No. 2 / 2008

European Gender Equality Law Review

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THE EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

European Gender Equality Law Review

2008–2

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

European Commission
Directorate-General for Employment, Social Affairs and Equal Opportunities
Unit EMPL/G/2
Theme
Equality, Action against Discrimination: Legal Questions

This publication has been commissioned by the European Commission under the framework programme PROGRESS (Decision 1672/2006/EC of the European Parliament and the Council, OJ L 315/1 of 15/11/2006).
For more information on PROGRESS see:
http://ec.europa.eu/employment_social/progress/index_en.htm

Manuscript completed in November 2008.
The information contained in this review reflects, as far as possible, the state of affairs on 29 September 2008.

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Introduction

Susanne Burri[*]

This is the second issue of the biannual *European Gender Equality Law Review* (EGELR) of the European Commission's European Network of Legal Experts in the field of Gender Equality. This electronic review provides information on policies, legislative developments and case law in the field of gender equality both at the European level and at the level of the 27 Member States of the European Union and the EEA countries (Iceland, Liechtenstein and Norway).

Currently, at the European level, two proposals by the European Commission to amend existing directives in the field of gender equality merit attention. The first proposal concerns the application of the principle of equal treatment between men and women engaged in a self-employed capacity.[1] The aim of this proposal is to change the Community legal framework concerning the application of the principle of equal treatment between women and men for self-employed workers and their spouses. When adopted, this directive will repeal Directive 86/613/EEC and will cover aspects not covered by Directives 2006/54/EC, 2004/113/EC and 79/7/EEC. Cadenau highlights in her contribution in this review the main shortcomings of Directive 86/613/EEC in the light of the problems faced by self-employed women. She discusses the diverse provisions of the current proposal and concludes that it could potentially improve the position of self-employed women. However, she also presents some suggestions for changes. The former Network of Legal Experts on the application of Community Law on Equal Treatment between Men and Women[2] compiled a written report for the European Commission on Directive 86/613/EEC in 2006.[3] Recently, the European Commission carried out an impact assessment of Directive 86/613/EEC, which has been published as well.[4]

The second proposal of the European Commission is aimed at amending Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.[5] The aim of this proposal is to improve the protection offered to these workers. If adopted, the proposal would mean an extension of the minimum length of maternity leave from 14 to 18 weeks and diverse improvements to some

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1 Proposal for a Directive of the European Parliament and 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, COM(2008) 636 final.

2 This Network was the predecessor of the European Network of Legal Experts in the field of Gender Equality, see S. Burri 'Introduction', *European Gender Equality law Review* No. 1/2008, pp. 1-3: http://ec.europa.eu/employment_social/gender_equality/docs/2008/egelr_2008_final_en.pdf, accessed 3 November 2008.

3 Available at: http://ec.europa.eu/employment_social/gender_equality/legislation/self-empl_en.html, accessed 3 November 2008.

4 Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=402&furtherNews=yes, accessed 3 November 2008.

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

employment rights of pregnant workers and workers who have recently given birth or are breastfeeding. Furthermore, employers will have to consider requests by these workers if they wish to change their working hours. The European Network of Legal Experts in the field of Gender Equality has recently published two reports on the issue of the reconciliation of work, private and family life. The first report (in English) provides an overview and analysis of general trends in the legislation and the case law in the 27 Member States of the European Union and the EEA countries (Iceland, Liechtenstein and Norway) as regards pregnancy and maternity rights, parental leave, paternity leave and other types of family-related leave. It also describes the types of redress available in the case of an infringement of the law, as well as measures taken by the social partners.[6] The second report (also in English) complements the information provided in the first report and addresses issues concerned with the reconciliation of work and parenthood, and other forms of care for e.g. elderly, sick partners and family members and other social activities, such as voluntary work.[7] The report provides a recent overview of the main (legal) sources, the legislation and collective agreements regarding part-time work and the adjustment of working time; job sharing and flexible working time; time-credit schemes and lifecycle regulations; and (financial) support for child-care facilities. The question whether statutory social security schemes cover (financial) risks related to some (temporary) forms of leave in relation to care and/or a temporary reduction of working time is answered in relation to unemployment, incapacity to work and the building up of pensions. Information is also provided regarding the question whether an employee is entitled to some financial compensation in the case of a temporary working-time reduction. Finally, attention is paid in this report to the different tax systems and their potential positive or negative impact on reconciliation. To round off, some good practices are described and some suggestions are made for measures at the EU level. The European Commission has also recently published diverse documents on the reconciliation of work, private and family life.[8]

The above-mentioned legislative proposals of the European Commission both contain new provisions on equality bodies, which will therefore also have a role to play in the fields covered by these proposals in all the Member States. Nousiainen discusses in this review some current developments regarding equality bodies, in particular international human rights bodies and specialized equality bodies. She explores more specifically two different traditions: the British tradition of Equality Commissions, and the Nordic Equality Ombuds, which are both heading for a unification of equality bodies and harmonized legislation. Finally, she presents some arguments for and against such unification from a gender equality point of view.

Further in this review, McCrudden discusses the use of the concept of 'human dignity' in the interpretation of EC anti-discrimination directives. The reason for this is the fact that Advocate General Maduro in his opinion in *Coleman*, in a case con-

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6 The Commission's Network of Legal Experts in the fields of Employment, Social Affairs and Equality between Men and Women *Report on Pregnancy, Maternity, Parental and Paternity Rights*, European Commission March 2007, available at: http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.html, accessed 3 November 2008.

7 European Network of Legal Experts in the field of Gender Equality *Legal Approaches to Some Aspects of the Reconciliation of Work, Private and Family Life in Thirty European Countries*, European Commission August 2008, available at: http://ec.europa.eu/employment_social/gender_equality/legislation/new_legislation_en.html, accessed 3 November 2008.

8 See for information on existing legislation: http://ec.europa.eu/employment_social/gender_equality/legislation/pregnant_en.html, accessed 3 November 2008. See for proposals and recent policy documents: http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=402&furtherNews=yes, accessed 3 November 2008.

cerning disability discrimination, frequently drew on this concept to support his interpretation of European anti-discrimination law. McCrudden explores the possibilities and pitfalls which the use of this concept might present in a comparative perspective and ends his contribution with a note of caution, which also holds true for gender discrimination issues. After all, despite the differences, there are also many common aspects between the different forms of discrimination. This was made patently clear during a seminar that took place on 25 November. The European Network of Legal Experts in the field of Gender Equality then participated in a Legal Seminar on the Implementation of EU Law on Equal Opportunities and Anti-discrimination: How to address discrimination across all grounds and share experience between different kinds of discrimination. This seminar was organized by the European Commission, in cooperation with the European Network of Legal Experts in the non-discrimination field and the European Network of Legal Experts in the field of Gender Equality. On the previous day, the last-mentioned network held its second biannual meeting of 2008.

The members of the editorial board hope that you will enjoy reading this Review and we welcome reactions, comments and suggestions regarding the Review. Proposals for future articles can be submitted to the co-ordinator (see the contact address below).

The publications of the European Network of Legal Experts in the field of Gender Equality can be found at:
http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.html

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Self-employed Women: a revision of Directive 86/613 in the light of the Lisbon Strategy*

*Hilde Cadenau***

1. Introduction

Traditionally, the regulation of the labour market and the accompanying social security systems has been an area which is largely reserved for the Member States. The European Community has however used its attributed competences to lay down rules that (indirectly or directly) influence the choices of the Member States in these areas and has set several minimum standards as to the rules concerning aspects of the labour market. One set of Community rules that has been in place since the early seventies is the equal treatment legislation, which aims to eliminate discrimination between men and women in, *inter alia*, the labour market.

In recent years the Community has abandoned its reserve in matters of employment. Instead, the EU has decided to become actively involved and has committed itself to the promotion of a high level of employment. The opening shot in this approach can be found in the Treaty of Amsterdam that came into force in May 1999.[1] This officially added a Title VIII 'Employment' to the Treaty establishing the European Community and since then the promotion of employment has been one of the Community's objectives. In the light of the new Treaty, the Community initiated a programme that covers the promotion of employment, the so-called 'Lisbon Strategy'.

At its gathering in March 2000, the European Council determined an ambitious set of plans that make up this Lisbon Strategy. The strategy was intended to make the European Union the most dynamic and competitive knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion, while simultaneously respecting the environment. The strategy was meant to catapult the European Community into the twenty-first century and to ensure that the European Community acts as a 'beacon of economic, social and environmental progress to the rest of the world'.[2]

One of the pillars of the Lisbon Strategy is an increase in labour participation. It is self-evident that economic growth can only be attained if all able-bodied, male and female European citizens are stimulated, or at least not hindered, in actively participating in the labour market. In this light it is specifically important that in areas in which women are traditionally underrepresented, such as self-employment, existing legislation is scrutinized and revised. A variety of indications suggested that the existing equal treatment protection of the self-employed, in particular Directive 86/613/EEC (the main instrument for the equality protection of the self-employed),

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* This article is partly based on a paper by the author: H. Cadenau *Inequality in equality: lacunae in the European equal treatment protection of self-employed women* Utrecht, Utrecht University 2008.

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1 Treaty of Amsterdam amending the Treaty on European Union, the treaties establishing the European Communities and related acts. OJ C 340 of 10 November 1997.

2 Communication to the Spring European Council. 'Working together for growth and jobs: A new start for the Lisbon Strategy' (Communication from President Barroso in agreement with Vice-President Verheugen) COM(2005) 24.

was inadequate and could hamper the goals of the Lisbon Strategy.[3] Exemplary is the firm discussion and case law in the Netherlands on the provision of pregnancy-related insurances for the self-employed.[4] Due to these apparent gaps in the directive, both the Council and the European Parliament urged the Commission to make haste with the reform of the directive.[5]

On 3 October 2008, the Commission published the long-awaited proposal for a new directive replacing Directive 86/613/EEC.[6] The directive is much more ambitious than its predecessor and seemingly addresses some of its shortcomings. In view of these developments, I shall first attempt to identify the most important lacunae in the current Directive 86/613/EEC, although I emphatically do not profess to present an exhaustive list. The gaps will be identified in view of the most conspicuous obstacles that self-employed women face concerning the initial establishment, such as the availability of start-up financing, and operation of their businesses, such as maternity and pregnancy-related issues. Subsequently, I will take a closer look at the merits of the proposal for the new directive and add some suggestions for change. This exploratory article explicitly does not consider the protection of 'assisting spouses'. Despite the importance of their (lack of) status and the ensuing disadvantages thereof, they form a distinct category of workers to the self-employed.

2. Directive 86/613/EEC in a nutshell

For the sake of completeness, it has to be noted that other directives are (arguably) partly applicable to the self-employed. These directives encompass Directive 2002/73/EC (general gender equal treatment directive for the labour market), Directive 2004/113/EC (equal treatment concerning goods and services) and the social security Directives 79/9/EEC and 86/378/EEC.[7] For a discussion on these directives, I

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3 Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ L 359, 19.12.1986, pp. 56–58.

4 See the case *FNV and Proefprocessenfonds Clara Wichmann* v *Staat der Nederlanden,* District Court of The Hague 25 July 2007, no. HA ZA 06-170, concerning the abolition of the Dutch Law on disability insurance for the self-employed (WAZ). The crux of the discussion was whether Directive 86/613/EEC (and other possibly applicable directives) obliged the Dutch State to maintain public insurance regarding pregnancy leave. The District Court determined that there is no such obligation.

5 See, for example, the Council's conclusions 'Balanced roles of women and men for jobs, growth and social cohesion' (SOC 385) in which it called on the Commission to 'consider the need to revise, if necessary, Council Directive 86/613/EEC in order to ensure the rights related to motherhood and fatherhood of self-employed workers and their helping spouses'.

6 Proposal for a Directive of the European Parliament and 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, COM(2008) 636 final. I also refer to the Impact Assessment Report accompanying the proposal.

7 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269, 5.10.2002, pp. 15–20.
Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, pp. 37–43.
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, 10.1.1979, pp. 24–25.

refer to a set of different articles and studies.[8] The overall picture is that these directives have very little effect on the protection of the self-employed. It is Directive 86/613/EEC to which we must turn, therefore. As the *lex specialis*, it focuses entirely on the self-employed and assisting spouses. The relevant substantive articles for the self-employed are in particular Articles 4 and 8. Articles 5, 6 and 7 address problems regarding the status of assisting spouses, including the formation of a company and the issue of access to contributory schemes and are, as such, not relevant to the situation of self-employed women.

Article 4 states that the Member States shall ensure the elimination of all provisions that are contrary to the principle of equal treatment, especially in respect of the establishment, equipment or extension of a business or its launching or extension or any other form of self-employed activity including financial services. In short, it concerns *access* to self-employed work. The Explanatory Memorandum indicates that the article is specifically meant to ensure access to financial means and resources, aiming at granting self-employed women access to, for example, bank credits and subsidies.[9] The original proposal contained an obligation to eliminate both provisions and practices contrary to the principle of equal treatment.[10] The removal of the word practices in the definitive directive diminishes the strength of the article. Article 4 seems to entail an obligation for the Member States to eliminate provisions which are contrary to equal treatment only in the public sphere, such as those concerning the matrimonial property regime (the division of property between spouses) and possibly the legislation concerning the banking sector (for example, regulations on conditions for loans).

Article 8 provides that the Member States shall examine whether, and under what conditions, female self-employed workers and the wives of self-employed workers may have access, during interruptions to their occupational activity owing to pregnancy or motherhood, to services supplying temporary replacements or existing national social services, or be entitled to cash benefits under a social security system or under any other public social protection system. The article merely contains an obligation to examine these provisions and seemingly fails to impose any obligation on the Member State to address any identified deficiencies. Article 8 required much more in the original proposal. As originally drafted, the article obliged the Member States to take all necessary measures to ensure that all women who are either self-employed or are wives of self-employed persons could make an appeal to replacement services or compensation in the framework of either a social security system, contributory or otherwise, or any other system of public social protection.[11] Although this earlier article did not indicate what minimum levels of compensation were acceptable, or the conditions under which such a service or compensation should be offered, it did at least oblige the Member States to act should such a service or compensation be non-existent. The change in drafting seems to have the effect that the only obligation Member States have is to determine inadequacies and maintain the status quo or take action at their own discretion. The outcome is a far cry from the original proposal, and

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Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes as amended by Directive 96/97/EC, OJ L 46, 17.2.1997, pp. 20–24.

8 A. Eleveld 'Een zwangerschaps- en bevallingsuitkering voor zelfstandigen en meewerkende echtgenoten in Europees perspectief' *Sociaal Maandblad Arbeid* No. 6 (June 2006). H.M. Cadenau *Inequality in Equality: Lacunae in the European Equal Treatment Protection of Self-employed Women* Utrecht, Kennispunt Faculteit Recht, Economie, Bestuur en Organisatie 2008.

9 COM(84) 57 final, Ex. Mem, p. 4.

10 COM(84) 57 final, p. 4.

11 COM(84) 57 final, p. 5.

the advice of the Economic and Social Committee and the Parliamentary Resolution. The European Parliament's wish was that self-employed women and the wives of self-employed men should be entitled to the same rights concerning pregnancy and motherhood as those common to female employees.[12] The ESC stressed the absolute necessity of replacement services, more so than monetary compensation for lost income, as women in these positions experience severe problems with the interruption to work that a pregnancy necessarily entails.[13]

There are several other deficiencies. The directive does not contain a provision on positive action, in contrast to the subsequently enacted Directive 2004/113/EC and the amendment Directive 2002/73/EC.[14] In addition, in its advice, the Economic and Social Committee indicated that obligations to secure equal treatment would be unlikely to be successfully realized if they are not accompanied by a proper system of sanctions.[15] Despite this advice, neither Article 4 nor the other articles in Directive 86/613/EEC include the subject of sanctions.

The limited substantive scope and the absence of several modern necessary provisions hamper the actual effects of the directive. In order to illustrate this, I will make a selective inventory of the hindrances that self-employed women meet during the establishment and operation of their businesses or occupation, while simultaneously considering the use (or the lack thereof) of Directive 86/613/EEC in these specific situations.

3. Specific barriers for self-employed women

3.1. Self-employed women: a distinct category

As a group, women are substantially less involved than men in self-employed activities. The average estimate is that women account for 25 % of self-employed persons, consequently leaving men an ample 75 %. The number varies across sectors and countries, and these differences can be quite substantial.[16] Apart from the low participation rate of women, it also seems that their enterprise survival rate is somewhat negative compared to that of men.[17] Another characteristic of self-employed women is that their activities tend to be concentrated in traditionally feminine sectors such as retail and personal services such as child care and are on average smaller in size.[18] In short, women are on average less represented, earn less and have smaller-scale activities.[19] Additionally, women are apparently over-represented in the more vulnerable in-

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12 OJ C 172, 2.7.1984, p. 82.

13 OJ C 343/1, 24.12.1984, p.1.

14 See Article 6 of Directive 2004/113/EC and Directive 2002/73/EC, Article 1(2)(8).

15 Opinion Economic and Social Committee, OJ C 343/1, 24.12.1984, p. 3.

16 See *Fourth Annual report on Reports of the European Observatory for SMEs* (abstract). http://ec.europa.eu/enterprise/entrepreneurship/craft/craft-women/craft-obswomen.htm The differences vary from 5 % to 52 %, but in general, it can be said that women are the least represented in industry, the most in services and variably in agriculture.

17 Ibid., Table 3.

18 *Women and work: Report on existing research in the European Union* Employment and Social Affairs, September 1997. For: DG Employment, Industrial Relations and Social Affairs. Luxembourg: Office for Official Publications of the European Communities, 1999, pp. 28 and 29. Self-employed activities that have a relatively high percentage of women include the liberal professions, such as the legal profession. While the liberal professions are characterized by middle or higher incomes, most of the other feminized sectors are low-income sectors.

19 Clearly, this is also the case in the category of employees, as the participation rate, pay, and position of women are not equal to those of men. However, these differences are smaller. See e.g. S. Jouhette, F. Romans 'EU Labour Force Survey Principal Results 2005', *Statistics in fo-*

between category of the so-called 'economically dependent worker' (EDP). This relatively new category emerged as a result of profound changes in the labour market in recent years that have undermined the traditional distinction between employment and self-employment. The EDP category worker can roughly be defined as 'a worker who is formally self-employed, but is economically dependent on a single or a few employer(s) for their income'.[20] These workers seem to have all the burdens of the self-employed, but none of the advantages. In light of the overall weaker position of self-employed women, it is crucial that they can benefit from adequate equal treatment protection on a par with the employed.

3.2. An inventory of some important obstacles

3.2.1. Financing: access to self-employed work

Financing is a barrier especially encountered by women who are starting up a business. In order to start a business in any form, some capital is usually required and women experience great difficulties in acquiring loans from banks and public subsidies. For that reason, most women rely on private or family capital.[21] A consequence might be that these amounts could be significantly lower than the amounts potentially acquired otherwise, resulting in smaller enterprises and more modest goals. The reasons why capital is more difficult to acquire for women are manifold, but difficult to pinpoint. Firstly, public institutions, banks and other financial providers can directly discriminate against women by external or internal rules that exclude women from qualifying from loans, but this will usually not be the case.

A more severe problem is that financial providers will sometimes make requirements that could possibly have an indirect discriminatory effect, by demanding a certain amount of experience or an uninterrupted employment history.[22] As, on average, women have less experience and they may have interrupted work for reasons of pregnancy or child care at some point in their career, it is very likely that such requirements will affect relatively more women than men.

Even in the absence of overt or rule-based direct discriminatory behaviour or indirect discrimination in the form of conditions or requirements, the question arises whether women operate on an equal basis with regard to finance. Usually women have less access to information, less knowledge of financial matters and they request loans that are less profitable, and thus less desirable for banks. Moreover, they have less access to the informal networks typical of the financial sector, which are often the

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cus/population and social conditions 13/2006. http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-NK-06-013/EN/KS-NK-06-013-EN.PDF#search=%22labour%20participation%20women%20EU%22

20 See for a more elaborate explanation e.g. A. Perulli *Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects* Report, 2003. http://ec.europa.eu/employment_social/labour_law/docs/parasubordination_report_en.pdf , pp. 6-7. See also the *EIRO comparative study on 'Economically dependent workers'* EIRO, 2000, pp. 3-4. http://ec.europa.eu/employment_social/labour_law/docs/eirostudy_en.pdf

21 *Young Entrepreneurs, Women Entrepreneurs, Co-Entrepreneurs and Ethnic Minority Entrepreneurs in the European Union and Central and Eastern Europe* (Study), Final report to European Commission/DG Enterprise, CEEDR, Middlesex University Business School, July 2000, Chapter 3: Women Entrepreneurs, p. 45. http://ec.europa.eu/enterprise/entrepreneurship/craft/craft-studies/documents/womenentrepreneurs.pdf

22 Op. cit. note 18, p. 28. Self-employed activities that have a relatively high percentage of women include the liberal professions, such as the legal profession. While the liberal professions are characterized by middle or higher incomes, most of the other feminized sectors are low-income sectors, p. 34.

most efficient and successful ways to acquire loans.[23] These kinds of barriers are not laid down in rules, but occur in the form of behavioural patterns of the banks and institutions and the women themselves and it will be a challenge to eliminate these patterns, which are often based on lingering stereotypical images about women and entrepreneurship.[24] Apart from starting a business, female entrepreneurs experience the same difficulties, albeit to a lesser extent, when trying to expand a business.[25]

The relevant article of the directive that is important for the issue at hand is, as mentioned above, Article 4 of Directive 86/613/EEC. The article is especially written for this purpose, and specifically includes access to financial facilities, which can include loans and subsidies from both private and public institutions. I also mentioned that the original version of the article in the earlier proposal included the elimination of discriminatory practices. The current Article 4 merely contains a reference to the elimination of certain provisions. Given the problems women run into regarding loans, the elimination of (legal) provisions alone will not be enough to tackle the problem of discriminatory practices and/or behaviour, as behaviour and practices are not necessarily based on provisions. In fact, according to the Implementation Report on Directive 86/613/EEC, Article 4 was already implemented in all Member States. In fact, very few countries had to change their legislation to do so, as formal legal equality already existed.[26] Additionally, the Commission pointed out in the conclusions of the Implementation Report that it was difficult to determine whether national legislation complied with Community law on all subjects, as the directive covered so many different rules.[27] The Commission also admitted that it was not possible to examine whether the Member States had taken all necessary measures to eliminate indirect discrimination.[28] This suggests that the introduction of Directive 86/613/EEC has had very little practical effect on the elimination of problems regarding start-up finance.

The absence or presence of the possibility of positive action is especially important regarding the subject of start-up finance. As was explained, self-employed women are proportionally less represented in self-employed activities. This fact, combined with a difficulty in accessing finance, makes it highly unlikely that the number of self-employed women will rise to any great extent. It has also become clear that the above-mentioned problems concerning start-up finance are less a matter of discriminatory provisions than they are of (indirect) discriminatory behaviour. Due to the many problems resulting from this behaviour, which is difficult to eliminate, the possibility of positive action in the field of start-up finance is crucial. As will be discussed below, it might not be a coincidence that there have been and are many initiatives by the Member States and organisations that in reality amount to positive action regarding start-up finance.

These initiatives that include positive action in the area of financial facilities for the self-employed are instigated by both the Member States as well as by semi-public and private organisations or institutions. Since the early eighties, other Member States

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23 *Young Entrepreneurs,* op. cit. note 21, p. 54.

24 Ibid., p. 55. Such widespread patterns can be considered structural or institutional discrimination.

25 Ibid., p. 55.

26 Report from the Commission on the Implementation of Council Directive of 11 December 1986 on the application of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (86/613/EEC). COM(94) 163 final, p .6. Note that the earlier version of Article 4 suggested a more active approach on the side of the Member States to eliminate discriminatory practices.

27 Ibid., p. 42.

28 Ibid.

have introduced measures and institutions that are specifically aimed at aiding women in starting up a business, by providing information, support, training and, albeit less often, funding.[29] Member States sustain programmes addressed to the promotion of self-employment for men and women, either especially for the unemployed, or agricultural activities or for small businesses in general.[30] The latter schemes cannot be perceived as being positive action with regard to women, as they apply to the (aspiring) self-employed regardless of sex. However, they can indirectly advantage women as they tend to focus on small businesses and start-up finance for the unemployed and women are proportionately overrepresented in these groups.[31] As Directive 86/613 does not provide the possibility of positive action, and one assumes that they fall under the scope of the directive, these initiatives are not explicitly allowed. The absence of such a provision could at least *suggest* that positive action is not allowed as far as the self-employed are concerned.

The recent Directive 2004/113/EC might offer some solutions regarding the problems mentioned above. This new directive could provide a safety net for the problems regarding financial services (and also areas of social security, such as pregnancy and maternity, which are not covered by Directive 86/613/EEC). However, if one assumes that Directive 86/613/EEC covers the subjects of financing and pregnancy and maternity, Directive 2004/113/EC will subsequently not be applicable in these areas. Apart from this apparent gap, Directive 2004/113/EC seems to contain many possible limitations in its material scope. Additionally, the directive contains an objective justification provision for both indirect and direct discrimination, which suggests that in the area of goods and services there is more room for manoeuvre in the exemption of measures and behaviour, and could well lead to a diminished protection in this area. However, the directive is very recent, and the actual effects thereof have not yet materialized, at least not enough to predict with any certainty in which areas the directive is likely to fail.

3.2.2. Pregnancy and maternity facilities

Another issue that is perceived to be a problem by self-employed women is the availability of (financial) facilities regarding maternity. These problems concern primarily the actual period of pregnancy, but also the subsequent period in the form of the availability of child-care facilities. Concerning the issue of pregnancy leave, a distinction can be made between the provision of replacement services and financial assistance. The first problem is the arrangement of financial assistance for the self-employed during pregnancy leave and this varies between the Member States. Most states have obligatory public social insurance with regard to pregnancy.[32] The fact that such a system exists, however, is no guarantee that the system will be comprehensive

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[29] See for an overview: *Good Practices in the Promotion of Female Entrepreneurship. Examples from Europe and other OECD Countries* Vienna, Austrian Institute for Small Business Research (IfGH) December 2002. DG Enterprise http://ec.europa.eu/enterprise/entrepreneurship/craft/craft-women/documents/study-female-entrepreneurship-en.pdf. Member States that provide special services to women in this area, including funding, are e.g. France, Germany and Greece. The services are provided by ministries, banks, and private and public organizations.

[30] Ibid., pp. 20-23.

[31] Ibid., p. 23.

[32] A. Eleveld 'Een zwangerschaps- en bevallingsuitkering voor zelfstandigen en meewerkende echtgenoten in Europees perspectief', *Sociaal Maandblad Arbeid* No. 6 (June 2006), p. 264. For more country information see: *Bulletin Legal Issues in Gender Equality* Employment and Social Affairs 2005, No. 2. http://ec.europa.eu/employment_social/gender_equality/docs/2005/bulletin05_2_en.pdf

or affordable. Other states do not have a public security system regarding the subject, which means that self-employed women need to rely on private insurance.[33] In the Netherlands it has become clear that the conditions applying to access to private insurances in relation to pregnancy and maternity are prohibitive and can therefore have a substantial influence on the participation rate of women in self-employment.[34]

The second part of the equation, which is particularly important in the agricultural sector, involves the availability of replacement services. The situation regarding these services again diverges considerably across the Community.[35] In practice, the absence of sufficient funds or replacement services can deter women from either starting a self-employed activity or continuing one. Women in a self-employed activity thus have an additional disadvantage in relation to men flowing from the fact that, unlike disability, there is a good chance that they will have to deal with absence due to pregnancy or maternity at some point in their life.

What exactly is the effect of Article 4 of Directive 86/613/EEC on this situation? The aim of Article 4, as has been mentioned in Section 2, was intended to be the elimination of discrimination especially as regards conditions regarding the establishment and expansion of self-employed activities, specifically financial services. It is questionable if the provision thus covers facilities regarding pregnancy and maternity, especially as the directive includes a specific provision on the matter. As was explained earlier, Directive 86/613/EEC further provides for a non-committal provision on the matter in the form of Article 8, in which the Member States are merely obliged to examine the pregnancy and maternity facilities. The provision emphatically does not obligate the Member States to act or address the matter. If a Member State finds a lack of protection in financial or replacement facilities, public or private, there is apparently no need to address the matter and ensure that there are facilities available. In contrast to Directive 92/85/EEC which is applicable to the employed, there are no minimum requirements as to these facilities in the area of the self-employed.[36]

The Impact Assessment Report accompanying the new proposal further supports the conclusion that Article 8 has a limited effect.[37] The report confirms that the conditions of pregnancy and maternity regarding the self-employed in legislation are sometimes less favourable than those of the employed. Moreover, the absence of provisions for temporary replacements is commonplace. Considering the reduced nature of the distinction between the employed and the self-employed, especially in the case of women, the results are disappointing.

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[33] See *Social protection in the Member States of the European Union, of the European Economic Area and in Switzerland* Organisation of social protection: Charts and descriptions Missoc, 2006. DG for Employment, Social Affairs and Equal Opportunities http://ec.europa.eu/employment_social/missoc/2006/organisation_en.pdf

[34] HR (Dutch Supreme Court) 11 July 2008, *LJN* BD1850, *RvdW* 2008, 726.

[35] Op. cit. note 33.

[36] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 348, 28.11.1992, p. 1.

[37] Commision Staff Working Document accompanying the proposal for a Directive of the European Parliament and 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) 601).

4. Towards a modernized directive

In light of the obstacles highlighted above, it has become crystal clear that the current protection of Directive 86/613/EEC does not and will not contribute to a higher and more successful participation of women in self-employment. In comparison to equal treatment protection for employed women, the protection of self-employed women is considerably worse. In order to achieve the ambitious goals set out in the Lisbon Strategy, a substantive adaptation of the directive therefore seems to be a minimum requirement for success. In the next paragraphs I shall attempt to provide a brief overview of the positive and negative aspects of the new proposal and in view of the above-mentioned problems of self-employed women and shall also add some further suggestions.

The personal and material scope of the directive can be found in Article 1 of the proposal. The new directive will, again, be applicable to the self-employed as well as assisting spouses. In my opinion, the combination of the two different groups in one directive is not self-evidently the best way forward. Instead of including assisting spouses in the same directive as the self-employed, it might have been more useful to introduce a separate directive for the group of assisting spouses, as they experience different problems from those which the self-employed experience. The separation of the two groups might lead to more specific and effective directives for both groups and offer them the specific attention that they deserve.

As far as the material scope in general is concerned, it is conspicuous that the directive does not cover the matters covered by Directive 2004/113/EC (implementing the principle of equal treatment between men and women in the access to and supply of goods and service) and that, in particular, Article 5 of Directive 2004/113/EC remains applicable to contracts of insurance and related financial services. This raises the question whether the financial services as mentioned above, such as loans and maternity insurances, will fall within its scope. The determination of its scope seems somewhat self-contradictory, for if one assumes that loans and maternity insurances fall outside its scope, the subsequent articles (Article 3 on the principle of equal treatment and Article 7 on maternity leave) will often not be applicable. At the very least, it could create confusion over which directive is applicable and thus what level of protection is guaranteed (as I have stressed earlier, the protection of Directive 2004/113/EC could have its pitfalls). In general, it is unfortunate that the Commission has not chosen to concentrate as many equal treatment issues of the self-employed in one single directive, *including* goods and services related to work and occupation such as financing and private insurances regarding pregnancy, maternity and other legitimate reasons for being absent from work or one's occupation. This could have enhanced the clarity and transparency of the applicable legislation.

Article 3 sub. 1 of the proposal is the new version of Article 4 of Directive 86/613/EEC and prohibits any direct or indirect discrimination in relation to the establishment, equipment or extension of a business or the launching of any other form of self-employed activity. The wording of the article no longer merely obligates the Member States to eliminate discriminatory provisions. Instead, the article compels the Member States as well as private parties to abstain from any rule (or behaviour) that could amount to discrimination. The article is also supplemented by the prohibition of sexual harassment and the instruction to discriminate and is thus adapted to the modern standards as far as the concept of discrimination goes. Due to the wider scope of the prohibition of discrimination, the new article is irrefutably an improvement on the old directive. I do, however, refer to my earlier comment about the possible conflict

between the scope of this article and that of Directive 2004/113/EC. If financing is covered by the latter, the new directive will have very little influence on the recurrent problems which self-employed women run into in acquiring loans.

