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Introduction

Susanne Burri[*]

Some interesting developments have taken place in the past few months which have or probably will have an impact on EU gender equality law. The Lisbon Treaty entered into force on 1 December 2009. Even if the Lisbon Treaty does not bring major changes to the approach to gender equality in the two treaties on which the European Union is now founded – the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)[1] – it is worth considering the changes and possibly the improvements that the amendments may bring. Evelyn Ellis analyses in her article in this review the impact of the Lisbon Treaty on gender equality and she concludes that the importance of gender equality is emphasized in the founding Treaties. In addition, the Charter on Fundamental Rights is now binding. The Charter will hopefully become a useful instrument to further the protection of fundamental rights in the EU, in particular in the field of gender equality.[2]

The Framework Agreement on parental leave that the European social partners reached in June 2009 will have to be transposed by the Member States by 18 March 2012 since Directive 2010/18/EU, implementing this agreement and repealing Directive 96/34/EC, has now entered into force.[3] The Framework Agreement (annexed to the Directive) lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents (Clause 1(1)). Member States might indeed adopt more favourable measures. The Framework Agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State. The Agreement thus also applies to part-time workers, fixed-term contract workers and temporary agency workers (Clauses 1(1) and 1(2)). They are entitled to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years. The age should be defined by Member States and/or social partners. The parental leave shall be granted for at least a period of four months (this minimum was three months in Directive 96/34/EC) and should, in principle, be provided on a non-transferable basis. To encourage a more equal take-up of leave by both parents, at least one of the four months has to be provided on a non-transferable basis (Clause 2). These are the most important changes that this new Directive on parental leave brings compared to the now repealed Directive 96/34/EC. It remains to be seen whether the provision on the non-transferability of one out of four months parental leave will indeed encourage fathers to take up parental leave. In practice, until now parental leave is still much more often taken by mothers than fathers. Member States are not obliged to introduce a (partially) paid parental leave, which

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[1] See for a consolidated version of both treaties: OJ C 83 of 30 March 2010.

[2] See Sophia Koukoulis-Spiliotopoulos 'The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality', *European Gender Equality Law Review* No. 1/2008, pp.15-24.

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

would provide a strong incentive for both parents to take up such leave. According to Clause 6(1), parents returning from parental leave may request changes to their working hours and/or working patterns for a set period of time. The employer has to consider and respond to such requests, taking into account both the employer's and the worker's needs. Even if this is a rather weak provision, it might offer possibilities in practice to adjust working and working hours while staying employed.

Two proposals for directives in the field of gender equality are still pending. The first proposal concerns the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, by which (if adopted) Directive 86/613/EEC will be repealed. The European Parliament has recently adopted a position in second reading on which the Commission agreed.[4] When adopted, the new directive would apply to self-employed workers, meaning all persons pursuing a gainful activity for their own account and to the spouses of self-employed workers. The directive would also apply to the life partners of self-employed workers, not being employees or business partners, where they habitually participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks. Conditions laid down in national law might apply (Article 2). The directive would introduce in this field the definitions of direct and indirect discrimination, harassment and sexual harassment that are similar to the definitions in the non-discrimination directives adopted since 2000 (Article 3). The principle of equal treatment on the grounds of sex should apply to the public or private sectors, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity (Article 4(1)). The directive would not extend the rights to social protection of self-employed: it only mentions that where a system for social protection for self-employed workers exists in a Member State, that Member State has to take the necessary measures to ensure that spouses and life partners can benefit from a social protection in accordance with national law (Article 7). This is a rather weak provision. The same is true for the provision on maternity benefits (Article 8). The Member States have to take the necessary measures to ensure that female self-employed workers and female spouses and life partners may, in accordance with national law, be granted a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks. Worth mentioning is that equality bodies should provide among other things independent assistance to victims of discrimination, conduct independent surveys etc. (Article 11). Even if some provisions of this new directive appear to be rather weak, as a whole, most of them certainly mean an improvement compared to the rights self-employed persons had under Directive 86/613/EEC, which will be repealed.

The second proposal for a directive 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] This proposal is still pending.[6]

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4 See A7-0146/2010.

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.

6 This second report has been prepared by Edite Estrela for the European Parliament: A7-0032/2010.

The issue of the future of old-age pensions is at the core of many political debates in the Member States. After judgments of the Court of Justice of the EU that considered certain aspects of some old-age pensions schemes as infringing the principle of equal pay between male and female workers,[7] France, Italy and Greece have initiated pension reforms. These reforms, the difficulties and the dilemmas that they entail in the light of gender equality are analysed in the article of Simonetta Renga, Hélène Masse-Dessen, Sylvaine Laulom and Sophia Koukoulis-Spiliotopoulos in this issue. The current financial and economic crisis might profoundly influence the organisation of old-age pension schemes in the future. The authors argue that differences in socio-economic positions between women and men in the past and the still unequal share of family responsibilities and care duties should be taken into account when reforming existing old-age pension schemes, both in the private and in the public sector.

The European Network of Legal Experts in the field of Gender Equality has produced two thematic publications in recent months, which are both published electronically on the website of the European Commission.[8] Both reports addressed conceptual aspects of the principle of equality. Sandra Fredman is the author of the publication *Making Equality Effective: The role of pro-active measures*, which is based on national reports of the experts participating in the gender network. The report provides useful information and examples developed at national level on the many ways to achieve equality. The second report, *The Concepts of Equality and Non-Discrimination in Europe: A practical approach* was written by Christopher McCrudden and Sacha Prechal. The authors analyse different conceptions of equality and also relied on national reports of the experts of the gender network in drafting this overview. Both these thematic reports are meant for a broad public of practitioners, lawyers, NGOs, equality bodies, academics etc. Furthermore, the Network's publication at national level *EU Gender Equality Law in 30 European Countries* was updated in 2009.[9] In addition, the second issue of 2009 of the *European Gender Equality Law Review* (EGELR) was published in December 2009 and is now also available on the website of the European Commission.[10]

On 6 October 2009, a legal seminar on the implementation of EU law on equal opportunities and non-discrimination was held in Brussels and was attended by some 200 academics, lawyers, representatives of NGOs, etc. This legal seminar was organised jointly by the European Commission, the European Network of Legal Experts in the Non-Discrimination Field and the European Network of Legal Experts in the Field of Gender Equality.[11]

Since early 2010, there have been some changes concerning the experts participating in the Network. I am very proud to announce that Sacha Prechal was nominated as the new judge of the Court of Justice of the EU for the Netherlands.[12] Since 1991, Sacha Prechal was very actively involved in the organisation of the gender network, having co-ordinated the Network for 16 years. In the past three years,

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7 See in particular Case C-366/99 *Joseph Griesmar* v *Ministre de l'Economie, des Finances et de l'Industrie et Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation*, [2001] ECR I-9383; Case C-46/07 *Commission* v *Italy*, [2008] ECR I-151 and Case C-559/07 *Commission* v *Greece* [2009] ECR I-47.

8 See http://ec.europa.eu/social/main.jsp?catId=641&langId=en, last accessed on 2 June 2010.

9 See http://ec.europa.eu/social/main.jsp?catId=641&langId=en, last accessed on 2 June 2010.

10 See http://ec.europa.eu/social/main.jsp?catId=641&langId=en, last accessed on 2 June 2010.

11 See for more information http://www.non-discrimination.net/en/seminar;jsessionid=B981D64D239B49C8E511D87FFC81493A, last accessed on 2 June 2010.

12 OJ 2010, L137/3.

she was an active member of the Network's executive committee. She is the author of many publications produced by the gender network. Regrettably, Sacha Prechal will no longer be able to participate in the gender network and this is indeed a great loss. I would like to congratulate her on her new position, in which she will probably also be seeking for opportunities to further gender equality. Also, I am pleased to welcome our new member of the executive committee: Linda Senden, Professor of European Union Law at Tilburg University in the Netherlands. She was involved in the Network as assistant co-ordinator from 1993 to 1997 and has published widely on gender equality.

As usual, this issue of the European Gender Equality Law Review offers an overview of recent developments in the field of gender equality at national level. The Network has been extended with three countries: Croatia, the Former Yugoslav Republic of Macedonia and Turkey. Thus three new experts have contributed to this issue of the EGELR: Goran Selanec, Mirjana Najcevska and Nurhan Süral. The members of the editorial board of the EGELR hope that you will enjoy reading this issue. If you would like to receive a printed copy in English free of charge, you can contact UUEU-network.law@uu.nl. We will be pleased to welcome any reactions, comments and suggestions and proposals for future articles.

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The Impact of the Lisbon Treaty on Gender Equality

Evelyn Ellis[*]

1. Introduction

The Lisbon Treaty had a long and troubled gestation. It emerged from the wreckage of the draft Constitutional Treaty as a slightly toned-down instrument from which the most obviously 'constitutional' references and implications had been excised. In this form it was able to be signed by the Member States in December 2007. The history of successive Irish referendums and of foot-dragging on the part of the Czech President is well known. Suffice it to say here that the remaining obstacles to ratification were finally removed in November 2009 and that the Treaty at last entered into force on 1 December 2009. Two introductory remarks seem apposite. The first is that, despite receiving a largely negative reception from the media (at least in the UK), the Lisbon Treaty does in fact achieve a substantial tidying-up of a treaty system which had become over-complex and difficult to follow for all but the most dedicated students of European law. The lay-out and internal logic of the founding treaties, the rationalisation of their provisions and the terminology adopted is by and large sensible and undoubtedly easier to follow than what preceded Lisbon. The pillar structure is removed and the Union is now simply founded on two treaties: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) which replaces the old Treaty establishing the European Community (TEC). The TEU and TFEU are expressed to have 'the same legal value'.[1] The Union replaces and succeeds the European Community. The second point to make here is that there is perhaps some political mileage, and maybe some judicial mileage too, to be made from the fact that the Treaty is explicitly not a constitutional one. The Member States clearly felt more able to accept its terms for this reason and it may well transpire that courts and tribunals, both Union and domestic, will feel correspondingly freer to construe it liberally than they would have done had it been more explicitly radical.[2]

2. The changes brought about by Lisbon

Reiteration of the importance of the principles of non-discrimination and equality

There are several ways in which the Lisbon Treaty can be expected to impact on the field of gender equality.[3] To begin with, in a number of early articles, the founding treaties underline the importance which is ascribed to the principle of the equality of the sexes. This is first evident in the newly phrased second recital of the Preamble to

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1 TFEU, Article 1(2).

2 Conversely, it may prove that the failure of the constitutional project will suggest to the judiciary that they should approach the new Treaty with restraint.

3 See also Sophia Koukoulis-Spiliotopoulos 'The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality' *European Gender Equality Law Review* No. 1/2008, p. 15.

the TEU which now proclaims that the Member States draw 'inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'. Article 2 of the TEU goes on to reiterate the centrality of these values and to state that they 'are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'. Article 3 of the TEU is concerned with the re-vamped aims of the Union, namely to promote peace, the Union's values and the well-being of its peoples; in the second indent of Paragraph 2, the Article pledges the Union to 'combat social exclusion and discrimination' and to 'promote social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child'.[4] Article 8 of the TFEU similarly promises that 'In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women'.[5] Article 10 of the TFEU further spells out that 'In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.[6] The importance of equality in the broad sense is also affirmed in specific contexts; in particular, Article 9 of the TEU which is concerned with democratic principles states that 'In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies'.[7] Also noteworthy is Article 21 of the TEU, at the start of Title V on external action and the Common Foreign and Security Policy; it provides in Paragraph 1 that 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'.

