender Equality and Equal Treatment Commissioner, in Estonia: an equality body with a single equality mandate that encompasses a number of grounds of discrimination. It has a decision-making function alongside a support and litigation function.[9]

Study sites

Equinet indicators

The Equinet indicators developed for the mandate of equality bodies include 18 indicators that relate to independent assistance competences.[10] These are applied to the three equality bodies in Table 1. They valuably encompass:

5 Equinet Project on Standards for Equality Bodies, Mandate – Indicators, Brussels, 2020, available at: https://equineteurope.org/wp-content/uploads/2020/02/NEB_Mandate_indicators.pdf.
6 Equinet Project on Standards for Equality Bodies, Independence – Indicators, Equinet, Brussels, 2021.
7 The examination of this body was informed by the report: Bribosia, E. & Rorive, I., Country Report, Non-Discrimination, Belgium, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, Brussels, 2020; and assisted by the authors responding to a detailed questionnaire.
8 The examination of this body was informed by the report: Bojić, I., Country Report, Non-Discrimination, Croatia, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, Brussels, 2020; and assisted by the author of this report responding to a detailed questionnaire.
9 The examination of this body was informed by the report: Poleshchuk, V., Country Report, Non-Discrimination, Estonia, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, Brussels, 2020; and assisted by the author of this report responding to a detailed questionnaire.
10 Equinet Project on Standards for Equality Bodies, Mandate – Indicators, Brussels, 2020, available at: https://equineteurope.org/wp-content/uploads/2020/02/NEB_Mandate_indicators.pdf.

- the conditions created for equality bodies in relation to these competences (indicators 1 to 7, and 14 to 16 for decision-making competences); and
- the conditions created by equality bodies in relation to these competences (indicators 8 to 13, and 17 to 18 for decision-making competences).

This approach is important for establishing primary responsibility for implementation of the standard on government, while still acknowledging the responsibilities that fall to the equality bodies alongside this, but doing so without allowing measurement of implementation of the standards to degenerate into an external evaluation of the performance of the equality body. While such evaluation is important, it should not be confused with steps to secure implementation of the standards required for equality bodies to be able to realise their full potential.

Table 1

Indicator	**Unia Belgium**	**People's Ombudsperson Croatia**	**Gender Equality & Equal Treatment Commissioner Estonia**
1. The equality body is accorded the competences to receive individual and collective complaints and provide free assistance, including legal assistance to victims of discrimination.	Yes[11]	Partly[12]	Yes[13]
2. The equality body is accorded the competence to engage in mediation and/or conciliation activities.	Yes	Yes	No
3. The equality body's powers enable it to effectively gather evidence in its procedure.	No	Yes	Partly
4. The equality body is accorded the competence to have legal standing before the courts by representing complainants.	Yes	No	No
5. The equality body is accorded the competence to have legal standing before the courts by acting as *amicus curiae* or expert.	Yes	No	No
6. The equality body is accorded the competence to have legal standing before the courts by bringing proceedings in its own name.	Yes	Partly	No
7. The equality body is accorded the competence to have legal standing before the courts by intervening in support of a party.	Yes	Yes	No
8. The equality body has established effective and accessible procedures to receive and process complaints.	Yes	Yes	Yes
9. The equality body regularly and effectively uses its legal standing before courts by representing complainants.	No	Does not have this competence	Does not have this competence

11 The equality body has a competence to address individual complaints. In relation to collective complaints, the concept of *actio popularis* involving a 'representative claimant' acting in court in the name of a collective interest, is unknown in Belgian law, if there is no identified victim, but Unia may act on its own behalf to challenge a breach of the anti-discrimination legislation.

12 The equality body has a competence to address individual as well as collective complaints (Article 24, Anti-Discrimination Act). However, as set out in text, the equality body is only empowered to provide limited support to the complainant.

13 The equality body has competence to address individual complaints but not collective complaints.

Indicator	Unia Belgium	People's Ombudsperson Croatia	Gender Equality & Equal Treatment Commissioner Estonia
10. The equality body regularly and effectively uses its legal standing before courts by acting as *amicus curiae* or expert.	Partly	Does not have this competence	Does not have this competence
11. The equality body regularly and effectively uses its legal standing before courts by bringing proceedings in its own name.	Yes	Partly	Does not have this competence
12. The equality body regularly and effectively uses its legal standing before courts by intervening in support of a party.	Yes	Partly	Does not have this competence
13. The equality body engages in strategic litigation based on published selection criteria.	Yes	No	No
14. The equality body is empowered to issue legally binding decisions that may include adequate, effective and dissuasive sanctions.	Does not have this competence	No	No
15. The equality body is empowered to issue non- legally binding decisions that may include recommendations to solve the discriminatory situation.	Does not have this competence	Yes	Yes
16. Proceedings before the equality body suspend the time limits for the initiation of court proceedings for the same complaint.	N/A	No	No
17. The equality body ensures follow-up of the implementation of its decisions.	Does not have this competence	Yes	No
18. If the equality body combines decision-making and other independent assistance functions, different staff and structures are responsible for each function and adequate resources are provided for each function to be effectively implemented.	Does not have this competence	No	No

Conditions created for the equality bodies

The Gender Equality and Equal Treatment Commissioner has competences to receive complaints and advise and assist individual complainants, including with legal assistance. It has the competence to prepare opinions on cases of alleged discrimination as submitted by complainants or on its own initiative. However, these opinions are not legally binding and there is no sanction applied by the equality body. The equality body has the competence to seek information and evidence from all parties to ascertain the facts of the case, though there is no specific provision to enable the equality body to ensure this information is provided. Beyond that, it is clear from Table 1 that the independent assistance competences attributed fall short of those suggested in European standards.

Unia is accorded a more complete range of independent assistance competences. It does not, however, have competences in relation to decision-making and it does not have powers to gather evidence as part of its procedures. The difference evident between Unia and the Gender Equality and Equal Treatment Commissioner, in the range of independent assistance competences provided, points to potential limitations that having a decision-making function might have on the range of such competences provided to an equality body.

The People's Ombudsperson has a decision-making function with competences to issue recommendations on issues of discrimination in individual and collective cases. However, these recommendations are not legally binding and sanctions cannot be applied by the equality body. Although it has a decision-making function, it is nonetheless accorded a broader range of independent assistance competences than the Gender Equality and Equal Treatment Commissioner. This suggests that having a decision-making function does not inevitably lead to a lesser range of such functions.

The People's Ombudsperson has competences to receive complaints and provide information to complainants; engage in mediation/conciliation; effectively gather evidence in its procedure; intervene in court in support of a complainant; and bring court proceedings in its own name, though limited to filing criminal charges for discrimination. This range of competences is, however, still less than in the case of Unia. Further, the competence of the People's Ombudsperson to support complainants is limited to providing information with regard to their rights and obligations and on their options for legal and other protection which is less extensive than the support Unia or the Gender Equality and Equal Treatment Commissioner is empowered to give.[14]

Conditions created by the equality bodies

The Gender Equality and Equal Treatment Commissioner and the People's Ombudsperson fall short of Unia in relation to the indicators for conditions created by an equality body for its independent assistance competences. This relates back, however, to the limited competences afforded to these equality bodies in that the indicators provided cannot be met in their absence.

Both the Gender Equality and Equal Treatment Commissioner and the People's Ombudsperson are understood to employ an effective and accessible procedure to receive and process complaints.[15] There is limited information on the use of the additional competences of the People's Ombudsperson to intervene in court in support of a complainant or to file criminal charges in cases of discrimination. It appears that such powers are only used to a limited extent.

Unia, on the other hand, fulfils most of the indicators for conditions created by the equality body, reflecting the broader range of competences it has been accorded. It is by strategic choice that it does not exercise its powers to represent complainants in court, preferring to intervene in support of complaints. Unia intervened in its own name or in support of a party in 96 cases between 2015 and 2019.[16] Its power to intervene as *amicus curiae* is used to a limited extent.

Unia is the only equality body of the three that engages in strategic litigation. It plans to publish criteria in this regard but has yet to do so. It is known to pursue strategic litigation in cases that: establish legal precedent; clarify points-of-law; refer to particularly serious facts; are illustrative of a societal debate; relate to a repeated problem; relate to structural discrimination; or refer to a priority area of Unia strategy. This is a broad understanding of strategic litigation, aligned with the ECRI standard.[17]

Rigorous follow-up by equality bodies of their decisions drives a high level of implementation of the recommendations they have made. The People's Ombudsperson has powers to issue an order for the respondent in a case to notify it within a deadline about actions taken on foot of the recommendation.

14 See: Article 12(2), The Anti-Discrimination Act of 9 July 2008, Croatian Parliament.

15 For Estonia, see: https://volinik.ee/en/contact-us/. For Belgium, see: https://www.unia.be/files/Documenten/Brochures/brochure_1l_-_centre_interfederal.pdf on how Unia processes complaints.

16 Data based on Unia annual reports for each year.

17 ECRI General Policy Recommendation No. 2: Equality Bodies to Combat Racism and Intolerance at National Level, Adopted 7 December 2017, CRI (2018)06, Strasbourg, 2018 – Point 80, Explanatory Memorandum: 'strategic litigation is to (i) generate case law that clarifies the interpretation of the equal treatment legislation, (ii) ensure a critical mass of casework on the different grounds covered, (iii) develop case law on issues of structural discrimination, (iv) generate publicity and use this publicity to sensitise individuals and institutions about their obligations under the equal rights legislation and (v) motivate individuals and institutions to respect these obligations and to bring about societal change'.

Implementation is monitored and outcomes are reported in the Annual Report. However, the equality body has no power to secure implementation of recommendations. The Gender Equality and Equal Treatment Commissioner is not accorded powers to follow up recommendations made.

In relation to the confidentiality afforded to complainants, whistle-blowers, and witnesses, the People's Ombudsperson is bound to protect the confidentiality of whistle-blowers under the Whistle-blower Protection Act, and the rules of procedure of the equality body identify that further issues of confidentiality are regulated by the Ombudsperson. For the Gender Equal Treatment Commissioner, the legislation is silent on confidentiality. However, names are concealed in its published opinions, while confidentiality of complainants is not possible within the procedure for an opinion. Unia is committed to handling enquiries and cases confidentially and any complainant may request that their identity is not revealed, and this will be respected.[18]

Independence, effectiveness, and accessibility

All three equality bodies enjoy a significant level of independence in the pursuit of their mandates according to a recent review of equality bodies in Europe.[19] The Gender Equality and Equal Treatment Commissioner has its own legal personality; has no identified accountability, and is deemed functionally independent, with the only limitation identified being the appointment of the Commissioner by a government Ministry, an issue that is seen to be mitigated by strong leadership within the equality body. The People's Ombudsperson has its own legal personality; has the ombudsperson and deputy ombudsperson appointed by parliament; is accountable to parliament, and is deemed functionally independent. Unia has its own legal personality; has the members appointed by federal and regional parliaments; is accountable to federal and regional parliaments, and is deemed functionally independent.

The Gender Equality and Equal Treatment Commissioner can point to effectiveness in providing independent assistance, in the initial growth in and then steady flow of applications filed: 209 cases in 2015 to 332 cases in 2016 to a high of 471 cases in 2017 and back to 308 cases in 2019.[20] Its effectiveness is, however, diminished by the limited range of independent assistance competences it is afforded, including that its decisions are not legally binding. Effectiveness is further undermined due to the inadequacy of its budget. This equality body is assessed as medium effective for the competences under review for these reasons.

The People's Ombudsperson can point to effectiveness in providing independent assistance, in the level of discrimination complaints received each year: 277 in 2017, 317 in 2018 (the largest field for complaints received by this multi-mandate body),[21] and 270 in 2019 (the second largest field).[22] However, there are limitations to the extent of competences accorded to the equality body for this function, including the limited nature of assistance that can be offered to complainants, and that its decisions are not legally binding. The People's Ombudsperson is one of 16 (out of 43) equality bodies identified as experiencing an increase in staff and/or budget in recent years.[23] However, there is an increasing demand on resources

18 See: https://www.unia.be/files/Documenten/Brochures/brochure_1l_-_centre_interfederal.pdf.

19 Crowley, N., Equality Bodies Making a Difference, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, 2018, available at: https://ec.europa.eu/info/sites/info/files/equality_bodies_making_a_difference.pdf.

20 Poleshchuk, V., Country Report, Non-Discrimination, Estonia, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, Brussels, 2020.

21 Annual Report of the Ombudswoman of Croatia for 2018, Zagreb, 2019, available at: https://www.ombudsman.hr/en/download/annual-ombudsman-report-for-2018/?wpdmdl=6777&refresh=601e9842b06501612617794.

22 Annual Report of the Ombudswoman of Croatia for 2019, Zagreb, 2020, available at: https://www.ombudsman.hr/hr/download/izvjesce-pucke-pravobraniteljice-za-2019-godinu/?wpdmdl=7580&refresh=601e9a840e9691612618372.

23 Crowley, N., Equality Bodies Making a Difference, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, 2018, available at: https://ec.europa.eu/info/sites/info/files/equality_bodies_making_a_difference.pdf.

and they are noted as not being significant in the same study. Nonetheless, it is assessed as highly effective for the competences under review.

The multi-mandate nature of the People's Ombudsperson presents particular challenges to effectiveness given the demands of its other mandates. The body is noted for steps taken to safeguard the effectiveness of its equality mandate, appointing a deputy ombudsperson to give strategic direction for this mandate and organising a dedicated staff unit for its implementation.[24] The specific anti-discrimination line to provide advice to complainants is of note in relation to its independent assistance competences.

Unia can point to effectiveness in providing independent assistance, in having received 8 478 individual complaints, opened 2 343 files and initiated legal action in 18 cases related to discrimination or hate crimes in 2019.[25] Effectiveness is evident in the wide range of competences accorded to and deployed by the equality body. Unia is one of 16 (out of 43) equality bodies identified as experiencing an increase in staff and/or budget in recent years and its budget is noted as being significant.[26]

The co-existence of two equality bodies at federal level, alongside concerns that a further equality body is proposed to be created in Flanders, are noted as a limitation on effectiveness.[27] Unia and the Institute for Equality between Women and Men signed a protocol in 2019 to formalise their collaboration. It is focused on fostering collaboration through sharing of information and taking joint initiatives. This enables some focus on issues of multiple discrimination but joint strategic litigation has not yet been reported. Unia is assessed as highly effective for the competences under review.

A similar situation pertains in Croatia with an equality body for the gender ground and one for the disability ground established alongside the People's Ombudsperson. Data on discrimination from all the ombudspersons are consolidated and published annually by the People's Ombudsperson. The equality bodies refer complaints that they receive if they fall under the powers of another equality body, or they work together on cases.

Multi-ground mandates can present challenges for the effective implementation of independent assistance competences, in achieving visibility for all grounds covered. Unia has, in the past, taken steps to actively manage its multi-ground mandate, setting out priorities in relation to grounds of: national or ethnic origins, religious or philosophical beliefs, and disabilities.[28] It is currently suggested that no group is under-represented in its casework.

All three equality bodies are assessed as highly accessible for the competences under review. Complaints can be addressed through a range of channels and without cost for all three equality bodies.

The People's Ombudsperson operates a network of anti-discrimination contact points involving 11 civil society organisations, and has regional offices in a number of cities. Unia works with and through local anti-discrimination 'contact points' established in several towns and cities in Flanders (13) and in Wallonia (4) in addition to the collaboration with the 10 'Wallonia Spaces'. The Gender Equality and Equal Treatment Commissioner does not have a local presence.

24 Crowley, N., Equality Bodies Making a Difference, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, 2018, available at: https://ec.europa.eu/info/sites/info/files/equality_bodies_making_a_difference.pdf.

25 Unia (2020) *Annual statistics report 2019* (Contributing to a more equal society for all), available on its website, www.unia.be.

26 Unia (2020) *Annual statistics report 2019* (Contributing to a more equal society for all), available on its website, http://www.unia.be/.

27 *Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations* (2017), *Premier rapport d'évaluation 2017*, para. 151, http://www.unia.be/en.

28 *Plan stratégique* 2016-18, *Une société inclusive avec une place pour chacun*, 2016, available at: https://www.unia.be/fr/publications-et-statistiques/publications/plan-strategique-2016-2018.

While informal practices to enable accessibility for the diversity of complainants are evident, there is limited information available to suggest any formal procedures of these equality bodies to establish and respond to specific needs of diverse complainants.

The communication work of equality bodies enables accessibility, including provision of information to enable knowledge of and exercise of rights; and a presence for the equality body in public discourse in a manner that builds trust and confidence in the institution among those exposed to discrimination. All three equality bodies are reported to have engaged in significant awareness-raising:

- Unia has used the media, in particular social media, to effect in raising awareness about the equality body, what it is doing, and for what it can be contacted;
- the People's Ombudsperson has secured a frequent media presence, commenting on and providing press releases about current issues of discrimination; and
- the Gender Equality and Equal Treatment Commissioner has engaged in effective awareness-raising to establish visibility for its multi-ground mandate, after having a mandate for only the gender ground. This included regular publication of articles in national and regional media; production of information materials on the new grounds; hosting events and workshops; and active engagement with civil society in the context of various events and project activities.[29]

Issues arising

Multi-mandate bodies

While the People's Ombudsperson in Croatia is exemplary in the management of its multiple mandates, the recent review of equality bodies identified that 7 out of the 14 multi-mandate bodies covered do not take any steps to actively manage their different mandates, with a lack of visibility for or limited use of equality mandate competences noted for 6 of these equality bodies.[30] Lack of such active management limits effective implementation of independent assistance competences.

Multiple functions mandates

The most significant issue for the effectiveness of independent assistance competences relates to equality bodies with multiple functions that include a decision-making function. This issue is evident in the wider range of independent assistance competences afforded to Unia in Table 1 above, and in the limited nature of assistance that the People's Ombudsperson is able to provide to individual complainants.

The impartiality required of the decision-making function places boundaries on the nature and range of independent assistance that can be provided. In a context of limited resources, the greater urgency required of the decision-making function can limit the scale of independent assistance that can be provided to complainants.

This tension between independent assistance and decision-making is evident in the recent review of equality bodies. This identified 21 equality bodies out of 43 equality bodies that provided no or limited

29 See: https://volinik.ee.

30 Crowley, N., Equality Bodies Making a Difference, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, 2018, available at: https://ec.europa.eu/info/sites/info/files/equality_bodies_making_a_difference.pdf.

legal assistance to victims.[31] Nineteen of these 21 equality bodies had a decision-making function.[32] Two of these equality bodies did not have a decision-making competence (Luxembourg and Spain).

The most effective way to address this issue is to have two equality bodies, with one equality body mandated to take on the decision-making function and the other, the support and litigation function. This is the case in Austria, Denmark, and Norway.

It is of note, however, that the recent review of equality bodies identified no limitations in the assistance provided by seven equality bodies that had a decision-making function.[33] Tensions between these competences can be managed to an extent. Good practices identified in this regard included deploying a specialised staff unit or a separate network of local representatives, to provide independent assistance.

Multi-ground mandates

There are specific challenges for multi-ground equality bodies to ensure an effective implementation of independent assistance competences, in a context of persistent high levels of under-reporting across many grounds. The recent review of equality bodies identified a predominant 'reactive approach' within multi-ground mandates rather than any active management of such a mandate.[34]

A reactive approach is based on a concern for equal treatment of all complainants, but it can fail to secure visibility for those grounds subject to higher levels of under-reporting. Active management of multi-ground mandates was identified as including: auditing by equality bodies of the grounds coming forward to inform action on under-represented grounds; and positive action by equality bodies in relation to such grounds with specific staff allocated to these grounds or workloads organised on ground-based lines.

At the same time, the barriers identified in contexts such as Belgium where a number of equality bodies are established on different grounds, are instructive as to the value in multi-ground approaches, provided such mandates are subject to active management. These barriers include complexities in responding effectively to cases of multiple discrimination, and limitations in securing adequate and appropriate visibility for each equality body.

Independence

Limited independence can compromise implementation of independent assistance competences. Independence was not at issue for the equality bodies assessed above. The recent review of equality bodies found that independence of equality bodies is largely accepted by governments. However, issues of independence are noted in:

– the manner appointments are made to the equality body, with leadership appointed by government or government ministers in 20 out of 43 equality bodies (including the Gender Equality and Equal Treatment Commissioner as noted above) and, where leadership was appointed by Parliament, there were few instances of transparent, competency-based and participatory procedures;

31 Crowley, N., Equality Bodies Making a Difference, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, 2018, available at: https://ec.europa.eu/info/sites/info/files/equality_bodies_making_a_difference.pdf.

32 The situation changed in the case of Norway in 2018, on foot of the establishment of a separate equality body that was afforded the sole mandate of the decision-making function.

33 Estonia (Gender Equality and Equal Treatment Commissioner), France, Hungary, Malta, Romania, Slovenia, and Sweden.

34 Crowley, N., Equality Bodies Making a Difference, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, 2018, available at: https://ec.europa.eu/info/sites/info/files/equality_bodies_making_a_difference.pdf.

– the forms of accountability required of the equality body, with 19 equality bodies accountable to Government, Ministers, or the President; and
– the instances of 'cautious leadership' in four equality bodies.[35]

Effectiveness: Competences

The range of independent assistance competences accorded to equality bodies is central to their effectiveness. Issues identified for the three equality bodies assessed above include: the narrow range of competences accorded to two equality bodies with a decision-making function, the limited range of competences accorded in relation to their decision-making function, and lack of follow-up powers in one instance.

The recent review of equality bodies identified 25 equality bodies with decision-making functions and established that 19 of these equality bodies do not have competences to issue legally binding decisions or to impose sanctions.[36] It further identified that sanctions that can be imposed by four equality bodies were viewed as not being sufficient to act as a deterrent. A further issue identified in the review was that eight equality bodies with this decision-making function do not engage in adequate follow-up to secure implementation of their recommendations.

Another broader issue identified in the recent review is a lack of legal standing to take cases of discrimination and/or to act as *amicus curiae* before the courts for many equality bodies. This is evident, in the study sites, for the Gender Equality and Equal Treatment Commissioner and the People's Ombudsperson, both equality bodies with a decision-making competence. The recent review found limitations of legal standing experienced by 22 equality bodies of the 43 covered.[37] This included 13 equality bodies with decision-making functions, indicating that there were 12 equality bodies with decision-making functions that had legal standing, and that there were 9 equality bodies without a decision-making function that experienced these limitations.

Effectiveness: Resources

The study sites indicate the key relevance of adequate resources to the effective implementation of independent assistance competences. This was evident in the inadequate resources available to the Gender Equality and Equal Treatment Commissioner and, to an extent, the People's Ombudsperson.

The recent review of equality bodies indicates this issue is widespread, with few equality bodies having funding adequate to make a real impact.[38] Limitations in resources were also found to coincide with increased demand on their services due to greater numbers of complaints submitted. The review noted 17 equality bodies that were unable to deploy some of their competences for lack of resources or inadequacies of strategy, including, in all cases, some independent assistance competences.

35 Crowley, N., Equality Bodies Making a Difference, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, 2018, available at: https://ec.europa.eu/info/sites/info/files/equality_bodies_making_a_difference.pdf.
36 Crowley, N., Equality Bodies Making a Difference, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, 2018, available at: https://ec.europa.eu/info/sites/info/files/equality_bodies_making_a_difference.pdf.
37 Crowley, N., Equality Bodies Making a Difference, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, 2018, available at: https://ec.europa.eu/info/sites/info/files/equality_bodies_making_a_difference.pdf.
38 Crowley, N., Equality Bodies Making a Difference, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, 2018, available at: https://ec.europa.eu/info/sites/info/files/equality_bodies_making_a_difference.pdf.

Accessibility

Regional/local presence is identified as valuable for accessibility in both of the European standards. Unia and the People's Ombudsperson have been able to address this. The recent review of equality bodies found this to be the exception, with only 11 equality bodies having regional or local offices, out of 43 equality bodies. Another six equality bodies had engaged with or contracted local entities to achieve a local presence. Local outreach can assist in the absence of such offices, but the recent review found that 10 equality bodies did not pursue such outreach.[39]

While the procedures of the three equality bodies assessed above allowed complainants to address their complaints through a range of channels and without cost, the indicators developed to date by Equinet do not allow any further examination of accessibility. The recent review of equality bodies found that only 28 equality bodies, out of 43 equality bodies, had 'some form of procedures to address the practical implications of diversity for their engagement with and service provision to people from different groups'.[40] The approach to this accommodation of diversity was found to vary in terms of the particular needs that were addressed, and tended to be informal, leaving little room for the communication of such flexibilities, and how to secure them, to complainants.

Indicators

The Equinet indicators are an important work in progress. The indicators for independent assistance competences usefully capture the conditions created for equality bodies in the application of the European standards. One minor issue with these specific indicators might be the conflation of individual complaints and collective complaints in the one indicator, given the complexities in providing for collective complaints. The same indicator would further benefit from being more specific as to the range of assistance offered individual complainants, given the issues that arise in relation to this for equality bodies with a decision-making function. It could address each form of assistance separately such as: provision of information on casework procedures; provision of legal advice and assistance in preparing and submitting a complaint; provision of personal support; and provision of legal advice and assistance in presenting a complaint for decision.

The Equinet indicators are less effective in capturing the conditions created by the equality bodies in this field. This is because these specific indicators are largely established in terms of regular and effective use by the equality body of the conditions created for equality bodies. It might be more useful to focus on equality body strategy in implementing the competences afforded to equality bodies. The approach of Unia, identified in the study site, reflects how strategy plays a part in whether and to what extent competences provided for are used by an equality body.

A focus on strategy might better explore the issues identified above in the implementation of independent assistance competences. There is, usefully, one indicator in this regard that addresses strategic litigation, though the specific nature of this strategic litigation is not addressed in the indicator. A broader range of such strategy-led indicators would encompass: active management of multiple mandates (this is addressed separately in the indicators developed, but solely in terms of allocation of resources to the equality mandate); steps taken to manage tensions between functions when an equality body has a decision-making function alongside other functions (this is addressed in a broad manner encompassing both separate staff and structures responsible for each function and allocation of adequate resources to each function); and active management of multi-ground mandates.

39 Crowley, N., Equality Bodies Making a Difference, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, 2018, available at: https://ec.europa.eu/info/sites/info/files/equality_bodies_making_a_difference.pdf.

40 Crowley, N., Equality Bodies Making a Difference, European network of legal experts in gender equality and non-discrimination, DG Justice and Consumers, 2018, available at: https://ec.europa.eu/info/sites/info/files/equality_bodies_making_a_difference.pdf.

Adequacy of resources is central to the effectiveness of independent assistance and all equality body competences. Budget and resources are addressed in the Equinet indicators on independence.[41] A broader heading of 'Independence and Effectiveness' for this body of indicators is suggested by including this focus on resources. The key resource-related indicator is posed in the terms of the European Commission standard: 'The equality body receives adequate human, technical and financial resources to fulfil its mandate effectively'. This leaves open the challenge of measuring this standard in terms of what 'adequacy' and 'effectively' might mean and how it might be judged to have been achieved. This challenge is opened up in the ECRI standard.[42]

Accessibility could be planned for future work by Equinet on these indicators. It is referenced in one indicator in terms of the conditions created by an equality body of 'effective and accessible procedures to receive and process complaints'. This indicator might usefully be further developed to address issues in relation to flexibility, specifically whether the equality body implements and communicates operational systems for accommodating the diversity of complainants and their specific needs.

Further indicators of accessibility would address issues of a regional/local presence; accessibility of premises in design and location; and outreach to communities exposed to discrimination. These would encompass the conditions created for equality bodies as well as the conditions created by equality bodies to be accessible.

Conclusion

Independent assistance competences are core to equality bodies achieving their potential in effecting social change. These competences drive change at the individual level in enabling people to challenge discrimination and to have their rights restored. They stimulate institutional change in encouraging a culture of compliance across the full spectrum of duty bearers. They contribute to societal change in communicating messages that discrimination, harassment and sexual harassment are not acceptable and that those exposed to inequality have and can exercise rights in this regard.

Equality bodies face challenges in realising this potential. This is evident in curtailed independence, limitations on effectiveness, and issues of accessibility in the conditions created for equality bodies. It is evident in the action still required by equality bodies in implementing strategies to create the conditions to implement these competences with greatest impact. This underpins the need for the European standards developed for equality bodies and for their effective implementation.

The European standards, relating to independent assistance competences, are seen to be relevant and comprehensive from this examination. There is an issue in the inclusion, in the European Commission standard, of the decision-making function of an equality body as part of its independent assistance competences. This approach leaves the inevitable tensions between this function and the other independent assistance competences unaddressed. This could be dealt with in the preparation of indicators by the European Commission for this standard.

Equinet has made a significant contribution towards the future implementation of these European standards with the two sets of indicators developed, on mandate and on independence. A number

41 Equinet Project on Standards for Equality Bodies, Independence – Indicators, Equinet, Brussels, 2021, available at: https://equineteurope.org/wp-content/uploads/2021/01/NEB-Independence-indicators.pdf.

42 ECRI General Policy Recommendation No. 2: Equality Bodies to Combat Racism and Intolerance at National Level, Adopted 7 December 2017, CRI (2018)06, Strasbourg, 2018 – Point 101, Explanatory Memorandum: adequacy would be calculated on the basis of objective indicators, including: the size of the Member State and of its population; the level and nature of reported and unreported incidents of discrimination and intolerance including hate speech; the range, capacity and contribution of other bodies working on equality, discrimination and intolerance; the costs involved for the equality body in implementing its functions and competences to a scale and quality necessary to make an impact; and the scale of the national budget of the Member State.

of challenges to further develop these indicators are identified above. Nonetheless, they provide the essential starting point for the European Commission and ECRI to build a set of indicators, based on this work, to measure implementation of these standards.

The first key recommendation from this examination of the independent assistance competences of equality bodies is for the European Commission to develop and agree with the Member States, a body of indicators for these competences to measure implementation of the standards set out in its Recommendation. This would serve as a starting point for processes to secure the full implementation of the standard set in its Recommendation on standards for equality bodies.

This work on developing indicators should build on the work done and approach taken by Equinet. It should be pursued in a manner that underpins the independence of equality bodies. It would need to further encompass a focus on: the issue of adequacy in relation to resources; action on the active management of multiple mandates; action to address the tension evident where the equality body has a decision-making function as part of its independent assistance competences; action on the active management of multiple grounds; the range of legal advice and assistance supports that could usefully be provided; and operational systems to accommodate the diversity of complainants.

The second key recommendation from this examination of the independent assistance competences of equality bodies is for the European Commission to build some leverage behind implementation of the standard at Member State level. This leverage should start with actions within the High Level Group on Non-Discrimination, Equality and Diversity to engage a peer stimulus for implementation. It should expand to encompass a strong external stimulus for implementation, developed through reference to implementing the standard in: action plans for the Pillar of Social Rights; Country Specific Recommendations under the European Semester; enabling conditions and horizontal principles for the European Structural and Investment Funds. Leverage should ultimately involve providing a legal basis for the standard in the equal treatment Directives, with ensuing sanction for non-implementation.

Gender equality and tax policies in the EU

Ulrike Spangenberg*

Introduction

In January 2019, the European Parliament adopted a resolution on gender equality and tax policies in the EU.[1] It draws attention to the interdependencies between socio-economic gender differences and the design and impact of different types of taxation in relation to gender equality. It also calls on the Member States and the European Commission to ensure non-discrimination and gender equality in taxation and to implement adequate measures.

The resolution itself is a non-binding recommendation, but it refers to an extensive legal framework of values, objectives and obligations concerning gender equality and non-discrimination. The European Union already introduced some of these regulations with the Treaty of Amsterdam. However, even 20 years later, and despite the resolution more than two years ago, macroeconomic policies, particularly legislative tax policies and soft law approaches to coordinate tax policies, tend to be designed without much regard for gender equality.

The EU has only limited governance capacities in the field of taxation. Despite the increasing significance of the European Union, taxation remains closely linked to Member States' sovereignty. On the other hand, the treaties provide the European Union with the capacity to introduce legislative measures to abolish discrimination and ensure gender equality. EU law also emphasises gender equality and non-discrimination as fundamental values and objectives.[2] These provisions raise the question of whether the legislative competences, the increasing weight of gender equality and non-discrimination, and subsequent obligations, can be utilised to advance gender equality in taxation.

The article explains the interdependencies of socio-economic gender inequalities and taxation and outlines the major problems in current tax laws for gender equality in the EU. It further describes European attempts to address gender equality in taxation, including recent progress, such as considering gender aspects of taxes within the European Semester.[3] It goes on to discuss the scope and impact of values, objectives and obligations in European primary and secondary law upon gender-based discrimination and gender equality in European and national tax policies. Based on European governance capacities and legal obligations, the article concludes with recommendations to advance gender equality in taxation.

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1 European Parliament (2019) Resolution on gender and taxation policies in the EU, 2018/20195 (INI), available at: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0014_EN.html.

2 Article 2 and Article 3(3) TEU.

3 For more detail see Section 2.2.

1 Gender aspects of taxation in the European Union

1.1 Taxes as a source of public revenue

For the EU Member States, taxes are the primary source of public revenue, necessary for financing government tasks, including promoting gender equality. The income generated through taxes enables governments for instance to absorb social inequalities and cushion the burden of unpaid care work, which is still predominantly done by women. Women tend to rely more on public services and financial transfers, which in many countries are depleted and underfunded after years of fiscal austerity.[4] Many Member States have lowered corporate taxes and taxes on capital income in recent decades, which has reduced government revenues, increased debts and limited fiscal mobility. The EU Stability and Growth Pact,[5] designed to ensure sound public finances, also imposed budgetary restrictions that led to limited fiscal flexibility for the Member States. Such policies make it very difficult to secure social objectives, including gender equality.[6] If the Member States take gender equality seriously, it is essential to ensure the public resources necessary to promote gender equality.

In recent years the obligation to mobilise sufficient resources by the state has been increasingly discussed in international treaties. The International Covenant on Economic, Social and Cultural Rights (ICESCR) explicitly obligates its signatories, including the Member States, to ensure the maximum available resources necessary to finance the protections to guarantee the rights enshrined in the treaty, among them equal rights for men and women.[7] Fulfilling these rights, for instance, may require enforcing progressive taxation schemes, which burden people with high incomes or wealth more than people with little income.[8] The Committee responsible for the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also addressed available resources. It points out, for example, the problematic effects of generous tax breaks for companies and the consequences of tax evasion and tax avoidance on state revenues that reduce governments' abilities to promote gender equality.[9]

The EU's increasing attention to tax fraud and tax evasion, such as the recent agreement to negotiate about the proposal for country-by-country reporting[10] are suitable for making taxes more effective and increasing public funds. It is, however, also necessary to review the changes of the Member States tax systems in past decades with a view to sufficient public revenues. These considerations are of particular relevance today because the recent COVID-19 pandemic further strains public revenues. Government measures to prevent the spread of COVID-19 affected the economy, reducing tax revenues. Simultaneously, the Member States made considerable expenditures to finance medical assistance, promote the economy or offset the loss of income, among other things. Due to the restrictions on public revenues with a simultaneous increase in expenditure, the question arises as to what tax measures will be required for the future. With regard to gender equality, tax reforms must ensure necessary public revenues, but also take the specific design and impact of taxation into account.

4 Donald, K. (2015), *Women's rights and revenues: no gender equality without fiscal justice*, https://www.cesr.org/womens-rights-and-revenues-no-gender-equality-without-fiscal-justice.
5 Articles 121 and 126 TFEU.
6 Perrons, D. (2015), 'Gender equality in times of inequality, crisis and austerity: towards gender-sensitive macroeconomic policies', in: Bettio, F.; Sansonetti, S. (eds.). *Visions for gender equality*, European Union, p. 17, https://ec.europa.eu/info/sites/info/files/150902_vision_report_sep_en.pdf.
7 Article 3 CESCR.
8 UN Committee on Economic, Social and Cultural Rights (2017) General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, p. 7, available at: https://www.refworld.org/docid/5beaecba4.html.
9 UN Committee on the Elimination of Discrimination Against Women (2016), *Concluding observations on the combined fourth and fifth periodic reports of Switzerland*, 18 November 2016, CEDAW/C/CHE/CO/4-5, available at: https://www.refworld.org/docid/583872184.html.
10 European Commission (2016) Proposal for a Directive of the European Parliament and of the Council, amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, COM/2016/0198 final – 2016/0107 (COD).

1.2 Design and impact of taxation

Gender aspects also concern the specific design and impact of taxes because taxes correlate in many ways with gender-related socio-economic inequalities and can therefore hinder, but also further gender equality.

Most Member States have abolished tax regulations that explicitly differentiate between men and women.[11] However, tax provisions and tax policy decisions that are technically gender-neutral often affect men and women differently due to gender differences in employment rates and patterns, the allocation of unpaid and paid work, the allocation of income and wealth, and the risk of poverty. Although a variety of measures to address these differences are necessary in order to achieve gender equality, taxation itself adds to the disadvantages for women. Tax laws reflect and construct dominant societal assumptions of normality that are often based on male norms and exclude and discriminate against women's socio-economic realities. The same applies to other categories that refer to people or groups who have experienced structural discrimination.[12]

One of the critical obstacles to gender equality is joint tax and benefit provisions, such as income splitting, tax allowances or tax credits, based on the income of both spouses or transferable tax reliefs.[13] While in a system of individual taxation, the marginal tax rate for each person increases only in relation to their own income, in systems of joint taxation, one spouse's marginal tax rate increases in relation not only to their own income but also to the spousal income. Thus, elements of joint taxation produce disincentives for secondary earners, mostly women, to take up or increase paid work.[14] However, joint tax and benefit provisions also further income differences and create financial dependencies. Simulations for the Canadian tax system suggest that complete individualisation of the income tax system would increase the average disposable income for women and shift income from lower to higher-income groups.[15] Despite the tendency to replace joint or family-based income tax systems, in the EU, only Finland and Sweden have a fully individualised income system.[16]

Furthermore, the overall structural changes in tax systems, in particular, the reduction of the tax burden on capital income and high incomes, tax cuts for corporations to further economic growth, and the increase of consumption taxes in recent decades have added to gender inequalities in the EU.[17] Changes in the tax systems have relied primarily on economic rationales of optimal taxation and taxing for growth. The neglect of the distributional effects of taxes on people with different levels of income or wealth in the European Union has weakened the power of tax systems to reduce inequalities in general. However, the tax policy reforms also imply a shift of the tax burden from men to women and a subsequent increase in inequalities in disposable, after-tax income. On average, women tend to have lower incomes in general and less income from stocks and assets that generate capital income. As a result, women

11 Bettio, F., Verashchagina, A. (2009), *Fiscal system and female employment in Europe,* EU Expert Group on Gender and Employment, p. 5, https://usiena-air.unisi.it/retrieve/handle/11365/16458/7349/Synthesis_Fiscal_system_Final_dec_2009.pdf.

12 See Infanti. A., Crawford, B. (eds.) (2009), *Critical tax theory. An introduction,* Cambridge University Press; for a comprehensive feminist perspective on tax law: Infanti, A., Crawford, B. (2017), 'Introduction to the feminist judgments: Rewritten Tax Opinions Project', in: Infanti, A., Crawford, B. (eds.) *Feminist judgments: Rewritten tax opinions*, Cambridge University Press, p. 9.

13 Rastrigina, O., Vershchagina, A. (2015), *Secondary earners and fiscal policies in Europe*, European Union, https://ec.europa.eu/info/sites/info/files/150511_secondary_earners_en.pdf; Gunnarsson, A., Schratzenstaller, M., Spangenberg, U. (2017), *Gender equality and taxation in the European Union,* available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583138/IPOL_STU(2017)583138_EN.pdf.

14 Bick, A., Fuchs-Schündeln, N. (2017), *American economic review: Papers and proceedings 2017*, 107 (5), pp. 100–104.

15 Lahey, K. (2015) 'Uncovering women in taxation: The gender impact of detaxation, tax expenditures, and joint tax/benefit units', In *Osgoode Hall Law Journal* 52(2), p. 455.

16 Meulders, D. (2016) *Taxation des revenues et emploi des femmes en Europe* (Taxation of income and employment of women in Europe), TMTEESS, Ministère du Travail, de l'Emploi et de l'Économie sociale et solidaire. Imposition individuelle et emploi. Luxembourg: Éditions d'Letzebuerger Land.

17 Kathleen Lahey uses the term 'structural detaxation'. It refers to systemic tax changes that remove or significantly reduce taxes imposed on broad categories of transactions, have diffuse policy purposes and are very costly in terms of foregone revenues, see Lahey, K. (2015) 'Uncovering women in taxation: The gender impact of detaxation, tax expenditures, and joint tax/benefit units', in *Osgoode Hall Law Journal* 52(2), p. 435.

benefit less from tax cuts for high-income groups in general and capital income in particular. Women are also less likely to own companies and thus benefit less from lower tax rates and tax expenditures for corporations.[18] In contrast, the long-discussed taxation of specific financial transactions, such as the exchange of stocks and bonds, might have had a positive impact on the redistribution of gender income and wealth inequalities, because women typically participate less in the stock market than men.[19] However, as of April 2021, the proposal of the European Commission for a European Financial Transaction Tax has not been adopted.[20]

Tax expenditures are a form of government spending within the tax code to create incentives for specific economic, social or environmental purposes. Most Member States use tax expenditures extensively in regard to personal taxation income, corporate income and consumption. Tax expenditures may, for instance, reduce the tax base or the tax liability. Their impact crucially depends on socio-economic realities, such as the level and type of income, employment or investment patterns, and the share of unpaid work.[21] Research suggests that women and men not only claim tax expenditures differently, but women frequently benefit less because tax expenditures often correspond more to male working patterns or increase with the level of income.[22] The purpose and the design of tax expenditures may also produce behavioural incentives. For instance, tax privileges for overtime hours or single-earner tax credits tend to increase the after-tax income of male employees and create disincentives for an equal distribution of paid and unpaid work.[23]

Research also suggests that consumption taxes, such as VAT, fall disproportionately on women as they often have lower incomes.[24] The tendency in the European Member States to increase tax rates for consumption taxes, to balance the decrease of taxes on corporations, for instance, puts a higher burden on women due to lower average incomes. Reduced rates and exemptions are not always well targeted. Furthermore, tax rates for goods and services vary and may affect women and men differently due to different consumption patterns.[25] For instance, personal care and household products are consumed more by women than men due to traditional family roles and may also be subject to higher tax rates. Furthermore, female hygienic products, and care products and services for children, elderly people or people with disabilities, are still not considered as basic goods in all Member States.[26]

The taxation of corporations is often assumed to have no gender impact, as corporations are legal entities. Still, the taxation may affect women and men differently due to gender differences in shares and

18 Gunnarsson, Å., Schratzenstaller, M., Spangenberg, U. (2017), *Gender equality and taxation in the European Union: Study for the FEMM Committee*, European Parliament, available at. https://op.europa.eu/en/publication-detail/-/publication/8d1a3a6a-3425-11e7-9412-01aa75ed71a1/language-en.

19 Schäfer, D. (2016), Distributional effects of taxing financial transactions and the low interest rate environment in: *Discussion Papers 1609, 29*, available at: https://www.diw.de/documents/publikationen/73/diw_01.c.544940.de/dp1609.pdf.

20 European Commission (2013), Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, 14.2.2013 COM(2013) 71 final.

21 Gunnarsson, Å., Schratzenstaller, M., Spangenberg, U. (2017), *Gender equality and taxation in the European Union: Study for the FEMM Committee*, European Parliament.

22 E.g. Eder, M. (2016), *A difference between men and women – the income. An analysis of the gender-related effects of the Austrian income tax system*, BMF Austrian Ministry of Finance; Spangenberg, U. (2013), 'Pflicht oder Kür? Das Verbot mittelbarer Diskriminierung im Einkommensteuerrecht' (Option or obligation. The prohibition of indirect discrimination in income tax law), in: Spangenberg, U., Wersig W. (eds.), *Geschlechtergerechtigkeit steuern. Perspektivenwechsel im Steuerrecht* (Steering gender equality. Change of perspective in tax law); Lahey, K: (2015), 'Uncovering women in taxation: The gender impact of detaxation, tax expenditures, and joint tax/benefit units', *Osgoode Hall Law Journal* 52(2), p. 446.

23 Schratzenstaller, M., Dellinger, F. (2017), *Genderdifferenzierte Lenkungswirkungen des Abgabensystems 2017* (Gender-differentiated steering effects of the tax system) , Austrian Institute of Economic Research, https://www.bmf.gv.at/ministerium/WIFO_Studie_Genderdifferenzierte_Lenkungswirkungen_Abgabensy.pdf?67rupe.

24 Grown, C., Valodia I (eds.) (2010), *Taxation and gender equity: A comparative analysis of direct and indirect taxes in developing and developed countries*, Routledge; Lahey, K. (2018) *Gender, taxation and equality in developing countries – Issues and policy recommendations,* UN Women, p. 43.

25 De la Fuente, M. – Institut per a l'estudi i la transformació d ela vida quotidiana (2016), *La fiscalidad en España desde una perspectiva de género*, available at: https://www.ernesturtasun.eu/wp-content/uploads/2018/01/Informe-Final-Fiscalitat-Impr%C3%A8s.pdf.

26 European Parliament (2019) Resolution on gender and taxation policies in the EU, 2018/20195 (INI), No. 25, available at: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0014_EN.html.

ownership of businesses or differing business profiles regarding investment, employees and consumers.[27] As a result, the tax reductions for companies over the past few decades, for instance, seem to benefit men more often than women.[28]

1.3 Mechanisms to address gender inequalities

There is no comprehensive study that maps national or European measures regarding gender equality in taxation. Some Member States have introduced reforms towards a more individualised tax system.[29] However, state measures that address gender inequalities in taxation seem to be rare. Although Member States often promote gender budgeting to foster gender equality in budgetary decisions, most initiatives focus on the expenditure side of the budget. Only a few countries consider the revenue side.[30] The Government of Andalusia, for instance, publishes statistics on the use of joint tax returns and the use of tax expenditures.[31] The Swedish budget bill includes an annex that analyses the distribution of economic resources between men and women. The analysis follows the development of incomes from work, capital incomes, transfers and taxes to individual disposable income. It shows how gender inequalities are expressed in economic terms, but also how transfers and taxes reduce the gender gap in earnings.[32]

The Austrian Government commissioned several studies on the gender impact of Austrian revenue policies, addressing, for instance, the redistributive effect of the tax rate, the use of tax expenditures and the impact on the distribution of paid and unpaid work.[33] Furthermore, Austrian ministries, including the Federal Ministry of Finance, must consider gender equality in planning, implementing and evaluating budgetary measures. Within the regular budget cycle, the Austrian federal ministries must formulate at least one legally binding gender equality objective and one measure for its implementation. Also, the obligatory ex-ante impact assessment of laws, directives and significant programmes proposed on the federal level must consider the potential effects on gender equality. Since the introduction of gender budgeting and gender impact assessment in 2013, the gender equality objective of the Austrian Federal Ministry of Finance has been addressing the influence of the tax system on the distribution of paid and unpaid work between men and women.[34]

27 Lahey, K. (2015), *The Alberta disadvantage: Gender, taxation, and income inequality*, Parkland Institute, p. 63, available at: https://s3-us-west-2.amazonaws.com/parkland-research-pdfs/thealbertadisadvantage.pdf; Kornhauser, M. (2011), 'Gender and capital gains taxation', in: Brooks, K., Gunnarsson, A., Philipps, L., Wersig M. (eds.), *Challenging gender inequality in tax policy making. Comparative perspectives,* Hart Publishing, p. 275.