A positive aspect of the directive is that it contains a provision that enables positive action in all areas, in line with nearly all other modern directives. This provision will at least provide some clarity that positive action is also an option in the area of the self-employed, especially in the areas currently (exclusively or not) covered by Directive 86/613/EEC. One could argue that the provision is a missed opportunity to take positive action a step further, and suggest an additional provision similar to 'the reasonable accommodation' provision of Framework Directive 2000/78/EC.[38] A similar provision in the area of the self-employed could lead to the result that a private or public body and/or supplier should make reasonable adjustments as to, for example, the conditions on which a loan is granted for the underrepresented group, in this case self-employed women. This scenario has the advantage that (positive) measures should be taken in order not to infringe the provision, while the mere occurrence of a provision on positive action by no means obliges the Member States or other parties to introduce positive action. Clearly, it could also be an option to formulate the article on positive action in such a manner that positive action will be obligatory in the case of (substantial) underrepresentation.[39] Such provisions could ensure that the Member States or private parties are not limited by the jurisprudence of the Court of Justice with regard to positive action and are able to introduce measures that automatically and unconditionally attribute advantages to women when women and men are equally qualified.

Concerning the important subject of pregnancy and maternity, the proposed new article forms a substantial change to Article 8 of Directive 86/613/EEC. Instead of a mere duty to examine whether female self-employed have access to services supplying temporary replacements and are entitled to cash benefits, the new article contains much more far-reaching obligations. Article 7 sub. 1 states that female self-employed workers should be entitled, at their request, to maternity leave as provided for in Directive 92/85/EEC.[40] According to Article 7 sub. 2 and 3, such maternity leave is to be paid at a rate which is at least equivalent to the payment received in the event of sickness, subject to any ceiling laid down by national law. If the person in question does not benefit from sickness allowance, the payment should be equivalent to any appropriate allowance established at a national level. Article 7(4) gives self-employed women, as far as possible, the option of temporary replacement services as an alternative to the financial allowance.

The unambiguous duty to ensure that maternity facilities are provided, whether in the form of replacement services or public or private allowances, could in practice enable women to start or continue a self-employed activity, or at least not deter them from it. During their maternity leave, every Member State will need to guarantee self-

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[38] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16-22, Article 5.

[39] This idea is not new, in fact it has been previously proposed that positive action should be obligatory: Professor Vogel-Polsky presented a report in which she recommended the introduction of a directive containing obligatory positive action programmes for EU institutions and national public bodies (*CREW Reports* (1983) Vol.3, No. 3, p. 4). However, the idea was rejected: E. Ellis *EU Anti-Discrimination Law* Oxford, Oxford University Press 2003, p. 299. Obviously, this issue is also relevant for the employed and other subjects such as race discrimination. It might be impossible to achieve, but then, nothing ventured, nothing gained.

[40] See Article 11.

employed women an income that is equivalent to the allowance they would have received in the case of sickness. Even if these women are not insured against sickness, an equivalent of such an allowance is to be established in national law. The article seems to suggest that Member States need to (at least) have a public insurance system that will function as a back-up for failing private insurances. The somewhat complicated wording of the article is almost identical to that of the article regulating the maternity allowances of the self-employed (Article 11 of Directive 92/85/EEC). The explicit reference to this article in sub. 1 and the similar obligations suggests that, in creating this article, the Commission had the intention of providing the self-employed with a similar protection as the employed.

At first glance, the proposal seemingly has the potential to improve the position of self-employed women. Apart from the apparent flaws of the revised directive, its material provisions are generally more obliging and are an improvement on the current provisions of Directive 86/613/EEC, especially in the case of maternity facilities. Referring back to the goals of the Lisbon Strategy, the directive could thus undeniably contribute to a higher participation rate of self-employed women. The extent of this contribution could be even greater if the provisions were to be amended according to some of the suggestions made. That being said, I emphasize that the text of the proposal is by no means final and is yet to be discussed by the European Parliament and the Member States during the legislative process. Its adoption is dependent on whether agreement can be reached on the potentially sensitive subjects of the proposal. Besides the fact that this process could take quite some time, the consequence of the discussion could be that the proposal will be substantially amended. It is not inconceivable that some of the provisions will prove to be a bridge too far for some Member States, especially those that at the moment have facilities for the self-employed that will need to be substantially adapted in light of this new directive.

Human Dignity and European Equality Law after *Coleman*[*]

Christopher McCrudden

Introduction

In his opinion in *Coleman* v *Law*,[1] Advocate General Maduro drew frequently on the concept of 'human dignity' to support his interpretation of European anti-discrimination law.[2] The way he draws on human dignity is worth recalling. The reasoning goes like this: The EC anti-discrimination directives are based on Article 13 EC. Both the directives and Article 13 itself are expressions of commitment to the principle of 'equal treatment'; Article 13 and the directives must be interpreted against that background. Equal treatment and non-discrimination are fundamental principles of Community law. 'In order to determine what equality requires in any given case it is useful to recall the values underlying equality. These are human dignity and personal autonomy.'[3] The Community adopted the anti-discrimination directives in order to protect, in the field of employment and occupation, 'people belonging to suspect classifications and to ensure that their dignity and autonomy is not compromised (…) by (…) discrimination.' In this article, I would like to comment briefly on this use of 'human dignity' in the interpretation of EC anti-discrimination directives, and to sound a note of caution.

Human dignity in *Coleman*

What does 'human dignity' mean, and why is it important for interpreting EC anti-discrimination law? For Maduro AG, 'human dignity entails the recognition of the equal worth of every individual' and 'individuals and political institutions must not act in a way that denies the intrinsic importance of every human life.' Autonomy is also relevant to the interpretation of equality but it is a different value. Autonomy 'dictates that individuals should be able to design and conduct the course of their lives through a succession of choices among different valuable options.' The two values are importantly linked, however. 'When we act as autonomous agents making decisions about the way we want our life to develop our "personal integrity and sense of dignity and self-respect are made concrete".'[4] In this brief comment, I will focus only on Advocate General Maduro's use of human dignity, and leave to one side his use of 'autonomy'.

In two important paragraphs, Maduro AG explains the role that dignity plays in his interpretation of the directives:

> '10. The aim of Article 13 EC and of the Directive is to protect the dignity and autonomy of persons belonging to those suspect classifications. The most obvious way in which such a person's dignity and autonomy may be affected is when one is directly targeted because one has a suspect characteristic. Treating someone

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[*] This article is extracted from a much longer article: C. McCrudden 'Human Dignity in Human Rights Interpretation', *European Journal of International Law* 19 (2008).

1 Case C-303/06, 31 January 2008.

2 Paras. 8-10, 12-13, 15, 22.

3 Para. 8.

4 Para. 9, quoting Joseph Raz, a legal philosopher.

less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being human. Recognising the equal worth of every human being means that we should be blind to considerations of this type when we impose a burden on someone or deprive someone of a benefit. Put differently, these are characteristics which should not play any role in any assessment as to whether it is right or not to treat someone less favourably.'

It is at this point that the facts of the *Coleman* case itself become important. Ms Coleman was formerly employed as a legal secretary. She gave birth to a son who suffered from apnoeic attacks and congenital laryngomalacia and bronchomalacia. Her son's condition required specialized care. Ms Coleman was his primary carer. She subsequently accepted voluntary redundancy from her employment. She then began legal proceedings, alleging *inter alia* that she had been treated less favourably than other employees because she was the primary carer of a disabled child. She based her application on national law, in particular those provisions designed to transpose Directive 2000/78, in order to plead discrimination against her former employer. The issue before the Court of Justice was whether Directive 2000/78 regarded as discrimination less favourable treatment connected with her son's disability, rather than her own disability. The importance of dignity, for Maduro AG, was that it went beyond the protection of individuals targeted directly by those discriminating. It also protected those targeted because of the characteristics of those associated with them in some way:

'12. (…) One way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong to the group. A robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as they, too, affect the persons belonging to suspect classifications.'

'13. Indeed, the dignity of the person with a suspect characteristic is affected as much by being directly discriminated against as it is by seeing someone else suffer discrimination merely by virtue of being associated with him. In this way, the person who is the immediate victim of discrimination not only suffers a wrong himself, but also becomes the means through which the dignity of the person belonging to a suspect classification is undermined.'

Although the ECJ's judgment in *Coleman* does not take up the Advocate General's invitation to adopt human dignity as a central underpinning of the directive (the concept is not mentioned in the body of the Court's judgement), I believe that Advocate General Maduro's use of dignity is potentially of exceptional interest and importance.

Human dignity in other ECJ cases

To some extent, the use of human dignity by the ECJ is not new. Human dignity has been incorporated judicially as a general principle of European Community law, deriving from the constitutional traditions common the Member States. Advocate General Jacobs stated in 1993: 'the constitutional traditions of the Member States in general allow for the conclusion that there exists a principle according to which the State

must respect not only the individual's physical well-being, but also his dignity, moral integrity and sense of personal identity.'[5] In a second case, interpreting the Community Directive prohibiting sex discrimination in employment, in which it was held that the directive prohibited a dismissal from employment on the basis of that person's transsexuality, the Court stated that 'to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.'[6] In *Omega*, the Court held that 'the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law.'[7] The judiciary in several jurisdictions enthusiastically further the incorporation and use of dignity in domestic interpretations of European equality law.[8]

Human dignity in the equality jurisprudence of international courts

Nor is the use of dignity as an important underpinning of equality confined to EC law. The principle of human dignity is often drawn on as one of several values that anti-discrimination norms further. Judge Tanaka and Vice-President Ammoun drew on dignity in the *South West Africa* case to explain the underlying wrong that apartheid occasioned against international law.[9] Some have argued, indeed, that the concept of dignity is the most appropriate normative basis for viewing anti-discrimination law generally. Denise Réaume, a prominent Canadian scholar, argues that unless equality or a prohibition on discrimination means that everyone must be treated the same all of the time, judges need some basis for deciding which distinctions are permissible and which are not.[10] A conception of dignity can provide that explanation. So too, the Inter-American Court of Human Rights has held that the 'notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual.'[11] Because of this, the Court explained, 'it follows that not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity.'[12] Accordingly, no discrimination existed if the difference in treatment had a legitimate purpose.[13]

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5 Case 168/91 *Christos Konstantinidis* [1993] ECR I-1191, Para. 39 of the AG's Opinion.

6 Case 13/94 *P* v *S and Cornwall County Council* [1996] ECR I-2143, Para. 22.

7 Case C-36/02 *Omega* [2004] ECR I-9609, Para. 34. See also Case C-377/98 *Netherlands* v *European Parliament and Council* [2001] ECR I-7079.

8 See, e.g. G. Moon and R. Allen 'Dignity Discourse in Discrimination Law: A Better Route to Equality', 6 *European Human Rights Law Review* (2006), 610 at 626, referring to the 'exponential growth in dignity discourse in the courts of England and Wales.'

9 *South West Africa Cases (Ethiopia* v *South Africa; Liberia* v *South Africa)* (Second Phase) Judgment of 18 July 1966 [1966] ICJ Rep 6, at 308, 312 (Judge Tanaka dissenting); Separate Opinion of Vice-President Ammoun (translation) in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion of 21 June 1971 [1971] ICJ Rep 16, at 77.

10 D.G. Réaume 'Discrimination and Dignity', (2003) 63 *Louisiana Law Review*, 645.

11 Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of January 19, 1986 (*Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica requested by the Government of Costa Rica*), Paras. 55-56.

12 Ibid.

13 Ibid.

Dignity and European Court of Human Rights equality jurisprudence

There has been a particular increase in the use of dignity arguments in the judicial interpretation of equality and anti-discrimination requirements in several European human rights jurisdictions,[14] not least in the context of the interpretation of Article 3 and Article 14 ECHR by the European Court of Human Rights (ECtHR) as applied to racial discrimination. The European Commission of Human Rights in *East African Asians* v *United Kingdom*, held that 'publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity,'[15] a decision applied in *Moldovan* v *Romania*,[16] where the ECtHR upheld the claim of a number of Roma that their rights had been breached under Article 14. In addition to providing a theoretical underpinning to constitutional and statutory equality guarantees, dignity has been drawn on heavily as a theoretical underpinning by judges in interpreting prohibitions against sexual harassment, both in Europe and the United States.[17]

Dignity in South African and Canadian equality jurisprudence

Dignity has also come to play an increasingly important foundational role in the judicial interpretation of the meaning of constitutional anti-discrimination prohibitions in Canada[18] and South Africa.[19] Indeed, the purpose of the right to equality in the Canadian Charter, according to the Supreme Court of Canada, is to: '(...) prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and deserving of concern, respect and consideration.'[20] In *Law* v *Canada (Minister of Employment and Immigration)*,[21] Iacobucci J, writing for a unanimous court, described the importance of human dignity:

> 'Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of dif-

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14 Equality and non-discrimination law encompass a wide variety of different measures, of course. In the context of this discussion, I will confine myself to discussing the role that dignity plays in the context of what has been termed 'status equality', (i.e. equality between different groups defined by their status, such as race, gender, etc) as it is in that context that the role of dignity is most prevalent.

15 (1973) 3 EHRR 76, 86, Para. 207.

16 Application Nos 41138/98 and 64320/01, 12 July 2005.

17 See R. Ehrenreich 'Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment', 88 *Georgetown Law Journal* 1 (1999).

18 E. Mendes 'Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity', 12 *National Journal of Constitutional Law* 3 (2000).

19 G. Huscroft 'Discrimination, Dignity and the Limits of Equality', 9 *Otago Law Review* 697 (2000), A. Chaskalson 'Human Dignity as a Foundational Value of Our Constitutional Order', 16 *South African Journal of Human Rights* 193 (2000), A. Sachs 'Equality Jurisprudence: The Origin of the Doctrine in the South African Constitutional Court', 5 *Review of Constitutional Studies* 76 (1999), E. Grant, 'Dignity and Equality', (2007) *Human Rights Law Review* 299.

20 *Law* v *Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, Para. 51.

21 [1999] 1 SCR 497, at p. 530.

ferent individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.'[22]

Equally, the South African Constitutional Court's interpretation of the Constitution's equality guarantee has relied on a dignity-based approach, beginning with *President of the Republic of South Africa* v *Hugo*.[23] Justice Goldstone has stated that the prohibition of discrimination was intended to contribute to 'the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership in particular groups.'[24]

There has been a significant relationship in several jurisdictions between dignity and the granting of rights to gay, lesbians, and trans-gendered individuals, beginning with claims that the criminalization of sodomy was contrary to human rights principles, and continuing most recently in the context of claims to permit marriage between same-sex partners. In the 1998 South African case of *National Coalition for Gay and Lesbian Equality* v *Minister of Justice*,[25] Ackermann J stressed the extent to which the common-law offence of sodomy was an infringement of the rights to dignity, as well as equality:

'There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution. (…) The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfillment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.'[26]

Dignity has also been drawn on in order to support decisions that declared legal restrictions on marriage between same-sex couples to be unconstitutional. In *Halpern* v *Attorney General*,[27] the Court of Appeal for Ontario recognized the relationship between dignity and access to the institution of marriage:

'Marriage is, without dispute, one of the most significant forms of personal relationships. (…) This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.'[28]

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22 [1999] 1 SCR at Para. 53.
23 1997 (4) SA 1 (1997).
24 At Para. 41. For discussions of the South African approach, in addition to Chaskalson, supra, and Sachs, supra, see L.W.H. Ackermann, *Equality and the South African Constitution: the Role of Dignity* Bram Fischer Lecture, Oxford May 2000.
25 6 BHRC 127 (CC, 1998), 1998 (12) BCLR 1517 (CC).
26 Paras 28, 36.
27 2003 65 O.R. (3d) 161 Court of Appeal for Ontario.
28 2003 65 O.R. (3d) at Para. 5.

Exclusion from marriage of same sex couples 'perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.'[29] Similarly, in the South African case of *Minister of Home Affairs* v *Fourie*,[30] Sachs J argued:

> 'there can only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair discrimination. Clearly, they are, and in no small degree. The effect has been wounding and the scars are evident in our society to this day. By both drawing on and reinforcing discriminatory social practices, the law in the past failed to secure for same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples.'[31]

Sounding a note of caution

However, although its use is widespread in the judicial interpretation of anti-discrimination and equality requirements, it is not uncontroversial, and this is reason for sounding a note of caution in its use by Maduro AG. The use of dignity is proving to be controversial generally, but dignity has come to be seen as perhaps particularly controversial in the equality context. Several commentators have argued that in its use of dignity, the Canadian Supreme Court has effectively incorporated an additional barrier that applicants must surmount; that the individual or the group with which the victim identifies or is identified has been subject to discrimination only if it is of such a type that the court is willing to see as engaging dignity. Dignity has enabled courts to build in limits to the reach and depth of the equality principle, limiting both the group of 'victims' who may legitimately claim, and limiting the distributive justice implications of the equality principle.

Although this approach has been the subject of much supportive comment,[32] attempts to establish the utility of dignity as a foundational norm for equality have also provoked a wave of criticism, particularly in Canada.[33] Grabham argues that the Canadian approach of basing equality on dignity limits the opportunity to base equality arguments on distributive justice. For some the divorce of anti-discrimination law from distributive justice is desirable. Indeed, dignity is regarded by some as desirable precisely because it provides a alternative rationale for equality that is not based on distributive justice.[34]

For others, however, this attempt to divorce equality from distributive justice is worrying. Robert Post argues that modern American anti-discrimination law should not be conceived as protecting the dignity of individuals but, rather, as attempting to transform social practices that define and sustain potentially oppressive categories such as race or gender.[35] In light of these criticisms of the use of dignity in the equality context, it is interesting that the Canadian Supreme Court (long the main proponent of the use of dignity as foundational to equality) has in its most recent equality

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29 2003 65 O.R. (3d), at 107.
30 2006 (3) BCLR 355 (Constitutional Court)
31 Para. 78.
32 M. Mendes 'Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity', 12(1) *Nat'l J Constitutional L* (2000), at 3.
33 R Gibbins 'How in the World Can You Contest Equal Human Dignity?', 12 *National Journal of Constitutional Law* (2000) 25.
34 D.G. Réaume 'Discrimination and Dignity' (2003) 63 *Louisiana Law Review* 645, at 650.
35 R. Post 'Prejudicial Appearances: The Logic of American Antidiscrimination Law', 88(1) *California Law Review* 1 (2000).

jurisprudence begun to move sharply away from dignity language. In its decision in *Kapp*, the Court admitted that:

> 'several difficulties have arisen from the attempt (…) to employ human dignity *as a legal test*. (…) [A]s critics have pointed out, human dignity is an abstract and subjective notion that (…) cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.'[36]

In particular, perhaps, the introduction of dignity into the interpretation of the EU equality directives brings an additional fear. If what constitutes dignity is effectively left to the interpretation of domestic courts, the legal test will become so contextualized as to be useless. Few courts acknowledge that the conception of human dignity that they apply is different from that applied in other countries. Indeed, to do so would appear to undermine one of the legitimizing functions of human dignity. A possibly significant breach in the dyke has now appeared, however, and from an important quarter.

In the *Omega* case, the European Court of Justice seems to have accepted that human dignity has potentially significantly different meanings from country to country. The German authorities had prohibited Omega, a commercial enterprise, from operating a laserdrome where players try to 'kill' other players by firing a laser beam at a sensory tag placed on their jackets. The company argued that because the game was lawful in other Member States, Community law required that it be allowed in Germany on the basis that Community law protected the freedom to provide services in the Community. The German Government argued that the prohibition was justified on the same grounds that peepshows and dwarf throwing were prohibited, namely on grounds of human dignity. The company argued in rebuttal that a restrictive measure based on the protection of fundamental rights must be based on a *common* conception of those fundamental rights under European Community law across the Community. The ECJ disagreed; it was not indispensable for the restrictive measure adopted by a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or interest is to be protected.[37] By implication, the German approach to dignity was not a conception of dignity common to the Member States.[38]

Implications and issues for gender equality

Thus far, my comments have concerned the use of dignity arguments in anti-discrimination law generally. Are there particular implications in using dignity in the more particular context of *gender* equality? My guess is that there are both reasons to support the use of dignity in that context, and reasons against it. I am primarily concerned in this article to stimulate a debate about its use than I am to condemn it, at least for the moment. But there are reasons to be concerned that adopting the concept of human dignity as a central organizing principle of EC gender equality law, is to

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[36] *R.* v *Kapp*, 2008 SCC 41, at Paras 22–23 (McLachlin CJ and Abella J (Binnie, LeBel, Deschamps, Fish, Charron, and Rothstein JJ concurring)).

[37] *Omega*, supra, Paras 34-37. For commentary on the case, see M.K. Bulterman and H.R. Kranenborg 'Case Comment', 31(1) *European Law Review* 93 (2006); T. Ackermann, 42 *Common Market Law Review* 1107 (2005).

[38] See also Case C-244/06 *Dynamic Medien* v *Avides Media* [2008] ECR I-0000.

introduce a concept that is at one and the same time subject to significant judicial interpretation, subjective to a high degree, and prone to widely differing interpretations from country to country. Might this not be seen as embarking on a highly risky enterprise?

Unification (or not) of Equality Bodies and Legislation

Kevät Nousiainen

This article discusses the current tendency of unification from the point of view of gender equality law and policies. The first part introduces EU law requirements concerning national equality bodies and looks at European-level equality bodies. The legal standard set for national bodies is compared with international human rights bodies and specialised equality bodies. Two traditions of specialised equality bodies are then discussed: the British and the Nordic; both traditions have introduced proactive measures and are heading for a unification of equality bodies and harmonized legislation. Finally, arguments for and against unification are discussed especially taking into account the need to address multiple discrimination and upholding the tradition of proactive gender equality policies.

Requirements set by EU law for national equality bodies

For decades, European gender equality law made no demands on the Member States to establish equality bodies. The Race Equality Directive of 2000[1] was the first EU non-discrimination directive to do so. A similar requirement was added as to gender equality when the Equal Treatment Directive was amended in 2002.[2] So far, the Member States are not required to establish an equality body to support equal treatment on the other grounds mentioned under Article 13 EC, although the Employment Framework Directive[3] does obligate the Member States to combat discrimination on the basis of disability, age, religion and sexual orientation in the area of employment.

The provisions that require the Member States to establish a body or bodies for gender and racial equality are very similar. Article 11 of the Equality Directive on Goods and Services[4] repeats what is said under Article 8 a of the Equal Treatment Directive, and corresponds with the requirements set under Article 13 of the Race Equality Directive. All these provisions set a similar minimum standard for equality bodies: that they have the competencies to give assistance to victims of discrimination independently, to conduct independent surveys and studies, and to publish reports and recommendations independently from national government and administration. The Recast Directive[5] repeats these minimum requirements, but adds a fourth. Under Article 20(2) of the Recast Directive, gender equality bodies are to have the competence to exchange information with corresponding European bodies.

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1 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, p. 22.

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

3 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

4 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, p. 37.

5 Directive 2006/54/EC of the European Parliament and of the Council 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, p.23.

The directives so far require that bodies are set up for gender and racial equality, and seem to assume that these bodies are separate from each other. There is no reference as to how or which body or bodies should handle cases and issues that involve several prohibited grounds (multiple discrimination). Several EU-level policy and soft law documents seem to prefer 'single equality bodies' and unified legislation that would cover all grounds of discrimination. The Green Paper on equality in the enlarged Europe[6] noted that some Member States had banned discrimination on a wider scope than required, and that several of them had 'put in place a single legal framework covering sex discrimination in addition to the grounds set out in the two EC Directives' (that is, the Race Equality Directive and the Employment Framework Directive). Unification was motivated by the need to address multiple discrimination. The European Commission report on tackling multiple discrimination[7] presented, in 2007, recommendations on non-discrimination law and equality bodies, and envisioned that such law should cover age, disability, religion or belief and sexual orientation with a scope that would be similar to that of race and ethnic origin. In July 2008 the Commission presented a draft directive to that effect. The draft directive contains a provision on a 'body or bodies' that the Member States shall designate for the promotion of equal treatment concerning all discrimination grounds under the Employment Framework Directive. The draft directive contains no provisions on multiple discrimination, however.

While Member States are required to establish equality bodies, European-level bodies have also been set up. The newly established European Institute for Gender Equality (GEI), based in Vilnius, is to promote gender equality including mainstreaming in Community and resulting national policies, as well as to combat discrimination based on sex. The Institute will collect and analyse information on gender equality.[8] Gender equality mainstreaming is a Community task under Articles 2 and 3(2) of the EC Treaty, while equality mainstreaming as to the other prohibited grounds of discrimination has neither a similar legal basis, nor much practical application so far.[9] European law allows positive action for promoting equality, but does not require that Member States introduce it. Yet, the tasks of the GEI concentrate on equality policies, rather than combating discrimination.

The establishment of the GEI was preceded by a debate in the European Parliament on whether the Institute should be a part of the European Union Agency for Fundamental Rights (FRA) in Vienna, which is to provide both EU and Member States assistance and expertise relating to monitoring fundamental rights.[10] The FRA in practice continues the work of the former European Monitoring Centre on Racism and Xenophobia. The FRA shall be the body that gathers information on multiple discrimination, also where gender discrimination is involved. While it is to work on all discrimination grounds and any combination of those grounds (multiple discrimination), the main emphasis in the Agency's work seems to be on ethnic discrimination. The annual report of the Agency contains information on the (in)effectiveness of equality bodies, but from the point of view of ethnic discrimination only.[11]

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6 Green Paper on equality and non-discrimination in an enlarged EU, COM(2004) 379 final.

7 *Tackling Multiple discrimination. Practices, policies and laws*. European Commission 2007.

8 Regulation (EC) No. 1922/2006 of the European Parliament and of the Council on establishing a European Institute for Gender Equality.

9 J. Shaw 'Mainstreaming Equality and Diversity in the European Union', *Current Legal Problems* 58 (2005), pp. 255-312.

10 Article 2, Council Regulation 168/2007.

11 European Union Agency for Fundamental Rights Annual Report 2008.

Two *genres* of equality bodies involved in the EU requirements

The equality directives mention two types of pre-existing bodies to which Member States may annex the required bodies: human rights bodies, and bodies specialising in promoting equality. On the EU level, the GEI resembles an equality body, whereas the FRA is a typical human rights body.

The EU minimum requirements for national equality bodies were first defined in the context of race discrimination. Unsurprisingly, they have a close affinity to the guidelines set for human rights bodies and bodies specialising combating racism. The Council of Europe's Commission against Racism and Intolerance (ECRI)[12] and the UN guidelines for human rights institutions known as the Paris Principles are important here. The standard set in the Paris Principles by the United Nations Commissioner for Human Rights in 1992[13] requires that human rights bodies are responsible for presenting opinions, recommendations and reports. The bodies should also disseminate information and carry out research. Reporting to the UN bodies and cooperating with such bodies is an important aspect of the standard competence. The UN Committee on the Elimination of Racial Discrimination (CERD) recommends the use of the Paris Principles, and so does the ECRI. The UN Convention on the Rights of Persons with Disabilities requires national implementation and monitoring by establishing 'one or more independent mechanisms (…) to promote, protect and monitor implementation'.[14] The ECRI recommendation and the Paris Principles stress the independence of the bodies themselves and their activities. On the basis of the preconditions listed in the Paris Principles and the ECRI recommendation, Rikki Holtmaat suggests that an equality body shall be able to act autonomously, have the appearance of neutrality and objectivity, and have sufficient competence and authority.[15]

Independence, especially independence from the government, is the key feature of bodies whose task it is to combat maladministration and wrongful state practice. The European Ombudsman is a concrete example of a body of that type. The Ombudsman investigates cases where an institution fails to act in accordance with the law, fails to respect principles of good administration, or violates human rights.[16]

Anti-discrimination is a complex matter, however. It involves promoting human rights, but it is also about achieving social policy goals and objectives.[17] The prevalence of features that are typical of the legal *genre* of human rights monitoring among the competencies that the national equality bodies are to have seems to downplay features which are typical of equality bodies entrusted with social policy aims and the proactive promotion of equality. Equality bodies may concentrate on anti-discrimination or aim to promote substantive equality.

While independence from government is important in monitoring administrative or state practice, it is less valuable when pushing positive action or mainstreaming. A positive public duty to promote equality by equality planning, or to promote private sector equality planning by employers or educational institutions, are activities which

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12 General Policy Recommendation No. 2 of the ECRI.

13 Office of the United Nations High Commissioner for Human Rights, 'Principles relating to the status and functioning of national institutions for protection and promotion of human rights', March 1992 (Resolution 1992/54).

14 Article 33, UN Convention on the Rights of Persons with Disabilities, 2006.

15 R. Holtmaat *Catalysts for Change? Equality bodies according to Directive 2000/43/EC – existence, independence and effectiveness* European Communities 2007, p. 33.

16 The European Ombudsman Statute, http://ombudsman.europa.eu/lbasis/en/statute.htm

17 J. Cormack and J. Niessen 'The Independence of Equality Bodies', *European Anti-Discrimination Law Review* 2005, p. 23.

can hardly be altogether disconnected from government policies. The tasks of the GEI at the European level exemplify an orientation to proactive measures and equality mainstreaming. The tradition of 'state feminism' that was the hallmark of Nordic gender equality policies traditionally relies on cooperation between government agencies, equality experts and feminist organisations. Such equality politics rely on a somewhat different rationality from the one required from an 'independent outsider' perspective that is typical of well-functioning human rights bodies.

The foremost task of the national equality bodies, in the light of the competencies these bodies are to have under EU law, is to help victims of discrimination. Under EU law, the remedies available to the victims of discrimination must include access to judicial procedures involving a route to sanction and compensation. Access to justice via the normal judicial process is often cumbersome, however, and quasi-judicial powers held by equality bodies can alleviate the burden of the victim. Assisting victims of discrimination may take many forms. Often assistance is only of the consultative type. Some of the Member State equality bodies have the competence to bring cases to court on their own initiative, or at least to assist the victim. Western legal systems have become more attuned to conciliation procedures during the last few decades. Equality bodies may have been given powers to conciliate between the parties in discrimination cases.

Assistance contains functions that set almost contradictory demands on how the body should be organised. There is a wide variety in the manner in which victims of racial discrimination were assisted in the Member States,[18] a variety that also brings to light underlying functional contradictions. If the function of a body is understood in line with the duties of a traditional Ombudsman type, there is strict emphasis on impartiality, neutrality and objectivity. Where impartiality is stressed, equality bodies may feel it appropriate to assist not only alleged victims of discrimination, but also alleged perpetrators. Assistance is here preconditioned by the necessity of appearing neutral. Where an equality body has quasi-judicial powers, it necessarily has to operate with strict impartiality. On the other hand, bodies may be preconditioned to helping the victims in a concrete manner, taking their part in negotiations and in court. In the latter case, the equality body's orientation is as a partisan actor rather than an umpire.[19] The different and even contradictory functions involved in 'assistance' may also be divided among several national bodies, the partisan agency helping the victim and the umpire making the decisions.

The EU minimum standards for national bodies have been considered vague to the extent that it is not even possible to make a legal assessment of Member State compliance therewith. There is no yardstick for evaluating whether the national bodies are effective in their operation, nor whether they exercise their competencies in the required manner.[20] The requirements may be met by setting up very small national equality agencies, with limited resources to tackle any of their functions.[21]

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18 Holtmaat, op. cit. note 15, pp. 32, 50-51.

19 Cormack and Niessen, op. cit. note 17, p. 26.

20 Holtmaat, op. cit. note 15, pp. 55-57. Holtmaat's study concentrates on bodies that implement the Race Discrimination Directive, but, just like gender equality bodies, the requirements are similarly vague.