These early references to sex equality and to non-discrimination between men and women can be expected to produce certain subtle but significant results. They emphasise the fundamental place occupied today by equality in general and sex equality in particular in EU law and this will enable courts, both domestic and Union, to justify a purposive interpretation favouring practical application of these principles where there is legal ambiguity. They also serve to remind those framing and those reviewing Union actions of the importance of the notion of sex/gender equality in all areas, not merely in the limited contexts in which there is specific EU legislation.

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4 Note also the Declaration made by the Member States on TFEU Article 3: 'The Conference agrees that, in its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat all kinds of domestic violence. The Member States should take all necessary measures to prevent and punish these criminal acts and to support and protect the victims'.

5 Formerly, TEC Article 3(2).

6 I am grateful to Hanneke van Eijken for pointing out that TFEU Article 10 might well provide the launch pad for broadening existing EU competences to embrace non-discrimination, in a parallel way to that in which agricultural powers have been interpreted to include environmental concerns; see in particular Case C-428/07 *R. (on the application of Horvath) v Secretary of State for the Environment, Food and Rural Affairs* [2009] ECR-I 000.

7 See also the Protocol on Services of General Interest which is annexed to the founding Treaties and commits the Member States to respecting the principle of equality in respect of services of general economic interest.

Specific changes in the legal provisions

The second way in which the Lisbon Treaty has impacted in the field of gender equality is through changes to the language and detail of the legal provisions which regulate the area explicitly. To begin with, there are changes as regards both the general anti-discrimination enabling provision and the sex-specific enabling authority. The old Article 13(1) of the TEC used to give the European Parliament merely a consultative role in the taking of Community action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; the Council was empowered to act here by unanimous vote on a proposal from the Commission. This is now replaced by Article 19(1) of the TFEU which provides for the adoption of such action by the Council 'acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament'. Article 289(2) of the TFEU explains that 'In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure'. The role of the European Parliament has, accordingly, been greatly enlarged here (in accordance with an across-the-board move in favour of democracy embraced by the Lisbon Treaty).[8]

The old Article 141 of the TEC, the substantive article on sex equality, has metamorphosed into Article 157 of the TFEU. The wording is unchanged, save for the reference in Paragraph 3 to the procedure for the adoption of measures to ensure the application of the principle of equal opportunities and equal treatment of the sexes in employment and occupation. The Council used to be required to act in accordance with the co-decision procedure set out in Article 251 of the TEC. This has now been replaced with the words 'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure'. In reality, this constitutes virtually no change because the 'ordinary legislative procedure', which is detailed in Article 294 of the TFEU, is in substance the former co-decision procedure.[9] It is perhaps also worth noting that the importance of the European Parliament's new role in enacting implementing legislation in this sphere is highlighted by it being referred to before the Council in the opening words of Article 157.

The aspect of the Lisbon Treaty which might perhaps be thought to produce the most significant changes for gender discrimination law is the legal recognition it accords to the Charter of Fundamental Rights. The Charter had its genesis at the Nice European Council in December 2000 but at that time it represented merely a political commitment and had no binding legal effect; it was subsequently adapted with a view to its legal adoption at the 2003-4 and 2007 Intergovernmental Conferences. Article 6(1) of the TEU provides that 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'. This seems to the present writer to be a neater solution than that adopted by the draft Constitutional Treaty, which had the Charter

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8 The Commission's right of initiative is preserved in general terms by TEU Article 17(2): 'Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise'.

9 The word 'absolute' has been deleted from Articles 294(7)(b) and 294(13) but this does not appear to have any significance.

sitting uncomfortably in the middle of the instrument.[10] The enactment of the Charter turns out, however, not to be of huge importance in the present context for a number of reasons. First and foremost is the scope of its provisions on sex equality. It is expressly provided[11] that the Charter is to be interpreted with due regard to the explanations prepared and updated under the authority of the Praesidium of the Convention which drafted the Charter.[12] Title III is headed 'Equality'. Article 21(1) at first sight appears to make a more extensive anti-discrimination provision than other parts of EU law; it states: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'. This clearly includes a wider set of prohibited grounds than Article 19 and it appears to operate outside the areas hitherto regulated by sex discrimination law (namely, the realms of work, the provision of goods and services, and social security). However, the Praesidium comments that it has a different scope and purpose from Article 19. The latter confers power on the Union to enact anti-discrimination legislation which can cover action by the Member State authorities as well as that of individuals in any area within the limits of the Union's powers. In contrast, Article 21(1) of the Charter does not create any legislative power and nor does it lay down a 'sweeping ban of discrimination'. Instead, (and we will revert to this point more fully below) it only addresses discrimination by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Therefore, concludes the Praesidium, Paragraph 1 'does not alter the extent of powers granted under Article 19 nor the interpretation given to that Article'.

Article 23 is headed 'Equality between women and men'.[13] It begins with the sentence: 'Equality between women and men must be ensured in all areas, including employment, work and pay'. Again, this appears to extend the field of operation of EU law but the Praesidium merely comments that the wording used draws on the existing provisions of EU law. The same explanation as given in relation to Article 21(1) would seem to apply here, namely that the Article merely constrains Union and Member State implementing action but does not contain any new free-standing substantive principle. The second sentence of Article 23 states that 'The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex'. This is a shortened version of Article 157(4) of the TFEU; it is unclear why the change of wording was thought necessary but anyway the Praesidium concludes that it does not amend Article 157(4).

Of the remaining articles in the Charter only two appear relevant to gender equality. Article 33(2) confers the right to protection from dismissal for a reason connected with maternity and confirms the right to paid maternity leave and to parental leave following the birth or adoption of a child. There is nothing new here apart from the assertion of the Praesidium that 'maternity' covers the period from

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[10] Such incorporation would, however, undoubtedly have given markedly greater constitutional force to the Charter.

[11] See Recital 5 to the Preamble of the Charter and Article 52(7).

[12] These explanations are to be found at OJ 2007, C303/02.

[13] Query why the Charter adopts this noun order when the Treaty itself, e.g. in Article 157, refers to 'men and women'.

conception to weaning.[14] Article 34 confirms entitlement to social security benefits and to social services providing protection in cases which include maternity; however, the Praesidium explains that this is not to be taken as implying that any such services must be created where they do not already exist.

A second reason for thinking that the impact of the Charter on gender equality law is going to be limited is that the total legal effect of the Charter is itself extremely circumscribed. The Charter is certainly intended to heighten the profile of fundamental rights; indeed the fourth recital to its Preamble asserts that 'it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter'. The Charter also modernises some of the language used in the European Convention on Human Rights and in some places it gives legislative blessing to decisions of the European Court of Justice. However, its actual legal effect is seriously constrained by the provisions of Title VII governing its interpretation and application. The third indent of Article 6(1) of the TEU requires the Charter to be interpreted in accordance with this Title. There is no question of the Charter creating new free-standing rights because Article 51(1) limits its addressees: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties'. In other words, the Charter provides an aid to the interpretation of Union legislation and Member States' implementing measures, and may also provide an argument supporting challenge to such acts, but this is the legal extent of its effect.[15] Indeed, the Charter may well fuel a greater number of challenges to such acts based on the denial of fundamental rights but, since as described above the Charter itself only marginally increases the scope for such claims in the field of gender discrimination, its impact here can be predicted to be small. The second indent of Article 6(1) of the TEU states categorically that the 'provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties'. And Article 51(2) reiterates that the Charter does not extend the field of application of EU law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.[16] Article 52(2) emphasises that rights recognised by the Charter for which provision is made in the Treaties must be exercised within the limits set out in the Treaties.

The third reason for suggesting that the Charter will not produce a dramatic change in relation to gender discrimination law is that it has received a distinctly lukewarm reception on the part of several Member States. Poland and the UK secured a Protocol (annexed to the founding Treaties) on the application of the Charter to themselves.[17] Its most important stipulation in the present context concerns justiciability; the Charter is not to extend the ability of the European Court of Justice or of Polish or UK courts to find that the national laws of these two Member States are inconsistent with the Charter. The Protocol does not, apparently, preclude such courts from giving an extensive interpretation of national law in recognition of rights

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14 Entertaining judicial dicta can be anticipated on the interpretation to be given to 'weaning'.

15 See also Article 52(5) of the Charter.

16 See also the Declaration concerning the Charter which is annexed to the Final Act.

17 The European Council has also agreed to extend this protection to the Czech Republic when the next accession treaty is agreed.

protected by the Charter. The UK's insistence on this Protocol seems somewhat surprising given that no such reservations were expressed before the UK signed the predecessor draft Constitutional Treaty. The official answer to this is that the period of political impasse provided pause for thought and that the UK Government concluded during the interim that the Charter might have a negative impact on British business; Craig, however, has put forward the more convincing view that the inclusion of the Protocol was principally motivated by the Government's desire to show that the Treaty of Lisbon was so significantly different from the EU Constitution that a referendum on Lisbon was unnecessary.[18] Also of note is the Czech Republic's Declaration 53 annexed to the Final Act which reiterates the legal limitations expressed about the Charter in the Treaties and in the Charter itself; it adds that it wishes to emphasise that the Charter does not diminish the field of application of national law and does not restrain any current powers of the national authorities. Poland similarly made Declaration 61, stating that the Charter 'does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity'. All this makes it unlikely that the courts of the other Member States will interpret the Charter over-generously since to do so would be to disadvantage themselves to the corresponding advantage of Poland and the UK.

A final specific change which Lisbon may produce and which may one day have repercussions in the gender equality field concerns the European Convention on Human Rights (ECHR). Article 6(2) of the TEU provides that the Union shall accede to the ECHR, albeit that such accession shall not affect the Union's competences as defined in the Treaties. Such accession would presumably result in the Convention itself becoming applicable EU law, as well as generating (as before) general principles of EU law. To the (currently quite limited) extent that the ECHR confers more extensive rights in the field of gender equality, these greater rights would therefore become a direct part of EU law.

The general effects of the Lisbon Treaty

This is not the place for a detailed analysis of the Lisbon Treaty, but the writer hopes that a couple of generalisations will be permitted. It is plain that the Treaty manages to achieve two apparently opposing goals. On the one hand, it defers to inter-governmentalism, in particular by enhancing the power and authority of the European Council and by permitting the withdrawal of a Member State from the Union.[19] On the other hand, it enhances the powers and status of the European Parliament, especially through its role in what has now become the 'ordinary' legislative procedure; it also addresses the democratic deficit in a number of other ways, including through an emphasis on transparency, the rights of the citizen and an increased role for national parliaments.

These changes will enable work to continue in an enlarged Union. The process of reform and realignment will no doubt continue for as long as the Union does, but for the moment the apparatus is in place for legislation to be created through a set of procedures which can be recognised as both reasonably robust and politically credible.