28 Lahey, K. (2015), *The Alberta disadvantage: Gender, taxation, and income inequality*, Parkland Institute, p. 63, available at: https://s3-us-west-2.amazonaws.com/parkland-research-pdfs/thealbertadisadvantage.pdf; Lahey, Kathleen A. 2015a. 'Uncovering women in taxation: The gender impact of detaxation, tax expenditures, and joint tax/benefit units' in: *Osgoode Hall Law Journal* 52(2), pp. 427-459.

29 E.g. Luxembourg and the Netherlands.

30 European Commission (2020) Mutual Learning Programme, Gender Mainstreaming & Gender Budgeting in the ESIF and National Budgets, Bratislava, 4-5 February, Country reports available at: https://ec.europa.eu/info/publications/eu-mutual-learning-programme-gender-equality-gender-mainstreaming-gender-budgeting-esif-and-national-budgets-slovakia-4-5-february-2020_en; Quinn, S. (2018) 'Chapter 4: Europe', in: Kolovich, L. (ed), *Fiscal policies and gender equality*, available at: https://www.elibrary.imf.org/view/IMF071/23551-9781513590363/23551-9781513590363/ch04.xml?language=en&redirect=true.

31 Gender Impact Commission of the Budget (2012), *Gender impact assessment report on the budget of the Autonomous Community of Andalusia for 2012*, available at: https://www.femtech.at/sites/default/files/informe_ingles_andalusia.pdf.

32 Nyberg, A., (2020) *Gender budgeting in Sweden*, available at: https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/mlp_se_comments_paper_sk_february_2020_en.pdf.

33 Eder, M. (2016) *A difference between men and women – the income. An analysis of the gender-related effects of the Austrian income tax system*; Austrian Ministry of Finance; Schratzenstaller, M., Dellinger, F. (2017), *Genderdifferenzierte Lenkungswirkungen des Abgabensystems (*Gender-differentiated steering effects of the tax system), available at: https://www.bmf.gv.at/ministerium/WIFO_Studie_Genderdifferenzierte_Lenkungswirkungen_Abgabensy.pdf?67rupe.

34 Dellinger F., Schratzenstaller, M. (2017), *The impact of the tax system on gender equality in Austria*, p.4, available at: https://ec.europa.eu/info/sites/info/files/at_comments_paper_se_2017.pdf.

The obligation to assess the gender impact of state measures, including tax laws, also exists in other countries.[35] It is unclear to what extent such obligations are actually implemented. In Germany, for instance, the necessary in-depth impact assessments are rare.[36]

At the European Union level, gender aspects of taxation seem to be gaining attention. For some time now, the European Commission has acknowledged the impact of taxation on low-wage and second-income earners, among whom women are over-represented.[37] The Horizon2020 call for research proposals explicitly addressed questions of gender equality in taxation.[38] In 2017, the European Institute for Gender Equality (EIGE) published a study on gender in economic and financial affairs that also refers to selected gender aspects in personal income taxation, particularly joint tax and benefit provisions.[39] The Mutual Learning Programme in Gender Equality addressed the impact of various tax systems on gender equality, focusing on joint tax and benefit provisions.[40]

The impact of taxation on low-wage and secondary earners is also receiving increasing attention within the European Semester, a yearly repeated mechanism to coordinate economic, employment and fiscal policies in the Member States.[41] According to the Gender Equality Strategy 2020-2025, the Commission will also develop guidance for Member States on how national tax and benefits systems can impact financial incentives or disincentives for second earners.[42] These considerations primarily intend to include women in the labour market as a means to foster economic growth. A similar approach can be observed in OECD publications.[43]

An exception to the focus on tax-related disincentives to work is the resolution of the European Parliament on gender equality and tax policy in the EU, adopted in January 2019.[44] The resolution expands the focus to the distributional and allocative gender outcomes of several forms of taxation. This includes taxes on personal income, corporate and business income, property and consumption. It draws attention to the interdependencies between socio-economic gender differences and the design and impact of various forms of taxation that often discriminate against women. It also calls on the Member States and the European Commission to ensure non-discrimination and gender equality in all forms of taxation and to implement adequate measures.

35 EIGE (2014), *Effectiveness of institutional mechanisms for the advancement of gender equality. Review of the implementation of the Beijing Platform for Action in the EU Member States*, p. 60, available at: https://eige.europa.eu/publications/effectiveness-institutional-mechanisms-advancement-gender-equality-report.

36 Deutscher Juristinnenbund (2019) *Ehegattensplitting und Gleichstellung im deutschen Steuersystem: djb kritisiert die mangelhafte Durchsetzung gleichstellungsorientierter Folgenabschätzung* (Income splitting and gender equality in the German tax system: djb criticises the inadequate implementation of gender impact assessments), press release from 10.09.2019, available at: https://www.djb.de/presse/pressemitteilungen/detail/pm19-28.

37 European Commission (2017) *Tax policies in the European Union – 2017 Survey*, available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/tax_policies_survey_2017.pdf; most recent: European Commission (2020) *Tax policies in the European Union – 2020 survey*, pp. 69 -73, available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/tax_policies_in_the_eu_survey_2020.pdf.

38 H2020-EURO-SOCIETY-2014 Subcall EURO-1-2014 work programme topic 'Resilient and sustainable economic and monetary union in Europe'.

39 EIGE (2018) *Gender in economic and financial affairs*, available at: https://eige.europa.eu/sites/default/files/documents/ti_pubpdf_mh0216895enn_pdfweb_20170124112528.pdf.

40 European Commission (2017) The EU Mutual Learning Programme in Gender Equality, The impact of various tax systems on gender equality, Sweden, 13-14 June 2017, available at: https://ec.europa.eu/info/publications/mlp-gender-equality-seminar-impact-tax-systems-gender-equality-june-2017-sweden_en.

41 See Section 2.2.

42 European Commission (2020) Gender Equality Strategy 2020-2025, available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_357.

43 Thomas, A., O'Reilly, P. (2016) 'The impact of tax and benefit systems on the workforce participation incentives of women', 29 *OECD Taxation Working Papers*, available at: https://www.oecd-ilibrary.org/taxation/the-impact-of-tax-and-benefit-systems-on-the-workforce-participation-incentives-of-women_d950acfc-en; Bisello, M., Mascherini, M. (2017), 'The gender employment gap: Costs and policy responses', 52 *Intereconomics*, p. 24, available at: https://www.intereconomics.eu/contents/year/2017/number/1/article/the-gender-employment-gap-costs-and-policy-responses.html.

44 European Parliament (2019) Resolution on gender and taxation policies in the EU, 2018/20195 (INI), available at: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0014_EN.html.

So far, however, the resolution has had little impact on European or national tax policies. This is partly because the resolution is a non-legislative instrument with no obligations for the Member States and the European institutions to implement the recommendations. Furthermore, the European Union in general and the European Parliament, in particular, have only limited governance capacities in taxation matters.

2 European governance capacities concerning taxation

The governance capacities of the European Union have increased considerably since the Treaty of Rome. The legislative competences regarding taxation, however, remain predominantly with the Member States. On a national level, states use taxes to generate revenue as a means to finance public expenditure. In EU law, taxes do not have such a role. The European Union, lacking any fiscal sovereignty, relies mainly on the Member States' contributions, based on the 'own resource decision', stipulated in Article 311 TFEU. As a result, the EU has only limited and particular governance capacities in the field of taxation. The promotion of gender aspects on the European level seems to be further hindered by the specific purpose and underlying principles of taxation in EU law and the lack of actors that promote the incorporation of a gender perspective.

2.1 Tax competences in primary law and legislative measures

The legislative tax competences of the European Union were drafted to facilitate the implementation and functioning of the internal market and prevent distortion of competition between the Member States.[45] The European Union has introduced several directives, concerning e.g. indirect taxes, such as value-added tax (VAT)[46] or excise duties (alcohol, tobacco and energy),[47] and direct taxes, such as the directive on tax fraud[48] or the proposal for a common consolidated corporate tax base (CCCTB).[49] These competences have not changed since the founding of the European Economic Union in 1957. An exception is the competence to implement environmental and energy taxes.[50] Although Article 3 TEU links the establishment of the internal market to the concept of sustainable development, which calls for a balance between economic, ecological and social objectives, European tax policies still concentrate primarily on economic considerations, based on principles such as neutrality or objectives like economic growth.[51] Social objectives and values, including gender equality, and shared principles and objectives that (to different extents) have shaped national tax policies, such as the ability-to-pay principle, have little foundation in European law.[52]

Furthermore, whereas the Treaty of Amsterdam rendered the ordinary legislative procedure admissible in most policy areas, legislative proposals concerning taxation are still subject to the special legislative procedure. The European Commission drafts tax legislation, mainly through the DG Tax and Customs, and requires the unanimous approval of ECOFIN, the Economic and Finance Ministers of the Member States. As a result, tax policies are governed by actors that focus on fiscal and economic aspects. The European Parliament, including the FEMM Committee which initiated the recent resolution on gender

45 Articles 113 and 115 TFEU, for more detail: Spangenberg, U., Mumford, A., Daly, S. (2019), 'Moving beyond the narrow lens of taxation: The Sustainable Development Goals as an opportunity for fair and sustainable taxation', *Columbia Journal of European Law*, Vol. 26, No. 1, pp. 36-100.

46 Council Directive 2006/112/EC of 28 November 2006 on the common system of value-added tax.

47 Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco.

48 Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

49 European Commission, COM (2016) 685, 25.10.2016, Proposal for a Council Directive on a Common Corporate Tax Base.

50 Articles 192(2), 194(3) TFEU.

51 Spangenberg, U., Mumford, A., Daly, S. (2019), 'Moving beyond the narrow lens of taxation: The Sustainable Development Goals as an opportunity for fair and sustainable taxation', *Columbia Journal of European Law*, Vol. 26, No. 1, p. 48.

52 Englisch, J. (2014) 'Ability to pay in European tax law', in: Brokelind, C. (ed) *Principles of law: Function, status and impact in EU tax law*; Grassi, C.M. (2015) Status and impact of the ability to pay principle in the ECJ's case law concerning tax benefits based on personal and family circumstances, *CFE Working Papers* series No. 52, available at: https://www.cfe.lu.se/sites/cfe.lu.se/files/cfewp52_1.pdf.

equality and taxation, is only consulted during the legislative process. Although the Council is required to acknowledge any concerns of the European Parliament, it is not obliged to comply with them. The influence of stakeholders in the legislative process who might act as a motor to promote gender equality, particularly members and committees of the European Parliament or social partners, is therefore limited.

2.2 Soft law approaches: The European Semester

The EU also uses soft law mechanisms, such as guidelines, recommendations or reports, to 'regulate' Member States' tax policies. An instrument of particular relevance for the design and impact of national tax policies is the European Semester. It is based on Article 5 TFEU, which stipulates that the Union shall adopt measures to ensure the coordination of the economic and employment policies of the Member States.

The European Semester's annual cycle starts with the Annual Growth Survey (AGS), which outlines the priorities for the upcoming year, based on the Integrated Guidelines for the economic and employment policies of the Member States and the Joint Employment Report. These priorities also refer to the Stability and Growth Pact and provide the background for the annual country-specific recommendations that the Council may issue to the Member States.

This framework addresses taxes mainly in its function to ensure fiscally sustainable public finances and to facilitate economic growth. The priorities in the past AGSs regularly focused on taxes as a foundation for a stable business environment, innovation and investment within a single market. Further aspects were inefficiencies in tax collection, the complexity of tax systems and the fight against tax abuse, tax avoidance and tax evasion.[53] As mentioned above, gender-differentiated perspectives related almost exclusively to women's labour force participation to enhance economic growth.[54] Even the concept of fair taxation, which surfaced some time ago, refers primarily to abolishing specific tax biases that create market distortions or fighting tax evasion, tax fraud and tax avoidance, and improving the collection of taxes.[55]

However, the adoption of the European Pillar of Social Rights in 2017,[56] also a soft law instrument, seems to advance social aspects in the European Semester. The AGS 2018, in particular, – in line with the amendments in the guidelines for employment policies, emphasised the need to address social inequalities through the design of national tax and benefit policies. It also states a necessity for the Member States to develop more progressive tax and benefit systems and to pay particular attention to the distributive effects of tax reforms.[57] Furthermore, recent country-specific recommendations address the shift away from taxes on labour to other sources less detrimental to growth, including taxes on wealth and property, which may reduce social inequalities.[58]

As of 2019-2020, the European Semester intends to directly support the European Union and the Member States in delivering the UN Sustainable Development Goals (SDGs),[59] which include reducing

53 e.g. European Commission (2016), Annual Growth Survey 2017, COM (2016) 725 final, available at: https://ec.europa.eu/info/publications/2017-european-semester-annual-growth-survey_en; European Commission (2017), Annual Growth Survey 2018; COM (2017) 690 final; European Commission (2018), Annual Growth Survey 2019, COM (2018) 770 final.

54 e.g. European Commission (2017), Annual Growth Survey 2018; COM (2017) 690 final; European Commission (2018), Annual Growth Survey 2019, COM(2018) 770 final, p. 11; European Commission (2019), Annual Growth Survey 2020, COM (2019) 650 final p. 9.

55 European Commission (2016), Annual Growth Survey 2017, COM (2016) 725 final, p. 13.

56 European Union (2017), The European Pillar of Social Rights, https://ec.europa.eu/info/sites/info/files/social-summit-european-pillar-social-rights-booklet_en.pdf.

57 European Commission (2017), Annual Growth Survey 2018, COM (2017) 690 final, p. 10.

58 European Commission (2020), Recommendation for a Council Recommendation on the 2020 National Reform Programme of Austria and delivering a Council opinion on the 2020 Stability Programme of Austria, COM(2020) 520 final, p. 5; European Commission (2020) Annex to the Proposal for a Council decision on guidelines for the employment policies of the Member States, COM(2020) 70 final, p. 1.

59 European Commission (2019), Annual Growth Survey 2020, COM (2019) 650 final. p. 14.

inequality (Goal 10) and furthering gender equality (Goal 5).[60] The concept of 'competitive sustainability', in which 'fairness' features as one of four interrelated key dimensions, is defined as the guiding principle to implement the SDGs. But despite the reference to gender equality as one element of 'fairness', the gender aspects of taxation remain confined mainly to the tax burden on secondary earners. For instance, the regressive impact of VAT, the need to increase the tax systems' progressivity or the effects of tax expenditures regarding gender equality are missing. Only in 2018 did some country-specific recommendations address the distributional effect of tax reforms on different income groups, men and women.[61]

Like the legislative process in matters of taxation, actors who might emphasise the need to address gender aspects are absent. The economic and finance units of the European Commission lead the European Semester's process, with a predominantly gender-blind concept of economics.[62]

3 European provisions with the potential to promote gender equality in taxation

The lack of attention to gender aspects of taxation contradicts the increasing relevance of gender equality in EU law. Although the founding treaties prioritised economic objectives, social objectives (and the ensuing legislative competences and obligations, including gender equality and non-discrimination) have gained increasing significance. While the provision on equal pay (3.1) does not apply to taxes, the Union's competences in the areas of equal treatment and non-discrimination (3.2), the prohibition of non-discrimination in the Charter of Fundamental Rights (3.3) and the principle of gender mainstreaming (3.4) have the potential to promote gender equality in taxation.

3.1 Equal pay: Article 157(1,2) TFEU

The principle of equal pay for women and men, already introduced with the Treaty of Rome (Article 119 EEC, Article 157(1,2) TFEU), does not apply to the impact of taxes or after-tax income. European law defines pay as the wage or salary which a worker receives directly or indirectly from the employer[63] and taxes or tax subsidies are neither paid nor regulated by the employer but the state.[64]

Despite the legal understanding of pay, it is essential to note that the amount of tax levied on the pay ultimately dictates the amount of money that a female or male worker has left.[65] Tax subsidies, in particular, are closely linked to the amount of pay. Partial tax exemptions for night and shift work, for instance, increase the amount of pay for certain types of work while reducing the labour market costs for employers. In Germany, this kind of tax relief benefits men more than women due to income inequalities. Furthermore, shift work and night work are more common in industries where more men than women

60 United Nations (2015) Transforming our world: 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

61 Country-specific recommendations: Austria, COM (2018) 419 final, para 13; Belgium, COM (2018) 401 final, para 17; Latvia, COM(2018) 413 final, para 9; Hungary, COM(2018) 416, para 12; Germany, COM(2018) 405 final, para 13.

62 Klatzer, E., Rinaldi A. (2020) *"#NextGenerationEU" leaves women behind. Gender impact assessment of the European Commission proposals for the EU Recovery Plan*, p. 45, available at: https://alexandrageese.eu/wp-content/uploads/2020/07/Gender-Impact-Assessment-NextGenerationEU_Klatzer_Rinaldi_2020.pdf.

63 Article 157(2) TFEU.

64 Judgment C-207/04, *Vergani v Agenzia delle Entrate*, para 23, ECLI:EU:C:2005:495.

65 Opinion of Advocate General Kokott, 28.01.2016, Case C-122/15, *Supreme Administrative Court, Finland*, para 37, ECLI:EU:C:2016:65.

work, thus increasing the after-tax inequalities.[66] It also hinders the equal distribution of paid and unpaid work.[67]

3.2 Equal treatment and non-discrimination competences: Articles 157(3), 19 TFEU

Today's primary law provides the European Union with legislative competences in matters of non-discrimination and gender equality. These competences deviate from the special legislative procedure in matters of taxation, including the European Parliament in the legislative process and averting the requirement of unanimity. Article 157(3) TFEU, for instance, which allows for the adoption of measures to ensure equal treatment of men and women in matters of employment and occupation, is based on the ordinary legislative procedure. This means that the process requires both the Council and the European Parliament to support the legislation with a majority of votes.[68] Legislative measures, based on Article 19 TFEU which enables the European Union to adopt legislative measures to combat discrimination, require unanimity in the Council. Still, in contrast to the European Parliament's mere consultation in matters concerning the functioning of the internal market, the European Parliament must consent at the very least.

Efforts to expand the scope of these legislative competences to include taxation have failed so far. During the legislative process for the Council Directive 2000/78/EC,[69] the European Parliament Committee on Civil Liberties, Justice and Home Affairs called for the inclusion of personal income taxation[70] but the amendment was never adopted. The proposal for the Goods and Services Directive[71] was also intended to cover direct and indirect taxation, including the taxation of transactions in securities, income from savings, rental revenue and wealth.[72] The taxation of income from employment was explicitly not included, based on the argument that the principle of non-discrimination is covered in Article 157 TFEU. Then Commissioner Anna Diamantopoulou had to withdraw the initial proposal, finding her way blocked not only by political realities, but also by the limits of EU competences.[73]

However, the CJEU opted in several cases to expand the scope of directives in matters of equal treatment and non-discrimination to tax provisions. It follows that the existing directives on protection against discrimination are at least partially applicable to national tax law and that Article 157(3) and Article 19 TFEU provides the EU with legislative competences to prevent gender-related disadvantages in tax law.

66 Spangenberg, U. (2011) *Geschlechtergerechtigkeit im Steuerrecht?!* (Gender equality in tax law?!), WISO Diskurs, p. 27, available at: https://library.fes.de/pdf-files/wiso/08575-20111109.pdf.

67 Schratzenstaller, M., Dellinger, F. (2017), *Genderdifferenzierte Lenkungswirkungen des Abgabensystems 2017*, Austrian Institute of Economic Research, https://www.bmf.gv.at/ministerium/WIFO_Studie_Genderdifferenzierte_Lenkungswirkungen_Abgabensy.pdf?67rupe.

68 Articles 289, 294 TFEU.

69 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, ELI: http://data.europa.eu/eli/dir/2000/78/oj.

70 European Parliament (2000) Report of the Committee on Employment and Social Affairs on the proposal for a Council directive establishing a general framework for equal treatment in employment and occupation, 21 September 2000, (A5-0264/2000), p. 58, https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2000-0264+0+DOC+PDF+V0//EN.

71 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, ELI: http://data.europa.eu/eli/dir/2004/113/oj.

72 Proposal for a Council Directive implementing the principle of equality between men and women (presented by the Commission), 2002/XXX (COD) – unpublished.

73 European Parliament (2004), Report on the Proposal for a Council Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services, COM (2003) 657 final, 2003/0265(CNS), available at: https://www.europarl.europa.eu/sides/getDoc.do?reference=A5-2004-0155&type=REPORT&language=EN&redirect. Direct taxes levied on income from the pursuit of employment were explicitly excluded.

The cases concern access to employment or vocational training as well as working conditions governing employment or dismissal.[74] In *Meyers* [1995], the Court did not discuss a tax provision but a social security benefit.[75] The benefit is similar to a tax relief and, as with tax norms, raises the question of the scope of a directive in matters of equal treatment. The specific benefit was a family credit, intended to supplement the income of paid workers responsible for a child. The decision concerned the question of whether this family credit falls within the scope of Directive 76/207/EEC,[76] a predecessor of today's Gender Recast Directive on equal treatment of men and women in employment and occupation.[77] Articles 3 and 5 forbid discrimination on the grounds of sex in the conditions for access to all jobs or posts and working conditions, including conditions governing dismissal. Although the Directive left matters of social security explicitly to subsequent instruments, the Court held that the Directive applies to social security benefits that concern access to employment and working conditions. The Court argued that the family credit encourages unemployed workers to accept work and therefore relates to considerations governing access to employment, covered by the scope of the Directive.[78] The benefit also constitutes a working condition in terms of Article 5 of the Directive because the entitlement depends on employment.[79]

In *Vergani* [2005],[80] the CJEU applied the same interpretation to a tax subsidy intended to encourage voluntary retirement. The tax subsidy was granted to female workers over the age of 50 and male workers over 55 and was thus considered discriminatory on the grounds of age and sex. In line with its judgment in *Meyers*, the Court interpreted the tax rule as a discriminatory condition governing dismissal and thus a violation of Article 5 within the scope of Directive 76/207/EEC.[81]

In *de Lange* [2016],[82] the Court found an age-based tax concession for vocational training costs to be in violation of the prohibition of discrimination concerning access to vocational training, stated in Article 3 of the Framework Directive, based on Article 13 TEC (today Article 19 TFEU). The tax concession was judged discriminatory because the financial consequences resulting from the non-deductibility of the expenses affect the actual accessibility of such training.[83]

These decisions expand the scope of existing directives in matters of equal treatment in employment and occupation at least partially to national tax laws. In line with *Meyers*, *Vergani* and *de Lange*, insufficient deductions for work-related childcare costs, for instance, may constitute indirect discrimination on the grounds of sex, as prohibited in Directive 2006/54/EC, because the financial consequences disproportionately hinder women's access to employment. The (insufficient) deductibility also constitutes a working condition which impedes women's employment.[84] Joint tax provisions may also fall within the scope of the Directive, because the disproportionately high tax burden on secondary earners affects access to employment. Furthermore, the judgments suggest that the legislative competence in Article 157(3) TFEU and Article 19 TFEU comprises tax provisions that directly or indirectly hinder employment or vocational training based on categories listed in these provisions.

74 Judgment C-116/94 *Meyers v Adjudication Officer*, ECLI:EU:C:1995:247; C-207/04; Judgment C-207/04, *Vergani v Agenzia delle Entrate*, para 25 -29; C-548/15 *de Lange v Staatssecretaris van Financiën*, ECLI:EU:C:2016:850, para 20.
75 Judgment C-116/94 *Meyers v Adjudication Officer*, ECLI:EU:C:1995:247; C-207/04.
76 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, ELI: http://data.europa.eu/eli/dir/1976/207/oj.
77 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), ELI: http://data.europa.eu/eli/dir/2006/54/oj.
78 Judgment C-116/94 *Meyers v Adjudication Officer*, para 21, 22.
79 Judgment C-116/94 *Meyers v Adjudication Officer* para 24.
80 Judgment C-207/04, *Vergani v Agenzia delle Entrate*, para 25-29.
81 Judgment C-207/04, *Vergani v Agenzia delle Entrate*, para 29.
82 Judgment C-548/15 *de Lange v Staatssecretaris van Financiën*.
83 Judgment C-548/15 *de Lange v Staatssecretaris van Financiën*, para 20.
84 See Mückenberger, U., Spangenberg, U., Warncke, K. (2007), 'Familienförderung und Gender Mainstreaming im Steuerrecht' (Family support and gender mainstreaming in tax law), *Nomos,* p. 69.

The CJEU seems to refrain from the former line of argument in *Finland* [2016].[85] The case addresses an additional tax on retirement income. In contrast to *Meyers*, *Vergani* and *de Lange*, the Court held that the regulation does not fall within the scope of the Framework Directive. However, the facts of the case do not correspond to the situation in *Meyers*, *Vergani* and *de Lange*. The additional tax on pension income neither qualifies as a regulation that governs access to work or dismissal nor does it constitute a condition of work or occupation. The case only concerns the tax rate, affecting the final tax liability, but – in contrast to *Vergani* – does not hinder or encourage employment or retirement.

3.3 Fundamental rights: Articles 21 and 23 CFR

European and national tax policies must also comply with the rights and principles in the Charter of Fundamental Rights (CFR), including the prohibition of (indirect) discrimination (Article 21 CFR) and ensuring equality between men and women (Article 23 CFR).

The rights and principles encoded in the Charter apply to all European measures, including hard and soft law tax policies adopted by the European Union. They further apply to national tax policies if these measures 'implement Union law'.[86] National laws, for instance, that implement secondary (tax) legislation, must conform to the Charter. The CJEU also includes value-added taxes (VAT) within the scope of the Charter due to the high level of European regulation and the link to the collection of VAT as a source for the EU budget.[87]

However, so far, European tax provisions or national tax policies implementing European law have not been discussed with regard to Articles 21 und 23 CFR. Furthermore Article 23 CFR, calling for the realisation of substantive gender equality, does not specify particular goals and measures necessary to ensure substantive gender equality.[88] It is therefore difficult to reduce the obligation in Article 23 CFR to specific enforceable measures or outcomes, beyond the prohibition of direct and indirect discrimination in Article 21 CFR.

3.4 Procedural obligations: Article 8 TFEU, Article 23 CFR

The Treaty of Amsterdam introduced Article 3(2) TEU, which obliged the Community 'to aim to eliminate inequalities, and to promote equality, between men and women' in all its activities, thus enshrining gender mainstreaming in primary law. However, taxation is a clear example of the lack of gender mainstreaming and the need to enforce a comprehensive implementation.

Similar to the initial gender mainstreaming provision, today's Article 8 TFEU obliges the European Union to aim for substantive equality in all its activities. Like Article 23 CFR the provision does not specify targets or measures necessary to achieve substantive gender equality. It can, however, be argued to contain a prohibition on weakening,[89] or even an obligation to optimise, the current situation.[90] As a result, Article 8 TFEU obliges the European Union to at least avoid measures that exacerbate or perpetuate existing gender disadvantages. The implementation of this commitment requires assessment of the possible

85 Judgment C-122/15, *Finland,* ECLI:EU:C:2016:391.
86 Kokott, J., Dobratz, L. (2015), 'Der unionsrechtliche allgemeine Gleichheitssatz im Europäischen Steuerrecht' (The general principle of equality under European Union law in European tax law), in. Schön, W., Heber C. (eds.), *Grundfragen des Europäischen Steuerrechts* (Fundamental questions of European tax law), Springer, p. 25; Judgment C- C-617/10, *Åklagaren* v *Hans Åkerberg Fransson*, para 23-25, EU:C:2013:10.
87 Elgaard, K. (2016), 'The impact of the Charter of Fundamental Rights of the European Union on VAT law', 5 *World Journal of VAT/GST Law* 63, p. 80.
88 Mückenberger, U., Spangenberg, U., Warncke, K. (2007) 'Familienförderung und Gender Mainstreaming im Steuerrecht' (Family support and gender mainstreaming in tax law), *Nomos,* p. 55 referring to Article 2(3) TEC.
89 Rossi, M. (2016), 'Article 8', in: Callies C., Ruffert, M. (eds.), *EUV/AEUV,* C. H. Beck, 5th edn, p. 56.
90 Lewalter, S. (2015) 'Geschlechtergleichstellung bei Privatisierungen: Anforderungen und Handlungsoptionen aus rechtlicher Sicht' (Gender equality in privatisations: requirements and options for action from a legal perspective) *Nomos*, p. 161.

impact of intended or promoted measures based on gender-disaggregated data and consideration of the effects discovered and possible alternatives during the formulation of policies. Without such a forecast, European institutions cannot determine whether a measure has positive or negative effects on the situation of men and women.[91] Therefore, the provision in Article 8 TFEU can be interpreted as a legal foundation to make informed and justified decisions, using gender-disaggregated data and forecasts to review proposed initiatives for intended and unintended gender outcomes.[92] These requirements translate into an obligation to conduct impact assessments of the effects of European measures on gender equality and other social inequalities that have gained little attention so far in policy fields focused on macro-economic policies, including tax policies.[93]

Article 23 CFR complements this procedural approach. The provision demands that the institutions bound by the Charter must ensure equality between women and men. Therefore, it is not sufficient to integrate a gender perspective into policy formulation to strive for more equality. The obligation to ensure equality between women and men is only met once a change in society is reached and secured.[94] This approach goes beyond the common practice of merely integrating a gender perspective into institutional procedures and policy formulation on the level of processes and outputs, and stresses the relevance of changing socio-economic outcomes and the actual diminution of gender inequalities in the Member States.[95] From a procedural perspective, 'ensuring equality' requires identifying and defining gender equality goals and sufficient monitoring based on specific indicators on which improvements or changes for the worse can be measured. If inequalities persist, ensuring equality may require taking specific measures to overcome structural disadvantages.[96]

It follows that it exceeds the scope of administrative discretion if the impact of tax measures on gender equality is neither analysed nor considered. Therefore, the failure to perform gender-based analyses and taking gender equality objectives into account is not just a political failure, but constitutes a violation of Articles 8 TFEU and 23 CFR.

4 Recommendations

Despite European and national obligations and commitments to prohibit discrimination and ensure gender equality, neither the Union nor the Member States adequately acknowledge gender issues in taxation. Therefore, it is essential to clarify the legal obligations applicable at the European and national levels and discuss and strengthen mechanisms for enforcing these obligations. This includes to ensure the implementation of gender mainstreaming in all matters of taxation on the European level, a goal, that is strongly pushed by the Gender Equality Strategy 2020-2025.

To ensure compliance with legal obligations in taxation matters on the Union level requires at least carrying out regular gender impact assessments for all fiscal policies, including the European Semester. This enables the European Union to set a good example and promote implementation at the Member State level. The implementation of gender impact assessments also requires specific gender equality-oriented goals for tax policy. In addition to reducing tax-related barriers to employment, it is necessary to consider the distribution of paid and unpaid work and the effects on disposable post-tax income. Tax policies must at least avoid increasing existing inequalities. Pursuing these goals conforms with the goals

91 Lewalter, S. (2015) 'Geschlechtergleichstellung bei Privatisierungen: Anforderungen und Handlungsoptionen aus rechtlicher Sicht', *Nomos*, p. 161.
92 Mückenberger, U., Spangenberg, U., Warncke, K. (2007), 'Familienförderung und Gender Mainstreaming im Steuerrecht' (Family support and gender mainstreaming in tax law), *Nomos*, p. 55.
93 The UN conventions, such as CEDAW and ICESCR, also highlight the relevance of social impact assessments.
94 Schiek, D. (2014) 'Art. 23 Equality between men and women', in: Peers, S., Hervey, T., Kenner, J., Ward, A. (eds.) *The EU Charter of Fundamental Rights. A commentary*, Hart publishing, para 32-33.
95 Schiek, D. (2014) 'Art. 23 Equality between men and women', in: Peers, S., Hervey, T., Kenner, J., Ward, A. (eds.) *The EU Charter of Fundamental Rights. A commentary*, Hart publishing, para 32-33.
96 Schiek, D. (2014) 'Art. 23 Equality between men and women', in: Peers, S., Hervey, T., Kenner, J., Ward, A. (eds.) *The EU Charter of Fundamental Rights. A commentary*, Hart publishing, para 32-33.

and targets of the SDGs. Goal 5 of the SDG, referring to Gender Equality, identifies specific targets, such as ending all forms of direct and indirect discrimination and recognising and valuing unpaid domestic and care work. Gender equality is not confined to Goal 5 of the SDGs but should be mainstreamed into other goals. Goal 10, for instance, refers to social inequalities within and between countries and includes targets that specifically address inequalities in income and wealth. These include the aim to progressively achieve and sustain income growth for the bottom 40 % of the population at a rate higher than the national average, adapting fiscal policy accordingly and progressively achieving greater equality. Taking gender equality into account requires, for example, considering gender inequalities in income and wealth. Similar to CEDAW and CESCR[97] the SDGs also call for enhancing revenues as a means of achieving the SDGs. The Addis Ababa Action Agenda specifically refers to modernised, progressive tax systems, improved tax policy and more efficient tax collection.[98]

To sufficiently address gender inequalities in taxation, it is also crucial to promote the collection of tax data on an individual basis and to close the gender data gaps on consumption patterns, the use of reduced rates, the distribution of entrepreneurial income and related tax payments, and the distribution of net wealth, capital income and related tax payments. Reducing gender inequalities further requires research, focusing on the impact of taxes on gender equality. Particularly relevant is research concerning taxes that play a vital role in restoring state revenues after the COVID-19 crisis without further increasing gender inequalities. Revenue from taxes will become increasingly important in order to restore state funding after the COVID-19 crisis. Therefore it is important to carefully assess the gender impact of the tax measures prior to the recovery phase.

Due to the role of European law in VAT and the increasing attention to environmental taxes, both these forms of taxation should also be analysed in depth. Mapping gender inequalities in national tax systems beyond joint tax measures will help identify appropriate European measures to address these inequalities. This should involve an overview of national non-discrimination and gender equality obligations that apply to tax policies, including state mechanisms that address gender inequalities in taxation.

One of the most critical objectives to promote gender equality in taxation remains to eliminate tax-related disincentives to female employment. Therefore, it is vital to increase both soft law and hard law efforts to phase in individual taxation in the Member States and support tax or benefit provisions and institutional forms of care to reduce the financial burden of care work.

Last but not least, it is essential to include gender experts in the European Semester and in law-making. The European Commission has already proposed changes to the legislative procedure in matters of taxation, because the requirement of unanimity has hampered progress on important tax initiatives.[99] The suggested use of clauses that allow for qualified majority voting also strengthens the role of the European Parliament, which has often promoted gender equality.

97 Section 1.1.
98 United Nations (2015) Addis Ababa Action Agenda of the Third International Conference on Financing for Development 7-9.
99 European Commission (2019), Communication from the Commission to the European Parliament, the European Council and the Council. Towards a more efficient and democratic decision making in EU tax policy, COM (2019) 8 final.

Protection of self-employed from discrimination in employment: A review of EU law and national law in Germany, Ireland and Sweden

Elaine Dewhurst*

Introduction

The decision to become self-employed may be freely taken to allow an individual the opportunity to pursue their passions or interests, to work more flexibly to meet their needs or to be more independent. The pull-effect of self-employment is real, with more than 59 % of those self-employed in the EU (some 32.6 million people or 14 % of the total employment)[1] genuinely choosing self-employment as a preference to contracted employment.[2] In some countries of the EU, the move to self-employment as a preference is even higher.[3] However, there is also a significant number of individuals for whom the move to self-employment is not one of choice but one of necessity (20 %).[4] These individuals are pushed into self-employment by a distinct lack of alternatives because traditional employment is either inaccessible to them (because it fails to be flexible, suit their passions or allow them to have their desired work-life balance) or traditional employment contracts are not available in their chosen field (some 16 % indicate that they were pushed into self-employment by a combination of preference and the fact that no other alternative existed for them[5]).

There are significant disparities between the types of individuals who are pushed and pulled into engaging in self-employment. Statistically, more men (61 %) than women choose self-employment, while more women than men feel pushed into self-employment by lack of other alternatives.[6] Those aged over 50 often choose self-employment as a preference (61 %) whereas in the younger age groups (under 35 years) the push to self-employment is more significant (24 %). Unsurprisingly, those choosing self-employment are more likely to be professionals (74 %), managers (66 %) and technicians and associate professionals

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1 European Commission, Eurostat, Products Eurostat News, Self-employed persons available at: https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20190430-1.

2 Eurofound, Exploring self-employment in the European Union, Publications Office of the European Union, Luxembourg, (2017) at p. 10.

3 See for example in Sweden where 86 % of those who are self-employed indicate that self-employment is chosen as a preference: Eurofound, Exploring self-employment in the European Union, Publications Office of the European Union, Luxembourg, (2017) at p. 10.

4 Eurofound, Exploring self-employment in the European Union, Publications Office of the European Union, Luxembourg, (2017) at p. 10.

5 Eurofound, Exploring self-employment in the European Union, Publications Office of the European Union, Luxembourg, (2017) at p. 10.

6 Eurofound, Exploring self-employment in the European Union, Publications Office of the European Union, Luxembourg, (2017) at p. 10.

(65 %)[7] while Eurofound has reported that '[s]ome 42 % of the self-employed in elementary occupations and 26 % in skilled agricultural occupations indicate that they had no other alternatives for work'[8] and may end up in vulnerable or concealed work as a result. Third country nationals may also end up being pushed into self-employment as a result of a lack of recognition of their qualifications, their language skills and understanding of the host labour market. Third country nationals also face discrimination in finding employment and may be forced into self-employment. While third country nationals often top business creation rates and show similar levels of self-employment to host country nationals, the type of self-employment they engage in is different. When only businesses with employees are considered, far fewer third country nationals are self-employed.[9] Those businesses with employees are more likely to have entered self-employment through choice and are less likely to fall into the vulnerable and concealed categories.

Debates as to whether the self-employed should properly be the subject of equal treatment (or other labour) protections due to their choice not to engage in contracted employment can be met with two competing arguments: (a) many self-employed persons are not self-employed by choice and (b) even if they have chosen to be self-employed, there are other good reasons why they should be the subjects of protection. This is particularly true if we value self-employment and entrepreneurship and want to encourage it. Eliminating inequalities has significant benefits in terms of ensuring social and economic integration[10] so as to ensure citizens can realise their full potential, of guaranteeing equal opportunities for all and of closing the gender gaps in entrepreneurship[11] which is often hampered by an inability to reconcile private and professional life. The many forms of discrimination experienced by those who are in contracted employment also beset self-employed workers. Incidences of direct and indirect discrimination, particularly in the provision of financial services or the non-renewal of contracts or in access to training or benefits, and failures to make reasonable adjustments for those with disabilities are commonplace. A lack of maternity and paternity protections has long been a significant deterrent from participating in self-employment, while those in self-employment are also exposed to harassment and sexual harassment, including from third parties such as clients, customers or patients.[12] Those who are vulnerable or in concealed self-employment are often more exposed to certain forms of discrimination such as harassment. Evidence also exists that women, non-EU nationals and young people are most at risk of discrimination in self-employment. Women have been identified as having difficulties accessing finance, training, networking and in establishing a work-life balance.[13] Non-EU nationals top business creation rates but they often 'fail more…due to a lack of information, knowledge and language skills' which forces them to rely on informal finance. Young people also experience market barriers[14] such as

7 Eurofound, Exploring self-employment in the European Union, Publications Office of the European Union, Luxembourg, (2017) at p. 10.

8 Eurofound, Exploring self-employment in the European Union, Publications Office of the European Union, Luxembourg, (2017) at p. 10.

9 OECD and European Union, *Indicators of Immigrant Integration* (2015) at p. 314.

10 Case C-63/86 *Commission v Italy* [1988] ECR 29, ECLI:EU:C:1988:9 at paragraphs 16 and 17; see also the opinion of AG Fennelly in Case C-334/94 *Commission v France* [1996] ECR I-01307, ECLI:EU:C:1995:393 at paragraph 42.

11 Position (EU) No 8/2010 of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC Adopted by the Council on 8 March 2010 OJ C-123E, Part II Objectives; Commission of the European Communities of 2 July 2008 entitled 'Renewed Social Agenda: Opportunities, access and solidarity in 21st century Europe', COM(2008) 412 final at paragraph 4.6.

12 European Commission, Employment and Social Developments in Europe, Leaving no one behind and striving for more: fairness and solidarity in the European social market economy (2020) at pp. 38-39.

13 See Commission staff working document accompanying the proposal for a Directive of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC – Impact Assessment Report {COM(2008) 636} {SEC(2008) 2592}/* SEC/2008/2593 final */; European Parliament Resolution, Women's economic empowerment in the private and public sectors in the EU of 3 October 2017 on women's economic empowerment in the private and public sectors in the EU (2017/2008(INI)); International Labour Office, Giving Globalisation a Human Face, International Labour Conference 101st Session, 2012 at p. 739.

14 Ceptureanu, S.I. and Ceptureanu, E.G., 'Challenges And Barriers Of European Young Entrepreneurs' (2015) 7(3) *Management Research and Practice* 34 at p. 40.

financial disincentives (e.g. accessing external finance[15]) and product barriers[16] where customers do not trust the reliability of their products or services.[17] As a result of lack of finance, young people often enter low-cost markets where the competition is particularly fierce, thus decreasing their chances of survival.[18]

Therefore, it is clear that discrimination on many grounds is flourishing within self-employment and that this has a detrimental impact on social cohesion and the elimination of discrimination more generally. This article analyses the existing protections against discrimination for the self-employed within EU law and within the national law of Germany, Ireland and Sweden. It highlights two particular gaps in protection: the exclusion of certain self-employed persons from the personal scope of many equality protections and the exclusion of certain forms of protection with respect to the exercise of (as opposed to accessing) self-employment from the material scope of some equality protections. In order to achieve the dual purpose of encouraging entrepreneurship and fostering inclusive societies, these gaps need to be addressed. This author advocates for an anti-discrimination approach as opposed to an employment law approach to be adopted in EU law which would allow anti-discrimination law to create its own personal and material scope of protection to address its own specific objectives which differ from more general labour law protections.

1 Protection against discrimination for the self-employed: Personal scope of protection

The idea that the self-employed should be the subject of laws protecting their equal treatment in the context of employment can receive conflicting responses. From a neo-liberal perspective, the exclusion of the self-employed from such protection makes sense as they are in a better position to insure themselves against losses, are more likely to work in higher income levels and it accords with the right to freedom of contract.[19] However, from a human rights perspective, given the increasing number of individuals being pushed into self-employment and given the potential and disparate impact of discrimination, failing to protect the self-employed makes little practical sense. Within this conflict the EU has tried to implement protections for the self-employed with the dual aim of 'cultivating entrepreneurship by removing barriers to running a small business and extending rights and protections to so called economic dependent workers.'[20] This would appear to theoretically satisfy both the neo-liberal and human rights perspectives, albeit that the practical effect is limited by the scope of the directives and national implementation measures. It would appear that currently the neo-liberal perspective is the predominant winner in the interpretation and use of these measures, with a failure to implement a human rights perspective causing significant gaps in protection for many self-employed individuals.

15 Eurofound, *Youth entrepreneurship in Europe: Values, attitudes, policies*, Publications Office of the European Union, Luxembourg (2015) at p. 24.
16 Eurofound, *Youth entrepreneurship in Europe: Values, attitudes, policies*, Publications Office of the European Union, Luxembourg (2015) at p. 24.
17 Employment, Social Affairs and Inclusion, *Entrepreneurship: An Avenue back to work for all?* (2015) Available at: https://ec.europa.eu/social/main.jsp?langId=en&catId=1196&newsId=2314&furtherNews=yes.
18 Employment, Social Affairs and Inclusion, *Entrepreneurship: An Avenue back to work for all?* (2015) available at: https://ec.europa.eu/social/main.jsp?langId=en&catId=1196&newsId=2314&furtherNews=yes.
19 Barnard, C., 'Discrimination law, self-employment and the liberal professions' (2011) 12 *European Anti-Discrimination Law Review* 21 at p. 32.
20 Vosko, L., *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment (Oxford University Press, 2011)* at p. 188.

1.1 Gap in the personal scope: EU law

The material scope of the main equality directives with respect to rights at work is relatively uncontroversial.[21] The directives are relatively clear and the national implementing measures[22] mirror, for the most part, the terms of these directives. The real challenge arises with respect to personal scope and most particularly whether all self-employed individuals fall within the scope of the directives or whether some individuals still remain unprotected.

The reason for the disparate personal scopes of the equality directives appears to arise from the traditional binary distinction in the personal scope of labour law which effectively distinguishes those workers who were employees from those who were independent contractors or self-employed workers. As a result of shifting and varying employment relationships, this distinction has been criticised as being too rigid and unhelpful in determining the reality of employment relationships. Many member states have moved to a tripartite model of protection identifying a third category of economically dependent worker who would also fall within the scope of employment protections, or have alternatively sought to expand the scope of employment protections so as to include these economically dependent or subordinate workers within the definition of an employee. The Commission has recently recognised that:

> 'self-employment has evolved over the last two decades in the EU. Importantly, the structural changes in the labour markets have blurred boundaries between labour market statuses. Alongside the traditional "entrepreneurs" and liberal professions, the self-employed status is being used more widely, in some cases even when de facto a subordinate employment relationship exists.'[23]

Self-employment can include a variety of workers including 'entrepreneurs, the business owners, freelancers, home-workers and the "pseudo-self-employed", ...[and]..those subcontracted by their original employers to now take on work in a self-employed capacity'.[24] However, the use of the term 'self-employed', with its various interpretations at an EU and national level has meant that an inconsistent application of equal treatment laws has arisen across the EU and within Member States. This has left a number of gaps in protection which means that many self-employed are not covered by important equal treatment protections and the objectives of the directives are not being adequately fulfilled.

In 2015, Barnard and Blackham,[25] building on the analysis of Countouris and Freedland[26] in the context of gender discrimination, engaged in the rather heroic task of uncovering the personal scope of the equal treatment directives. They began by identifying a tripartite classification of the personal scope of the relations in the employment field generally within Member States.

21 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; 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; 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, 26.7.2006; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC OJ L 180, 15.7.2010.

22 Sweden: Discrimination Act 2008 (2008:567); Ireland: Employment Equality Acts 1998-2015 (No. 21 of 1998 as amended); Germany: General Act on Equal Treatment (Law to implement the European Directive on the realization of the principle of equal treatment) (AGG) 2006.

23 Proposal for a Council Recommendation on access to social protection for workers and the self-employed COM/2018/0132 final – 2018/059, 1. Context of the Proposal.

24 Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC OJ C 228, 22.9.2009 at paragraph 4.2.

25 European network of legal experts in the field of gender equality, Barnard, C. and Blackham, A., *Self Employment* European Commission (2015) at pp. 5-8.

26 European network of legal experts in the field of gender equality, Countouris, N. and Freedland, M., *The Personal Scope of the EU Sex Equality Directives*, European Commission (2012) at p. 5. See also Countouris N. and Freeland, M., '"Work", "Self-Employment", and Other Personal Work Relations: Who Should be Protected against Sex Discrimination in Europe?' 2 (2013) *European Gender Equality Law Review* 15.

- Category 1: Employees who are the 'usual subject of employment law'
- Category 2: (Self-employed) workers who are self-employed but are 'largely dependent on one particular 'employer'"
- Category 3: Self-employed who work for a number of 'employers' more 'naturally called customers or clients'. They note that this latter category ordinarily falls outside the realm of employment protection in many Member States.

Using this categorisation, Barnard and Blackham undertook an assessment of the main equal treatment directives and identified which categories were covered within the personal scope of the provisions. While in some cases the categorisation was relatively straightforward, as Countouris and Freedland[27] also identified, there is often varying personal scopes even within directives depending on the material article being relied upon. The table below summarises the detailed analysis of Barnard and Blackham.[28]

Directive	Covered	Categories Included
2006/54 (gender)	Article 4	1, 2
	Article 14(1)(a)	1, 2, 3
	Article 14(1)(b),(c) and (d)	1, 2
2000/43 (race)	Article 3(1)(a)	1, 2, 3*
	Article 3(1)(b),(c),(d),(e),(f),(g) and (h)	1, 2
2000/78 (age, disability, sexual orientation, religion)	Article 3(1)(a)	1, 2, 3*
	Article 3(1)(b),(c) and (d)	1, 2
2010/41 (gender)	Article 4	2, 3 (access to self-employment only)

* the decision of the UK Supreme Court in *Jivraj v Hashwani*[29] would dispute the extension of these provisions to Category 3 persons in the context of UK equality law and potentially even under EU law.