21 G. Moon 'Enforcement Bodies' in: D. Schiek, L. Waddington & M. Bell *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* Oxford and Portland, Hart Publishing 2007, p. 890.

Two traditions evolving towards single bodies: British and Nordic equality bodies

Many equality bodies existed even before EU equality law required Member States to set up such bodies. In some Member States, no specific equality bodies existed, and in some others, several public and private actors were involved in anti-discrimination and equality politics. Where no bodies so far existed, Member States seem to have opted for a single body to monitor several discrimination grounds. For example, in France the legal and organisational basis of anti-discrimination was even described as the 're-enforcement of the social contract' that an independent new equality body was to embody.[22]

In countries with an established gender equality body and policy tradition, the unification of bodies is being debated by actors – authorities and NGOs – who risk losing their former positions and achievements. Where promoting equality by means of positive action and equality mainstreaming are legally proscribed equality policies, unification concerns a wide set of legal and political issues. The British and Nordic traditions may serve as examples.

In the 1970s, European anti-discrimination legislation was often inspired by US legislation, and that is especially true of the UK. Britain introduced the Equal Pay Act of 1970 already before joining the European Communities, and enacted the Sex Discrimination Act of 1975 and the Race Relations Act of 1976 soon after. Both latter Acts had a scope that extended to employment, education as well as certain services.[23] Two bodies were established to oversee implementation: the Equal Opportunities Commission and the Commission for Racial Equality. Both the legal basis and the powers of the UK bodies were mainly limited to anti-discrimination. After the UN Beijing conference, gender equality mainstreaming was established under a new unit. A growing national emphasis on the need to consider several grounds of discrimination in an integrated manner, together with the need to implement the EU equality directives, led to a review aiming at a single body to replace the three existing bodies: the Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission.[24] The new Equality and Human Rights Commission was launched in 2007.

The (gender) Equal Opportunities Commission supported the new single body subject to the condition that the existing functions and powers of the former bodies were retained.[25] The emphasis on tackling multiple discrimination was welcomed, although the Commission emphasised that a legislative reform was a prerequisite for that task. Also promoting equality and facilitating mainstreaming should be made more prominent, according to the Equal Opportunities Commission. For similar reasons, many academic equality experts interested in multiple discrimination were in principle positive concerning the single equality body.[26] At the moment, the UK Gov-

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22 http://lesrapports.ladocumentationfrancaise.fr/BRP/044000074/0000.pdf, p. 86.

23 S. Fredman *The Future of Equality in Britain* Manchester. Equal Opportunities Commission 2003.

24 *Fairness and Freedom: Final Report of the Equalities Review*, 2007. http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/equality_review.pdf

25 Equal Opportunities Commission *Towards Equality and Diversity – Making it Happen: A Response from the EOC* http://83.137.212.42/sitearchive/eoc/PDF/making_it_happen.pdf, accessed 22 September 2008.

26 For example, CentreLGS, Arts and Humanities Research Council Centre for Law, Gender and Sexuality at the University of Kent, found at http://www.kent.ac.uk/clgs/centre-files/consultation_responses.html, accessed 22 September 2008.

ernment plans a unification of legislation in the form of an Equality Bill covering race, gender, disability, age, sexual orientation, and religion or belief. A positive duty to promote equality in the public sector on all these grounds is to be introduced.

The UK legislation has been an inspiration for many other European states. For example, the German *Allgemeines Gleichbehandlungsgesetz* (AGG),[27] which covers all discrimination grounds under Article 13 EC, contains legal provisions which have British provisions as guidelines. The AGG also contains provisions on the unified Federal Anti-discrimination Body (*Antidiskriminierungsstelle*).[28]

The Nordic tradition on gender equality law also started in the 1970s, and the first gender equality bodies were established at that time. There were significant differences compared with the solutions adopted in the UK. The Nordic legislation was inspired by international human rights developments. The UN CEDAW Convention[29] has a general scope. Similarly, the Norwegian Act relating to Gender Equality[30] had a general scope, covering even private and family life. No sanctions were available for discrimination that took place in the private sphere, however.[31] The Finnish Act on Equality between Women and Men of 1986[32] was also given a general scope encompassing all areas of life. The Swedish gender equality law had a scope limited to labour law even after it had been amended in 1991.[33]

In Finland, Norway and Sweden, none of which had joined the European Communities at that time, gender equality measures were from the very beginning attuned to proactive equality policies rather than anti-discrimination. Positive duties to promote gender equality held an important place in the Finnish Act on Equality. Authorities, employers and educational institutions were obligated to carry out equality planning.[34] A prototype for gender mainstreaming was introduced in the form of 'functional equality planning' by the authorities in each field. The Icelandic Act (1976) and the Danish legislation (the latter based on EC directives on equal pay and equal treatment) were more limited in scope and positive duties.

In Finland and Sweden, Parliamentary Ombudsmen have for a long time supervised public authorities, combated maladministration and monitored legality – the tradition was an inspiration when the European Ombudsman was set up in 1992. New, rather different, Ombuds with the task of protecting groups of people such as consumers, children or patients, appeared in the welfare state context. Such new Ombuds were expected to act in a partisan manner towards the protected group and they were given a proactive role. The Norwegian Gender Equality Ombud was modelled on those premises, its task being to advise, handle complaints and promote equality in 1978. The Swedish Ombudsman for Equal Opportunities between Men and Women was established in 1980, and the Finnish Equality Ombudsman in 1986. Quasi-judicial tasks of the equality ombudsmen were often delegated to other equality bodies. For example, in Finland, the Equality Ombudsman has mainly consultative duties, but

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27 *Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung. Vom 14 August 2006. BGBI.I. 1897 geändert durch gesetz vom 2. Dezember 2006, BGVI.I.2742.*

28 D. Schiek (ed.) *Allgemeines Gleichbehandlungsgesetz (AGG). Ein Kommentar aus europäischer Perspektive* Munich, Sellier 2007.

29 United Nations International Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979.

30 *Lov om likestilling mellom kjonnene*, 9.6.1978 No. 45.

31 T. Stang Dahl, K. Graver, A. Hellum & A. Robberstad *Juss og Juks* Oslo, Pax Forlag 1975.

32 Act on Equality between Women and Men, 609/1986.

33 The Gender Equality Act 1979:1118 was replaced by the Gender Equality Act 1991:433.

34 N. Bruun & P.K. Koskinen *Tasa-arvolaki* Vammala, Lakimiesliiton Kustannus 1986.

s/he may assist a victim of discrimination in the courts. Decision-making is in the hands of the Equality Board or the ordinary courts. The Gender Equality Council promotes equality and forms a link with Parliament, while the Gender Equality Unit prepares the Government's gender equality policy. The division of tasks and competencies underscores that equality bodies have partly different roles, whereas being under one Ministry facilitates the necessary co-operation.[35]

Secondary anti-discrimination law and equality bodies concentrated merely on gender for a long period of time in all Nordic states. In Sweden the Act on Disability Discrimination,[36] the Act on Discrimination on the Ground of Sexual Orientation[37] and the Act on Discrimination covering several grounds of discrimination[38] were enacted during the last ten years. Several new equality bodies were set up, so that at present four Ombuds deal with equality issues. In Norway, the Centre for Combating Ethnic Discrimination was established in 1997 while the Gender Equality Ombud remained in charge of promoting gender equality and combating gender discrimination. In Finland, the Ombudsman for Minorities and the Discrimination Board were established as equality bodies for ethnic discrimination.

Both Norway and Sweden are in favour of a major legal unification. Equality bodies have already been unified in Norway, and a Government Bill for the unification of both acts and bodies has been presented to the Swedish Parliament.[39] A review of equality law is also underway both in Denmark and in Finland, and the emphasis has been on unification.[40]

In the 1970s, the British Equality Commissions differed considerably from the Nordic solutions, but the differences have since narrowed. Protected discrimination grounds have multiplied in the Nordic states, while mainstreaming and positive duties have been introduced in Britain. Both traditions are undergoing a major review. The mechanism leading to these reviews seems to be that when secondary anti-discrimination is extended to several grounds, the need for legal harmonisation increases. Monitoring anti-discrimination and promoting equality through only one body is then seen as effective.[41] Feminists and gender equality authorities find the political concern for multiple discrimination a compelling argument for unification.[42] The other key question is the impact of unification on proactive policies, which are often an amalgam of law and politics.

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35 *Tasa-arvoasioiden organisointi- ja sijaintityöryhmän loppumuistio, Sosiaali- ja terveysministeriön työryhmämuistioita* 1998:19.

36 *Lagen om forbud mot diskriminering I arbetslivet på grund av funktionshinder* 1999:132.

37 *Lagen om förbud mot diskriminering I arbetslivet på grund av sexuell läggning* 1999:133.

38 *Lagen om förbud mot diskriminering* 2003:307.

39 The Government Bill *Ett starkare skydd mot diskriminering*, Prop. 2007/08:95 was sent to the Swedish Parliament in March 2008.

40 R. Randorff *Multidimensional Discrimination Policies in the Nordic Countries*, Nordic Gender Institute 2008, contains updated information and country reports on the law review, http://www.nikk.uio.no/publikasjoner/Diskriminationsrapport-netudgave.pdf. For Finland, see J. Kantola and K. Nousiainen 'Pussauskoppiin? Tasa-arvo- ja yhdenvertaisuuslakien yhtenäistämisestä', *Naistutkimus/Kvinnoforskning* 2008 (2), pp. 6-20.

41 V.B. Strand 'Vern mot direkte og indirekte diskriminering etter norsk rett – et ensartet vern?', *Lov og Rett: Norsk Juridik Tidsskrift* 2007, Vol 46 (3), pp. 131-153.

42 H. Skjeie and M. Teigen *Menn i mellom: Mannsdominans og likestillingspolitikk* Oslo, Gyldendal 2003.

Single bodies and unified equality laws: good or bad news for gender equality?

Equality directives do not require that equality laws be unified – the choice of the legislative means used in transposing directives belongs to the Member States. The transposition of the equality directives has necessitated a review of the complex national legislation in many Member States, however, and encouraged convergence in the form of single equality bodies. This review has been motivated by very similar claims in several European states. Simpler, more comprehensible laws are seen to be more effective. A single body with competence to combat all forms of prohibited discrimination is believed to have more authority and expertise. It is also assumed that resources available for anti-discrimination are better utilised by a single body than several bodies. Taking into account that there is no European standard for what such resources should be and that they vary to a great extent from country to country, it is difficult to generalise about the effects of pooling resources.

It has been feared that setting up single equality bodies would introduce a zero-sum game where different prohibited grounds fight for resources, and where gender equality will be the loser. The European Women's Lobby reacted to the Green Paper with some scepticism concerning the single legal framework approach, and feared that it might lead to a decrease in resources allocated to gender equality.[43] Similar concerns were expressed by, for example, the CEDAW Committee in the latest report on Finland.[44] In its conclusions, the Committee was concerned that the equality review might lead to a loss of visibility concerning the issue of discrimination against women, and a decrease in the resources available for work on gender equality.

Gender equality bodies and women's organisations have reacted positively to extending the material scope of anti-discrimination law concerning other grounds, especially because they have recognised the need to address multiple or intersectional discrimination. Researchers have warned about the dangers involved, such as that different disadvantaged groups may be set against each other.[45] Two prerequisites for a functioning protection against multiple discrimination have been pointed out: legal harmonization and a definition of discrimination that does not focus on a comparator.[46]

At the moment, the various grounds of discrimination have varying material scope under European law, and also in many national jurisdictions. Under these circumstances, it may occur that a remedy is only available for one of the grounds involved even where several grounds together result in detrimental treatment. Where several grounds are intertwined, it is often impossible to find a comparator, or there are several possible comparators from which to choose – often to the detriment of the person claiming discrimination. Reviews of equality laws have brought about a demand that the existing hierarchies between different prohibited grounds be removed. For example, the Finnish Non-Discrimination Act[47] in principle protects an open-ended list of grounds. In practice, the protection against ethnic discrimination has a

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43 L. Rolandsen Agustín 'Civil society participation in EU gender policy-making: Framing strategies and institutional constraints', *Parliamentary Affairs* 2008 61 (3), pp. 505-517.

44 http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.FIN.CO.6.pdf, at 9 and 10, accessed 26 September 2008.

45 M. Verloo 'Multiple Inequalities, Intersectionality and the European Union', *European Journal of Women's Studies* 2006 13 (3), pp. 211-228.

46 S. Fredman 'Double Trouble: Multiple Discrimination and EU Law' *European Anti-Discrimination Law Review* 2 2005, pp. 13-18.

47 Non-Discrimination Act 21/2004, http://www.finlex.fi/pdf/saadkaan/E0040021.PDF

much wider scope and access to a specialised equality body is denied to other prohibited grounds, and the law review aims at the equal treatment of grounds.

Harmonization is not easily achieved, however. Prohibited grounds cause more or less severe social problems in different societies. They are also connected to different social and legal institutions: discrimination on the ground of gender and sexual orientation, for example, is often connected to regulations on family life, whereas successful policies for decreasing discrimination on the ground of disability require adequate resources in order to be accommodated. It is not desirable to ban all differential treatment on the ground of age, and so on. Efficient equality law may require ground specific policies and provisions. It may be difficult to achieve similar protection even of the grounds recognised by EU law, let alone of a much longer list of prohibited grounds of discrimination.

It seems an easier task for national legislators to unify equality bodies than legislation. Unified bodies are often established to supervise several pieces of legislation. For example, in Norway the Anti-Discrimination Ombud Act gave the new body the competence to monitor seven separate acts in accordance with the UN CEDAW and CERD Conventions.[48] The scope of the prohibition against discrimination on the ground of gender, ethnic discrimination, language and religion extends to all areas of life, except private and family life,[49] but the other prohibited grounds are not protected to the same extent. In the UK, legal harmonization is still underway, and in many other Member States, harmonization is not even considered.

Sweden aims at a unified act on anti-discrimination. A Government Bill proposes both a new Anti-Discrimination Act and a new body for the seven prohibited grounds (a Discrimination Ombudsman).[50] The Swedish Government had considered extending protection to a longer list of grounds, but the task proved too difficult. The aim is to simplify legislation, but the outcome is far from simple. The scope of the proposed Act covers working life, education, labour market policies, goods and services, health and social services, social security and military service. Exemptions concerning different prohibited grounds are provided under each of these specific areas. The Swedish Bill aims to allow positive discrimination only in promoting gender equality, while positive action is allowed on other grounds. Statistics that are often vital for equality planning do not exist on all grounds; moreover, it is prohibited to gather information on race, religion and similar personal characteristics. Unfortunately, the Bill even proposes that certain existing provisions on gender pay equity be levelled down.

Legislative harmonization may thus lead to more comprehensible legislation, but not necessarily to similar protection for all grounds. The same conclusion can be drawn on the basis of the German AGG. The fact that the scope of protection differs according to the ground makes it difficult to address multiple discrimination. It is also remarkable that while a law review is often seen as a necessary precondition for addressing multiple discrimination, there are very few legal provisions on how to deal with such discrimination in the new acts or proposals. Provisions on how to handle multiple discrimination cases are simply lacking.[51] The German AGG contains a pro-

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48 Section 1, *Lov om Likestillings- og diskrimineringsombudet og Likestillings- og diskriminerings-nemnda, Lov -2005-06-10-40.*

49 Section 3, Discrimination law.

50 Draft Bill 2007/08:95 *Ett starkare skydd mot diskriminering* , at http://www.regeringen.se/content/1/c6/10/06/34/47ceceac.pdf, accessed 28 September 2008.

51 Outside Europe, for example the Canadian Human Rights Act (R.S., 1985, c H-6) explicitly prohibits multiple discrimination.

vision on multiple discrimination,[52] but only to the effect that differential treatment on several grounds can only be justified if the justification covers all grounds that are involved.

The requirement of a comparator in the definition of discrimination is seen as an impediment to effective protection against intersectional discrimination, where no suitable person can be found as a comparator. National equality laws seem to follow the wording of the definition of discrimination in EU directives in this respect. Equality bodies proposed in the context of the Swedish law review that the comparator requirement be relaxed, but the Government decided to retain comparison as the main focus of the legal definition.[53] The expectation that the unification of equality bodies will automatically bring about better protection against multiple discrimination seems overly optimistic, if no material provisions are developed for that purpose. Gender equality bodies and women's organisations are motivated to promote or accept unification largely because multiple discrimination needs to be addressed, and a failure in this respect reduces the legitimacy of unification.

Setting up a single body is also motivated by a hope of better capacities for promoting equality. The European-level equality bodies have rather different profiles, the GEI being premised on equality policies and the FRA on monitoring rights. Although the task of the national bodies is to promote equal treatment according to EU law, the minimum standard for national bodies does not refer to the powers needed for proactive measures. Therefore, how positive measures are to be integrated into new unified bodies has to be resolved at the national level. In many Member States, gender equality bodies are traditionally oriented to promoting equality, which involves intricate contacts with administrative and governmental policies. Separating equality policies and rights monitoring altogether is problematic because of the intrinsic connection between monitoring rights and steering equality policies. An example: indirect discrimination, which is basically recognised by the detrimental impact of a measure or policy, and equality mainstreaming, which also involves an impact analysis, should ideally go hand in hand, so that discriminatory structures and patterns can be addressed from both sides. The present strong emphasis on monitoring rights, combined with the tendency towards the unification of equality bodies, is problematic in this respect.

Promoting equality by positive equality duties and equality mainstreaming does not lead to a similar impasse in addressing multiple grounds of disadvantage as anti-discrimination does at the moment, due to the varying scope of protection and the difficulties in finding comparators. Equality policy agendas can be targeted towards minority women and other groups that suffer from discrimination on several grounds. Therefore, it is crucial for multidimensional equality that such policy agendas become part of the European legal and political sphere. Much depends on resources: where resources are scarce, there is little to prevent such agendas from becoming battle grounds where disadvantaged groups fight for recognition.

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[52] AGG, § 4 *Unterschiedliche Behandlung wegen mehrerer Gründe*.
[53] Proposal 2007/08:95, pp. 100-101.

EU Policy and Legislative Process Update

May 2008 – October 2008

1. On 10 October 2008 the European Commission sent a proposal to the Council for a directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.
   COM(2008) 637 final
   http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0637:FIN:EN:PDF

2. On 10 October 2008 the European Commission also sent a proposal to the Council 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.
   COM(2008) 636 final
   http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0636:FIN:EN:PDF

3. On 13 August 2008 the European Commission published a final evaluation report on the Community framework strategy and Community action programme relating to the Community strategy on gender equality (2001-2006) in a Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions.
   COM(2008) 503 final
   http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0503:FIN:EN:PDF

4. The report 'Legal Approaches to Some Aspects of Reconciliation of Work, Private and Family Life in Thirty European Countries' has been published in August 2008.
   http://ec.europa.eu/employment_social/gender_equality/docs/reconciliation_final_28_august_en.pdf

5. On 2 July 2008 the European Commission adopted a proposal for a directive which provides for protection from discrimination on grounds of age, disability, sexual orientation and religion or belief beyond the workplace.
   http://ec.europa.eu/social/BlobServlet?docId=477&langId=en

European Court of Justice Case Law Update

July 2008 – October 2008

ECJ, 17 July 2008, C-543/07
Commission of the European Communities v Kingdom of Belgium* [2008] *n.y.r. (available in French and Dutch only)
Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

Facts of the case
The Kingdom of Belgium did not correctly implement Directive 2002/73/EC before the deadline for its implementation (on 5 October 2005). Belgium argued that some federal legislation was enacted after the notification by the European Commission and that some federal authorities are preparing legislation in order to implement the directive.

Judgment of the Court of Justice
The Court of Justice concluded that the implementation measures were not taken before the deadline and that Member States may not rely on their federal structure when they fail to implement Community law. By not having adopted within the prescribed period, all the laws, regulations and administrative provisions necessary to comply with Directive 2002/73/EC, the Kingdom of Belgium has failed to fulfil its obligations.

ECJ, 13 November 2008, C-46/07
Commission v Italy, n.y.r. (available in French and Italian only)
Article 141 EC

Facts of the case
According to an Italian pension scheme for civil servants established by law, women are usually entitled to a pension at the age of 60 and men at 65.

Judgment of the Court of Justice
The Court first considered whether the pension scheme fulfils the criteria developed in the case law of the Court in order to decide whether the pension scheme falls within the concept of pay as defined in Article 141. The Court recalled that considerations of social policy, of State organization, of ethics, or even the budgetary concerns which influenced or may have influenced the establishment by the national legislature of a scheme such as the one in question, cannot prevail if the pension concerns only a particular category of workers, if it is directly related to the period of service completed and if its amount is calculated by reference to the public servant's last salary. Public servants must be considered as a particular category of workers (with references to cases C-366/99, *Griesmar*, Para. 31 and C-351/00, *Niemi*, Paras 37-38). The Court considered that the pension scheme in question applies to a particular category of workers. In addition, the calculation of the pension at stake is related to periods of

service completed during the last ten years. Therefore the above-mentioned criteria apply to this scheme. The Court rejected the argument of the Italian Government that the objective of the different pensionable ages for men and women is to combat discrimination against women, because such an age requirement does not compensate for disadvantages to which women might be exposed in their professional careers. Therefore Italy has failed to fulfil its obligations on the ground of Article 141 TEC.

News from the Member States and EEA Countries

AUSTRIA – *Anna Sporrer*

Policy developments

On 28 September 2008 parliamentary elections have been held in Austria. In the run-up to the elections the lack of child-care facilities and the question of tax deductions for child rearing costs played an important role. Finally, a few days prior to the date of the election Parliament passed an act providing for an extra 13th payment of the regular child-care benefit for every child per year.

In the run-up to the elections gender equality in general has been positively addressed by the Social Democrats, the Greens and the Christian Conservatives whereas the right-wing parties such as the FPÖ and the BZÖ have not been in favour of improvements to gender equality. In particular one member of the FPÖ in Parliament has referred to the improvement of gender equality legislation which has recently been approved by Parliament (OJ I 97 and 98/2008) as 'gender mania'.

Legislative developments

Legislation on the Equal Treatment Act and anti-discrmination concerning the disabled

The amendments to the Federal Equal Treatment Act for the public sector, OJ I 97/2008, mainly entered into force by 3 July 2008 and the amendments to the equal treatment acts for the private sector, OJ I 98/2008, came into force by 1 August 2008 (the author has already reported on both laws in *European Gender Equality Law Review* 1/2008).

New legislation has also been passed in the field of anti-discrimination concerning disabled persons by amendments to the Act on the Engagement of Disabled Persons (*Behinderteneinstellungsgesetz*) as well of the Federal Act on the Equality of Disabled Persons (*Bundes-Behindertengleichstellungsgesetz*), OJ I 67/2008. Reference is made to multiple discrimination on grounds of disability with other forms of discrimination, *inter alia* gender discrimination, which are addressed by the other equal treatment acts. Such cases are to be dealt with by the settlement procedure which has been established by the Federal Act on the Equality of Disabled Persons.

Administrative law on affirmative action

As already mentioned in previous reports, due to the Federal Equal Treatment Act all federal ministries have to issue affirmative action plans for women, which have to be renewed every second year and have to formulate concrete aims and goals for the advancement of women in all fields and at all levels. Thus the action plan for the Ministry of Agriculture and Forestry, Environment and Water Management, OJ II 293/2008, for the Ministry of Traffic, Industry and Technology, OJ II 258/2008, and for the Ministry of Economy and Labour, OJ II 317/2008, have been revised and renewed due to the current situation concerning gender representation within the existing personnel.

Case law national courts

Supreme Court

The Supreme Court refused a petition by a claimant against her dismissal after she had informed her employer that she was intending to undergo in-vitro fertilisation. She had claimed maternity protection whereas the employer had claimed that there was not yet any 'pregnancy' when dismissing her. The Supreme Court had asked the ECJ for a preliminary ruling which was delivered on 28.2.2008, C-506/06. The EJC had stated that in-vitro fertilisation is not covered by maternity protection prior to the nidation of the follicles *in utero* but it may constitute discrimination on the grounds of sex. Nevertheless, the Supreme Court had to refuse the remedy because legally it was only based on maternity protection (Supreme Court 16.6.2008, 8ObA27/08s). The Supreme Court took into account the EJC judgment, but as the claimant only based her claim on maternity protection and not on discrimination on grounds of sex, it felt that it could not allow the claimant's appeal due to formal reasons.

Another Supreme Court judgment referred to EC provisions on the shifting of the burden of proof between the parties and stated that EC law does not require a reversal of the burden of proof in a technical sense. As the claimant, who had applied for a job, could not produce any evidence of discriminatory facts and the Supreme Court is not competent to revise the rules on consideration of evidence the legal remedy had to be dismissed (Supreme Court, 9.7.2008, 9ObA177/07f).

Furthermore, the Supreme Court confirmed the decision of lower instances on compensation in a case of sexual harassment when applying for a job which stated that the manager of a joint stock company has to be legally considered to be an 'employer' and therefore the company was liable for damage caused by its manager (Supreme Court 5.6.2008, 9ObA18/08z).

High Administrative Court

The High Administrative Court dismissed an application by a female civil servant who had applied for the post of a school director as it was not well founded. With reference to the EC and national provisions on the shifting of the burden of proof the High Administrative Court stated that there have been no changes to the provisions on the burden of proof by the amendment of the Federal Equal Treatment Act by OJ I 65/2004. Therefore the Federal State, as the employer, had to prove that there were other grounds than those mentioned in the law as being discriminatory whereas the claimant had to establish that there were forbidden motives by officials filling the post – even if the Federal Equal Treatment Commission has ascertained a case of discrimination on grounds of sex (High Administrative Court, 28.4.2008, 2007/12/0064).

BELGIUM – *Jean Jacqmain*

Policy developments

In *European Gender Equality Law Review* 1/2008, it had been reported that the terms of reference of the new Federal Government included a firm commitment to comply with the Gender-mainstreaming Act of 12 January 2007. Regrettably, the implementation of that commitment was subject to a spectacular false start when every member of the Government filed his/her 'note on general policy' with the Federal Parliament, as not a single one of those notes included any reference to gender-mainstreaming

(with the exception of the one by the Minister of Equal Opportunities, which promised that the necessary Royal Decrees, ancillary to the Act of 12 January 2007, would be adopted).

The Equal Opportunities Council promptly produced its Opinion No. 115 of 16 May 2008[1] to point at the responsibilities of the Federal Government collectively, and of every one of its members individually, in the effective implementation of the Act, and registered one single (slightly piqued) reaction from the Minister of Defence.

Legislative developments

Equal treatment in occupational pension schemes for the self-employed

An Act of 8 June 2008[2] has amended Article 12(2) of the Gender Act of 10 May 2007 so that the provisions on the equal treatment of women and men in occupational pension schemes are extended to self-employed persons (see *European Gender Equality Law Review* 1/2008).

Updating Collective Agreement No. 25

When Belgium was first required to implement Directive 75/117/EEC on equal pay, the social partners (in the private sector) insisted that a collective agreement (C.A.) was the most suitable instrument to that effect. Thus, Collective Agreement No. 25 was concluded within the National Labour Council (N.L.C.) on 15 October 1975 and made generally binding by a Royal Decree of 9 December 1975. Later on, the successive Acts on gender equality included pay as a condition of employment, but the social partners did not consider that C.A. No. 25 had become redundant and they kept it in force; however, the C.A. became increasingly outdated as compared with EC law and the ECJ's case law.

When the social partners concluded their latest general agreement (a biennial process which provides guidelines for negotiations at activity sector and enterprise levels), taking steps to reduce the persistent pay-gap between men and women appeared indispensable in order to comply with the Action Framework on Equality, adopted by the European social partners on 1 March 2005. Updating C.A. No. 25 was such an obvious step and, after useful cooperation with the Equal Opportunities Council, C.A. No. 25ter was signed within the N.L.C. on 9 July 2008.[3]

It was no earth-shattering operation (more like mentioning Article 141 EC instead of Article 119, and taking aboard that any benefits resulting from occupational social security schemes are pay under EC law), yet a freshened up C.A. assumes a new usefulness as a handbook for equal pay, given the dried up style of the present federal legislation on gender equality (the 'Gender Act' of 10 May 2007). However, the trade-union negotiators failed to convince the employers' representatives that the C.A. should make the introduction of gender-neutral job classification systems compulsory; instead, the merits of such systems (the application of which remains far from extensive, especially in small businesses) are praised in a report which is annexed to C.A. No. 25, but not legally binding.

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1 Accessible at http://www.conseildelegalite.be, in French and Dutch.

2 *Moniteur belge/Belgisch Staatsblad*, 16 June.

3 Accessible at http://cnt-nar.be, in French and Dutch. C.A. n°25ter was published in the *Moniteur belge/Belgisch Staatsblad* of 14 October with the Royal Decree of 28 September which made it generally binding.

Case law national courts

The relevant case law seems to be focusing on two very distinct issues.

Reimbursement of the cost of medication for the treatment of osteoporosis

This issue arose when a number of men, suffering from osteoporosis and prescribed a specific medication, Fosamax, by their physicians, could not obtain a reimbursement which the regulations on Healthcare and Sickness Insurance reserved to women after menopause. Such a restriction relied on the manufacturer's scientific notice; the latter was revised in 2002 and reimbursement is currently available for men as well, but only if the medication is administered in a much more intrusive way than to women. More recently, fresh litigation was initiated concerning another medication, Actonel, again because reimbursement is reserved to women after menopause.

The male patients' claims led to an extremely confused case law, mainly because the obviously different treatment of men and women was exclusively challenged under the general principle of equality under the law (Articles 10 and 11 of the Constitution). Finally, the Labour Court of Brussels[4] took heed of Directive 79/7/EEC (concerning the equal treatment of men and women in statutory social security schemes) and found that the Belgian regulations were in breach of the prohibition of discrimination (Articles 3(1) and 4(1) of the directive). Although the Healthcare and Sickness Insurance Agency has appealed against the judgment, it is now hoped that the other pending cases will be examined in the proper light of EU law.

Payment in lieu of the notice period after a reduction of the working time

Under the career-break scheme (now called time credit in the private sector), and with certain qualifications, employees are entitled to reduce their working time. They are protected against dismissal, unless for reasons unrelated to the reduction. Under the Employment Contracts Act of 3 July 1978, the dismissal is only effective after a period of notice (except when there are serious grounds), or else the payment of remuneration in lieu of the notice period is due. Thus a lively controversy arose in the case law, as certain courts (including the Court of Cassation) opined that the remuneration in lieu of the notice period was that of the reduced working time while others held that it was the remuneration corresponding to a full-time occupation.

Curiously, Directive 97/81/EC (concerning the European framework agreement on part-time work) does not seem to have been ever mentioned. As to the obvious eventuality of indirect gender discrimination (as women are the main users of the career-break/time credit schemes, due to the unbalanced sharing of family responsibilities), it was finally evoked when a Labour Court referred questions to the Constitutional Court for a preliminary ruling. The latter decided[5] that the Recovery Act of 22 January 1985, which provided protection against dismissal, entailed no discrimination (under Articles 10 and 11 of the Constitution) against employees who had reduced their working time and that, given that the Act treated men and women equally, there was no gender discrimination either.

The issue recently took a fresh course because the career-break scheme also provides for the implementation of Directive 96/34 EC (concerning the European framework agreement on parental leave). When a case involving a female employee who had taken parental leave in the form of a reduction of her working time went to the

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4 Judgment of 11 April 2008, *Rôle général* n°20524/06, unreported.

5 Judgment n°51/2008 of 13 March 2008, *Journal des tribunaux du travail*, 2008, p.149.

Court of Cassation, the latter found[6] that it had to refer to the ECJ for a preliminary ruling. The case is now pending (C-116/08, *Meerts*).