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[18] Craig, 'The Treaty of Lisbon, process, architecture and substance' (2008) *33 ELRev. 137*.

[19] TEU Article 50.

Conclusions

Amidst all the wrangling and political shenanigans that led up to the eventual ratification of the Treaty of Lisbon, it could have been that the principle of equality would become side-lined in a desperate bid for compromise. Clearly this did not happen and, as has been seen, the importance of sex equality is emphasised in the scene-setting provisions of the founding Treaties. Furthermore, the inclusion of the Charter provides the basis for a broader than hitherto protection for fundamental rights generally by and within the Union. The immediate practical changes which the Treaty produces for the field of gender discrimination are, admittedly, relatively minor but the way is now clear for future development of the law in a manner which will further the practical realisation of the goal of sex equality and will hopefully also pass the test of democratic legitimacy.

Old-Age Pension Rights for Women in Three European Countries. Which Equality?

A gender perspective on the French, Italian and Greek old-age pension systems[1]

Simonetta Renga, Hélène Masse-Dessen, Sylvaine Laulom and Sophia Koukoulis-Spiliotopoulos

1. Introduction

Equality in pension schemes is certainly one of the most difficult questions currently being debated. Pension schemes are constructed for the long term. Rights are acquired gradually, and one cannot establish equality without considering the history and background of pension schemes.

The organization of the schemes is based on various historical, sociological and cultural data that is not always clearly explicit, and in the majority of states it is the result of successive reforms that make comprehension difficult. In addition, the economic aspects of the schemes are a function of various parameters. Thus any reform calls into question the balance of previous and new advantages and legitimate expectations of the schemes' beneficiaries.

Reforming pensions systems has become a crucial item on the political agenda of many Member States. This is mainly due to demographic and structural problems, such as the ageing of the population, changing family patterns, lowering of the fertility rate, and last but not least the tremendous economic crisis that is afflicting Europe, especially countries such as Greece and Italy. In this context, women's pension rights may be seriously weakened. Following this path, the poverty risks of women of pensionable age can increase due to their low pension amount or their failure to qualify under the old-age pension schemes.

In a number of states, especially those in Mediterranean Europe, pension systems are based on a family model, assuming the presence of stay-at-home mothers, and granting women on the one hand a portion of their husbands' rights, and on the other hand specific rights in consideration for raising the children. These 'advantages' simultaneously concern the retirement age, and increases of various types in pension rights for stay-at-home mothers. In these countries, women's pensions are generally lower than men's, despite these 'advantages', simply because of their lower salaries, their shorter careers, and the greater uncertainty of their lives especially in relation to employment. In this context, implementing the principle of gender equality, which was already accompanies by some difficulty, becomes a major challenge.

Will reforms, following the implementation of European Union rules, cause increased regression in women's rights? Will this consideration be taken into account in a context where hope for upward adjustments (levelling up) is fading?

The problem was difficult when only dealing with equalization of rights. But now, in the present context of deep reforms, will women's rights even be taken into account? In the tempest caused by the economic crisis, will general reforms be gender neutral, and promote gender equality, or, on the contrary, fail to take into account

[1] As important reforms are planned, we must point out that this paper was finalized in late May 2010.

women's situation and lower their pensions? Will the social aims of the EU disappear behind economic measures?

The examples studied here[2] are those of three Mediterranean countries. They share similar family-related models, although there are notable differences in the structure of their pension schemes. Their pension schemes have been the subject of decisions of the ECJ, leading to difficult reforms. All of them face crisis. The comparison will allow us to ask these questions, and hopefully give some useful tools, instead of only regret better times.

2. Old-age pension rights for women in France[3]

French pension schemes are organized in two main systems. Roughly stated, workers in the private sector have a 'general regime', (statutory scheme) to which occupational schemes add supplements. Civil servants' schemes, and some are under another scheme, are paid by the public employer, and are analysed in the *Beune* and *Griesmar* cases as occupational. In both schemes, as a consequence of family policies, women were given specific pensions rights for years. Indeed, it seems that 'France is the country that grants the widest range of pension rights for children raised and whose pensions rules are the longest established, as some date back to when the pension system was first created in 1945'.[4] In order to address a social reality, namely the disadvantages which they incur in their professional career by virtue of the predominant role assigned to them in bringing up children, mothers who have raised children were granted an increase of their insurance coverage and some other advantages. The purpose of these measures was to offset the disadvantages which female workers who have had children encounter in their professional life. Some differences existed between the statutory old-age pension scheme, the scheme governing the retirement of civil servants and other specific occupational schemes, but a common point was the recognition of these specific rights for mothers: contribution credits to increase the contribution period, pension provision for non-working mothers, and pension bonuses for persons with three or more children.

As is well known, the *Griesmar* case[5] challenged the specific rights for women in occupational old-age pension schemes and obliged the Government to adopt new measures, taking into account the fathers and not only the mothers. However, as we will see, the conformity of the scheme governing the retirement of civil servants with EU legislation is still debated as it is still said to indirectly discriminate against fathers,[6] and on 25 June 2009 the European Commission sent a reasoned opinion to France.

The *Griesmar* case did not question the legality of the general pension scheme. Article 7 of Directive 79/7 still allows differences between men and women for advantages in respect of old-age pension schemes granted to persons who have brought up children and the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children. However, it gave

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2 We chose to study three Mediterranean countries: France, Italy and Greece. The present situation shows how the topic is currently being handled, as data are constantly changing and the situation is quite fluid, in particular in Greece, but also in the other countries.

3 By Sylvaine Laulom and Hélène Masse-Dessen.

4 C. Bonnet et al. 'Effects of Pension Reforms on Gender Inequality in France', *Population* 2006/1, p. 41.

5 Case C-366/99, *Griesmar* [2001] I-09383.

6 For example, some rights are granted only when the parent has stopped working for a certain period, and fathers did not have the right to do so until recent reforms.

beneficiaries certain expectations, and the statutory old-age pension scheme has also been challenged, not based on the legislation of the EU, but based on Article 14 of the European Convention of Human Rights. As a consequence, new legislation was enacted on 24 December 2009.[7] If the recognition of father's rights could not be questioned, the problem was to conceive a solution where women's rights were not diminished.

But, unfortunately, these reforms occur in the context of a general reform of pensions, aiming to lower the financial burden of pensions, and nobody believes that the rights previously granted to mothers can be maintained and offered to fathers. The question is whether the reforms will not have a adverse effect on women.

2.1. Specific rights for women in occupational old-age pension schemes

After the *Griesmar* case, a reform was needed which was produced by the Law of 21 August 2003 reforming the pensions. The question still debated regards the transitional period as the rights are different if the children are born before or after 1 January 2004. For children born after 2004, women will still receive a six-month contribution bonus per child. According to the Law, this specific right is linked to pregnancy and maternity and thus it should not be analysed as a discrimination prohibited by EU legislation. Indeed, in the *Griesmar* case, the Court of Justice distinguished 'whether that credit is designed to offset the occupational disadvantages which arise for female workers as a result of being absent from work during the period following childbirth, in which case the situation of a male worker is not comparable to that of a female worker, or whether it is designed essentially to offset the occupational disadvantages which arise for female workers as a result of having brought up children, in which case it will be necessary to examine the question whether the situations of a male civil servant and a female civil servant are comparable' (Point 46). Another contribution bonus could be paid to both women and men but is equal to the periods when they are off work or working reduced hours for childcare purposes, with a maximum of three years.

However, the system is different for children born before 2004. Unless it aims to conceive an extension of the previous women's rights to include men, a transitional period is needed not to harm the reasonable expectations of women in the continuation of existing pensions rules. According to the 2003 Law,[8] female and male civil servants will receive a one-year pension contribution 'bonus' for every child born or adopted before 2004 if they stop working to look after the child for at least two months. Could this rule be considered as indirect discrimination, as the Commission believes? The problem is that because of the pregnancy leave, women will automatically fulfil this condition but men will not.

2.2. Specific rights for women in the statutory old-age pension schemes

The 2003 Law maintained specific rights for mothers in statutory schemes as it was allowed by Article 7 of Directive 79/7. For the *Conseil Constitutionnel* this was not contrary to the constitutional principle of equality as it could be analysed as a positive action: 'considering that it is the legislator's duty to take account of inequalities from which women have suffered up to now; that in particular they have ceased employment to a much greater extent than men in order to bring up their children;

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7 *Article 65 de la loi n° 2009-1646, loi de financement de la Sécurité Sociale pour 2010*. On the current situation, see E. Chemla, 'Retraites: majorations de durée d'assurance et égalité', Droit social fév. 2010, p. 190.

8 Articles 12 and R13 of the Civil and Military Retirement Pensions Code.

that, in 2001 for instance, their contribution period to a scheme was, on average, 11 years less than that of men; that women's pensions remain, on average, one-third lower than those of men; that it is in the general interest to take account of this situation and guard against the consequences that would result from repealing the provisions of Article L. 351-4 of the Social Security Code on the level of pensions provided to contributors in the coming years, the legislator is entitled to maintain, while adjusting them as required, provisions aimed at compensating for the inequalities that are normally destined to disappear'.[9] It was the first time that the *Conseil Constitutionnel* was using this argument to justify what could have been analysed as discrimination.

However, certainly because of the *Griesmar* case, this provision was challenged by fathers who had raised children. In a first decision, the *Cour de Cassation*[10] applying Article 7 of Directive 79/07 refused to grant to a father who had raised two children on his own the increase of his insurance coverage.[11] In 2006, the *Cour de Cassation* decided that Article L.351-4 of the Social Security Code was contrary to Article 14 of the European Convention of Human rights.[12] Article L.351-4 does not make any distinction between women who stopped working to raise their children and women who continue to work. For the *Cour de Cassation* there is no justification for discriminating between women who did not stop working to raise their children and a man who proves that he raised his child on his own. However, the legislator did not take into account this decision and no modification was made to this provision. In 2009, the *Cour de Cassation*,[13] applying Article 14 of the European Convention of Human Rights, held that such difference of treatment between men and women is contrary to the Convention; it could only be allowed if there is an objective and reasonable justification for this difference. Thus the man, the father of 6 children he had raised on his own, could ask for the same pension benefits as a woman. The decision of the *Cour de Cassation* follows a deliberation of the HALDE, which took the same position and asked the legislator to modify the Social Security Code.[14]

The decisions of the *Cour de Cassation* gave a strong incentive to the legislator and a new provision included in the Law to finance social security in 2010 was adopted in December 2009.[15] As for civil servants, a specific right for women linked to maternity is maintained: increased insurance coverage for pensions in the private sector for a maximum of one year for women who have given birth to one or more children. For the second year, the mother will continue to benefit from another increase of insurance coverage for the children born before 1 January 2010, except if the fathers can prove, in the year following the publication of the law, that they have raised their children on their own. For the children born after 1 January 2010, the mother will continue to benefit from an increased insurance coverage for a second year, if there is agreement between the father and the mother, expressed in the six months following the child's 4th birthday. If there is disagreement between the

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9 Decision n°2003-483 DC du 14 août 2003.