Two important gaps emerge from this analysis:

(a) There is a divergence between the dependent self-employed (Category 2) and those who are self-employed and work for a number of employers more naturally called customers or clients (Category 3). Depending on whether a person falls within the former or the latter, differing levels of protection will apply. Most of the employment equality protections for the self-employed are limited to Category 2 workers.

(b) Category 3 – the self-employed who work for customers or clients – receive only minimal protection under the existing equality acquis. Primarily, their protection is limited to equality on all six protected grounds (gender, race, age, disability, sexual orientation and religion) with respect to conditions for accessing self-employment. This includes conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.[30] However, the decision of the UK Supreme Court in *Jivraj v Hashwani*[31] and the interpretation of many Member States is that 'access' to self-employment is a very limited concept and would not include 'exercise' of self-employment. This would mean that the self-employed would not be adequately protected by discrimination perpetrated by a client or customer. This will be discussed in more detail below (gap 2).

27 European network of legal experts in the field of gender equality, Countouris, N. and Freedland, M., *The Personal Scope of the EU Sex Equality Directives*, European Commission (2012) at Part 1.

28 European network of legal experts in the field of gender equality, Barnard, C. and Blackham, A., *Self Employment* European Commission (2015) at Chapter 3.

29 United Kingdom: *Jivraj v Hashwani* [2011] UKSC 40 at paragraph 68.

30 Article 3(1)(a), 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, Article 3.

31 United Kingdom: *Jivraj v Hashwani* [2011] UKSC 40.

The central rationale for the exclusion of this particular category of self-employed from many of the provisions of the equal treatment directives arises in the main from decisions of the Court of Justice of the European Union (CJEU) (interpreting other articles of the equality directives) which have clearly been determined to have a specific application only to 'workers' (Category 2 of Barnard and Blackham's analysis) by virtue of the decision in *Allonby*[32] (e.g. Article 4 of Directive 2006/54). The decision in *Allonby* defined a 'worker' as a 'person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration'[33] and added that the 'formal classification of a self-employed person under national law does not change the fact that a person must be classified as a worker within the meaning of that article if his independence is merely notional'.[34] This, therefore, clearly excludes Category 3 persons whose independence would fall outside this concept of notional independence.

Directives 2000/43 and 2000/78 refer in Article 3 to 'all persons' and particularly to 'self-employed' persons which, on first reading, suggests a rather broad application encompassing Category 3 persons. However, the decision in *Jivraj* has cast some doubt on this assessment. The UK Supreme Court held that in determining the personal scope of Directive 2000/78 regard should be had to the decision of the CJEU in *Allonby* and in doing so held that an element of subordination was necessary for the relationship to be considered as one falling within the scope of the UK employment equality laws. This essentially excludes Category 3 workers from the scope of Directive 2000/78 entirely (and by analogy from Directives 2000/43 and 2006/54 which utilise similar wording).[35]

The case of *Jivraj* is an interesting one as it indicates the manner in which the directives are being interpreted in the national context and the potential uncertainty arising from the application of the *Allonby* decision and the literal wording of the directives. This case will be discussed here not as an example of national law but as a wider example of the potential implications of the uncertainty at an EU level. The case involved the selection of arbitrators who, the parties had agreed, should be from the Ismaili religious community. In determining whether this requirement was discriminatory under the Equality Act 2010 (and its preceding Employment Equality (Religion or Belief) Regulations 2003),[36] the court had to decide whether an arbitrator fell within the scope of the Regulations which had been enacted to implement Directive 2000/78. The Regulations (and prospectively the Equality Act 2010) provided that a person would fall within the scope if they had a contract of employment, a contract of apprenticeship, or they were employed under a contract personally to do any work. The question then arose as to whether an arbitrator was 'employed under' a contract 'personally to do any work' (as they clearly did not fall within the other two constructs). At first instance, the High Court held that an arbitrator was not so employed and did not fall within the scope of the Regulations.

The Court of Appeal reversed this decision and concluded that an arbitrator was indeed employed under a contract personally to do work and that the arbitration clause was therefore discriminatory. The Court of Appeal examined the Directive in detail and referred to its wide scope and purpose. They specifically drew on the language of the recitals and the articles of the Directive which indicated that the Directive was concerned with discrimination affecting access to the means of economic activity; 'whether through employment, self-employment or some other basis of occupation'.[37] Just like consulting a lawyer, a doctor or an accountant, an arbitrator fell within the scope of the Directive and was therefore protected by the Regulations. The essence of the reasoning of the Court of Appeal was that the purpose of the Directive was not only to ensure protection against discrimination but was also to foster conditions for a

32 Case C-256/01 *Allonby v Accrington & Rosendale College* [2004] ECR I-873, ECLI:EU:C:2004:18.
33 Case C-256/01 *Allonby v Accrington & Rosendale College* [2004] ECR I-873, ECLI:EU:C:2004:18 at para 67.
34 Case C-256/01 *Allonby v Accrington & Rosendale College* [2004] ECR I-873, ECLI:EU:C:2004:18 at para 79.
35 For a short discussion see Countouris, N., 'Remoulding the Scope of Application of Anti-Discrimination Law' (2012) 71(1) *Cambridge Law Journal* 47 at p. 48.
36 United Kingdom: Employment Equality (Religion or Belief) Regulations 2003, S.I. 2003/1660.
37 United Kingdom: *Jivraj v Hashwani* [2011] UKSC 40 at paragraph 15.

socially inclusive labour market 'and to ensure the development of democratic and tolerant societies'.[38] This approach is certainly an appealing one as it aims to marry the dual aims of fostering socially inclusive labour markets and ensuring protection for individuals beyond the traditional dependent worker category. The decision of the Court of Appeal appears to endorse the view of scholars such as Davies and Freedland who had previously described the widening of the scope of equality law in the UK to include those employed under a contract personally to do work as moving anti-discrimination law away from a focus on 'the dependent or subordinate work relationship' to an approach where discrimination would be prohibited 'in access to all work opportunities, even where the person discriminated against was not open to economic exploitation'.[39] It also supports the position of Fredman who has previously argued that UK 'discrimination law …has always extended beyond subordinate workers, and indeed beyond economic dependence, to include any worker under a contract for services provided only that the service is provided personally.'[40]

The Supreme Court, however, took a decidedly different view. In examining the term 'employment under…a contract personally to do work', they concluded that the term 'employment under' indicated an element of subordination which could not be applied to the case of an arbitrator whose role could not be 'described as one of employment at all'. The Court placed great emphasis on the working of the statute and the purpose of the statute which was to protect individuals in employment. The extension beyond the employment context to other personal service contracts such as taxi drivers or butchers was not warranted. The Court also placed significant emphasis on the decision of the CJEU in *Allonby* where it was held that Article 141(1) EC (now Article 157 TFEU) did not include 'independent providers of services who are not in a relationship of subordination with the person who receives the services'.[41] Applying this to the facts of the particular case, the Supreme Court held that arbitrators were not employed under a contract personally to do work as they were not working for or under the direction of the parties and they were not subordinate. On the contrary, they were independent of the parties (necessarily so as a result of their quasi-judicial role).[42] The Supreme Court did make it clear that the decision was not speculating on other factual contexts but did indicate strongly that it would be 'surprising' if relationships, such as a plumber engaged on a one-off contract, 'would be subject to the whole gamut of discrimination legislation'. This would have to be decided on a case-by-case basis.[43]

There has been much discussion in the UK around the implications of the Supreme Court decision. In the initial aftermath of the decision there was a collective sigh of relief from lawyers and arbitrators in the City of London that the Supreme Court had demonstrated an understanding of arbitration as a 'very significant process-based dimension which is largely left to the discretion of the arbitrators by most national arbitration legislations, major institutional rules and other international codes (such as the UNCITRAL Model Law), subject only to certain safeguards necessary in the public interest'. The work of an arbitrator, it is argued, and their approach to resolving disputes are inextricably linked to certain personal characteristics and even if not so linked, the 'objective perspective of parties' would be that this was the case. Nationality clauses are common in arbitration agreements as are language and expertise clauses. The Supreme Court 'strongly endorsed the ethos of consent and choice on which dispute settlement through arbitration is premised.'[44]

38 United Kingdom: *Jivraj v Hashwani* [2011] UKSC 40 where it was stated that the Court of Appeal had drawn on the opinion of AG Maduro in Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-05187, ECLI:EU:C:2008:397.

39 Davies, P. and Freedland, M., 'Labour markets, Welfare and the personal scope of employment law' (1999) 21 *Comparative Labour Law and Policy Journal* 231 at p. 263.

40 Fredman, S., 'Marginalising Equal Pay Laws' (2004) 33 *Industrial Law Journal* 281 at p. 285.

41 United Kingdom: *Jivraj v Hashwani* [2011] UKSC 40 at paragraph 68.

42 See the opinion of McCrudden, C., *Two Views of Subordination: The Personal Scope of Employment Discrimination Law in Jivraj v Hashwani*, (2012) 41(1) *Industrial Law Journal* 30. See also the view of Freedland, M. and Countouris, N., 'Employment Equality and Personal Work Relations—A Critique of *Jivraj v Hashwani*' (2012) 41(1) *Industrial Law Journal* 56.

43 United Kingdom: *Jivraj v Hashwani* [2011] UKSC 40 at paragraph 43.

44 Gearing, M., *Jivraj v Hashwani*: A Pro-Choice, Corrective Ruling from the Supreme Court (2011) Kluwer Arbitration Blog available at: http://arbitrationblog.kluwerarbitration.com/2011/09/22/jivraj-v-hashwani-a-pro-choice-corrective-ruling-from-the-supreme-court/.

However, the case also has huge implications beyond the arbitration domain. The Court of Appeal and the Supreme Court demonstrated fundamentally different understandings of employment discrimination law, its scope and its purpose. According to McCrudden, the Court of Appeal adopted an anti-discrimination law perspective: interpreting the anti-discrimination laws differently to other employment laws allowing them to give a rather broad interpretation of the personal scope of the legislation. The Supreme Court adopted an employment perspective: focussing on subordination as a proxy for vulnerability which is intimately connected with the purpose of employment law.[45]

Since the decision in *Jivraj*, there has been a tendency in employment tribunal decisions in England and Wales to equate protection afforded under the Equality Acts with the concept of 'worker' (a category specifically designed in the UK to capture economically dependent and subordinate workers).[46] For example, in the case of *Cummins*, the employment tribunal held that as the claimant was not a worker, she was also not covered by the Equality Act 2010.[47] Ms. Cummins was, in fact, a self-employed dog walker despite the fact that she argued that she worked for the respondent dog-walking business and operated under a significant level of day-to-day control. However, it is possible that a more considered and broader view is now being taken. In the most recent decision of the Employment Tribunal on this issue in the case of *Percy*,[48] the tribunal judge, having reviewed all the most recent authorities, concluded that while subordination was one of the factors to be considered, 'it need not necessarily be present and a consideration of the degree of integration into the allegedly employing business is an important factor when considering whether an employment relationship (as distinct from self-employment) exists'.[49] The judge specifically referred to the difficulty associated with the concept of subordination in the context of senior or highly qualified professionals in particular that 'the kind of subordination found in relation to more junior employees is rarely present'. However, the judge did consider that elements of subordination could be identified by looking at levels of control, integration and powers relating to termination. While this might indicate a move away from the need for an element of subordination in every case, there still appears to be a conflation of the worker status and the concept of employment under a contract to personally do work which unless severed will continue to prevent this latter concept from having any wider scope, certainly within the UK context. If such an approach were to be adopted at an EU level, potentially all Category 3 workers would be considered to be excluded from the personal scope of Directive 2000/78 and other analogous provisions under other equality directives.

1.2 Gap in the personal scope: National law

An interesting question is whether Member States have considered Category 3 workers to be included in their own national equality regimes which transpose the equality directives. Unfortunately, this does not appear to be the case: similar gaps with respect to the exclusion of Category 3 workers can easily be identified. The gap arises as a result of the reliance on an employment law perspective within national contexts which essentially retains employment protections (including protections against discrimination) for those who are vulnerable and in need of protection. An examination of the approaches of Germany, Ireland and Sweden is instructive in this regard.

45 McCrudden, C., 'Two Views of Subordination: The Personal Scope of Employment Discrimination Law in Jivraj v Hashwani' (2012) 41(1) *Industrial Law Journal* 30 at part 13.

46 United Kingdom: *Ms. Bagniewska-Tomczak v Nationwide Healthcare Providers Ltd*, Case No: 2600562/2018 at paragraph 17 available at: Ms_K_Bagniewska-Tomczak_v_Nationwide_Healthcare_Providers_Ltd_2600562.2018_Case_Management.pdf (publishing.service.gov.uk).

47 United Kingdom: *Miss Cummins v Ms Robins Sociable Canines* Case No: 2302552-2019 available at: Miss_G_Cummins_v_Ms_T_Robins__Sociable_Canines__2302552-2019_Judgment_and_Reasons.pdf (publishing.service.gov.uk) and *Mrs. Hamilton v Birstall Social Club* Case No: 2601992 2018 available at: Mrs_J_Hamilton_v_Birstall_Social_Club_2601992_2018_Reserved.pdf (publishing.service.gov.uk).

48 United Kingdom: *Dean Martyn Percy v The Dean & Chapter of the Cathedral Church of Christ in Oxford of the Foundation of King Henry VIII* Case No: 3310878/2019 available at: Microsoft Word - *Percy* - 3310878.19 - Oct 2020 PH Re Status Issue - corrected.doc (publishing.service.gov.uk).

49 United Kingdom: *Dean Martyn Percy v The Dean & Chapter of the Cathedral Church of Christ in Oxford of the Foundation of King Henry VIII* Case No: 3310878/2019 available at: Microsoft Word - *Percy* - 3310878.19 - Oct 2020 PH Re Status Issue - corrected.doc (publishing.service.gov.uk) at paragraph 61.

The gateway to the protection of employment law (including equality law) at a national level is employment status. Equality legislation protects individuals who have a particular employment status. If an individual falls outside the protected statuses, they have no protection under employment law. In general, equality law protects Category 1 employees but it may also protect certain self-employed workers (Category 2) under certain conditions. Unfortunately, none of the three Member States studied provide a clear definition in national legislation as to who constitutes an employee or a self-employed worker. This has been left to the courts to determine on the facts of each case, often putting aside the clear and express contractual terms to determine the real relationship between the parties. Concepts such as integration, economic dependence and control are often determinative factors in establishing employee status. Ireland is a relative exception to this model in that it has developed a soft law code which can be utilised by the courts to assist in the determination of the outside limits of employee versus self-employment status.[50]

The determination of employment status in these jurisdictions rests substantially on a binary distinction between an employee (or a person working under a contract of service (Ireland)[51]) (Category 1 and potentially Category 2) and a self-employed worker (a person working under a contract for services) (Category 3). Access to employment protection is dependent upon falling within the scope of the particular legislation with many employment statutes limiting their personal scope to Category 1 employees or maybe stretching it to Category 2 workers.

In Sweden, the definition of 'employee' is rather wide and comfortably covers both Category 1 and Category 2 workers.[52] Rönnmar notes that although there is no statutory definition of an employee or a self-employed person, the courts have stepped in to make this determination in individual cases where disputes have arisen. Crucially,

> 'the courts are not bound by the description or definition of the relationship given by the parties themselves, for example, in a written contract. The court makes an independent assessment of the legal nature of the relationship on the basis of the actual situation at hand.'[53]

The determination as to whether someone is an employee is based on an overall assessment of various factors in the individual case taking into account personal performance, control, subordination, mutuality of obligation, integration and economic dependence.[54] For the purposes of the Swedish Discrimination Act, as long as the worker is a natural person, in the public or private sector, and can demonstrate that they fall within the definition of an employee and not self-employed, they will be covered in all material respects by the Swedish Discrimination Act. The paucity of case law in Sweden is problematic, however, in terms of truly understanding the extent to which (self-employed) workers are brought within the fold of the Swedish Discrimination Act.

50 Ireland: Office of the Revenue Commissioners, *Code of Practice for Determining Employment or Self-Employment Status of Individuals* (2019) available at: https://www.revenue.ie/en/self-assessment-and-self-employment/documents/code-of-practice-on-employment-status.pdf.

51 Ireland: the main precedent is Supreme Court, *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34. See also *Minister for Agriculture and Food v Barry* [2009] 1 IR 215. For more literature on the determination of employment status in Ireland, see Murphy, A. and Regan, M., *Employment Law* (Bloomsbury Professional, 2017) at Chapter 2; Purdy, A., *Equality Law in the Workplace* (Bloomsbury Professional, 2015) at Chapter 6.

52 Engblom, S., 'Self-employment and the Personal Scope of Labour Law – Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States' (2003) Florence, European University Institute, EUI PhD Theses accessed 30 January 2019 at p. 24 and Åberg, A., 'Working in a Cross-Border Situation: A Study on the Concepts of Employment and Self-Employment' available at: https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=8876224&fileOId=8876237.

53 Rönnmar, M., 'The Personal Scope of Labour Law and the notion of employee in Sweden' available at: clls04_ronnmar2.pdf (jil.go.jp) at p. 159.

54 Åberg, A., 'Working in a Cross-Border Situation: A Study on the Concepts of Employment and Self-Employment' at: https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=8876224&fileOId=8876237 (2016).

In Germany, self-employment is similarly not specifically defined in legislation[55] and has in turn led to 'extensive case law and legal particularities' with respect to determining how an individual worker may be categorised.[56] The meaning of 'self-employed person', as opposed to an employee, is determined by the Federal Labour Court through case law by virtue of a typological method.[57] In a similar manner to Sweden, the factors most relevant to a determination of whether an individual is a Category 1 employee (and therefore protected by employment legislation) or Category 3 self-employed (and falling outside the scope of the employment protections) include economic dependency, control[58] and integration. Persons may also be considered to be of 'dependent economic status'[59] (Category 2). This is effectively a new legal category of 'worker-like persons' who are economically dependent.[60] Such persons will also fall within the personal scope of much employment legislation because of their economic dependence on one single or principal client.[61] Persons will only be protected by the equality legislation (General Act on Equal Treatment) where they are employees or workers with a dependent economic status.[62] Category 1 or Category 2 workers are, therefore, entitled to the full protection of the General Act on Equal Treatment.[63]

Ireland, comparative to Germany and Sweden, has the most expansive protections for the self-employed. Similar to the Equality Act in the UK, the Irish Employment Equality Acts 1998-2015 provides protection not only to employees or apprentices who are natural persons but also to 'any other contract whereby an individual agrees with another person personally to execute any work or service for that person'.[64] Unlike the situation in the UK, however, where the Equality Act has been effectively limited to Category 1 and 2 workers, the Irish Labour Court has confirmed that the Employment Equality Acts must be interpreted as covering certain self-employed persons to ensure conformity with EU directives.[65] While this may seem similar to the situations in Germany and Sweden (which provide more expansive definitions of employees in their equality laws extending as they do protection to both Category 1 and Category 2 workers), the definitional net in Ireland has been cast somewhat more widely allowing for potentially more Category 3 – self-employed – to be brought within the scope of the Employment Equality Acts 1998-2015.

In the seminal case of *Nowacki*[66] a freelance veterinary practitioner claimed discrimination under the Employment Equality Acts 1998-2015 on the grounds of gender and family status. In order to establish her claim, she had to demonstrate that she fell within the scope of this notion of employment envisaged in Section 2(1) of the legislation. Relying on the case of *Danosa*[67] where it was held that: '...the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration...', the claimant

55 Germany: Self-employment is not defined in the General Act on Equal Treatment (Federal Law Gazette I p. 1897, as last amended by Article 8 of the SEPA Accompanying Act of 3 April 2013 (Federal Law Gazette I p. 610)). It is understood that the concept is equivalent to other areas of labour law. For an excursus on the nature of employment status in German Law see Waas, B., 'What Role for Solopreneurs in the Labour Market?' (2017) 8(2) *European Labour Law Journal* 154 and Daubler, W., 'Challenges to Labour Law' (2019) 5(2) Law J Soc & Lab Rel 16.

56 Eurofound, *Digital Age – Employment and working conditions of selected types of platform work. National context analysis Germany* (2018) at p. 9.

57 Waas, B., 'What Role for Solopreneurs in the Labour Market?' *European Labour Law Journal*, vol. 8, no. 2, 154 at p. 156.

58 A person is an employee and not self-employed if the employer has the right fully to direct them with respect to time, duration and place of performance (Cf. Federal Labour Court 6 May 1998, 5 AZR 347/97)).

59 Germany: General Act on Equal Treatment, Section 6(1)(3)(1).

60 Vosko, L., *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment (Oxford University Press, 2011)* at p. 190.

61 Schrader/Schubert, in Däubler, W. and Bertzbach, M., *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (Nomos, 2018) Section 6 point 13 AGG.

62 Germany: General Act on Equal Treatment, Section 6(1)(3)(1).

63 Schrader/Schubert, in Däubler, W. and Bertzbach, M., *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (Nomos, 2018) Section 6 point 4 ff. AGG.

64 Ireland: Employment Equality Acts 1998-2015, Section 2(1).

65 Ireland: *Wall, O'Shea and Kavanagh, Veterinary Partnership t/a Moyne Veterinary Clinic v Nowacki*, EDA198, 4 April 2019, available at: https://www.workplacerelations.ie/en/cases/2019/april/eda198.html; See also Workplace Relations Commission, *Refereeing Official v Sporting Association*, ADJ-00017749, 8 August 2019, available at: https://www.workplacerelations.ie/en/cases/2019/august/adj-00017749.html.

66 Ireland: *Wall, O'Shea and Kavanagh, Veterinary Partnership t/a Moyne Veterinary Clinic v Nowacki*, EDA198, 4 April 2019, available at: https://www.workplacerelations.ie/en/cases/2019/april/eda198.html.

67 *Danosa v LKB Lizings SIA* [2010] I-11405; ECLI:EU:C:2010:674.

argued that she was a worker and fell to be protected under equality law. The claimant relied solely on EU law as the supreme authority of the interpretation of the directives. In establishing that the claimant had performed work personally, the claimant demonstrated control, integration, economic dependence, and the existence of mutuality of obligation between the respondent and the claimant. Interestingly, the respondent relied on the *Jivraj* and *Allonby* decisions to emphasise the need for subordination in the relationship, which it was argued did not exist in this case. However, the Labour Court favoured a more expansive definition than that propounded in *Jivraj*. To support this the Labour Court identified that the wider definition of an employee (a contract personally to perform work) also existed in another employment law statute and had been interpreted as including a sub-contractor providing services personally under a contract for services (a self-employed contract).[68] In addition, the Labour Court examined the purpose of the Employment Equality Acts 1998-2015 which was to implement the equal treatment directives and in light of that held that it 'follows that the broad definition of a "contract of employment" must be interpreted as intended to bring self-employed persons within the ambit of the Acts so as to bring the Acts in conformity with the personal scope of the Directives.'

The Labour Court also distinguished the case of *Jivraj* citing material differences in the wording of the relevant statutes. In *Jivraj*, the UK Supreme Court had placed some emphasis on the words 'employed under' as denoting a subordinate relationship. The Employment Equality Acts in Ireland did not contain such wording. While the Labour Court did require a degree of subordination to be demonstrated, a much wider version of subordination, akin to the Employment Tribunal decision in *Percy* discussed above, was applied. This may have been in recognition of the professional status of the claimant and the fact that demonstrating subordination in such circumstances can be more difficult. The Labour Court determined that subordination 'refers to the degree to which one party exercises economic power vis-a-vis the other. Where one party is dependent on another to a significant extent for work, and consequently their means of livelihood, a relationship of subordination exists'. In this case, the Labour Court was satisfied that the claimant was clearly dependent on the respondent for most, if not all, of her work and therefore, fell within the scope of the Employment Equality Acts. The important distinction in this case is the fact that limited economic dependence (not necessarily on one employer) was sufficient to allow the claimant to fall within the scope of the equality protections.

The situation in Ireland has some important implications for the interpretation of the personal scope of the equality directives. In the first instance, it distinguishes the decision in *Jivraj* and places it firmly within its own jurisdiction by linking the decision clearly to the wording of the UK statute which is wording which is not found within the equality directives. This opens the door to allowing self-employed workers to be brought back within the fold of all the equality directives, particularly Directive 2000/78 which was disputed in *Jivraj*. Secondly, the Irish courts have given a very broad interpretation to the equality directives. The Labour Court noted that the broad definition of a 'contract of employment' must be interpreted as intending to include self-employed persons 'so as to bring the Acts into conformity with the personal scope of the Directives'. The Labour Court specifically cited the clear use of the term 'self-employed' within Article 3 of Directives 2000/43 and 2000/78 and Article 14 of Directive 2006/54. Finally, the Irish Labour Court has also reduced the reliance on the concept of subordination to allow an individual to fall within the scope of the Irish legislation. The Labour Court recognised that the concept of subordination is not always necessary and as long as some limited economic dependence can be demonstrated this may be sufficient to allow that individual to fall within the personal scope of the legislation. The situation in Ireland then is that Category 1 and Category 2 workers are most definitely covered by the legislation. However, Category 3 workers may also be covered where some limited economic dependence is identified.

68 Ireland: *Building and Allied Trades and Valentine Scott v The Labour Court and The Construction Industry Federation and Gerry Fleming* [2005] IEHC 109 available at: https://ie.vlex.com/vid/building-and-allied-trades-793689253.

1.3 Gap in personal scope: conclusions

Since the decision in *Jivraj* in the UK, there is a distinct concern that despite the express use of the term 'self-employed' in the equality directives only employees and those self-employed workers who are subordinate to potentially one employer will be covered by the terms of the equality directives. This seems to accord also with the interpretations of some Member States. An examination of Sweden and Germany, in particular, indicates a preference in national equality law towards protecting employees and those who are subordinate and economically dependent. However, national equality law is almost exclusively based on an employment law theory which seeks to provide protection for the most vulnerable rather than an anti-discrimination theory which seeks to meet protection aims but also other aims such as social cohesion. Anti-discrimination theory would require a different personal scope of equality legislation to that which exists for other employment protection legislation so as to meet these differing objectives. Ireland seems to have come the closest to meeting this anti-discrimination law theory in the most recent decision of its Labour Court. It has determined that the personal scope of its equality laws do not have to be the same as other employment protection legislation and it can expand to include self-employed workers in certain circumstances. While there is still some adherence to a subordination concept, it is a much broader and more inclusive definition than that existing in other Member States and more cognizant of the realities of self-employed activities which may include professionals whose work is more difficult to describe as subordinate but which may still have hallmarks of economic dependence. It is a model which sets the ball rolling on closing this existing gap in the personal scope of EU equality law.

2 Protection against discrimination for the self-employed: Material scope of protection

The second gap in protection arises in relation to the extent to which the equality directives protect against discrimination in self-employment, i.e. what exactly is the material scope of that protection? Do the equality directives protect against discrimination in accessing self-employment or does protection extend also to the exercise of self-employment? In addition, what does accessing self-employment actually mean? For example, does protection from discrimination in accessing self-employment include protection from discrimination with respect to selection, engagement or appointment or is it merely limited to preventing discrimination in qualifications or setting up as a self-employed worker? Indeed there is a fine line between access and exercise – it is arguable that the act of selecting a self-employed person for work could be viewed either as a form of exercise of self-employment or a restriction on accessing self-employment. In this section, for ease of terminology, access to self-employment will be limited to qualifications and establishment, while exercise will refer to conditions with respect to selection, engagement or appointment and other forms of exercise.

The reason that this distinction between access and exercise is so important is because much discrimination which occurs to self-employed workers may arise after the point of establishment while they are exercising their self-employment and leaves a substantial gap in protection for self-employed workers. Where the self-employed are discriminated against by a client or a customer, they are, therefore, not protected against this discrimination. Barnard and Blackham correctly observe that Directive 2004/113 will not apply as that applies only where the self-employed person themselves discriminates against a client/customer (but not where they are discriminated against by a client or customer). This section will examine to what extent the access or exercise of self-employment is protected in EU and national law.

2.1 Gap in material scope: EU law

The main equality directives provide that there should be no discrimination on grounds of racial or ethic origin (Directive 2000/43) or age, religion, sexual orientation or disability (Directive 2000/78) or gender (Directive 2006/54), including protecting equal treatment in 'conditions for access to employment, to

self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.'[69] In the context of gender specifically, such protection has been defined as including 'protection with respect to establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity'.[70]

The term 'access' is utilised in most equality Directives. However, this concept is not defined in any detail. The term 'access' is not utilised in Directive 2010/41, a Directive which is not meant to replicate the existing protections in other equality directives[71] but reference is made to protections for 'the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.'[72] Barnard and Blackham have contended that Article 4 of Directive 2010/41 is similarly limited to accessing self-employment and does not protect the exercise of self-employment. This distinction is based on a literal reading of Article 4 which sets out some examples of the type of activity protected by the principle of equal treatment all of which appear to be inherently linked to access to self-employment such as establishment, equipment, extension of a business, launching or extending a self-employed activity. This would tie in with the focus in Article 14(1)(a) of Directive 2006/54 on access to self-employment but would also mean that there is very little that Article 4 has added to protection for the self-employed, other than to flesh out the content of what Article 14(1)(a) may protect against in more detail.

The UK Supreme Court in *Jivraj* also tackled this notion of access and exercise in the context of Directive 2000/78 and also concluded that the protection under the Equality Act in the UK was limited to accessing self-employment and effectively preventing only discrimination by the State and/or professional bodies.[73] The Supreme Court felt rather strongly that it could not extend to the exercise of self-employment. The Supreme Court distinguished between 'preventing discrimination from qualifying or setting up' as a self-employed worker which was ostensibly covered by Directive 2000/78 and 'selection, engagement or appointment' which would not be covered by Directive 2000/78. This evidently leaves a rather large gap in protection to self-employed persons with respect to their selection or appointment to certain roles.

In the employment context (not self-employment, although one must assume a uniformity of interpretation), it would appear that the CJEU has not accepted this rather narrow interpretation of the term 'access' in Directive 2000/78 and has considered many things notionally described as 'exercise' to fall within the scope of the equality directives. In a recent opinion delivered in 2019, which was followed by the CJEU, Advocate General (AG) Sharpston advocated strongly for a very broad interpretation of the equality directives in view of their seminal objectives.[74] She specifically indicated that equality

69 Article 3(1)(a) of 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; Article 3(1)(a) of 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; and Article 14(1)(a) 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) OJ L 204, 26.7.2006.

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) OJ L 204, 26.7.2006 at Preamble 13.

71 Recital 10 of Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC OJ L 180, 15.7.2010.

72 Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC OJ L 180, 15.7.2010, Article 4.

73 European network of legal experts in the field of gender equality, Catherine Barnard and Alysia Blackham*, Self Employment* European Commission (2015) at p. 11.

74 Opinion of AG Sharpston, Case C-507/18 *NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford* ECLI:EU:C:2019:922 at para 41.

> 'of treatment in respect of access to employed or self-employed activities involves the elimination of *any discrimination* arising from *any provision which prevents access* of individuals to all forms of employment and occupation. Employment and occupation are key elements in guaranteeing equal opportunities for all.'[75]

She defined access as the 'means or opportunity to approach or enter a place'.[76] With respect to 'access to employment' (and again one must assume a similar uniform interpretation with respect to access to self-employment), it was held that the term encompasses the conditions, criteria, means, and ways to get employed work. With respect to selection, she noted that '[i]f an employer chooses not to hire certain persons because of their (perceived) sexual orientation, he establishes a (negative) discriminatory selection criterion for employment.'[77]

Applying these principles by analogy to the case of self-employment it is clear that Directive 2000/78 requires the elimination of *any discrimination* arising from *any provision which prevents access* of individuals to all forms of self-employment. In the context of self-employment, it concerns any means or opportunity to enter a place encompassing any conditions, criteria, means or ways to get self-employed work. This may at first glance indicate an interpretation similar to that in *Jivraj* limiting the distinct access to certain professions. However, AG Sharpston specifically goes on to discuss selection and if the provision is to be applied uniformly, then with respect to selection, if a client or customer chooses not to hire certain persons because of their (perceived) characteristic, they would also establish a (negative) discriminatory selection criterion for self-employment. This would indicate that the term 'access' in the equality directives would include both access and exercise if one is to consider exercise as including selection, engagement and appointment.

This would appear to coalesce with other decisions of the CJEU. The CJEU has tackled the interpretation of Article 3(1)(a) of Directive 2000/78 in the context of self-employed persons in the case *of CO v Comune di Gesturi*.[78] Here the court had to determine whether legislation which prohibited public administrative authorities from awarding analysis and consultancy roles to those who were retired was discriminatory. Central to this analysis was whether such an activity, which could be described as the exercise of self-employment, fell within the scope of the Directive. Due to the fact that such legislation 'directly affects the establishment of a working relationship and, a fortiori, the pursuit by the persons concerned of certain professional activities', it was considered as 'laying down rules regarding the conditions for access to employment' and as such fell within the material scope of the Directive.[79]

The broad interpretation of Article 3(1)(a) of Directive 2000/78 coupled with a more purposive interpretation of Article 4 of Directive 2010/41 indicates that these provisions are capable of extending to coverage of both access to, and exercise of, self-employment. Barnard and Blackham point out that Article 4 of Directive 2010/41 itself is non-exhaustive and that Article 1(1) refers to 'putting into effect in the Member States the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity' which itself indicates a preference towards protection in the exercise of self-employment. Secondly, Directive 2010/41 is meant to be an addition to the equality acquis with respect to the rights of the self-employed. If access is the only aspect covered, then the Directive adds very little in terms of protection for the self-employed. Thirdly, if one considers that Directive 2004/113 provides protection against gender discrimination in

75 Opinion of AG Sharpston, Case C-507/18 *NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford* ECLI:EU:C:2019:922 at para 42.
76 Opinion of AG Sharpston, Case C-507/18 *NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford* ECLI:EU:C:2019:922 at para 43.
77 Opinion of AG Sharpston, Case C-507/18 *NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford* ECLI:EU:C:2019:922 at para 43.
78 Case C-670/18, *CO v Comuni di Gesturi* ECLI:EU:C:2020:272.
79 Case C-670/18, *CO v Comuni di Gesturi* ECLI:EU:C:2020:272.

the opposite direction (protection of a client/customer from discrimination by a service provider[80]), it would seem rather unreasonable that a service provider would not be so reciprocally protected against discrimination by a client/customer in the exercise of their self-employment under any of the equality directives. Fourthly, there are potential implications in the wording of the Articles 15 and 16, read in conjunction with Article 21, of the Charter of Fundamental Rights which would indicate that the more expansive reading of the equality directives with respect to both access and exercise is certainly warranted.[81] Finally, from a purposive perspective, the exclusion of exercise of self-employment does not fulfil the multiple objectives of the equality directives.

2.2 Gap in material scope: National law

This is a rather vexed question at a national level in a similar manner to EU law due to lack of clear definitions of both terms 'access' and 'exercise' at an EU and national level.

In Sweden, once the individual falls within the personal scope of the Swedish Discrimination Act, they are entitled to all the general anti-discrimination protection. In addition, self-employed persons who fall within the scope of the legislation have an additional material protection with regard to starting or running a business and professional recognition.[82] Discrimination is prohibited with regard to financial support, permits, registration or similar arrangements that are needed or can be important for someone to be able to start or run a business, and recognition, certification, authorisation, registration, approval or similar arrangements that are needed or can be important for someone to be able to exercise a certain profession. These provisions indicate a clear preference for protecting only access to self-employment in the limited sense identified in the UK case of *Jivraj* such as preventing discrimination in qualifying or setting up a business or profession. It does not appear to cover exercise of self-employment such as selection, appointment or engagement and does therefore not protect against discrimination by a client or customer. This would indicate a clear preference in Sweden for maintaining a very limited protection for self-employed workers.

In Germany, those that fall within the scope of the General Act on Equal Treatment will be entitled to full protection from direct/indirect discrimination, as well as harassment and to positive action in line with the equality directives. A wide measure of protection with respect to accessing any kind of employment, including self-employment, is provided for by law.[83] With respect to equality law specifically, the self-employed are generally only protected with respect to access to self-employment not to the exercise of such self-employment.[84] Access has, however, been defined rather broadly as including not only the first time of access but also renewed access or continuation after termination of an activity.[85] This would seem to create a sort of umbrella protection where if a contract is ongoing, long-term and established, some protection will be afforded to the self-employed individual which would include protection with respect to exercising self-employment regarding selection, appointment or engagement. Conversely, self-employed individuals working under individual one-off contracts would not be so protected with respect to the exercise of their self-employment. It will be the court who will be the ultimate arbiter as to whether such an arrangement will fall to be protected or not.[86] While this interpretation would appear to cover a wider

80 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, at Article 3.

81 European network of legal experts in the field of gender equality, Barnard, C. and Blackham*, A., Self Employment* European Commission (2015) at p. 11. Protections also exist in national law and can be much more generous. For example, Section 19 of the General Act on Equal Treatment in Germany provides that a client or customer is protected from discrimination by a service provider on the grounds of race and ethnic origin, sex, religion, disability, age or sexual orientation.

82 Sweden: Swedish Discrimination Act, Chapter 2, Section 10.

83 Germany: Article 12 Basic Law.

84 Germany, Section 6(3) General Act on Equal Treatment.

85 Germany, Higher Regional Court, Cologne, judgment of July 29, 2010, AZ 18 U 196/09. See also the contributions in *Industrielle Beziehungen*, Heft 2/2016, v. Roetteken, T. *Kommentar zum AGG* (Munich, 2007) at Section 6.

86 Däubler, W and Bertzbach M, *Allgemeines Gleichbehandlungsgesetz: Handkommentar* (Nomos, 2018) Section 2 point 7; Roetteken, T. *Kommentar zum AGG* (Munich, 2007) at Section 6 point 42.

definition of access than a literal first reading of the General Equal Treatment Act would indicate, it brings with it a large measure of uncertainty as to whether a particular contractual relationship will fall within the protection of the legislation.[87] The Federal Anti-Discrimination Agency gives the example of a lawyer where they note that a lawyer would be protected with respect to accessing the profession but would not be protected with respect to individual contracts made with clients who have the right to choose who they would like to represent them even if based on certain personal characteristics.[88] However, this may not be the case if the lawyer is economically dependent on one client alone (perhaps indicating an employment-type relationship) or even on two or more clients exclusively.[89] Another example which demonstrates the uncertainty in the existing legislation is the role of a lecturer in a private university. If a lecturer is repeatedly hired for two hours per week but then is refused another contract on grounds of age, the dispute arises as to whether there is protection under the General Equal Treatment Act. On a literal interpretation, it could be argued that there is no protection as the right of access to self-employment has not been affected here (the lecturer is free to teach at any other institution so basic access to self-employment is not affected). However, if this was to be considered a long-term, established relationship, it could fall within the protection of the legislation as access to this particular job is being denied (which is effectively straying into the exercise of self-employment territory).[90] There is a clear indication in the case law that there have been many cases taken on the basis not only of access to self-employment but also with respect to exercise, particularly termination[91] and as such this wider definition would have a significant impact on the level of protection of the self-employed. It can be concluded that self-employed people benefit from legal protection against discrimination not only upon access but also (although not expressly and with some legal uncertainty) with respect to some aspects of the exercise of self-employment such as selection, appointment or engagement.

Of all three jurisdictions studied, Ireland would appear to have the widest protections. In fact, there are no distinctions evident with respect to access to, or exercise of, self-employment. If the self-employed person falls within the Employment Equality Acts 19982015, they will be protected in all aspects of their employment. While some self-employed workers will fall outside this protection, the Irish courts (as discussed above) have recently widened the existing protection. The case of *Nowacki*[92] is a prime example of a self-employed person receiving protection under Irish equality law for discrimination by a client or customer in the course of their dealings on grounds of gender and family status which was connected with termination of their self-employment (exercise).[93] This therefore firmly establishes a level of protection beyond pure access to self-employed activities in Ireland.

2.3 Gap in material scope: Conclusions

There is clearly a distinct gap in the protection of self-employed persons brought about by a notional difference between whether the equality directives protect merely against discrimination with respect to accessing self-employment or whether this may also extend to protecting against discrimination with respect to certain aspects of the exercise of self-employment. Within EU law itself, there would appear to be an appetite to give a rather broad interpretation to the equality directives in order to ensure that the objectives of these directives are substantially met. However, the problem also arises

87 *Antidiskriminierungsstelle des Bundes*, *Evaluation des Allegemeinen Gleichbehandlungsgesetzes* available at https://regenbogen.verdi.de/++file++57d8f468890e9b0704e078a8/download/AGG_Evaluation.pdf at pp. 46-48.
88 *Antidiskriminierungsstelle des Bundes*, *Evaluation des Allegemeinen Gleichbehandlungsgesetzes* available at https://regenbogen.verdi.de/++file++57d8f468890e9b0704e078a8/download/AGG_Evaluation.pdf at pp. 46-48.
89 *Antidiskriminierungsstelle des Bundes*, *Evaluation des Allegemeinen Gleichbehandlungsgesetzes* available at https://regenbogen.verdi.de/++file++57d8f468890e9b0704e078a8/download/AGG_Evaluation.pdf at fn 288.
90 *Antidiskriminierungsstelle des Bundes*, *Evaluation des Allegemeinen Gleichbehandlungsgesetzes* available at https://regenbogen.verdi.de/++file++57d8f468890e9b0704e078a8/download/AGG_Evaluation.pdf at p. 46-48.
91 *Antidiskriminierungsstelle des Bundes*, *Evaluation des Allegemeinen Gleichbehandlungsgesetzes* available at https://regenbogen.verdi.de/++file++57d8f468890e9b0704e078a8/download/AGG_Evaluation.pdf at p. 46-48.
92 Ireland: *Wall, O'Shea and Kavanagh, Veterinary Partnership t/a Moyne Veterinary Clinic v Nowacki*, EDA198, 4 April 2019, available at: https://www.workplacerelations.ie/en/cases/2019/april/eda198.html.
93 For more literature on this issue in Ireland see Purdy, A., *Equality Law in the Workplace* (Bloomsbury Professional, 2015) at Chapter 6.

at a national level with many Member States (Sweden and Germany in this study) excluding protection against discrimination in the exercise of self-employment. However, Ireland appears to have extended its equality legislation to cover the exercise of self-employment without much difficulty and with the added benefit of achieving the objectives of the equality legislation. Clarity within the EU equality acquis with respect to the level of protection required to meet the desired objectives of deterring discrimination and encouraging economic and social cohesion would be desirable and would bring legal certainty to the self-employed, and to their clients and customers.

Conclusions

It is true that the existing EU acquis and its implementation at a national level in Ireland, Sweden and Germany fail to provide adequate protection for the self-employed who fall outside certain employment relationships or outside certain notional definitions.[94] If the aim of the equal treatment directives is to foster an inclusive and tolerant labour market, to protect against discrimination and to encourage entrepreneurship, then excluding the self-employed from necessary protections will not encourage people to leave dependent employment and close the existing equality gaps. It will also potentially lead to more concealed forms of self-employment so as to avoid existing employment protections.

This analysis has highlighted numerous gaps in the existing legal protection of the self-employed from discrimination. This has mainly arisen from two sources: the requirement that the self-employed be in a position of subordination in order to receive protection under existing equality laws and the distinction between access to, and exercise of, self-employment with only the former being protected without any doubt, with limited exceptions.

It has been argued in this article that in order to meet the purposes of the equal treatment directives, considerably greater protections need to be afforded to the self-employed and the existing gaps in protection require immediate attention. With respect to the requirement of subordination or dependency, it can be argued that this requirement stems from two main sources. Firstly, it stems from a distinctly employment law perspective at a national level combined with a traditional binary understanding of the employment relationship. Secondly, it stems from the EU law decision in *Allonby* relating to equal pay. With regard to the latter, it is arguable that such emphasis on *Allonby* is misguided as the equal pay provisions have a much narrower scope than the equal treatment directives in EU law which are distinct and different, and a number of national legal systems contemplate, in their implementing instruments, these distinctions.[95] It also appears that some Member States, including potentially the UK where the *Jivraj* distinction initially arose, are moving away from this strict reliance on subordination. Case law in the UK itself is showing signs of moving towards a more nuanced understanding of self-employment. More significantly in Ireland, there has been a distinct movement towards a broader understanding of who should fall within the personal scope of employment equality law. A broader understanding at an EU level would be most welcome.

In addition, there has been an implication that the equal treatment protections apply only in relation to access to and not the exercise of self-employment. This means that a self-employed person could not be discriminated against with respect to accessing a profession (e.g. entering training or gaining a professional qualification), but could be discriminated against during the exercise of their self-employment (a client or customer could discriminate in relation to the selection of a self-employed person). This is the case despite the fact that the self-employed person would themselves be guilty of discrimination if they

94 Vosko, L., *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment (*Oxford University Press, 2011*)* at p. 198.

95 Countouris, N. and Freedland, M., "'Work", "Self-Employment", and Other Personal Work Relations: Who Should be Protected against Sex Discrimination in Europe?' 2 (2013) *European Gender Equality Law Review* 15 at p. 20.

discriminated against a client/customer.[96] It is argued that the wording of the equal treatment directives do not warrant such an interpretation and the CJEU is moving towards a broader interpretation, that the Charter of Fundamental Rights does not support such an interpretation and that the purpose of the directives in terms of encouraging entrepreneurship and economic and social cohesion will not be fulfilled if the existing narrow interpretation is maintained. It is likely the narrow scope is reflective of the national implementation of these principles as has been demonstrated in the case of Sweden and Germany and will require some effort at a national level to implement greater protections. However, there is an indication that at an EU level there is a preference towards a broader interpretation of protections for the self-employed and there are also some Member States, like Ireland, who are extending a wide range of protections to self-employed persons. The extension of these principles does not cause significant disruption in such jurisdictions.

A recent European Trade Union Confederation (ETUC)report on self-employment indicates that a key priority for European institutions should be establishing international rules providing a common legal framework for self-employed workers. The most commonly presented call for action at EU level was the need for some 'EU regulation of self-employed workers' including establishing self-employed status and clarifying legal status of self-employed workers across the member states.[97] Given that certain types of self-employment are increasing, and that there are significant disparities in self-employment in terms of gender, age and race, it is no longer acceptable that such large gaps in protection, arising mainly from traditional binary understandings of employment protection and notional interpretative distinctions are maintained. The time has come to create a new understanding of self-employment, beginning with clearly defining who is self-employed and unashamedly ensuring their protection from discrimination. Access to employment, and by extension self-employment, is of

> 'fundamental significance for every individual, not merely as a means of earning one's living but also as an important way of self-fulfilment and realisation of one's potential. The discriminator who discriminates against an individual belonging to a suspect classification unjustly deprives her of valuable options. As a consequence, that person's ability to lead an autonomous life is seriously compromised since an important aspect of her life is shaped not by her own choices but by the prejudice of someone else. By treating people belonging to these groups less well because of their characteristic, the discriminator prevents them from exercising their autonomy. At this point, it is fair and reasonable for anti-discrimination law to intervene. In essence, by valuing equality and committing ourselves to realising equality through the law, we aim at sustaining for every person the conditions for an autonomous life'.[98]

96 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, at Article 3.