BULGARIA – *Genoveva Tisheva*

Policy developments

On 23 July 2008 the European Commission found, in its Progress Report, serious mismanagement of EU funds by the Bulgarian Government. As a result, about 1 billion euros were suspended from the PHARE,[7] ISPA[8] and SAPARD[9] programmes. It is a severe sanction for Bulgaria which will entail the mobilization of additional resources from the national budget in order to compensate the suspended EU funds. This will impact negatively on the budget allocations until the end of 2008, despite the expected high surplus of more than 3 % of the Gross Domestic Product. These financial considerations are of importance for the development and implementation of legislation and policy on gender equality. The budget restrictions will result in a restriction of the budget for gender equality, because this is not a priority for the Government. In practice, the Bulgarian Government will most probably continue to allocate meager funds for this crucial issue and will refrain from adopting special legislation and establishing a gender equality body.

Legislative developments

On 17 July 2008 the Council of Ministers of Bulgaria adopted the National Action Plan for Promoting Gender Equality 2008-2009. The action plan provides for governmental action in several areas and spheres of social life. After an introductory part on the governmental policy for the promotion of gender equality, the plan envisions measures for strengthening gender equality in economic activities. The next sphere is to promote gender equality in education, health and culture. Concrete measures are provided for the reconciliation of professional and family life for women and men. Furthermore, attention is given to gender equality in decision-making and, finally, the elimination of gender-based violence and trafficking forms part of this action plan. Non-governmental organisations dealing with gender equality are not formally involved in the implementation of this plan in all these spheres. This is a huge gap, given the lack of awareness by representatives of governmental institutions and the need for capacity-building in this sphere. Only NGOs currently have the capacity to undertake action for the implementation of such a plan. The most striking example where NGOs are almost completely excluded is the sphere of gender-based violence, in spite of their extensive experience.

Although the plan is meant to comply with the EU Roadmap on Gender Equality 2006-2010, there are important elements which are missing, for example the focus on certain tools like the need for a gender equality body and the application of the gender budgeting approach. Another gap is related to the lack of policies which are oriented towards encouraging a gender equality approach in the work of trade unions and employers' associations.

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6 Judgment of 25 February 2008, *Journal des tribunaux du travail*, 2008, p. 152.
7 The Programme of Community aid to the countries of Central and Eastern Europe
8 Instrument for Structural Policies for Pre-Accession.
9 Special accession programme for agriculture and rural development.

This being the first governmental action plan on gender equality adopted in Bulgaria after EU accession, the expectations of society, NGOs and experts for a comprehensive framework providing for concrete activities, ensured by the necessary funds, were high. Instead of such a guarantee, the implementation of the action plan is supposed to be ensured within the framework of the existing budget of each implementing ministry or other government body. This is equivalent to setting in advance unrealistic and declaratory objectives in the field of gender equality in Bulgaria.

Equality body decisions

An interesting case of gender stereotyping in the advertisement industry was referred to the Commission for Protection from Discrimination at the beginning of September 2008. The complaint challenges a series of sexist advertisements by Anisette 'Peshtera', named 'Passion of crystals' and 'The season of the watermelons'. The case was instigated by a group of Bulgarian women almost at the same time as the consideration by the European Parliament of Eva Svensson's report on the gender stereotyping of women in the European media, the advertisement and marketing industry and in educational materials. The complaint is the first of its kind based on the Law on Protection from Discrimination (LPFD) and before the equality body. Although the complaint has not yet been officially announced, its relation to Council Directive 2004/113 on equal treatment in access to and the supply of goods and services poses interesting legal issues. As a matter of fact, Bulgaria had transposed the directive by the end of December 2007 but not with all the exceptions provided for. Namely the exception in Article 3(3) of Directive 2004/113 was not transposed in the Bulgarian law, which makes the provisions of the LPFD also applicable to the content of media, advertisements and education. In addition to the arguments based on the directive, the complaint relies on the Constitution, the CEDAW and the European Convention on Human Rights. The consideration of the case by the Commission in the following months will be a challenge for its jurisdiction.

CYPRUS – *Evangelia Lia Efstratiou-Georgiades*

Policy developments

Since April 2008 (*European Gender Equality Law Review* 1/2008) there have not been any significant developments in the policy concerning gender equality, which essentially remains the same. The Ministry of Justice and Public Affairs as well as the National Machinery for Women's Right are concentrating on utilizing the national plan of action for the Equality of men and women 2007-2013 as was mentioned in issue 1/2008 on page 51.

Legislative developments

The implementation of the principle of equal treatment between men and women in the access to and supply of goods and services

Parliament passed a law on 'The implementation of the principle of equal treatment between men and women in the access to and supply of goods and services' in line with Directive 2004/113/EC which was published on 2.5.2008 in the Official Ga-

zette.[10] The purpose of this law is to lay down a framework for combating discrimination based on sex in access to and the supply of goods and services, with a view to putting into effect the principle of equal treatment between men and women. The law applies to all persons who supply goods and services which are available to the public, irrespective of the person concerned in both the public and private sectors, including public bodies and local authorities and which are offered outside the area of private and family life and transactions carried out in this context. Every person is free to choose with whom he/she will enter into a contract, provided the selection of the other contractual party is not made on the basis of sex. The law does not apply: (a) in education, (b) in mass media and advertising, and (c) in employment and vocational activity. Any discrimination on the grounds of sex in applying the scope of the law is forbidden, but the law does allow for different treatment in providing goods or services to persons of one sex if there is good justification for this. Also positive actions are allowed if they serve the purposes of the law. Law 18(1)2008 entered into force on 2.5.2008 and specifies the authorities that are empowered to monitor the provisions (see *European Gender Equality Law Review* 1/2008, p. 52).

Equality body decisions/opinions

Ombudsman File No. A.K.I. 25/2006 and 41/2006

The Ombudsman has examined a complaint by female Non-Commissioned Officers of the 3rd series of the National Guard against the Ministry of Defence regarding alleged adverse discriminatory treatment, relating to the terms and conditions of their employment as well as their professional promotion, on grounds of sex. The claimants in question had been recruited as Volunteer Non-Commissioned Officers on contract in February 1991 in the rank of Sergeant, scale A1 (the lowest in the public sector) and received a permanent contract after 10 years. The claimants asserted that, although they satisfied all the necessary requirements for promotion, none of them had been promoted by the date that the complaint was submitted (10 April 2006), i.e. after 15 years. The claimants asserted that this was due to their sex, since their male colleagues, who had been recruited at the same time as they were, are now at the level of staff sergeant (a position which higher than that of Sergeant). Furthermore, they stated that at the regular yearly appraisal in 2004, there had been 120 vacant promotion posts in the rank of Sergeant Major and none of the women of their own seniority had been promoted. The same thing happened in 2005. On the other hand, men working in the army complained to the Ombudsman that female Non-Commissioned Officers in the Cyprus Army receive more favourable treatment as regards their salary when they are appointed to the permanent post of Sergeant, since they are appointed in the 3rd or 5th increment in the salary scale, depending on whether they have an education which is higher than secondary school or have a university degree, whereas there is no such treatment for men. Male Non-Commissioned Officers assert that this constitutes discrimination on grounds of sex when it comes to salary at the time of their permanent appointment in the army. Appointments, seniority, promotion and retirement of Non-Commissioned Officers in the Cyprus Army are based on separate Regulations for Men and Women. The Ombudsman noted that the lack of uniform legal regulations regarding the employment of men and women in the army proves the existence of different treatment on the ground of sex. After studying all the facts and relevant laws and regulations concerning the complaints, the Ombudsman stated that the army's

[10] Law 18(1)/2008, see also *European Gender Equality Law Review* 1/2008, p. 52.

work regulations create direct discrimination between the sexes and must be revised without delay. The Ombudsman also submitted her report with her findings and recommendations to the Attorney General of the Republic who, as the Government's Legal Advisor, must study the matter and advise the Minister of Defence and/or the Council of Ministers on the necessary amendments to the relevant laws, so as to repeal any discriminatory provisions.

Miscellaneous

Between April and June 2008 the EQUAL projects have been completed. Cyprus participates in the second round of EQUAL from 2004 to 2008, with a total budget of EUR 3.6 million. In Cyprus the Pillars and Themes were selected by the Managing Authority for EQUAL. Seven (7) Projects were selected and are implemented by seven (7) Development Partnerships (DPs), which are: a) Employability (3 DPs), b) Equal Opportunities (3 DPs), c) Asylum Seekers (1 DP).

Development Partnership (DP) consists of public, semi-public, or private organizations, called national partners, with a view to implementing activities on the basis of a common project linked to a thematic field of EQUAL.

A. Employability (3 DPs)

One of the three (3) Employability Projects was entitled **'**Channels of Access'. Name of DP: Increase in the access of women in the employment market through the creation of a standard for companies that are friendly to alternative methods of employment. Brief description: Inactive female personnel consist of a significant percentage of the total female population. The common characteristics of this group are married women, with two or three children with primary and/or secondary school education. The target group of this project is women who wish to enter the labour market with emphasis on women living in the countryside.

The second project was entitled **'**Women Empowerment Net (W.E.N)' which dealt with the problem of the employability of women, which is one of major importance in Europe. Women generally face more difficulties in entering the labour market, and more importantly in re-entering after a period of absence. Web page of transnational and national project (Cyprus): http://www.channelsofaccess.com

The third project was entitled 'Network for the Promotion of Youth Employability'. Name of DP: ARRIS. Brief description of the project: The network aims at enhancing the efforts of young people to find work.

B. Equal opportunities for men and women (3 DPs)

The first project was entitled 'New routes for women in employment in Cyprus'. Name of DP: New routes for women. Brief description of the project: The aim of the project is the reconciliation of family and professional life. Web page of the national project: http://www.cyprusequalwomen.com.Web page of the transnational project: http://www.restart-equal.eu

The second project was entitled 'OPEN DOORS'. Name of DP: ELANI. Brief description: The project was addressed to: a) working women, b) unemployed women, c) women who have never worked and c) businesses and organizations in public and private sector undertaking their social role. Web page of the national project: http://www.elani.com.cy

The third project was entitled 'Transforming the reconciliation of family and professional life, from cost to competitive business advantage: supporting the incentive

for all decision makers (at enterprises, trade unions, organizations)'**.** Name of DP: PANDORA. The project aims to contribute to the creation of 'good practices' that will reinforce the national policy of Cyprus in the field of equal opportunities for women and men and, in particular, policies that focus on the reconciliation of family and professional life. Web page of the national project: http://www.equalpandora.com, web page of the transnational project: http://www.equal-enaequo-net

C. Asylum seekers (1 DP)

Project title: Social Rights for Asylum Seekers – Social Rights for all. Name of DP: Equality and solidarity for Asylum Seekers – Guarantee of Employment and freedom. Web page: http://www.equal.dipa.org.cy

CZECH REPUBLIC – *Kristina Koldinská*

Policy developments

A major political issue remains the continuous attempt to adopt the Act on equal treatment and protection against discrimination (the Anti-Discrimination Act). As will be described in what follows, the situation is currently in a stage of deadlock, as the President refused to sign the already approved Act and this was followed by a political crisis, during which a session of the Chamber of Deputies, that had to discuss the Act once again, was interrupted. No further important policy developments in the field of gender equality are to be reported.

Legislative developments

In April 2008, the Senate approved the Anti-Discrimination Act, but the President declined to sign it by using his right of veto on 16 May 2008. The Chamber of Deputies started to discuss the Act once again, but that session was interrupted on 3 June 2008 by a political crisis and was not been renewed until the end of September.[11]

It should be admitted that the Anti-Discrimination Act is not of high legislative quality. From the point of view of systematic legislative work, the Act is very confused, not very clear, and is sometimes too formalistic, so that it will probably not be very easy to apply. The legislator should have considered, in more depth, how to implement the 'spirit' of the EC directives and to do this more clearly and systematically.

Already during the legislative process the Act has been strongly criticised. In the Czech Republic there is strong antipathy against the equal treatment part of EC law (if not against the whole of EC law). Among the arguments against the Anti-Discrimination act emerged, for example, the fear of interference in private law relations or in the freedom of entrepreneurship. Another strongly presented argument was that a forced equality would be introduced, which is against nature as nature makes all people different. Such arguments are unfortunately also presented by the highest political representation.

As confirmation of this sad statement, a brief citation from the official position of the President regarding his vetoing the bill may be presented: 'The Act provides citi-

[11] http://www.psp.cz/sqw/historie.sqw?o=5&t=253, accessed 22 September 2008.

zens with the right to equal treatment in private law relations, which is not possible, as per definition. (…) The Act negates that it is possible to expect from everybody different success, diligence, effectiveness and also different behaviour. The Act tries to remove inequality, which is however a natural phenomenon. (…) This Act is not only bad, but also dangerous. (…) All this can also be proved by the fact that the Senate, even though it adopted the Act, also adopted a resolution with the following wording: "the Senate holds that the Anti-Discrimination Act is an instrument by which to implement requirements emanating from European law, where a failure to enact such requirements would mean sanctions for the Czech Republic. The Senate, however, does not agree with the character of the Act, which artificially interferes with the natural development of society and does not respect the cultural differences among Member States. The requirement of equality overrides the principle of free choice. The Senate therefore asks the Government not to agree with the adoption of the further anti-discrimination norms on the EU level".'[12]

Case law national courts

As regards case law, there is one case to be reported.

Case No. 11 Ca 161/2007-39 (not published)

The Court of the City of Prague decided a case regarding indirect discrimination claimed by the plaintiff. The case started with the decision of a financial office which argued that a married couple could not benefit from so-called 'common taxation of spouses', as one of them was not taking the caring benefit provided by the system of state social support. In fact, the Czech law on taxation recently introduced the common taxation of spouses in order to support families with children through a tax benefit. This advantage is, however, not provided to self-employed persons who do not benefit from the parental benefit provided by the system of state social support. In such a case, where the spouse who was self-employed would also benefit from the above-mentioned benefit, the common taxation of spouses could have been applied. The respective spouses resorted to the courts, as they were of the opinion that such a condition in the legislation represents indirect discrimination against people who care for children and at the same time work as self-employed persons. The spouses presented many arguments using European equality law and relevant directives, thereby also claiming the direct application of these directives when the national legislation does not respect (or implement) them.

The financial office argued, however, that there was no indirect discrimination and that it was not its fault that the national legislation defined several concrete conditions for those who wish to apply the common taxation of spouses.

Neither the financial office nor the Court discussed the principles of European law and the issue of indirect discrimination was totally neglected in the reasoning, whereby the Court simply argued that there was no such discrimination.

An appeal is still pending and it shall be decided by the Supreme Administrative Court.

This is one of the very rare cases in the Czech Republic where indirect discrimination has been argued. Therefore it is very sad that the national court did not use the opportunity to discuss the matter properly and to compare this national case with EC

[12] See http://www.hrad.cz/cms/cz/info_servis/tiskove_zpravy/5389.shtml, accessed 22 September 2008.

law and the vast body of ECJ case law. The tone of the decision only confirms that Czech judges need better training and need to be updated on current developments in EC law and ECJ case law.

DENMARK – *Ruth Nielsen*

Policy developments

Following a strike in women-dominated jobs (nurses, home-carers and similar groups) in the spring of 2008 where the striking women demanded an equal pay commission, the Prime Minister, in August 2008, promised to set up a pay commission. In September 2008 the Government proposed a commission which should look at pay in a broad context, including pay systems as management tools. The trade unions refused to participate in such a commission and demanded a commission focusing on equal pay. The Government declared that if the trade unions will not participate in the commission, no commission will be established. The result therefore seems to be that there will be no commission – neither an equal pay commission, nor a general pay commission.

Legislative developments

In May 2008, the Danish Parliament finally adopted the proposals reported in the last issue of the *European Gender Equality Law Review* amending the Equal Pay Act with the aim being to implement the Recast Directive (2006/54/EC) and the new Act on a Complaints Board for Equality concerning discrimination on all the prohibited grounds in the gender equality legislation and the Discrimination Act (which covers grounds of prohibited discrimination other than gender, such as ethnic origin, religion or belief, age, handicap, sexual orientation, political opinion or social origin). The existing Complaints Boards for Gender Equality and Ethnic Equality will be abolished and their functions taken over by the new Complaints Board from 1 January 2009.

Gender balance in company boards

Gender balance in company boards – or rather the lack thereof – is a much debated issue in Denmark. In May 2008 a proposal was put forward by the opposition to introduce legislation in Denmark in line with the Norwegian Company Act which requires gender balance (gender quotas) in the boards of listed companies and it was discussed in Parliament. The (slight) majority supporting the present Government does not want legislation on gender balance. The proposal was therefore not adopted and it is not likely that Denmark will adopt legislation on this issue while the present Government is in office.

CSR action plan and ensuing legislation

In May 2008, the Government published an action plan for corporate social responsibility (CSR). The plan focuses on initiatives concerning business-driven social responsibility. It refers extensively to the UN principles on social responsibility, which comprise principles targeting businesses (Global Compact) and investors (Principles for Responsible Investments, PRI). In the view of the Government the advantage of the UN principles is that they are based on international conventions on human rights, labour, the environment and anti-corruption. Gender equality is not specifically men-

tioned, but it is covered by some of the conventions referred to, for example CEDAW (the UN Convention on the Elimination of Discrimination Against Women), ILO Convention No. 100 on Equal Pay and ILO Convention No. 111 on Discrimination on a number of grounds.

In the CSR Action Plan, the Government declares its intention to make it mandatory for large businesses to report on CSR in the management's review of the annual report and to make it mandatory for institutional investors and unit trusts to report on CSR in the management's review of the annual report. In September 2008, the Government circulated a proposal for new legislation to introduce these duties. It is only a duty to report on – i.e. to make public – whether the company does anything to 'promote' corporate social responsibility, not a duty to actually do it. The proposal will be placed before Parliament when it meets in October 2008.

Case law national courts

There have been no important developments in the case law of the courts, but there has been a decision by the Gender Equality Complaints Board.

There have been a number of cases before the Gender Equality Complaints Board on different prices for men and women when entering discotheques. The Gender Equality Complaints Board has consistently held that such a price differentiation is a violation of Section 2 of the Gender Equality Act.

The only sanction applied in Denmark is that the Complaints Board expresses the view that the discotheques in question had acted unlawfully and awards compensation to the extent of the differentiation in the entrance fee. Experience shows that such sanctions are ineffective. Many discotheques continue to differentiate prices according to sex regardless of the decisions of the Gender Equality Complaints Board. The Gender Equality Complaints Board has brought this fact to the notice of the Ministry of Justice which could – if it so wishes – introduce a more effective sanction by denying discotheques an alcohol licence if they violate equality legislation.

ESTONIA – *Anneli Albi*

Policy developments

In recent months, a number of legislative initiatives have been shaped in Estonia by the general economic climate, where the recent rapid economic growth has been replaced by an economic slowdown and a consequent reduction in the demand for labour. For example, as noted in the previous report, the new draft Labour Contract Act aims to fully revise the present law by liberalizing employment relationships in order to make the labour market more flexible; the draft Act is currently pending before Parliament. The economic slowdown has also led to negotiations over the new, considerably reduced state budget. As a result of the negotiations, the Government has submitted to Parliament a draft Act that would reform the system of benefits related to child care. The details of the draft Act will be provided below. One of the questions discussed during the State budget negotiations concerned the possibility of putting an end to increases in the maximum amount of parental benefit. Currently, the Parental Benefit Act provides that the parent receives, as a rule, a parental benefit equivalent to 100 % of his/her average income during the preceding calendar year; the maximum amount is three times the average income in Estonia per calendar month. The maxi-

mum amount of the benefit for the following calendar year is approved by the Government by 1 September of the given calendar year on the basis of the social tax data of the preceding calendar year. Due to the recent economic growth, the average income has increased in Estonia: while in 2008 the maximum parental benefit stood at 25 209 kroons (EUR 1 616), in 2009 it will be nearly 31 000 kroons (EUR 1 987). However, the Reform Party, which leads the Government, refused to accept the proposal to 'freeze' the maximum benefit to the 2008 level. By way of an alternative, the Prime Minister proposed to end the payment of child support benefit to each and every child, which currently stands at 300 kroons (EUR 19) per month. Whereas this cut enables continued increases in the maximum amount of parental benefit in 2009, the State will cease financing the 10-day fathers' leave, which was introduced in 2008. At the time, fathers' leave had been regarded as an important step to enhance the role of fathers in child care. While the decision not to modify the rules on the payment of parental benefit could, in principle, be considered as a positive move, it is unfortunate that it comes at the expense of other measures designed to increase the role of fathers or to support families.

Legislative developments

Draft Act to amend the State Family Benefits Act, the Working and Rest Time Act and the Holidays Act

On 25 September 2008, the Government submitted to Parliament a draft Act to amend *inter alia* the State Family Benefits Act, the Working and Rest Time Act and the Holidays Act (No. 349). According to the draft Act, the payment of a number of benefits (such as parental benefit and child-care benefit) to the same parent will be discontinued; the State will no longer cover the breaks for feeding a child under 1½ years of age if the parent receives a parental benefit. Furthermore, in view of the changing economic climate as described above, the State will no longer finance the so-called fathers' leave. By way of a background, on 1 January 2008, amendments to the Holidays Act had come into force, introducing the right for fathers to take ten working days' leave during the pregnancy leave or maternity leave of the mother or within two months after the birth of the child. During this time, in 2008 fathers have received a holiday allowance amounting to their average salary, with a maximum of three times the average national wage. According to the statistics, fathers had started to use this possibility much more frequently, and the discontinuation of the payment may thus be a cause for concern from the point of view of promoting equality.[13]

Amendments to the Income Tax Act

On 25 September 2008, the Government submitted to Parliament a draft Act to amend *inter alia* the Income Tax Act (No. 347 SE). The amendments temporarily end the recent possibility to declare additional tax deductions by persons who raise one child, which entered into force in 2008.

Draft Equal Treatment Act (No. 262 SE II-1)

As reported in the previous *European Gender Equality Law Review*,[14] the draft Equal Treatment Act, which aims to implement Directives 2000/43/EC and 2000/78/EC, is being deliberated by Parliament and is still waiting to be adopted.

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[13] See also *European Gender Equality Law Review* 1/2008, p. 61.
[14] *European Gender Equality Law Review* 1/2008, p. 60.

Draft amendments to the Gender Equality Act, the Civil Service Act and Labour Contracts Act (No. 317 SE I)

As reported in the previous *European Gender Equality Law Review*,[15] the draft Act to amend the Gender Equality Act, the Civil Service Act and the Labour Contracts Act is pending before Parliament and is still waiting to be passed.

FINLAND – *Kevät Nousiainen*

Policy developments

Governmental programmes on equal pay

Gender pay differentials in Finland have remained at a steady 20 % for two decades, in spite of policies under several Government Programmes, including the present Government's Equality Programme. Equal pay policies have traditionally been largely orchestrated by cooperation among the Government and the labour market organisations. In 2006, a high-level tripartite working group, representing the Government, employers' and employees' organisations was established to follow up policies for equal pay. The group was reinstated for 2007–2011 by the present Government. Policies based on a corporatist model may be on the vane, however, because the employers' organisation has refused to continue the tradition of centralised income policy agreements.

Two projects on equal pay undertaken under the present Government have been lately reported. A project on gender segregation and the gender wage gap gives new information on the issue in its report on the findings of a study carried out by Statistics Finland and two research institutes that represent employers (Research Institute of the Finnish Economy) and employees (Labour Institute for Economic Research).[16] It has been a standard assumption that the pay gap can best be reduced by decreasing segregation in the labour market; girls and women are often indirectly blamed for wrong career choices. The project notes, however, that segregation as such does not create the pay gap, which is caused by the fact that women are placed in low wage positions, men in high wage positions. Pay differentials could in principle be small even in highly segregated labour markets. The project found that the amount of segregation decreased only slightly in 1995-2004, and that the jobs held by under 30-years olds are as segregated as those of older age groups. The wage gap seems to originate from pay discrepancies between collective agreements, which coincide with occupational segregation. The project developed practical tools for examining wages across more than one collective agreement in the local government sector.

Another project 'Workplace Salary Survey'[17] aimed at developing equality planning. In 2005, a new equality planning provision (Section 6(a)) was introduced in the Act on Equality between Women and Men (609/1986). Employers with 30 or more employees are to produce an annual equality plan including an assessment of the gender equality situation in the workplace, with detailed information on women and men

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15 *European Gender Equality Law Review* 1/2008, p. 60.

16 Segregation and the gender wage gap. Reports of the Ministry of Social Affairs and Health 2008:26, at http://www.stm.fi/Resource.phx/publishing/store/2008/09/hm1222236485118/passthru.pdf, accessed 30 September 2008.

17 'Workplace Salary Survey – Facts and Experiences' *Reports by the Ministry of Social Affairs and Health* 2008:25, at http://www.stm.fi/Resource.phx/publishing/documents/15459/index.htx, accessed 30 September 2008.

in different jobs and a survey of the grade of jobs performed by women and men, as well as of pay and pay differentials (Subsection 2(1)). The wording of the provision is rather vague and open to many interpretations. A persistently contested issue has been whether a wage survey should be carried out across collective agreements, or separately on each agreement. The project 'Workplace Salary Survey' was carried out with the aim of explicating how the wage surveys should be carried out in the workplace, and advises the use of cross-agreement surveys.

Legislative developments

Proposed amendment of the Act on Equality between Women and Men

The Government decided on the 2nd of October 2008 to place before Parliament a Government Bill which is needed for the transposition of Directive 2004/113/EC on equal treatment in the access to and supply of goods and services. The transposition will be by an amendment to the Act on Equality between Women and Men (609/1986). The Government aims to have the amendment in force by the beginning of 2009. The Act on Equality does not fulfil the requirements of the directive. The Act on Equality has a general scope, and the prohibition of direct and indirect discrimination on the ground of gender covers the access to and supply of goods and services. However, the prohibition is not backed up by sanctions in this area, and victims of discrimination have no remedy at their disposal. Therefore, the only channel for voicing any instances of this prohibition has been to contact the Equality Ombudsman.

The Equality Ombudsman has received numerous complaints about gender-differentiated pricing and gender-segregated access to services, and she has given advisory opinions in several cases. The opinions have referred to the Goods and Services Directive, and taken guidance from it. The Ombudsman has more closely scrutinized cases of segregated services that are motivated by commercial interests, and where the difference in treatment cannot be justified by an acceptable aim of the activity. Thematic, time-limited promotion events have been considered more leniently ('Mothers' day lunch discounts for women') than regular policies. When the Ombudsman has found acceptable reasons for continuing a sex-separated service, she has required that similar services are offered to both sexes. The Ombudsman has published a few official statements on sex-segregated leisure-related services, which illustrate her guidelines.

The Government Bill adds to the Equality Act a new provision on discrimination in access to and the supply of goods and services (Section 8(e)). The new section largely repeats the contents of Article 3(1), 3(3) and Article 4(5) of Directive 2004/113/EC. The Bill also extends the scope of the prohibition against victimisation (Section 8(a)) and of the right to compensation, as well as provisions on monitoring the prohibition so that they cover discriminatory treatment by a provider of goods or services. The provision on compensation was otherwise left unchanged, which means that the minimum compensation of EUR 3 000 may be adjusted to a lower sum. According to the motivations, an adjustment may be needed where a private person or a small enterprise is in question.

The directive's provisions on the use of actuarial factors in insurance were already transposed by amendments to the insurance legislation in 2007. The legislation took advantage of the option that Article 5(2) of the directive allows for Member States to permit differences in premiums and benefits, provided that there is accurate and updated data on the use of sex as an actuarial factor. Insurance companies and societies are to deliver to the Insurance Supervisory Authority an assessment of the

use of sex as a risk factor every five years. The Supervisory Authority shall make public a summary of the assessment, and publish information on which insurance types use sex as an actuarial factor.

FRANCE – *Sylvaine Laulom*

Legislative developments

Positive action recognized in the Constitution

The revision of the Constitution took place in July 2008. Among the modifications, Article 1 has been rewritten. It now states that the law favours the equal access of women and men to political mandates and functions and also to professional and social responsibilities. The new article clearly provides a constitutional basis for some positive actions that are currently not accepted.

New Anti-Discrimination Act to implement the adopted EC directives

A new anti-discrimination Law was adopted on 27th May 2008 (Loi n°2008-496). As said in the first issue of the *European Gender Equality Law Review*, the aim of the Law is to complete the implementation of all relevant EC directives on discrimination. However, the definition of direct discrimination is still slightly different from its European equivalent and the new definition of harassment could create some coordination problems concerning other definitions of harassment which have not been repealed.

Right of associations to take a case to court

The right of associations to take a case to court on behalf of an employee has been recognized since 2001. A new decree extends this right to take into account the new anti-discrimination Law adopted in May 2008 (Décret n°2008-799, 20 August 2008, JO 22 August). Associations, legally established for at least five years, and whose institutional purpose is to combat discrimination, can take a case to court on behalf of an employee for all the judicial actions which arise from the new rights recognized by the Law. Just as before, the conditions for the action are slightly different from those of trade unions as associations must have informed the victim of the action and they must have a written agreement from the interested party. To exercise this right, associations must be established for at least five years. For the Government, this condition strengthens the protection of victims of discrimination because only associations with extensive experience can instigate a case on behalf of a victim. However, it is obvious that actions by new associations are limited by this condition.

Report on the comparative situation of men and women in enterprises

To take the measures necessary to improve professional equality between women and men, enterprises must draw up, on a yearly basis, a written report on the comparative situation of men and women in those enterprises. For example, this report could be used in the negotiation established by the Law on Equal Pay between Men and Women[18] which aims to reduce the wage disparities between men and women. The Law specifies that the pay gap between men and women should disappear before 31 December 2010 and leaves it to the social partners to find the necessary means to

[18] N°2006-340 of 23 March 2006.

reduce these wage disparities. Thus social partners at enterprise level (companies with more than 50 employees) and/or at branch level have to negotiate on that issue. A new decree of 22 August 2008 modifies the indicators which should be used in the report to measure equality between men and women in enterprises. The aim of the decree is to clarify and simplify the elaboration of the report. The Government has also published model reports to be used by enterprises.

Case law national courts

Equal pay for equal work

In France, since 1996, a general principle under which workers have a right 'to equal pay for equal work' has been recognized by the *Cour de Cassation*. Thus litigation on equal pay is mostly not based on sex discrimination, but on a difference between one worker and other workers in the same situation. The decision of the *Cour de Cassation* on 26 June 2008[19] is particularly interesting because it is litigation on sex discrimination and it shows a very restrictive approach by the *Cour de Cassation* to this type of discrimination.

In this case, a woman working as a human resources director alleged that she was paid less than other male directors. For the Court of Appeal of Poitiers, the other directors were on the same hieratical level in the enterprise, with the same professional classification, and they were all members of the board. The Court found discrimination based on sex as the employer could not explain the differences in the functions which could have justified the difference in treatment. The *Cour de Cassation* overruled the Court of Appeal's decision. It stated that the employer must provide the same pay for men and women for the same job or for a job of equal value. Workers who do not have the same functions are not doing the same job or a job of equal value. This decision is very worrying as the *Cour de Cassation* did not compare the woman's work with that of men. Of course if the functions are different it could justify a difference in pay, but the decision seems to state that the work has to be the same in order to be compared. It is indeed a very restrictive approach to sex discrimination and it seems to be far removed from the ECJ's approach. Another, less restrictive, interpretation would be to consider that the *Cour de Cassation* wants judges to compare the functions of workers in order to decide if there is a job of equal value. The Court of Appeal relied on the classification and not on an analysis of the real functions of workers. However, the *Cour de Cassation* did not make any reference to ECJ case law and did not give any indication as to how to compare the functions. The non-clarity of the decision is in itself disturbing.

Miscellaneous

Annual report on collective bargaining

As mentioned above, the Law on Equal Pay between Men and Women[20] leaves it to the social partners to find the necessary means to reduce the pay gap before 31 December 2010. The annual report on collective bargaining, published in June 2008, shows that the number of collective agreements on equal pay between men and women have increased as 9 specific agreements on that issue were concluded in 2007, and one in 2006. A total of 24 agreements also contain some provisions on this issue.

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[19] Cass. Soc. n°06-46204.

[20] N°2006-340 of 23 March 2006.