10 Cass. 2ème civ. 29 novembre 2006, n°04-30586, Bull. II 364.

11 Cass. 2ème civ. 14 juin 2004, n° 02-30978, Bull. II 300.

12 The conformity of the French provisions with the ECRH could be discussed as the European Court has accepted specific rights for women if justified; see ECRH, 27 March 1998, *Petrovic v Ostria* and ECRH 12 April 2002, *Stec v. United Kingdom*, see E. Chemla, 'Retraites: majorations de durée d'assurance et égalité', Droit social fév. 2010..

13 Cass. 2ème civ. 19 février 2009, n°07-20668, Bull. II 53.

14 Délibération n°2005-43 du 3 octobre 2005 and Délibération n° 2008-237 du 27 octobre 2008.

15 *Article 65 de la loi n° 2009-1646 du 24 décembre 2009, loi de financement de la Sécurité Sociale pour 2010*.

parents, the advantage will be granted to the parent who can prove that he/she has contributed more and for a longer period to the education of the child. If both parents have contributed equally to the child's education, the benefit will be divided into two.

2.3. Concluding remarks on the French reforms

It is obvious that maintaining specific rights just for mothers in both the occupational old-age pension schemes and in the statutory scheme could be seen as anachronistic and reflecting a paternalist vision of the French society. Therefore one question to be answered is how to create a new system for the future, and to take into account the fact that men can and are actually contributing to the education of their children. Another question is how not to deprive women of a decent pension, and to take into account their actual situation, in the past and still in the present. The French situation highlights the difficulties in trying to conceive real equality in pension rights. First, in the well-known demographical and economical context of European countries, the necessity to reform in the name of equality between men and women could give the legislator the opportunity to weaken women's rights and to stop women from receiving the benefit necessary to maintain a minimal pension. Women still receive much lower retirement pensions than men[16] and considering the present situation of women in the labour market, this situation is not going to change soon. If this difference is not taken into account in defining women pensions rights, women's rights to pension could get worse and lead to another form of indirect discrimination.[17] The second difficulty is to define measures in a context where time is particularly important. The past and present situation of women in the labour market defines the present and future pension rights of women. Reforms should take into consideration the legitimate expectations of women and this is the reason why transitional measures are essential. If not, a rigid and abstract conception of equality will be turning into indirect discrimination of women. Third, EU legislation and case law on gender equality could contribute to a dichotomy between occupational old-age pension schemes and the statutory scheme and one may wonder if this distinction is really justified. However, the French example illustrates how the development of the law for public servants leads to a reform in the private sector. In France there still is a difference between the two schemes, which could be justified by the fact that the situation of female civil servants seems to be better than the situation of women working in the private sector.[18]

But a general reform of pensions is now under discussion in France. One of the topics is this difference of retirement age; another is the ways of lowering the burden of financing pensions. The proposals include longer qualification time, higher pensionable age, and new resources. Women might become the main victims of this reform, under the pretext of granting the same rights to men, and it is essential to adopt a gender perspective not to weaken women's rights.

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16 *Conseil d'Orientation des Retraites, Retraites; les droits familiaux et conjugaux*, 17 December 2009, see http://www.cor-retraites.fr/IMG/pdf/doc-1052.pdf, last accessed on 27 April 2010.

17 A. Lyon-Caen & H. Masse-Dessen, 'La retraite des femmes ou l'égalité mal comprise', *Le Monde*, 11 September 2009.

18 See E. Chemla, 'Retraites: majorations de durée d'assurance et égalité', Droit social fév. 2010.

3. Old-age pension rights for women in Italy[19]

3.1. The statutory pension system: discriminatory features

The Italian social security system is mainly based on the first pillar, i.e. statutory pensions. The general statutory system for old-age, invalidity and survivors' pensions (*IVS* scheme) is administered, in the private sector, by *INPS* (National Social Welfare Institute) and, in the public sector, by *INPDAP* (National Provident Institution for the Employees of Public Administrations).

The Italian pension system was reformed with Act No. 335/1995, which transformed the pension regime from a pay-based system (where benefits are calculated on the basis of the average of taxable pay received in the last 10 years contributions) to a contribution-based system (where benefits are calculated taking into consideration the contributions accrued in the notional account and the life expectancy factor). The long transition period provided for the coming into full effect of the reform has caused the coexistence within our pension system of two different regimes: the old *pay-based system* and the new *contribution-based system.*

The statutory schemes are, on the whole, generally in line with EU anti-discrimination legislation, despite the fact that Directive 79/7 has never been implemented.

Indirect gender-discriminatory aspects are shown in the areas of part-time work and temporary work and other non-standard working patterns, where there is a massive presence of women.

In particular, under the pay-based pension scheme, the earnings level, the amount and the number of contributions paid and the continuity of payment determine both the eligibility to social insurance and the benefits level. The increase in minimum insurance and contribution requirements, which has taken place in Italy during the last decades, is bound to have a negative impact on the pensions of all atypical workers. Irregular attachment to the labour market which afflicts atypical workers, and among them certainly women, endangers, in fact, the fulfilment of contribution conditions. As long as part-time workers are specifically concerned, insurance and contributions periods for the purpose of determining the pension amount are calculated proportionally to the number of hours effectively worked; therefore, they are not credited with contributions for the weeks when they do not carry out their work activity and this can noticeably endanger the contribution record of vertical part-timers (i.e. when work is executed full time, but only in certain fixed periods during the week/month/year). Moreover, as far as the pension amount is concerned, decreases of earnings during the period of reference for the calculation of pensionable income (normally the last 10 years) determine in turn a decrease of the pension benefit. Therefore, all those who have strong pay fluctuations are disadvantaged in relation to the definition of the pension amount.[20] Again, a temporary worker will have substantial reductions made to his/her contribution period for the purpose of the pension amount and this will naturally cause a reduction in the pension amount.[21]

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[19] By Simonetta Renga.

[20] However, for those who earn less than EUR 183 a week, their contribution period is proportionally recalculated for the purpose of the pension amount: this lengthens the period of reference for the calculation of pensionable pay and in turn an increase of the pensionable pay and thus of the pension.

[21] If, for example, one works for 40 years under temporary contracts of 6 month a year, she/he will have the contribution period reduced to 20 years and in the end she/he will have a pension of an amount equal to 40 % of the earned pay (a quota or rate of yield of 2 % x each year of contribution

Under the contribution-based pension system, which is founded on how many contributions have been paid over the years, the earnings variations as well as the continuity and regularity of employment of the beneficiaries once more appear to be of crucial importance, as the benefit-qualifying conditions and the pension amount are very sensitive to these factors.

The pensionable age is different for men and women: it is set at 60 for women and at 65 for men (this is allowed by Article 7 (1) (a) of Directive 79/7). Women can, however, carry on working until the pensionable age set for men. They are protected against unfair dismissal. Thus, the pensionable age is flexible only for women and not for men. This feature, which clearly favours women, is often justified by emphasising that it helps to fill the gaps in the contribution records of the beneficiaries or to compensate the caring work carried out by women.

Finally, there are advantages as regards old-age pensions for the purpose of child rearing provided, under the new contribution pension system, exclusively to the benefit of women (Article 7(1)(b) Directive 79/7/EEC). In particular, more favourable coefficients of transformation (according to which pensions are calculated)[22] are fixed for maternity: the coefficient of transformation is increased to one year for one or two children and to two years for three or more. Then, in relation to maternity, a reduction in the age of retirement of 4 months per child is granted, with a maximum limit of 12 months; alternative to that, the pensionable age of the working mother can be virtually increased by one year, when she has one or two children, or by two years, when she has three children or more.[23]

3.2. The occupational pension schemes: discriminatory features

Domestic legislation is, on the whole, generally in line with EU anti-discrimination legislation. The main discriminatory feature of occupational funds can be detected in relation to pensionable age. Indeed, Act No. 252/2005 states that the occupational old-age pension is allowed when reaching the pensionable age established in the obligatory system which the individual belongs to. In the statutory system for employed workers, as we have already mentioned, women's pensionable age is set at 5 years lower than that for men, but women can carry on working until the pensionable age set for men.

However, the Government has recently passed Decree No. 5 of 25 January 2010, which finally implements the Recast Directive. As regards social security, the Decree extends the ban on direct and indirect discrimination to occupational pensions, in particular as regards the following: the scope of such schemes and the conditions of access to them; the obligation to contribute and the calculation of contributions; the

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accredited); if the same worker had worked for 40 years with a contract of employment of indefinite duration, his/her pension would have been equal to 80 % of the earned pay.

[22] Under the *contribution-based system*, the pension amount is calculated as follows: individual contribution total (sum of all contribution years accredited to the interested party, re-valued annually on the basis of the average variation of gross domestic product in the previous five years) x transformation coefficients (representative of the average remaining life expectancy) = gross annual pension, which is re-evaluated annually on the basis of inflation.

[23] However, the pension reform of 1995 introduced, for those paying contributions to the new contribution-based system, either men or women: a) up to 160 days per child of notional contributions for parents who take time off work to educate or assist children up to the age of six years; b) 25 days per annum of notional contributions, for parents who take time off work to assist children above six years of age, or their spouse, or a live-in parent, provided that there are situations of handicap. *Notional contributions* is a fictional contribution paid by the State in substitution of employers and employees contributions; the notional contribution applies both to the total amount of, and to the right to, pensions.

calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits. The Decree also allows the setting of different levels of benefits insofar as may be necessary to take account of actuarial calculation factors, which differ according to sex in the case of defined-contribution schemes; in the case of funded defined-benefit schemes, certain elements may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented. The Decree states that actuarial factors used must be sound, relevant and accurate; the Commission of Vigilance on Pensions (*COVIP*) and the National Equal Opportunities Committee are charged with monitoring the legitimacy and the non-discriminatory nature of the actuarial factors used.

It is worth noting that among the actuarial factors, the higher life expectancy of women is often taken into consideration by occupational funds; therefore, women's pensions can be lower or their contribution rate higher than those provided for men. Decree No. 5/2010 does not provide anything regarding the personal and material scope of the principle of non-discrimination, on its implementation as regards self-employment, or on retroactive effects of the measures introduced.

In particular, in relation to the material scope, the application of the principle of non-discrimination to public servants benefits paid by reasons of the employment relationship (Article 7.2 of Directive 2006/54/EC), which is the main issue of the Court of Justice decision 46/07, is not mentioned at all by the Decree. The Court of Justice, in Case no. 46/07, *Commission v Italy*, declared the pension scheme for civil servants managed by *INPDAP* discriminatory on the basis of Article 141 EC, since it provides that the general pensionable age for men is 65 and for women 60.[24] The Court, therefore, regarded the *INPDAP* scheme as occupational. By contrast, our legislation treats it as a statutory pension scheme and regulates it according to the legislation of public schemes (Act no. 421/1992 and Act no. 335/1995). The statutory nature of *INPDAP* is also shown by the facts that the subscription to it is compulsory (occupational funds are voluntary in Italy); *INPDAP* has a general coverage in the public employment sector and as such replaces the general pension insurance scheme run by the *INPS* (National Social Welfare Institute), which is consequently not operative in the area of public employees; alongside the statutory *INPDAP* scheme, there are other occupational funds for public servants. Obviously, if the *INPDAP* pension scheme is considered to fall under the scope of Directive 79/7, then pensionable age is a possible exception to the application of the equality principle on grounds of gender ex Article 7(1)(a).