97 ETUC, *Trade Unions Protecting Self-Employed Workers: Why Self-Employed Workers need better rights? What unions are doing? Which priorities for the future?* (Brussels, 2018).

98 Opinion of AG Maduro in Case C-303-06 *Coleman* EU:C:2008:61, point 11.

Transparency, whistle-blowers and gender equality: Lost opportunities, second chances?

Jean Jacqmain and Nathalie Wuiame*

Introduction

In 2019, the European Parliament and Council adopted, among others, two directives: Directive (EU) 2019/1152,[1] on transparent and predictable working conditions in the European Union, and Directive (EU) 2019/1937,[2] on the protection of persons who report breaches of Union law (hereafter 'the Whistle-blower Directive').

Both directives share the aim of bringing more transparency: the first one, for workers, on their working conditions; the second, for citizens in general, in facilitating the disclosure of threats or harm to the public interest and breaches of Union law.

They could have been particularly useful to boost the effectiveness of the extant gender equality machinery and to serve as good examples of the implementation of the gender mainstreaming principle enshrined in Article 8 TFEU. However, neither of them presents any visible connection with gender equality issues. This paper will endeavour to explore what aspects could, or indeed should, have been included in each of these new directives, so that, at least by default, they provide Member States with an incentive to strengthen their respective legislations on gender equality in employment, given that both directives contain provisions relating to non-regression and freedom for Member States to take more favourable measures.

Transparent and predictable working conditions

Genesis

Nearly 30 years ago, after the adoption of the Community Charter of the Fundamental Social Rights of Workers, which already proclaimed the right to fair and just working conditions, it appeared that such a right could not be exercised unless every worker was informed of those conditions. This consideration was the basis for Directive 91/533/EEC[3] on an employer's obligation to inform their employees about

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1 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ *L*186, pp. 105-121.

2 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ *L*305, pp. 17-56.

3 Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ *L*288, 18.10.1991, pp. 32-35.

the conditions applicable to the contract or employment relationship, the 'Written Statement Directive'. Regrettably, most Member States only went through the motions of minimal implementation, so that within the spread of EU instruments dealing with aspects of social law, Directive 91/533/EEC promptly became the 'Cinderella Directive'.[4] If the related case law of the Court of Justice serves as a benchmark of the impact of a directive, only three cases can be reported, *Kampelmann*,[5] *Lange*[6] and *Andersen*,[7] plus one from the EFTA Court, *Harðarson*.[8]

Much later on, in December 2000 in Nice, the Charter of Social Rights was subsumed into the Charter of Fundamental Rights of the European Union, Article 31 of which now guarantees the right to fair and just working conditions.

More recently, in November 2017 in Göteborg, the European Parliament, Council and Commission adopted the European Pillar of Social Rights (EPSR).[9]

While not legally binding, the EPSR serves as a new impetus for action from the European Commission.[10] The EPSR consists of a set of 20 principles and rights which aim to 'deliver new and more effective rights to citizens'.[11] It is organised around three main categories: equal opportunities and access to the labour market, fair working conditions and social protection, and inclusion. The adoption process of the EPSR gave the opportunity to review the relevance of the EU *acquis* in this field, analyse needs and challenges in the light of new trends, and identify future action that can 'serve as a compass for renewed convergence within the euro area'.[12]

Directive (EU) 2019/1152, replacing the 'Written Statement Directive', was already announced by the Commission in April 2017, when presenting the EPSR, as one of the concrete initiatives to be taken.[13] The purpose of the revision is to improve workers' and employers' clarity on their contractual relationship and ensure that this protection is extended to all workers, irrespective of the type of employment relationship, including in particular those in new and non-standard forms of work. In terms of gender aspects, the 'Impact Assessment' notes that: 'Among those who are at least partially excluded from protection of the Written Statement Directive is a relatively high proportion of vulnerable workers. Available data indicate for example that non-standard jobs – and particularly fixed-term jobs – are disproportionately held by younger, less-educated and lower-skilled workers. There is also a gender bias, with women over-represented among non-standard workers.'[14] It adds that 'a minimum common level of predictability can prove extremely important for (…) work-life balance (…) of workers without a fixed schedule, including on-demand work and zero-hour contract workers'.[15]

4 See Clark, J. and Hall, M. (1992), 'The Cinderella Directive? Employee rights to information about conditions applicable to their contract or employment relationship', *ILJ*, p. 106.
5 Judgment of 4 December 1997, *Helmut Kampelmann and Others v. Landschaftsverband Westfalen-Lippe*, C-253/96, EU:C:1997:585.
6 Judgment of 8 February 2001, *Wolfgang Lange v. Georg Schünemann GmbH,* C-350/99, EU:C:2001:84.
7 Judgment, 18 December 2008, *Ruben Andersen v Kommunernes Landsforening*, C-306/07 EU:C:2008:743.
8 EFTA Court, Judgment of 25 March 2013, *Yngvi Harðarson v Askar Capital hf*, E-10/12. Available at: www.eftacourt.int.
9 Interinstitutional Proclamation on the European Pillar of Social Rights, OJ *C*428, pp. 10-15.
10 See Bednarowicz, B. (2019), 'Delivering on the European Pillars of Social Rights: The New Directive on transparent and predictable working conditions in the European Union', *ILJ*, Vol. 48.
11 See Bednarowicz, B. (2019), 'Delivering on the European Pillars of Social Rights: The New Directive on transparent and predictable working conditions in the European Union', *ILJ*, Vol. 48.
12 Communication from the Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, Launching a consultation on a European Pillar of Social Rights, COM (2016), 127 fin, Strasbourg 08.03.2016.
13 Commission Staff Working Document Impact assessment, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union {COM(2017) 797 final} - {SWD(2017) 479 final} Brussels, 21.12.2017 SWD(2017) 478 final.
14 Commission Staff Working Document Impact assessment, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union {COM(2017) 797 final} - {SWD(2017) 479 final} Brussels, 21.12.2017 SWD(2017) 478 final.
15 Commission Staff Working Document Impact assessment, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union {COM(2017) 797 final} - {SWD(2017) 479 final} Brussels, 21.12.2017 SWD(2017) 478 final.

Indeed, Directive (EU) 2019/1152 does refer to Article 31 of the Charter of Fundamental Rights (Recital 1). It also refers to the EPSR: Recital 2 quotes Principle 5, on the right to equal and fair treatment in working conditions; Recital 3 quotes Principle 7, on the right to individual information regarding essential aspects of the employment relationship. However, Principle 2 of the Pillar, on gender equality (including 2 (b) on equal pay for work of equal value) was not selected (or, apparently, even thought of) as an inspiration.

Consequently, one can only peruse Directive (EU) 2019/1152 and ponder how it could have reinforced the effectiveness of the gender directives.

Revisiting the CJEU case law

Paradoxically, the first connection which arises is negative, as the new Directive overlooked an evolution in the case law. In 1995, the Court of Justice had found in *Nolte*[16] and *Megner and Scheffel*[17] that Directive 79/7/EEC[18] did not oppose national (German) provisions which excluded workers in 'minor employment', i.e. of not more than 15 hours per week, from the statutory sickness insurance and old age pension schemes; the Court had considered that indirect discrimination against women could be justified by the need to keep the schemes viable financially. However, four years later the Court stated in *Krüger*[19] that the same valid exclusion from statutory social security schemes could not be extended to the exclusion of 'minor employment' workers from the right to a Christmas bonus provided by collective agreement, resulting in indirect discrimination against women, a breach of Article 119 EEC (now 157 TFEU) on gender equality in pay. Now, Article 1(3) of Directive (EU) 2019/1152 leaves Member States free to exclude workers who are not employed for more than three hours per day over a period of four months from the personal scope of transposition; this is bowing to what various Member States had provided in respect of Directive 91/533/EEC (as revealed in Recital 11), but takes no account of the potential gender discrimination which the CJEU had recognised in *Krüger*.

Conversely, in *Wippel*[20] the Court found that an employment contract under which the employer could seek the services of a female worker when needed and subject to her consent fell within the respective scopes of Directive 97/81/EC[21] (concerning the framework agreement on part-time work) and Directive 76/207/EEC (now the Recast Directive 2006/54/EC).[22] Nevertheless, the Court ruled that these two instruments did not oppose an employment contract in which the weekly duration of work and the work schedule were not fixed (a type of contract which concerns women by a huge majority), while these elements were fixed in all the contracts of the other workers of the enterprise. Contrasting with such a tolerant approach, Directive (EU) 2019/1152 appears anxious to provide some stability and, indeed, prospect of better employment conditions for on-demand workers (see Articles 10 to 12 and Recital 30). However, surprisingly, it makes no reference to Directive 97/81/EC and Directive 1999/70/EC[23] (concerning the framework agreement on fixed-term employment), two instruments with obvious incidence on gender equality.[24]

Twenty-five years ago, the CJEU produced some case law concerning German part-time workers who were elected as the workforce's representatives within works councils. The question considered was,

16 Judgment of 14 December 1995, *Inge Nolte v Landesversicherungsanstalt Hannover*, C-317/93, EU:C:1995:438.
17 Judgment of 14 December 1995, *Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz, now Innungskrankenkasse Rheinhessen-Pfalz*, C-444/93, EU:C:1995:442.
18 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, OJ *L*6, pp. 24-25.
19 Judgment of 9 September 1999, *Andrea Krüger v Kreiskrankenhaus Ebersberg*, C-281/97, EU:C:1999:396.
20 Judgment of 12 October 2004, *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG*, C-313/02, EU:C:2004:607.
21 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work, OJ *L*14, pp. 9-14.
22 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, pp. 23-36.
23 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ *L*175, pp. 43-48.
24 See Burri, S. and Aune, H. (2013), *Sex discrimination in relation to part-time and fixed-term work*.

when those workers attended training sessions (provided by their trade unions) which were necessary to enable them to perform their tasks usefully, and parts of the training took place at times or on days when they were not occupied according to their working schedules, did those parts have to be regarded as work? The resulting litigation focussed on the right to corresponding pay, and given that the overwhelming majority of part-time workforce representatives were women, the Court recognised the potential indirect gender discrimination, forbidden by Article 119 EEC (now 157 TFEU), in Cases *Bötel*,[25] *Freers and Speckmann*[26] and *Lewark*;[27] yet, considerations of social policy might be admitted as valid justifications. As for Directive (EU) 2019/1152, under 'predictable working conditions' Article 13 provides that 'mandatory training' should be regarded as working time. Now, this provision does not seem to apply to the type of training which was disputed in the German cases (in which the training was certainly necessary, but not 'mandatory'); moreover, under EU law working time is governed by Directive 2003/88/EC,[28] which is not concerned with corresponding pay.[29] However, there might be Member States in which *Bötel* type issues have not yet been solved satisfactorily (Belgium is certainly one), so that the implementation of the new directive could have been an incentive to settle the matter, i.e. finally provide in legislation that training sessions for workforce representatives are considered as working time, to be paid as such, regardless of whether a worker is employed full- or part-time.

Crucially, Article 4 of the new directive offers an open list of elements about which every worker must be informed in writing at the very beginning of the employment relationship. Article 4(2)k) mentions remuneration (its initial basic amount, all its components, the frequency and method of payment), but nothing about how a worker could check whether she/he is the victim of pay discrimination. Here lies the essence of missed opportunity, as Directive (EU) 2019/1152 could have provided some powerful muscle to the effectiveness of the European Commission's Recommendation (EU) 2014/124 on pay transparency.[30] Of course, making remuneration systems transparent and, above all, gender neutral requires tackling a collective dimension (e.g. when such systems are regulated by collective agreements). Nevertheless, very often an issue of gender equality in remuneration boils down to how Worker Y (a woman) can know or demonstrate that she is paid less than Worker X (a man) for the same job or a job of equal value. A most pertinent question, certainly, and one where so far the Court of Justice – concerning discrimination not in pay, but in access to employment – has barely scratched the surface (see below).

An unforeseen booster

Yet, implementing Article 4(2)k) of (EU) Directive 2019/1152 could offer various Member States an opportunity to meet another challenge, which came more recently from an unexpected source: the European Committee of Social Rights of the Council of Europe, warden of the Revised European Social Charter. Indeed, this Charter contains several provisions on gender equality; and the monitoring of the signatory states' compliance with the Charter was strengthened considerably by the adoption in 1995 of the Protocol on Collective Complaints, under which non-governmental organisations are enabled to submit alleged breaches of the Charter to the Committee. In this way, University Women Europe (UWE), a transnational association of female lawyers and academics, filed complaints against every one of the 14 Member States of the EU who had ratified the Protocol, plus Norway who had done so too. UWE focussed its complaints on two sets of provisions of the Charter: on gender equality in pay; and on gender balance in the boards of directors of commercial companies. The European Committee of Social Rights decided on the merits of the complaints on 5 December 2019, but the 15 decisions were not made public until

25 Judgment 4 June 1992, *Arbeiterwohlfahrt der Stadt Berlin e.V. v Monika Bötel*, C-360/90, EU:C:1992:246.
26 Judgment of 7 March 1996, *Edith Freers and Hannelore Speckmann v Deutsche Bundespost*, C-278/93, EU:C:1996:83.
27 Judgment of 6 February 1996, *Kuratorium für Dialyse und Nierentransplantation e.V. v Johanna Lewark*, C-457/93, EU:C:1996:33.
28 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ *L*299, pp. 9-19.
29 See order of 11 January 2007, *Jan Vorel v Nemocnice Český Krumlov*, C-437/05, EU:C:2007:23.
30 Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency, OJ *L*69, pp. 112-116.

29 June 2020.[31] With the exception of Sweden, the Committee found that all the concerned states had not complied with various provisions of the Charter.

Gender balance in boards of directors falls outside the scope of this paper. In contrast, the Committee's findings on gender discrimination in pay are highly relevant. To wit, one aspect of compliance which attracted the Committee's attention was transparency as a condition of effectiveness; only four states (Finland, France, Norway and Portugal) escaped criticism in this respect, while the other ten (Belgium, Bulgaria, Croatia, Cyprus, Czechia, Greece, Ireland, Italy, the Netherlands and Slovenia) were found lacking. Obviously, remedying such deficiencies would require measures of a collective nature, such as better monitoring of the contents of collective agreements. However, providing individual workers with the necessary information so that they may check whether or not they are victims of discrimination, as suggested above, seems inescapable as well.

Although the enforcement machinery of the European Social Charter is political much more than legal, straying signatory states are expected to take steps toward better compliance. Moreover, other signatories of the Charter who remain immune from collective complaints should feel compelled to check the conformity of their own respective legislations, all the more since the European Equality Law Network's report on the issue[32] did not paint a generally and uniformly satisfying picture.

Arming individual workers against pay discrimination

With such a background, providing individual workers with effective means to detect gender discrimination asserts itself as an essential element of pay transparency, and the implementation of Article 4(2)k) of (EU) Directive 2019/1152 gives an excellent opportunity to do so.

Now, the standard obstacle which will arise in this respect is confidentiality. In Cases *Kelly*[33] and *Meister*,[34] a man and a woman respectively complained of discrimination in access to employment and demanded to know on what grounds another candidate had been preferred. However, in both cases the Court of Justice opined that even the rules on the burden of proof in discrimination disputes had to be applied with due respect to EU and national provisions on the protection of privacy. Still, after General Data Protection Regulation 2016/679/EU[35] came into force on 25 May 2018, the validity of the Court's analysis should be reassessed, given that under Article 6(1) of the Regulation, processing individual data is lawful if it is necessary '(c) for compliance with a legal obligation to which the controller is subject' or '(d) to protect the vital interests of the data subject or *of another natural person*' (emphasis added). To be sure, gender equality in remuneration, enshrined in Article 157 TFEU, Article 23 of the Charter of Fundamental Rights of the EU and Principle 2 of the European Pillar of Social Rights, falls within both categories.

Whistle-blowers

Genesis

The perilous situation of whistle-blowers has been arousing the attention of the media for quite a long time, prompted by some notable lawsuits in various countries such as the USA. In Europe, while certain

31 See www.hudoc.esc.coe.int, Complaints No. 124/2016, No. 125/2016, 126/2016, No. 127/2016, No. 128/2016, No. 129/2016, No. 130/2016, No. 131/2016, No. 132/2016, No. 133/2016, No. 134/2016, No. 135/2016, No. 136/2016, No. 137/2016, No. 138/2016.
32 See Veldman, A. (2017), *Pay transparency in the EU*, European Commission.
33 Judgment of 21 July 2011, *Patrick Kelly v National University of Ireland (University College, Dublin)*, C-104/10, EU:C:2011:506.
34 Judgment of 19 April 2012, *Galina Meister v Speech Design Carrier Systems GmbH*, C-415/10, EU:C:2012:217.
35 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ *L*119, pp. 1-88.

states, e.g. the United Kingdom, developed legislation to cope with the issue, a number of cases were submitted to the European Court of Human Rights, usually in relation to Article 10 of the European Convention on Human Rights (ECHR), which guarantees the right to freedom of expression. The resulting case law led the Parliamentary Assembly of the Council of Europe to adopt its Resolution 1729 and Recommendation 1916 of 29 April 2010, urging the construction of a legal framework to protect whistle-blowers, which the Committee of Ministers implemented in its Recommendation of 30 April 2014 to Member States.

At EU level, the Parliamentary Assembly's texts were an inspiration, among others, for the European Parliament, which stressed the need for action of a more binding nature in its Resolution 2016/2224 of 24 October 2017; the European Commission complied by proposing a directive.

Initially, the protection of whistle-blowers at international level was limited to the fight against corruption[36] and this understanding is also present in the directive adopted (i.e. Recital 6). Even if the scope is broader, the directive seems to focus on financial infringements. The concept of whistle-blower is widely misunderstood in public debates[37] and its translation in some languages is understood as alerting the public to new risks of malpractice rather than the broader sense of disclosing infringements of any type. The adoption of this directive is therefore crucial to ensure minimum protection for whistle-blowers in all Member States.

Obviously, such an instrument only applies within the European Union's jurisdiction; so Directive (EU) 2019/1937 deals with the protection of 'persons who report breaches of Union law'. Furthermore, given the somewhat experimental nature of the exercise, one can accept that, at least initially, the material scope of the directive be limited to a number of matters which are regarded as vital for the working of the Union and for the common interests of its citizens. Hence, Article 2 of the directive provides a closed list of matters which includes neither social policies nor anti-discrimination legislation. The recitals of the directive do not offer any explanation for the complete absence of such matters. Given that the action of whistle-blowers is regarded as a useful contribution to the enforcement of EU law (see Recitals 2 and 3 of the directive), one must deplore such an exclusion, as the new directive would certainly have reinforced the effectiveness of the gender equality directives, among others. This is all the more surprising because the Commissioner in charge of the proposed Whistle-blower Directive was also in charge of 'gender equality', which includes the importance of the principle of gender equality in the architecture of EU Treaties and the obligation to mainstream gender in all EU policies (Article 3 TEU; Articles 8, 153(1)i), 157 TFEU).

One explanation for the exclusion of social policies arises from the grounds on which the directive was adopted. Article 114 TFEU is one,[38] which means protecting the internal market: although gender equality was introduced into EU Law as an important element of fair competition,[39] labour law and working conditions regulations are based on Article 153, not 114 TFEU.[40] Still, one may ask whether the scope of the directive must be expanded and its protection granted when working conditions are intrinsically linked to a policy field that is encompassed by the directive.[41] For example, Article 168 TFEU, on public health policies, is another ground. So, in a COVID-19 context, if a worker reports that her working conditions do not respect social distancing, would this be linked to public health, a policy area that is encompassed by the directive, so that the worker would be protected?[42]

36 Boulale Maidane, N. (2020), 'La nouvelle directive 2019/1937 relative à la protection des 'lanceurs d'alerte': d'où elle vient, où elle va peut-être', in *Chroniques de droit social*, p. 459.
37 Abazi, V. (2020) 'The European Union Whistle-blower Directive: A 'game changer' for whistle-blowing protection?' in *ILJ,* Vol. 49, p. 646.
38 Abazi, V., op.cit., in *ILJ,* Vol. 49, 2020, p. 646.
39 Article 119 of the Treaty of Rome.
40 Abazi, V., op.cit, in *ILJ,* Vol. 49, 2020, p. 646.
41 Abazi, V., op.cit, in *ILJ,* Vol. 49, 2020, p. 646.
42 Abazi, V., op.cit, in *ILJ,* Vol. 49, 2020, p. 646. See also, Abazi, V. (2020) 'Truth distancing? Whistleblowing as remedy to censorship during Covid-19', *European Journal of Risk Regulation,* p. 375.

What value the directive could have added

Going back to the analysis of the Whistle-blower Directive, Article 5(7) defines a whistle-blower as any person who reports a breach of the provisions related to the matters listed in the material scope, whatever their motives for reporting may be. In contrast, Article 19 of Recast Directive 2006/54/EC only provides that a worker who claims to be a victim of gender discrimination must be given legal ways to obtain redress; and Article 24 protects that worker against victimisation related to her/his complaint within the undertaking or any legal proceeding. Indeed, the protection of Article 24 extends to any other worker involved in the claim, as the Court of Justice made it clear recently in *Hakelbracht*;[43] but there must be a claim. Thus, those provisions do not cover the hypothetical case of a worker who is not personally a victim of discrimination, but who is conscious of illegal treatment which is inflicted upon other workers who either are not aware of it or dare not complain. For the sake of example, let us say that X, a male clerk in the Human Resources department of an enterprise, knows that certain female workers are paid less than men for work of obviously equal value. Now, in compliance with Directive 2006/54/EC, there must be channels available if X wants to report that situation, such as the Gender Agency or the Labour Inspectorate. Yet, the existence of such channels does not provide X either with any legal status or with any protection; hence the evident advantage of falling within the scope of Directive (EU) 2019/1937.

Next, Articles 7 to 12 of the new directive require that, both internally (within the enterprise or organisation concerned) and externally (outside it), channels be made available for whistle-blowers to convey their reports. The relevance of such provisions is best illustrated by a famous case of the European Court of Human Rights in which the gender dimension was not mentioned, although it certainly was an important element of the general background.[44] Brigitte Heinisch was a nurse, employed in a home for seriously ill elderly people, part of an organisation in which the *Land* of Berlin was the majority shareholder. The home suffered from a blatant staff shortage, resulting in exhaustion among the nursing personnel and the collapse of basic hygienic care for the residents. When she discovered that such a state of affairs was a consequence of embezzlement of public subsidies by the members of the board of directors, Ms Heinisch applied for an interview with the board to discuss the matter, which was denied.

Consequently, she filed a complaint based on criminal legislation, but the public prosecutor finally decided to discontinue the investigation of the case. Meanwhile, Ms Heinisch had to take sick leave herself, and was dismissed with a notice period because the directors considered that her absence was increasing the difficulties in the operation of the home. With her trade union's support, she then distributed leaflets among the personnel, exposing her findings and mentioning her complaint in criminal law. She was dismissed a second time, with immediate effect, for breach of loyalty to her employer. When she challenged the dismissal, the Labour Court ruled in her favour, but then her plea was rejected at all further degrees of jurisdiction, including the Federal Labour Court and the Constitutional Court. This is why she had to apply to the European Court of Human Rights. After careful examination of the successive steps which she had taken to express her protest, as well as of the legitimacy and selflessness of her behaviour, the Court concluded that the German judges' rigid interpretation of employment contract law had resulted in a violation of Article 10 of the ECHR. Clearly, if the channels required by the Whistle-blower Directive had been available, Ms Heinisch would have been spared such a stressful and damaging experience.

Protecting whistle-blowers against victimisation is an essential element of effectiveness. Thus, Article 19 of the new directive, after stating that victimisation is prohibited, offers an open but extensive list of maltreatments which come under that notion; and Article 21, on the protection itself, goes into careful detail as to the necessary corrective measures, including full compensation of the damage suffered by the whistle-blower. In comparison, Article 24 of the Recast Directive may be regarded as too restrained to provide Member States with any precise guidance.

43 Judgment of 20 June 2009, *Jamina Hakelbracht and Others v WTG Retail BVBA*, C-404/18, EU:C:2019:523.
44 ECtHR, judgment of 21 July 2011, *Heinisch v. Germany*, appl. No. 28274/08, www.hudoc.echr.coe.int.

Finally, Article 27(3) gives a perspective on the possible future extension of the directive, based on the experiences of implementation which Member States report. The ineffective protection of whistle-blowers and the inability to detect, investigate and prosecute in certain cases which fall outside the present material scope of the directive impair the effective enforcement of EU law and the capacity to detect breaches of EU law. This is certainly a challenge identified in the implementation of gender equality, concerning issues such as indirect discrimination or, in pay claims, where individuals and equality bodies face persistent difficulties in unmasking discrimination since evidence is difficult to collect. Light needs to be shed on organisational mechanisms and insider access to evidence is required. The role of whistle-blowers could also be essential as they can report even in the absence of a complaint or a potential victim.

Over to the Member States

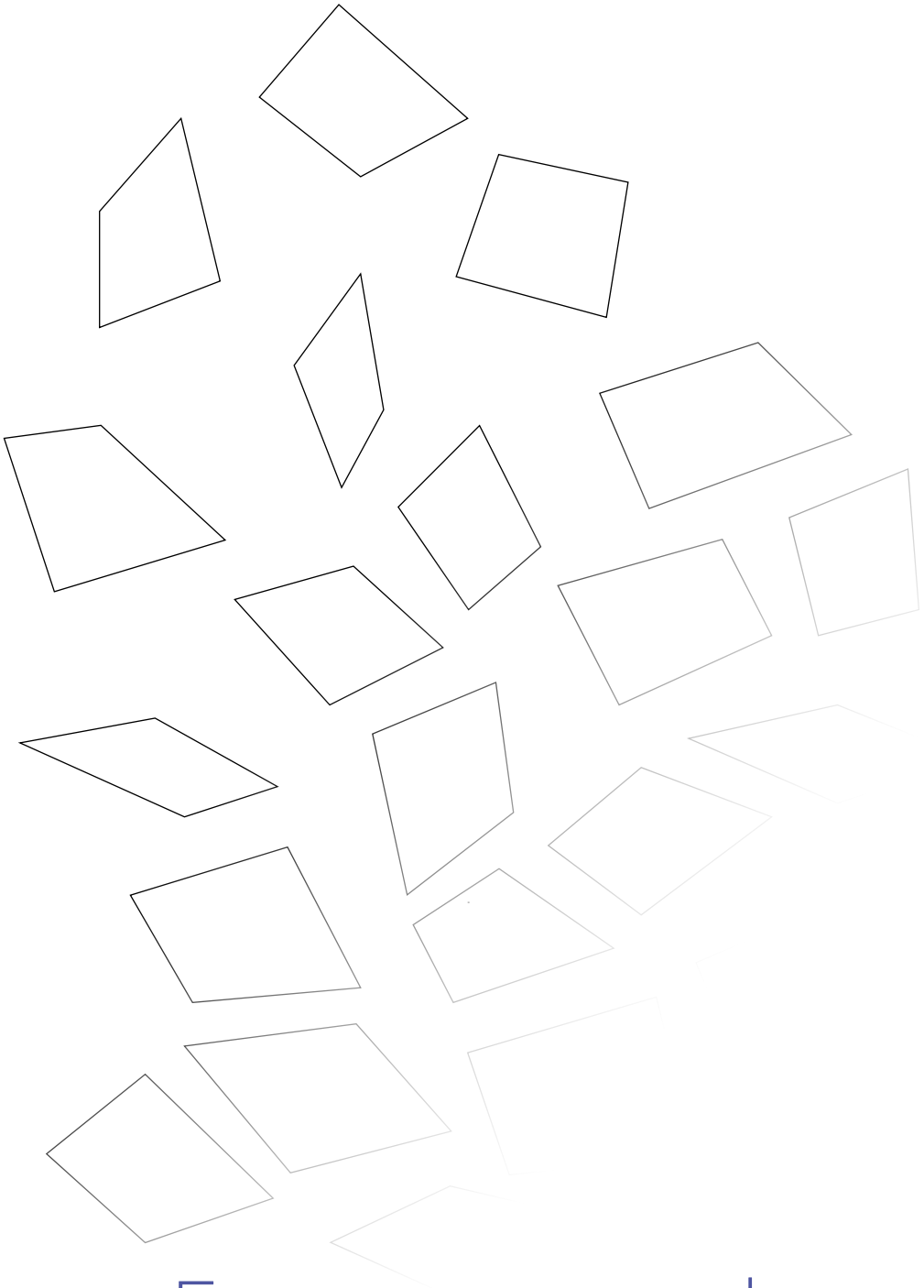
To sum up, every European state which is bound to implement Directive (EU) 2019/1152 (by 1 August 2022 at the latest) and Directive (EU) 2019/1937 (by 17 December 2021 at the latest, with an extension to 17 December 2023 for certain private enterprises, concerning internal channels) now stands at a crossroads.

Regarding transparent and predictable working conditions, the temptation will be strong to start from what (if anything) was done to transpose Directive 91/533/EEC as well as other instruments such as Directive 93/104/EEC (now 2003/88/EC) on working time, and be content with adding some minor adjustments. However, we hope to have suggested that a second (raptor) bird could be killed with the same stone if improved information to individual workers came to strengthen the effectiveness of gender equality legislation, especially in respect of transparency of remuneration, as insisted upon by the European Commission and the European Committee of Social Rights of the Council of Europe.

The whistle-blower issue will require more intense legislative activity, as the material scope of the new directive covers a large variety of matters. Now, apart from journalists, paid workers are the most frequent 'reporters of breaches'; and although the directive does not apply (yet?) to EU social law, it will hardly be conceivable for Member States not to extend the new protective machinery to workers who report breaches of national labour or social security legislation. Given the status of gender equality (and, actually, non-discrimination in general: see Articles 20 and 21 of the Charter of Fundamental Rights) in EU law, not to extend the new protection in that direction as well would be even less admissible. National equality bodies can certainly play a role in advocating the importance of extending the scope of the protection to whistle-blowers when they report breaches of anti-discrimination directives.

Most unfortunately, no light will be shed on the 'crossroads' mentioned above by the European Commission's Proposal for a directive 'to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms',[45] which, in the authors' view rather inexplicably, does not include any reference to either directive.

45 COM(2021) 93 final, of 4 March 2021.



European case law update

This section provides an overview of the latest main developments in gender equality and non-discrimination cases pending or decided by the Court of Justice of the EU and the European Court of Human Rights, from 1 July to 31 December 2020.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE GENERAL OPINIONS

Gender

Case C-463/19, *Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle* v *Caisse primaire d'assurance maladie de Moselle*, Opinion of Advocate General Bobek, delivered on 9 July 2020, ECLI:EU:C:2020:550

This opinion by Advocate General (AG) Bobek concerns the request for a preliminary ruling from the Conseil de prud'hommes de Metz (Labour Court, France) regarding the equal treatment of male and female workers. On 18 November 2020, the CJEU also delivered its ruling in this case.[1]

Under the French collective agreement for employees of social security bodies, the duration of statutory maternity leave may be extended. This extended leave is exclusively reserved for women bringing up a child on their own. In the main proceedings, a trade union introduced an action on behalf of a male employee (the father of a little girl), who was refused the additional leave on the ground that he is a man. In 1984, the Court ruled in *Hofmann*[2] that after the statutory period of maternity leave has expired, an additional period of maternity leave may be reserved for women. However, the AG argues that, in view of social and legal changes over the past 40 years, certain limitations are needed to the so-called 'pregnancy and maternity exception' made in *Hofmann* (and currently provided for by Article 28(1) of Directive 2006/54).

Essentially, the Labour Court asks whether Directive 2006/54 should be interpreted as meaning that the additional leave is excluded from the scope of application of that directive. However, the AG (in agreement with the Commission) argues that it is clear that the leave as discussed in the main proceedings falls within the material scope of the Directive. Instead, it should be questioned whether Articles 14(1) and 28(1) of Directive 2006/54, are to be interpreted as *precluding* a leave such as provided for in the main proceedings. Therefore, the AG analyses the interpretation of Article 28(1) of Directive 2006/54 to assess the compatibility of the national legislation at issue in the main proceedings with these EU provisions.

With regard to maternity leave, the AG argues that it seems undisputed that Member States are entitled to reserve a period of at least 14 weeks to women. Moreover, as ruled in *Hofmann*, an additional period of maternity leave may be reserved exclusively for women. With regard to the latter, discretion was given to the Member States to adopt such protective measures in connection with pregnancy and maternity. This discretion is accompanied by the 'Hofmann test', the aim of which is twofold: first, there needs to be a legitimate aim to ensure the protection of the woman's biological condition (during and after pregnancy) and secondly, there needs to be a legitimate aim to protect the special relationship between the woman and her child.

According to the AG, an update in the form of limiting the reach of *Hofmann* is called for. The AG considers that at the time of *Hofmann*, no harmonisation had taken place at the EU level regarding maternity and parental leave. Additionally, since *Hofmann*, EU legislation and the case law of the CJEU have evolved considerably towards recognising the equality of both men and women in their role as parents.

1 CJEU, judgment of the Court (First Chamber) of 18 November 2020, *Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle* v *Caisse primaire d'assurance maladie de Moselle*, C-463/19, ECLI:EU:C:2020:932; a summary of the judgment is also included in this issue.

2 CJEU, judgment of 12 July 1984, *Ulrich Hofmann* v *Barmer Ersatzkasse*, C-184/83, EU:C:1984:273.

The AG argues that the introduction of the statutory maternity leave made the first element of the *Hofmann*-test (protection of the woman's biological condition) lose relative relevance, while the second element (protection of the relationship between a woman and her child) can justify almost any supplementary period of leave. However, the AG is of the opinion that the aim to protect the special relationship between a woman and her child needs to be interpreted with caution and applied restrictively. In that sense, the two elements should not be read as two independent criteria, but rather as two sides of the same coin: 'The protection of the special relationship between mother and child cannot justify, in itself and independently from the objective needs attached to the biological condition of women, any extended period of leave supplementary to statutory maternity leave.' The starting point of the additional maternity leave should thus be the protection of the biological condition of the woman *and* the special relationship between the mother and the child. The AG articulates the following elements to be taken into account when assessing whether any additional leave indeed concurs with that aim: (i) the conditions for entitlement to the leave, (ii) its length and modalities of enjoyment, and (iii) the legal protection that attaches to that period of leave.

As for the extended leave in the case in question, the AG considers that, as a whole, the leave might encounter some difficulties in falling under the 'maternity exception' of Article 28(1) of Directive 2006/54, particularly because of the rather long period to which it may be extended and the limited legal protection attached to it. The extended leave may range from one and a half months to a year, with the potential to be extended for another year, during which the right to be reinstated in a previous job is guaranteed for a year, but full pay is only guaranteed during the first month and a half (or three months, depending on whether the mother is single or on the resources of her partner). Therefore, the extended leave may not be fully covered by the maternity exception.

Case C-795/19, *XX* v *Tartu Vangla*, Opinion of Advocate General Saugmandsgaard Øe delivered on 25 November 2020, ECLI:EU:C:2020:961

Disability

This Advocate General Opinion follows a request for preliminary ruling from the *Riigikohus* (Supreme Court, Estonia) which questioned the proportionality of a hearing requirement for prison officers. The claimant in the initial proceedings was a prison officer who was dismissed when, after 15 years of service, a medical examination showed that his hearing capacity was below the limit prescribed by national regulations establishing the health requirements for prison officers. The relevant regulation prescribed that prison officers were authorised to wear hearing aids at work but not when their hearing is tested for the purposes of establishing compliance with the regulation. The same regulation authorised prison officers with impaired vision to use corrective aids such as glasses or lenses both at work and when examining their vision. The claimant argued that the relevant regulation constituted discrimination on the ground of disability, and claimed compensation before the national courts. After his claim had been rejected at first instance, the Court of Appeal found in favour of the claimant, awarding compensation and initiating the procedure for reviewing the constitutionality of the relevant health requirement regulation before the referring court.

While the referring court did not question the fact that ensuring the operational capacity and proper functioning of the police, prison or rescue services constitutes a legitimate objective, it did express doubts as to the proportionality of the restrictions at hand on the activity of a prison officer with a hearing disability, to that objective.

Having confirmed without difficulty that the hearing requirement regulation at hand fell within the scope of the Employment Equality Directive and that it gave rise to a difference of treatment based directly on disability, the Advocate General (AG) further determined that this regulation would appear to constitute a genuine and determining occupational requirement related to the nature of the work performed by prison officers and the conditions in which it is exercised. The AG then entered into the central part of

his analysis by examining whether such a requirement goes beyond what is necessary to achieve the legitimate aim of ensuring public security and maintaining order.

In this regard, the AG first noted the need to balance the aim of integrating persons with disabilities into the labour force, notably by accommodating their needs on the one hand with the imperative of ensuring the proper functions of the work sector concerned on the other. In this regard, the AG examined in some detail the case law of the Court related to the two sides of this balancing act, before applying the relevant principles to the facts of the case in question. The AG thus drew from the Court's jurisprudence on gender equality to examine the requirement for interoperability, i.e., the ability to perform tasks which go beyond those ordinarily required, which was considered particularly crucial by the Ministry of Justice in the proceedings before the referring court. In this regard, the AG determined that a requirement for interoperability cannot simply be deemed to exist, but needs to be established. As no specific evidence of such a requirement was presented in the case, it would be for the national court to determine its existence. The AG also drew from the Court's case law on age discrimination, noting that a requirement for particularly high physical capacity is only proportionate for the most demanding duties within a given occupation. In relation to the requirements of interoperability and of high physical capacity, the AG underlined the duty of employers to provide measures of reasonable accommodation for employees with disabilities to enable them to meet the requirements of their employment. Discussing different such measures of an either operational or physical nature that could be envisaged in the present case, the AG notably drew a parallel between prison officers such as the claimant, on the one hand, and those with visual impairments who are allowed to use correctional devices to enable them to perform their functions, on the other.

The AG thus concluded that 'the automatic exclusion of any prison officer assigned to supervising prisoners or of any applicant for such duties, without regard to his ability to perform the assigned duties, on the sole ground that he does not meet the standard of auditory acuity laid down by a regulation such as [that at hand] is not proportionate to the objective of public security and maintenance of order. It follows that such a regulation constitutes direct discrimination on the ground of disability, contrary to Article 2(2)(a) of Directive 2000/78.'

REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

Case C-366/18, *José Manuel Ortiz Mesonero* v *UTE Luz Madrid Centro (integrada por las mercantiles SICE SA, URBALUX SA IMESAPI SA EXTRALUX SA y CITELUM IBÉRICA SA)*, judgment of 18 September 2019, ECLI:EU:C:2019:757.[3]

Gender

This request for a preliminary ruling was submitted by the Social Court 33, Madrid, Spain, in the context of the proceedings between Mr. José Manuel Ortiz Mesonero (applicant) and UTE Luz Madrid Centro (respondent). The case concerns the latter's refusal to grant the applicant the right to work under a fixed working schedule in order to combine work with the care of his children.

The respondent in this case is contracted by the Spanish Government to take care of the maintenance of electric lighting in Madrid. In order to provide this service 24 hours a day, the company schedules its employees in three different shifts covering morning, afternoon and night. The applicant in this case rotated between the different shifts. In 2018, he submitted a request to work exclusively in the morning shift in order to take care of his two children. However, he also wished to maintain the same number of working hours and the same pay. His request was rejected, and Mr Ortiz Mesonero appealed the rejection of his request to the referring court. The referring court determined the appeal to be based on Article 37(6) of the Workers' Statute which provides workers with the right to request a reduction

3 Case C-366/18 falls outside the information cut-off dates of the current edition of the *European equality law review*, but was included on the request of the European Commission.

of their working hours, with a proportional reduction in salary, in order to take care of their children or a dependent family member. It does not however, provide the right for workers to request a different working arrangement without adjusting the total amount of working hours or pay. However, where the production activity extends over a longer period of time than the working time to be carried out by the worker, it is possible, without reducing that working time, to adapt the working time in order to make it compatible with family needs. This would apply to the case of Mr Ortiz Mesonero, since there are three shift work teams between which he rotates.

The referring court decided to stay the proceedings and refer to the Court for a preliminary ruling on whether Directive 2010/18 of 8 March 2010 implementing the revised Framework Agreement on parental leave[4] and Articles 23 and 33(2) of the Charter must be interpreted as precluding rules of national law such as Article 37(6) of the Workers' Statute.

The Court refers in its judgment to the only provision of the Framework on Parental Leave relating to the adjustment of working time: Clause 6(1) of the Agreement. Clause 6(1) states that Member States and/or Social Partners are to take the necessary measures to ensure that workers may request changes to their working hours and/or patterns for a set period of time when 'returning from parental leave'. The Court finds that it is not apparent from the current case whether the applicant is in a situation of returning from parental leave in the meaning of Clause 6(1) of the Framework Agreement. Therefore, neither Directive 2010/18 nor the Framework Agreement on Parental Leave apply in this case as they do not contain any provision that would require Member States, in the context of a request for parental leave, to grant the applicant the right to request a change in his working hours and only work on fixed working time in order to reconcile work with the care for his children.

Under Article 5(1) of the Charter, provisions of the Charter only apply to Member States when they are implementing EU law. Since neither Directive 2010/18 nor any other provision of EU law has been declared applicable in the main proceedings, the Court held that there is no need to interpret Article 23 and Article 33(2) of the Charter.

Case C-223/19, *YS* v *NK*, judgment of 24 September 2020, ECLI:EU:C:2020:753

Gender

Age

This judgment of the Court concerns the request for a preliminary ruling from the Landesgericht Wiener Neustadt (regional court, Austria) with regard to equal treatment in matters of pay and social security. The referring court questions whether men, who are the primary recipients of larger pensions compared to women, are indirectly discriminated against when they are obliged to contribute more to secure the pension revenue. The legislation at hand allegedly affects more men than women, as well as more old people than young people. In this respect, the Court will have to determine whether such legislation is compatible with the prohibitions of (indirect) discrimination on grounds of sex and age contained in Directives 2000/78 and 2006/54. Additionally, the referring court questions the compatibility of the national legislation with Articles 16, 17, 20 and 21 of the Charter.

On 2 March 1992, YS, the applicant in the main proceedings, concluded an occupational pension contract with Austrian undertaking NK, a limited liability public company. The agreement contained a 'direct defined benefit pension', which the employer will pay to the employee after the employment relationship comes to an end. Furthermore, the agreement included a provision that the pension would be indexed at the same percentage as the increase of the salaries of the highest category of employment. However, NK withheld a part of the pension of YS (as pension security contributions) and did not index the pension benefits in accordance with the agreement. NK argued that it withheld the pension security contribution, in accordance with Paragraph 24a of the Lower Austrian Law on provincial and municipal remuneration

4 Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (OJ 2010 L 68, p. 13).

('*NÖ Landes- und Gemeindebezüge*') and did not increase his pension, in accordance with Paragraph 711 of the General Law on social security (ASVG). These provisions aim to 1) reduce the imbalance created by 'special' pensions and 2) ensure the long-term funding of retirement benefits. However, it is important to note that, according to official Austrian statistics, the national legislation at issue affects men more than women. Moreover, the financial burden of funding such retirement benefits is borne exclusively by older people as such occupational pension schemes have not been concluded in Austria since 2000.

First, the Court looks at whether Directive 2006/54 precludes the national legislation at issue in the main proceedings. The Court recognises that, according to Austrian statistics, the national legislation affects men in the large part, which indicates (possible) indirect discrimination. However, it is up to the national court to determine whether or not this is actually the case, taking into account national law and practice. Should the referring court hold that the national legislation gives rise to differential treatment on the ground of sex, then it must assess to what extent this can be justified by objective factors unrelated to sex. Since the national legislation is implemented systematically and consistently and applies to all pensions granted in the form of a 'direct defined benefit pension', it does not appear to consist of measures that go beyond what is necessary to obtain the two aforementioned objectives.[5] Thus, the national legislation is not precluded by Articles 5(c) and 7(1)(a)(3) of Directive 2006/54, under the condition that the difference in treatment is justified by objective factors unrelated to sex, which ultimately the referring court must verify.

Secondly, the Court assesses the question regarding Directive 2000/78. According to the referring court, the potential existence of indirect discrimination on the grounds of age is based on the fact that no pension contract in the form of a 'direct defined benefit pension' has been concluded in Austria after 2000, which results in only persons of a certain age being affected by this legislation. In order to establish indirect discrimination, it must be shown that the national legislation has a negative effect on a notably higher percentage of people of a certain age compared to other people, without justification. The Court ascertains however, that the mere fact that new legislation is adopted in respect of people under a certain age cannot give rise to indirect discrimination on the grounds of age. Thus, the Court ruled that the national legislation does not infringe on Article 2(1) and (2)(b) of Directive 2000/78.

With regard to Articles 16, 17, 20 and 21 of the Charter, it must be noted that the scope of the Charter applies only when Member States implement EU law. Regarding Article 20 (everyone is equal before the law) and Article 21(1) (any discrimination based on grounds of, *inter alia*, sex, age or property is prohibited), the question on discrimination should be examined in light of Directives 2006/54 and 2000/78 alone. As it has already been stated that the difference in treatment resulting from the national legislation does not constitute indirect discrimination (on the grounds of sex or age), this legislation does not infringe Articles 20 and 21(1) of the Charter. As for Article 16 of the Charter (on the freedom to conduct a business), the national legislation at issue here constitutes a limitation on the freedom of contract in so far as it requires businesses to pay their former employees a 'direct defined benefit pension' that is lower than the contractually agreed amount of pension. Yet, the freedom to conduct a business must be examined in light of its function in society, and may be subject to interventions by public authorities. Only a very small part of the occupational pensions are being withheld and the difference in treatment caused by this is justified by the aforementioned objective of ensuring the long-term funding of retirement pensions. In this light, the limitation complies with the principle of proportionality and does not infringe Article 16 of the Charter. Finally, Article 17 of the Charter on the right to property is not an absolute right and it cannot be interpreted as entitling a person to a pension of a particular amount. Any limitation on the right to property must be provided for by law and respect the principle of proportionality. The limitations at issue here are indeed provided for by law and only limit a part of the total amount of the pension. Hence, these restrictions appear to be necessary to achieve the objectives, which means that there is no infringement of Article 17 of the Charter either.

5 The provisions aim to 1) reduce the imbalance created by 'special' pensions and 2) ensure the long-term funding of retirement benefits.

Case C-243/19, *A* v *Veselības ministrija*, judgment of 29 October 2020, ECLI:EU:C:2020:872

Religion or belief

This request for a preliminary ruling was submitted by the Augstākā tiesa (Senāts) (Supreme Court, Latvia) and concerned the Latvian authorities' refusal to fund[6] the claimant's son's healthcare in accordance with his religious beliefs in another Member State. The claimant's son needed open-heart surgery, but due to his religious beliefs as a Jehovah's Witness, the claimant refused to consent to the use of a blood transfusion during the surgery. As the operation was not available in Latvia without a blood transfusion, the claimant requested that the national health authorities grant his son prior authorisation in accordance with national provisions transposing the Social Security Regulations to receive the operation in Poland, where it was available without a blood transfusion. The authorities refused on the ground that the operation could be performed in Latvia. The claimant challenged the decision before the administrative courts, but his action was dismissed. The case was brought for judicial review before the referring court, which asked the Court to provide a preliminary ruling on the issue of whether the Latvian health authorities were entitled to refuse to grant the prior authorisation on the basis of solely medical criteria or whether, in particular with regard to Article 21(1) of the EU Charter of Fundamental Rights, they were also required to take into consideration the religious beliefs of the claimant. The referring court asked the Court to provide guidance on the interpretation of the relevant provisions of the Social Security Regulations and of the Cross-Border Healthcare Directive,[7] although the claimant had only sought prior authorisation under the national legislation transposing the Social Security Regulations.