However, some agreements simply recall the principle of equal pay without providing specific measures.

GERMANY – *Beate Rudolf*

Policy developments

In light of the upcoming federal elections (scheduled for September 2009), the parties of the governing coalition have not introduced any new policy proposals in the reporting period. Instead, they have focused on adopting their legislative proposals introduced before the parliamentary summer break.

Legislative developments

The Federal Parliament (*Bundestag*) passed a law on the advancement of children under three years in day-care institutions (*Gesetz zur Förderung von Kindern unter drei Jahren in Tageseinrichtungen und in der Kindertagespflege, Kinderförderungsgesetz – KiFöG*).[21] The law introduces, from August 2013 onwards, a legal claim for parents to have access to day-care for their child starting from the age of one. Children whose parents are working, looking for work or are pursuing education have a claim to day-care from their birth onwards. It is expected that the law will be enacted by the Federal Council (*Bundesrat*) before the end of the year.

The law also contains the announcement that a child-care allowance (*Betreuungsgeld*) will be introduced in 2013. It is to be paid to parents who do not want to place their children in a child-care institution. Critics argue that this creates a false incentive for low-income families to keep their children at home, thus preventing one of the parents – usually the mother – from seeking work and at the same time depriving children with a non-German-speaking background of the opportunity of learning the language. It is to be expected that the issue will be debated in the next Federal Parliament, after the elections in September 2009.

Case law national courts

Federal Labour Court (Bundesarbeitsgericht), judgment 9 AZR 219/07 of 20 May 2008, (full text not yet published)

The Federal Labour Court (*Bundesarbeitsgericht*) had to decide whether an employee had a right to be paid for a period of vacation that she could not take because of the beginning of parental leave. According to the relevant provision,[22] the employer has to grant the employee the remaining vacations in the year when the parental leave ends, or in the following year. If the employment ends before the end of the parental leave or if it is discontinued, the employer is obliged to pay the employee monetary compensation for the vacation period not taken. In the case before the Court, the employee could not make use of this provision because she had a second child during her first parental leave and took a second parental leave immediately after the end of the first. During the second parental leave, her temporary employment contract ended.

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[21] For the background, see *European Gender Equality Law Review* 1/2008, p. 69.

[22] Today: § 17(2) of the Law on Parental Leave Allowance and Parental Leave (*Bundeselterngeld- und-Elternzeitgesetz, BEEG*).

The employer refused to pay her compensation for the vacation period not taken because she did not fulfil the requirements of the provision, read literally. To date, this literal interpretation had been accepted by the Federal Labour Court.

In the present judgment, the Court overruled its prior decision. It now held that the right to compensation for vacation periods not taken under these circumstances also exists when the employment contract ends during a second parental leave that immediately follows the first. The Court based its reasoning on the need to interpret the pertinent German provision so as to be compatible with the general equality principle under the German Constitution (Article 3(1) of the Basic Law, *Grundgesetz*) and European directives.[23]

Federal Constitutional Court (Bundesverfassungsgericht), decision 2 BvL 6/07 of 18 June 2008

This case concerned the different calculation methods for the pensions of full-time and part-time civil servants. According to the relevant provision,[24] the pension of part-time civil servants is calculated on the basis of their years of service, but is then reduced by a certain percentage (*Versorgungsabschlag*). The legislator had explained this reduction by the intention to offset the situation that, by introducing part-time work for civil servants for labour market reasons in the 1980s, the State had to pay more in pensions than it would have had to do without the possibility of part-time work.

The Federal Constitutional Court considered that the provision was discriminatory because the reduction did not serve to attain the equality of pensions for part-time and full-time civil servants, but amounted to putting them at a comparative disadvantage. Moreover, the Court held that the provision constituted indirect discrimination against women since the large majority of part-time civil servants are women. The Court therefore applied the stricter standard for the justification of prohibited discrimination under Article 3(3), *viz*. that the measure must pursue an objective of constitutional value, and not merely a reasonable aim.

The Court found no justification for the discrimination. The aim of protecting public funds was not sufficient because it did not explain why only women have to bear the financial burden. In addition, the Court considered the law to be contradictory as its negative impact on women went against the purpose of the law to promote the reconciliation of work and family life by introducing the possibility of part-time work.

By its decision, the Federal Constitutional Court adopted the ECJ's reasoning in judgments rendered with respect to a different provision, which meant that the provision impugned in the present case remained applicable to those civil servants who were in active duty on 31 December 1991.[25] While the ECJ had limited the effects of its judgment to benefits due for working time fulfilled after 17 May 1990,[26] the decision of the Federal Constitution Court now attains the same result for working time fulfilled before that date. It is noteworthy that the Court applied a strict standard for the justification of indirect (gender) discrimination, *viz.* that of constitutional values. It

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[23] The Court referred to Article 7 of the Working Time Directive (93/104/EC), Article 2 of the Employment Equality Directive (now: Recast Directive 2006/54/EC), and the values enshrined in Articles 8 and 11 of the Maternity Protection Directive (92/85/EEC).

[24] § 14(1) of the Law on Civil Servants' Pensions (*Beamtenversorgungsgesetz, BeamtVG*). The provision had been repealed as of 1 January 1992.

[25] Cases C-4/02 and C-5/02 of 23 October 2003, [2003] ECR I-12575.

[26] This is the date of the *Barber* judgment, case C-262/88, [1990] ECR I-1889.

thus goes beyond the requirements of European law and clarifies a point that had been contested in German constitutional law.

Federal Administrative Court (Bundesverwaltungsgericht), judgment 2 C 22.07 of 26 June, 2008 (full text not yet available)

The Federal Administrative Court decided yet another case regarding a prohibition on civil servants from wearing an Islamic headscarf.[27] The present case concerned a trainee teacher in the state (*Land*) of Bremen. Trainee teachers are not public servants (*Beamte*), but are merely in an employment relationship governed by public law (*öffentlich-rechtliches Ausbildungsverhältnis*). The relevant law[28] forbids trainee teachers from wearing religious symbols so as to avoid an 'abstract danger' to peace at school. This term means that it is sufficient that students and/or their parents may object to the teacher wearing a religious symbol, which they may consider to be an attempt to proselytise. It is not necessary that there are any actual complaints.

The Federal Administrative Court considered the prohibition to be an interference with every German citizen's freedom of profession and that it was not proportionate. As the State has a monopoly in training teachers, whether they will work in public or private schools thereafter, the prohibition prevents a prospective teacher from undergoing a mandatory part of her education, thus constituting an absolute barrier to the profession.

It is commendable that the Federal Administrative Court rejected the 'abstract danger' to school peace as a justification in this context, at least for trainee teachers. It thus recognizes that it is unconstitutional to make a person choose between his/her professional aspirations and his/her religious convictions.

Miscellaneous

Women in boards of listed companies

On 7 May 2008, the Legal Committee of the Federal Parliament *(Rechtsausschuss des Deutschen Bundestags)* organised a consultation on the introduction of a quota for women in (supervisory) boards of listed companies.[29] Presently, only 7.5 % of board members of listed companies in Germany are women, and 75 % of them are representatives of employees. Experts who were in favour of the 40 % quota proposed by one opposition party considered that, if implemented, the proposal would contribute to bringing about an overdue change in public opinion. Other experts were of the opinion that career obstacles for women have to be first abolished, such as the lack of possibilities to reconcile work and family life, the lack of networking possibilities for women, and a male-dominated corporate culture.

Stocktaking on the promotion of gender equality in the private sector

In 2001, the Federal Government and the leading associations of German industry (*Spitzenverbände der deutschen Wirtschaft*) entered into a political agreement on the promotion of gender equality in the private sector. According to this agreement, the leading associations will recommend to their members measures for promoting gender equality. In return for a successful implementation of this agreement, the Federal

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[27] See also the case of 14 March 2008 in the *European Gender Equality Law Review* 1/2008, p. 71.

[28] § 59 (4) and (5) of the Schools Law of the State of Bremen (*Bremisches Schulgesetz*).

[29] http://www.bundestag.de/ausschuesse/a06/anhoerungen/35_Quote/01_Gesetz.pdf, accessed 2 June 2008 (text of the proposal), http://www.bundestag.de/ausschuesse/a06/anhoerungen/35_Quote/04_Stellungnahmen/index.html, accessed 2 June 2008 (experts' statements).

Government promised not to introduce any legislation concerning gender equality, unless required by EU law. A stocktaking of the agreement's implementation must be carried out on a regular basis.

In April 2008, the Federal Government and the leading associations presented their third report on the implementation of the agreement.[30] Overall, the report paints a positive picture: It shows an increase in women's education, a rise in women in technical studies, in apprenticeships and among the self-employed. It also notes a sharp increase in company measures for reconciling work and family life. However, the employment rate for women with children under the age of five is only 44 %, thus placing Germany in the lowest range in a Europe-wide comparison. Women are still rare in decision-making positions, and the gender pay gap persists. Numerous women's organisations considered the report to be proof of the need to enact a gender equality law for the private sector. They criticized the fact that measures for reconciling work and private life all too often focus on increasing women's flexibility through part-time work instead of gender equality.

GREECE – *Sophia Koukoulis-Spiliotopoulos*

Policy developments

As there are rumours of premature parliamentary elections, the participation of women in political decision-making is the subject of political and social debate, the more so as the percentage of women in Parliament is among the lowest in Europe (there are currently seventeen (17) women MPs out of a total of three hundred (300) i.e. about 5.7 %), while *positive measures* are not merely allowed, they are *required* by the Constitution, in particular in favour of women, in all fields. In response to this requirement, a positive measure regarding parliamentary elections was recently introduced. It is thus opportune and topical to explain the situation in Greece in this respect and to mention the continuous instrumental role of women's NGOs in constitutional and legislative developments.[31]

The Constitution has always contained a general provision requiring equality for all Greeks before the law (Article 4(1)), which, however, proved insufficient to eradicate gender discrimination and ensure equal rights for men and women. In 1975, after the fall of the seven-year military dictatorship (1967-1974), a new Constitution came into force, an important feature of which was the strengthening of human rights. On that occasion, a specific gender equality provision was introduced into the Constitution, as a result of a big campaign by women's NGOs: 'Greek men and women have equal rights and obligations' (Article 4(2)). This provision was, however, combined with another one, which allowed derogations 'for sufficiently justified reasons, in cases specifically provided for by statute' (Article 116(2)).

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30 http://www.bmfsfj.de/bmfsfj/generator/Kategorien/Publikationen/publikationsliste.html (search for '3. Bilanz Chancengleichheit'), accessed 22 July 2008.

31 On the contribution of women's NGOs to constitutional developments, see S. Koukoulis-Spiliotopoulos 'Greece: from Formal to Substantive Gender Equality; the Leading Role of Jurisprudence and the Constribution of Women's NGOs' in: A. Manganas (ed.) *Essays in Honour of Alice-Yotopoulos-Marangopoulos* pp. 659-700, Athens/Brussels, Nomiki Bibliothiki/Bruylant 2003 vol. A; and 'Gender equality in Greece and effective judicial protection: issues of general relevance in employment relationships', *Neue Zeitschrift für Arbeitsrecht* Beilage 2/2008 pp. 74-82.

In a landmark judgment, the Council of State (the Supreme Administrative Court),[32] also invoking Directive 76/207[33] and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), held that Article 4(2) guarantees not only formal, but also substantive gender equality, and that positive measures in favour of women are necessary in order to remedy their inferior position in society. Following that judgment and a new campaign by women's NGOs, the original provision of Article 116(2) was replaced in 2001 by a provision that reads: '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 which exist in practice, in particular those detrimental to women'.

Legislative developments

Positive measures

Positive measures have already been taken, *inter alia*, in the field of politics, starting with Article 75 of Act 2910/2001 which requires that: 'The number of candidate members of local government councils of each sex shall correspond to at least one third of the total number of candidates appearing on each ballot.'

The Greek League for Women's Rights, relying on Article 116(2) of the Constitution and its favourable interpretation by the Council of State (*infra*) and supported by the biggest women's NGOs, this year launched a campaign for a positive measure analogous to the measure regarding local government elections to be taken in connection with parliamentary elections. The recent revision of the electoral law was a good occasion for this. The NGOs proposed that the number of candidate MPs of each sex should correspond to at least one third of the total number of candidates appearing on each ballot. Responding to this campaign, the Minister of the Interior added to the relevant bill a provision requiring that every party must present a number of candidates of each sex which corresponds to one third of the total number of its candidates over the country. The NGOs disputed the effectiveness of this provision and insisted on their own proposal, but the provision was adopted as it stood in the bill, and it became Article 3 of Act 3636/2008. The explanatory memorandum states that this provision aims to implement Article 116(2) of the Constitution and to comply with the CEDAW and recalls that positive measures do not constitute discrimination, as stipulated by Article 116(2) and Article 4(1) of the CEDAW.

The candidates in both local government and parliamentary elections appear on a ballot paper on which the voter chooses his/her preferred candidate by placing a cross beside his/her name. Thus, the number of women elected depends on the voters' choice and the support of the party. The first positive measure was applied in two local government elections (in 2002 and 2006) with the result that female members of local government councils increased.

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[32] Council of State judgment No. 1933/1998 (Full Court).

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

Case law national courts

Council of State: positive measures are a 'must'

The Council of State,[34] interpreting Article 116(2) of the Constitution in the light of the CEDAW and the Covenant on Civil and Political Rights, held that it requires that the legislature and all other State authorities take those positive measures in favour of women that are necessary for and pertinent to achieving real gender equality in all cases where women are in an inferior position. It thus confirmed the constitutionality of the positive measure regarding local government elections, and held that it was necessary in view of the under-representation of women in this field, appropriate for achieving the constitutional goal of substantive gender equality, and proportionate. These judgments concern the first local elections held after the relevant positive measure was introduced (*supra*). No jurisprudence concerning the second (2006) local elections is yet available, but a reversal of this landmark jurisprudence, which lays down the foundations for effective positive action, in all fields, is unimaginable.

It results from this jurisprudence that it is not sufficient for positive measures to be taken in areas where women are in an inferior position; in order to be in conformity with the constitutional requirement, these measures must also be appropriate to bring about the desired result, i.e. a significant improvement of the position of women in the particular area. The effectiveness of the positive measure regarding parliamentary elections remains to be tested in light of the constitutional requirement.

HUNGARY – *Csilla Kollonay Lehoczky*

Policy developments

New Hungary Development Plan

Gender equality continues to be a peripheral issue (or not an issue at all) when policy decisions are made on programmes and priorities within the New Hungary Development Plan, in the belief that gender equality is guaranteed or it does not require special measures. Apart from some issues supporting the return of child-caring mothers to the labour market, gender does not seem to be a policy issue.

For example, a new priority within the 'Social Renovation Programme' action plan (within the New Hungary Development Plan) is the 'Guarantee of Quality Education and Access for All' which was published in July 2008.[35] The details of the goals and available support make no mention of gender, not even within the framework of measures to improve opportunities for 'multiple disadvantaged' groups, where the term 'multiple disadvantage' concerning, for example, Roma children does not seem to include the female sex, which is a real disadvantage in their education.

[34] Council of State judgment Nos 2831, 2832, 2833/2003, 192/2004, 2388/2004.

[35] http://www.nfu.hu/uj_magyarorszag_fejlesztesi_terv_2

Legislative developments

No legislation has been directly adopted in the field of the promotion of the equal rights of women in employment or in the field of trading in goods and services during the period under consideration (May to September) in the present issue. Some legislative developments may have an indirect impact on the situation of women.

Civil Code, family law

On May 28, 2008 the Government submitted to Parliament the bill on the new Civil Code that includes the Family Code as Chapter III. This inclusion is considered to be a change of historical significance. Besides involving the earlier equated registered partnership with the legal effects of marriage (extending this opportunity to both heterosexual and homosexual couples while further maintaining marriage for only heterosexual couples), the draft bill facilitates divorce and has reformed the rules on maintenance between former couples and on other issues affecting property and family relationships. The debate which lies ahead seems to be a long one and the law is expected to enter into force from 2010 onwards.

Educational infrastructure

Act XXXI aimed at the promotion of equal opportunities in education has established new opportunities for disadvantaged communities to set up combined nurseries and pre-school facilities in order to start the integration of disadvantaged family children as early as possible. (Parents without elementary education who enroll their children in kindergartens might be entitled to a pecuniary 'bonus'.) Although the aim of the provision was to promote educational opportunities for the most disadvantaged (predominantly Roma) families, indirectly the norms might have a positive impact on working opportunities for mothers in general.

Case law national courts

Two decisions reflect the existing slight differences in the application of the reversal of the burden of proof in discrimination cases by judges. (The first decision was delivered by a panel deciding on labour law cases, the second by a panel deciding on civil law cases.)

Supreme Court decision on the rejection of rehiring a female bus driver, burden of proof (Mfv.I.10.449/2007/3.sz.)

A female busdriver, dismissed due to disability, applied on several occasions to be rehired after she had recovered and was rejected. The main ground of the discrimination claim was a sexist remark by the manager who was dealing with the application. ('Women should have cooking spoon and not a steering wheel in their hands'.) The remark was only witnessed by indirect, non-neutral persons (friends and relatives of the plaintiff). The employer defended itself by alleged policies of not rehiring those who received severance pay upon dismissal, like the plaintiff. The evidence procedure left uncertainties. The Court, applying a reversal of the burden of proof, accepted the allegation by the plaintiff employee. The Court awarded lost pay for the time between her rejection and obtaining a new job. On the other hand, the Court required full evidence of the claimed non-material damages as well, and, since the plaintiff could only refer in general to the suffered distress without any supporting evidence, this part of

the claim was turned down. In its decision the Court referred to Case 14/83 (*Colson and Kamann)* by the ECJ.

Supreme Court decision on the withdrawal of retraining support for a middle-aged woman, burden of proof (Pfv.IV.21.938/2007/6.sz.)

A female marketing manager aged around forty, fluctuating between jobs and unemployment, applied for subsidized training at the Labour Market Centre. She had scheduling difficulties with her various studies, had interrupted and then continued her studies and had been referred to employers but rejected a fixed-term job, although in part she had also been rejected by certain employers. Finally, the Labour Market Centre withdrew support from her. She took legal action against the Centre and the training institution for a violation of her personality rights by discriminating on the ground of her sex, age and also acting in her case for reasons of personal bias. The facts of the case raised doubts about the claim; however, the evidence procedure failed to lead to an obvious result. The lower courts rejected discrimination because 'the plaintiff could not prove discrimination with certainty' and 'discrimination cannot be established *because* the defendant made the decision within its discretionary power'. The Supreme Court apparently focused only on the violation of the personality rights of the plaintiff under the Civil Code and approved the lower courts' decisions. However, with reference to the reversed burden of proof, it established that the deliberation of the authorities was based on certain facts, and that there was no 'strikingly grave unlawful deliberation' on the side of the authorities, so the claim of discrimination was unfounded.

Equality bodies decisions

Protection of pregnant women and workers on parental leave

The Equal Treatment Authority (ETA) found a violation of equal treatment when a pregnant woman was not given a prolongation of her fixed-term contract following the announcement of her pregnancy. The authority imposed a fine of about EUR 2 000 (HUF 500 000), prohibited any further violation and ordered the publication of the decision. *(Case 108/2008.)*

The ETA found a violation of the principle of equal treatment when an employer was reluctant to redefine the wage of the worker after having returned from parental leave and also delayed the provision of leave accumulated (but not taken) during the parental leave as well as delays in providing the employee with cafeteria benefits to which she was entitled. When the employee announced a second pregnancy the employer interrupted negotiations on the not provided wages and benefits and did not pay anything. The ETA prohibited any further violation and ordered a revision of the payments made. The decision is not final as the employer has instigated a case against the ETA before the courts. *(Case 32-I-2008.)*

Access to jobs

The ETA found a case of discrimination when a male applicant was rejected from an administrative assistant post in a health-care institution. The claimant applied for a job as an administrative assistant in a patient-admission unit of a health-care institution. He was qualified for the job, but on two occasions was still advised by phone not to apply for the post. The institution indicated that it wanted to fill the job with a woman due to the reluctance of employees in the unit to work with a male. Later, when he claimed discrimination, he was offered an interview, but was then rejected. The insti-

tution eventually employed a woman. The ETA established a violation of the principle of equal treatment, and prohibited any *further* violations as well as ordering the publication of the decision for 60 days on its website. *(Case 419/2008)*.

The ETA rejected a claim by a female who had applied for the post of administrative assistant with a public employer but was rejected with reference to the 'physical efforts' needed for the job. She was told that the employer wanted to hire a male applicant with regard to the 'physical work' involved. The applicant possessed the required technical education and considered herself to be suitable for the job. Out of four female and six male applicants a male was hired. In the procedure before the ETA the employer referred to the job description that implied, among other things, intervention in the case of a technical failure, renovation and maintenance tasks, mail delivery and transporting documents between units. The defendant explained that this might mean occasionally moving furniture or packed materials weighing tens of kilos. The ETA thereby found that the employer had proved that the unequal treatment of applicants was based on significant and legitimate requirements for the job and that the physical efforts needed entitled the employer to make a selection among applicants on the basis of their physical characteristics and their 'expected ability to cope with a physical burden'. The fact that the employer offered an interview to the four female women was also evaluated as proof of the lack of any intention to exclude women *ab ovo*. This decision raises questions about the interpretation of 'genuine and determining' requirements as well as the allocation of the burden of proof by the ETA. *(Case 441/2008)*.

ICELAND – *Herdís Thorgeirsdóttir*

Introduction

W.H. Auden, the British poet, wrote of Iceland in the beginning of the 20th century: 'Fortunate island/ Where all men are equal/ But not vulgar – not yet.' A century later Iceland finds itself in a financial storm – a disastrous meltdown that is now taking place in the country's economy. Iceland's top three banks have collapsed and were nationalized in the first week of October. Iceland entered on to the world's financial stage in the early years of this decade. A class of 30-something business school alumni – mostly men – have had a leading role in Iceland's emergence as a Nordic powerhouse with a punch that far exceeded its size. Iceland represents an extreme case of a huge financial system towering over a small economy, yet other states also suffer from similar imbalances and the financial crises are spreading. Iceland's foreign obligations are allegedly ten times the size of its GNP. According to the *Economist*, Iceland differs from other countries in scale, but not in substance. How these crises will be dealt with, remains to be seen at this point. The International Monetary Fund may step in and taxpayers' money will be used whether to recapitalize banks or to take on troubled debts. The welfare system and low employment that has characterized Icelandic society will suffer. As the dust settles it is also likely that women will be the majority of those sacked when companies close down and unemployment increases. The other side of this coin, however, is that now that the sheltered elite of men in power and politics running the financial system has been 'exposed', a new era may have arrived where women will be more dominant in the financial sector and in politics. After the nationalization of the banks two women have been appointed as chief executives of two of the three main commercial banks, the Landsbanki and Glit-

nir. The present financial collapse presents an opportunity to dispense with a society where women have been second-class citizens faced with a bulletproof glass ceiling and the largest gender-based pay gap in Europe. In the midst of this turmoil, where the financial crisis may be spreading into a global depression, small-scale measures prior to this situation seem somewhat irrelevant now that we are faced with a warlike situation with new kinds of casualities and a completely different reality from some weeks ago.

Policy developments

As is evident from the above, Iceland faces the end of an era. The Minister of Social Affairs described this on TV as the time when *laissez-faire* market politics is over. She has publicly expressed her concerns about the welfare system which has not been strengthened during the financial upheaval. She said that it was necessary to make amendments to the default law to lessen the possibility of people losing their homes.

The financial crisis and depression is likely to hit women harder. A loan from the International Monetary Fund may entail obligations for Icelanders so that the welfare system will be significantly cut, thereby forcing women into the underground economy where wages are low and no benefits are guaranteed.

Case law national courts

The Reykjavík District Court: non-violation of Gender Equality Act

The Reykjavík District Court found that the Minister of Agriculture had not violated the Gender Equality Act in a judgment on 26 September. The plaintiff, a woman, based her claim on the assertion that she had been more qualified to become the rector of the Agricultural University of Iceland due to her education than the man that the Minister of Agriculture appointed. The University Council had held, prior to the appointment, that all applicants met the requirements set out in the advertisement for the post. Both the woman plaintiff and the man eventually appointed had doctoral degrees. The Council held that the man had a clear vision as to the future and was also endowed with experience in handling employees as well as experience in research. The District Court judge reasoned in reaching the decision that the Minister of Agriculture had not violated the Gender Equality Act by appointing the man and that given the above skills he surpassed the woman. Apparently, he had also been more impressive during the interview for the post. The Court referred to the interviewers' impression of the male applicant and his clear vision of the difficult task facing the Agricultural University as an institution that was to be merged with two other institutions. The Court also referred to the interviewers' impression in reaching a decision as to who would best qualify for the task and that the woman plaintiff had not been the runner-up after the interviews (this was in fact another man). The former Minister of Agriculture (also a man) who had appointed the interviewers testified and said that the mandate of the interviewers had been to check the clarity of the future vision of the applicants and not least how the applicants intended to solve the difficult task of merging the three institutions into one. Subsequently the Minister of Agriculture conducted his own private interview with the two most favoured candidates after the job interview which convinced him of the clear vision and interesting outlook of the subsequently appointed candidate.

The District Court judge, himself a man, was convinced by this *man's-man* approach and discarded the Ombudsman's opinion presented before the Court that the

administrative procedure was lacking in quality as the answers by the applicants had not been written down as evidence of their future vision surpassing that of the woman applicant. This, in the Court's view, was not a decisive fact. The Court accepted the above reasoning concerning a future vision and the impression that the chosen applicant had made as evidence that he was indeed better qualified to take on the task of rector of the Agricultural University. There was no evidence of gender discrimination in this appointment process and hence no premises to base the burden of proof on the defendant. Furthermore, the Complaints Committee on Gender Equality had reached a similar decision in reasoning that there had not been indirect discrimination within the meaning of the Gender Equality Act.[36] The Court did not find that the woman should be awarded compensation.

Case law of the Complaints Committee on Gender Equality

The Complaints Committee on Gender Equality has been publicly criticized in recent months for being biased and deciding in favour of employers instead of women complaining that they have been victims of sex discrimination in appointment processes. The Complaints Committee has not been fazed by such criticism, having increased powers after the amended Gender Equality Act No. 10/2008 as its rulings are now binding. A few weeks ago it decided in favour of another male minister.[37] The case concerned the appointment of the Director General of the National Energy Authority. The Deputy Director General, a highly educated woman, had applied for the post and brought a complaint to the Complaints Committee when the Minister of Industrial Affairs appointed a man who was also qualified. She maintained that different paradigms had been used in evaluating the qualifications of different applicants and that systematic measures had been used in making more of the man's experience and education at the same time as her experience and knowledge had been dwarfed. She held that the appointment was in breach of administrative procedures in choosing the most qualified applicant.

The Committee emphasized that both these applicants had been deemed qualified with regard to education and experience but that the man appointed had made a better impression in the interview with the consulting firm, although there was not a remarkable difference. In its reasoning for appointing the man, the Minister of Industrial Affairs pointed to the consulting firm's analysis that held that the man was better educated, that he had a broader perspective on energy matters and a diverse experience of management. Last but not least, he surpassed the woman in his vision of the future for the National Energy Authority (of which the woman was the deputy director) and that comments he made indicated that he had better leadership qualities and communication skills than the woman. The Complaints Committee hence saw no reason to contest that an objective assessment had prevailed in the appointment of the man instead of the woman.

It must be added here that seeking assistance from consulting firms in the hiring process is viewed as giving the hiring process a more objective image when the politician or employer in question may have made up his mind before that process independent of the outcome of such interviews. Secondly, the staff of consulting firms do not have the specialized knowledge to decide on the specialized knowledge of the applicants, like in the case of energy matters.

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[36] Para. 3, Article 24 of Act No. 96/2000.
[37] Case No. 2/20008.

IRELAND – *Frances Meenan*

Policy developments

Equality Authority – cut in budget

In the last edition of the *European Gender Equality Law Review*,[38] it was reported that the Government is proposing to merge the Equality Authority, the Irish Human Rights Commission and the Office of the Data Protection Commissioner. The Minister for Finance in his Budget 2009 speech on 14 October 2008 to the Dail (lower house of Parliament) announced the rationalisation of various State agencies. He announced that the Equality Authority and the Human Rights Commission are to fully integrate their facilities, back office and administrative services and access for citizens.[39] Since then it has been reported that there is to be a 43 % cut in the budget of the Equality Authority. The Authority is also to be decentralised from Dublin, the capital to a country town. The CEO of the Authority has since resigned over funding.

The Equality Tribunal published its Annual Report, Legal and Mediation Reviews for 2007 on 16 August 2008.[40] These publications are particularly useful for lawyers and laymen alike. The Equality Tribunal is the adjudicating authority charged with adjudicating and/or mediating claims of alleged discrimination under the Employment Equality Acts 1998-2008,[41] the Pensions Acts 1990-1994 and the Equal Status Acts 2000-2008. Overall there was an increase of 44 % in equality claims; however, there was only a 5 % increase in claims on the gender ground.

Case law national courts

Pensions

There have been very few pension cases in Ireland and this case highlights the difficulty of the application of the marriage bar[42] in the public service which was lifted in 1973. In *Shanahan* v *HSE West*[43] the dispute concerned a claim that the claimant was discriminated against by not being allowed to join an occupational pension scheme and then by being allowed to join but treated in a less favorable manner on the grounds of gender, marital status and family status under the Pensions Acts 1990-2004. The claimant commenced work as a psychiatric nurse in 1963 and resigned in August 1968 because of the public service marriage bar which she claims was direct discrimination on the gender ground. The marriage bar was removed in 1973 but the claimant was not offered her job back and maintained that the lack of family-friendly working arrangements until 1985 was a barrier to her returning to work which amounted to indirect discrimination. She returned to work in 1986 and repaid the marriage gratuity (with interest) that she had received. This meant that she received credit for her service between 1963 and 1968. She resigned in 2006, three years before normal retirement age. The pension scheme for psychiatric nurses dou-

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38 No. 1/2008.

39 http://www.budget.gov.ie/2009/downloads/AnnexDRationalisationOfStateAgencies.pdf, accessed 4 November 2008.

40 http://www.equalitytribunal.ie/index.asp?locID=156&docID=-1, accessed 2 October 2008.

41 Save that there is an option of bringing gender ground claims directly to the Circuit Court (whether there is technically no upper limit as to compensation that may be awarded).

42 Obligation to retire on marriage. Many such employees then received a 'marriage gratuity'.

43 http://www.equalitytribunal.ie/index.asp?locID=155&docID=-1, accessed 2 October 2008.

bles each year of service after twenty years which allows them to retire from age 55 provided they have 30 years' service taking a full entitlement of 40 years' service. The claimant maintained that she had to work 7½ years' service post-55 years and then only accrued 32½ years' service entitlement toward her pension. She maintained that she could not take full advantage of the provision for retiring early whilst her male colleagues could. The Equality Tribunal rejected her claim as regards access to work and flexible work arrangements as this was a claim under the Pensions Acts and not under the Employment Equality Acts 1998-2004. The claimant argued that she was at a 'particular disadvantage' and suffered indirect discrimination as more male colleagues could reach 30 years' service at age 55 years as they would have been less likely to take a career break. This issue arose because she is a woman so it was accepted that there was a *prima facie* case of indirect discrimination. However, Section 68(2) of the Pensions Act provides that such a rule may be '*objectively justified by a legitimate aim and that the means of achieving that aim are appropriate and necessary*'. It was argued by the employer that the benefit of 'added years' was objectively justified as it was a benefit not given to other public service nurses (who have to complete 40 years' service) and that psychiatric nurses received it in recognition of their onerous work. In addition, a person who has less than 30 years' service would have less need for such a benefit. It was held that there was no discrimination.