However, following the Court of Justice decision, Act 3.8.2009 No. 102 equalized the pensionable age of men and women in the civil servants sector. The rule will be

[24] J.P. Lhernould 'L'actualité de la jurisprudence communautaire et internationale', *Revue de jurisprudence sociale* (2009) pp. 201-202; P. Schlesinger & F. Bonetti 'Pensione di vecchiaia dei dipendenti pubblici e parità di trattamento tra uomini e donne', *Il Corriere giuridico* (2009) pp. 589-599; F. De Bari 'Parità di retribuzione ed età di pensionamento diverse sulla base del sesso del dipendente pubblico', *Diritto pubblico comparato ed europeo* (2009) pp. 403-407; A. Vallebona 'Età pensionabile e differenze', *Massimario di giurisprudenza del lavoro* (2009) p.76; L. Terminiello 'La previsione di un diverso requisito anagrafico per uomini e donne ai fini della percezione della pensione INPDAP viola l'art. 141 del Trattato CE', *Rivista italiana di diritto del lavoro* No. 2 (2009) pp. 452-456; C. Buzzacchi, ' In tema di età pensionabile: la parità tra i generi o la tutela della funzione familiare della donna?', *Quaderni costituzionali* (2009) pp.416-419; F. Angelini 'Il principio della parità retributiva nel lavoro pubblico', *Giornale di diritto amministrativo* (2009) pp. 721-730.

fully operative only in 2018. In the meantime, women's pensionable age will be increased, starting in 2010, by one year every two years. The pensionable age of 60, including the right to carry on working until the age set for men, is still applied to those women who fulfilled their contributions and age conditions by 31 December 2009. Moreover, according to Article 22, starting in 2015, the pensionable age will be increased every five years for everyone, men and women, in proportion to the increase of the life expectancy registered by the National Statistics Institute and validated by Eurostat. The mechanisms of this adjustment are not clear, as they are due to be enacted through a regulation of both the Ministry of Labour and that of Economy and Finance; Article 22 only provides a ceiling in the 2015 pensionable age increase of three months.

Here it must also be outlined that the equalization has taken place by way of increasing the pensionable age of women up to the limit provided for men rather than the opposite. Thus the equalization has a negative effect, as could have been predicted given the budgeting constraints and the progressive increase of life expectancy in Europe.

In relation to occupational funds, it is also to be stressed that the benefit rights of atypical workers and of intermittent, temporary, occasional and part-time workers as well as those of workers with earnings inferior to the average standards, many of whom are women, will always be at stake, as their qualifying conditions, contributions record and benefit amount depends on the regularity of their careers. The occupational funds, in particular, tend to mirror the differences between workers existing in the labour market. In this light, it is particularly worrying that the structure of occupational funds makes no provisions for the recovery of wasted contributions during pregnancy/maternity.

3.3. Hopes for the future

In our context, it is extremely important to keep atypical workers, i.e. intermittent, temporary, occasional and part-time workers - which are all job positions often taken up by women - within the statutory social insurance and occupational systems. It must be avoided, in the first place, that they become confined to the area of social assistance, which in our country is absolutely inadequate. Therefore, an important step in this direction could be the improvement of the set of instruments geared to recover wasted contributions in the statutory social security system, such as the crediting of notional contributions, totalising of contribution, redemption and voluntary contributions.

National contribution is a fictional contribution paid by the State in substitution of employers' and employees' contributions; it applies to both pension rights and amount purposes. *Redemption* allows additional contributions, referring to periods of working life which did not permit contributions to be made, to be included into the individual's pension position; the costs of redemption are to be paid by the interested party and this makes the mechanism less desirable for our purposes. Finally, the payment of contributions can also be continued *voluntarily*; voluntary continued contributions are also to be paid by the worker.

As occupational schemes do not provide for the recovery of wasted contributions, here again, a state intervention for the sharing of the costs of the recovery instruments could be welcome; alternatively, employers could be required to pay wasted contributions to the fund, which can then be deducted from taxable income. A further remedy would be that of allowing workers who experience spells of inactivity to maintain the subscription to the fund without paying contributions.

Another measure that could be taken is that of providing all those workers who have fulfilled the contribution conditions with a minimum benefit in order to grant them social integration.

The difficulties of atypical workers are fully shown by Cases C-395/08 and C-396/08 (*Inps v Bruno and Pettini*), which also reveal the scarce familiarity with the anti-discrimination legislation among judiciary and lawyers. The cases, not yet decided, are about vertical part-time workers, who are not credited for the purpose of calculating their pensions amount with contributions for the weeks when they do not carry out their work activity: this may constitute indirect discrimination on grounds of gender, once it is proved that the part-timers involved are mainly women. The Court of Appeal of Rome asked the Court of Justice for a preliminary ruling on the application to this issue of Directive 97/81/EC on part-time work, rather than of Directive 79/7/EEC on statutory social security. Consistent with the request, the Advocate-General states, in his opinion of 21 January 2010, that Directive 97/81/EC does not apply to statutory social security pensions.

On the road to equality, the different pensionable age for men and women should be repealed for statutory and occupational funds; the flexible pensionable age between 57 and 65 years of age of the 1995 Pension Reform should be re-introduced. Incidentally, decision C46/07 of the Court of Justice implies for our Country much more than the equalization of the pensionable age, as it may cause a total re-thinking of the features of the three pillars structure in our system. Among other things, the different pensionable age for men and women might have consequences in relation to the discipline of early retirement. This is an instrument for situations of crisis or restructuring of the enterprise linked to redundancies, which pays early pensions to workers nearing the retirement age:[25] in the past, these provisions have often recognised, consistent with the different pensionable age, a contribution credit to women for the purpose of retiring earlier which was lower than what is necessary to reach the early pension amount allowed to men. The *Corte Costituzionale* intervened on the issue several times and has declared the relevant provisions unconstitutional:[26] as a consequence, women now have the contribution credit corresponding to the same pension amount as granted to men. In contrast with these decisions, the European Court of Justice No. 139/95 (*Balestra v. Inps*) declared the mentioned provisions on early retirement compatible with EU anti-discrimination legislation, on the basis of Article 7(1)(a) of Directive 79/7/EEC.[27]

The advantages granted to women as regards old-age pensions for the purpose of child rearing (Article 7(1)(b) Directive 79/7/EEC) should be extended to men. Let us try to explain. It is the women's employment career which mainly affects their qualification for social security and their careers are so fragile because the burden of family (parenthood) and care responsibilities (e.g. for elderly and disabled relatives) generally falls much more on women than on men. When measures such as the ones mentioned address only women or mothers, the consequence is that this further reinforces the stereotyped traditional gender roles within the family and in the labour market. Moreover, this circumstance certainly has an adverse effect on women, as employers will not be inclined to hire women, especially in their fertile years. Indeed,

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[25] In particular, workers are paid a pension according to the years of service at the date of termination, plus full notional service up to the usual retirement date.

[26] Constitutional Court cases no. 371/1989 and no. 134/1991.

[27] CJ 207/04 (*Vergani v. Agenzia delle Entrate Ufficio di Arona*), declared that the exception under Article 7(1)(a) cannot be extended to tax concession inequalities grounded on gender-linked rights to different early retirement provisions based on the different pensionable age.

gender equality will be reached by both favouring women's participation in the labour market and increasing men's role of caring in the family.

4. Old-age pension rights for women in Greece[28]

4.1. ECJ finds Greece in breach of Article 141 TEC

In a judgment issued on 26 March 2009 (Case C-559/97), the ECJ found Greece in breach of Article 141 TEC (now 157 TFEU), because it maintained in force provisions concerning different retirement ages and different minimum-service requirements for men and women in the Civil and Military Pensions Code (CMPC), which it considered an occupational scheme. Invoking the *Griesmar* case,[29] the ECJ dismissed the argument of the Greek Government that lower pensionable ages for women can be considered a positive measure in their favour, as they cannot offset the disadvantages that women suffer during their working life. Pointing out that the impugned provisions mainly concern women in their capacity as parents of minor children, the ECJ recalled that men may also be parents and that the situation of employed men and women may be comparable in this respect.

This ECJ judgment triggered a wide and strong debate on the measures to be taken in order to comply with it. A general reform of the social security system, which was already pending, seems to be accelerated by this judgment. The Government deems such reform necessary for ensuring both the sustainability of pensions and the long-term financial viability of the social security schemes, in view of the increasing ageing of the population. However, this is admittedly very difficult in the current socio-economic circumstances.

Trade unions from the outset expressed their opposition to the raising of the pensionable ages of women and other workers. The Government called for a social dialogue and set up a Group of Experts, which should propose solutions. A Bill presented some days ago for public consultation[30] raises pensionable ages for both men and women, but maintains gender differences. Another Bill, for the public sector, was announced, but has not been presented yet.

4.2. The Greek social security system: problems and provisions conflicting with EU law

The social security system is fragmented and complex. There are about 150 schemes, each governed by provisions scattered in several, frequently amended, statutes, decrees and ministerial decisions. It is thus difficult to distinguish the occupational schemes and to look for discriminatory provisions, and more generally to find one's way in this maze.[31]

There has been no systematic study aimed at finding gender-discriminatory provisions in any social security scheme. This task has mostly been left to the courts, which usually apply the constitutional gender equality norm[32] to all schemes, by levelling-up, without bothering about the (occupational or statutory) character, under

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28 By Sophia Koukoulis-Spiliotopoulos.

29 Case 366/99 *Griesmar* [2001] ECR I-9383.

30 Ministry of Employment and Social Security: http://www.ypakp.gr (in Greek), last accessed on 17 May 2010.

31 This was acknowledged in the Explanatory Report to Act 3655/2008 'Administrative and organizational reform of the social security system and other social security provisions', OJ A 58/3.4.2008.

32 Article 4(2) of the Constitution: 'Greek men and women have equal rights and obligations'.

EU law, of the scheme at issue. The provisions that the ECJ found contrary to Article 141 TEC (now Article 157 TFEU) had already been found unconstitutional by the Court of Audit, which hears civil servants' pension cases. This Court usually upholds men's claims to an old-age pension at an (earlier) age or subject to the (shorter) service requirements provided for women.[33]

4.3. The non-implementation of EU rules regarding occupational schemes

In 2000, the ECJ found that Greece had failed to transpose Directive 86/378, as amended by Directive 96/97.[34] Presidential Decree 87/2002[35] had transposed the Directive inadequately. It merely copied it, without specifying which Greek schemes were occupational or providing any criteria for their identification. Thus, until the ECJ's 26 March 2009 judgment, there was a general lack of awareness of the notion of 'occupational scheme', although, besides the *CNPC*, there are many others, such as those of public corporations and banks, which cover their personnel. An example is provided by the *Evrenopoulos* case where the ECJ found that the Public Power Corporation (*DEI*) scheme is occupational.[36]

4.4. Causes of the inferior position of women in social security

In the 26 March 2009 judgment, while not accepting that lower pensionable ages may be considered a positive measure in favour of women (see above, in 1), the ECJ referred to the Member States' obligation to take measures facilitating the reconciliation of professional and family obligations by both men and women. This part of the judgment must be read in light of well-established ECJ case law, from which it results that the effective guarantee of maternity and parental rights is a primordial condition for substantive gender equality.