The Court first recalled its case law regarding the correct interpretation of the relevant provisions of the Social Security Regulations, stating in particular that the prior authorisation system takes into account exclusively the patient's medical condition, not his or her personal choices as regards medical care. Based on the facts of the case, the Court determined that there was no medical justification for the claimant's son not being able to receive the treatment available in Latvia. However, the Court noted that the Latvian authorities were implementing EU law, within the meaning of Article 51(1) of the Charter, when refusing to grant the prior authorisation provided for in the Regulation, and they were therefore required to respect the fundamental rights it enshrines, including Article 21(1). While it is for the referring court to determine whether the refusal in this case amounted to a difference in treatment based on religion or belief, the Court provided some guidance in this regard. It noted that the refusal did not give rise to direct discrimination based on religion but that a difference of treatment indirectly based on religious beliefs appeared to be at hand. In this regard, the Court noted that Jehovah's Witnesses would need to bear medical costs themselves when undergoing medical treatment in another country, while patients with other religious beliefs would not.

The Court then examined at some length whether that difference in treatment was based on an objective and reasonable criterion. In this regard, the Court made a distinction between the prior authorisation system under the Social Security Regulations and that under the Cross-Border Healthcare Directive. Under the Regulations, the Court concluded that not taking religious beliefs into account when examining requests for prior authorisation would appear to be a justified measure to achieve the objective of ensuring the financial stability of the health insurance system. The Court thus underlined the potential additional financial burden for the Member State of affiliation obliged to reimburse costs incurred in another Member State that could be significantly higher than what they would have been in the Member State of affiliation.[8] In this regard, the Court further noted the unpredictable and inherently subjective

6 In accordance with, notably, Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1) (the Social Security Regulations).

7 Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare (OJ 2011 L 88, p. 45).

8 In this regard, the Court made a distinction between the prior authorisation system under Regulation 883/2004 (object of the referring court's first question) and that under Directive 2011/24 (object of the second question). Under the Directive, the prior authorisation system contains limitations on the costs that the Member State of affiliation can be required to reimburse. These limitations made the objective of ensuring the financial stability of the health insurance system irrelevant.

nature of religious beliefs and of their potential impact on medical treatment needs and their potential costs. Under the Directive however, the prior authorisation system contains limitations on the costs that the Member State of affiliation can be required to reimburse, making the objective of ensuring the financial stability of the health insurance system irrelevant. It would however be for the referring court to determine whether the prior authorisation could have been refused on the basis of a legitimate aim related to maintaining treatment capacity or medical competence, and if so whether that refusal would have been an appropriate and necessary means of achieving that aim.

Case C-463/19, *Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle* v *Caisse primaire d'assurance maladie de Moselle*, judgment of 18 November 2020, ECLI:EU:C:2020:932

Gender

This judgment of the Court of 18 November 2020, concerns the request from the Conseil de prud'hommes de Metz (Labour Court, France) regarding a national collective agreement granting the right to leave following statutory maternity leave (known as extended leave). This judgment followed shortly after the Opinion of Advocate General Bobek of 9 July 2020, a summary of which is included above.[9]

In the main proceedings, the father of a little girl was refused the extended leave because extended leave was exclusively reserved for women who bring up a child on their own. The referring court questions whether the extended leave is excluded from the scope of application of Directive 2006/54. The Court, like the AG in his opinion, reformulates the referring court's question by asking whether Articles 14(1) and 28(1) of Directive 2006/54, are to be interpreted as precluding leave in the form discussed in the main proceedings.

The Court starts out by recalling that Article 14(1) of Directive 2006/54 prohibits all forms of direct and indirect discrimination on grounds of sex in relation to employment and all working conditions. However, Article 28 of that Directive states that the prohibition of discrimination is without prejudice to provisions concerning the protection of women (particularly with regard to pregnancy and maternity). In that sense, the Court recognises that maternity leave is intended to, first, protect a woman's biological condition (during and after pregnancy) and secondly, to protect the special relationship between a woman and her child. The latter is intended to protect that relationship from being burdened by pressure to return to work. The Court recognised that measures such as extended leave may fall within the scope of Article 28(1) of Directive 2006/54, if it seeks to protect a woman with regard to her pregnancy or motherhood. Thus, such leave may be exclusively reserved for women, because it is only a woman who may find herself subject to undesirable pressures to return prematurely to work after pregnancy/maternity (see *Hofmann*, Paragraph 26).[10] With reference to the opinion of AG Bobek (point 61), the Court clarifies that indeed merely the protection of the relationship between mother and child is not enough to exclude fathers from the additional leave. Moreover, measures designed to merely protect women in their capacity as a parent also cannot be justified on the basis of Article 28(1) of Directive 2006/54. Such measures would constitute direct discrimination with regard to male workers, as prohibited by Article 14(1) of Directive 2006/54.

In the case in question, it must thus be established whether the extended leave is intended to protect a mother based on pregnancy/maternity, meaning the biological condition of the mother, as well as the special relationship between the mother and child, and not merely the mother in her capacity as a parent. The Court further clarifies that in order to assess this, the leave must first be granted to all women covered by the national legislation (irrespective of length of service and without the need for the employer's consent). Secondly, the duration and the manner in which the extended leave is exercised must be appropriate to ensure the protection of the woman's biological conditional and her relationship

9 Opinion of Advocate General Bobek, delivered on 9 July 2020, *Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle* v *Caisse primaire d'assurance maladie de Moselle*, C-463/19, ECLI:EU:C:2020:550; see page 56.

10 CJEU, judgment of 12 July 1984, *Ulrich Hofmann* v *Barmer Ersatzkasse*, C-184/83, EU:C:1984:273.

with her child. Thirdly, the legal protection must be in conformity with the minimum protection guaranteed by Directives 92/85 and 2006/54 as regards statutory leave.

In the end, it is for the referring court to determine whether the extended leave discussed in the main proceedings meets the conditions to fall within the scope of Article 28(1) of Directive 2006/54. The system of cooperation established by Article 267 TFEU is based on a clear division of responsibilities. In proceedings brought on the basis of Article 267 TFEU, the interpretation of those provisions of national law is a matter for the national courts. The CJEU has no jurisdiction to rule on the compatibility of the national rules with EU law, and can merely provide the national courts with guidance as to the interpretation of EU law. Thus, the Court emphasises that certain elements of the extended leave may be incompatible with Article 28(1) of Directive 2006/54 (varying duration of the leave, partially unpaid), but leaves the final assessment to the referring court.

REFERENCES FOR PRELIMINARY RULINGS – ORDERS OF THE COURT

Joined Cases C-439/18 and C-472/18, *OH, ER* v *Agencia Estatal de la Administración Tributaria (AEAT)*, Order of the Court (Seventh Chamber) of 15 October 2019, ECLI:EU:C:2019:858.[11]

Gender

This Order of the Court was formulated in response to the request for a preliminary ruling from the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia, Spain), and concerns the interpretation of Clause 4 of the Framework Agreement on part-time work, concluded on 6 June 1997 ('the Framework Agreement') and Article 14(1) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of equal opportunities and equal treatment between men and women (Equal Treatment Directive).

The applicants in the main proceedings, were recruited by the Agencia Estatal de la Administración Tributaria (AEAT) in 2002 and 2005, respectively. They both worked on a vertical cyclical part-time basis, as so-called '*fijo discontinuo*' workers. This means that they only worked for certain months of the year. In May 2015, both applicants applied for a recognition of their seniority in order to receive a three-year seniority bonus. However, their applications were rejected because the calculation of length of service (as provided for by the fourth collective agreement) does not include periods not worked for part-time workers. In other words, only the actual hours worked are taken into account to calculate the length of service of a worker on a vertical cyclical part-time working contract.

The Spanish court questions whether the manner of calculation constitutes an undue application of the principle of *pro rata temporis*. Therefore, it is necessary to examine the objective justification for the measure and to ascertain whether the effects of the measure are necessary and appropriate. Moreover, the Spanish court emphasises that the official statistics show indirect discrimination against women, because the fourth collective agreement (although formulated in a neutral manner) places women at a disadvantage to men. Therefore, the Spanish court asked the Court to clarify whether the length of service of a vertical part-time worker (working merely certain months of the year) can be calculated solely based on the time actually spent working (for the purpose of such a three-year bonus).

In the case at hand, the Court found it appropriate to give a decision by reasoned order (as provided for in Article 99 of its Rules of Procedure). Essentially, the Court must clarify whether a provision as set out in the main proceedings (calculating the length of service of vertical part-time working solely based on the time actually worked) is precluded by Clause 4 of the Framework Agreement and Article 14(1) of Directive 2006/54.

11 This order of the Court falls outside the cut-off dates of this issue of the *European equality law review*, and was included on the request of the Commission.

Clause 4 of the Framework Agreement on part-time work

The Court begins by recognising that the Framework Agreement seeks to promote part-time work and to eliminate discrimination between part-time workers and full-time workers. In that sense, Clause 4 of the Framework Agreement prohibits less favorable treatment of part-time workers solely on the ground that they work part time, unless the difference in treatment is objectively justified. Moreover, Clause 4 of the Framework Agreement must be understood as expressing the EU principle of equality and therefore cannot be interpreted restrictively. Consequently, 'conditions of employment' within the meaning of Clause 4 cannot exclude measures relating to pay, as that would reduce the scope of protection afforded to part-time workers (which is contrary to the objective of the Framework Agreement). Next, it should be determined whether the part-time workers are indeed treated less favorably than comparable full-time workers, as defined by Clause 3(2) of the Framework Agreement. In the case at hand, the Court states that there is nothing that would suggest that the workers are not in comparable situations (although that is for the referring court to determine). There is, however, a difference in treatment based solely on the reason for part-time work: the calculation of service for full-time workers is based on the duration of the employment relationship, while the calculation of service for part-time workers is based on the periods of time actually worked. Consequently, it needs to be determined whether the difference in treatment is objectively justified.

First, the Spanish Government argues that the principle of *pro rata temporis* should be applied to the calculation of the length of service. The calculation of the three-year bonus depends directly on the amount of work carried out by the worker, which is in accordance with the principle of *pro rata temporis*. The Court recognises that EU law does not preclude such a calculation in accordance with the principle of *pro rata temporis*. However, it is apparent from the case law of the Court that the length of service should be understood as the actual duration of the employment and not the amount of time worked during that period. The principle of non-discrimination therefore means that the length of service for a part-time worker should be calculated as if they had worked full time.[12] Secondly, the Spanish Government states that due to the nature of vertical part-time work, namely that such workers only work for a few months a year, specific rules are required, particularly in relation to the calculation of length of service. Such a rule for calculating the length of service should be regarded as justified because of the purpose of the bonus, namely to reward the loyalty of a worker who has completed a certain period of employment. If the suggested method to calculate length of service were applied, full-time workers would be discriminated against, or so the Government argues.[13] In that context, it should be borne in mind that the concept of 'objective reasons' in Clause 4 (1) of the Framework Agreement must be understood as not justifying a difference in treatment between part-time workers and full-time workers by the fact that that difference is provided for by a general and abstract national rule. The concept of 'objective reasons' requires that the difference in treatment is justified by precise and specific factors (characterising the employment condition in question) on the basis of objective and transparent criteria. In the case in question, the difference in calculation cannot be justified by the concern to avoid the discrimination as described by the Spanish Government. Above all, because of the fact that the calculation of the length of service of full-time workers constitutes their year of employment regardless of periods of inactivity due to holiday leave of possible periods of sick leave. Consequently, the Court holds that the Spanish Government has not provided an objective justification for the difference in treatment. Therefore, it must be concluded that Clause 4 of the Framework Agreement must be interpreted as precluding the measures at issue in the main proceedings.

12 See, to that effect, judgment of 10 June 2010, *Bruno and Others*, C-395/08and C-396/08, EU:C:2010:329, Paragraph 66.
13 Full-time workers would need 36 months of actual work to obtain the three-year bonus, while vertical cyclical part-time workers would merely need 9 to 12 months of actual work.

Article 14(1) Directive 2006/54/EC

The Court starts out by noting that Article 14(1) of Directive 2006/54/EC prohibits, among other things, indirect discrimination on the ground of sex as regards employment and working conditions, including pay. It is clear from settled case law that indirect discrimination exists where a national measure (although formulated neutrally) disadvantages a much higher number of women than men. In the case at hand, the great majority of the disadvantaged group of vertical cyclical part-time workers are female workers. This means that a much larger number of women than men are affected by the measure at issue in the main proceedings. Therefore, it can be concluded that the measure constitutes indirect discrimination, as prohibited by Article 14(1) of Directive 2006/54/EC, unless objectively justified. The measure can be objectively justified if it meets a legitimate aim and if the means to achieve that aim are appropriate and necessary. However, in order to justify the measure, the Spanish Government has put forward neither any arguments demonstrating the legitimate aim pursued by the measure nor the appropriateness or necessity of the means chosen. Therefore, there is no objective reason to justify the measure and, thus, it must be concluded that the measure at issue in the main proceedings constitutes indirect discrimination and is prohibited by Article 14(1) of Directive 2006/54/EC.

Consequently, both Clause 4 of the Framework Agreement and Article 14(1) of Directive 2005/54/EC preclude measures that calculate the length of service of a vertical part-time worker in order to receive a three-year bonus that are solely based on the time actually spent working, and thus exclude periods not worked from the calculation, while full-time workers are not subject to such a practice.

European Court of Human Rights

G.I. v *Italy*, Application No. 59751/15, judgment of 10 September 2020

Disability

The applicant is a child diagnosed with autism who had been benefitting from 24 hours per week of specialised assistance ever since she had started attending preschool at the age of three, as provided by national law. The aim of the assistance was to facilitate the socialisation and inclusion of the applicant in her preschool class, as well as her personal autonomy. In 2010, the applicant started primary school, but was not granted the assistance provided by national law. After one year without specialised assistance, the applicant was held back a year and then started the first year of primary school again, without assistance. The applicant's parents made multiple requests to the municipality for their daughter to have the assistance she needed, but their requests were ignored and/or denied. From January 2012, the applicant's parents paid for specialised assistance themselves. The school claimed that while they had failed to provide specialised assistance for the school years 2010/2011 and 2011/2012, they had asked several members of staff to provide additional support and physical assistance to the applicant. However, the school failed to prove the type and amount of support provided. The national courts found in favour of the defendants, the municipal and regional authorities, finding that the applicant had not demonstrated a clear link between the lack of specialised assistance and the damage claimed. The courts also held that the municipal and regional authorities were faced with a substantial decrease in the budget allocated to them by the state at the time, and could therefore not be held responsible for their consequential budgetary decisions in this case.

Before the European Court of Human Rights, the applicant claimed a violation of Article 14 ECHR (non-discrimination) in conjunction with Article 2 of Protocol No. 1 to the Convention (right to education) as well as a violation of Article 8 (right to private and family life). In its ruling, the Court recalled that the States Parties to the Convention have a duty under international law to ensure inclusive education, particularly for pupils with disabilities, and that the margin of appreciation of the States is significantly reduced when limitations to the fundamental rights of vulnerable groups exposed to discrimination are concerned.

With regard to the failure of the State to provide specialised assistance to the applicant, the Court noted that, during two school years, the applicant had not been able to attend primary school under conditions comparable to those of children without disabilities, and that this difference of treatment was indeed due to her disability.

Napotnik v *Romania*, Application No. 33139/13, judgment of 20 October 2020

Gender

The ECtHR delivered a judgment on 20 October 2020, in a case against Romania regarding a female applicant who claimed to be discriminated against on the ground of sex due to the termination of her diplomatic posting based on her pregnancy, contrary to Article 1 of Protocol No. 12 to the Convention.

In October 2002, the applicant, Ms Napotnik, started working for the Ministry of Foreign Affairs (MFA) of Romania, and in March 2007, she took office in her diplomatic posting in Ljubljana, Slovenia. At the embassy, her main tasks consisted of providing aid to Romanian nationals who found themselves in emergency situations in Slovenia. In April 2007, she became pregnant with her first child. Prior to her maternity leave, she was absent from work for two months due to health problems related to the pregnancy. Subsequently she went on maternity leave followed by annual leave from June until December 2008. During her absence related to health problems, requests for a replacement by the high

ambassador were denied and therefore her office consular services were suspended and requests for assistance were redirected to embassies in neighbouring countries. The consular post was again closed for several days during the month of June when there was no replacement available for her post either. In December 2008, the applicant returned to work, and shortly after her return, in January 2009, she informed the ambassador that she was pregnant again. Later that month, the applicant's posting to Ljubljana was terminated. She was informed that this decision was based on the fact that she would be unable to carry out her tasks at the embassy due to medical appointments linked to the pregnancy and the subsequent maternity leave. She was expected to return to the Bucharest office in February 2009. At the applicant's request, her work contract was suspended for personal reasons. The leave was granted based on parental leave followed by a period of unpaid leave. Finally, she resumed work in September 2015 in Bucharest.

In the meantime, the applicant had lodged a civil action against the MFA, alleging the termination of her diplomatic posting was discriminatory and thus unlawful. The Bucharest County Court dismissed the action, stating the MFA had the discretion to terminate postings when necessary. As for the discrimination, the Court added that 'decisions to terminate a posting are taken by the MFA with regard to all diplomats, irrespective of their sex; when the applicant argues that her posting should not have been terminated on these grounds, she is using her pregnancy in order to obtain preferential treatment.'

The applicant turned to the European Court of Human Rights to examine the case under Article 1 of the Protocol No. 12 of the Convention. The Court asserted that Article 1 of Protocol No. 12 applied to the facts of the present case because the case concerned potential discrimination by a public authority in the exercise of discretion The Court in its assessment, states that the same standards concerning the protection afforded by Article 14 ECHR are applicable in cases brought under Article 1 of Protocol No. 12. Therefore, difference in treatment is discriminatory if it 'has no objective and reasonable justification.' The difference in treatment should pursue a 'legitimate aim' and there should be a 'reasonable relationship of proportionality' between the means employed and the aim sought to be realised. The Court also reiterated that, when a difference in treatment is based on sex, the margin of appreciation afforded to the State is narrow.

The Court first considered that there had indeed been a difference of treatment based on sex, as the applicant's diplomatic assignment had been terminated due to her pregnancy. Difference of treatment based on the ground of sex amounts to direct discrimination if not justified. Indeed, referring to the CJEU, the Court recognises that only women can be treated differently on the grounds of pregnancy and, therefore, such a difference in treatment automatically results in direct discrimination on the grounds of sex (if not justified). Therefore, the Court must determine whether the reasons used to justify the treatment were relevant and sufficient (notwithstanding the narrow margin of appreciation afforded to the State in such a case).

The Court accepts the Government's argument that the reposting of the applicant pursued the legitimate aim of protecting the rights of others (in need of consular assistance). The reposting was also justified, because the absence of the applicant jeopardised the functional capacity of the embassy's consular section. Essentially, the early termination of the applicant's diplomatic posting was necessary to ensure the functioning of the diplomatic mission and the protection of the rights of others. The Court also notes that, although the diplomatic posting of the applicant was terminated, she was not dismissed from her work as a diplomat. These changes in working circumstances cannot be equated with a loss of employment.

In light of the above, the Court found that the measure imposed (the reposting of the applicant) was necessary and therefore justified. For these reasons, the Court unanimously held that there had not been a violation of Article 1 of Protocol No. 12 to the Convention. This case is the first case where the Court examined discrimination based on sex because of pregnancy in the field of employment. It is also the

first case in which the Court examined the merits of a complaint regarding discrimination on the ground of sex under Article 1 of Protocol No. 12 of the Convention.

Mile Novakovic v *Croatia*, Application No. 73544/14, judgment of 17 December 2020

Racial or ethnic origin

Age

The applicant, now deceased, was a teacher of Serbian ethnic origin working in a region that had been peacefully reintegrated into Croatian territory after the war, in January 1998. Although the applicant had been teaching in the Serbian language since 1971, legislation adopted in the context of the post-war reintegration process imposed the standard Croatian language for all classes taught in Croatia. During the school year 19981999, the school where the applicant was employed began to apply the new legislation, but the applicant as well as a few other teachers continued to use the Serbian language. Following a complaint from some students against the teachers of Serbian origin, an inspection was conducted that led to the dismissal of the applicant. The school referred to the age of the applicant (55) when stating that it could not provide him with further education and training as it was not justified to expect him to change his 'permanent characteristics and capabilities'. The applicant claimed that the dismissal amounted to a violation of Article 8 ECHR, taken alone and in conjunction with Article 14 and with Article 1 of Protocol No. 12 to the Convention.

The Court noted that while some other schools taught in part or fully in minority languages, the school where the applicant was employed had circulated a recommendation, orally, to the teachers to teach exclusively in Croatian, only one month prior to the inspection that led to the applicant's dismissal. The Court considered circumstances such as the similarities between the two languages, the fact that the applicant had lived and worked in Croatia for most of his professional life, and the specific post-war context of the region, and concluded that the dismissal was not proportionate and that the domestic courts had failed to provide a sufficient and convincing explanation as to why the applicant's age represented an insurmountable obstacle to further training. The Court held that the dismissal of the applicant led to a violation of Article 8 ECHR, awarding EUR 5 000 in respect of non-pecuniary damage and EUR 850 in respect of costs and expenses.

The Court underlined that no teachers of Croatian ethnicity had been subjected to inspection in the school concerned and that, while it is true that complaints were lodged only against the teachers of Serbian origin, in the specific post-war context of the region at the relevant time, singling out a certain group of persons on the basis of language, which is closely related to their ethnic origin, could justifiably raise an issue of compatibility with the prohibition of discrimination guaranteed by both the Convention and the Constitution of the Republic of Croatia.

The Court held that there was no need to examine separately the applicant's complaints under Article 14 and Article 1 of Protocol No. 12, noting that it had already considered the domestic authorities' reliance on the applicant's age and ethnic origin, in its examination of the complaint under Article 8.

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

This section provides an overview of the latest main developments in gender equality and non-discrimination law (including case law) and policy at the national level in the 27 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia, Turkey and the United Kingdom, from 1 July to 31 December 2020.

AL Albania

LEGISLATIVE DEVELOPMENTS

Constitutional revision guarantees gender representation in Albanian Parliament

Gender

On 30 July 2020, amendments to Articles 64 and 68 of the Albanian Constitution were approved by the Albanian Parliament by Law No. 115/2020, and published in the Official Journal of 24 August 2020.[1] Among other things, the aim of the amendments was to guarantee more equal gender representation in politics.

The amended articles concern general rules on the parliamentary electoral system and on proposing deputy candidates. The aim of this constitutional revision initiative was the removal of closed lists of deputy candidates for the parliamentary elections, banning pre-election coalitions, and setting a 5 % vote threshold.[2]

The amendments added a sentence to make legal provision in the Election Code to guarantee preferential voting for at least two-thirds of the multi-name list, with one-third reserved for the underrepresented sex, to ensure gender representation.

Although gender representation in the Albanian Parliament has already been guaranteed by law since 2008, through Article 67(5) of the Electoral Code of 2008,[3] the relevance of the latest developments is highlighted by the fact that gender representation in the parliament is now guaranteed by a constitutional provision. Moreover, it is the first time that a constitutional revision has addressed a gender equality measure.

Online source:
https://qbz.gov.al/eli/fz/2020/153/67ec863a-085a-4ded-af3a-a9c36ffe2508

Adoption of amendments to the anti-discrimination law

All grounds

On 5 October 2020, the Assembly of the Republic of Albania adopted a series of amendments to the Law on protection from discrimination (LPD).[4] The draft law had gone through a long public consultation process with international organisations in Albania, Government institutions, independent bodies and NGOs. The purpose of the amendments was to bring the Albanian anti-discrimination law closer in line with EU law and with the recommendations of ECRI, the Commissioner for Protection from Discrimination (CPD) and national NGOs.[5]

The amendments include the following:

1 Albania, Law No. 115/2020 On some changes to the law No. 8417, dated 21 October 1998 'The Constitution of the Republic of Albania', as amended, Official Journal No. 153 of 24 August 2020, available at: https://qbz.gov.al/eli/fz/2020/153/67ec863a-085a-4ded-af3a-a9c36ffe2508.

2 Albania, Parliamentary Commission on Legal Affairs, Public Administration and Human Rights (2020), *Report on the bylaw for changes in the Albanian Constitution*, pp. 4-5, available at: https://www.parlament.al/Files/ProjektLigje/20200716145313Raport%20per%20ndryshimet%20Kushtetuese-16-7-2020.pdf.

3 According to Article 67(5), at least one-third of the multi-name list for each electoral zone and/or one of the first three names of the list should belong to each gender. The Electoral Code of 2008 is published in the Official Journal No. 189 of 29 December 2008, available at: https://qbz.gov.al/eli/fz/2008/189/704d08a5-6eb0-4dde-acc6-9626da2b2cf0.

4 Albania, Law No. 124/2020, for some additions and amendments to the Law No. 10221 of 4 February 2010, 'On protection from discrimination', Official Journal No.191 of 3 November 2020.

5 Report of the Parliamentary Committee on Legal Affairs, Public Administration and Human Rights.

1. Extended protection
New protected grounds are added, including sex, citizenship, living with HIV/AIDS and appearance, as well as new forms of discrimination, such as multiple, structural and intersectional discrimination, hate speech, segregation and sexual harassment. New definitions are also included for some forms of discrimination, such as instruction to discriminate and victimisation.

2. Extended legal standing for NGOs
Organisations with legitimate interests may (1) request the Commissioner for the Protection from Discrimination (CPD) to initiate an administrative inquiry ex-officio, by submitting credible information, (2) represent a person or a group of persons before the Commissioner, and initiate lawsuits before the courts in defence of the principle of equality and non-discrimination, on issues related to collective interests.

3. Amendments related to the equality body
New criteria are stipulated for the appointment of the Commissioner for Protection from Discrimination – the candidate to be appointed as Commissioner must have five years of experience in the field of fundamental freedoms, human rights and law. The amendments further provide that a qualified majority of votes is required for the dismissal of the Commissioner.

The amendments have removed the competence of the CPD to represent complainants in court in civil cases, to ensure the impartiality of the body when deciding on complaints. In parallel, the CPD is granted standing to file lawsuits in defence of the principle of equality and non-discrimination, on issues related to collective interests.

The mandate of the CPD is also extended to cover complaints and monitoring not only based on the Law on protection from discrimination, but also on the Law on gender equality in society.

Procedural amendments related to the CPD include the reversal of the burden of proof in administrative procedures before the CPD, the option to join together several complaints submitted to the CPD when they are addressed to the same subject and have the same object, and authorising the CPD to seek specialised opinions from external experts when special knowledge is required.

Finally, the status of the Commissioner's decisions has been revised, as it is stipulated that they are to be appealed before the competent court according to the legislation regulating the adjudication of administrative disputes. Furthermore, when the CPD has issued a fine, the decision is converted into an executive order to be executed by the bailiff's office.

Online source:
https://qbz.gov.al/eli/ligj/2020/10/15/124/c6d5d6ef-dbcc-45a0-beb0-5eff962b4546

Electoral Code developments strengthen the implementation of gender quota in assembly and local council elections and in election administration

Gender

The Albanian Electoral Code of 2008[6] was recently amended by Law No. 101/2020 23 July 2020,[7] and by Law No. 118/2020 5 October 2020.[8]

6 Albania, Law No. 10019 of 29 December 2008, the Election Code of the Republic of Albania, as amended.
7 Albania, Law No. 101/2020 on some additions and changes to Law No. 10019, dated 29 December 2008, the Election Code of the Republic of Albania, as amended, Official Journal No. 143 of 4 August 2020, available at: https://qbz.gov.al/eli/fz/2020/143/82f816ff-4638-446d-b3f6-c1125ecec32f.
8 Albania, Law No. 118/2020 On some additions and changes to the Law No. 10019, dated 29 December 2008, the Election Code of the Republic of Albania, as amended, Official Journal No. 191 of 3 November 2020, available at: https://qbz.gov.al/eli/fz/2020/191/4a6fb792-6c8d-4637-ba0f-fa0ece007562.

Some of the amendments to the Electoral Code made by Law No. 101/2020 strengthen the implementation of gender quotas in parliamentary and local elections, and in the election administration by:

- adding the 'underrepresented gender' to the definitions given in Article 2;
- setting the principle of gender equality as a core principle of the Electoral Code, that is mandatory for the electoral subjects, electoral administration and the court – Article 4(1) and (2);
- determining that the Electoral Code promotes gender equality for the elected bodies and the election administration by setting a gender quota for the underrepresented gender of at least 30 % in the Parliament seats and the bodies of the basic units of local government, setting a gender quota for the underrepresented gender for at least 30 % in the composition of all levels of the election administration– Article 4(3);
- obligating electoral subjects to make a list of which one in three names should belong to the underrepresented gender for each constituency in parliamentary elections and one in each two of the subsequent names in the elections for local councils – Article 67(6). Furthermore, in cases when the electoral subjects do not fulfil this obligation, according to Article 175 of the Electoral Code, as amended, the list will be rejected from registration in parliamentary/local elections.

Law No. 118/2020 changed the provisions of the Electoral Code on the distribution of seats for the winning candidates on the list, maintaining the rules to safeguard the gender quota. The amendments to Articles 67(1-5) and 163 that concern the multi-name candidate lists for the parliamentary/local elections and the determination of the winning candidates on the list, maintain the rules for safe-guarding the gender quota. This is guaranteed by the provision of a formula that calculates the winning mandates on the basis of two criteria: preferential voting and a 30 % quota for the under-represented gender.

Online sources:
https://qbz.gov.al/eli/fz/2020/143/82f816ff-4638-446d-b3f6-c1125ecec32f
https://qbz.gov.al/eli/fz/2020/191/4a6fb792-6c8d-4637-ba0f-fa0ece007562

AT Austria

CASE LAW

Constitutional Court repeals ban on headscarves for girls in primary education

Religion or belief

Gender

In May 2019, Parliament amended the School Education Act, prohibiting pupils 'until the end of the school-year in which they reach ten years of age' to 'wear clothing that is influenced by belief or religion and which encompasses a covering of the head' in a new Section 43a.[9]

In December 2020, the Constitutional Court ruled on a complaint against this provision submitted by two pupils and their parents, finding that the amendment was unconstitutional and discriminatory.[10] The court underlined in particular the selective nature of the headscarf prohibition, which made it unsuitable to reach the alleged aim. On the contrary, the court held that such a prohibition could have a negative effect on the inclusion of the pupils affected and lead to discrimination, risking impeding their access to education and excluding them from society. The court further noted that the prohibition purposefully targeted and stigmatised a specific group of people.

9 For further information, see *European equality law review*, Issue 2019/2, pp 78-79.
10 Austria, Constitutional Court, Decision of 11 December 2020, No. G4/2020-27.

In response to the alleged aim of preventing conflicts and protecting Muslim pupils who do not wish to wear a headscarf, the court held that it could not be reasonably justified to target the pupils wearing headscarves instead of those individuals who disturb peace and order in school by attacking or putting pressure on others. By targeting only female Muslim pupils, the court found that the amendment segregated them from others in a discriminatory manner.

The Constitutional Court's decision rendered Section 43a of the amended School Education Act null and void.

Online source:
https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_20201211_20G00004_01/JFR_20201211_20G00004_01.html

Belgium

BE

CASE LAW

The Ghent Labour Court rendered its judgment in the Belgian *Achbita* case concerning the ban on religious symbols at work

Religion or belief

This case concerned a Muslim woman, Mrs Achbita, who worked as a receptionist at G4S Security Services and decided, in April 2006, three years after her hiring, to wear the Islamic headscarf during working hours. A few days later, she was informed that her wearing of the headscarf was contrary to the (unwritten) neutrality policy of the company. During the conflict with Mrs Achbita, the work regulations of the company were amended in order to forbid explicitly workers from wearing any visible symbols expressing their political, philosophical or religious beliefs. Refusing to remove her headscarf within the premises of the company, Mrs Achbita was dismissed.

According to the Antwerp Labour Court,[11] which decided the case on 23 December 2011, the employer could prohibit the wearing of any religious signs by all employees to preserve the neutral image of the company, even though the company did not have any clear neutrality regulation at the time of hiring. When the case reached the Court of Cassation,[12] it was submitted to the CJEU for a preliminary ruling, focusing only on the issue of direct discrimination. The CJEU rendered its judgment on 14 March 2017,[13] finding that there was no direct discrimination. The Court stressed however that the company regulation could constitute indirect discrimination if it was demonstrated that people with a particular religion were more disadvantaged by this measure.

On 9 October 2017, the Belgian Court of Cassation[14] overturned the decision of the Antwerp Labour Court, except with regard to the consideration that there was no direct discrimination in the case at hand, following the interpretation of the CJEU in this respect. The case was then referred to the Ghent Labour Court for a ruling on the merits.

On 12 October 2020, the Ghent Labour Court[15] ruled that the policy of general neutrality did not disadvantage Muslim women more than others. All G4S workers are required to refrain from revealing their religious, political or philosophical beliefs. In any case, the separation between state and church does not allow the court to distinguish these beliefs according to their importance. The Court concluded

11 Belgium, Labour Court of Appeal of Antwerp, judgment of 23 December 2011, No. A.R. 2010/AA/453 and No. A.R. 2010/AA/467.
12 Belgium, Court of Cassation, judgment of 9 March 2015, No. S.12.0062.N.
13 CJEU, judgment of 14 March 2017, *Achbita*, C-157/15, ECLI: EU:C:2017:203.
14 Belgium, Court of Cassation, judgment of 9 October 2017, No. S 12.062.N1.
15 Belgium, Labour Court of Ghent, judgment of 12 October 2020, No. 2019/AG/55.

that there was no indirect discrimination because it was not demonstrated that people with a particular religion were more disadvantaged by this policy of neutrality in the company. The Court further added that, had there been indirect discrimination, the policy of neutrality would have been a legitimate aim and the measure would have been appropriate, necessary and proportionate to achieve that aim.

Throughout the entire process, the equality body Unia has been a party to the proceedings, acting in support of Mrs. Achbita.

Online source:
https://www.unia.be/files/Documenten/Rechtspraak/2020_10_12__Arbh._Gent.pdf

BG Bulgaria

CASE LAW

Religion or belief

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

The case concerns a non-traditional faith group (Shri Chinmoy Centre), which had filed a claim against a pro-Orthodox, anti-minority advocate who had successfully incited various service providers to deny the minority group access to renting premises for faith-related concerts and gatherings. For this purpose, the advocate had published and distributed an article against the minority group and engaged directly with premise providers. The first instance civil court had ruled in favour of the minority claimants, finding incitement to discrimination on grounds of belief, ordering the respondent to terminate and abstain from the impugned conduct, and awarding damages of EUR 175 to each of the two minority believers. The appeals court found that the conduct did not amount to incitement to discrimination as the respondent had been acting within her right to free expression. The article had not contained hate speech, therefore, it did not constitute incitement to discriminate. Furthermore, the article had not mentioned specifically the group's concerts but had discussed their activities in general. In addition, the claimants had not proven that the respondent had treated them less favourably when compared to others.[16]

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

The Supreme Court of Cassation ruled that the questions filed on behalf of the minority group were inadmissible as they were either poorly formulated, irrelevant from the standpoint of general procedural law, and/or inadequately substantiated. The Court did not engage with any issues of discrimination law but refused to hear the case on general procedural grounds.[17]

The appeals court decision is thus final, declaring that a finding of incitement to discrimination requires intent as well as less favourable treatment in comparison to third parties, and, in terms of the content of the impugned expression, hate speech.

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

16 Bulgaria, City Court of Sofia, Decision No. 553 of 24 January 2019 in Case No. 16814/ 2017.
17 Bulgaria, Supreme Court of Cassation, Ruling No. 221 of 25 March 2020 in Case No. 2958/ 2019.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Failure to implement the ECtHR decision in *Yordanova and Others* v *Bulgaria*

Racial or ethnic origin

On 2 November 2020, the Council of Europe Commissioner for Human Rights made a Rule 9.4 submission to the Committee of Ministers regarding the execution of the 2012 *Yordanova and Others* v *Bulgaria* judgment of the ECtHR,[18] which Bulgaria has failed to implement and whose execution is under enhanced supervision by the Committee of Ministers. The Commissioner asserted that the authorities should prevent forced evictions, tackle the stigmatisation and marginalisation of Roma and improve their access to adequate housing, including social housing.

The case concerned a local government decision to evict Roma families from their long-standing informal settlement in Sofia in violation of the right to private and family life (Article 8 ECHR). The Commissioner based her submission on her March 2020 report on Bulgaria, stressing that in addition to seriously infringing the right to adequate housing, forced evictions potentially result in violations of various other human rights, wherefore preventing them is essential. She pointed out that states have an obligation to limit the risk of human rights violations related to evictions and to ensure that the principles of proportionality and non-discrimination are respected in any eviction process. She submitted that the problem of evictions of Roma in Bulgaria can only be effectively addressed by tackling the widespread prejudice and institutional racism against Roma, and through structural changes in the area of housing rights. She reiterated her concerns about the numerous obstacles to Roma access to social housing, including public opposition at local level, which has led some municipalities to cancel construction projects. The Commissioner detailed necessary steps to prevent forced evictions in the light of international human rights standards.

Online source:
https://www.coe.int/en/web/commissioner/-/bulgarian-authorities-should-prevent-forced-evictions-tackle-the-stigmatisation-and-marginalisation-of-roma-and-improve-their-access-to-adequate-housi

New National Strategy for People with Disabilities 2021-2030

Disability

On 22 December 2020, the Council of Ministers adopted a new National Strategy for People with Disabilities 2021-2030, to enhance the opportunities of people with disabilities to enjoy their rights and equal participation. The goals of the strategy include social inclusion by means of securing an accessible environment using a comprehensive approach, including, in particular, through integrative education and employment. The Ministry of Labour and Social Policy will be monitoring and assessing the implementation of the strategy, and reporting on its outcomes to the Government.

Based on the UN Convention on the Rights of Persons with Disabilities, the principles of the strategy include dignity, equality, full participation and an individualised approach. Measures provided for relate to: physical environmental accessibility (buildings, infrastructure, etc.), transportation and communications accessibility, individual mobility (equipment, aids), technologies to facilitate access to workplaces based on individual needs, and universal design. Education integration measures include capacity building to secure resources and support for students with special needs, including professional training. Employment measures include developing an integrated tool to assess the working abilities of people with disabilities with a view to enabling their active participation, career counselling, active mediation and mentoring services, effective vocational education, workplace support, as well as employment promotion via stimuli for employers, and capacity building for companies for the purposes of reasonable accommodation, among other activities.

18 ECtHR, *Yordanova and Others* v *Bulgaria*, No. 25446/06, 24 April 2012.

Online sources:
http://www.strategy.bg/StrategicDocuments/View.aspx?lang=bg-BG&Id=1342
https://www.mlsp.government.bg/odobrena-e-natsionalna-strategiya-za-khorata-s-uvrezhdaniya-za-perioda-2021-2030-godina

CZ Czechia

LEGISLATIVE DEVELOPMENT

Disability

Access of children with disability to assistance during classes may be restricted

In September 2020, the Ministry of Education, Youth, and Sports presented a draft amendment to the Decree No. 27/2016 on the education of students with special educational needs,[19] also known as the 'inclusion decree', which regulates the practical implementation of inclusive education in Czechia. The proposed amendment relates to the conditions for assigning assistant teachers to children with special educational needs. Under the current regulations, a child with any special educational need is eligible for the help of an assistant teacher, the only requirement being to obtain a recommendation from a special pedagogical centre. The proposed amendment limits the scope of this right only to children with mental, visual, or hearing impairments, serious behavioural disorders, more than one disability, or autism. It is estimated that approximately 6 000 children currently using the help of an assistant teacher would be negatively affected by this change, such as for instance children with physical disabilities, speech impediments, or learning disabilities.[20] As a result, the assistants working with these children would have to be discharged or their services would need to be covered from alternative sources (e.g. parents). Many experts have criticised this proposal.[21]

At the time of writing, the draft amendment was pending in Parliament.

Online source:
https://apps.odok.cz/veklep-detail?pid=ALBSBT2J3U3L

POLICY AND OTHER RELEVANT DEVELOPMENTS

All grounds

Ombudsman report on anti-discrimination case law of Czech courts

On 1 October 2020, the Office of the Ombudsman (the Czech equality body) published a research paper on the case law of Czech courts on discrimination between 2015 and 2019.[22] The research focused on the number of cases, the substance of the claims, and their results.

The main statistics and conclusions of the report include the following:

19 Czechia, draft amendment to the Decree No. 27/2016 Coll., on the education of children with special educational needs, available at: https://apps.odok.cz/veklep-detail?pid=ALBSBT2J3U3L.

20 Seznam zprávy (2020), 'Školství překvapilo novou vyhláškou k inkluzi. Část žáků má přijít o podporu' (Ministry of Education surprised with the new decree about inclusion. Part of the pupils should lose the support), news article, available at: https://www.seznamzpravy.cz/clanek/skolstvi-prekvapilo-novou-vyhlaskou-k-inkluzi-cast-zaku-ma-prijit-o-podporu-119118.

21 Neovlivní.cz (2020), 'Pod rouškou koronaviru: Plaga chce sebrat školní asistenty postiženým dětem' (Minister Plaga wants to take away assistant teachers of the children with disability), news article, available at: https://neovlivni.cz/pod-rouskou-koronaviru-plaga-chce-sebrat-skolni-asistenty-postizenym-detem/.

22 Ombudsman (2020), *Rozhodování českých soudů o diskriminačních sporech 2015-2019* (Discrimination case law of Czech courts between 2015-2019), research paper, available at: https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/2020-vyzkum_judikatura-DIS.pdf.

- During 2015 to 2019, Czech courts dealt with 90 discrimination cases. Altogether, courts of various instances delivered 204 decisions in these cases.
- In 54 of these cases, the claimants were unsuccessful.
- Overall, the most commonly claimed ground of discrimination was disability.
- Overall, the most commonly claimed type of discrimination was direct discrimination.
- The most commonly claimed field of discrimination was employment (60 % of all cases). In this particular field, the most common grounds concerned were age (27 % of cases) and sex (25 % of cases).
- Victims of alleged discrimination in the fields of healthcare, housing and education had low success rates, due to the lack of provisions stipulating the shift of the burden of proof in discrimination cases in these fields on grounds other than race.
- Courts very rarely granted compensation of non-pecuniary damage (in 12 out of 59 cases where such compensation was claimed). In only two cases, courts awarded the amount of compensation for non-pecuniary damage that was claimed; in all other cases, the sum awarded was significantly lower.
- On average, claimants asked for EUR 21 932[23] in compensation for non-pecuniary damage. The average amount awarded was EUR 2 936.
- The highest amount of compensation for non-pecuniary damage awarded was EUR 15 546, while the lowest was EUR 553 (to be divided among three claimants).
- In most cases, courts did not grant the reimbursement of the judicial costs to either of the parties.
- According to the Office of the Ombudsman, the high standard for obtaining non-pecuniary damages in discrimination cases means a lack of any preventive, satisfactory or punitive effect.

The Ombudsman's recommendations included:

- amending the Anti-Discrimination Act to simplify the access to compensation for non-pecuniary damage;
- amending the legal framework regarding the shift of the burden of proof for all discrimination cases;[24]
- lowering the judicial fee of an appeal against the decision of the first-instance court;
- introducing action in public interest (*actio popularis*) into the legal order;
- introducing the concept of discrimination by association into the legal order;
- publishing regularly judicial decisions in discrimination cases.

Online Source:
https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/2020-vyzkum_judikatura-DIS.pdf

New data in relation to gender equality in Czechia

Gender

In 2020, new data and research regarding gender equality in Czechia were published. This included data on domestic violence during the COVID-19 crisis, as well as data on the views of the Czech public regarding domestic violence.

1) Domestic violence during the COVID-19 pandemic

The Czech Academy of Sciences conducted research on the state of domestic violence during the COVID-19 pandemic. The project has been running since spring 2020, and the first results were published

23 All amounts in euros are approximate as the original figures are in Czech koruna.
24 Currently, Section 133a of Act No. 99/1963, the Civil Procedure Code, is the key to the shift of the burden of proof in discrimination cases. However, it does not cover all situations of discrimination. For example, it applies to discrimination on any ground in the field of employment, but in the field of healthcare or education, it is applicable only to the ground of race. Thus, victims of various types of discrimination do not enjoy the same procedural protection before the court.

in November 2020.[25] Some of the findings are the direct result of the difficulties posed by the COVID-19 pandemic, however other findings do not seem to be related to the COVID-19 crisis specifically. The research concluded that:

- During the pandemic, domestic violence incidents have become more aggressive and extreme. The experts suggest that the impact of domestic violence may be even more serious during the current uncertain social situation.
- During the pandemic, the frequency of domestic violence is probably even higher than before.
- The institutions involved in dealing with domestic violence (police, social and legal protection of children authorities, NGOs) face an overload and are at the limits of their capacities. Hence, such institutions may evaluate the threat or severity of DV differently in various parts of the country.
- This variation in approach does not contribute to the overall credibility of the system.
- Overall, a strong taboo in respect of the sexual violence in intimate relationships still persists.
- This year, the urgent need to increase the number of places in asylum houses (shelters) has grown.

2) Public opinion concerning domestic violence

In November 2020, research concerning the views of the Czech public regarding domestic violence was published.[26] The research focused mainly on the perception of the severity of different types of domestic violence. The most important conclusions are:

- Around 85 % of the population considers domestic violence to be a serious societal problem.
- Around 62 % of the respondents believe that domestic violence does not receive enough attention and should be discussed more in society.
- Overall, women consider domestic violence to be a more serious problem than men do.
- Respondents with a higher education perceived domestic violence to be bigger problem than respondents with a lower level education.
- On the one hand, approximately two thirds of the respondents recognise and acknowledge the harm that may be caused to the victim by psychological and physical domestic violence. On the other hand, one third of the respondents do not believe that forcing unwanted sexual intercourse upon a spouse or a partner, or socially isolating them would potentially cause very serious damage to the victim.

3) The Gender Equality Index of the EU ranked Czechia in 23rd place out of the EU Member States

The European Institute for Gender Equality published its annual Gender Equality Index, according to which Czechia is in 23rd place in the EU concerning gender equality.[27] It received 56.2 out of 100 possible points. Czech sociologists point out that since the existence of the index, there has been no improvement in Czechia, and perhaps even the opposite. They attribute this outcome to the lack of active work and efforts on gender equality legislation and policy.[28]

According to the index, the most problematic area is women in decision-making processes. Women are barely represented in higher executive positions in Czechia, whether in politics, science, media, the justice system or sports. Furthermore, strong stereotypes still prevail in the labour market as women and men

25 Czech Academy of Sciences, Institute of Sociology (2020), 'Domácí násilí za COVID-19: Je to o lidech?' (Domestic violence during COVID-19: Is it about the people?), press release, available at: https://www.soc.cas.cz/sites/default/files/soubory/tz_20201022_domaci_nasili_za_covid-19.pdf.

26 Focus Agency and Czech Academy of Sciences, Institute of Sociology (2020), *Problematics of domestic violence in the view of Czech public,* final research report, available at: https://www.nadacevodafone.cz/upload/documents/prilohy/Domácí%20násilí_nadace%20Vodafone.pdf.

27 EIGE (2020), *Gender Equality Index: Czech Republic*, available online at: https://eige.europa.eu/gender-equality-index/2020/CZ.

28 Czech Academy of Sciences, Institute of Sociology (2020), 'Zaostávající podprůměr: Česko se na evropském žebříčku genderové rovnosti propadá, je na 23. Místě' (Czech Republic is falling down in the Gender Equality Index, it occupies the 23rd place), press release, available at: https://www.soc.cas.cz/aktualita/zaostavajici-podprumer-cesko-se-na-evropskem-zebricku-genderove-rovnosti-propada-je-na-23.

are directed into work in stereotypically 'male' and 'female' spheres. This is connected to another well-known issue – the gender pay gap. In general, the basis for these inequalities may be the unbalanced division of domestic labour and care between women and men.