Pregnancy

The case of *Lane* v *MBNA*[44] received considerable publicity in Ireland. The claimant alleged first discriminatory treatment following her first pregnancy; there was a subsequent pregnancy and then a claim of victimisation dismissal following the initiation of discrimination proceedings. Some seven months after her second pregnancy, she was informed that she was to be made redundant with notice stating that efforts would be made to find her an alternative job and that she would receive an enhanced redundancy package if she signed a waiver agreement stating that she would take no further claims against the respondent. This would have meant that she could not pursue her equality claim. She did not sign the agreement. The Equality Tribunal considered that the respondent had failed to rebut the inference of discrimination against the claimant. As regards the victimisation claim it was accepted that it was a genuine redundancy. It was noted by the Equality Tribunal that the claimant ruled herself out of working in a number of areas and overall it was considered that there was not enough evidence that she suffered adverse treatment as a reaction to making a claim for discriminatory treatment. However, the claimant had been given a verbal reassurance that if she signed the disclaimer she could proceed with her claim for discriminatory treatment. However, this was not put in writing and she decided not to sign the disclaimer and thus received a reduced redundancy package. This was considered to be adverse treatment for making a claim. She was awarded EUR 17 000 for discriminatory treatment, EUR 6 315.84 for the difference between the basic and the enhanced redundancy payment and a further EUR 33 000 being the equivalent of one year's salary in compensation for adverse treatment.

The Bank of Ireland was held to have discriminated against an employee because there was no objective justification in a delay of five years in acceding to the claimant's request for part-time working or job-sharing following the adoption of her child.[45] It was also noted that the Bank implements a procedure for all job sharing and

[44] http://www.equalitytribunal.ie/index.asp?locID=139&docID=1827, accessed 2 October 2008.

[45] *Morgan* v *Bank of Ireland Group* DEC – E2008-029. http://www.equalitytribunal.ie/index.asp?locID=139&docID=1778, accessed 2 October 2008.

part-time working applications that is fully in accordance with S.I. No. 8 of 2006, Code of Practice on Access to Part-Time Working.

ITALY – *Simonetta Renga*

Policy developments

Good preaching and bad practices

Minister Carfagna presented to Parliament, at the end of July, the programmatic guidelines of the recently elected right-wing Government's Department of Equal Opportunities.[46] In this document, the Minister stresses the importance of reconciliation policies in order to increase women in employment and the crucial role that the availability of adequate child-care services would play to this end. More specifically, the Minister recognises that in our country the coverage rate of child-care services is low and that kindergartens are expensive. The Minister also denounces the low rates of women in employment that characterize our country and the existing delay in policies promoting female participation in the labour market. She stresses the necessity of instruments and proactive welfare measures geared towards increasing women's occupation, towards favouring gender equality and towards improving the career perspectives of women. She calls for improvements to part-time work and for provisions aimed at promoting female entrepreneurship. Finally, the Minister promises the transposition of the Recast Directive (2006/54/EC) into national law and generally welcomes policies on gender budgeting and mainstreaming.

Leaving aside the unpromising generality of the Ministry programme, particularly in relation to the instruments and provisions through which the objective announced should be pursued, the first legislative interventions by the new Government seem to be going in opposite directions as regards gender equality. Indeed Act No. 133/2008 provides for radical and indiscriminate cuts in public spending, which strongly involves, among other things, the education system in all its aspects. The first consequences of this policy are already underway as Act No. 133 has been implemented by reducing the primary school week from the current 32 hours to 24. This provision was enacted through a decree upon the initiative of the Minister of Education, Gelmini, and has to be confirmed by an act of Parliament to become definitive. If it will be maintained, for school children aged from 6 to 10 years full-time education will no longer be available, and this will severely impair reconciliation for families with working parents and with low incomes and, in turn, will contribute to lowering female participation rates in the labour market. More generally, the necessity to radically reduce public spending will soon turn into a lowering of the standards of social protection and services and will result in accrued difficulties in carrying out any policy to promote gender equality, including positive actions, gender budgeting and mainstreaming.

On the whole, the intervention of Act No. 133/08 cannot be deemed to be gender sensitive. A failure to take reconciliation policies into account can be noticed as regards a slight but remarkable change in the public sector. The transformation from full-time to part-time work is no longer a worker's right: the employee's request can

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[46] Department of Equal Opportunities, http://www.pariopportunita.gov.it/, last accessed 29 September 2008.

be rejected by the public employer, and not simply postponed for six months as under the previous ruling, if it hampers its organization.

A further and meaningful change regarding temporary and precarious working patterns is the tendency to widen the possibility of using these patterns which mainly affect women who are more extensively employed in precarious and low paid jobs.

Legislative developments

Act No. 101/2008 on compliance with infringement procedure No. 2006/2535

The Act of 6 June 2008 No. 101 has repealed the 'Code of equal opportunities between men and women' and Decree No. 151/2001 on Sustaining Motherhood and Fatherhood in order to comply with infringement procedure No. 2006/2535, started due to non-compliance with Directive 2002/73 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. Generally speaking, this Act can be regarded as a positive intervention to the extent that, by expressly repealing specific rules, it breaks the recent tendency of national legislation implementing EU law which merely transposes it by a word for word repetition of the EU directives, a habit that does not ensure the necessary coordination with other existing provisions.

The first change to the Code concerns the notion of direct discrimination, where instructions to discriminate are now included: indeed, instructions to discriminate were not expressly governed by the repealed legislation as a hypothesis for discrimination.

Then, Act No. 101/2008 introduced in the Code the possibility to bring a claim to the courts for anti-gender discrimination interest organizations: in fact, associations and organizations promoting respect for equal treatment between male and female workers have been entitled to act on the worker's behalf. Before this intervention, only Equality Advisers and trade unions were empowered to act on behalf of victims of discrimination. This change is very important as it strengthens the system of remedies.

Finally, Act No. 101/2008 lays down the right of a woman on maternity leave to benefit at the end of this period from any improvement in working conditions to which she would have been entitled during her absence. The new provision completes, as required by the directive, the protection granted by Decree No. 151/2001 for workers on maternity/paternity leave, which also ensures the right of the worker who has taken this leave to return to his or her job or to an equivalent post and stipulates that compulsory maternity leave is to be counted as actual work as regards seniority, annual vacations and thirteenth month salary payments and that, for the purposes of promotion, periods of maternity leave are to be regarded as periods of employment, unless special requirements have been made for that purpose by collective agreements. The repeal of the Decree on Sustaining Motherhood and Fatherhood can be considered to be a wasted occasion. On this matter, the implementation of EU law, on the whole, is satisfactory and domestic legislation has often gone even further than EU law. However, Italian legislation does not implement the third subsection of Article 2(7) of Directive 2002/73; indeed, there are no rules in Italian labour law to provide that less favourable treatment on grounds of pregnancy and maternity is to be regarded as a case of sex discrimination. This feature does not allow the claimant to benefit from specific procedural rules and to obtain stronger remedies provided by the law in the case of discrimination, such as the partial shifting of the burden of proof.

The Government's intervention in taxes and female participation in the labour market

With the declared aim of increasing the productivity of enterprises, there is an ongoing experiment in the private sector which addresses workers who had a personal income not exceeding EUR 30 000 in 2007. Decree No. 93/2008 provides for a fixed tax rate of 10 % to be applied, instead of all taxes on personal income (which on average normally amount to about 30 % of the salary), to remuneration up to EUR 3 000 received by workers for overtime or as a production bonus. The Minister of Labour, Maurizio Sacconi, underlined that the tax reductions mentioned above have met with widespread success among the social partners and can be considered as a first step towards reforming the model of collective bargaining. The Minister of Public Administration explained that this sector could not be included in the experiment as it needs further in-depth reform.

Actually, the tax reduction started an interesting as well as unusual (as it concerns gender equality) debate on its possible detrimental effect on women's participation in the labour market. In fact, some comments underlined that family care still burdens mainly women, so this measure will simply be an incentive for men to work more and increase the traditional 'non-sharing' of care duties. According to some authoritative opinions, this provision could even be indirectly discriminatory, as although it is a neutral measure addressed to all workers with a certain annual income, it would disadvantage mainly women who normally work shorter hours. Moreover, in some sectors, where the percentage of female employment is high, such as for instance textile industries, overtime is not used as much as in other sectors such as, for instance, engineering industries, where the percentage of female workers is lower.

However, an infringement of the principle of non-discrimination needs evidence that this measure totally lacks a legitimate justification, that is, as someone argued, that it does not help to increase the productivity of undertakings. This is a critical point. It has been observed that the marginal cost of overtime for an enterprise is already lower than the marginal cost of ordinary work as the latter does not include the 'indirect costs' of paid holidays, illness, severance pay, extra remuneration and so on.

In any case, even if indirect discrimination could not be detected, the possible detrimental effect of this measure on women's remuneration and on women's participation in the labour market seems to be easily predictable and goes in the direction of increasing the *de facto* gap which already exists in men's and women's average remuneration. For this reason, it has also been observed that the tax reduction should probably have been addressed to only women as a positive action aimed at increasing the percentage of female employment. In fact, in Italy the real problem is the low participation of certain categories in the labour market and not the short working schedule of active workers.

Case law national courts

The justificatory clause of the nature of the work carried out

In a recent decision the Administrative Regional Tribunal of Lazio[47] held that hiring procedures for the post of junior vice inspectors within the penitentiary police force were not discriminatory despite the fact that they reserved a higher number of posts

[47] TAR Lazio, Rome, Section I-quarter, Decision 3 June 2008, No. 5430, published in *Il Sole 24 Ore*, No. 7-8 of July-August 2008.

for men than for women. The judges denied an infringement of the principles of equality in Articles 3 and 37 of the Italian Constitutional Charter as the relevant legislation provides, in this sector, separate employment rates according to sex, and that a number of posts widely favour men as opposed to women: this is due to the fact that, according to the same legislation, the penitentiary police have to be of the same sex as the convicted persons because detainees' necessities vary according to their sex. This latter circumstance would therefore represent, according to the judges, justification for discrimination linked to the nature of the work carried out.

As regards access to employment, Directive 76/207 (as amended by Directive 2002/73) indeed allows differences in treatment based on characteristics related to sex where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. This exception may justify separate employment rates on the ground of sex as they are linked to the sex of detainees; even though it can be matter for analysis whether a post is placed at a medium-high level in the hierarchic scale, such as that of a junior vice inspector, if it involves daily contact with detainees and the performance of that task then the sexual requirement imposed by the legislation is justified. However, it appears that the huge differences in posts for men and women are not justified; indeed, the number of posts reserved for each sex should be strictly related to the sexual situation of each penitentiary where there are job vacancies. In other words, in order to be non-discriminatory, the legislation should provide for a periodical monitoring of the proportion between the two sexes within the convicted population for it to be correctly mirrored by the employment rates in this sector.

Miscellaneous

Pensionable age for public employees

The European Commission claims that the pension scheme managed by INPDAP (the National Provident Institution for the Employees of Public Authorities) is a discriminatory occupational scheme contrary to Article 141 EC, since it provides that the general pensionable age for men is 65 and for women 60. Therefore the Commission, after the infringement procedure, has brought a case before the Court of Justice, which is now pending.[48]

The counter-arguments are as follows. Article 141 EC lays down the principle of equal pay, which, according to the case law of the European Court of Justice, can also be applied to occupational pensions due to their retributive nature: however, the pension scheme run by INPDAP is a public pension scheme and not an occupational one. Indeed, this scheme has general coverage in the public employment sector and as such replaces the general insurance public pension scheme run by the INPS (the National Social Welfare Institute), which is consequently not operative in the area of public employees. The INPDAP pension scheme therefore falls within the scope of Directive 79/7, which makes the pensionable age a possible exception to the application of the equality principle on grounds of gender. Moreover, women's pensionable age for the purpose of an old-age pension is set at 5 years lower than that for men, but women are allowed to carry on working until the pensionable age set for men.[49] In this context,

[48] Case C-46/07, OJ C 82, 14.04.2007, p. 20.

[49] Art. 30 Decree No. 198/2006 and Constitutional Court No. 498/1988.

there are two exceptions to the equality principle, both favouring women: in first place, given women's higher life expectancy, the possibility of anticipated access to a pension implies a higher real yield rate concerning women's pensions than men's; in the second place, the pensionable age is only flexible for women and not for men. Nevertheless, according to Articles 7(1-2) and 8 (2) of the directive, the two exceptions might still be regarded as socially justified as they help to fill the gaps in the contribution records of women claimants or to compensate the care work carried out by them.

LATVIA – *Kristīne Dupate*

Legislative developments

Labour law

At the beginning of this year the Ministry of Welfare presented new draft amendments to the Labour Law. Several draft amendments concern gender equality. Recently an inter-institutional meeting (between the institutions of the executive powers) was held where social partners and the institutions involved tried to reach an agreement on different proposals to improve the draft amendments. Several of the discussed issues concerned gender equality. In particular, dismissal on the ground of an illness-related absence, the calculation of the average wage and the time-limit for bringing a claim before the courts in discrimination cases.

Many of the proposals by the Ombudsman Office, which represents the functions of the National Equality Body, were not taken into account. According to the agreement reached at inter-institutional meeting the amendment proposal now envisages the following norms. First, the right to dismiss an employee on the ground of an illness-related absence is without exception a discriminatory dismissal when it relates to a pregnancy-related illness as determined by the ECJ in *Larsson*[50] and *Brown*.[51] Second, the provisions on calculating the average wage for the purposes of pay during annual leave and compensation for idle time in the case of unfair dismissal do not take into account the situation of persons who, during the period taken into account for the purposes of calculating the average wage, did not have an income due to maternity, paternity and child-care leave. Thirdly, the time-limit for bringing a claim based on discrimination is extended from one month to three months, which in any case does not seem to correspond to the EC principle of the effectiveness and equivalence of the remedies.

Social security

On 19 June 2008 Parliament adopted amendments to the Law on State Social Security.[52] The amendments envisage an obligation on the part of the state to provide social insurance payments in favour of fathers on paternity leave against risks of old age and disability. These amendments will come into force on 1 January 2009.

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[50] Case C-400/95 *Handels – og Kontorfunktionerernes Forbund I Danmark, acting on behaf of Helle Elisabeth Larsson* v *Dansk Handel & Service, acting on behalf of Futex Supermarked A/S* [1997] ECR I-02757.

[51] Case C-394/96 *Mary Brown and Rentokil Limited* [1998] ECR I-04185.

[52] *Official Gazette* No.104, 09.07.2008.

Persons taking paternity leave, unlike persons on maternity leave, are not subject to insurance against the risk of unemployment, which amounts to direct discrimination against men.

Goods and services

On 19 June 2008 Parliament adopted amendments to the Law on the Protection of Consumer Rights which came into force on 23 July 2008.[53] The amendments partially implement the requirements of Directive 2004/113. They implement concepts such as direct and indirect discrimination, instructions to discriminate, harassment, sexual harassment, the burden of proof and the right to compensation for moral damage. However, the scope of the Law on the Protection of Consumer Rights is itself limited. In particular, the law is applicable in the field of consumer protection as provided by EU law. It means that these amendments prohibit discrimination on the grounds of sex only in so far as it concerns access to and the supply of goods and services provided for the personal use of the recipient (not for the purposes of the performance of professional activities) and the provider acts for this purpose within its professional capacity.

The Ministry of Welfare has elaborated and in September it proposed to the Assembly of State Secretaries[54] a draft law on the non-discrimination of natural persons pursuing professional activities.[55] This law is intended to implement one more aspect of Directive 2004/113. Namely, this law prohibits discrimination against self-employed persons with regard to access to and the supply of the goods and services which are necessary for the professional activities of those persons, because the Law on the Protection of Consumer Rights only covers consumers – i.e. natural persons acting outside a professional capacity.

Case law national courts

Social security

It was described in *European Gender Equality Law Review* 1/2008 that a right to the statutory social insurance (contributory) allowances and their amount is dependant upon contributions to the statutory social insurance budgets in the periods preceding the social risk (for example, unemployment, sickness). During parental leave the State insures the parent instead of the parent having to insure him/herself, but only to a minimum amount as if the parent would earn a gross monthly salary of LVL 50 (EUR 70). Consequently, if, for example, the risk of unemployment occurs during a particular period after child-care leave the person is entitled to this minimum unemployment allowance.

This situation is currently being contested before the administrative court. The claimant was dismissed two months after she returned to work after parental leave. Although her earnings constituted LVL 1 000 monthly and normally her unemployment allowance should have constituted 50 % of her salary (LVL 500 or EUR 711), nevertheless since for the purposes of calculating the unemployment allowance the six

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53 *Official Gazette* No. 104, 09.07.2008.

54 This is at the stage of the legislative process in executive power. If the Assembly of the State Secretaries approves the proposal it then goes to the Cabinet of Ministers, where after approval the Cabinet of Ministers submit the legislative proposal to the legislator: Parliament.

55 Available on the home page of the Cabinet of Ministers, www.mk.gov.lv at http://www.mk.gov.lv/lv/mk/tap/?dateFrom=2007-09-29&dateTo=2008-09-28&text=Fizisku+personu%2C+kuras+veic&org=0&area=0&type=0, accessed 28 September 2008.

preceding months are taken into account and four months which were taken into account for that calculation coincided with her parental leave, her unemployment allowance only constituted LVL 360 (EUR 512).

Before the Administrative District Court she claimed indirect discrimination on the grounds of sex as prohibited by Article 4 of Directive 79/7 and Article 2^1 of the Law on Social Security, since Latvian law does not contain the exception provided by Article 7(1)(b) of Directive 79/7.

On 3 July 2008 the Administrative District Court dismissed the claim. The Court found that since both sexes enjoy equal rights to parental leave there is no discrimination. It demonstrates that the courts, just like the State Social Security Agency (the institution which is responsible for the statutory social security system and the calculation and payment of allowances), do not distinguish between direct and indirect discrimination. The definitions of indirect discrimination as provided by Article 2^1 of the Law on Social Security and Article 4(1) of Directive 79/7 as interpreted by the ECJ in, for example, *Commission* v *Belgium*,[56] were not taken into account. The Court also overlooked the fact that on 5 July 2007 the Ministry of Welfare admitted in a press release that the right to an unemployment allowance is less favourable for women since they constitute the majority of persons who make use of the right to parental leave.

LIECHTENSTEIN – *Nicole Mathé*

Policy developments

'Equality pays' ('Gleichstellung lohnt sich'[57])

The Equal Opportunities Board, in cooperation with the NGO named i*nfra* and the employees' representative interest group, are leading an awareness-raising campaign concerning the Gender Equality Act that was enacted in 1999 and revised in 2006. Information about the Gender Equality Act and sexual harassment is specifically addressed to employees and employers in order to inform the public and to guarantee the correct application of the law.

CEDAW

For the third time female Members of Parliament met to discuss the CEDAW.[58] Liechtenstein has been a contracting party to the CEDAW since 1995 and it submitted a third country report in 2006 which was dealt with by the competent committee of the Council of Europe in 2007. A paper with 32 observations and recommendations was the result and it formed the basis for this round of discussions. Well-known and still unresolved topics such as traditional mental attitudes, stereotypes, flexible working hours, parental leave, pay differentials between men and women, and the emancipation of men and women who are under-represented in managerial posts were discussed in the light of the CEDAW. The female Members of Parliament agreed upon the fact that pragmatic and creative gender politics with clear targets will be successful. Creative solutions will be, for example, recruiting members for commissions by

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[56] Case C-229/89 *Commission of the European Communities* v *Kingdom of Belgium* [1991] ECR I-02205.

[57] http://www.llv.li/amtsstellen/llv-scg-gleichstellung-veranstaltungen/llv-scg-gleichstellung-kampagne_zum_gleichstellungsgesetz-2.htm, accessed 29 September 2008.

[58] Press release by the Information Office of Liechtenstein dated 07.05.2008.

advertising, promoting male politicians as role models when they reconcile family and working life, and sending out clear signals and incentives to highlight the fact that the reconciliation of family and professional life is both desirable and socially acceptable.

Legislative developments

Law proposal concerning family politics[59]

The Government addressed a proposed law concerning demographic measures of family politics as well as a modification to the fiscal law and invited public comments. Family benefits will be more concretely designed. Tax deductions for child care will be introduced and the maximum deduction for training costs shall be increased. The new measures will strengthen families and guarantee real freedom of choice in the organisation of family life and enhance the reconciliation of family and professional situations.

Miscellaneous

Various projects and activities to promote gender equality[60]

An interregional project entitled '*Frauenleben 50+*'[61] between Vorarlberg (Austria), St. Gallen (Switzerland) and Liechtenstein analysed the societal situation of women aged 50 to 65 and elaborated appropriate recommendations for this target group.

To sensitize men concerning their role as fathers the idea of Fathers' Days[62] was promoted in Liechtenstein. They take place every two years alternately in companies, kindergartens and schools. For one day fathers can visit the child's school or kindergarten, and children can go to work with their father or another male attachment figure in order to gain an insight into his professional world.

Since 1999 the Equal Opportunities Board administers the Women's Pool[63] (*Frauenpool*) as a database where politically interested women can register. These women are available to work in commissions and working groups for the state authorities. Liechtenstein nationality or party affiliation is not necessary. Women in the Women's Pool come from very different professional and social backgrounds and are of different ages. The Equal Opportunities Board planned for this year an extension of the database and an intensive awareness-raising campaign concerning the Women's Pool. All the addressees are to be actualised and all official authorities are to be informed thereof. Organisations and associations can also refer to the Women's Pool when filling management positions.

Liechtenstein is planning for 2009 a three-year project on child-care facilities.[64] A total of 20 additional places will be created to improve the child-care situation of young children from 4 years of age up to school entrance.

The campaign 'Euro 08 against trafficking in women'[65] ('*Euro 08 gegen Frauenhandel*') is intended to clarify and inform. By this campaign 25 organisations raise

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59 Press release by the Information Office of Liechtenstein dated 14.05.2008, BuA 2008/110 http://bua.gmg.biz/BuA/index.jsp, accessed 29 September 2008.

60 Press release by the Information Office of Liechtenstein dated 09.05.2008.

61 http://www.llv.li/pdf-llv-scg-massnahmenkatalog_web.pdf, accessed 29.09.2008.

62 http://www.llv.li/amtsstellen/llv-scg-gleichstellung-veranstaltungen/llv-scg-gleichstellung-vaetertag.htm, accessed 29 September 2008.

63 http://www.llv.li/amtsstellen/llv-scg-gleichstellung-veranstaltungen/llv-scg-gleichstellung-veranstaltungen_und_projekte-frauenpool.htm, accessed September 2008.

64 Press release by the Information Office of Liechtenstein dated 09.05.2008.

65 www.frauenhandeleuro08.ch, accessed 29 September 2008.

awareness by means of a petition highlighting the emergency situation of the women and girls in question and it advocates better protection for victims and witnesses and more effective rights.

LITHUANIA – *Tomas Davulis*

Policy developments

State Family Policy Concept

On 3 June 2008 Parliament, after long and highly sensitive debates, approved the State Family Policy Concept which shall serve as guidance for future initiatives in the sphere of family support. Parliament agreed with the opinion of the group which drafted the Concept that the priority in the state family policy shall be granted to the traditional family based on marriage. Thus marriage is understood as a basis of the family and is limited to the union between a man and a woman. This approach was heavily criticized by NGOs, scholars and international experts who expressed their fears that the advantages of married couples will be denied to single and unmarried parents who do not fall under the definition of a 'family' or to divorcees, widows and widowers with children who are considered to be an 'incomplete family' or to gay and lesbian couples. The Concept may be used to differentiate the status of natural persons on the ground of marriage in future legislative proposals. In all cases the Constitutional Court will be the last to decide whether the proposal or the Concept itself is in conformity with the principle of equal treatment in Section 29 or Section 38 that guaranteed state support and protection to families.

Strategy for the Implementation of Equal Opportunities of Women and Men in Science

On 2 June the Ministry of Education and Science adopted the Strategy for the Implementation of Equal Opportunities of Women and Men in Science.[66] The document draws attention to the fact that despite a significant increase in the number of new female doctors during the last decade women are underrepresented in the academic administration, they take a doctor's degree or training at a later age and face less beneficial conditions while studying.[67] The Strategy seeks to implement the evaluation of gender equality criteria in the system for supervising science and studies, thereby revising existing legislation with the view to promoting equal opportunities and to allocate appropriate financial means for the promotion of persons of the underrepresented sex. The Strategy expects that by 2013 the percentage of women at the highest level of academic activity (i.e. professors or senior researchers) will be increased so as to reach 20 % and the percentage of women in the physical sciences and technology will reach more than 30 %.

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[66] *State Gazette* 2008, No. 67-2537.

[67] See *European Gender Equality Law Review* 1/2008, p. 95.

Legislative developments

Adoption of amendments to the Equal Opportunities Act

The amendments to the Equal Opportunities for Women and Men Act[68] were adopted by Parliament on 19 June 2008 (in force since 3 July 2008).[69] The first group of fragmental amendments is intended to include the state and municipal *agencies* in addition to state and municipal institutions within the scope of certain provisions concerning the enforcement of gender equality policies. Institutions are designed to exercise public administration whilst agencies (in Lithuanian *įstaigos*) have as their purpose the provision of social services for society (health, education etc.). From now on these public law-governed agencies are legally obliged to observe the principle of gender equality in all their activities.

The new Article 5-3: 'Prohibition of Discrimination on Grounds of Sex in Social Security Systems' prohibits discrimination on grounds of sex when establishing and applying social security provisions including those that amend or supplement the state social insurance system:

1) when establishing possibilities for participation and use;
2) when establishing contributions and their amount;
3) when establishing benefits including additional benefits for spouses and dependent persons as well as when establishing the duration of the right to benefits and their retention.

The sickness, invalidity, old-age, early retirement, accidents at work, occupational diseases, unemployment and social protection schemes are covered by the principle of non-discrimination, including survivors' pensions, allowances and other benefits. The provisions of non-discrimination in social security schemes apply to 'employed persons', including self-employed persons, persons who terminate their employment due to sickness, maternity, an accident at work or forced unemployment as well as persons looking for employment, disabled workers and persons who are entitled to receive benefits on their behalf. The new Article 7-3 enumerates prohibited acts of discrimination in social security systems. These include the establishment of compulsory or non-compulsory participation or different rules concerning the minimum period of participation, different conditions for awarding benefits and restrictions concerning their receipt, the preservation of deferred payments, the establishment of different amounts of benefits or contributions etc.

Article 9 of Directive 2006/54/EC had already been partially implemented in Section 23 of the Law on Occupational Pension Schemes.[70] By simply reproducing the relevant provisions in the Equal Opportunities for Women and Men Act the legislator simply incorporates the prohibition of discrimination in rules on occupational social security schemes in an act which has a general, inter-disciplinary nature. From now on it allows prosecuting and penalising possible breaches of this principle with an administrative fine in accordance with the procedure established by the Equal Opportunities for Women and Men Act. In addition, the amendments broaden the scope of application of the principle of equal treatment compared with that required by the Recast Directive. The formulation 'social security provisions including those that amend or supplement the state social insurance system' encompasses state social security and no special provisions are foreseen.

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[68] *State Gazette* 1998, No. 112-3100.
[69] *State Gazette* 2008, No. 75-2923.
[70] *State Gazette* 2006, No. 82-3248.

The great novelty of the amendments of 19 June 2009 concerns the inclusion of the self-employed and public servants within its scope of application. It may be recalled that the Equal Opportunities for Women and Men Act initially targeted the employment relationship within the meaning of labour law. The explicit reference to employed persons including self-employed persons allows the inclusion of self-employed and public servants and other categories of state employees who are covered by the State pensions system (military personnel, scientists and judges) and to this extent fall under the principle of non-discrimination.

Case law national courts

On 30 June 2008 the Court of First Instance in Vilnius delivered its decision in a landmark case on discrimination (Case No. 2-1189-545/2008). A café that had refused to employ the candidate due to her Roma origin was ordered to pay the minimum wage for the period from the day of its unlawful refusal to employ the woman up to the day of her actual employment by another employer as well as compensation for non-material damage. Despite the fact that the case does not concern the prohibition of discrimination based on sex, the case gained importance due to the fact that this was the first significant discrimination case in the employment sector. Having heard strong evidence of a refusal to employ a person on discriminatory grounds, the Court had to apply national legislation in conjunction with equality legislation and EC directives. The decision has confirmed that complaints arising from a discriminatory refusal to employ a person shall follow procedure established by the Labour Code. In the event that a refusal to employ is determined by the court to be unlawful, the employer shall be obliged to employ this person and to pay him compensation to the amount of the minimum wage for the period from the day of the refusal to employ him up to the day of the execution of the court order (Section 96 Labour Code). In the reported case the Court awarded non-material damages of LTL 2 000 (EUR 580) to the victim of discrimination. It provided guidelines on the evaluation of non-material damages in possible similar cases. In this case a great deal of evidence was presented by the victim and her representatives, but a reversal of the burden of proof was not applied. This occurred due to the fact that at the time of the litigation neither the applicable Equal Opportunities Act nor the Labour Code had established the provision on the reversal of the burden of proof. Only the new version of the Equal Opportunities Act implements this rule alongside the Equal Opportunities for Women and Men Act.

LUXEMBOURG – *Anik Raskin*

Policy developments

Child-care fees, tax rebates and pension rights

On 22 May 2008, the Prime Minister presented his annual state of the nation speech to Parliament. In particular, he announced that, as from 2009, the Government intends to introduce service vouchers for families with dependant children. These vouchers are meant to be used to pay for services, in particular child-care fees. The Minister of Family Affairs will present a list of the services concerned in the next few months. According to the Prime Minister, child care should be free in the long term. The rate of introducing free child care will depend on the financial means of the State.

Furthermore, as from 2009, certain tax rebates, such as for example the single-parent tax rebate, will be transformed into tax credits in order to reinforce the purchasing power for lower-wage earners.

Finally, it must also be mentioned that the Prime Minister announced a pragmatic solution concerning the splitting of pension rights in the event of divorce. This subject has now been under discussion for over thirty years in Luxembourg. The Government estimates that the problem could be solved as follows: in the event of divorce, the judge could note a partner's pension rights compared to the other. This should be considered before any other division. National solidarity should also be taken into consideration if necessary.

Legislative developments

Transposition of Directive 2002/73/EC

Bill No. 5687 transposing Directive 2002/73/EC has been adopted on 30 April 2008.[71]

Since no national law aimed specifically at the self-employed has existed, the new law has been divided into two parts, the first of which creates a general framework of non-discrimination between women and men, whereas the second deals exclusively with aspects of work and employment. Thus, the first part constitutes an autonomous law applicable to all categories of workers (self-employed, employees and civil servants) while the second part contains provisions modifying existing specific legislative instruments (labour law and public service).

Regarding access to employment, a difference in treatment based on a characteristic related to sex does not constitute discrimination within the meaning of the law when, because of the nature of the particular activities concerned or their framework, such a characteristic constitutes an essential and determining professional requirement. The objective has to be legitimate and the requirement proportional.

On 28 July 2008, Bill No. 5908 concerning forced marriages and partnerships even as marriages and partnerships of convenience was introduced by the Government in Parliament.

On 11 September, Bill No. 5914 was introduced by the Government in Parliament. This law has a double objective. Firstly, it aims to increase women's legal age for marriage from the current sixteen to eighteen years old. (Men's legal age for marriage is already eighteen years old). Secondly, the Government proposes to repeal the current periods during which widowed and divorced women are not allowed to remarry.

Equality body

The *Centre pour l'Egalité de Traitement, CET* (Centre for Equal Treatment) is concerned with discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. The CET is directed by a board of five members who are designated by Parliament. Designations took place in 2008 and the last member joined the CET in June 2008. The staff of the CET will be composed of two full-time workers who have been engaged from October-November onwards. The CET was officially presented in mid-September. The members have already began to set up the CET which will probably be operational at the beginning of 2009.[72]

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[71] The law is available (in French) at http://www.legilux.public.lu/leg/a/archives/2008/0070/index.html, accessed 27 September 2008.

[72] See also *European Gender Equality Law Review* 1/2008, p. 97.