It is common knowledge that the gender pension gap is the result of the disadvantaged position of women in the labour market. It reflects the gender pay gap and the labour market structural inequalities that perpetuate it (e.g. atypical and precarious employment, concentration in low-paid, low-prestige jobs, career breaks/shorter working lives of women, 'glass ceiling' blocking their promotion). Maternity or even its mere prospect is the main obstacle for entering, remaining in and returning to the labour market. Measures facilitating the 'reconciliation of family and work' by men and women, along with incentives for men to make use of such measures,[37] can alleviate women's multiple burden and modify their image as costly and disadvantageous workers, whom employers avoid hiring or promoting or try to find a way to dismiss at no cost.

It is characteristic that the bulk of complaints to the Ombudsman (the gender equality body) concern violations of maternity rights. The Ombudsman also receives telephone calls from pregnant women who report pressure in order to resign, but do not dare lodge a formal complaint. Legal protection against dismissal during pregnancy and thereafter is strong,[38] but discrimination on grounds of maternity is a growing concern in practice, in particular in view of the financial crisis, as the

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33 See e.g. Court of Audit (Plen.) judgments 977/2000 and 44/2009.

34 ECJ C-457/98 *Commission v. Greece* [2000] ECR I-11481.

35 OJ A 66/04.04.2002.

36 Case C-147/95 *Dimossia Epicheirissi Ilektrismou* (*DEI*) v *E. Evrenopoulos* [1997] ECR I-2057.

37 See preamble to the Framework Agreement on Parental Leave (Directive 96/34/EC OJ L 145 19.6.1996, p. 4). This is repeated in the Greek Council of State (Supreme Administrative Court) judgments 1 and 2/2006.

38 Article 15 of Act 1483/1984 prohibits dismissal during pregnancy and one year after childbirth or for a longer period in case of pregnancy-related sickness, thus going further than EU law.

Ombudsman also stresses.[39] Parental leave in the private sector[40] is a dead letter, as it is unpaid and not compensated through state benefits; moreover, a parent who takes it must pay his/her own and the employer's social security contributions, in order to maintain social security coverage. Thus, take-up is very low and those taking it (mainly mothers) are disadvantaged in pay and social security.

These are mainly private sector problems, but there is also discrimination (direct and indirect) in the public sector regarding parental leave and promotion (glass ceiling).[41]

The complaints to the Ombudsman only show the tip of the iceberg. Furthermore, while Greek remedies and sanctions are very effective, women are reluctant to bring cases before the courts, mainly for lack of evidence and fear of victimization. This fear is growing along with the financial crisis and the consequent increase in female unemployment, which, in Greece, is already much higher than male unemployment.[42] Moreover, workers cannot benefit from the EU rules on the burden of proof and the *locus standi* of trade unions and other organisations for bringing workers' cases before the courts, as these rules are inadequately transposed and thus remain virtually unknown.[43]

4.5. The inadequacy of compensatory social security measures

The only measure meant to address women's pension problems (and the demographic deficit) is a *service credit*. Mothers are credited with one year of additional service for the first child and two years for each subsequent child, until the third one. If the mother does not make use of this credit, then the father is entitled to it.[44] This measure may not be gender discriminatory, but it cannot *per se* affect the roots of the problems, since it cannot offset the disadvantages that women suffer during their working life (see above, in 1).

It is true that in *Griesmar* the service credit was granted to women only, but the ECJ reasoning also applies to the Greek situation, since in both cases the problem is *the timing and effectiveness* of the measure. This advantage, although formally available to men too, is in fact addressed to women who have managed, in spite of adverse conditions, to stay in or re-enter the labour market. However, it comes too late for many women who have not been able to realise this feat.[45] Therefore, the equalization of men's and women's pensionable ages must be *immediately* coupled

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39 Ombudsman *Equal treatment of men and women in employment and labour relationships,* Special Report November 2009, pp. 15, 43, 80.

40 Three and a half months for each parent, non-transferable, until the child reaches the age of three and a half (Articles 5-6 Act 1483/1984 OJ A 153/8.10.1984, as modified by Act 2640/1998 OJ A 206/3.9.1998).

41 See S. Koukoulis-Spiliotopoulos 'Greece' in S. Prechal & S. Burri *Gender Equality Law in 30 European Countries 2009 update:* http://ec.europa.eu/social/main.jsp?catId=641&langId=en, last accessed on 17 May 2010; S. Koukoulis-Spiliotopoulos 'Retirement and harmonization of family and work; issues of substantive gender equality and judicial protection (ECJ 26.3.2009 C-559/07)' *Social Security Law Review* 2009 pp. 753-785 (in Greek).

42 This is 1.5 times higher than the average and more than twice as high as the male rate: Labour Institute of the General Confederation of Labour & the Civil Servants Federation *Enimerossi* 164/2009: http://www.inegsee.gr, last accessed on 18 May 2010.

43 See S. Koukoulis-Spiliotopoulos 'Greece' *European Gender Law Review* No. 1/2008, p. 73.

44 It initially concerned the main statutory scheme for workers on a private-law contract (*IKA*). Article 4(7) of Act 3655/2008 extended it to more schemes for such workers, among which are occupational ones.

45 See S. Koukoulis-Spiliotopoulos 'Greece' *Bulletin Legal Issues in Equality* No. 3/2002.

with effective 'reconciliation' measures and with the gradual stamping out of labour market structural inequalities, which must *start now*.[46]

4.6. The Greek social security reform within the framework of the financial crisis

The social security reform must be seen within the framework of the financial crisis and the support programme for Greece agreed with the Euro area Member States, as part of a loan package including International Monetary Fund (IMF) financing.[47] Following discussions with the Commission, the European Central Bank and the IMF, the Greek Government presented a '*Memorandum of understanding*' containing, in general lines, the measures to be taken as conditions for the granting of the loan and time schedules. The Memorandum was annexed to Act 3845/2010,[48] a 'framework statute' on 'measures for implementing the mechanism of support of the Greek economy by the Euro area Member States and the IMF', which will be followed by more specific provisions.

The Memorandum deals, inter alia, with social security, e.g. acceleration of pensionable age increases: women's (along with men's) general pensionable age must reach 65 years in the public sector by 2013 and in the private sector by 2015. Current transition periods for those affiliated with a scheme before 1993 will be abolished. Let us note that private sector schemes include statutory ones (e.g. *IKA*, see above, in note 42), for which Directive 79/7 does not require equalization of men's and women's pensionable ages. The pension amount (now based on the last wage) will be based on the whole working life – something prejudicial to women, due to their irregular working patterns (see above, in 4). Moreover, the social security schemes will be merged into three. Neither the Memorandum nor Act 3845/2010 refer to gender equality or the reconciliation of family and work.

The social security Bill (see above, in 1) does not equalize pensionable ages. It deals, inter alia, with the new method of pension calculation and the merging of most schemes into three: for salaried workers (including civil servants), the self-employed and farmers, and provides that the merging will be achieved by virtue of decrees before 1 January 2018. The final formulation of these provisions, as well as whether this merging will affect the character of existing statutory and occupational schemes remains to be seen.

4.7. What about EU values, fundamental rights and horizontal social objectives?

It is true that the financial situation in Greece is very bad and severe austerity measures are needed in order to exit the crisis. However, both the above Memorandum and the implementing national measures must be seen in the light of fundamental EU values and rights, including gender equality, and of EU horizontal social objectives which condition the effectiveness of economic objectives.

It is in the same light that the planned 'reinforcement of economic governance in the EU', aimed at achieving greater budgetary discipline and a more even economic development in the EU, has to be designed and implemented. The Commission's Communication on this issue refers to EU employment guidelines,[49] while its recent

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46 See the demands of Greek women's NGOs, further in this issue, under 'Greece'.

47 See http://www.european-council.europa.eu/home-page/highlights/defending-greece-and-the-eurozone.aspx?lang=en, last accessed on 18 May 2010.

48 OJ A 65/6.5.2010.

49 See *Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions* Brussels 12 May 2010 COM(2010) 250 final; and *Remarks of the President of the*

Proposal for a Council Decision on such guidelines refers to the above objectives (Article 3 TEU).[50] In order to be in line with the Lisbon Treaty, any EU instrument related to economic or social policy should refer at least to Articles 2 (fundamental EU values, including gender equality) and 3(3) TEU (linking EU economic objectives with gender equality, full employment and social progress), Article 8 TFEU (maintaining gender equality as a positive obligation in all areas) and Articles 21 (prohibiting any discrimination) and 23 (reaffirming substantive gender equality as a fundamental right in all areas) of the Charter of Fundamental Rights.

The above Lisbon Treaty imperatives are reflected in the Commission's 2010 Report on gender equality, where it is stressed that 'efficient gender equality policies must be considered as part of the solution for exiting the crisis, supporting recovery and building a stronger economy for the future'. The Commission recalls that *gender equality* is not only a question of social fairness, but also 'a precondition for meeting the objectives of sustainable growth, employment, competitiveness and social cohesion'. Moreover, it warns that 'the economic downturn should not be used as a reason to slow down progress on reconciliation policies and to cut budgets allocated to care services and leave arrangements, affecting labour market access by women in particular'.[51]

A provision that seems incompatible with fundamental rights is Article 2(7) of Act 3845/2010 (see above, in 6). This provision (which is not required by the Memorandum) overturns the current hierarchy of collective agreements, according to which *minimum* standards fixed by national general collective agreements (n.g.c.a.) for all workers on a private-law contract in the country may not be lowered by collective agreements of narrower scope. The above provision allows collective agreements of a narrower scope to lower *minimum* n.g.c.a. standards, which are a fundamental safety net against poverty and social exclusion. This will be prejudicial to women and vulnerable categories of workers. Moreover, n.g.c.a.s have been instrumental regarding measures for reconciling family and work. The above provision seems incompatible with *ILO* Convention 87 (freedom of association and protection of the right to organise),[52] hence also with Article 28 of the Charter of Fundamental Rights (right of collective bargaining and action), which must be read in the light of this Convention (see Article 53 of the Charter).

5. Concluding remarks

The most crucial issues in the three countries analysed are those of pensionable age, advantages regarding old-age pensions for the purpose of child rearing and pension rights of atypical workers, most of whom are women.

European Council following the first meeting of the Taskforce on economic governance, http://www.european-council.europa.eu/the-president, last accessed on 21 May 2010.

50 Proposal for a Council Decision on guidelines for the employment policies of the Member States COM(2010) 193/3.

51 *Report from the Commission to the Council, the European Parliamant, the European Economic and Social Committee and the Committee of the Regions. Equality between women and men - 2010,* SEC(2009)1706.

52 See e.g. *Liberté syndicale et négociation collective* (*Étude d'ensemble de la Commission d'Experts pour l'application des conventions et recommandations*), Conférence internationale du Travail, 81e session, 1994, Paragraphs 195 and 249.