Denmark

DK

LEGISLATIVE DEVELOPMENT

Access to financial compensation during maternity leave and parental leave for self-employed persons

Gender

In September 2020, the Danish Government put forward a legislative proposal to improve the maternity/parental leave provisions for self-employed persons, aiming to solve certain economic challenges experienced when self-employed people take maternity/parental leave from their own company.

The proposal is part of an overall political intention to improve the incentive of women to become self-employed in the private sector, as well as to improve salary compensation during maternity and parental leave for men and women. As such, the proposal is expected to have a positive effect on equality between men and women in the labour market in general.

The proposal entailed an amendment to the existing Act on Equalisation of Maternity Leave Benefits,[29] applicable to the private sector. The amendments were adopted on 17 December 2020 and came into force on 1 January 2021.

Prior to this amendment, the self-employed experienced financial challenges during maternity/parental leave. The maternity/parental leave benefits often did not match the level of income of the self-employed. The self-employed could not apply for additional funding with a view to reducing the gap between the usual income level and the level of maternity/parental leave benefits. Nor could the self-employed apply for compensation to reduce the financial burden of the ongoing costs of running the company whilst on maternity/parental leave, such as rent for commercial property, commercial insurance and temporary staff. The amendment gives self-employed people access to the maternity equalisation scheme, which is applicable to private employers.

Self-employed people can now receive compensation from the maternity equalisation scheme similar to the salary compensation reimbursed to private employers. The compensation to the self-employed is calculated based on the difference between the income of the self-employed person in the preceding financial year(s) and the level of maternity/parental leave benefits. The compensation is capped at the same level as private employers' salary compensations from the maternity equalisation scheme. This compensation scheme reduces the general costs of being on maternity/parental leave for the self-employed, and can be used, for example, to pay for ongoing costs such as rent, insurance and a temporary worker during the leave period.

In turn, all self-employed people (where self-employment is their main occupation) must contribute to the maternity equalisation fund on an equal footing with private companies. The annual contribution for the self-employed is set at DKK 1 225 (approximately EUR 163).

29 Denmark, Act on Equalisation of Maternity Leave Benefits, available at: https://www.retsinformation.dk/eli/lta/2019/281 and amendment Act No. 2198 of 29 December 2020 to the Act on Maternity Equalisation in the Private Labour Market, available at: https://www.retsinformation.dk/eli/lta/2020/2198.

The proposal was thought to have a positive effect on the general equality between men and women on the labour market. The introduced compensation entitlement of the self-employed provides more financial stability, which enables them to, for example, cover the fixed expenses of their business while on leave. The size of the compensation is calculated based on how much they earn.

In addition to providing an incentive for women to become self-employed, the legislature also expects that the scheme will encourage more male self-employed workers to take parental leave to a larger degree than is currently the case. The amendment established that employees and the self-employed are entitled to equal rights in most aspects of social protection linked to childbirth and childcare.

Online source:
https://www.retsinformation.dk/eli/lta/2020/2198

CASE LAW

Level of compensation for discriminatory dismissal

Disability

The case dealt with a full-time teacher who experienced a work-related injury in December 2014, following which she was periodically on sick leave because of the physical and cognitive impairments she had sustained. The employer (the municipality) tried to accommodate the employee's needs before dismissing her in January 2017, due to a number of operational difficulties.

The teacher filed a complaint with the Board of Equal Treatment, arguing that the municipality had failed to make reasonable accommodations and that she had been discriminated against because of disability. The Board of Equal Treatment upheld the claims and awarded financial compensation equal to nine months' full-time salary.[30] When the municipality refused to pay, the case came before the city court of Roskilde.

The city court noted that the work injury, according to a specialist doctor's statement, had resulted in the teacher experiencing concentration and memory problems as well as fatigue and difficulties in reading and writing. The court thus held that it did not 'understand that a person with such a disorder and impairments can be competent, suitable or available for a teaching job.' However, the court found that the municipality had not proved that the teacher could not be successful in a part-time position had she been provided with the right accommodations. The court therefore concluded that there had been discrimination on the ground of disability, but that the compensation should be set to nine months' half-time salary. The city court thus reduced by half the compensation awarded by the Board of Equal Treatment.[31]

Denial of access to café because of child's disability

Disability

The case dealt with a mother and her six-year-old daughter who were rejected at the entrance to a café. Before the visit, the mother had made a reservation over the phone, explaining that due to the daughter's disability, they would bring a special stroller. The café had confirmed that that would not be a problem.

When they arrived, an employee told the mother that the café did not allow strollers inside due to fire safety regulations, and the family was denied access. The mother and her daughter filed a complaint to the Board of Equal Treatment claiming that they had both been discriminated against because of the daughter's disability.

30 Denmark, Board of Equal Treatment, Decision No. 9399 of 23 May 2018, available at: https://www.retsinformation.dk/eli/retsinfo/2018/9399.

31 Denmark, Roskilde City Court, decision of 7 May 2020 in Case No. BS-33137/2018-ROS.

The café had a policy stating that although strollers were not allowed in the café, wheelchairs and strollers for people with disabilities were exempted. On the basis of this policy, and the telephone conversation between the mother and the café, the Board argued that facts had been established that gave rise to presume that the mother and daughter had experienced indirect discrimination based on disability. The Board stated that the denial of access was not objectively justified. In conclusion, the Board found that the café had not proven the denial of access to be non-discriminatory. Thus, the mother and daughter were each awarded compensation of EUR 672 (DKK 5 000) according to the Act on the Prohibition of Discrimination due to Disability.[32]

Eastern High Court ruling on indirect discrimination on grounds of gender

Gender

On 7 September 2020, the Eastern High Court delivered a judgment concerning indirect discrimination as prohibited by Section 1(3) of the Statutory Act on Equal Treatment of Men and Women as regards access to employment.[33] The case concerned the question of whether a female employee, who was also a divorced single parent of three children, had been discriminated against indirectly on the ground of gender when she was dismissed.

The applicant, a female employee and single parent, was dismissed as part of a large restructuring of the company. Upon request, the employer provided a written explanation according to which, henceforth, the position would involve significantly increased travel time and this did not match the employee's profile. In a later communication, the company confirmed that the company 'did not regard her as the right candidate because of her situation'.

The Eastern High Court found that the decision to dismiss had been decisively influenced by the company's perception of her lack of flexibility in relation to working hours because of her family situation as a single parent. Also, the High Court found that the dismissal took place without prior dialogue with the employee on whether she would be able to meet the requirements of increased flexibility. It referred to the former Supreme Court ruling of 2014,[34] which stated that a perceived lack of flexibility due to status as single parent could place persons of one gender at a disadvantage compared to persons of the other gender, which would constitute indirect discrimination based on sex. The Eastern High Court in the 2020 ruling thus found that the employer's reference to the requirement of flexibility and her family status constituted a reference to factual circumstances, which gave reason to presume that the dismissal could constitute indirect discrimination on grounds of gender. The burden of proof thus shifted to the employer, who then had to prove that the principle of equal treatment had not been violated, as stated in Section 16a of the Equal Treatment Act. As the employer had not investigated whether the employee possessed the necessary qualifications or flexibility required for the future terms of the position, nor proven that her work performance had not been satisfactory up until then, the employer could not prove that the principle of equal treatment had not been violated.

The 2020 High Court ruling is the first ruling that explicitly rules that a neutral criterion of 'flexibility' with reference to the family status of an employee, constitutes indirect discrimination on the ground of sex. The High Court considered the employer's reference to the employee's perceived lack of flexibility because of her family status as a single parent as an expression of indirect discrimination based on sex.

Several elements in the ruling are of interest:

– First, the emphasis on the perception of the company. The 2020 High Court ruled that the employer's actions based on a *perceived* lack of flexibility of the employee as a single mother could place persons

32 Denmark, Board of Equal Treatment, Decision No. 9761 of 3 September 2020, available at: https://www.retsinformation.dk/eli/accn/W20200976125.
33 Denmark, Statutory Act on Equal Treatment of Men and Women as regards access to employment, etc. No 645 of 8 June 2011.
34 Danish Supreme Court (U.2014.106/2H) 7 October 2013, Case No 274/2011.

of a certain gender in a disadvantaged position compared to persons of the other gender. It is still not clear whether a *factual* lack of flexibility would in itself justify the indirect discrimination, as the High Court 2020 ruling only emphasised that the employer should have investigated whether the employee was in fact flexible enough to fulfil the requirements of the position.
- Secondly, the connection between the status of single parent and the indirect discrimination based on sex is not elaborated on in the 2020 High Court ruling, nor in the 2014 Supreme Court ruling. The 2020 High Court ruling simply refers to the 2014 Supreme Court ruling, in which the Court stated that the perception that a female employee caring for children is less flexible in relation to working hours, was indirect discrimination based on gender. The Supreme Court referred to the preparatory works of the Equal Treatment Act of 2000-2001[35] and of 2005-2006[36] as the basis for assessing that perceived flexibility of single parents could be indirect discrimination based on gender. However, neither of the preparatory works mention single parents.
- Thirdly, a separate issue not addressed by the 2020 High Court ruling, nor by the 2014 Supreme Court ruling, was that in both cases the specific childcare arrangement was shared on a 50/50 basis, i.e. the children lived 7 days in one parent's house and then 7 days in the other parent's house. In both cases, neither of the parents, based on the facts, bore the majority of the childcaring burden. The 2020 High Court ruling did not raise the question of whether a 50/50 shared childcare arrangement challenged the connection between single parenthood and the adverse effects on one gender.

Online source:
https://ast.dk/filer/naevn/ligebehandlingsnaevnet/j-nr-2017-6810-34888-ol.pdf

Families refuse to move from their homes because of alleged discriminatory ghetto legislation

Racial or ethnic origin

Danish legislation adopted in 2019 aims to abolish all so-called ghettos by 2030. The legislation refers to 'marginalised residential areas', defined according to a number of criteria related to the level of income, criminal history, level of education and unemployment rate of the residents. A 'ghetto' is furthermore defined as a 'marginalised residential area' where the percentage of immigrants and descendants from third countries exceeds 50 %. The legislation further stipulates that a certain percentage of apartment buildings in a 'ghetto' has to be torn down, renovated for other purposes or sold to private investors. Residents of the demolished buildings are to be offered alternative accommodation.

The case in question dealt with eight ethnic minority families who were sued by their landlord as they refused to move out after being evicted. The landlord was planning to remodel the building (where a total of 96 families were living) into accessible housing for seniors and persons with disabilities in order to comply with the 'ghetto' legislation. The eight families argued that the evictions were based, among other factors, on their ethnic origin and thus constituted direct discrimination in violation of Section 3 of the Act on Ethnic Equal Treatment as well as international human rights conventions.

On 20 November 2020, the city court of Helsingør found that the evictions had taken place in full accordance with the Social Housing Law. The court also underlined that the legislation defining 'marginalised residential areas' had been adopted by the Danish Parliament following traditional procedures. While in theory, Danish courts are authorised to set aside discriminatory legislation, the court in this case concluded that the relevant provision was not discriminatory.[37]

The eight families were therefore ordered to move out of their apartments.

35 https://www.retsinformation.dk/eli/ft/200012L00078.
36 https://www.ft.dk/samling/20051/lovforslag/l17/20051_l17_som_fremsat.htm.
37 Denmark, Helsingør City Court, decision of 20 November 2020 in Case No. BS-13867/2020 HEL.

Estonia EE

CASE LAW

Burden of proof before the administrative court in a case of alleged age discrimination

Age

The claimant was 60 years old and applied for a position in a municipality, for which he was highly qualified. While the claimant was not even invited for an interview, the successful candidate was 27 years old and had much less professional experience and a much lower level of education.

The claimant argued that he had been discriminated against on the ground of his age, and requested an explanation from the city authorities, as is his right under the Equal Treatment Act. While he did not receive any clear explanation, one of the letters from the potential employer contained the following passage: '[…]it is obvious that it is not possible for younger people to achieve the same variety of work experience as for older people. At the same time, leaving for this reason young people without opportunity to contribute to the development of society, we would really make decisions based on age and would not give room for fresh ideas.'

The claimant filed a claim for compensation of non-pecuniary damage due to age discrimination. In addition to the aforementioned letter, he referred to the lack of a requirement for work experience in the recruitment announcement, the lack of any equality policy within the municipality, and the current lack of age balance in the staff of the relevant city service.

In November 2020, the Tartu Circuit Court concluded that the claimant had failed to prove the fact of age discrimination, without examining the differences between the qualifications of the claimant and those of the successful candidate.[38] The court accepted the consideration of statistical evidence (e.g., 4 out of 5 employees were aged under 40), but found that it was not sufficient to establish an assumption of an environment favourable to age discrimination within the municipality.

In Estonia, employment-related complaints of (potential) public officials fall within the competence of the administrative court, where no shift in the burden of proof is provided in discrimination proceedings.

Online source:
https://www.riigiteataja.ee/kohtulahendid/detailid.html?id=278966486

France FR

LEGISLATIVE DEVELOPMENT

Legislative measures to fight the development and practice of a 'radical Muslim community'

Religion or belief

A bill consolidating republican principles[39] was announced as a structuring element of Government policy to fight de facto insularity, development and practice of a radical Muslim community which is perceived

38 Estonia, *X.* v *Tartu linn*, judgment of the Tartu Circuit Court of 19 November 2020 in administrative Case No. 3-19-504.

39 France, Bill consolidating the principles of the Republic (*Projet de loi confortant le respect des principes de la République*), Assemblée nationale, No. 3649 rectified, 9 December 2020, available at: http://www.assemblee-nationale.fr/dyn/15/textes/l15b3649_projet-loi.pdf.

to be hostile to the principles of western civilisation and the values of the French Republic. The legal framework currently in force is said to be insufficient to actively and effectively combat Islamist radicals.

The President of the Republic has emphasised that the aim is not to target the entire Muslim community, and that the legislation is to be implemented together with a renewed policy to fight discrimination on the ground of origin, particularly by the police, and to promote integration.[40] This parallel programme was to be launched in January 2021.

Title I of the proposed legislation intends to secure submission to the rules of the Republic in all areas where specific communities are exposed to radical Islamist control and the values promoted by radical Islam. It includes:

- an obligation for all entities contracting with the state or obtaining public funds to commit to respecting republican values and the principle of secularity;
- provisions protecting public agents against intimidation, menace or violence;
- measures to reinforce fiscal and legal controls of the financing and implementation of tax benefits for NGOs supported by private generosity as well as foreign funds;
- reinforcement of the protection of gender equality, notably through the fight against forced marriages and the practice of virginity certificates; by protecting the right of women, and of children of polygamous families, to inherit patrimony in France; and by restricting residence rights of polygamous families;
- measures to restrict the right to home schooling so that it is only available as an exception for children with certain health conditions or disabilities, special sport or artistic training, and Travellers;
- reinforcement of the fight against hate speech and practices encouraging violence and hatred, by the creation of an offence of endangering another's life by public disclosure of personal information and by the creation of an accelerated criminal procedure for enforcement of the prohibition on hate speech in all media.

Title II of the bill intends to reform the regime of religious organisations by reinforcing the protection of associations that are regulated by the Law of 1905 (on the separation between the state and the church) against unworthy take over through foreign funds and shadow control. It includes:

- increased obligations to submit declarations regarding foreign financing and membership of controlling members, under the purview of the local prefects;
- mandatory transfer of all existing and new religious associations that are formed under the regime of the General Law of 1901 on associations to the regime of the Law of 1905, thus submitting them to the control of the Muslim religious federation and to the aforementioned regime of declarations;
- reinforced sanctions in case of non-conformity, including administrative shut-down of worship facilities and the dissolution of NGOs;
- reinforced powers to the local prefects to impose sanctions on organisations and local authorities who give in to religious pressure and make concessions on the principle of neutrality of public facilities, such as pool facilities reserved for women.

Earlier versions of the bill have been heavily criticised by civil society and the Council of State,[41] as constituting a threat to fundamental rights. It has thus been substantially modified.

Online sources:
http://www.assemblee-nationale.fr/dyn/15/textes/l15b3649_projet-loi.pdf
http://www.assemblee-nationale.fr/dyn/15/textes/l15b3649_etude-impact.pdf

40 Interview with the President of the Republic, 4 December 2020, Brut: https://www.elysee.fr/emmanuel-macron/2020/12/04/le-president-emmanuel-macron-repond-aux-questions-de-brut.

41 France, Council of State, General Assembly, Advisory Opinion of 3 December 2020, No. 401549, NOR:INTX2030083L/Verte-2, available at: https://www.assemblee-nationale.fr/dyn/15/textes/l15b3649_avis-conseil-etat.pdf.

CASE LAW

Legality of the decree reserving compensation for spoliation during World War II to persons of Jewish origin, excluding victims of Traveller and Roma origin

Racial or ethnic origin

In 1995, the (then) President Chirac recognised the liability of the French State in the persecution of victims of antisemitism during the occupation of France by the Nazi regime during World War II. In 1999, a decree was adopted creating a specific legal framework for the compensation of victims of such persecution. The liability of the French State for similar crimes committed against French Travellers and Roma during the Occupation was only recognised in 2016 however, by (then) President Hollande.

The decree of 1999 was consistently interpreted by the Council of State to be strictly limited to the compensation of victims of antisemitism during the Occupation, due to the specificity of the systematic persecution they suffered.[42]

Together with an individual Traveller whose parents were victims of spoliations during the Occupation, several organisations representing French Travellers and Roma presented motions to quash the decree of 1999 before the Council of State. The applicants argued that the scheme instituted in 1999 violated the principles of equality and fraternity protected by the Constitution, that it deprived the Traveller and Roma victims of racial persecutions of a remedy, in contradiction to the principle of protection of property guaranteed by Article 17 of the Declaration of Human and Civic Rights, and that it violated the principle of non-discrimination in relation to the protection of property, as protected by Article 1 of Protocol No. 1 and Article 14 of the ECHR. The Defender of Rights presented its views in support of the duty of the State to provide compensation to Travellers and Roma victims of spoliations and racial crimes during the Occupation.[43]

In September 2020, the Council of State ruled on the application, maintaining its previous position regarding the specificity of antisemitic persecutions and spoliations related to their systematic dimension. Therefore, it decided that the decree was not contrary to the principles of equality and fraternity.[44]

However, it further stated that Traveller and Roma victims of persecutions by the French Government during the Occupation could prevail themselves of the general regime of liability of the State to institute actions in liability.

Online source:
https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042365900?tab_selection=all&searchField=ALL&query=437524&page=1&init=true

Dismissal due to the apparently religious and political shape of one's beard

Religion or belief

The claimant was a security agent who was tasked with accompanying American civilians in Yemen. The client requested that the claimant modify his beard, which the client considered to be shaped in a 'religious and political fashion', therefore jeopardising the safety of the persons the claimant was to protect. The claimant was dismissed after having refused to modify his beard.

42 France, Council of State, *Pelletier*, decision of 6 April2001 in Case Nos. 22495 and following; and Council of State, *Bidalu*, decision of 6 June 2001 in Case No. 214205.

43 France, Defender of Rights, Decision No. 2020-159 of 2 September 2020, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=33840&opac_view=-1.

44 France, Council of State, decision of 25 September 2020 in Case No. 437524, available at: https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042365900?tab_selection=all&searchField=ALL&query=437524&page=1&init=true.

The Court of Appeal of Versailles[45] found that the employer did not substantiate the safety risks it invoked through evidence describing the situation objectively, on the one hand, and specifically related to the claimant's beard, on the other. In the absence of such evidence, the shape of the beard itself could not justify that the employer restricted the claimant's rights and freedoms. The Court thus concluded that the dismissal constituted direct discrimination based on the employer's desire to repress the claimant's religious and political convictions. The employer challenged the decision before the Court of Cassation.

In July 2020, the social chamber of the Court of Cassation delivered its ruling.[46] Referring to its decision in the *Bougnaoui* case,[47] further to the preliminary ruling delivered by the Court of Justice of the EU,[48] the Court stated that all decisions based on restrictions to the freedom of religion must conform to the provisions on genuine and determining occupational requirements. The Court reaffirmed that an employer's in-house regulations cannot impose a neutrality requirement that is contrary to a person's individual and collective freedoms, if it is framed in general terms, undifferentiated, not justified by the nature of the task to be accomplished or implemented in a proportionate manner.

In the case in question, there was no evidence that such in-house regulations or internal instructions existed. The request that the claimant change his physical appearance in order to conform to the employer's conception of neutrality thus constituted direct discrimination on the ground of the claimant's religious and political convictions. The expectations of a client relating to the shape of a beard cannot be considered as genuine and determining occupational requirements in the sense of Article 4(1) of Directive 2000/78.

Meanwhile, a legitimate requirement to protect the safety of personnel and clients can justify restrictions to individual and collective rights and liberties of employees and allows an employer to impose a neutral appearance when necessary to prevent an objective danger, which, however, the employer bears the burden to establish. The Court made a finding of direct discrimination as the employer's arguments were limited to its subjective interpretation of the beard. In this case, the Court of Cassation followed the line set out by the Council of State in its decision of February 2020,[49] refusing to endorse the subjective appreciation of a beard as an indication of a religious and political sign that should be repressed as a genuine and determining occupational requirement related to a duty of neutrality.

Online source:
https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/715_8_45097.html_

Challenge to the legality of the removal of alternative school meals due to secularity of the public service

Religion or belief

In France, public school cafeterias are managed and financed by municipalities. Since 1984, public schools in Chalon-sur-Saône provided alternative meals to children when serving pork. In March 2015, the mayor made a public statement that alternative meals would no longer be provided, in order to enforce the secularity and neutrality of the public service. The Municipal Council abrogated the municipal bylaw authorising alternative meals on the ground that it was illegal and contrary to the principles of neutrality and secularity of the public service. The League of Judicial Defence of Muslims challenged the new municipal bylaw on the ground of illegality and notably discrimination due to religion, and the equality body, the Defender of Rights, acted in support of the claimant.

45 Versailles Court of Appeal, 27 September 2018, No. 17/023758.
46 France, Court of Cassation, social chamber, decision of 1 July 2020 in Case No. 18-23743, available at: https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/715_8_45097.html.
47 France, Court of Cassation, social chamber, Decision No. 13-19.855.
48 CJEU, judgment of 14 March 2017, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH)* v *Micropole SA*, C-188/15, ECLI:EU:C:2017:204.
49 France, Council of State, decision of 12 February 2020 in Case No. 418299. For further information, see *European equality law review*, Issue 2020/2, pp. 103-104.

In 2018, the Court of Appeal found in favour of the claimant and the Defender of Rights, and annulled the new bylaw.[50] It stated that the principles of secularity and neutrality of the public service do not prevent the provision of alternative meals, and that modifications to the organisation of a public service could only result from considerations related to the needs and constraints of the service. The municipality had not argued that the provision of alternative meals for more than 30 years had created any difficulties of management of school catering. Thus, the municipal decision was illegal considering that it was entirely based on considerations of secularity and neutrality. However, the legal principle of economy of means led the court to conclude that there was no need to examine the argument of the claimant and of the Defender of Rights that the new municipal bylaw constituted discrimination on the ground of religion. The mayor appealed the decision before the Council of State as the Supreme Administrative Court.

The Council of State ruled on the case in December 2020.[51] First, it held that there is no obligation for municipalities to provide alternative meals to accommodate children on the ground of religion. On the other hand, the principles of secularity and neutrality of the public service do not prevent them from doing so, and cannot be invoked to put an end to such a service once it had become a de facto acquired right. Nevertheless, the Council of State held that the burden of proof resting on the municipality to establish that the modification of its service to provide alternative meals is justified and is not limited to evidence establishing 'necessity of the service'. In this regard, the applicable principle when evaluating the legality of a decision to modify a municipality's offer of services is the standard of 'general interest'. It remains to be seen whether budgetary considerations would be considered sufficient to satisfy this standard.

Online source:
https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-12-11/426483

Retroactive applicability of the collective action procedure in discrimination cases

All grounds

A specific collective action procedure for discrimination cases was created in 2016. In discrimination cases related to career issues in employment, the procedure is exclusively accessible to trade unions acting on behalf of a list of identified workers, or to associations in matters related to recruitment or access to professional training. It allows a trade union to request that a decision or agreement be annulled and that its effect be interrupted as of the date of the mandatory letter of demand preceding the initiation of the action. This interruption of the discriminatory situation can take the form of compensation for damages incurred after the date of the letter of demand, or a revision of in-house rules or practices.

The case concerned a French aircraft and spacecraft engineering and manufacturing corporation, where allegations of salary progression discrimination on the ground of trade union activities had been settled in 2004 and 2006 through two collective agreements, signed by all trade unions except one (the claimant).

The claimant, representing 36 individual trade union representatives, considered that the method provided by these agreements to calculate the salary progression of trade union representatives was inadequate, did not create conditions ensuring equal treatment and that, in fact, trade union representatives who are members of the claimant union have been discriminated against in their salary progression.

The claimant initiated a group action in January 2018, challenging the legality of the agreement alleging that it is discriminatory and requesting that its provisions be annulled, and their impact corrected by determining the proper career salary progression calculation method for the future. The Defender of Rights, the French equality body, presented an *amicus curiae* brief before the court.

50 France, Administrative Appeal Court of Lyon, decision of 23 October 2018 in Case No. 17LY03323, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=26346&code=987a505c8a9d6714bcb4fb21ee363883&emprlogin=servicedocumentation&date_conex=1540392485.

51 France, Council of State, decision of 11 December 2020 in Case No. 426483.

In December 2020, the Judicial Tribunal of Paris delivered its ruling, interpreting the provisions relating to the group action as being applicable only to situations where the discriminatory fact generating liability, or the illegal situation, occurs after their entry into force.[52] The Court held that the relevant facts in this case relate to the effects of an agreement that was entered into prior to the adoption of the provisions. The Court further held that prior events that continue to have an effect are also excluded from the purview of the group action, and that the only events to be adjudicated upon are those that occur between the adoption of the law and the letter of demand that launches the procedure. Therefore, the Court did not analyse the legality of the agreements or discuss details relating to evidence and the merits of the case.

Due to the massive investments required to initiate group actions under the new procedure, the first actions have concerned discrimination based on trade union activities, a protected ground of discrimination in France that has been at the core of all early jurisprudential developments relating to discrimination law.

If the Court's ruling is upheld, group actions in discrimination matters will not be available to challenge situations of systemic discrimination originating from historically discriminatory conditions.

EL Greece

LEGISLATIVE DEVELOPMENTS

Gender quota of a minimum of 1/3 for administrative councils of athletic unions

Gender

On 21 September 2020, the Greek General Secretariat for Family Policy and Gender Equality welcomed the adoption of a provision on gender quotas as a step towards the reduction of gender disparities in sports bodies. It noted that this is an innovative provision given that in most EU Member States there is no such binding norm, and the adoption of gender quotas is voluntary.

Article 2(5) of Act 4726/2020,[53] regarding the election of members to the administrative councils of sports bodies, provides that the number of the candidates of each gender must be at least equal to one third of the number of the posts for which the election is held, including that of the President. If the calculation results in a decimal number, this has to be rounded up to the next whole number.

This is the second binding legislative norm on positive action in the form of gender quotas adopted in 2020, following the recent provision of Article 3(1)(b) of Act 4706/2020, which introduced a gender quota of 25 % for the election of the members to the administrative councils of limited liability companies (S.A.) listed in Greece.[54]

Both provisions are in line with the constitutional norm on positive action of Article 116(2) of the Greek Constitution,[55] which requires that the legislature and all other state authorities take any positive measures which are necessary and pertinent in promoting gender equality in all areas. It thus exceeds the requirements of EU law, as it explicitly makes positive action obligatory. In accordance with the

52 France, *FTM-CGT* v *S.A. Safran Aircrafts Engines*, Judicial Tribunal of Paris, decision of 15 December 2020, in Case No. 18/04058.
53 Greece, OJ A 181/18.09.2020, amending Article 5 of Act No. 2725/1999, OJ A 121/17.06.1999.
54 Greece, Act 4706/2020, OJ A 136/17.07.2020, See EELN flash report of 16.09.2020 'Gender quota of a minimum of 25 % for administrative councils of listed companies', https://www.equalitylaw.eu/downloads/5251-greece-gender-quota-of-a-minimum-of-25-for-administrative-councils-of-listed-companies-100-kb.
55 Greece, Article 116(2) of the Constitution: 'Positive measures aiming at promoting equality between men and women do not constitute discrimination on grounds of sex. The State shall take measures to eliminate inequalities existing in practice, in particular those detrimental to women'. https://www.equalitylaw.eu/downloads/5186-greece-pregnancy-and-family-related-leave-due-to-covid-19-127-kb.

hierarchical structure of the Greek legal order, all national provisions relating to positive action must be read and applied in light of this constitutional norm.

Online source:
https://www.kodiko.gr/nomothesia/document/640480/nomos-4726-2020

COVID-19: Protective measures for pregnant workers in the private sector – special leave for parents of diagnosed children

Gender

In 2020, with the rise of the second wave of COVID-19, Act 4722/2020, OJ A 177/15.09.2020 and Joint Ministerial Decision of the Ministers of Employment and Social Affairs and Health No 37095/1436/2020, OJ B 4011/18.09.2020 (hereinafter JMD) adopted in September 2020, provide, *inter alia*, for the following pregnancy and family related measures in the private sector:

Special leave for parents of children diagnosed with COVID-19

Article 16 of Act 4722/2020 provides that workers in the private sector who are parents of children diagnosed with COVID-19 are entitled (due to their children's disease) to special leave of 14 days or even more if necessary upon medical certification or hospitalisation of the child. The term 'children' covers: infants; children attending pre-kindergarten, kindergarten, elementary school and high school; children attending special schools or school units of special education, irrespectively of their age; and disabled persons attending disability open care structures. During the leave, employees receive two thirds of their wages from their employer and one third from the State budget (which offers full pay in the wider public sector or in public bodies). *This* leave is granted (a) in addition to other leave due to illness or hospitalisation of children, (b) irrespective of the adoption of other measures for the limitation of the spread of the leave (e.g. teleworking) and (c) under no condition of seniority. The details for the implementation of this leave will be regulated by a ministerial decision of the Minister of Employment and Social Affairs.

Protective measures for pregnant workers in the private sector

On 11 May 2020, pregnant workers in the public sector (public servants, local authorities etc.) were recognised for the first time as vulnerable groups of workers at high risk of COVID19 (in addition to cancer patients undergoing chemotherapy, those who have undergone a transplant etc.)[56] with entitlement to a fully paid special leave.[57]

In contrast, in the private sector, there was no such definition for several months. At last, on 17 September 2020, Article 1 of the JMD defined those falling under the 'vulnerable groups of workers at high risk of COVID-19' in the private sector, including, *inter alia*, pregnant workers. As a result, pregnant workers in the private sector are entitled to the protective measures provided by Article 8 of the Act of Legislative Content (ALC) of 22.08.2020, OJ A 161/22.08.2020,[58] ratified by Act 4722/2020, which include: i) the right to telework on the pregnant worker's request, which the employer is obliged to accept if the work can be performed from a distance; ii) if working from a distance is not feasible, the employer must take measures to ensure that the pregnant worker does not come in contact with the public; iii) if this is not feasible, the pregnant worker is put on the furlough scheme until 30 September 2020. This measure can be extended for a further period by a joint ministerial decision of the Ministers of Economic Affairs,

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57 Article 25 of the Act of Legislative Content (ALC) of 14 March 2020, OJ A 64/14.03.2020, sanctioned by Article 3 of Act 4682/2020, OJ A 76/03.04.2020 in conjunction with Joint Ministerial Decision of the Ministers of Health and Interior Affairs ΔΙΔΑΔ/Φ.64 /341/9188/11.05.2020, OJ B 1800/11.05.2020) and Joint Ministerial Decision of the Ministers of Health and Interior Affairs ΔΙΔΑΔ/Φ.64/346/9011/14.5.2020, OJ B 1856/15-05-2020.

58 Article 8 of ALC of 22.08.2020, OJ A 161/22.08.2020, amended Article 4(2) ALC of 11 March 2020, OJ A 55/11.03.2020, which was ratified by Article 2 Act 4682/2020, OJ A 76/03.04.2020.

Labour and Social Affairs and Health. An administrative fine of EUR 5 000 is applicable where the employer, despite the pregnant worker's proven request, does not comply with the above provision, including the adoption of the successive steps of the protective measures outlined.

Online sources:
https://www.taxheaven.gr/law/4722/2020
https://www.taxheaven.gr/circulars/34229/37095-1436-17-9-2020

CASE LAW

First Greek judgment on the recognition of a non-binary person

Gender

Transgender

For the first time in Greece, on 22 December 2020, the Justice of the Peace of Kallithea has upheld the petition of a non-binary person for the recognition of their gender identity and the change of their surname.[59]

The applicant of the case was registered as female at birth and asked for a change of their first name from a female name to a neutral name and of the existing surname, which in Greek had a female ending to one with a male ending. By its judgment, the Justice of the Peace of Kallithea found the petition to be legally founded on the provision of Article 5(1) of the Greek Constitution on the protection of the free development of the personality.[60] Article 5(1) of the Greek Constitution comprises of, *inter alia*, the individual right to self-determination of a person's identity, the individual right to a name and a surname (as fundamental aspects of a person's identity) the individual freedom to appear in public as one wishes, the right to sexual orientation and the freedom of sexual relations (also safeguarded by Article 8(1) of the European Convention of Human Rights). According to the Justice of the Peace, the concept of 'good usages' in Article 5(1) of the Constitution refers to the prevailing social perceptions and the admittedly socially acceptable standards of right and good behaviour. Therefore, it varies according to the historic context, giving the legislature and, following that, the competent judicial authority, the ability to estimate the extent to which the limitation of individual autonomy is constitutionally legitimate. The Justice of the Peace also found the petition to be legally founded on Article 14(1) Act 344/1976 on the certificates of registration[61] and on Act 4491/2017, OJ A 152/13.10.2017 on the legal recognition of gender identity. In this context, the Justice of the Peace found that the petitioner was attracted to persons of both genders without wishing to experience such a relation as a bisexual woman, but rather as a man and a woman at the same time, i.e. as a non-binary person. Thus, by a stable and specific choice, since 2017, the petitioner has asked their friends, family and social environment to address them with the gender-neutral name '…'. and the surname '…'. This has become an indispensable and stable characteristic of the petitioner's personality by which the petitioner is exclusively known and addressed by their family and social environment. At the same time, it facilitates the petitioner's social relations and is in line with the petitioner's psyche and the free development of the personality of the petitioner. It also ensures security in the petitioner's transactions with the State and with individuals. According to the Justice of the Peace, a rejection of the claim would create undesirable consequences for the petitioner in relation to their personal and social situation and image.

59 Greece, Justice of the Peace of Kallithea, Judgment No 153, 22 December 2020.

60 Greece, Article 5(1) of the Constitution: '1. All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages'.

61 Greece, Article 14(1) Act 344/1976, OJ A 143/11.06.1976, as amended by Article 7(1) Act 4491/2017, OJ A 152/13.10.2017: 'Modifications related to the situation of a natural person due to … change of name, surname … or due to the correction of the registered gender are registered in the field 'Modifications' of the information system of Article 8A within one month since they took place, upon submission of … a certificate of irrevocability of the relevant judicial judgment… Especially in the case of the correction of the registered gender, the judicial judgment may be final'.

Online source:
http://www.dsanet.gr/Epikairothta/Nomologia/eirkal%20153_2020.htm\

POLICY AND OTHER RELEVANT DEVELOPMENTS

Programme 'Nannies in the Neighbourhood' for the care of children aged 0.5-2.5 years

Gender

On 28 July 2020, the General Secretariat for Family Policy and Gender Equality announced the operational planning and the pilot function of the new programme 'Nannies in the Neighbourhood' for the care of children aged six months to two and a half years.[62] The programme aims to facilitate the reconciliation of professional life with family and/or private life through the provision of financial aid to parents (mostly employed), single parents, foster parents and in general to the family horizontally, which will cover the cost of the care of the children aged six months to two and a half years either at their home or at the house of a pedagogue/carer.

According to the General Secretary for Family Policy and Gender Equality, the programme is to be considered as a positive action measure with a dual aim: to support and facilitate mothers to fully integrate in the labour market and to continue their professional careers, as well as to encourage mostly unemployed (including long-term unemployed) women (but also retired women) to work as pedagogues/carers following the relevant certification. The implementation of the programme will also lead to the reduction of undeclared work given that nowadays most of the women proving care to children of this age at home are employed illegally, as the General Secretary pointed out.[63]

The programme has been adopted under the Partnership Agreement for the Development Framework 2014-2020[64] and in particular of the operational programme 'Development of human resources and education and on-going training'. It will start with a pilot stage at the beginning of 2021, with the aim of nation-wide implementation within the new programme period 2021-2027.

The announcement of the programme 'Nannies in the Neighbourhood' has been given wide publicity in the press and online media. In 2011, Greece was found to be among the 11 Member States that had achieved none of the objectives set in Barcelona,[65] scoring only 19 % in the case of children under 3 years old cared for under formal arrangements.[66] In this context, 'Nannies in the Neighbourhood' will address a very acute problem for young parents.

62 See newsletter dated 28 July 2020, available at: http://www.isotita.gr/%CE%B4%CE%B5%CE%BB%CF%84%CE%AF%CE%BF-%CF%84%CF%8D%CF%80%CE%BF%CF%85-%CE%AD%CE%B3%CE%BA%CF%81%CE%B9%CF%83%CE%B7-%CE%BA%CE%B1%CE%B9-%CE%AD%CE%BD%CE%B1%CF%81%CE%BE%CE%B7-%CF%83%CF%87%CE%B5%CE%B4%CE%B9/.

63 Interview of the General Secretary for Family Policy and Gender Equality M. Syreggela on 2 August 2020 in https://www.liberal.gr/news/oi-ntantades-tis-geitonias-dipla-stin-elliniki-oikogeneia-/315984.

64 Εταιρικό Σύμφωνο για το Πλαίσιο Ανάπτυξης -ΕΣΠΑ The PA (Partnership Agreement for the Development Framework) 2014-2020 constitutes the main strategic plan for growth in Greece with the contribution of significant resources originating from the European Structural and Investment Funds (ESIF) of the European Union. The PA, through its implementation, seeks to tackle the structural weaknesses in Greece that contributed to the economic crisis, as well as other economic and social problems caused by it. Moreover, the PA 2014-2020 is called upon to help attain the national targets within the Europe 2020. See: https://www.espa.gr/en/Pages/staticPartnershipAgreement.aspx.

65 In 2002 the Barcelona European Council set specific objectives in this area by asking Member States to 'remove disincentives to female labour force participation, taking into account the demand for childcare facilities and in line with national patterns of provision, to provide childcare by 2010 to at least 90% of children between 3 years old and the mandatory school age and at least 33% of children under 3 years old.' This priority has been reaffirmed both in the Lisbon Strategy and subsequently in the Europe 2020 Strategy. Moreover, the Commission Recommendation of 20 February 2013 'Investing in children: breaking the cycle of disadvantage' (2013/112/EU) calls for the provision of access to high-quality, inclusive early childhood education and care.

66 EU Network of Independent Experts on Social Inclusion (2014) 'Investing in children: Breaking the cycle of disadvantage A Study of National Policies – Greece', available at: https://ec.europa.eu/social/main.jsp?catId=89&langId=en&newsId=2061&moreDocuments=yes&tableName=news.

Potentially disproportionate language requirement for school cleaners

Racial or ethnic origin

In August 2020, a Ministerial Decision was adopted, requiring candidates for the position of school cleaning staff to prove sufficient knowledge of the Greek language through a Certificate of Greek Studies level A1 or A2.[67] The new language requirement is only applicable to candidates without Greek citizenship and Greek origin, as persons from certain groups of Greek origin are explicitly exempted from the requirement, as long as they can prove their consciousness of their Greek origin by some means.[68]

While a large number of foreign nationals of non-Greek origin have been employed as school cleaners for many years, they are now excluded from this work – at a time when no examinations for Certificates of Greek Studies are being held due to the COVID-19 pandemic. Consequently, while the need for permanent cleaning staff is multiplying due to the pandemic, the Municipality of Athens recruited only 264 cleaners instead of more than 500 as requested by the schools.

Online source:
https://www.poeota.gr/images/poe-ota-content/1918/fek-tefxos-v-3485-2020.pdf

HU Hungary

LEGISLATIVE DEVELOPMENT

Legislation preventing courts from imposing pecuniary compensation for fundamental rights violations in education

Racial or ethnic origin

In May 2020, the Curia[69] (Hungary's highest court) upheld a second instance decision[70] granting compensation for non-pecuniary damage to over 60 Roma victims of educational segregation that had lasted more than a decade in the elementary school Gyöngyöspata (Northern Hungary). The Curia's decision was made amidst public statements from high-ranking Government politicians, including the Prime Minister, encouraging the Curia to overturn the second instance decision and impose in-kind compensation (such as IT and language training) instead of financial compensation.

The decision of the Curia spurred the MP of the incumbent party for the region where Gyöngyöspata is located to make a statement[71] that 'social peace' was disturbed by the decision and that it was punishing a whole town indiscriminately and excessively for the – alleged or actual – grievances of a minority. The Prime Minister later commented[72] that it was unacceptable that the majority should feel like aliens in their own homeland, and that the town would have justice through legislative amendments preventing similar judgments in the future.

In June 2020, a proposal was submitted to amend the Act on National Public Education, by inserting a Paragraph 4 into Article 59 of the Act, as follows:

> 'If the educational institution violates the inherent personal rights of the child or pupil in relation to education, the Civil Code's provisions regarding moral damages shall be applied with the

67 Greece, Ministerial Decision No. 52878/2020 on 'Procedure and criteria for the recruitment of cleaning staff for school units in the country by the municipalities with a fixed-term employment contract under private law' (OG B 3324/22.08.2020).
68 The exempted groups are South Albanian expatriates of Greek origin, Cypriot expatriates of Greek origin, expatriate foreigners of Greek origin from Istanbul and the islands of Imbros and Tenedos, and expatriates of Greek origin from Egypt.
69 Hungary, Curia, Decision No. Pfv.IV.21.556/2019/22 of 12 May 2020.
70 Hungary, Appeals Court of Debrecen, Decision No. Pf.I.20.123/2019/16 of 16 September 2019.
71 For the full statement, see: https://24.hu/belfold/2020/05/12/gyongyospata-kuria-fidesz-horvath-laszlo/.
72 For the full statement, see: http://www.atv.hu/belfold/20200515-orban-viktor-kokemenyen-nekiment-a-kurianak.

> difference that the moral damages shall be granted by the court in the form of educational or training services. The educational or training services granted by the court can be either provided or purchased by the violator.'

The proposal was endorsed by the Parliamentary Committee for Cultural Affairs on 9 June 2020 and was then debated in Parliament on 2 July. Members representing the governing parties as well as the right-wing Jobbik Party expressed support for the amendment, while the remaining opposition parties criticised it for trying to circumvent the judicial decision, failing to offer a lasting solution to the problem of segregation and being an element of a campaign inciting negative sentiments towards the Roma community. The Parliament adopted the amendment on 3 July 2020, and the law was published in the *Official Journal* on 14 July, entering into force on 22 July.

The amendment raises several concerns:

1) The text concerns all types of violations of inherent personal rights related to education and not only equal access issues and segregation. This can include violations for which the provision of training would be completely irrelevant as a form of compensation (e.g. harassment by a teacher or unauthorised use of the child's picture on the school website).
2) In segregation cases, such 'compensation' can also be irrelevant, notably in situations where the segregated pupil has managed to succeed despite the segregation and has finished their studies, etc.
3) It is highly controversial to oblige the victims of inherent rights violations to accept educational or training services from the perpetrator, in particular as it denies them the possibility of deciding for themselves what kind of remedy they wish to receive.
4) The amendment itself could arguably be considered to constitute indirect discrimination based on ethnicity. It will disproportionately affect segregated Roma pupils, as the majority of known cases of inherent rights violations committed by educational institutions are segregation cases. Furthermore, victims of inherent rights violations by educational institutions (often segregated Roma pupils) are now deprived of their freedom of choice regarding the use of the compensation they are granted, compared to victims of other inherent rights violations.
5) Furthermore, the amendment puts perpetrators of educational violations in a more advantaged situation than the perpetrators of any other fundamental rights violations, as they are exempted from the 'hard' (and expensive) consequence of having to pay each child concerned pecuniary compensation.

The amendment has thus arguably reduced the degree of dissuasiveness of the current system of sanctions, thereby breaching the requirements set out by Articles 6 and 15 of the Racial Equality Directive.

New legal provisions on gender identity

Transgender

Gender

On 10 November 2020, the Government – more specifically, the Minister of Justice – submitted a bill on the Ninth Amendment of the Fundamental Law (Hungary's current constitution),[73] which addresses, amongst other things, the issue of gender identity.

The timing of the proposal of the Ninth Amendment of the Fundamental Law by the Government was questionable. On 3 November 2020, the Prime Minister announced that from 4 November, a special legal order ('state of danger') would be introduced due to the second wave of the COVID-19 pandemic, claiming that political debates should be set aside, and that rapid actions and timely measures were

73 Hungary, Bill No. T/13647 on the Ninth Amendment of Hungary's Fundamental Law, available (in Hungarian) at: https://www.parlament.hu/irom41/13647/13647.pdf.

needed during this period. However, within a week, the Government submitted the bill to amend the Fundamental Law to the Parliament.[74]

Among the many amendments proposed, two address the issue of gender identity and include the following provisions:

– 'the mother is a woman, and the father is a man' (in Article 1);
– 'Hungary protects children's right to identity in line with their birth-sex' (in Article 3).

The same day, on 10 November, an omnibus bill was also submitted by the Government – by the Minister of Justice – amending the Child Protection Act.[75] The omnibus bill provides[76] that a single person may be granted permission to adopt in exceptional cases, and only with the permission of the Minister for Family Affairs, who is supposed to take into consideration the principles enshrined in Article XVI Paragraph (1) of the Fundamental Law, including the notion of children's right to identity in line with their birth-sex.

When the Minister for Family Affairs was confronted in a political talk-show with a question about the hurried nature of the constitutional amendment, she explained that gender identity issues have become significant since 2011 when the original version of the Fundamental Law was adopted.[77]

The 'Detailed Reasoning' section of the Bill includes the conception that there are 'new, modern ideological tendencies in the Western world' questioning the nature of sexes and concludes that 'birth sex is given and cannot be changed'.

As for the political context in Hungary, it should be highlighted that, unlike in the cases of Western or Northern European countries, the public debates about gender identity issues or transgender claims have just begun, mostly centred around two recent developments:

– in May 2020, the amendment of the Civil Registration Procedure Act introduced the concept of 'birth sex' (*születési nem*);[78]
– in September 2020, the publication of a storybook – *Fairyland is for Everyone (Meseország mindenkié)*[79] – and the related awareness-raising educational materials on diversity,[80] stirred fierce social debates, because some of the stories touched upon issues like same-sex attraction, gender non-conformity and transgenderism.