MALTA – *Peter Xuereb*

Policy developments

Positive action appears to be another issue of common ground between the two political parties at least internally, in the sense of the use of quotas in their internal party mechanisms, including election or appointment to party posts, in order to ensure the participation of women in their decision-making bodies. It is expected that the forthcoming national budget will contain measures intended to promote a better work/life balance for women and men, to make further provision for child-care centres and generally encourage women to return to work (see for more on the budget shortly the website of the Malta Government, www.gov.mt accessed 29 September 2008). A major development with implications for gender equality may have been heralded in the aftermath of the general elections of March 2008. The two main political parties have each declared that they support the holding of a national debate on the possible introduction of divorce in Malta. It might be said that the running has been made by the opposition Labour Party, but the governing Nationalist Party was quick to announce its own willingness to see such a debate. No concrete proposals have been made, and so far the 'debate' has been confined to sporadic but frequent letters in the press and statements from the Catholic Church leaders. Most of the discussion proceeds along the lines of the definition of marriage and the possible impact of divorce on family values. However, the fact that the two main political parties have appeared willing to begin such a national debate is unprecedented in this strongly Catholic country, and evidence of the growing incidence of marriage breakdown and the difficulties faced in particular, it is argued, by women as a result. (See, for example, www.timesofmalta.com/articles/search/keywords:divorce, accessed 15 September 2008).

Legislative developments

Implementation of the Equal Access to Goods and Services Directive

Council Directive 2004/113/EC was transposed into Maltese law on 1 August 2008. This was done by the adoption of the Access to Goods and Services and Their Supply (Equal Treatment) Regulations, Legal Notice 181 of 2008 (available at www.doi.gov.mt/legalnotices), by virtue of the powers conferred on the Minister for Social Policy by the Equality for Men and Women Act of 2003 (Chapter 456 of the Laws of Malta, available at http://www.2.justice.gov.mt/lom/home.asp). The regulations are in effect a full transposition of the Council Directive into Maltese law, the provisions of the directive being reproduced *verbatim*. However, the Legal Notice postdates the date for implementation set out in the directive (21 December 2007) by some eight months. As to the intervening period, it may be possible to argue that the directive's provisions are capable of direct effect, and are therefore capable of being invoked in the courts by individuals, at least as against a public entity. The National Commission for the Promotion of Equality (NCPE), the Maltese equality body, reported in its latest annual report (NCPE Annual report 2007, published in March 2008, www.equality.gov.mt) that it had received a number of complaints in relation to access to and the supply of goods and services. Details are not given by the NCPE in its annual reports, but it is understood that these are ongoing and it may therefore happen that the directive will be invoked. Most complaints are settled amicably after mediation by the NCPE.

Case law national courts

In an unprecedented gender reassignment case, a woman who underwent gender reassignment surgery is battling for her right to marry. The twenty-six year old had asked the Marriage Registrar to issue marriage banns for her and her fiancée. The Registrar refused on the grounds that under Maltese law a marriage can only take place between a man and a woman. The Civil Court (first hall) had ordered the Registrar to issue the banns, but the Registrar appealed against the judgment. In July, the Court of Appeal overturned the lower court's judgment and ruled that while the entries on the plaintiff's birth certificate relating to name and sex could be altered after gender reassignment surgery for the purposes of protecting her right to privacy and to avoid 'embarrassment', the Registrar had acted correctly in refusing to issue the marriage banns. The plaintiff has now applied to the Civil Court in its constitutional jurisdiction, arguing a breach of her rights under the Maltese Constitution and under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. The case continues. (Case not yet reported; but see www.independent.com.mt search: right to marry, *The Malta Independent*, 30.07.08).

Equality body decisions/opinions

It remains the case that while the equality body (the National Commission for the Promotion of Equality) has the power to mediate and also to litigate (with the consent of the complainant), the NCPE currently has no adjudicating or enforcement powers. Nor have regulations been made, despite provision being made for this in the Equality for Men and Women Act of 2003, regulating the procedure and other issues related to the conduct of investigations by the NCPE. This is a source of frustration for the equality body, and hampers its work, in particular its inability to summon witnesses as necessary for a proper and full investigation. The NCPE reports that it received 50 new complaints in 2007 (NCPE Annual Report 2007, at p. 46, www.equality.gov.mt).

Miscellaneous

National Council of Women seeks revision of the law

The National Council of Women of Malta has made an urgent plea to the Government to revise the law in light of Council Directive 92/85/EEC, and more specifically Article 10 thereof. The issue is that applicable Maltese law, in the form of the Employment and Industrial Relations Act of 2002 (EIRA, Chapter 452, Laws of Malta) and the Equality for Men and Women Act of 2003 (EMWA, Chapter 456, Laws of Malta) do not effectively protect workers against dismissal on grounds of pregnancy, recent birth or breastfeeding during the probationary period in so far as the law does not require reasons to be given for dismissal during this period. This means that any person dismissed during this period does not have effective means of challenging her dismissal. http://www.ncwmalta.com/news, accessed 28 August 2008.

Recent reports by the NCPE

The Maltese equality body, the National Commission for the Promotion of Equality (the NCPE), has produced three important new research papers. These are a research paper on Single Mothers on Social Benefits, a report on Taking Gender Equality to Local Communities, and a report on The Gender Gap in Science and Technology in

Malta. These, or further information, are available at the NCPE website www.equality.gov.mt, accessed 19 September 2008.

Church Commission proposals

In Malta, the Catholic Church has always been outspoken about poverty and social inequality. Many support agencies were started and run by the Church. It also firmly seeks to protect the family as the basic unit of society. With an upcoming government budget in view, a Church Commission yesterday made a large number of proposals that impact on the questions of the family, work/life balance, sharing of parental responsibilities between the father and mother, financial support for families, addressing single-parent families and child poverty. The measures proposed include: increasing the minimum wage (currently, the statutory minimum wage is insufficient to take the recipient above the poverty line); a paternity leave quota in order to encourage fathers to shoulder some of the burden of child rearing; an increase in parental leave to 17 weeks for the second child and to 21 weeks for the third child; the gradual increase of the fiscal benefits granted to parents whose children are at kindergartens or private schools, until the entire fee costs are allowed as a deduction against income for tax purposes. Many of the measures would impact positively on women who may wish to return to work, as well as on those already struggling to maintain a work/life balance. (www.timesofmalta.com, accessed 27 September 2008).

NETHERLANDS – *Rikki Holtmaat*

Legislative developments

Announcement of a prohibition on face-covering clothing in and around schools

In the first issue of the *European Gender Equality Law Review* (1/2008) we reported that in the Netherlands there is a fairly lively debate on the question whether the Dutch Government should prohibit the wearing of Islamic *burqas* or *niqaabs* in all public places or in specific areas or buildings (like in hospitals, schools, on trains or in public administration buildings). Recently, on 9 September 2008, the Government has announced a bill which realizes a prohibition on face-covering clothing in education.[73] The prohibition will concern all types of schools (irrespective of public or private funding) and all persons who are in or around schools. The Government justifies this proposal by stating that in education open communication and identification are very important factors, which require that teachers and students can see each other's faces. Furthermore, schools are also responsible for social integration and preparation for civil citizenship, to which face-covering clothing would constitute a barrier. With regard to the prohibition on face-covering clothing *around* schools, the Government argues that it is important to identify persons who are picking up 'their' young children at the end of the school day. All these reasons constitute a justification for a possible indirect distinction on the basis of religion and indirect sex discrimination. Some schools have already introduced such a prohibition. In 2004 the Equal Treatment Commission (ETC, the national equality body) ruled that a prohibition on wearing face-covering clothing in schools is acceptable when the clothes in question hamper communication and identification and affect safety. The proposal does not imply the inclusion of a prohibition in the Criminal Code. Instead, school boards will be obliged

[73] Letter to Parliament, *Kamerstukken* II 2007-2008, 31 200 VIII, No. 209.

to issue a prohibition that they need to implement themselves. The bill will be presented in Parliament in the summer of 2009.[74] Proposals regarding the ban on face-covering clothing in pubic institutions are still forthcoming.[75]

Case law national courts[76]

District Court of Rotterdam, LJN:BD9643, 6 August 2008

An applicant (a male) was rejected for a position as a 'client manager' within the social service department of the city of Rotterdam because of his refusal to shake hands with individuals of the opposite sex. The applicant had said that he would not shake hands with women because of his Islamic belief. He brought an action against the municipality of Rotterdam on the ground of being discriminated against due to his religion. The municipality put forward as a defence that it (also) had to protect women against discrimination by their civil servants. For this specific position as a 'client manager', the applicant would have to receive many clients (citizens), and therefore 'greeting' should be regarded as an essential function of the position.

In this case, the right to employment as a civil servant without any consideration being given to religion clashes with the right to equal treatment on the ground of sex by civil servants. The case is complicated because 'shaking hands' is not a written right or obligation, but a custom, which might be seen as specifically Western. On the other side, citizens who do not know about the specific religious background of the applicant in this case might interpret the refusal to shake hands as a lack of respect.

In an earlier instance, the case was brought before the Equal Treatment Commission (ETC, the national equality body). The ETC had deemed that there was a legitimate aim in the protection of women against discrimination, but the municipality had failed to seek alternative ways of showing respect to both male and female clients in an equal way. As a result, the ETC deemed that the rejection of the candidate was not necessary and proportional.[77] The District Court determined otherwise, however. First, the Court considered that a 'client manager' was an important contact person between the local authorities and citizens. The Court deemed that the municipality has the right to choose 'to observe the usual rules of etiquette and of exchange greetings in the Netherlands'. As a result, the Court deemed it necessary and proportional to reject the applicant for the specific position that was at stake because of his (announced) refusal to shake hands. The (indirect) distinction made by the municipality on the ground of religion was objectively justified.

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74 See *Kamerstukken II* 2006-2007, 31 108, Nos 1-4 (proposal by Wilders and Fritsma); *Kamerstukken II* 2007-2008, 31 331, Nos 1-3 (proposal by Kamp); *Kamerstukken II* 2007-2008, 31 200, No. 4 (Government response); Equal Treatment Commission, Opinion 2004-138; *Kamerstukken II* 2005-2006, 29 754, No. 41 (report of the expert committee).

75 See *Kamerstukken II* 2006-2007, 31 108, Nos 1-4 (proposal by Wilders and Fritsma); *Kamerstukken II* 2007-2008, 31 331, Nos 1-3 (proposal by Kamp); *Kamerstukken II* 2007-2008, 31 200, No. 4 (Government response); Equal Treatment Commission, Opinion 2004-138; Kamerstukken II 2005-2006, 29754, No. 41 (report of the expert committee).

76 Dutch Case Law is to be found at www.rechtspraak.nl

77 See ETC Opinion 2006-220, www.cgb.nl

Equality body decisions[78]

Opinion of the ECT 2008-102, 31 July 2008

A taxi company had reserved one of their taxis for women only. The company argued that offering this particular service was justified because their female customers often feel uncomfortable in taxis with men, especially during the evenings and nights. This 'sex-segregated' service was contested in vain by a local anti-discrimination organization. The ETC deemed that the complaint was of too little importance, as only one of around 40 taxis was reserved. According to the ETC, this service was not likely to cause extra waiting time or other disadvantages for men. Therefore, the petitioners did not have a sufficient interest in the case, which is a ground for rejection laid down in Article 14, Section 1(b) GETA. This decision could therefore be regarded as a practical solution for this type of sex-segregated service, since literally speaking it would not fall under any of the exemptions or exceptions that are provided for in the law. With regard to sex-segregated services, Dutch equal treatment law applies a closed system of justifications, instead of an open system.[79] Such a legal system could bring about a certain degree of legal certainty, but it leaves little room for unforeseen occasions in which a sex-segregated service is harmless and even favourable for women. By applying Article 14, Section 1(b) GETA, the ETC seemed to avoid a (renewed) debate on this aspect of Dutch equal treatment law.

NORWAY – *Helga Aune*

Policy developments

The report on 'Consequences of pregnancies and parental leave in the Norwegian employment market'

The Ministry of Children and Equality initiated a research project in 2007 on the discrimination of pregnant employees as well as employees on parental leave. The research was carried out by the Work Research Institute (*Arbeidsforskningsinstituttet*) and the report was presented on 12 September 2008.[80] One of the main findings was that the act of discrimination in general is more a result of a lack of consistent and systematic human resource management and ad-hoc solutions from the management rather than wilful acts of discrimination. Another finding was that the leave periods seemed to enforce stereotypical gender patterns while, on the other hand, men taking untraditional longer leave periods also experienced being side-tracked career wise. A clear conclusion is that parental leave should be more divided between the mother and the father of a child, thus forcing a change to stereotypical gender patterns and thus also altering the expectations which an employer may have towards men and women.

The use of a Hijab (headscarf) in public services

The military forces as well as the customs authority and the health sector all accept the use of a hijab together with their uniforms. The police force is still considering

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78 To be found at the website of the Equal Treatment Commission: http://www.cgb.nl

79 Directive 2004/113/EC only prescribes an open system of justifications with regard to sex-segregated services. Under Article 4(5) of Directive 2004/113/EC, a sex-segregated service can be justified if it has a legitimate aim and insofar as the measure is proportional to that aim.

80 http://www.afi.no, Report No. 2/2008 accessed 29 September 2008

whether or not to allow the use of the headscarf as part of the uniform.[81] The use of the headscarf has been discussed both as a matter of freedom of religion, but also as a gender issue as in practice it is muslim women who form the majority carrying religious symbols.

Survey of all court cases regarding discrimination including on the ground of gender

The Ministry of Employment and Integration initiated a fact-finding survey regarding the number of cases and the compensation awarded in discrimination cases during the spring of 2008 and the report was presented in August 2008. The survey was conducted by the previous second leader of the Gender Equality and Anti-discrimination Tribunal, 2006-2008, Mrs Else Leona McClimans. All courts were contacted and asked to submit all cases regarding discrimination cases and all discrimination grounds including gender. The survey revealed that during the period 1986-2008 the Supreme Court delivered five judgments regarding discrimination on the basis of gender and in none of the cases was compensation awarded. During the period 1989-2008 six judgments from the Appeal Courts were delivered regarding discrimination on the ground of gender. Of these, compensation was awarded in only one case regarding discrimination due to pregnancy. During the period 1985-2008 only four cases concerned discrimination due to gender, all based on discrimination because of pregnancy.

McClimans' analysis of the material concluded that in many of the cases the provisions regarding protection against discrimination were not the main focus of the lawyers. Usually the cases had started with an employment law argument and then the gender aspect was added at the very end or even only as late as the appeal case. Another finding was that since compensation was hardly ever awarded in these cases and, in addition, having to cover even the opposite party's fees in some cases, going to court in these discrimination cases is very often costly. McClimans suggests that fees in discrimination cases should be subject to free legal aid or that there is a system of splitting the costs even at a loss. Thirdly, McClimans suggests that the Gender Equality and Anti-discrimination Tribunal should be given, through legislative changes, the right to award damages, since this is the organ which deals with the majority of all discrimination cases. Lastly, McClimans advises that the Gender Equality and Anti-discrimination Ombud, through legislative changes, should be given the right to bring cases of importance before the courts.

Legislative developments

Proposed amendment to the Gender Equality Act of 1978, 6 June No. 45, Section 4

One proposal in the field of gender has been put forward for consideration regarding an amendment to the Gender Equality Act, Section 4, prohibiting employers from asking about family planning issues including plans to become pregnant in application procedures or in any other way trying to acquire such information regarding an applicant. Such questions will be deemed to be an act of direct discrimination. The proposal was sent for public hearing on 18 August 2008 with 18 November being set as the deadline for comments. The aim is to abolish any possible doubts as to the existence of a right to ask about the issue of pregnancy or views regarding family issues.

[81] Article in the newspaper: *Dagsavisen*, 27 September 2008.

Preliminary work for a White Paper regarding the implementation of the CEDAW into the Human Rights Act

The Ministry of Children and Equality has sent a letter of consultation regarding the implementation of the CEDAW into the Human Rights Act of 21 May 1999 No. 30. CEDAW is at present already part of the Gender Equality Act of 9 June 1978 No. 45 Section 1(b). The Human Rights Act gives the human rights conventions listed in the act a superior status in case of conflict with rights listed in ordinary national legislation, while the Gender Equality Act is such an ordinary national Act which must yield to any rights listed in the Human Rights Act in case of conflict. This flaw of the discrimination of the CEDAW in comparison to other human rights has been criticized by the CEDAW Committee on several occasions as well as giving rise to a fierce debate in Norway between legal scholars and activists as well as in the media.

The Gender Equality and Anti-Discrimination Tribunal

Discrimination on grounds of pregnancy and parental leave

A female employee applied for the position of Head of the Store where she was employed as second in charge at the time of the application, thereby already substituting the Head of the Store on certain occasions.[82] The female applicant was interviewed but was not named on the list of possible candidates. Two men were listed, one was second in charge at another store and the other was a substitute leader in a third store. In the application list, it was written that the female applicant was pregnant and was due to be on parental leave.

The Tribunal stated that the protection against discrimination due to pregnancy covers the entire application process, and is not limited to the final decision of who is to get the job. The prohibition may be violated where the applicant is denied the right to be evaluated in the process. Based on an overall assessment of all the evidence in the case the Tribunal found it most likely that the pregnancy and the parental leave placed the female applicant in a less favourable position than she would have been if she had not been pregnant. The employer was found to be in breach of the Gender Equality Act Section 3 and Section 4.

A hospital discriminated against a doctor on grounds of pregnancy

A hospital gave a contract of temporary employment to a female doctor.[83] The termination of the contract coincided with the date of the start of the employee's maternity leave. As the hospital was not able to present any evidence or reasons as to why the termination date was to be the same as the start of the maternity leave, the burden of proof had shifted. The hospital was not able to present any reasons as to why the termination date of the employment contract had to be the same date as the maternity leave and it was therefore found to be in breach of the Gender Equality Act Section 3.

[82] Gender Equality and Anti-Discrimination Tribunal, case No. 13/2008.
[83] Gender Equality and Anti-Discrimination Tribunal, case No. 16/2008.

POLAND – *Eleonora Zielińska*

Policy developments

The Polish governmental agencies continue to demonstrate a lack of knowledge, understanding and sensibility concerning equality issues and have no consistent vision of equality and anti-discrimination policy.[84] Proof of a lack of awareness concerning gender discrimination is the recent proposal by the Minister of Health to establish at the Ministry a special Department on Women and Children which would be obliged to keep a special register of pregnant women in Poland. According to the intention of the Minister, the existence of such a register would enable, among other things, the combating of underground abortions. As a result of rapid reactions by feminist organisations, followed by criticism from lawyers and opposition parties, the Minister has withdrawn this proposal.[85] At the same time the Ministry has removed from the ministerial ordinance[86] the provision which explicitly determined the liability of health service providers which refuse to provide – on the basis of a consciousness clause – medical services contracted with the National Health Fund (mainly legal abortions), without guaranteeing their execution at another unit. There are also disturbing signs of discriminatory practices based on sexual orientation exercised by state organs. Namely district offices for citizens' affairs consistently refuse to deliver to Polish citizens wishing to conclude a same-sex marriage or registered partnership in another country (where this is allowed), documents confirming their marital status. Such a refusal takes plane despite an explanation by the Ministry of the Interior and Administration from 2002[87] in which the existing legal basis for issuing such documents was reconfirmed (Article 79 of the Law on Civil Acts).[88] Further evidence of state authorities' passive stance concerning matters connected with discrimination may be considered to be the reluctance which is demonstrated with the introduction of effective remedies for victims of discrimination under Article 13 ECHR. Such a requirement derives, among other things, from the European Court of Human Rights' judgments in

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84 See e.g. the independent reports submitted by NGOs to the UN Committee on Economic, Social and Cultural Rights. http://www.kampania.org.pl/swiat.php?subaction=showfull&id=1218107171&archive=&start_from=&ucat=3& and http://www.federa.org.pl/english/english1.htm, accessed 10 September 2008.

85 This proposal has been withdrawn mainly as a result of protests by feminist organisations www.feminoteka.pl/news.php?readmore=3616, http://wyborcza.pl/1,75478,5690702,Kopacz_wycofuje_sie_z_rejestru_ciaz.html?skad=rss, accessed 13 September 2008.

86 *Rozporządzenie Ministra Zdrowia z dnia 26 maja 2008 r. w sprawie ogólnych warunków umow o udzielanie świadczeń zdrowotnych* (Ordinance of the Minister of Health of 26 May 2008 in the matter of general contacts on providing health-care services). *Dziennik Ustaw (Dz. U.)*, (Journal of Laws of the Republic of Poland) No. 81, item 484,. http://www.federa.org.pl/Informacje/MZ_nadregulacja0001.pdf, accessed 10 September 2008.

87 *Biuletyn Monitoringu Dyskryminacji Osób LGBT w Polsce* (Bulletin monitoring Lesbian and Gay Persons in Poland) 2/07/2008 ed. by NGO Kampania przeciwko Homofobii (The Campain against Homophobia) . The Campaign against Homophobia also protested against the formula (No. 3-90/86A) prepared by the Minister of Health in which homosexuality is linked to risky behaviour http://www.kampania.org.pl/kraj.php?subaction=showfull&id=1215443810&archive=&start_from=&ucat=2&, accessed 13 September 2008.

88 *Ustawa o aktach stanu cywilnego z dnia 29 września 1986 r* , consolidated text : Dz. U. 2004 , No. 161 item 1688 with further amendments. The above-mentioned provision introduces the obligation of these offices to deliver confirmation of the existence or non-existence of , among other things, a marriage.

the cases *Tysiąc* v *Poland*[89] and *Bądkowski and others* v *Poland*.[90] Additional proof of effective comprehensive anti-discrimination policies is derived from the fact that since April 2008 two separate equality bodies with similar mandates and competences are now operating, namely the Department of the Family and to Counteract Discrimination at the Ministry of Labour and Social Policy (which replaced the Office of the Government Plenipotentiary for the Equal Status of Women and Men, abolished in 2005)[91]and the Government Plenipotentiary for Equal Treatment established on 22 April 2008.[92] Neither of these existing institutions has an independent character and is equipped with a mandate to become involved in resolving individual cases. The Office of the Government Plenipotentiary for Equal Treatment, according to its Head, would rather perceive its role as being limited to only monitoring and coordinating different anti-discriminatory policies, rather than as an organ conducting proactive initiatives, in particular the promotion of gender equality. These recent events have proved that neither of these institutions is able to prevent or to react quickly in cases of violations of the principle of equality and acts of discrimination.

There were expectations that the Draft Equal Treatment Act presented by the Ministry of Labour and Social Policy will clarify the situation as to the competences of these organs. However, it seems that those expectations were not justified. There have already been three versions of this Draft[93] and none of them has yet been presented to Parliament yet. In all versions of the Draft the competences of the mentioned organs do not substantially differ; they only essentially differ institutionally. They are supposed to contain, among other things, the duty to monitor the principle of equal treatment, to evaluate different draft laws from an equality perspective, to prepare legislative amendments and to order that independent research be carried out. However, providing independent assistance to individual victims of discrimination, in pursuing their complaints of discrimination, has been left to the Commissioner for for the Protection of Civil Rights.[94] The proposed 'division of work' creates the risk that none of these organs will feel that it is fully responsible for combating discrimination.

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89 Case No. 5410/03 judgment of 20th of March 2007. This case referred to a physician's refusal to carry out an abortion for health reasons.

90 Case No. 1543/06, judgment of 3rd of May 2007. This case related to the refusal to organise a Lesbian/Gay event, the so-called 'Equality Parade'.

91 On its website the Department declares that it is the equality body in the sense of Directive 2002/73/EC, http://www.kobieta.gov.pl/?1,23,459, accessed 1 September 2008.

92 Established by *Rozporządzenie Rady Ministrów z dnia 22 kwietnia 200 8r. w sprawie Pełnomocnika Rządu do spraw Równego Traktowania* (Ordinance of Council of Ministers on the matter of the Government Plenipotentiary for Equal Treatment of 22 April 2008) (Dz.U. 2008 No. 75 item 450).

93 On the website of the Ministry of Labour and Social Policy only one version of the Draft (from the 3rd of July 2008) can be found. (http://www.mps.gov.pl/bip/download/Ustawa%20o%20rownym%20traktowaniu%2016-07-08.pdf, accessed 15 September 2008), and this was replaced in October by the third Draft renamed the Law on the transposition of certain EU provisions on equal treatment – draft of 25 September 2008 **(***Ustawa w sprawie wdrożenia niektórych przepisów Unii Europejskiej w zakresie równego traktowania projekt z 25.09.08 r.)* http://www.mps.gov.pl/bip/index.php?idkat=1603 (accessed 20 October 2008).

94 The draft contains appropriate amendments to the law on the Commissioner of 15th July 1987, Dz.U. 2001 No. 14 item 147, unified text with further amendments.

Case law national courts

Discrimination against women in employment in connection with reaching the retirement age

The Supreme Court (the Labour and Social Security Chamber), in its decision of 19 March 2008 (I PK 219/07), considered as ill-founded the appeal in cassation instigated by an employer (the Polish State Railways) against a female employee who had demanded compensation for being illegally forced to retire from work when she achieved the statutory retirement age. The Court of First Instance acknowledged this claim recognising that the forced retirement had a discriminatory character based on sex and decided that the plaintiff should be awarded compensation amounting circa PLN 22 500 (approximately EUR 6 600). This decision was upheld by the Appellate Court. The Supreme Court, while dismissing the cassation claim, shared the opinions of the above Courts and decided that her forced retirement should be considered as directly violating the prohibition of sex discrimination provided for in Article $11^{3}$of the Labour Code, as well as the equality clause, subject to Article 18^{3a} of the Labour Code.

The Supreme Court explained that the possibility of earlier retirement, specifically created for women, should be understood as a personal right, not an obligation. In this situation the forced retirement deprived her of the possibility to make a choice between profiting from a pension or continuing in employment five years earlier than in the case of men and shortened the possibility of continuing her professional career and to obtain benefits therefrom, as well as depriving her of the possibility to obtain additional retirement benefits. While justifying this opinion the Supreme Court evoked the two decisions of the ECJ.[95] It also referred to the earlier decisions of the Polish Constitutional Tribunal, which in several rulings consistently declared that women's forced retirement constitutes sex discrimination.[96] It might be added that the issue of a different retirement age for women and men, and the discriminatory practice which derives from this provision, prompted Poland's Commissioner for the Protection of Civil Rights to take several actions. First, he addressed the Minister of Employment and Social Policy to consider putting forward a legislative initiative aimed at appropriate amendments to the Labour Code which should consist of introducing a provision which states that approaching the retirement age should not constitute an exclusive (sufficient) reason dissolving an employment contract.[97] In justifying this proposal the Commissioner pointed to the inconsistency between the government policy aimed at the integration of older people in employment[98] and discriminatory practices on the basis of age, as exercised by many employers (including the state). Secondly, the Commissioner lodged with the Constitutional Tribunal a motion claiming that the provisions of the Law on Pensions from Social Security Funds, which pro-

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[95] Case 152/84 *Marshall* v *Southampton & South –West Hampshire Area Health Authority* [1985] ECR 723 and case 262/84 *Vera Mia Beets-Proper* v *F.Van Lanschot Bankiers* [1986] ECR 773.

[96] See, among others, the Judgment of the Constitution Tribunal of 24 September 1991, Kw 5/91. *Orzecznictwo Trybunału Konstytucyjnego (OTK)* (The Case Law of the Constitutional Tribunal) 1991, item 5; of 29 September 1997 , K. 15/97, OTK 1997, item 37, 5 December 2000 , K. 35/99, OTK 2000 item 295; of 134 June 2002, K. 15/99, OTK 2002, item 137. http://www.trybunal.gov.pl/index2.htm, accessed 13 September 2008.

[97] RPO 571564 -III/07/LN/MPR.

[98] RPO – 571564-07/UH/LN.

vides for the different retirement age between women and men, are unconstitutional.[99] Both initiatives should be, in my opinion, positively evaluated.

Discrimination on the basis of sexual orientation

On 2 June 2008 the District Court in Wrocław issued a judgment which for the first time relates directly to the sexual orientation of the child's parent. In this decision, the Court explicitly expressed the opinion that sexual orientation, as such, should not influence the judicial decisions on the exercise of parental authority. In the referred case a grandmother cared for a child for several months due to the difficult psychological condition of the child's mother. The grandmother had refused to return the child and requested a court decision on restricting the mother's parental rights, arguing that her daughter was a drug addict and that her lesbianism could lead to the child being subject to harassment. Although the Court decided that the child would have a better life when continuing to stay temporarily with the grandmother, it nevertheless did not exclude the possibility of returning the child to the mother after she had undergone family therapy with the participation of the grandmother.[100]

PORTUGAL – *Maria do Rosário Palma Ramalho*

Legislative developments

Amendments to labour law

In September, the Portuguese Parliament approved a bill proposed by the Government[101] that introduces major changes to the Labour Code and eliminates the Labour Regulation Act.

Although the legislative process regarding this new legislation has not yet come to an end (since the rules were only approved in general and will be studied in a specialized Parliamentary Commission, and specific changes can still be introduced), some new trends in the provisions on gender equality as well as the protection of maternity and paternity and the reconciliation of family and working life are already noticeable.

Without going into detail, two important goals can already be traced in the new bill in this area.

On the one hand, the new Labour Code intends to increase policies that promote the reconciliation of family and working life. In this area, the new legislation establishes more flexible working times and reinforces the protection of maternity and paternity in a gender-balanced way, based on the new concept of 'parenthood' (*parentalidade*). Measures like establishing time banks, child-care leave for fathers as well as broader protection in the case of adoption are established in this bill.

On the other hand, gender equality issues are dealt with in a more dignified way, since the new legislation abandons the former division between the Labour Code and the Labour Regulation Act, and integrates most of the provisions from this second Act directly in the Labour Code. Gender provisions are part of these integrated provisions. Also in this area, the enlargement of the legal concept of harassment is to be noted.

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[99] The Minister of Employment and Social Policy established, among others, the programme 'Solidarity of generations, increasing the professional activity of persons aged 50 +'.

[100] *Biuletyn Monitoringu Dyskryminacji Osób LGBT w Polsce* (Bulletin Monitoring Lesbian and Gay Persons in Poland) 2.7.2008.

[101] Proposta de Lei nº 216/X.

It is of course too soon to anticipate the final outcome of this process, let alone the practical results of the new provisions. However, a more favourable political *ambiance* concerning the issues of gender equality and reconciliation can already be noticed.

Sources

Proposta de Lei nº 216/X. This legal proposal can be traced at:
www.assembleiadarepublica.pt

ROMANIA – *Roxana Tesiu*

Legislative developments

Legislation concerning family support for raising children

Three important legal initiatives are currently pending in Parliament with regard to gender aspects, including reconciling family and professional life. The first initiative belongs to a group of deputies and aims to complete the legal provisions of Law No. 7.[102] The preliminary explanation of this legal initiative highlights its scope, namely to enlarge the categories of the law's beneficiaries who are entitled to receive a parental leave allowance by adding the category of women students who give birth during university studies.

The law currently provides that the parental leave allowance is determined in a fixed amount and is granted to persons who have earned wages from employment for 12 months before the date of confinement.[103] The next paragraph stipulates the categories of persons who can meet this 12-month period by adding periods in which they found themselves in certain situations, such as: persons who accompanied his/her spouse sent on a mission abroad, persons who benefited from unemployment allowance, medical leave and health social insurance, persons who benefited from disablement pensions, unpaid leave for professional training, persons who worked abroad and persons who are subject to an interruption to their work activity based on the employer's decision for economic reasons. By adding the category of women who give birth and are enrolled in university studies, as long as women students who become mothers do not currently benefit from any state support, the final result will be to encourage young couples to have children. For 2004, the National Institute for Statistics indicated that 376 000 children were newly born, while estimations for 2010 indicate a 30 % decrease, down to 260 000 newborn children. In most cases mothers who gave birth while undergoing university studies gave up studies. Such a decision affected their further professional development.