5.1. Pensionable age

Regarding pensionable age, the questions about whether to allow retroactive measures, transitional periods for entry into force of new legislation and levelling down appear to be extremely important. The lower pensionable age or contribution requirements in statutory pensions have been often justified under Directive 79/7, and well accepted in public opinion, as they help to fill the gaps in the contribution records of the beneficiaries or to compensate the caring work carried out by women. On the other hand, earlier pensionable ages for women are likely to lower their pension amount.

At any rate, transitional periods and progressive entry into force of reformed legislation appear to be necessary. Moreover, the increasing of pensionable age ought to be compensated by gender-neutral crediting mechanisms for persons who have brought up children or have performed other care work within the family.

5.2. Advantages for the purpose of child rearing

The issues of advantages regarding old-age pensions for the purpose of child rearing should probably be re-thought in the perspective of a life-cycle approach to social protection, inspired by reconciliation policies between work and private life. The life-cycle approach could take into account changing career patterns and periods outside of labour market employment and it could also lead to the inclusion of education or active parenting among the insured risks. But the Greek example, where service credits are granted primarily to mothers and secondarily to fathers, shows how careful one must be to ensure that such measures are effective. Indeed, although the credit is also available to fathers, the fact that it cannot offset the disadvantages suffered by women during their working life remains.

Women's employment mainly affects their qualification for old-age pension schemes. And women's employment is so fragile because the burden of family (parenthood) and care responsibilities (e.g. for elderly and disabled relatives) generally falls more on them than on men. Quite often, reconciliation policies, such as advantages regarding old-age pensions for the purpose of child rearing, address only women or mothers; on the other hand, measures encouraging men to engage in care activities are scarce. The consequence is that this further reinforces the stereotyped traditional gender roles within the family and the labour market. Moreover, this circumstance certainly has an adverse effect on women, as employers are not inclined to hire them, especially in their child-bearing years. Indeed, gender equality in social security can be reached not just by favouring women's participation in the labour market but also by increasing men's role in caring within the family.

Therefore, reconciliation measures should be aimed at both men and women. In this context, the Court of Justice cases of *Hofmann*, no. 184/83, *Abdoulaye*, no. 218/98, *Griesmar*, no. 366/99 and *Lommers*, no. 476/99, where benefits granted to women as mothers are not equally granted to fathers, certainly does not help the definition of reconciliation in terms of redistribution of the roles within the family and, consequently, within the labour market. It should, however, be recalled that the Court considers reconciliation 'a natural corollary to gender equality' and a means for its substantive achievement.[53] Consequently, reconciliation is a proactive principle, a 'value', a fundamental right and a horizontal objective of the EU, in all areas, at the

[53] Cases C-243/95 *Hill and Stapleton* v *the Revenue Commissioners and the Department of Finance* [1998] ECR I-3739; C-1/95 *Gerster* v *Freistaat Bayern* [1997] ECR I-5253.

same level as gender equality.[54] It is along the same vein that we expect the Court to continue.

5.3. Pension rights of atypical workers

As regards the pension rights of atypical workers, gender differences in working patterns are mirrored, often in the form of indirect gender discrimination, by the statutory pension schemes. All the more so if the pension system is based on the lifetime employment record of the beneficiaries, if the schemes are based on actuarial principles (which means the use of gender-related actuarial factors), if there is a strong link between benefits and contributions (such as there is in the described contributions schemes, for example) and if benefits are earnings-related.

As regards the occupational old-age pension schemes, which are also deeply involved in the processes of reforming old-age pensions, they are increasingly run according to insurance principles and thus under the criteria of capitalization, and this might cause many gaps in terms of social protection. Among them should be considered the following: if the higher life expectancy of women is taken into consideration, women's pensions can be lower or their contribution rate higher than those provided for men (moreover, a higher contribution rate can discourage employers from hiring women); the contribution record (i.e. the number of contributions accrued over a working life) is impaired by earnings inferior to the average standards and irregular careers, as the insurance principles are rigorously applied here. In substance, as regards occupational schemes, the application of actuarial principles can result in social inequalities and this can give rise to indirect discrimination based on gender, which once more stems from women's different working patterns.[55]

In this context, an important step could be the improvement of the set of instruments geared to recover wasted contributions due to the performance of caring activities in both the statutory and the occupational social security system, such as the crediting of contributions opening pension rights.[56] Provisions as such should deliver gender-neutral advantages.

5.4. EU equality law and pensions systems

More fundamentally, one should re-examine the principles of equality as applied to pension law.[57]

The structure of European legislation is known, and it is unnecessary to recall it here. It rests upon the very strong connection between occupational pension schemes, in which pensions are assimilated into pay, so that the principle of equality is mechanically applied in a symmetrical way, and legal schemes mirror statutory pension schemes, arising from social policies, and for which Directive 79/7 authorizes exemptions.

The first question that is asked and that continues to stir debate is to classify the pension schemes into these categories. For notably historical reasons, the three

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54 See S. Koukoulis-Spiliotopoulos, 'The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality', *European Gender Equality Law Review* No. 1/2008.

55 Directive 2004/113 must be mentioned, as it gives possibilities and restrictions in the use of actuarial factors.

56 Periods when no professional work has been produced could be better credited as working periods.

57 See S. Prechal and S Burri *EU Rules on Gender Equality: How they are transposed into national law?* http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=353&furtherPubs=yes, last accessed on 8 July 2010.

countries do not have a single scheme, but rather a multitude of schemes, generally distinguishing the public employee schemes from those of private sector employees. However, in France, Italy and Greece, specifically, pension schemes for public employees and related workers were analyzed by the *CJCE* as occupational schemes. But it was commonly understood in those countries that they were not different from the private sector schemes, and it is difficult to understand that the advantages maintained in one of the schemes are not be maintained in the other. Current pension reform, which generally tends toward equalization between schemes, makes the distinction even more incomprehensible. In Greece, the distinction is also problematic. Is the difference between occupational and statutory scheme, and therefore the absolute prohibition to maintain temporary advantages for women adapted to the present situation, at a time when it is no longer a question of giving men the advantages granted to women? The rigidity of this distinction, and the risk of levelling down it creates can lead to strong social and political opposition.

The second question asked by the development of French case law is that of the continuity of this distinction. Can the exceptions allowed by Directive 79/7 be maintained under the constitutional gender equality principle (Greece) or under that of the European Convention for the Protection of Human Rights (France)? Will they thus be prohibited even in transitional schemes? Otherwise, how is the situation of women's pensions protected?

The third question is that of the solution of inequalities. Certainly courts, especially those in Greece, can grant to men the rights previously allocated only to women. But we see that these rights are withdrawn by legislative reforms, with, as a consequence, less pension rights for both men and women.

Finally, the fourth question is that of the very definition of equality in old-age pension schemes. Is equality a current or temporary theme, or do we build on equality during our whole life, taking into account the past situation and the future? In fact, we can examine it from different perspectives: On the one hand, that of the creation of rights for the future. In this case, the systems that do not maintain familiar stereotypes will be favoured, and equal parental rights will be emphasized. It is this analysis that led the ECJ to condemn certain aspects of the Greek pension scheme. But such an analysis very obviously implies coordinating pension schemes with measures that permit the effective exercise of shared responsibilities, real access by women to job and equal pay. Not taking this part of the problem into account only leads to formal equality. On the other hand, that of women's current situation, in which rights have been created in a situation of inequality. Pension rights were created when equality was not granted regarding family duties, remunerations, working periods in life,[58] etc. Not considering this, and only taking into account the first question is to go against true equality. And maybe sometimes the decisions of ECJ can be argued as missing part of this background, and maybe the true meaning of equality.

5.5. What is the future for women's rights?

And now, in the context of deep economic reforms, when old-age pensions are at the top of the agenda, what will happen to women's pensions? There must be some concern. In this context, can we remain optimistic? Certainly, if one remembers the essential point: gender equality is a fundamental 'value' in the EU and a horizontal goal in all its policies; and among its horizontal goals are 'full employment' and 'social progress' – necessary preconditions for a 'balanced economic growth' (new

[58] And of course, this is still the case….

Articles 2 and 3-3 TEU). As explained above in the Greek context, we do not lack legal instruments. This is why the Commission, in its 2010 gender equality report, stresses the crucial role of efficient gender equality and reconciliation policies for exiting the crisis.

The implementation of the principle of equality in pension schemes should not be the occasion to reduce women's rights and guarantees. The reforms that followed the ECJ decisions showed that this risk can become reality. But we now face general pension reforms, introduced with urgency. And these reforms call for more and more vigilance regarding women's rights. For general reforms should not forget the specific past, present and future situation of different groups in relation to old-age pension rights. When speaking of a longer period of building up pensions, one must not forget that women have shorter careers, lower rates, and more flexible work relations. No general reform is gender neutral if these criteria are forgotten, which they might be in the present maelstrom about old-age pensions. Pension reform cannot take place without this double reminder. Pensions are built and managed for the long term, and in the long term. Moreover, pension policies must take into account the constantly rising youth unemployment, which strongly affects young women and affects the possibilities of young people to form families and/or combine family with professional obligations. Will the prolongation of working life for older workers not affect young person's employment opportunities and conditions? One cannot forget past inequalities under the cover of equality. This would only construct formal equality, creating even greater inequality. One cannot forget, when reforming pension schemes, that the situation of women has not been for many years, still is not and will not be equal to that of men as regards the creation of their pension rights.

EU Policy and Legislative Process Update

October 2009 – May 2010

1. On 18 May 2010 the Commission adopted a position on EP amendments on 2nd reading with a view to the adoption of a Directive of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC.
http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=197459

2. In March 2010 the European Commission sent Estonia a reasoned opinion for incorrectly implementing the Parental Leave Directive (96/34/EC). One of the main points of violation is the fact that state officials, local government officials and those serving in defence are not considered as working under an employment contract by Estonian law and therefore do not fall under the scope of the Directive.
http://ec.europa.eu/social/main.jsp?langId=en&catId=418&newsId=735&furtherNews=yes

3. On 26 March 2010 an informal meeting of EU equality ministers took place. According to Ministers from many Member States, the EU's new strategy for growth and jobs should set the same target rate for the employment of both men and women (75 %). Ministers also stressed that closing the gender pay gap would provide an important incentive to encourage more women into paid employment.