Online source:
https://www.parlament.hu/irom41/13647/13647.pdf

All grounds

Legislation dismantling the Equal Treatment Authority and transferring its powers to the Ombudsman

In November 2020, a bill was submitted on behalf of the Parliamentary Committee of Justice Affairs proposing the abolition of Hungary's equality body, the Equal Treatment Authority, and transferring

74 See the communication on the Government's website (in Hungarian): https://kormany.hu/hirek/rendkivuli-jogrendet-es-ejszakai-kijarasi-korlatozast-vezet-be-a-kormany.
75 Hungary, Act XXXI of 1997 on the Protection of Children and the Administration of Guardianship.
76 Hungary, Bill No. T/13648 on the amendment of certain laws in the field of justice, Article 100, https://www.parlament.hu/irom41/13648/13648.pdf.
77 See the video: https://www.facebook.com/watch/live/?v=1842655189221103&ref=watch_permalink.
78 See Balogh, L. (2020), 'Hungary: Amendment of the provisions on legal recognition of gender' (Flash Report), available at: https://www.equalitylaw.eu/downloads/5168-hungary-amendment-of-the-provisions-on-legal-recognition-of-gender-137-kb.
79 See the webpage of the publisher, Labrisz Lesbian Association (*Labrisz Leszbikus Egyesület*): https://labrisz.hu/index.php?searchenginerUrl=irodalmi_rovat%2Flabrisz-konyvek%2Fmeseorszag_mindenkie&language=en&language=hu.
80 Published by the Network of Human Rights Educators (*Emberi Jogi Nevelők Hálózata*), available at: https://drive.google.com/file/d/1cpwc7Fg7KDGlcuV00D2YvxGvFfdgbNEl/view.

its tasks and competences to the Commissioner for Fundamental Rights (Hungary's Ombudsman). No consultation had preceded the submission of the bill and it spurred strong criticism from several quarters, including domestic NGOs representing protected groups[81] and ILGA Europe.[82] On 1 December 2020, the bill was nevertheless passed by the Parliament, and entered into force on 1 January 2021.[83]

The Equal Treatment Authority was established in 2003 by the Act on Equal Treatment and the Promotion of Equal Opportunities (ETA) and began operation on 1 February 2005. It was an autonomous public administrative body with overall responsibility for ensuring compliance with the principle of equal treatment. The Equal Treatment Authority dealt with discrimination based on any of the characteristics protected under the ETA, including age, disability, gender, racial or ethnic origin, religion or belief, sex and sexual orientation, and was entrusted with all the powers required by the Racial Equality Directive. The Authority's mandate included (i) conducting complaint-based or *ex officio* investigations to establish whether the principle of equal treatment had been violated, and, if necessary, applying sanctions on the basis of the investigation; (ii) initiating lawsuits with a view to protecting the rights of persons and groups whose rights have been violated; (iii) reviewing and commenting on drafts of legal acts concerning equal treatment; (iv) making proposals concerning governmental decisions and legislation pertaining to equal treatment; (v) informing the public about the situation concerning the enforcement of equal treatment; (vi) providing information to those concerned and offer assistance in acting against the violation of the principle of equal treatment; (vii) preparing an annual report for Parliament on its activities and its experiences in applying the ETA.

The law transfers all the tasks and competences of the Authority to Hungary's Ombudsman, who investigates violations of fundamental rights on the basis of complaints or *ex-officio*. Unlike the Authority, the Ombudsman's decisions are not binding but may contain recommendations to the relevant authority or its supervisory body.

The transfer of the Authority's powers and mandate to the Ombudsman raises a number of concerns, including:

- The Equal Treatment Authority was one of the best functioning rights protection bodies in Hungary, delivering decisions in sensitive, complex cases to protect vulnerable minority groups, such as the Roma and the LGBTQI community.[84] The explanatory memorandum of the new law does not provide any convincing argument as to why a well-functioning body that has gained the respect of a wide range of stakeholders, including civil society organisations representing the interests of the protected groups needs to be dismantled.
- The Ombudsman is Hungary's National Human Rights Institution, but it's A-status is currently pending review due to its failure to 'demonstrate adequate efforts in addressing all human rights issues'.[85] It seems particularly problematic therefore to transfer the widely respected Authority's mandate to the Ombudsman at a time when its reaccreditation as a fully independent NHRI is pending.

81 See notably: http://www.meosz.hu/blog/a-meosz-szerint-veszelybe-kerulhet-a-hatekony-jogervenyesites-az-ebh-megszuntetesevel/, https://civilizacio.net/hu/hirek-jegyzetek/nagyon-rossz-lps-az-egyenl-bnsmd-hatsg-beolvasztsa-az-alapvet-jogok-biztosnak-hivatalba, and https://telex.hu/belfold/2020/11/24/ebh-aosz-mvgyosz-meosz-tiltakozas-targyalas.

82 See: IGLA Europe (2020) 'ILGA-Europe is alarmed by Hungarian Parliament's moves to abolish the national Equal Treatment Authority', press release, 10 November 2020, available at: https://www.ilga-europe.org/resources/news/latest-news/ilga-europe-alarmed-hungarian-parliaments-moves-abolish-national-equal.

83 Hungary, Act CXXVII of 2020 on the Amendment of Certain Laws with the Aim of Enhancing the Enforcement of The requirement of Equal Treatment.

84 See for instance *European equality law review*, Issue 2019/2, p. 112, available at: https://www.equalitylaw.eu/downloads/5005-european-equality-law-review-2-2019-pdf-3-201-kb.

85 Global Alliance of National Human Rights Institutions (GANHRI) (2019), *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)*, 14–18 October 2019, https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20Report%20October%202019%20English.pdf, pp. 23-26.

- The transition was carried out with inexplicable haste, without any consultation of the affected bodies or groups. This will inevitably cause problems and delays in the procedures that were in progress before the Authority, and those before the court reviewing the Authority's decisions.
- It is concerning that the issue of non-discrimination, which has been the single focus and mandate for the Authority, will now be part of the responsibility of a large organisation with a wide mandate spanning from environmental protection through children's rights to the monitoring of prisons.
- The quasi-judicial nature of the Authority is foreign to the Ombudsman, who relies on recommendations and publicity, which can create tension between the two capacities. Indeed, the Ombudsman already has a mandate to examine discrimination complaints in his current capacity, which can lead to non-binding recommendations based on the procedural rules of the Act on the Ombudsman. Under the new law, the complainant would have a choice whether he/she wants the Ombudsman to act in his original capacity or in his capacity as successor to the Authority. In the latter case, the Ombudsman must proceed on the basis of the Code of Administrative Procedure that prescribes much stricter rules regarding a number of issues (such as deadlines, discovery, the warning of witnesses before hearings, etc.). Furthermore, the law stipulates that it would also be possible for the Ombudsman to investigate a complaint in his capacity as Ombudsman first, and then, after that examination is completed (e.g. with a recommendation) also as the successor to the Authority if the complainant requests so or the Ombudsman decides so *ex officio* on the basis of the results of the first investigation. However, such a situation would affect the impartiality of the Ombudsman, which is a crucial element of the quasi-judicial procedure. Procedural requirements regarding quasi-judicial procedures would also be compromised, notably regarding the hearing of witnesses.

Online source:
http://www.kozlonyok.hu/nkonline/index.php?menuindex=200&pageindex=kozltart&ev=2020&szam=268

IS Iceland

POLICY AND OTHER RELEVANT DEVELOPMENTS

Impact of the equal pay certification system on the Icelandic labour market

Gender

In December 2020, research was published regarding the effect of the equal pay certification system in Iceland.[86] Certain amendments to the equal pay clause in Article 19 of the Gender Equality Act No. 10/2008 came into force on 1 January 2019. The amendments required companies and institutions employing 25 or more workers to obtain equal pay certification of their equal pay system and the implementation thereof on an annual basis. The purpose of the obligatory equal pay certification is to enforce the current legislation prohibiting discriminatory practices based on gender and requiring that women and men working for the same employer are paid equal wages and enjoy equal terms of employment for the same jobs or jobs of equal value. In accordance with the legislation, certification must meet the requirements of the Standard ÍST 85, Equal Wage Management System – Requirements and guidance (normally called the Equal Pay Standard). Equal pay certification under the Equal Pay Standard is designed to ensure that wages are based only on objective and relevant factors.

The recently published scientific research questions the efficiency and value of the equal pay certification. According to the research, the equal pay certification process entails increased bureaucracy and

86 Hafsteinsdóttir, G. B., Kristjánsdóttir, E. S. and Christiansen, Þ. H (2020), "Þetta er allt mannanna verk": Upplifun stjórnenda á áhrifum jafnlaunavottunar á kjaraumhverfi ('This is all the work of man': experience management on the impact of equal pay certification on wage environment*), Icelandic Review of Politics and Administration* 16(2), available at: http://www.irpa.is/article/view/a.2020.16.2.9/pdf.

systemisation and may thus be illusory or worthless. The research is based on the experience of employers and managers. The interviews relate to the impact of the equal pay certification on the (equal) pay conditions on the Icelandic labour market. The findings of the research show that although the equal pay certification system appears legitimate and reliable, certain aspects of this system enable companies to meet the requirements of equal pay certification even though discriminatory pay practices still prevail.

Online source:
http://www.irpa.is/article/view/a.2020.16.2.9/pdf

Ireland

POLICY AND OTHER RELEVANT DEVELOPMENTS

Maternity leave

In December 2020, the Minister of Justice announced that she was expecting a baby in 2021 and that she would be taking some 'time off' from public duties after the birth next spring. She is the first cabinet minister to expect a baby whilst in office.

This announcement has highlighted a loophole: female politicians in Ireland do not have an entitlement to maternity leave of 26 weeks (with maternity benefit) along with additional maternity leave of 16 weeks. In order to take 'time off', a politician has to take sick leave. This anomaly applies to members of Parliament (the Dáil and Seanad, which are the upper and lower houses of the Oireachtas) and local politicians (councillors). Members of Parliament are considered officeholders along with others, such as judges. They pay 'Pay Related Social Insurance' (PRSI) at the K1 rate of 4 %, but receive no benefits.

This loophole does not only affect female politicians, but also affects fathers or the other parents, as leave under the Paternity Leave and Benefits Act 2016, the Adoptive Leave Acts 1995 and 2005, the Parental Leave Acts 1998 and 2006 and the Parents' Leave and Benefit Act 2019 do not apply to politicians either. Other officeholders, such as judges are also not entitled maternity leave and related periods of leave with any social welfare benefits. This is a matter that will have to be addressed so that more women may enter politics or become officeholders.

Other issues arise such as voting in Parliament during any period of leave, although 'pairing' arrangements can be made where a member of the opposition can abstain from voting. Hence, parliamentary difficulties need not arise. Such arrangements are frequently made when for example, a Government minister is away on Government business. In addition, another member of cabinet could be appointed to act as a minister for a certain period of time (while the cabinet minister takes leave) to take parliamentary questions, sign statutory instruments etc.

Online sources:
https://www.gov.ie/en/publication/aec76e-prsi-class-k/
https://www.irishtimes.com/news/politics/lack-of-maternity-leave-for-politicians-a-glaring-barrier-for-women-td-says-1.4431159

CASE LAW

Gender discrimination in *O'Rourke* v *Minister for Defence*

Gender

On 2 December 2020, the Workplace Relation Commission (WRC) issued a judgment concerning discrimination with regard to pregnancy and maternity leave within the Defence Forces.[87] The key issue of the case is the criticism of the discrimination within the Defence Forces in respect of pregnancy and maternity. Due to this discrimination, the WRC required the Defence Forces to update its written procedures accompanied by appropriate training. The discrimination in this case was described as 'a systems failure' that was discriminatory.

The complainant of the case was a former member of the Defence Forces who joined in 1991 as a cadet and became a commissioned officer in the rank of lieutenant in 1994. The complainant asserted that she was discriminated against on grounds of gender in that the respondent treated two lengthy absences from work, both on maternity leave, as equivalent to sick absences of a male officer and gave her a poor performance rating, which impacted her ability to go on a mandatory training course that she would have needed to advance to the role of commandant. She raised an internal grievance, which was investigated and partly upheld in her favour. The respondent argued that the favourable outcome of the investigation and the subsequent efforts of her senior officers to get her on the course effectively cured the wrongs that she had suffered. The complainant disagreed, and brought a claim before the WRC.

The issue for decision was whether the complainant had been discriminated against on the ground of gender in relation to promotion, due to the treatment of her absences on maternity leave in her performance appraisals that hindered her access to the training necessary to become eligible for promotion. Relying on case law of the CJEU, the adjudication officer of the WRC decided that maternity leave and pregnancy related absences are conditions that only women can experience and which must not be equated with sick leave absences which a man might accrue. This is therefore, prima facie discrimination. It was considered that the Defence Forces handbook reference to discrimination was short and inadequate. The WRC adjudication officer considered that the complainant was subject to a 'major systems failure' as there was no updating of the systems and instructions in relation to pregnancy and maternity.

The adjudication officer ordered that a comprehensive review of training and information materials, instructions and local practices within the Defence Forces be carried out by 31 December 2021 to ensure their compatibility with the protection that pregnant persons enjoy under anti-discrimination law and to ensure that the basic provisions of Irish law are clearly written in the Defence Forces materials along with relevant training for staff with personnel responsibilities. The complainant was awarded two years' salary in the sum of EUR 117 814 in respect of discrimination due to the systems failure along with interest dating from 1 May 2013, being the date of reference of the claim to the date of payment.

Online sources:
https://www.workplacerelations.ie/en/cases/2020/december/adj-00007375.html
https://www.courts.ie/acc/alfresco/a563d770-9dc9-42f7-9ee1-02ac55c5fe59/2019_IECA_338_1.pdf/pdf#view=fitH

87 Ireland, Labour Court, *O'Rourke* v *Minister for Defence*, ADJ-00007375 and DEC-E2020-009, 2 December 2020, available at; ADJ-00007375 - Workplace Relations Commission.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Board diversity

Gender

On 10 September 2020, the Department of Public Expenditure and Reform issued an annex on 'Gender Balance, Diversity and Inclusion' to the Code of Practice for the Governance of State Bodies of 2016. With a view to accelerating progress in realising the target to achieve 40 % representation of women and men in respect of all State boards, on 11 December 2018, the Government agreed to convene an interdepartmental group on gender balance in State boards. The result of these deliberations was the annex, which updates the provisions of the Code of Practice.

A key requirement of the Code of Practice is that:

'Appointments to State Boards should be made against objective criteria with due regard for the benefits of diversity on the Board. The Chairperson of the Board, in assisting the Department in drawing up the specification for the Board appointment should have due regard for the benefits of a gender balanced and diverse Board.

Chairpersons should maintain a focus on those Boards on which either women or men are significantly under-represented and should actively seek to appoint candidates of the under-represented gender from the Public Appointments Service shortlist where possible'.

The developments in these governance documents underpins Section 42 of the Irish Human Rights and Equality Commission Act 2014, which establishes a positive duty on public sector bodies to eliminate discrimination, protect human rights and promote equality of opportunity for their employees, customers, service users and everyone affected by their policies and plans. However, the most important aspect of the annex to this code is that:

> 'The comprehensive report issued to the relevant Minister covering the State body should also include the following details:
>
> (a) the gender balance of appointments made to the State Board in question in the previous year;
> (b) where the Board stands vis-à-vis the 40 % gender balance requirement;
> (c) the key elements of the Board's approach to the promotion of diversity and inclusion and the progress being made in this area... including the approach being pursued to promote gender balance and diversity in Board membership;
> (d) in the case of a State Board which continues to have either all-male or all-female membership, the measures being taken to address urgently the situation and to promote better gender balance'.

Arising from these amendments to the Code of Practice, the annex provides that each board should provide the minister with a statement as to gender balance in the board membership, detailing the percentage of female members and number of persons and likewise for males and the number of positions that are vacant along with a statement as to whether the target of a minimum of 40 % representation of each gender is so provided on the board and furthermore the measures that are planned to address such imbalance (if any).

Online sources:
https://revisedacts.lawreform.ie/eli/2014/act/25/section/42/revised/en/html
https://govacc.per.gov.ie/wp-content/uploads/Annex-to-the-Code-of-Practice-for-the-Governance-of-State-Bodies.pdf

IT Italy

LEGISLATIVE DEVELOPMENTS

Further measures to tackle the COVID-19 crisis

Gender

Law 126 of 13 October 2020 converted and modified Decree No. 104 of 14 August 2020 providing for a wide range of measures aimed at coping with the societal impact of the COVID19 crisis. The latest version of the Decree has been slightly amended by Decree No. 137 of 28 October 2020 in a continuous effort to adjust the different measures to the non-stop changes of the economic and the impact of the pandemic.[88]

Measures regarding gender issues:

- Article 12*bis* of Decree No. 104, as amended by Law 126/2020, substituted the cut in contributions for sports clubs which signed an autonomous or subordinate working contract with female athletes (recently provided by Article 1, Paragraph 181 of the Budget Act for 2020 for the period 2020-2022) by a specific fund aimed at promoting female athletes in professional sports. The fund will mainly finance measures to tackle the COVID-19 crisis for the first year (2020) and finance recruiting and training of female athletes, as well as extending the social security schemes to the latter for the following two years. Only federations that include a professional female sector will be entitled to accede to the fund. It is expected that this fund will be an incentive for the federations to include a professional female sector, which is probably the main reason for the change.
- Article 21 of Decree No. 104 increased the fund for vouchers for babysitting services paid by INPS (the National Institute for Social Security) from EUR 67.6 million to EUR 236.6 million for 2020 (as provided by Article 25(5) of Decree No. 18/2020). These vouchers are for workers in the health services, including doctors, nurses, technicians of medical laboratories or radiology, social health operators, personnel of the defence and public rescue sector assigned to operations enhanced to tackle the COVID19 emergency.
- Article 21*bis* of Decree No. 104 stated that, until 31 December 2020, each of the working parents (in alternation with the other) can apply flexible working conditions known as 'smart working' where they have a child up to 14 years living with them who has been quarantined by the Health Service following cases detected at school or in other educational activities. Article 22 of Decree No. 137/2020 of 28 October 2020 extended this provision to parents of a child up to 16 years and to cases where their school had to suspend physical lessons and organise online ones. If their job cannot be performed this way, the working parent of a child up to 14 years can take up parental leave, which is covered by figurative contributions as well as by an allowance of 50 % of the remuneration paid by the INPS for the whole period of quarantine, or until the child can go back to school. For working parents of children up to 16, a mere suspension of the working relationship has been provided, with the ban on dismissal and the right of maintaining the job. The allocation for this allowance has been increased from EUR 50 million EUR 93 million by the latest Decree No. 137/2020.
- In the private sector, Article 21*ter* of Decree No. 104 also extended the worker's right to smart working (provided that the job can be performed this way) where the worker's family unit includes a person with a disability of certified seriousness until 30 June 2021.

88 Italy, Decree No. 104 of 14 August 2020, providing for Urgent measures aimed at sustaining and relaunching the economy, as converted and modified by Law 126 of 13 October 2020, OJ No. 253 of 13 October 2020, o.s. No. 37, available at: https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2020-08-14&atto.codiceRedazionale=20G00122&atto.articolo.numero=0&qId=&tabID=0.39601001434451955&title=lbl.dettaglioAtto; Decree No. 137 of 29 October 2020 providing for Further urgent measures on protection of health, support for workers and enterprises, justice and safety, linked to the pandemic emergency, OJ No. 269 of 28 October 2020, available at: https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2020-10-28&atto.codiceRedazionale=20G00166&atto.articolo.numero=0&qId=&tabID=0.39601001434451955&title=lbl.dettaglioAtto.

– The impact of the COVID-19 crisis, and especially the lockdown measures, caused a significant rise in domestic violence. Article 26*bis* of Decree No. 104 allocated EUR 1 million to support rehabilitation centres for the criminals sentenced for gender violence.

These urgent measures are appreciated and illustrate that gender equality is mainstreamed in the economic measures taken to cushion the impact of the crisis. Nevertheless, the economic crisis has hit women harder and the pandemic is having a regressive effect on their participation in the labour market. Many critics have stressed that, in the wake of the COVID-19 pandemic, stronger efforts with a long-term perspective are needed to push for further gender equality, avoid further regression and stimulate economic growth.

Online source:
https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=20200814&atto.codiceRedazionale=20G00122&atto.articolo.numero=0&qId=&tabID=0.39601001434451955&title=lbl.dettaglioAtto

The Budget Act for 2021 marks a certain increase in allocations regarding gender equality and support for the family

Gender

Article 1 of the Budget Act for 2021, issued on 30 December 2020,[89] contains several paragraphs regarding gender equality;

– Paragraph 23 allocates an additional EUR 50 million for 2021 to the EUR 10 million annual fund supporting family policies. The allocation is expressly aimed at supporting organisational measures set up by employers to help working mothers to return to work after childbirth.
– Paragraph 16 entitles employers hiring long-term unemployed women (six-months unemployed in some areas of the South) for a cut in social security contribution up to 100 % for a maximum of EUR 6 000 a year for 2021/2022. Permanent contracts and an increase in the personnel working for the enterprise are required.
– Paragraphs 97 to 108 of the Budget Act allocated a fund of EUR 20 million for 2021, and the same amount for 2022, to support female entrepreneurship, especially those who focus on the development of new technologies. The measures to be financed include, among others, grants, zero-interest loans, assistance in setting up or running the business, investments in capital, professional training and educational campaigns.
– Paragraph 276 allocated a fund of EUR 2 million for 2022 to the Ministry of Labour to enhance measures aimed at supporting the social and economic value of gender pay equality at work. At the same ministry, another fund of EUR 30 million a year for 2021, 2022 and 2023 has been allocated by Paragraph 334 to support the issue of legislative provisions aimed at recognising the social and economic value of family caregivers.
– Paragraphs 363 and 364 increased compulsory paternity leave from seven days to ten days and extended it to 2021.[90]
– Paragraph 365 entitles unemployed or working women who are the only breadwinner in the family to an allowance of up to EUR 500 per month where they take care of a disabled child with a certified disability of a minimum of 60 %.
– Different measures aimed at the economic support of families will be reorganised and unified in a single allowance to be applied according to their annual income and to the number of children, as well

89 Italy, Law 178 of 30 December 2020, OJ No. 322 of 30 December 2020, o.s. No. 46/L, available at: https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2020-12-30&atto.codiceRedazionale=20G00202&atto.articolo.numero=0&qId=&tabID=0.903930556814972&title=lbl.dettaglioAtto.

90 Italy, Article 4, Paragraph 24(a) of Law 92/2012 as an experimental measure for 2013-2015 and extended by Para. 354 of Law 232 of 2016 for the period 2017-2020.

under the ongoing reform provided by the Family Act. Paragraphs 2 and 7 provide for an increase of the respective fund of EUR 3 billion for 2021 and from EUR 5 billion to EUR 6 000 million for 2022.
- For the next few years, a remarkable and progressive increase of State contribution has also been included in the fund for municipalities to improve support for the development of crèches (Paragraphs 791 and 792).
- Under Paragraph 1134, a fund run from the Prime Minister's Office to fight gender violence will be financed from 2021 until 2023 with EUR 2 million a year. These resources are mainly dedicated to the functioning of associations fighting against gender violence.
- Paragraph 27 also allocated EUR 2 million a year from 2021 until 2023 for the creation and the consolidation of specialist psychological support services in prisons aimed at avoiding the recidivism of perpetrators of crimes of gender violence.

Online source:
https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=20201230&atto.codiceRedazionale=20G00202&atto.articolo.numero=0&qId=&tabID=0.903930556814972&title=lbl.dettaglioAtto.

NL Netherlands

LEGISLATIVE DEVELOPMENT

Bill proposal on gender-balanced company boards

Gender

On 9 November 2020, a bill proposal to improve gender balance on company boards was submitted to Parliament.[91] The proposal introduces a so-called 'ingrowth quota' for supervisory boards of listed companies, which will be obliged to ensure that their supervisory boards consist of one-thirds women. In the event that a man is appointed while this target has not yet been met, the appointment will be declared null and void. In which case the 'chair' of the supervisory board will remain empty until a female director is appointed. If a company has a one-tier board, the same rule will apply. The rule then applies to the non-executive members of the board. The quota will only apply to new appointments, not to re-appointments of current board members. However, re-appointments are to be carried out within eight years after the first appointment. In exceptional circumstances (e.g. during crises) it will be possible to deviate from the quota and to appoint a man instead of a woman. Such an appointment may only be for two years.

In addition to the quota, the bill proposal obliges large corporations to set appropriate and ambitious objectives by setting targets to reach a more balanced percentage of men and women in the management board, the supervisory board *and* the sub-management. By increasing the number of women in the sub-management, women are more likely to move on to top positions. Companies have to draft a plan to realise these targets that has to be made available to the public. Furthermore, large companies must report on their diversity policy and the extent to which their targets have been met in their annual reports.

The Council of State and the Netherlands Institute of Human Rights (the Dutch equality body) were asked for advice on the bill proposal. They both affirmed that the proposal appears to be contrary to the case law of the European Court of Justice (CJEU), as the CJEU has ruled that automatic or absolute preference for women is contrary to EU law, *inter alia* in *Kalanke* (C-450/93), *Marshall* (C-409/95), *Badeck* (C-158/79) and *Abrahamsson* (C-407/98). The legislator subsequently acknowledged that the proposal

91 Netherlands, Bill proposal for gender balance on company boards, 9 November 2020, available at; Kamerstuk 35628, No. 2 | Overheid.nl > Officiële bekendmakingen (officielebekendmakingen.nl).

appears to conflict with the CJEU case law. However, the legislator refers to the proposal for a directive on women on boards by the European Commission, and mentioned that the Commission takes the view that a quota of 40 % is justified. Reference is also made to other Member States that have introduced quotas and to the Convention on the Elimination of all Forms of Discrimination against Women, which requires Member States to remove the disadvantaged position of women in relation to men.

The CJEU case law has long been an obstacle for a bill proposal regarding a gender quota. However, the Dutch legislature has decided to pursue the proposal with reference to the changed wording of Article 157(4) TFEU in comparison to the text at the time of the relevant CJEU judgments, the measures taken in other Member States as well as the position of the Commission regarding the draft directive on women on boards and the CEDAW.

Online sources:
https://zoek.officielebekendmakingen.nl/kst-35628-2.html
https://zoek.officielebekendmakingen.nl/kst-35628-3.html

CASE LAW

Equality Body considers the positive action policy of the Technical University Eindhoven to be unlawful

Gender

On 2 July 2020, the Netherlands Institute for Human Rights (NIHR, the Dutch national equality body) ruled that the positive action policy implemented by the Technical University of Eindhoven (TU/e), was in breach of equality law.[92]

The TU/e opened job vacancies for permanent academic staff only to women during a period of six months on 1 July 2019. If no suitable female candidate were to be found within these six months, the vacancy would be opened up to men as well. The aim of this policy was to increase the number of female professors, associate professors and university lecturers at the TU/e. This policy was intended to apply for six years. An exception was made for exceptionally qualified male applicants, or for talented male partners of female candidates who were selected on the basis of the programme. An anti-discrimination bureau (Radar), which received several complaints from men about the programme, asked the NIHR for an opinion about the lawfulness of the programme.

The NIHR took the view that the positive action programme has a legitimate aim, being the elimination or reduction of factual inequalities between men and women. At the TU/e, women are seriously underrepresented in scientific positions in relation to the available supply of staff with relevant expertise. However, the TU/e's policy does not meet the required standard of care, because the exceptions to the priority for women are so marginal that in fact female candidates are given absolute and unconditional priority. This is contrary to the case law of the CJEU. Furthermore, the TU/e's policy does not meet the proportionality requirement, as less far-reaching measures appear to be possible. Measures taken at the department and research group level to reach a gender balance have not been sufficiently successful because they did not impose binding measures. It could not be proven that the TU/e has tried to take more binding measures in this respect, for example by introducing financial consequences for the departments who fail to meet the objectives. Therefore, at this moment, the TU/e's policy is in breach of the law, according to the NIHR.

Decisions by the NIHR are not legally binding. Nevertheless, the TU/e announced that it will review its policy in order to comply with the NIHR's decision. Moreover, the decision by the NIHR appears to be in

92 Netherlands, judgment of the Netherlands Institute for Human Rights, 2 July 2020, https://mensenrechten.nl/nl/oordeel/2020-53.

line with the case law of the CJEU. This case law leaves little room for prioritising women. If the CJEU were to revoke its case law or if the EU were to overrule the case law with new legislation, it would make it easier for institutions in the Netherlands to take positive discrimination measures.

Online source:
https://mensenrechten.nl/nl/oordeel/2020-53

Supreme Court finds provision in a collective agreement regarding maternity leave for teachers in secondary education to be discriminatory

Gender

On 6 November 2020, the Supreme Court ruled that a provision in the secondary education collective agreement, which states that the pregnancy and maternity leave of employees lapses when it overlaps with school holidays other than the summer holiday, is contrary to the Equal Treatment Act and constitutes direct discrimination.[93]

The case was initiated by a teacher in secondary education, whose maternity leave partly coincided with the May vacation in 2018, and therefore came to lapse. The teacher took the view that this was contrary to anti-discrimination law, whereas the school stated that the collective agreement did not grant a number of holidays, but only stipulated when granted days can be taken. The district court asked preliminary questions of the Supreme Court, which have now been answered.

The Supreme Court's decision is notable, because in the past the Supreme Court took a different view. In a judgment of 9 August 2002, it ruled in a similar situation that there was no discrimination involved, because the provision in the collective agreement did not grant a specific number of holidays to employees, but only pointed out when holidays could be taken. However in the meantime the CJEU rendered the *Gómez* judgment (C3241, ECLI:EU:C:2004:160), in which it made clear that Article 5(1) of Directive 76/207/EEC (old) must be interpreted as meaning that a worker must be able to take her annual leave during a period other than the period of her maternity leave, including in a case in which the period of maternity leave coincides with the general period of annual leave fixed by a collective agreement for the entire workforce. In its decision, the Supreme Court applied the CJEU *Gómez* judgment and ruled that it is contrary to both Dutch and EU law if maternity leave lapses where it overlaps with school holidays. It is important to observe that in the decision of the Supreme Court, the case law of the CJEU was decisive.

Online source:
https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2020:1748

POLICY AND OTHER RELEVANT DEVELOPMENTS

National action plan for diversity and inclusion in higher education and research

Racial or ethnic origin

Gender

On 1 September 2020, the Minister for Education, Culture and Science presented a national action plan for greater diversity and inclusion in higher education and research. The action plan was drawn up in cooperation with a number of organisations representing the research and higher education sector, including the Dutch Research Council, the Association of Universities in the Netherlands and the Dutch Network of Women Professors. The action plan recognises the existence of structural barriers to diversity and inclusion in higher education and research. The term diversity is interpreted broadly to refer to a range of characteristics, such as gender, cultural/ethnic background, sexual orientation, religion and disability, but also class, 'work style', education and experience.

93 Netherlands, Supreme Court, judgment of 06 November 2020, ECLI:NL:HR:2020:1748, Hoge Raad, 20/01531 (rechtspraak.nl).

The action plan contains five objectives, to be achieved by 2025:

- criteria relating to diversity integrated into existing assessment instruments, such as protocols for scientific reviews and course accreditations, to be taken into account in the evaluation of research proposals and course curricula;
- improved monitoring of diversity and, where possible, of inclusion and safety from harassment;
- the Netherlands will subscribe to a diversity charter at the European level or develop a charter at the national level;
- a format for institutional diversity strategies developed at the national level, to strengthen strategies developed by universities and other institutions;
- a national centre of expertise financed for a period of at least 5 years.

The action plan also mentions three short-term objectives, which are to 1) formulate new targets to increase the number of female professors and investigate the possibility of formulating targets for other groups and functions, 2) publish an advisory report on the prevention and combating of misconduct and harassment in research and 3) open a new grant programme for researchers with a 'non-western migration background'[94] and refugees. In addition, a committee of experts was set up to provide advice to the Ministry of Education, Culture and Science and to organisations and institutions in the field of higher education and research.

The action plan recognises that the available data does not provide sufficient insight into existing levels of diversity and inclusion and that better data collection is needed. The action plan suggests ways to overcome the barrier related to the sensitivity of data on ethnicity and migration background.

Online source:
https://www.government.nl/documents/reports/2020/09/01/national-action-plan-for-greater-diversity-and-inclusion-in-higher-education-and-research

Parliamentary investigation into the effectiveness of Dutch anti-discrimination legislation

All grounds

On 1 December 2020, the Dutch Senate set up a temporary commission for the preparation of a parliamentary investigation into the effectiveness of the anti-discrimination legislation. The motion to create the temporary commission stated that discrimination is widespread in the Netherlands despite the existence of strong anti-discrimination legislation, and that it occurs between citizens as well as in the public sector, in sectors that are heavily regulated by the Government, and that it sometimes takes on a systemic nature. The motion called for an analysis and evaluation of the causes and possible solutions for the existing 'gap' between anti-discrimination law and the occurrence of discrimination in practice and of the role that the Dutch Parliament could play in this respect.

The task of the temporary commission, consisting of senators from across the political spectrum, will be to draft a research proposal that can serve as a basis for the parliamentary investigation and to issue a reasoned opinion as to the necessity of such an investigation. The temporary commission will report to the Senate, which will decide whether an investigation will indeed take place. No date has been set for the report yet.

Within the Dutch legislative process, the Senate has the task of assessing legislative proposals in terms of their compatibility with the Constitution and their enforceability. Such assessments are usually conducted as part of the legislative process, before legislation enters into force. It is not common for the

94 Statistics Netherlands (CBS) uses the term 'persons with a non-western migration background' for persons who were born in, or have at least one parent who was born in, a country in Latin-America, Africa, Asia (other than Japan or Indonesia) or in Turkey. The term is generally used in Dutch policy discourse to indicate persons who form the target group of integration policies.

Senate to set up a parliamentary investigation into the functioning or effectiveness of existing legislation. The introduction of the temporary commission must therefore be understood as signalling increased awareness in the Dutch political debate of the problem of persisting discrimination, which was spurred, *inter alia*, by the Black Lives Matter demonstrations earlier in 2020.

No decision has been made on the scope of the proposed parliamentary investigation, including which acts or legislative provisions would be subject to examination. Only Article 1 of the Constitution and the General Equal Treatment Act were explicitly mentioned in the Senate debate, but it is not unlikely that other legislation will be included as well (e.g. the Age Discrimination Act, Disability Discrimination Act or provisions of criminal law). This will be part of the research proposal that will be drawn up by the temporary commission.

Online source:
https://www.eerstekamer.nl/commissies/tijdelijke_commissie_voorbereiding_3

MK North Macedonia

LEGISLATIVE DEVELOPMENT

Anti-discrimination Law (re)adopted by Parliament, following annulment by the Constitutional Court

All grounds

On 14 May 2020, the Constitutional Court annulled the Law on Prevention and Protection against Discrimination (ADL), finding that it had not been adopted with the appropriate majority vote required by the Constitution. The country was thus left without a comprehensive anti-discrimination law (and without a functioning equality body) at a time when the Parliament had already dissolved for pre-term elections, meaning the law could be re-adopted only following the elections.

During the pre-election campaign, 17 political parties signed a pre-election political declaration initiated by CSOs, pledging to re-adopt the ADL immediately after the Parliament was constituted.[95] Within a month after the Parliament was constituted and the new Government was elected, the competent ministry – the Ministry of Labour and Social Policy – forwarded the text, as annulled by the Constitutional Court, to the Government, with one amendment. The amendment was proposed by CSOs and it pertained to the parliamentary procedure for the appointment of the members of the equality body, the Commission for Prevention and Protection against Discrimination (CPPD). The CSOs proposed that the model procedure that was used in 2019 for the appointment of the members of the State Commission against Corruption should also be used for the members of the CPPD. The proposed amendment (Article 18) included a fully transparent and public appointment process with the participation of CSO representatives throughout. Nevertheless, the Government rejected this amendment, stating that the law was already well in line with international standards and had been annulled by the Constitutional Court only because of a formal condition, thus there was no need to amend Article 18.

95 MK – EU Resource Centre (MERC) (2020), '17 политички партии ја потпишаа Декларацијата за приоритетно донесување на законот за спречување и заштита од дискриминација' (17 political parties signed the Declaration on for Priority Adoption of the Law for Prevention and Protection against Discrimination), 13 July 2020, http://www.merc.org.mk/aktivnost/62/17-politichki-partii-ja-potpishaa-deklaracijata-za-prioritetno-donesuvanje-na-zakonot-za-sprechuvanje-i-zashtita-od-diskriminacija.

On 28 October 2020, the Parliament adopted the text of the ADL, as annulled by the Constitutional Court earlier that year.[96] The rejection of the amendment proposed by CSOs sends a worrying signal on the intentions of the parties regarding the appointment of members of the CPPD.

Norway

NO

CASE LAW

First case brought before the Equality Tribunal by the Equality Ombud – discrimination against female inmates in a Norwegian prison

Sex

The Equality and Anti-Discrimination Tribunal (Equality Tribunal) concluded,[97] that the Norwegian Correctional Service discriminates against female inmates by not providing equal access to services/ opportunities for female as compared to male inmates in a prison in Tromsø, a city in the north of Norway.

Tromsø prison is a prison for both men and women and has departments with both high and low security levels. The prison has a ward for women which consists of four departments with a lower security level. However, the prison does not have its own ward for women who are serving their sentence at a high security level. Nor is there a penitentiary department for women serving their sentence at a high security level. Therefore female inmates who serve time at a high security level, serve time in prison together with men in the so-called custody department. Women who should serve time at the lower security level may also be placed in the custody department together with men, if there are no more places available at the lower security level.

The Equality and Anti-Discrimination Ombud (Equality Ombud) complained to the Equality Tribunal that the Correctional Service is acting contrary to the prohibition against direct discrimination on the grounds of sex (as prohibited by Article 6 of the Gender Equality and Anti-Discrimination Act (GEADA)) by not giving female inmates opportunities equal to those of male inmates in Tromsø prison. The Equality Ombud argued that the fact that the female prisoners serving at high level security have to serve time in the custody department together with men is discrimination based on sex. The way the prison is organised leads to female inmates being locked in the cells with less access to the prison community than men. Some of the female inmates spend 23 hours in their cells. They also do not receive the same access to employment or education facilities as the male inmates.

The Equality Tribunal concluded unanimously that female inmates in Tromsø prison are 'treated worse' than male prisoners in the prison contrary to Article 6 of GEADA, because female prisoners are placed in the custody department due to the absence of their own penitentiary department for female inmates serving at a high security level. The Equality Tribunal mentioned both direct and indirect discrimination in the beginning of the statement, but it is not clear whether the Tribunal made a ruling of direct or indirect discrimination in the case.

This is the first case the Equality Ombud has brought to the Equality Tribunal on its own initiative after the amendment of the Equality and Anti-Discrimination Ombud Act (EAOA) in 2018 which means that the Ombud no longer handles individual complaints, but according to Article 5 of EAOA must work to promote

96 North Macedonia, Law on Prevention and Protection against Discrimination, *Official Gazette of the Republic of North Macedonia*, No. 258/2020 (30 October 2020).

97 Norway, Equality Tribunal, decision of 9 June 2020, in Case No. 19/114, published July 2020, https://diskrimineringsnemnda.no/media/2413/sak-19-114.pdf.

genuine equality and prevent discrimination in all sectors of society, including providing guidance in individual cases and bringing cases before the Equality Tribunal.

Online source:
https://diskrimineringsnemnda.no/media/2413/sak-19-114.pdf

The Equality Tribunal awards damages for the first time in a case on pregnancy and parental leave

Gender

The Equality and Anti-Discrimination Tribunal (Equality Tribunal) awarded damages and compensation in September 2020.[98] The case concerned discrimination because of pregnancy and parental leave, prohibited by Article 6 of the GEADA. This is the first case where the Equality Tribunal has awarded damages.

A female cosmetic nurse got a position at a private healthcare facility, was offered NOK 25 000 (approximately EUR 2 500) in minimum wages, plus a certain percentage of the profits of the sales. Shortly after starting her new position, she informed her employer of her pregnancy. She was informed by the employer by email that it would be problematic to let her start in the position due to her pregnancy and the upcoming parental leave. The Equality Tribunal, unanimously found that the nurse was a victim of direct discrimination, violating Article 6 the GEADA, because of both her pregnancy and parental leave.

According to Article 12(1) of the EAOA, the Equality Tribunal can make an administrative decision concerning compensation in employment. According to Article 12(2) of the EAOA the Equality Tribunal may also unanimously make a decision on damages for 'economic loss' if the defendant has no objections to the claim, or if the Equality Tribunal finds reasons to set aside the defendant's objections as 'manifestly untenable'.

In this case, the Equality Tribunal found that the defendant's (employer's) objections were obviously untenable and could be set aside. The Equality Tribunal could therefore award damages. The Equality Tribunal also concluded that the complainant was not obliged to inform her employer about the pregnancy during the recruitment process. The prohibition against differential treatment due to pregnancy and parental leave in connection with employment is absolute, and applies to both employees and self-employed workers.

Based on previous statements in the preparatory works for the EAOA,[99] the Equality Tribunal discussed whether its competence to award damages is limited to NOK 10 000, (approximately EUR 1 000). The Equality Tribunal concluded that it has never been the Government's intention to limit the Tribunal's mandate to award damages to a maximum of NOK 10 000. Its competence goes further than this, and the Tribunal therefore awarded the nurse NOK 75 000 (approximately EUR 7 500) in damages for 'economic loss' for three months' lost income, which matched her claim. In accordance with Article 12(1), the Equality Tribunal also awarded the complainant NOK 50 000 in compensation (approximately EUR 5 000).

This is the first case where the Equality Tribunal has awarded damages for economic loss in a case on gender equality after the amendment of the EAOA in 2018. The case also shows the important principle that pregnant employees and employees taking up parental leave should not be treated less favourably than a non-pregnant employee, and employees that are not taking up parental leave.

98 Norway, Equality Tribunal, Case 20/57, Statement of 24 September 2020, available at: https://www.diskrimineringsnemnda.no/media/2531/anonymisert-vedtak.pdf.
99 Norway, Preparatory works to the Equality and Anti-Discrimination Ombud Act, Prop. 80 L (2016-2017), p. 94, available at: https://www.regjeringen.no/no/dokumenter/prop.-80-l-20162017/id2545683/.

The Norwegian Supreme Court finds breach of the protection provision against sexual harassment

The Norwegian Supreme Court delivered a judgment on 22 December 2020 on a case concerning sexual harassment.[100] The case concerned a female employee who was training to become a welder. She filed a lawsuit complaining of sexual harassment at the workplace, demanding damages and compensation from two customers. The woman was 19 years old at the time of her complaint and the only female employee of the company in question.

The complainant had endured several experiences with the two customers, and complained to her employer about it. She clearly stated on several occasions that the behaviour was unwanted, but the behaviour did not stop.

The question to be addressed by the Supreme Court was which actions are regarded to qualify as sexual harassment under Article 8 of the former GEA and Article 13 of the GEADA. Under Article 8 of the GEA, sexual harassment is defined as 'sexual attention that is troublesome'. According to Article 13 of the GEADA, sexual harassment is 'any form of unwanted sexual attention with the purpose or effect of being offensive, intimidating, hostile, degrading, humiliating or troublesome'. According to the preparatory works,[101] the wording in GEADA Article 13 was changed slightly so as to be more objective, but the intention was not to change the purpose of the provision. The Supreme Court noted initially that the sexual attention must be undesirable to the person towards whom the attention is directed for it to be regarded as sexual harassment. The Court also pointed out that according to the Equality Act's preparatory works, the person giving the attention must be made aware that the attention is unwanted through words or actions.

A key question for the Court was whether the first customer's actions towards the woman were regarded as 'troublesome'. The Court answered this in the affirmative. The Supreme Court stated that whether an action is troublesome depends on an objective assessment. The Court also noted that a key element in the interpretation is what the Court refers to as a 'women's norm' since far more women experience sexual harassment than men. The Supreme Court does not say more about the norm, but noted that the aim is to give the person who is exposed to unwanted sexual attention sufficiently effective protection in light of the Act's purpose to prevent sexual harassment.

The Supreme Court concluded that both customers had sexually harassed the woman, as the Court found that their behaviour had been sexually explicit, unwanted and troublesome to her. The customers were sentenced to pay compensation to the woman of EUR 2 000 (NOK 20 000) and EUR 1 500 (NOK 15 000).

The Supreme Court makes it clear that it does not necessarily take much before a person should in fact understand that the sexual attention he or she gives to another person is undesirable and unwanted – a nonverbal act may be enough. The judgment also provides some clarifications regarding the threshold for an act to qualify as sexual harassment with its interpretation of the word 'troublesome'. The Supreme Court also states that a key element in the interpretation is what the Court refers to as a 'women's norm' since far more women experience sexual harassment than men.

The decision from the Supreme Court may lead to an increase in the number of complaints about sexual harassment brought before the Equality Tribunal and the courts. However, since the amount awarded in compensation was very low, this may also lead to fewer cases.

Online source:
https://www.domstol.no/globalassets/upload/hret/avgjorelser/2020/desember-2020/hr-2020-2476-a.pdf

100 Norway, Supreme Court, judgment of 22 December 2020 in Case No. HR-2020-2476-A.
101 Norway, Preparatory works to the Gender Equality and Anti-Discrimination Act, Prop. 81 L (2016-2017).

POLICY AND OTHER RELEVANT DEVELOPMENTS

New action plan against hate and discrimination against Muslims

Religion or belief

In September 2020, the Norwegian Government launched a new action plan against discrimination and hate against Muslims, focusing on four main areas: 1) dialogue and meeting places, 2) safety and security, 3) knowledge and research on discrimination and hate against Muslims, and 4) hate and discrimination against Muslims outside Norway.

The action plan contains 18 measures, including: a new funding programme for measures against racism, discrimination and hate speech to promote initiatives locally, regionally and nationally; promoting diversity in the culture sector, including arts and sports; developing a programme for communicating the diversity among Muslim identities, targeting adolescents; promoting religious dialogue; improving the dialogue between Muslim communities and the police; registering hate crime against Muslims specifically as such; funding security measures for religious communities; and increased research on discrimination against Muslims in the labour market, as well as the relationship between negative attitudes towards Muslims and Muslims' participation in society and perceived belonging to the larger society. The measures are well targeted, and seem to include a significant amount of funding. The action plan also mentions equality issues relating to gender and sexual orientation and does not fall into the essentialist trap[102] regarding Muslims.

The action plan has been well received among anti-racist and Muslim civil society organisations, even though the Government is lacking some credibility among the general population regarding prejudice against Muslims due to its former coalition partner the Progress Party, which it still depends on for a majority in Parliament.