Under the current legal provisions, after three births, persons who have been in gainful employment for 12 months before the date of confinement are entitled to 3 months leave without the payment of child allowance. Another important addition envisioned by the legislative draft under discussion refers to increasing the duration of the granted leave from 3 months to 6 months.

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[102] Law No. 7 of 9 January 2007 for the approval of Emergency Governmental Ordinance No. 148 of 3 November 2005 on supporting the family in raising children.

[103] Article 1(1) of the Emergency Governmental Ordinance No. 148 of 3 November 2005.

Legislation concerning the construction of crèches and kindergartens

As a result of privatization and the recession, several thousand kindergartens and crèches have been closed. In 2008 approximately 1 000 functional kindergartens and crèches are registered in Romania. Such a low number generated a crisis situation at the beginning of each school year, as a high number of children could not benefit from kindergarten facilities. As a consequence, families with pre-school children were put in a very difficult situation. In many cases women were obliged to remain at home as no other solution was available for pre-school child care. On the other hand, attending private crèches and kindergartens implies significant enrolment fees that are not affordable for most families with an income lower than 1 600 RON (approximately 450 EUR) per family member. The legal proposal under discussion aims to facilitate the construction of state and private kindergartens and crèches during 2009-2012. For the state kindergartens and crèches investment the following funds shall be assured: 50 % of state budget through the Ministry of Education, Research and Youth, 30 % from the local county council and 20 % from the local town council. Upon request, local town councils are obliged to grant concessions for building kindergartens and crèches for 49 years. The price for the concession is set at a maximum of 10 EUR/square meter and it has to be set up by a decision of the local council.

Case law national courts

On 9 October 9 2008, the Section of Administrative and Fiscal Contentious Cases at the High Court of Cassation and Justice of Romania reached a decision on file No. 935/57/2008 on the ground of illegality. The law suit under discussion relates to the legal provisions on supporting families in raising children[104] and more specifically to the grounds for granting a monthly allowance for parental leave. The monthly allowance for raising a child is set at a fixed amount of 600 RON per month (approximately 166 EUR). The claimant I.D. grounded her action on the violation of the principle of equality of treatment between children born as a result of a single pregnancy and multiple births. The claimant gave birth to triplets on 4 December 2006. Following the written petition submitted by I.D. the Labour and Social Protection Directorate of Alba County decided to grant only one allowance based on the application of the legal provisions relating to the parental leave allowance.

According to the legal provisions of Article 6 of Emergency Governmental Ordinance No. 148 of 3 November 2005, the parental leave and parental leave allowance shall be granted 'for each of the first three births'. The provisions on the application of the Emergency Governmental Ordinance No. 148 of 3 November 2005[105] provide in Article 3(1) that 'by birth is to be understood the bringing into the world of one or more children'. The claimant submitted a court complaint against the Labour and Social Protection Directorate of Alba County. The Court Appeal of Alba Iulia admitted the illegality and decided that there had been discrimination between persons in identical situations without any objective grounds. The High Court of Cassation and Jus-

[104] Law No. 7 of 9 January 2007 for the approval of Emergency Governmental Ordinance No. 148 of 3 November 2005 on supporting the family in raising children, published in the *Official Gazette* No. 33 of 17 January 2007. Emergency Governmental Ordinance No. 148 of 3 November 2005 was published in the *Official Gazette* Part I No. 1.008 of 3 November 2005.

[105] Governmental Ordinance No. 1025 of 9 August 2006 on the approval of Methodological Norms on the application of the Emergency Governmental Ordinance No. 148 of 3 November 2005, published in the *Official Gazette* No. 704 of 17 August 2006.

tice of Romania rejected the appeal submitted by the Labour and Social Protection Directorate of Alba County as being groundless.

In the light of the above case law, on 6 October the Senate adopted a draft law on modifying Emergency Governmental Ordinance No. 148 of 3 November 2005 with regard to the amount of the allowance for raising children and the conditions for granting it. According to the legal proposal, the amount of the allowance for raising a child shall be differentiated based on the number of living children resulting from a birth: 600 RON for one child (approximately 166 EUR), 800 RON for two children (approximately 222 EUR), and 1 000 RON for three or more children (approximately 277 EUR). However, it must be stated that the amount itself has been determined in a very arbitrary manner, without any reflection of the scope for which the initiative was proposed. There are legal opinions reflecting the fact that granting the parent a unique amount of money irrespective of how many children have resulted from the birth is not discriminatory as long as Emergency Governmental Ordinance No. 148 of 3 November 2005 does not specify that the allowance for raising a child is a child-related right.[106] In this context it is pertinent that for the state allowance provided for each child the legislator clearly stipulated that it is a child-related right designed to cover a child's needs. *Per a contrario* we shall assume that in this case the legislator did not stipulate that the allowance for raising a child is a parent-related right designed to replace wages that the parent would earn if he/she would not have been on leave. The legal source of the rights provided by Emergency Governmental Ordinance No. 148 of 3 November 2005 is the need of the parent who requests them and not the number of children or the birth itself. However, it must be highlighted that, in case the legal source of the rights provided for by Emergency Governmental Ordinance No. 148 of 3 November 2005 is the need of the parent and the allowance is designed to replace the wage that the parent would earn if he/she would not have been on leave, it is then difficult to sustain why the parent suddenly has lower needs once the child is born and does not have access to the salary that he/she would be entitled to.

SLOVAKIA – *Zuzana Magurová*

Policy developments

The UN Committee on the Elimination of Discrimination against Women (CEDAW) requires the fulfilment of certain commitments

In July of this year the UN Committee on the Elimination of Discrimination against Women published its Concluding Observations addressed to Slovakia. In this document it calls upon the Government of Slovakia to ensure the proper fulfilment of the commitments resulting from the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The adoption of these recommendations was preceded by the meeting of the Committee with the Delegation of the Government of Slovakia that was held during the 41st meeting of the Committee in mid-July. Also the coalition of women's and human rights NGOs evaluated the fulfilment of CEDAW through a so-called 'Shadow Report' that was submitted to the Committee before this meeting.

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[106] *Cat de discriminatorie este indemnizatia pentru cresterea copilului?* Avocat Andreea Lisievici http://www.avocatnet.ro/content/articles?id=13361, accessed 13 October 2008.

Although the Committee admitted that certain progress had been made in the implementation of CEDAW in Slovakia, it criticised the persisting serious weaknesses in the effective exercise of women's rights, particularly obstacles to the access of many women to means of legal protection from discrimination, the unwillingness to take temporary special measures on the grounds of sex, gender or ethnic origin, the persistent gender stereotypes in individual sectors of society, and the limited access of women and adolescent girls to sexual and reproductive health services. The Committee also expressed serious concerns about the continuing multiple discrimination against Roma women and called upon the Government to take efficient measures for the elimination of their disadvantaged position. It also criticised violence against women and trafficking in women, where special attention should be paid to the adoption of comprehensive measures.

Legislative developments

The draft Child Allowance Act

Several non-government organisations pointed out to the unprofessional and non-systematic approach of the Ministry of Labour, Social Affairs and Family of the Slovak Republic in drafting Acts that do not properly take into account the needs of families. In August the Union of Maternity Centres (the 'Union'), representing more than 70 maternity centres in Slovakia and therein thousands of parents on maternity and parental leave, organized a petition for the withdrawal of the draft Child Allowance Act, for the adoption of an amendment to the Family Allowance Act and for further changes in legislation that will take into account the needs of parents. Its purpose is to stop the adoption of the draft Child Allowance Act which is aimed at parents and which was prepared by the Ministry during the summer. The Union requests the preparation of a targeted, comprehensible, clear and professionally-based conception of family policy in Slovakia, including its subsequent integration into the legislation of Slovakia.

The family allowance is currently paid in its full amount also to those working parents who do not use subsidized nursery schools and crèches, because a grandparent or other family member takes care of their child. According to the draft Child Allowance Act, from the beginning of the following year the state will pay this allowance to parents who are in gainful employment and ensure that their child up to the age of three years is cared for by another legal or natural person (an institution or a family member). The allowance should correspond to 80 % of the documented costs incurred by the child care, but it should not exceed the amount of the family benefit if the child care is by a nursery school or crèche. If e.g. a grandparent or other family member, to whom no family allowance is paid, takes care of the child, the amount of the child allowance will be 25 % of the family allowance. Moreover, from the beginning of September the family allowance will increase from the existing sum of SKK 4 560 (EUR 151.37) to SKK 4 780 (EUR 158.67). The minimum wage is currently SKK 8 100 (EUR 268.9).

The draft Child Allowance Act does not differentiate between those parents who decide to work before their child attains the age of three years and those who decide not to work. The draft merely makes a difference between working parents who allow their children to be cared for by a family member (e.g. a grandparent) and working parents who allow their children to be cared for by collective institutions (e.g. nursery school). Finally, it means that the draft discriminates against parents who opt for personal care by another individual, particularly their family member, rather than for in-

stitutional collective care (crèche, nursery school). The draft Act withdraws the family allowance from the working parents and awards the entitlement to the alternative (compensatory) child allowance to the amount of one quarter of the family allowance. A parent who has chosen a 'career' instead of raising his/her own children also means a parent who performs a gainful activity his/her home, in his/her free time, often under a service contract (contract for work). The draft Act in this way discriminates against a parent who is willing and able to deal with his/her financial situation alone, and it will sanction not only the poorest parents on parental leave, but also the middle classes who that spend most of the family budget on housing.

The draft does not correspond to the policy statements of the government to the effect that it will support the enforcement of the principles of gender equality, as it has a demotivating effect on the participation (especially of women) in the labour market. It is not comply with the context of the National Reform Programme, one of priorities of which is to increase the participation of women and to reduce the differences between the sexes in the area of employment and wages. For this reason the Union requests the Ministry to halt the adoption of the draft Child Allowance Act.

The Union requires in the following year an increase in the family allowance up to the amount of the minimum wage of SKK 8 100 (EUR 268.9), in line with the public promise given by the Minister of Labour and Social Affairs, Viera Tomanová. It also requires that entitlement to the family allowance be maintained, irrespective of whether or not the parent is engaged in gainful activity, and equal entitlement conditions for a parent who is self-employed.

The NGOs underline the need for non-discriminatory legislation in the area of private law

In September of this year the non-governmental organisations Citizen and Democracy, Pro Choice and First Lesbian Association 'Museion' sent to the Ministry of Justice of Slovakia professional suggestions on the draft legislation aiming to codify private law, that should lead to the adoption of a new Civil Code. In their comments they request that the draft Private Law Act should among other things ensure the observance of the principle of equality and justice in the legislation relating to e.g. marriage/partnership and family relations. They also request the elimination of discrimination against certain groups of persons (lesbians and gay people) to whom the existing legislation does not guarantee the effective exercise of their human rights and freedoms in many areas of life.

The NGOs pointed to the need for an equitable legal solution concerning partnerships between non-heterosexual couples, who should be given the right to institutionalize their partnership like heterosexual partners. Furthermore they submitted comments on e.g. certain property aspects of marriage (so-called pre-nuptial agreements, alimony between divorced spouses) or the existing discriminatory regulation of assisted reproduction, unsatisfactory legislation regulating the procedure for gaining legal capacity by minors older than 16 years, or the legal limits on the choice of one's surname upon the conclusion of marriage.

Court fees are prohibitive for discriminated persons

The existing fees for proceedings in cases of a violation of the principle of equal treatment often do not contribute to effective protection against discrimination.

The association Citizen and Democracy together with other women's non-governmental organisations submitted collective comments to the draft amendment of the Code of Civil Procedure, amending, among others, the Act on Court fees. By these

comments they wish to see a reduction in court fees in cases of violations of the principle of equal treatment.

The main reason for the submission of the collective public comments is the fact that discriminated persons very often constitute the socially and economically most vulnerable group of the population and high court fees represent for them a real barrier to the protection of their right to equality and to protection from discrimination.

The association Citizen and Democracy proclaimed that 'the existing amount of court fees in proceedings in cases of violations of the principle of equal treatment prevents many discriminated women from seeking protection. Moreover, it does not allow a request for the compensation of immaterial damage in the amount that will actually deter discriminating entities. To fulfil its commitments resulting from the European Anti-Discrimination Directives the Government must ensure the reduction of court fees in cases of violations of the principle of equal treatment or their complete cancellation.' (It means that according to the association Citizen and Democracy it is necessary to reduce court fees.)

Many women, especially Roma women, currently do not use the possibility to seek protection from discrimination by legal action, because they cannot afford to pay the existing high court fees. The protection guaranteed by the Anti-Discrimination Act is still a formal statement, rather than real protection.

The existing fee in proceedings in cases of violations of the principle of equal treatment is at least SKK 3 000 (EUR 100). If the plaintiff requests the compensation of immaterial damage in cash, this fee represents 6 % of the required amount. If the Ministry of Justice were to accepted the proposal by the non-governmental organisations the basic fee would decrease to SKK 2 000 (EUR 66.60) and the required compensation of immaterial damage to 3 % of the required amount.

SLOVENIA – *Tanja Koderman Sever*

Policy developments

Annual report of the Labour Inspectorate and the session of the Commission of the National Assembly for Petitions, Human Rights and Equal Opportunities

At the end of April, the Slovenian Labour Inspectorate published the Annual Report for 2007.[107] According to this report inspectors had found three violations of the Act Implementing the Principle of Equal Treatment. One case of direct discrimination and two cases of harassment were found. Concerning the Parental Care and Family Benefits Act they found two violations concerning the right to part-time work which was not granted to a parent who nursed and cared for a child until that child had attained the age of three years old.

In May, the Commission of the National Assembly of the Republic of Slovenia for Petitions, Human Rights and Equal Opportunities discussed the Annual Report on the work of the Advocate for Equal Opportunities for Women and Men and the Principle of Equal Treatment (hereinafter the Advocate) for 2007, which had been adopted by the Government in April 2008. Besides a substantial presentation of the cases handled by the Advocate they also discussed her independent status. Some of its members explicitly expressed concerns about the fact that the Advocate operates within the Of-

[107] http://www.id.gov.si/fileadmin/id.gov.si/pageuploads/Splosno/Letno_porocilo_IRSD_2007.pdf, accessed 28 September 2008.

fice for Equal Opportunities, which is a governmental body, since this could be an obstacle to her actual independence. The Director of the Office for Equal Opportunities, who was present at the Commission session, also agreed that the regulation on the status of the Advocate is not perfect, but it does guarantee her the necessary conditions for undertaking her working duties which can be seen from the Annual Report. In addition, the director assured that the Advocate is independent and autonomous in her work and emphasized that significant progress has been made in the field of the political representation of women. At the end of the sitting, the Commission, in addition to other conclusions, adopted a conclusion proposing that the Government should examine whether the legal regulation of the institution of the Advocate is still appropriate or whether some changes should be made.

Government activities

Among the Government activities, it is worth mentioning the adoption of the Report on the prevention of bullying in July 2008, which is explicitly prohibited according to amendments to the Employment Relationship Act that were adopted in November 2007. Bullying, according to the survey carried out by the Labour Inspectorate, is widely present in Slovenian society, but is rarely tackled. Another report, adopted by the Government at the beginning of May, was the Report on the implementation of the Resolution on the National Programme for Equal Opportunities for Women and Men for the period 2006-2007.[108] After its adoption by the Government, it was submitted to the General Assembly. In addition, the Government adopted the second periodical plan for the implementation of the Resolution on the National Programme for Equal Opportunities for Women and Men for the period 2008-2009[109] also at the beginning of May. The second periodical plan is the implementing act for the national programme establishing six priority areas (gender mainstreaming, equal opportunities for women and men in matters of employment and work, a quality working environment, the social welfare of women and men, knowledge-based society, gender relations and decision-making) and activities (such as organizing workshops, training programmes and seminars; raising awareness; carrying out analysis and monitoring; formulating recommendations, guidelines and instructions; focusing the inspection system on different issues; providing financial support for certain projects etc.) for implementing the objectives and measures thereof in particular areas of the national programme.

Political representation

The political representation of women is always an important issue before general elections. In June, three months before the general parliamentary elections, the Coalition for Equal Representation of Women and Men in Public Life issued a call to parliamentary parties to promote the election of their female members by their equal visibility in the election campaign and by giving them the opportunity to canvass in those electoral districts where they have the best possibilities of being elected. They warned that the 25 % female quota will not be sufficient if the political parties do not demonstrate a real political will to have women elected.

As some sceptics concerning the efficiency of the female quota had predicted, the 25 % quota which was first introduced in the September 2008 parliamentary elections,

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[108] http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/NPPrviPeriodnicniPorocilo.pdf, accessed 28 September 2008.

[109] http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/NPDrugiPeriodicni.pdf, accessed 28 September 2008.

was not a success. Only one additional female candidate was elected, so twelve in total, to sit in the General Assembly.

Legislative developments

The new Criminal Code[110] was adopted in May 2008 and it will enter into force on 1 November 2008. It devotes significant attention to criminal acts committed within the sphere of employment relationships with special emphasis on the protection of workers' rights and it introduces two new criminal offences related to gender (obstructing a woman from becoming pregnant or from having a baby when concluding an employment contract and during the duration of an employment relationship and bullying).

Miscellaneous

A book entitled 'Between public and private. Women on the labour market' has been published. The collection of academic papers consists of ten contributions by Slovenian female scientists and presents a whole review of the actual findings on the position of women on the Slovenian labour market. The contributions are based on empirical data and deal with employment, career management, the reconciliation of work and family life, paid and unpaid work and they also demonstrate the existing differences in power between genders.

In the week of equal opportunities at the end of September 2008 non- governmental organizations, which took an active part in the Progress Programme entitled 'Diversity is the treasure of society', called attention to the problem of discrimination in society with several events all over Slovenia. The equal opportunities week concluded with a conference which was the final measure in this project. At the conference non-governmental organizations presented good practices in combating discrimination and launched a discussion on cooperation between the Government and non-governmental organizations in the fight against discrimination.

SPAIN – *Berta Valdés*

Policy developments

Policy developments in Catalonia: Strategic Plan on the Uses of Time Management in Everyday Life

The Strategic Plan on the Uses of Time Management in Everyday Life (2008-2010) approved by the Government of Catalonia on July 1, 2008 (Official Gazette of the Government of Catalonia, No. 5168, of July 8, 2008) has as its aim to establish transversal policies that respond to the realities of new types of time management and distribution. The plan establishes a strategy that goes further than traditional measures that encouraged 'the reconciling of personal, family and working life'. This is accomplished through actions centred in four areas, one of which established a new balance between the value and distribution of time devoted to paid work from participation in the labour market and work in the family and household sphere.

[110] http://www.dz-rs.si/index.php?id=101&vt=6&cl=K&mandate=-1&unid=SZ|C12563A400338836C1257435005A1F1C&showdoc=1, accessed 28 September 2008.

Policy developments in Galicia: municipal measures to promote the reconciliation of work and family time

Decree 182/2008, of July 31 (Official Gazette of Galicia, No. 167, of August 29, 2008) promotes new methods of time management for reconciling work and private life. The local reconciliation plans are a set of coordinated measures that include the creation of 'Municipal Time Banks', a plan to programme a city's time and other activities elaborated by municipal governments to encourage, whenever possible, the co-responsibility of women and men in reconciling work, personal and family time.

Galician Council on Labour Relations and the Participation of Women in Employment

Decree 181/2008, of July 24 (Official Gazette of Galicia, No. 167, of August 29, 2008) sanctions the creation of the Galician Council on Labour Relations and the Participation of Women in Employment. By its very nature, this council is an administrative and consultative body, participated in by women, and its most important goals are the adoption of measures in the areas of equal opportunities in employment and the dissemination of the values of equality and non-discrimination in the realm of labour relations.

Legislative developments

Legislative developments: Catalonia

The Catalonian Parliament approved Law 5/2008 on April 24, formally recognizing women's right to the eradication of sexist violence (Official Gazette of the Government of Catalonia, No. 5123, of May 2, 2008). The law defines the concept of 'sexist violence' (*violencia machista*) as that which is exercised against women as a manifestation of discrimination and the situation of inequality existing within the framework of a system of power relationships giving men power over women. The law covers all types of violence, whether physical, psychological, or sexual and economic violence, taking place in any area of life, not just in the family, at work or in the lives of a couple. It also includes violence in the societal and community realm such as trade and the exploitation of women, genital mutilation, and violence as a consequence of military conflicts. The law establishes overall protection with measures that touch on many aspects of the issue at once and gives government administration a role in ensuring such protection. The said measures include the right to effective protection, meaning among other things access to housing, the right to compensation and the constitution of a Security Pension Fund. This Fund will cover maintenance payments as established by judicial decisions, when they are not paid by the spouse or partner, so as to reduce the situation of economic dependence and the exclusion of the victim.

Case law national courts

Dismissal during pregnancy

Article 55 (5b) of the Workers' Statute establishes the nullity of a termination due to a worker's pregnancy, from the date of the beginning of the pregnancy until the date of the beginning of the suspension of the contract for pregnancy. In Spanish labour regulations, the worker is not required to communicate to her employer that she is pregnant, nor that the employer should be aware of this. However, in rulings of 29 February 2008 and 12 March 2008, the Supreme Court interpreted that the law protects the worker against termination for discriminatory reasons, in other words, in this case, for

reasons of pregnancy. For this to occur, knowledge of the said pregnancy on the part of the employer is a condition for the discriminatory practice. The argument of the Supreme Court is based on Directive 92/85, which establishes the obligation that the worker has to communicate her status to her employer.

The Constitutional Court in its ruling of 21 July 2008 also analyses Article 55(5b) of the Workers' Statute and presents a different interpretation to that held by the Supreme Court. The nullity of the termination of a pregnant worker's employment has an automatic character and, in the case of a dismissal, only requires as proof the objective physical fact of the pregnancy and the non-consideration of the termination as the result of reasons not related to the pregnancy.

The finding of the Constitutional Court completely changes the interpretation and application utilised to date by the Supreme Court on the protection of pregnant women against termination. This means that the Spanish law establishes a double protection: the nullity of the termination due to discrimination and objective nullity. Nullity due to discrimination assumes the existence of a discriminatory cause based on reasons of gender. Objective nullity is applicable in all situations of pregnancy regardless of whether or not there exist indications of discriminatory treatment or even whether or not discriminatory motives are involved. The Constitutional Court considers that the Workers' Statute has made a transposition that extends beyond the minimum levels of protection envisioned in Directive 92/85/EEC, establishing an automatic and objective guarantee. There is no requirement for the worker to communicate her pregnancy to her employer and neither must she prove that the employer was aware of the said pregnancy for the nullity of the termination to be effective.

Distinct penal treatment for men and women in gender violence cases

Article 153.1 of the Penal Code, as modified by Article 37 of Organic Law 1/2004 on Integral Protection Measures against Gender Violence, established a distinct penal treatment according to who are the perpetrators and the victims of the crime. The crime of 'occasional' abuse (involving stressful situations, not repeated abuse) is punished with a prison sentence of six months to a year when the perpetrator is a man and the victim a woman, while the same conduct is punished with a three-month prison sentence if the perpetrator is a woman and the victim a man. This is the first time that the Penal Code has introduced more severe punishment when the perpetrator is a man, but the Constitutional Court, in its decision of 14 May 2008, stated that this difference is not contrary to the principle of equality established in Article 14 of the Constitution. The main point in the decision by the Constitutional Court is the reason for this difference of treatment. The sanction is not imposed because of the sex of the perpetrator or that of the victim. The more severe punishment is based on the quality of the offences, which are more serious as they constitute a specifically harmful manifestation of violence and inequality.

Miscellaneous

Trafficking in human beings for sexual exploitation

The Government is elaborating an Integrated Plan to Combat the Trafficking in Human Beings for Sexual Exploitation, especially women and male and female children. Participating in the plan are eleven ministries, non-governmental organizations and the Autonomous Community Governments of Spain.

Abortion

A Congressional Sub-Committee is studying a legislative measure to reform the law regulating abortion, with the aim of strengthening the legal underpinnings of the law and guaranteeing respect for the rights of women and the availability of this service within the public health-care system.

SWEDEN – *Ann Numhauser-Henning*

Legislative developments

As mentioned in the previous *European Gender Equality Law Review*[111] the Government proposed a new Bill on 'Stronger protection against discrimination', which was presented on 13 March 2008. This proposal has now been accepted by the Swedish Parliament and the new (2008:567) Discrimination Act, merging the existing legislation regarding discrimination into a Single Non-discrimination Act implementing the European equality directives will enter into force on 1 January 2009.

In September 2008 the Government moreover presented a bill on reform as regards the composition of the Labour Court in employment discrimination cases according to the 2008 Discrimination Act.[112] In such cases the court will be composed of five judges of whom only two represent the social partners. Normally there are seven judges among whom are four representatives of the social partners.

Case law/NGO initiative

In July 2008 the NGO *Centrum för rättvisa* lodged a complaint against an entity of higher education, the *Sveriges Lantbruksuniversitet (SLU),* alleging gender discrimination when taking on new students for the veterinary programme. Women are in the majority among the students in this programme. For a group of students, with top results in certain earlier education, admission is decided by the drawing of lots. This is done in such a way that the underrepresented sex (i.e. men) is 38 times more likely than any woman to be admitted to the programme. The claim is thus concerned with whether or not this type of positive action can be admitted in these situations. The complaint is of special interest also since this is the first time a group petition according to the Act (2002:599) on group petitions *(Lagen om grupprättegång*) has been lodged in a discrimination case. The case was presented to the District Court of Uppsala according to the 2001 Student at Universities Act.

The claim was widely published and discussed during the summer and later on a report on the full extent of these practices within higher education was presented by the same NGO, the report entitled *Systematisk könsdiskriminering i den svenska högskolan*.[113]

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[111] In the previous issue more details can be found on the content of the Bill, see *European Gender Equality Law Review* 1/2008-1, p. 124.

[112] Prop. 2008/09:4, *Ändrad sammansättning i Arbetsdomstolen i diskrimineringstvister*.

[113] http://www.centrumforrattvisa.se/index.php/publisher/articleview/action/view/frmArticleID/140/

UNITED KINGDOM – *Aileen McColgan*

Policy developments

The main relevant policy development in the UK since April 2008 has probably been the announcement made on 26 June 2008 by the Minister for Women and Equality on 'the main themes of the Equality Bill' to be introduced in the next 12 months. One of the big disappointments relates to the continuing refusal of the Government to introduce mandatory pay audits, preferring instead to embrace greater transparency over pay in the public sector, to 'consider (…) how public procurement can be used to deliver transparency and change', to allow employment tribunals to make recommendations applicable to all employees in the event of a finding of unlawful discrimination against an employer, to have the Equality and Human Rights Commission conduct inquiries into the sectors with the biggest gender pay gaps, starting with the financial services sector, and to 'challenge', but not require, companies to report on equality'.

Ms Harman, Minister for Women and Equality, also announced the Government's intention to permit (though not to require) some positive action by employers (the scope for such action is at present extremely narrow) and to extend the permission for all-women shortlists for parliamentary selection until 2030. The *Framework for a Fairer Future –The Equality Bill*, which was published on the same day as the Minister's statement, drew attention, *inter alia,* to the persistence of the gender pay gap (12.6 % for full-time women workers, 40 % for part-time women workers) and proposed the introduction of a new Equality Duty in the public sector ('bring[ing] together the three existing duties [that is, the positive duties imposed on public authorities in relation to the promotion of race, gender and disability equality] and extend[ing] to gender reassignment, age, sexual orientation and religion or belief').[114]

The statement and paper of June 2008 are only indications of the Government's thinking on the future of equality law in the UK.[115] What is evident at this stage, however, is that there appears to be an emphasis on business-pleasing enabling and simplifying measures rather than any hard-edged commitment to measures which will force the private sector properly to deal with the gender-pay gap or the under-representation of women in higher status jobs.

On a different note, in September 2008 the Home Secretary announced that the government would tighten the rules allowing the licensing of lap-dancing clubs, in relation to which local communities currently have no role. The Fawcett Society and local authorities have campaigned for the tougher regulation of lap-dancing clubs (of which there are at least 300 in the UK) as 'part of the commercial sex industry (…) [which] fuel a sexist culture of treating women as sex objects', pressing for them to be subject to the same requirements as Sex Encounter Establishments (these include sex shops and sex cinemas) rather than, as at present, treated in the same way as cafes. Following government consultation the Home Secretary declared at the Labour Party Conference that local communities would be given a greater role in the licensing process.

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[114] *Framework for a Fairer Future* is available at http://www.equalities.gov.uk/equality_bill/index.htm

[115] *The Equality Bill – Government Response to Consultation*, published in July 2008 and available as above, gave further clues to the Government's thinking but the Bill is still at a very early stage of preparation.

Case law national courts

Allen v GMB

The main action in this context has been in relation to equal pay, with a number of very significant cases on union liability for unequal pay, and on the application of the domestic 'material factor defence' in the context of the public sector. In *Allen* v *GMB* [2008] IRLR 690 the Court of Appeal restored an employment tribunal decision that the union had breached the Sex Discrimination Act 1976 by encouraging women equal pay claimants to accept an equal pay settlement which limited awards in respect of 'back pay' so as to leave as much as possible of a limited pot of money to cover future pay increases for all its members and to give greater priority to pay protection for the predominantly male groups whose jobs had previously been overpaid relative to value. In 'selling' the deal to its membership the union had understated the difference in value between the settlement put forward as regards back pay and what might have been achieved in successful equal pay claims. The decision of the Court of Appeal creates enormous problems for unions. It is of course not acceptable for unions to discriminate against their women members but it is perhaps ironic that unions which have done much in the UK to contribute towards lower gender-pay gaps in the public than in the private sector are being required to 'carry the can' for decades of inertia on the part of local government and determined refusal by central government to fund the cost of equal pay.

Redcar & Cleveland Borough Council v Bainbridge and Surtees v Middlesbrough Borough Council

The decisions of the Court of Appeal in *Redcar & Cleveland Borough Council* v *Bainbridge and Surtees* v *Middlesbrough Borough Council* [2008] IRLR 776 are also extremely important. The question was whether, in attempting to eliminate long-standing pay differentials between men and women, local authorities which had re-graded jobs following job evaluation exercises were entitled to reduce rates in male dominated jobs gradually over time to the level of female-dominated jobs, rather than immediately equalising wages in female-dominated jobs up to those paid to male jobs of comparable value. The claimants, women who continued to be paid less than their male comparators as a result of the practice, argued that they had been entitled to be paid the same as their male comparators throughout, so that the provision of pay protection to the men and not to them breached the Equal Pay Act 1970. The employers argued that pay protection was objectively justified in softening the blow to (male) workers whose salaries would be reduced as a result of job evaluation. The Court of Appeal ruled that pay protection arrangements could be objectively justified as a proportionate means of achieving a legitimate aim, but that an employer armed with the knowledge that a pay scheme was indirectly discriminatory 'will have great difficulty in justifying the continuation of any discriminatory element,' though justification might be possible where, for example, an employer showed that it had done everything possible to minimise the effect of continuing discrimination but had been unable to eliminate it immediately. The decision of the Court of Appeal fails to lay down clear rules as to whether transitional arrangements are lawful or not.

Miscellaneous

A study published in summer 2008 suggested high levels of concern about the impact of working mothers on family life and declining levels of support for gender equality

in Britain and the US.[116] The study, by Professor Jacqueline Scott of Cambridge University, compared the results of social attitude surveys from the 1980s, 1990s and 2000s in Britain, the US and the former Federal Republic of Germany (West Germany), and found growing sympathy for the view that a woman's place is in the home. Whereas, in the 1990s in Britain, more than half the men and women surveyed stated their belief that family life would not suffer if a woman went to work, in the 2000s these figures had fallen to 46 % of women and 42 % of men and less than 60 % of men and women regard paid work as the best way for a woman to be independent. The figures for the US and former West Germany are worse (only 38 % in the US and 37 % in the former West Germany stating, in 2002, that family life does not suffer if a woman works), but these figures were down from 51 % in 1994 in the US and up 24 % in West Germany.

[116] F Scott (ed.) *Women And Employment; Changing Lives And New Challenges* Edward Elgar Publishing Ltd, 2008.

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