Online source:
https://www.regjeringen.no/contentassets/b2a6fd21c6a94bae83d5a3425593da30/handlingsplan-mot-diskriminering-av-og-hat-mot-muslimer-2020-2023.pdf

PL Poland

LEGISLATIVE DEVELOPMENT

Request to examine the compliance of the Istanbul Convention with the Polish Constitution

Gender

On 27 July 2020, the Minister of Justice and the head of United Poland (one of the parties forming the ruling coalition, together with the Law and Justice party (PiS)) – submitted to the Minister of Family, Labour and Social Policy the request to initiate the denunciation procedure regarding Istanbul Convention.[103] The reason for this being that 'in the ideological layer it is incompatible with the Polish Constitution and the Polish legal order.'[104] Three days later, on 30 July 2020, the Prime Minister submitted a request

102 I.e. seeing all Muslims as essentially alike, or Islam as the same for all Muslims.
103 Council of Europe Convention on preventing and combating violence against women and domestic violence, drawn up in Istanbul on 11 May 2011 (JoL of 2015, item 961).
104 Do Trybunału Konstytucyjnego wpłynął wniosek premiera ws. konwencji stambulskiej [The Constitutional Court received a request from the Prime Minister on the Istanbul Convention], Gazeta Prawna, 31 July 2020, available at: https://prawo.gazetaprawna.pl/artykuly/1487379,do-trybunalu-konstytucyjnego-wplynal-wniosek-premiera-ws-konwencji-stambulskiej.html.

to the Constitutional Tribunal (hereinafter 'the proposal') to examine the compatibility of the Istanbul Convention with the Polish Constitution in the following respects:

I. The conformity of the Istanbul Convention (in so far as its translation published in the Official Journal is incompatible with the authentic text) with Article 2 of the Constitution (principle of the democratic rule of law) and Article 91(1) of the Constitution (providing that a ratified international agreement, after the promulgation thereof in the Journal of Laws of the Republic of Poland, shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute).
II. Compliance of Article 6, Article 12, Article 14, Article 18, Article 49(2), and Article 60 of the Istanbul Convention with Article 25, Section 2 of the Constitution of Poland (the principle of equality of religious associations: the rule that Public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life).
III. Compliance of Article 14 of the Istanbul Convention with Article 48, Section 1 of the Constitution (the principle of protection of parental authority: parents have the right to raise their children according to their own beliefs. This upbringing should take into account the degree of maturity of the child, as well as the freedom of conscience and religion and its beliefs), as well as Article 25, Section 2 of the Polish Constitution (principle of equality of religious associations).[105]

The Commissioner for Human Rights joined the proceedings before the Constitutional Tribunal and requested that the proceedings be discontinued on the grounds that the application did not meet the basic formal requirements. At the same time, on 18 August 2020, a legislative motion was filed to the Parliament, aimed at the denunciation of the Istanbul Convention. The draft law was submitted by the Komitet Obywatelski Inicjatywy Ustawodawczej (Citizen's Comittee on the Legislative Initiative) 'Yes to family, no to gender',[106] which is supported, among others, by the Ordo Iuris organisation.[107]

Although the ongoing dispute involves legal issues, the problem in fact lies in the sphere of values and ideology. The proposal accuses the Istanbul Convention of:

> 'undermining the legal order, that it has an ideological basis, that it incorrectly defines the real sources of violence against women and does not provide for effective tools to combat domestic violence.'[108]

According to the Prime Minister, it is unacceptable to consider gender as a criterion of discrimination.[109] The proposal indicates that:

> 'the natural and inalienable dignity of every person should be the starting point for the protection of women from violence. Unfortunately, in principle, this perspective has not been noticed or

105 Poland, Motion of the Prime Minister to the Constitutional Tribunal, 30 June 2020, available at: https://ipo.trybunal.gov.pl/ipo/dok?dok=F873260322%2FK_11_20_wns_2020_07_30_ADO.pdf.
106 Poland, 'Yes to family, no to gender' available at: https://wyborcza.pl/7,75398,26226894,rzecznik-praw-obywatelskich-broni- konwencji-antyprzemocowej.html.
107 Ordo Iuris Institute for Legal Culture is (according to its webpage): 'an independent legal organization incorporated as a foundation in Poland. It gathers academics and legal practitioners with the aim of promoting a legal culture based on respect for human dignity and rights' (http://en.ordoiuris.pl/who-we-are). This Polish NGO was founded in 2013 by the Piotr Skarga Institute for Social and Religious Education. Ordo Iuris is seen as the advocacy group articulating postulates of the Catholic Church. It is connected with the Brazilian NGO Tradition, Family and Property – TFP.
108 Do Trybunału Konstytucyjnego wpłynął wniosek premiera ws. konwencji stambulskiej [The Constitutional Court received a request from the Prime Minister on the Istanbul Convention], Gazeta Prawna, 31 July 2020, available at; https://prawo.gazetaprawna.pl/artykuly/1487379,do-trybunalu-konstytucyjnego-wplynal-wniosek-premiera-ws-konwencji-stambulskiej.html.
109 Trybunał Konstytucyjny przyjął wniosek premiera. Przyjrzy się konwencji stambulskiej [The Constitutional Court accepted the Prime Minister's request. It will look into the Istanbul Convention], Gazeta Prawna, 10 August 2020, available at: https://wiadomosci.gazeta.pl/wiadomosci/7,114883,26197605,trybunal-konstytucyjny-przyjal-wniosek-premiera-przyjrzy-sie.html.

> expressed in the Convention. These observations may provide a sufficient basis for considering that the Convention is in fact a kind of ideological declaration and not a normative document aimed at preventing and combating violence against women.'[110]

The Prime Minister requested the Constitutional Tribunal not only to assess the constitutionality of the abovementioned articles of the Convention, but also to assess the compatibility of the Convention with its translation published in the *Official Journal*. In his opinion, the translation contains numerous errors, e.g. the word 'gender', sometimes translated (correctly) as 'gender', or (incorrectly) as 'sex'. This is a highly problematic allegation, given the fact that – as pointed out by the Commissioner for Human Rights among others – the Constitutional Court does not have the power to assess the correctness of the translation of the text of an international agreement.[111] The Commissioner for Human Rights also disputes the remaining part of the proposal, pointing out that it infringes the principle that the contested provisions must be confronted with articles of the Constitution in a manner that clearly demonstrates specific infringements of the fundamental rights defined in the Constitution. Meanwhile, the Prime Minister challenged six very extensive articles without indicating specifically where the problem of non-compliance lies.[112]

Online source:
https://trybunal.gov.pl/s/k-11-20

CASE LAW

Compensation for non-pecuniary damage in a case of discrimination on the ground of religion in access to tertiary education

Religion or belief

The case concerned the decision of the dean of the College of Social and Media Culture (CSMC) not to accept the claimant for postgraduate studies in environmental protection. The dean stated that the claimant did not include in his application one of the required documents, i.e. the opinion of his parish priest.

The claimant appealed the decision to the rector of the college, presenting the following facts: he had contacted the college before applying to ask whether the opinion of the parish priest is a mandatory requirement for studies subsidised by the National Fund for Environmental Protection and Water Management. He had been informed that if he did not wish to provide such an opinion, he should include a statement explaining his reasons, which he did. He had then received confirmation that he had submitted the required documents and, subsequently, a positive decision on admission to the college including information on the required tuition fees for the first semester. Having paid the fees, the claimant presented himself at the college to receive his student papers, but was then informed by the dean that he was not admitted to the college. A few days later, he received the written decision rejecting his application.

In his appeal to the rector, the claimant argued that the refusal conflicted with the constitutional obligation of equal treatment in education regardless of religion. He further argued that the course,

110 Trybunał Konstytucyjny przyjął wniosek premiera. Przyjrzy się konwencji stambulskiej [The Constitutional Court accepted the Prime Minister's request. It will look into the Istanbul Convention], Gazeta Prawna, 10 August 2020, available at: https://wiadomosci.gazeta.pl/wiadomosci/7,114883,26197605,trybunal-konstytucyjny-przyjal-wniosek-premiera-przyjrzy-sie.html.

111 Rzecznik praw obywatelskich broni konwencji antyprzemocowej przed Trybunałem Przyłębskiej [Ombudsman defends anti-violence convention before Przyłębska's Tribunal], Wyborcza, 21 August 2020, available at: https://wyborcza.pl/7,75398,26226894,rzecznik-praw-obywatelskich-broni-konwencji-antyprzemocowej.html.

112 Rzecznik praw obywatelskich broni konwencji antyprzemocowej przed Trybunałem Przyłębskiej [Ombudsman defends anti-violence convention before Przyłębska's Tribunal], Wyborcza, 21 August 2020, available at: https://wyborcza.pl/7,75398,26226894,rzecznik-praw-obywatelskich-broni-konwencji-antyprzemocowej.html.

being subsidised by public funds, should be available without using the criterion of religion, even if it is run by a college with a religious profile. The rector upheld the decision, referring to the constitutionally protected autonomy of tertiary education providers and to the freedom of teaching.

In his civil complaint to the court, the claimant alleged violations of his right to equal treatment and non-discrimination in social life for any reason, including a violation of his right to professional training, referring to (among others) the Constitution, the European Convention on Human Rights and Fundamental Freedoms, and the Equal Treatment Act. The claimant was represented notably by the Polish Society for Anti-Discrimination Law.

In August 2019, the first instance court found indirect discrimination on the ground of religion/belief and awarded approximately EUR 1 200 as compensation for pecuniary and non-pecuniary damage to the claimant, as well as reimbursement of legal expenses.[113] The court qualified the discrimination as indirect, unlike the claimant who had claimed direct discrimination, stating that the requirement to provide the opinion of the parish priest was seemingly neutral and applied to all candidates alike. The respondent appealed the verdict.

The Court of Appeal delivered its decision on 21 August 2020, confirming the findings of the first instance court, including with regard to the compensation.[114] The compensation was awarded on the basis of the Equal Treatment Act, in contrast to previous court rulings claiming that compensation under this act could only be awarded for material damage.

Constitutional Tribunal bans the right to abortion for embryopathological indications

In its ruling of 22 October 2020, the Constitutional Tribunal (CT) decided that the so-called embryopathological indication for abortion, provided for in Article 4a(1) point 2 of the Abortion Law, is contradictory to Article 38 (protection of life of human person), in conjunction with Article 30 (protection of human's person dignity), in conjunction with Article 31(3) (conditions of admissibility of introduction of restrictions on the enjoyment of constitutional rights and freedoms) of the Constitution.[115] The verdict was passed by the majority of votes of the entire CT's chamber, with two dissenting opinions. As a consequence, as soon as the verdict is published, the questioned provision of abortion law loses its legal force.

Sex

The Abortion Law provides for three indications for which termination of pregnancy does not constitute an offence under Article 152 of the Criminal Code (which threatens with a punishment of up to three years' imprisonment anyone who terminates a woman's pregnancy with her consent but in violation of the law). Legal termination of pregnancy is allowed in the first 12 weeks of pregnancy in the following situations: 1) the pregnancy constitutes a threat to the life or health of the pregnant woman; 2) prenatal examinations or other medical reasons indicate a high probability of a serious and irreversible impairment of the foetus or an incurable disease threatening its life (in such cases, the abortion is allowed until the foetus is able to live independently); 3) there is a reasonable suspicion that the pregnancy is a result of a forbidden act (e.g. rape, incest).

A group of 141 Polish politicians (mainly from the ruling Law and Justice party) filed a motion with the Constitutional Tribunal to declare the second indication (in Article 4a(1) point 2 of the Abortion Law) to be unconstitutional. The applicants emphasised that 'the legalisation of eugenic practices in relation to the unborn child' is incompatible with the constitutional principles: of protection of a human person's life

113 Poland, District Court of Torun, *M. J.* v *the College of Social and Media Culture in Toruń*, decision of 6 August 2019 in Case No. Sygn. akt: I C 469/18.
114 Poland, Regional Court of Torun, decision of 21 August 2020 in case No. Sygn. Akt: VIII Ca 1058/19.
115 Poland, Constitutional Court, Case No. K 1/20, 20 October 2020, available at: https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11300-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy.

and respect for a human person's dignity and constitutes prohibited direct discrimination on the ground of health'. Moreover, the way in which the premise of the contested provision has been expressed, constitutes evidence of the use of undefined criteria and of the legalisation of the interruption of pregnancy without sufficient justification for the protection of another value. The Constitutional Tribunal confirmed this argumentation in its verbal justification of the ruling in its entirety. The judge rapporteur emphasised in particular that the questioned prerequisites of admissibility are not precise enough and are excessively broadly defined. For example, the requirement of endangering the life of the foetus is only discussed in the context of an incurable disease, and not a serious, irreversible impairment of the foetus. In addition, it is not necessary to identify such abnormalities in the foetus in order to terminate the pregnancy, instead it is only sufficient to demonstrate a high probability.

This ruling may in practice mean a complete ban on legal abortion, since abortions based on the so-called embryopathological indications, according to official statistics, accounted for about 98 % of all legal abortions every year.[116]

The decision was issued despite the fact that women's organisations and the Commissioner for Human Rights repeatedly pointed out that women who wanted to legally terminate their pregnancy in Poland face numerous obstacles on the part of medical entities, that Poland does not fulfil its obligations resulting from the three cases before the ECtHR concerning termination of pregnancy and prenatal diagnosis, and moreover, that the State failed to introduce regulations regarding the referral of a pregnant women to a doctor who would be willing to assist in case of indications for abortion. The State was obliged to provide for such regulations after the Constitutional Tribunal ruled that doctors refusing an abortion by invoking the conscientious objection clause have no obligation to provide assistance.[117]

Furthermore, the ruling makes it impossible for women to legally terminate their pregnancy in the most tragic cases, such as when the foetus has no chance of survival or is condemned to live in suffering with serious disabilities. It is worth emphasising that with the current system of social care and healthcare in Poland, pregnant woman and sometimes also their caregivers (in practice, usually the mother or grandmother) have to carry the burden. The consequences of the situation is illustrated, among others, by the demonstrations of mothers of disabled people in the Sejm (the lower house of the Polish Parliament) which took place in 2018.[118]

The consequences of this ruling will hit hardest those women who are already in a disadvantaged situation. It is worth emphasising that the ruling of the Constitutional Tribunal and its verbal justifications ignore the issue of the rights of women, who are directly affected by pregnancy. The balancing of conflicting interest disproportionally gives primacy to the protection of the conceived life – without referring to the rights and freedoms of the woman who is being treated in a subjective manner.[119]

Online source:
https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11300-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy

116 https://pulsmedycyny.pl/oficjalne-dane-o-legalnej-aborcji-w-polsce-1110-zabiegow-przerwania-ciazy-w-2019-r-999603.
117 Poland, Constitutional Court, K 12/14, 7 October 2015 available at: https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?sprawa=13434&dokument=13021.
118 See among others: https://tvn24.pl/polska/sejm-protest-rodzicow-dzieci-niepelnosprawnych-i-list-do-prezesa-pis-ra830548-2357287.
119 Such an argumentation was found in the dissenting opinions of the judges of the Constitutional Tribunal (judges Piotr Pszczółowski and Leon Kieresa).

Portugal PT

POLICY AND OTHER RELEVANT DEVELOPMENTS

Annual Report of the National Institute for Rehabilitation on discrimination on the grounds of disability or aggravated health risk

Disability

In October 2020, the National Institute for Rehabilitation published its 2019 annual report on discrimination on the grounds of disability or aggravated health risk. The report contains statistical and administrative data, presenting the main developments and trends during the previous year. The Institute is one of several entities mandated to receive complaints about alleged discrimination on the grounds of disability or aggravated risk to health, and to distribute them to the competent authorities. These authorities then report back to the Institute on the outcome of the complaints.

In 2019, the Institute registered 1 274 complaints, which represented a 30 % increase compared to the previous year. Complaints related to (lack of) accessibility were the most common (44 %), followed by limitation of rights by companies or agents of the State (33 %).

Among the complaints registered by the Institute in 2019, 486 were forwarded to the competent authorities, while 367 are still pending. Some 420 of the complaints were archived, most often because the situation had been resolved or due to a lack of evidence. Only one of the complaints registered in 2019 was upheld as an administrative offence and led to the imposition of a fine.

Online source:
https://www.inr.pt/documents/11309/380827/Relat%C3%B3rio+-+Lei+da+N%C3%A3o+Discrimina%C3%A7%C3%A3o+2019/2621a2dc-b704-4056-9e21-fa893284a4cb

Romania RO

LEGISLATIVE DEVELOPMENTS

Amendments to the Labour Code definitions of discrimination

All grounds

In July 2020, the Labour Code provisions on discrimination were amended to introduce new wordings and concepts, including the following:[120]

- Direct discrimination: 'Any act or act of distinction, exclusion, restriction or preference, based on one or more of the [protected] criteria (…), which have as purpose or effect the non-granting, restriction or removal of the recognition, use or exercise of the rights provided in the labour legislation.'
- Indirect discrimination: 'Any seemingly neutral provision, action, criterion or practice that has the effect of disadvantaging a person over another person based on one of the [protected] criteria (…), unless that provision, action, criterion or practice is objectively justified by a legitimate aim, and if the means to achieve that aim are proportionate, appropriate and necessary.'
- Harassment: 'any type of behaviour based on one of the [protected] criteria (…) which has as its purpose or effect the damage of a person's dignity and leads to the creation of an intimidating, hostile, degrading, humiliating or offensive environment.'

120 Romania, Law No. 151 of 23 July 2020 amending the Labour Code (Law No. 53/2003).

- Discrimination by association: 'any act or act of discrimination committed against a person who, although not part of a category of persons identified according to the [protected] criteria (…), is associated or presumed to be associated with one or more persons belonging to such a category of persons.' This is a new concept in Romanian law.
- Order to discriminate: 'any behaviour that consists in ordering, in writing or verbally, a person to use a form of discrimination, which is based on one of the [protected] criteria (…), against one or more persons is considered discrimination.'
- Victimisation: 'any adverse treatment, triggered in response to a complaint or legal action regarding the violation of the principle of equal treatment and non-discrimination.'
- Genuine occupational requirements: 'Exclusion, distinction, restriction or preference in respect of a particular job does not amount to discrimination when, by the specific nature of the activity in question or the conditions under which the activity is performed, there are certain essential and decisive professional requirements, provided for the purpose to be legitimate and the requirements proportionate.'

These definitions differ slightly from those of the Anti-discrimination Law. The Labour Code further stipulates that failure to observe the prohibition of discrimination as defined in the relevant provisions is punished with a fine between approximately EUR 206 and EUR 4 136, applicable by the labour inspectorates. It does not mention that the national equality body is also competent to issue sanctions in cases of discrimination in employment.

Online source:
https://www.codulmuncii.eu/modificari-codul-muncii/legea-nr-151-23-iulie-2020.html

Anti-discrimination Law amended to include moral harassment

All grounds

In August 2020, the Romanian Anti-discrimination Law was amended[121] to include the concept of moral harassment, despite the criticism of the national equality body that the amendment would not be enforceable.[122] The new Article 5(1) defines moral harassment as 'any conduct committed against an employee by another employee who is his/her superior, by a subordinate and/or by a comparable employee from a hierarchical point of view, in relation to employment relationships, which have as purpose or effect a deterioration of working conditions by infringing the rights or dignity of the employee, by affecting his/her physical or mental health or by compromising his/her professional future, behaviour manifested in any of the following forms: a) hostile or unwanted conduct; b) verbal comments; c) actions or gestures.' The amendment further adds that 'Moral harassment in the workplace is any behaviour that, by its systematic nature, can harm the dignity, physical or mental integrity of an employee or group of employees, endangering their work or degrading the work environment. For the purposes of this law, stress and physical exhaustion are subject to moral harassment at work.' The amendment also stipulates that moral harassment in the workplace is punishable by disciplinary, misdemeanour or criminal law, depending on the circumstances. The existing definition of harassment remains, i.e. 'any behaviour based on race, nationality, ethnicity, language, religion, social category, beliefs, gender, sexual orientation, membership in a disadvantaged category, age, disability, refugee or asylum status or any other criterion that leads to the creation of an intimidating, hostile, degrading or offensive environment.'

The sanctions provided for by the amendment are significantly different from the sanctions provided in the Anti-discrimination Law for other forms of discrimination, including harassment. Thus, the fines for moral harassment range between approximately EUR 2 000 and EUR 3 100, while the fines for other forms of discrimination range between approximately EUR 250 and EUR 7 500 where the victim is an individual and between EUR 500 and EUR 25 000 where the victims are a group or a community. Furthermore,

121 Romania, Law No. 167 of 7 August 2020 amending Government Ordinance No. 137/2000 (Romanian Anti-discrimination Law).
122 https://www.g4media.ro/presedintele-cncd-csaba-asztalos-dupa-ce-presedintele-a-promulgat-legea-care-interzice-hartuirea-la-locul-de-munca-dupa-hartuirea-stradala-psihologica-mobbing-si-bullying-avem-si-aceasta-modific.html.

the amendment provides for different measures available to the courts when finding moral harassment, such as ordering the perpetrator to stop, to reintegrate the victim, or to provide compensation, including for moral damage. In contrast, the national equality body NCCD can only order the employer to take all necessary measures to stop any acts or acts of moral harassment at work regarding the employee in question, and to pay the amount necessary for the psychological counselling that the employee needs, for a reasonable period established by the occupational medicine doctor.

In addition to the provisions related to moral harassment, the adopted amendment also abrogated Article 26(4) of the Anti-discrimination Law, which provided for the statutory limitations for applying the sanctions issued by the NCCD when finding discrimination.

Online source:
http://legislatie.just.ro/Public/DetaliiDocument/24129

Anti-Gypsyism Law adopted by the Romanian Parliament

Racial or ethnic origin

In December 2020, the Anti-Gypsyism (Anti-Tziganism) Law was submitted to the President for promulgation, after having been adopted by both houses of Parliament.

Anti-Gypsyism is defined by Article 2 as 'both the perception of the Roma expressed as hatred against them, as well as verbal or physical manifestations, motivated by hatred against Roma, directed against the Roma or their properties, against institutions/NGOs, leaders of Roma communities or their places of worship, traditions and Romani language.' The law condemns the act of promoting, in public, in any way, anti-Gypsy ideas, conceptions or doctrines as a crime to be punished with imprisonment from three months to three years and the prohibition of some rights. The distribution or making public by any means of anti-Gypsy materials is also a crime to be punished with imprisonment from one to five years. Furthermore, producing, selling, disseminating or possessing with the purpose of further disseminating anti-Gypsy symbols are to be punished with imprisonment from three months to three years. Initiating or establishing an organisation with an anti-Gypsy character is also defined as a crime to be punished with imprisonment from three to ten years.[123]

Online source:
http://legislatie.just.ro/Public/DetaliiDocument/235923

CASE LAW

Court of Appeal confirms that the eviction of 200 Roma amounts to discrimination

Racial or ethnic origin

In November 2017, a non-governmental organisation filed a complaint before the national equality body, the National Council for Combating Discrimination (NCCD), against the Alba Iulia local authorities, challenging their decision to evict approximately 200 Roma. In November 2018, the NCCD found that 'the eviction of a large number of persons (about 200), who belong to a disfavoured category, without taking into consideration measures adapted to their needs, without taking the necessary measures to relocate these persons in dwellings which would ensure the minimum standard of living' amounted to discrimination, and ordered each respondent authority to pay a fine of approximately EUR 1000.[124] The respondents challenged the NCCD decision before the Alba Iulia Court of Appeal.

123 The law was promulgated by the President of the Republic after the cut-off date of this publication, on 4 January 2021, see Anti-Gypsyism Law No. 2/2021 published in the Official Gazette on 5 January 2021.
124 Romania, National Council for Combating Discrimination, Decision No. 454 of 19 November 2018.

The respondents argued that the NCCD decision was illegal on several grounds. First, they argued that the decision was not delivered within the statutory timeframe of 90 days after the submission of the complaint. Secondly, they argued that the NCCD decision wrongly identified the Alba Iulia local council as a respondent, and that the decision did not fully describe the facts of discrimination as required by law. Thirdly, the respondents challenged the decision as unfounded, claiming that there was no proof that the 200 evicted persons were Roma, and that no discrimination on grounds of Roma ethnicity could therefore be found. Fourthly, they argued that the NCCD decision would go against the eviction orders issued by the courts, which the respondents were simply executing when evicting the 200 Roma persons. Finally, the respondents argued that the NCCD decision failed to identify any comparable group in order to establish the differential treatment.

The Court of Appeal issued its ruling on the appeal in November 2020.[125] First, the Court underlined that the complainant association that had initially filed a complaint before the NCCD maintained its legal standing before the court when the NCCD decision was challenged. This issue is the subject of diverging interpretations, but the Court of Appeal in this case held that such continuing standing is justified as the legal relationship between the parties is reanalysed by the court.

With regard to the respondents' argument in relation to the 90-days' deadline to issue a decision, the Court of Appeal clarified that a failure to respect this deadline 'does not amount *de plano* to a reason for illegality of the decision adopted', unless it is established that it caused harm to the respondent that cannot be removed in any other way than through the annulment of the decision, which was not the case. Responding to the allegation that the NCCD decision was unfounded, the court clarified the nature of the principle of equality and underlined that the NCCD decision did not look into the legality of the judicial decisions leading to the eviction, but rather examined the eviction itself. The court further highlighted that the respondents had the duty to present before the NCCD their arguments, including the justifications regarding the fact that the persons evicted were not Roma and that the failure to present such proof before the NCCD, during the proceedings, entailed a confirmation of the discrimination. The court also underlined the 'special situation in which [the Roma] are, being vulnerable persons due to their inequality when compared to the majority citizens given the identity-related differences as compared to the majority, and the fact that they are confronted with a behaviour of rejection and social marginalisation.' Citing the judgment of the European Court of Human Rights in the *Winterstein* v *France* case, the Court of Appeal upheld the NCCD conclusion that 'the situation of those belonging to an ethnic minority (Roma) is special and different and triggered a differential treatment which entailed that eviction through forced execution required to be prefaced by some special, positive and affirmative measures of the local administrative authorities meaning a special and effective taking care of the vulnerable condition of the Roma ethnics, an obligation which was not fulfilled by the defendants.'

RS Serbia

CASE LAW

Sex

Sexual orientation

Supreme Court decision on discrimination on the grounds of sex and sexual orientation

On 3 August 2020, the Supreme Court delivered a judgment regarding an allegedly discriminatory speech by a university dean. The Commissioner for the Protection of Equality initiated strategic litigation proceedings concerning discrimination on the grounds of sex and sexual orientation against the dean of a law faculty.

125 Romania, Alba Iulia Court of Appeal, Decision No. 1293 of 25 November 2020, Case No. 4/57/2019.

In June 2017, the dean, who was also a professor at his university, published an article with the title 'Domestic Violence and Violence against the Family'. The author criticised the Law on the Prevention of Domestic Violence,[126] which was adopted in 2016. According to him, the Law was not only designed to protect weak women, but could further initiate the break-up of families, as measures such as the expulsion of men from their home prohibiting contact with their wife and children can be imposed. The author further advocated for a traditional and patriarchal organisation of the family, where the man is the head of the family in charge of all important decisions regarding the family, placing women in an unequal position. Furthermore, the author described the LGBTI community as 'primitive', 'violent' and as 'prostitutes'.

The Commissioner for the Protection of Equality emphasised that protection from domestic violence should apply to all, and should not depend on the personal circumstances of women. The Commissioner highlighted the fact that the attitude that only 'weak' women deserve protection is based on a stereotypical role of women.

The Higher Court in Novi Sad delivered its decision in May 2018, finding that the author of the text committed an act of discrimination on the basis of gender and sexual orientation.[127] The court of first instance found that the author, as a public figure, should not advocate discrimination or ideas that encourage discrimination, which can have detrimental effects on democratic processes and human rights guarantees in society. However, the Appellate Court in Novi Sad found that the author's statements fell within the scope of the right to freedom of expression and that his profession (university law professor and dean) was irrelevant in this case. In its decision, the Court invoked Article 10 of the European Convention on Human Rights (ECHR) and relied on principles deriving from the jurisprudence of the European Court of Human Rights, but did not refer to any particular case. The court particularly emphasised that Article 10 ECHR also protects information that can offend, shock, or disturb others, finding no discrimination in this case.[128] Therefore, the finding of discrimination was quashed in this case.

On 3 August 2020, the Commissioner for the Protection of Equality was informed that the Supreme Court of Cassation upheld the Appellate Court's decision.[129] The highest court found that the author did not offend people based on sex or sexual orientation and did not have the intention to offend. On the contrary, he merely expressed his value judgment about the Law on the Prevention of Domestic Violence, and criticised the manifestation of sexual orientation at Gay Pride. Also, the court found that the Commissioner's position set forth in the complaint (that the decision of the Appellate Court that legitimises the discriminatory speech is unacceptable for combating discrimination and should not be a part of the Serbian legal order) can be viewed as a special pressure on the court. The court did not take into account the possible effects of the statements of the defendant expressed in his position as a public figure.[130]

Online source:
https://www.standard.rs/2020/08/05/m-djurkovic-presuda-vks-je-razlog-za-smenu-brankice-jankovic/

126 Serbia, Law on the Prevention of Domestic Violence, Official Gazette of the Republic of Serbia No. 94/2016.
127 Serbia, Higher Court in Novi Sad, II. 1344/2017, judgment of 8 May 2018.
128 Serbia, Appellate court in Novi Sad, *Commissioner for the Protection of Equality* v *AA*, decision of 17 October 2018 in Case No. Gž.3576/2018.
129 Serbia, Supreme Court of Cassation, Rev 195/2019, judgment of 29 January 2020.
130 Serbia, Supreme Court of Cassation, Rev 1855/2017, judgment of 30 June 2017.

POLICY AND OTHER RELEVANT DEVELOPMENTS

Re-election of the Commissioner for the Protection of Equality

All grounds

The Commissioner for the Protection of Equality (Commissioner) was established in 2010 by the Law on the Prohibition of Discrimination[131] (LPD) as an independent, autonomous, and specialised state body, with a wide mandate for the promotion of equality and protection from discrimination in Serbia. The mandate of the previous Commissioner Jankovic expired on 27 May 2020, and was renewed on 26 November, for a five-year period.

Even though the Commissioner is perceived as competent to perform this duty, the election process raises some concern, in particular seeing as a candidate supported by 60 NGOs was not called for an interview before the Committee on Constitutional and Legislative Issues of the National Assembly. Indeed, according to the Law on the Prohibition of Discrimination, only the parliamentary groups in the National Assembly have the right to propose candidates for the Commissioner to the Committee.

Online source:
http://ravnopravnost.gov.rs/en/national-assembly-of-the-republic-of-serbia-elected-brankica-jankovic-for-commissioner-for-protection-of-equality/

SK Slovakia

CASE LAW

Appeal court confirmed that state authorities have no obligation to take measures to eliminate school segregation of Roma children

Racial or ethnic origin

In 2016, a claimant NGO filed an *actio popularis* lawsuit under the Anti-Discrimination Act against the Ministry of Education and the district office in Prešov concerning documented segregation of Roma children at a primary school. The claimant argued that some Roma children at the school faced segregation due to decisions adopted by the responsible state authorities setting up the school catchment area as well as due to their lack of action to prevent existing segregation. The school was struggling with limited space capacities and an increasing percentage of socially disadvantaged Roma children, partly due to 'white flight' of non-Roma children to other schools. As a result, the school was unable to effectively accommodate the needs of all the children and started educating some Roma children in separate Roma-only classes and in the second afternoon shift. The claimant argued that the state authorities should have set up the school catchment area differently, considering the capacities of the other nearby schools and supporting ethnic diversity. They asked the court to oblige the respondent authorities to adopt effective measures to eliminate and prevent the segregation of Roma children at the school. The Public Defender of Rights provided a mapping of the local situation as a third party, in support of the claimant.

The District Court of Prešov dismissed the lawsuit in 2019,[132] stating that it was not proved that the disputed decisions of the state authorities had violated the principle of equal treatment. The court concluded that the state authorities were not eligible to interfere with the organisation of the educational process which was the responsibility of the school. The claimant filed an appeal.

131 Serbia, Law on the Prohibition of Discrimination, Official Gazette No. 22/2009.
132 Slovakia, District Court of Prešov, decision of 27 February 2019, in Case No. 29C/14/2016.

In August 2020, the Regional Court of Prešov fully upheld the judgment of the district court,[133] stating that the school catchment area as decided by the respondents did not cause the segregation of Roma children, as argued by the claimant. The court did not dispute the fact that segregated education of Roma children constitutes discrimination and that state authorities have a positive duty to take measures to eliminate and prevent segregation. It also acknowledged that Slovakia is facing international criticism for the segregation of Roma children in education. However, it underlined that it is the schools that are responsible for organising and managing the teaching, and thus held that state authorities have no positive duty to take measures to eliminate segregation. The court failed to consider whether the school was in fact in a position to effectively desegregate despite the school catchment area decided by the authorities. The claimant plans to file an extraordinary appeal before the Supreme Court of Slovakia.

Online source:
https://www.poradna-prava.sk/en/documents/decision-of-the-regional-court-in-presov-in-a-case-concerning-alleged-responsibility-of-state-authorities-for-segregation/

POLICY OR OTHER RELEVANT DEVELOPMENTS

Research report on the health and discrimination of Roma living in segregated communities

Racial or ethnic origin

In 2018-2019, the Ministry of Health initiated extensive field research to assess the social determinants of health in segregated Roma communities as well as the health needs of people living in these communities. The research was primarily carried out for the purposes of the national project 'Healthy Communities' the aim of which is the systematic improvement of the extremely poor health status of people living in segregated Roma communities through community health work. The final research report was published in July 2020.[134]

The field research covered 488 segregated Roma communities and included 14 700 structured interviews in sample households within those communities. The research can be considered remarkable in the context of Slovakia for a number of reasons, listed below.

a. Participative approach: residents of the segregated Roma communities were continuously engaged in specifying the objectives, procedures, and implementation of the research and in the preparation and interpretation of its results.
b. Extensive data: the collected data and quantitative indicators are particularly extensive and describe the health situation of the residents of each segregated Roma community in detail. The data may thus provide a valuable basis for designing targeted measures for improving the situation and monitoring future progress.
c. Discrimination aspect: in addition to assessing the determinants of health in Roma communities and the health status of their residents, the research also explored current occurrences of direct discrimination against Roma in healthcare, as reported by respondents, as well as discrimination against Roma in the areas of education and access to public services.

The research results included findings that:

– A substantial share of Roma living in (some) segregated communities are exposed to critical levels of health-endangering exposures, leading to an extremely poor health status of the population.
– Most residents are constantly exposed to environmental hazards.

133 Slovakia, Regional Court of Prešov, Judgment No. 16Co/21/2019-483 of 20 August 2020.
134 Belák, A.(2020) *Úrovne podmienok pre zdravie a zdravotné potreby vo vylúčených rómskych osídleniach na Slovensku* (Social determinants of health and health needs in excluded Roma communities in Slovakia), Košice: Univerzita P. J. Šafárika.

- A significant share of the respondents reported problems with accessing healthcare services, including ethnic discrimination. In this regard, 16 % of respondents reported having experienced ethnic discrimination in access to their attending doctor in the past year and over 25 % reported discrimination on a gynaecology ward. Similarly, 25 % of respondents reported that they tend not to solve their health problems, because of difficulties in accessing healthcare services.
- Over 23 % of respondents reported that someone in their household had experienced direct discrimination in schools in the past year, over 24 % in shops, over 27 % in public offices and over 23 % in access to services.
- The existence of segregated Roma-only schools or classes was reported in almost 70 % of the localities covered by the research.

The research clearly indicates ongoing systemic discrimination and a lack of Government measures that would effectively address the serious health risks faced by Roma living in these communities and their discrimination in healthcare as well as other areas.

Online source:
https://www.zdraveregiony.eu/wp-content/uploads/2018/04/ZK_potreby_e-verzia.pdf?fbclid=IwAR1WuWEsHmLYh8sGiJQmCeMraNaw3N9wlyFXGxKXc5e07IMzUJnzkNry-Tw

ES Spain

LEGISLATIVE DEVELOPMENT

New Royal Decree on equal pay

Gender

On 13 October 2020, the Council of Ministers of the Government of Spain adopted Royal Decree 902/2020, on equal pay for women and men.

This Decree further develops Articles 22(3) and 12(4)(d) of the Workers' Statute,[135] which refer to the obligation that professional classifications are carried out based on non-discriminatory criteria. Additionally, they refer to the obligation to guarantee equality between women and men in the case of part-time contracts (thus the absence of direct and indirect discrimination).

The obligations contained in the Royal Decree will be applicable to labour relations regulated by the Workers' Statute. The Royal Decree regulates specific measures to guarantee the right to equal treatment and non-discrimination between women and men in remuneration matters. It also provides for mechanisms to identify and correct unjustified pay gaps.

This regulation develops the principle of pay transparency, which must be integrated and applied by both companies and collective agreements. Additionally, it provides for the obligation of equal remuneration for work of equal value. The Decree explicitly refers to the criteria to determine the equal value and enumerates (without being exhaustive) factors and conditions that may be relevant to assess the value of an activity. The principle of pay transparency is regulated by three different instruments: the remuneration records, the equal pay audit, and the job evaluation system (with regard to the professional classification of the company or as contained in the collective agreement). Remuneration records are mandatory for all companies (Article 28(2) of the Workers' Statute), including management and senior positions. The Royal

135 Spain, Royal Legislative Decree No. 2/2015 which approved the Workers' Statute, 23 October 2015, www.boe.es/buscar/act.php?id=BOE-A-2015-11430, as amended by Royal Decree No. 6/2019 on urgent measures for ensuring equal treatment and opportunities for women and men in employment and occupation, 1 March 2019, https://www.boe.es/buscar/doc.php?id=BOE-A-2019-3244.

Decree establishes precise instructions on the information they must contain and how to compute it, with different modalities depending on whether or not the company carries out pay audits. The remuneration record should include salaries, salary supplements and extra-salary benefits. The legal representation of the workers have the right to know the full content of the remuneration record, and will be consulted prior to the preparation or modification of the record. Companies that are obliged to prepare an equality plan must conduct an equal pay audit. The Royal Decree regulates the content of the pay audit (diagnosis with job evaluations and an action plan for the correction of eventual pay inequalities).

In addition to the job evaluation system of the company, the Royal Decree also refers to the negotiating committees of collective agreements, as responsible for ensuring that the factors and conditions concurring in each group and professional level respect the principle of equal pay.

The Royal Decree also contains a provision on judicial and administrative protection mechanisms. In addition, it explicitly establishes the equal right of part-time workers, regulating the application of the principle of proportionality in pay.

This Royal Decree will enter into force on 14 April 2021, six months after its official publication. Within six months of its entry into force, a ministerial order will be approved with the job evaluation procedure. The Institute for Women and Equal Opportunities, in collaboration with unions and business organisations, will prepare a technical guide for conducting pay audits with a gender perspective.

Online source:
https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-12215

New Royal Decree regulating equality plans in companies

On 13 October 2020, the Council of Ministers of the Government of Spain adopted Royal Decree 901/2020, regulating equality plans for companies and their registration, amending Royal Decree 713/2010 of 28 May 2010, on the registration and deposit of collective agreements and labour agreements.[136]

Gender

The new Decree is intended to further develop the requirements of equality plans, as mandated in the new Article 46(6) of the Law on Effective Equality.[137] This new Decree regulates the minimum requirements of equality plans for companies in Spain (the analysis, contents, issues to be treated, pay audits, and monitoring and evaluation mechanisms) as well as the registration of these plans.

The Decree is divided into four chapters. The first chapter establishes that the Decree will be applicable to all companies with more than 50 workers. The development and implementation of equality plans will be voluntary for other companies, unless they are obliged under collective agreements. The Decree establishes specific criteria to determine the number of workers in a company, which includes all forms of employment contracts.

The second chapter regulates the negotiation procedure of the equality plans, in line with the jurisprudence of the Supreme Court regarding the transparency of the negotiating process and the right to negotiate. Companies must initiate the development of the equality plan by setting up a negotiating commission within a maximum period of three months from when they reach 50 workers. The new Decree establishes a maximum period of one year from the start of the procedure to approve the equality plan and submit the

136 Spain, Royal Decree No. 901/2020 regulating equality plans and their registration and amending Royal Decree 713/2010, of 28 May 2010, on the registration and deposit of labour agreements and collective bargaining agreements, 13 October 2020, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-12214.

137 Spain, Law No. 3/2007 on Effective Equality between Women and Men, 22 March 2007, www.boe.es/buscar/doc.php?id=BOE-A-2007-6115 as amended by Royal Decree No. 6/2019 on urgent measures for ensuring equal treatment and opportunities for women and men in employment and occupation, 1 March 2019, https://www.boe.es/buscar/doc.php?id=BOE-A-2019-3244.

application for registration. Existing equality plans must be adapted within the period provided for their review and, in any case, within a maximum period of 12 months from the entering into force of the Royal Decree. The new regulation expressly establishes that equality plans must be subject to negotiation.[138] In the negotiating commission, the representatives of the company and the representatives of the workers must participate on an equal basis. The people who make up the commission have the right to access all the documentation and information that is necessary for the intended purposes. They will have the same rights and obligations as the people who negotiate the collective agreements.

The third chapter provides for the required content of each equality plan. The first phase in the preparation of the plan is the execution of an analysis. The analysis will assess through quantitative and qualitative indicators, at least the following aspects: a) selection and contracting processes; b) professional classification; c) training; d) professional promotion; e) working conditions, including the salary audit;[139] f) co-responsible exercise of the rights of personal, family and work life; g) female underrepresentation; h) remuneration; and i) prevention of sexual and gender-based harassment. The analysis should be extended to all positions, all work centres and to all hierarchical levels, including data disaggregated by sex of the different groups, categories, levels and positions. For the execution of the analysis, the specific criteria indicated in the annex to the Royal Decree must be followed. If the results of the analysis reveal the underrepresentation of people of a specific sex in certain positions or hierarchical levels, the equality plans must include measures to correct it.

The equality plans will have, at least, the following content: a) determination of the parties that enter into them; b) personal, territorial and temporal scope; c) report on the analysis of the company's situation; d) results of the remuneration audit, as well as its validity and periodicity; e) definition of qualitative and quantitative objectives of the equality plan; f) description of specific measures, execution period and prioritisation of the same, as well as design of indicators; g) identification of the means and resources; h) calendar of actions; i) monitoring, evaluation and periodic review system; j) composition and functioning of the commission or joint body in charge of monitoring; k) modification procedure and procedure to resolve possible discrepancies that may arise in the application and monitoring.

The equality plans will be subject to mandatory registration in the Register of labour and collective agreements.[140] The specific measures to prevent sexual harassment and harassment based on sex at work will be subject to voluntary deposit. This regulation will enter into force on 14 January 2021, three months after its official publication in the BOE.

Online source:
https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-12214

138 The negotiating commission has powers in the negotiation and development of both the analysis and the measures that make up the plan. It can produce the report of the results of the analysis, and identify priority measures, the fields of application, the material and human resources necessary for its implementation, and the responsible persons or bodies. The commission is also competent to define the indicators and the information gathering instruments necessary to monitor and evaluate the measures of the plan. The commission promotes the implementation of the plan and initiates information and awareness-raising actions for the workforce. The commission may set up internal operating regulations.

139 Regulated by a 'twin' Royal Decree issued on the same day; Royal Decree 902/2020, on equal pay between women and men, 13 October 2020, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-12215.

140 The period of validity of the equality plans will be determined by the negotiating parties, but may not exceed four years.

United Kingdom

CASE LAW

Discrimination against gay and lesbian foster parents due to the religion and belief of the adoption agency

Sexual orientation

Cornerstone is a charity acting as an independent fostering agency (IFA) offering foster and permanent homes to children in the care of local authorities. The charity is founded on, and operates according to, its perception of evangelical Christian principles, so that it only recruits carers who are prepared to abide by its Code of Practice, which requires staff, volunteers and carers to be evangelical Christians and to refrain from 'homosexual behaviour'. In effect, the only potential carers Cornerstone accepts are evangelical married heterosexual couples. In 2019, following an inspection, the statutory body responsible for the registration, regulation and inspection of IFAs concluded that Cornerstone's policy violated provisions of the Equality Act prohibiting discrimination on grounds of sexual orientation in the provision of goods and services, as well as the European Convention on Human Rights. It required Cornerstone to change its policy.

Cornerstone challenged the inspectorate's conclusions, arguing first that it was not involved in the provision of services, and, secondly, that any discrimination was because of homosexual behaviour and not because of sexual orientation. It also argued that it was covered by an exception available for charities that limit their benefits to persons who share a protected characteristic, in this case religion or belief.

In July 2020, the High Court delivered its ruling in this case,[141] finding that Cornerstone was indeed offering services to two sections of the public: potential foster parents on the one hand and children who need to be fostered or adopted on the other. The Court further held that the policy did discriminate on grounds of sexual orientation, both directly and indirectly, and that any indirect discrimination could not be justified. In this regard, Cornerstone had claimed that its policy was justified on the basis that it served a number of aims including increasing the pool of evangelical Christian foster carers, and increasing the number of available foster placements. The Court considered these particular aims and found them to be unfounded, noting in particular that excluding gay and lesbian evangelical Christians from fostering could not be a proportionate means of increasing the pool of evangelical Christian carers. Moreover, the Court categorically rejected any suggestion that gay men and lesbians cannot make wonderfully loving foster and adoptive parents whether they are single or in a same-sex partnership. Finally, the Court concluded that the exception for charities did not apply in this case as the limit was based not on the religion or belief of carers, but on their sexual orientation. With regard to the ECHR claims, the Court held that the recruitment policy violated Article 14 of the Convention read with Article 8 insofar as it required carer applicants to be heterosexual. Permission has been granted for the decision to be appealed to the Court of Appeal.

Online source:
https://www.bailii.org/ew/cases/EWHC/Admin/2020/1679.html

Positive action restricting housing to one religious community

Religion or belief

The case involves the obligations under the Equality Act of a charity that was set up to provide housing for a disadvantaged group, 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 city

141 United Kingdom, High Court of England and Wales, *R (Cornerstone (North East) Adoption and Fostering Service Ltd)) v The Office for Standards In Education, Children's Services and Skills*, decision of 7 July 2020, No. 1679 (Admin).

council as she was not from the Orthodox Jewish community. 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[142] had accepted that there was a correlation between poverty and deprivation in the concerned community and their religion, and found that the discrimination was lawful as a proportionate means of compensating for that disadvantage. The claimant appealed and the Court of Appeal upheld the Divisional Court's finding.[143] The claimant appealed to the Supreme Court, which dismissed the appeal.

The Equality Act provides exceptions to the prohibition of discrimination for both positive action which addresses, proportionately, disadvantages and needs connected to a protected characteristic, and for charities to restrict benefits to those with a protected characteristic if that restriction is a proportionate means of achieving a legitimate aim or of preventing or compensating for disadvantage linked to the protected characteristic. The focus of the appeal was on whether the housing association's housing allocation policy was lawful. The Supreme Court upheld the lower courts' findings that the restriction of housing to members of the disadvantaged religious group was proportionate.[144] The aim of the measure, to minimise the disadvantages that are connected to the Orthodox Jewish community's religious identity and to counteract the discrimination that they suffer, was legitimate. The Court was also entitled to find the housing allocation policy to be proportionate. The Supreme Court also considered whether the housing allocation policy contravened the Racial Equality Directive. This was a new ground of appeal that was not decided in the earlier hearings. In deciding this aspect of the case, the Supreme Court differentiated the UK Supreme Court *JFS* case[145] which had held that discrimination in education against non-Jewish pupils was direct race discrimination. In the *JFS* case the discrimination operated against anyone who could not trace matrilineal descent from a Jewish mother or one who had been converted in accordance with the tenets of Orthodox Judaism, with no requirement of observance or practice of the Jewish faith. In contrast, in this case, the housing association did not select on the basis of an individual's matrilineal descent, but instead selection was based on whether they participated in Orthodox Jewish religious observance. The Supreme Court held that this amounted to discrimination on the grounds of religion or belief, rather than race, and so the housing policy could not be found to be in contravention of the terms of the Directive. As a result of this finding, the Supreme Court did not go on to consider fully the positive action exception under Directive 2000/43 Article 5, but suggested that such an exception might well apply.

Online source:
https://www.bailii.org/uk/cases/UKSC/2020/40.html

142 United Kingdom, Hugh Court of England and Wales, decision of 4 February 2019, No. 139 (Admin), available at: https://www.bailii.org/ew/cases/EWHC/Admin/2019/139.pdf.
143 United Kingdom, Court of Appeal of England and Wales, decision of 27 June 2019, No. 1099 (Civ), available at: https://www.bailii.org/ew/cases/EWCA/Civ/2019/1099.html.
144 United Kingdom, Supreme Court, *R (on the application of Z and another) v London Borough of Hackney Council and Another*, decision of 16 October 2020, No. 40.
145 United Kingdom, Supreme Court, *R (E) v Governing Body of JFS (United Synagogue intervening)*, decision of 16 December 2009, No. 15, available at: https://www.supremecourt.uk/cases/docs/uksc-2009-0105-judgment.pdf.

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