4. On 25 March 2010 the Commission published the report 'More women in senior positions: Key to economic stability and growth'. The report examines the current situation and trends and also considers ways in which the advancement of women can be supported and accelerated to get more women in senior positions.
http://ec.europa.eu/social/BlobServlet?docId=4746&langId=en

5. As part of its commitment to promoting gender equality in decision making, the European Commission established a database monitoring the numbers of men and women in key decision-making positions in order to provide reliable statistics that can be used to monitor the current situation and trends through time. Between autumn 2009 and spring 2010, data on the gender balance in decision making were collected and updated.
http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=739&furtherNews=yes

6. On 24 March 2010 the European Commission requested the views of workers' and employers' representatives on the options for reviewing EU rules on working hours. The first-stage consultation asks the European social partners whether action is needed at EU level on the Working Time Directive (2003/88/EC) and what scope it should take. This represents the first step towards a comprehensive review of the Directive, after previous attempts to revisit the existing legislation reached an impasse in April 2009.
http://ec.europa.eu/social/BlobServlet?docId=4753&langId=en

7. On 18 March 2010 the European Commission sent reasoned opinions to Austria, Belgium and Poland after they failed to communicate national legislation that aims to implement Directive 2006/54/EC. On the same day the Commission closed the infringement proceedings on Directive 2006/54/EC against Estonia, after the country notified the Commission of its legislation transposing the Directive.
http://ec.europa.eu/social/main.jsp?langId=en&catId=418&newsId=737&furtherNews=yes

8. On 8 March 2010 the Council Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by *BUSINESSEUROPE*, *UEAPME*, *CEEP* and *ETUC* and repealing Directive 96/34/EC was adopted.
Official Journal L 68 of 18 March 2010, pp. 13-20

9. On 5 March 2010 the European Commission strengthened and deepened its commitment to equality between women and men with a Women's Charter. This political declaration sets out five key areas for action and aims at building a gender perspective into all policies for the next five years.
http://ec.europa.eu/commission_2010-014/president/news/documents/pdf/20100305_1_en.pdf

10. On 24 February 2010 the report 'Equality between men and women 2010' was published by the European Commission. The 2010 report more particularly addresses the shorter-term and longer-term challenges for gender equality in the context of the economic crisis. It also focuses on challenges relating to work/life balance, poverty and social inclusion and violence against women.
http://ec.europa.eu/social/BlobServlet?docId=4613&langId=en

11. On 10 February 2010 the new European Commission took office. László Andor is the Member of the European Commission responsible for employment, social affairs and inclusion.
http://ec.europa.eu/commission_2010-2014/andor/index_en.htm

12. On 28 January 2010 the European Commission sent reasoned opinions to Italy and the United Kingdom for non-communication of national legislation to implement EU rules prohibiting gender discrimination in employment and occupation (Directive 2006/54/EC). It also decided to close the infringement proceedings on the same Directive against Luxembourg after the country communicated to the Commission its legislation transposing the Directive.
http://ec.europa.eu/social/main.jsp?langId=en&catId=418&newsId=672&furtherNews=yes

13. Also on 28 January 2010 the Commission decided to close the infringement proceedings against the Czech Republic since the Anti-Discrimination Law, which entered into force in September 2009, correctly transposes the Directives on equal treatment for men and women in occupational social security schemes (96/97/EC and 86/378/EEC).
http://ec.europa.eu/social/main.jsp?langId=en&catId=418&newsId=673&furtherNews=yes

14. On 16 December 2009 the European Institute for Gender Equality (EIGE) officially opened its doors in Vilnius.
http://ec.europa.eu/social/main.jsp?langId=en&catId=732&newsId=659&furtherNews=yes

15. On 1 December 2009 the Treaty of Lisbon entered into force, together with the Charter on Fundamental Rights.
Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union and the Charter on Fundamental rights are in *Official Journal C 83 of 30 March 2010*.

16. In December 2009 the report 'Making Equality Effective: The role of proactive measures' was published by the European Network of Legal Experts in the Field of Gender Equality.
http://ec.europa.eu/social/BlobServlet?docId=4551&langId=en

17. In November 2009 the report 'Concepts of Equality and Non-Discrimination in Europe: A practical approach' was published by the European Network of Legal Experts in the Field of Gender Equality.
http://ec.europa.eu/social/BlobServlet?docId=4553&langId=en

European Court of Justice Case Law Update

October 2009 – May 2010

Case C-486/08, 22 April 2010
Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol
Framework agreement on part-time work, concluded on 6 June 1997, annexed to Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 98/23/EC of 7 April 1998 Framework agreement on fixed-term work concluded on 18 March 1999, annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP Framework agreement on parental leave concluded on 14 December 1995, annexed to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 97/75/EC of 15 December 1997

Facts
The applicant in the main proceedings, as the competent body for the employees of the hospitals of the Province of Tyrol, lodged an application for a declaration of the national court that provisions of the Law on contractual public servants are incompatible with EU law. This national law provided for a different treatment of workers employed under a private-law contract by a local or regional authority or a public undertaking and who work less than 12 hours per week (30 % of the normal working hours), in comparison with full-time workers. Also workers for a period of less than 6 months were treated differently with regard to, among other things, additional payments and classification in salary group. Furthermore, the Law stated that if the number of working hours is changed, the annual leave which has not yet been taken is adjusted proportionally to the number of hours in the new contract. Finally, the Law provided that workers who exercise their right to parental leave of two years lose, following that leave, their right to the paid annual leave accumulated during the year preceding the birth of their child (where 97 % of these workers is female). In the preliminary reference, the *Landesgericht Innsbruck* asked the Court of Justice whether these above-mentioned provisions are compatible with European Union law.

Judgment of the Court of Justice
1. Relevant European Union law and, in particular, Clause 4.2 of the Framework agreement on part-time work must be interpreted as precluding a national provision such as Paragraph 55(5) of the Law of the Province of Tyrol on contractual public servants of 8 November 2000, in the version in force up to 1 February 2009, under which, in the event of a change in the working hours of a worker, the amount of leave not yet taken is adjusted in such a way that a worker who reduces his working hours from full-time to part-time suffers a reduction in the right to paid annual leave he has accumulated but not been able to exercise while working full time, or that he can only take that leave with a reduced level of holiday pay.
2. Clause 4 of the Framework agreement on fixed-term work must be interpreted as precluding a national provision such as Paragraph 1(2)(m) of the Law of the

Province of Tyrol on contractual public servants of 8 November 2000, in the version in force up to 1 February 2009, which excludes from the scope of that law workers employed under a fixed-term contract of a maximum of six months or on a casual basis.

3. Clause 2.6 of the Framework agreement on parental leave must be interpreted as precluding a national provision such as the last sentence of Paragraph 60 of the Law of the Province of Tyrol on contractual public servants of 8 November 2000, in the version in force up to 1 February 2009, under which workers exercising their right to parental leave of two years lose, following that leave, their right to the paid annual leave accumulated during the year preceding the birth of their child.

Case C-186/09, 4 February 2010
European Commission v United Kingdom of Great Britain and Northern Ireland
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

Facts
In this case it is common ground that, at the end of the period prescribed in the reasoned opinion, measures to ensure the full transposition of Directive 2004/113 into the domestic legal order of the United Kingdom had not been adopted.

Judgment of the Court of Justice
The Court

1. Declares that, by failing to adopt, within the prescribed period, all the laws, regulations and administrative provisions necessary to comply with 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, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that Directive;
2. Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.

OPINIONS OF ADVOCATE-GENERALS

Case C-104/09
Opinion of Advocate-General Kokott delivered on 6 May 2010
Pedro Manuel Roca Álvarez v Sesa Start España ETT SA
Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

Facts
Under Spanish law, employed mothers are entitled to a reduction in their working day in the first nine months following the birth of their child. Although the law refers to time off work 'for the purpose of breastfeeding', that time off work is also granted, pursuant to Spanish case law, to non-breastfeeding mothers. Even at this point it must therefore be observed that the terms 'time off work for breastfeeding' are misleading, since breastfeeding certainly is not a condition for being granted time off work. If a

female worker does not claim the time off work for herself, the child's father may take the time off instead of the mother, provided that he too is an employee. Mr Roca Álvarez applied to his employer for such time off work. His request was refused on the ground that the child's mother was self-employed and consequently was not personally entitled to time off work. Nor, therefore, did Mr Roca Álvarez have a derived entitlement: Spanish law does not recognise the existence of an independent entitlement for employed fathers to time off work.

The Advocate-General advises the Court of Justice to answer as follows:
National legislation which only recognises employed mothers, but not employed fathers, as holders of an individual right to paid time off work for the purpose of taking care of a child – time off which consists in a half-hour reduction in the working day or an hour taken off work that may be divided into two parts – violates the principle of equal treatment within the meaning of Directive 76/207/EEC.

Joined Cases C-395/08 and C-396/08
Opinion of Advocate-General Sharpston delivered on 21 January 2010
Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini
Istituto nazionale della previdenza sociale (INPS) v Daniela Lotti and Clara Matteucci
Framework Agreement annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC

Facts
Ms Tiziana Bruno, Mr Massimo Pettini, Ms Daniela Lotti and Ms Clara Matteucci, employees of Alitalia SpA, requested recognition of qualifying for benefit contributions equal to the total number of weeks in the period of part-time work. They stated that they had applied for and obtained (in respect of the periods specified) conversion of their contracts of employment from full-time to vertical-cyclical part-time work. Thus, they worked in some months of the year, but not in others. The *INPS* only treated the periods worked, excluding the periods not worked, as contributory periods for pension purposes. The *Corte d'Appello di Roma* referred three questions to the Court of Justice on the compatibility of this measure (also provided for by Italian legislation) with Directive 97/81/EC (and especially the Framework Agreement).

The Advocate-General advises the Court of Justice as follows:
- The Framework Agreement annexed to Council Directive 97/81/EC does not apply to statutory social security pensions. It is for the national court to establish whether the pension at issue in the main proceedings falls within that category. Should it conclude that the pension at issue is a statutory social security pension, it must examine whether Italy has exercised its competence as regards social security in accordance with Community law and, in particular, with the principle of non-discrimination;
- Clause 4 of the Framework Agreement on part-time work does not preclude national legislation whereby the weeks qualifying for the acquisition of pension rights are calculated in accordance with the principle of *pro rata temporis*. Clause 4 applies to unequal treatment between different types of part-time work only when that treatment also discriminates in favour of full-time workers and

against part-time workers. Member States are at liberty to introduce distinctions between various types of part-time work. However, the measures that they enact must be compatible and consistent with the objectives and provisions of Directive 97/81 and the Framework Agreement on part-time work; and comply with the general principles of Community law, in particular the principle of equal treatment. Member States must not introduce arbitrary distinctions between various types of part-time work that would run counter to those objectives and that infringe the general prohibition on discrimination in Community law.

Case C-471/08
Opinion of Advocate-General P. Mengozzi delivered on 17 December 2009[1]
Sanna Maria Parviainen v Finnair Oyj
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

Facts
Sanne Parviainen was temporarily transferred to lower-paid work because of her pregnancy, whereas she used to work as head of a cabin crew of *Finnair* and worked for a certain period as part of a ground crew. The question was whether she had to be paid the average salary she received before the transfer based on the Protection of Pregnant Workers Directive.

The Advocate-General is of the opinion that:
Directive 92/85/EEC does not oblige the Member States to guarantee the employee, who temporarily performs work that is lower paid, the average of the salary she earned before the transfer. The referring judge has to examine, however, whether the payments are in accordance with Directive 92/85, so that the principle of equal pay for equal work is ensured.

PENDING CASES BEFORE THE EUROPEAN COURT OF JUSTICE

Case C-149/10, Reference for a preliminary ruling from the *Diikitiko Efetio Thessalonikis* (Greece) lodged on 29 March 2010
Zoe Chatzi v Ipourgos Ikonomikon
Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC

Questions referred by *Diikitiko Efetio Thessalonikis* (Administrative Appeal Court)
1. Can Clause 2.1 of Directive 96/34/EC interpreted in conjunction with Article 24 of the Charter of Fundamental Rights of the European Union relating to the rights of the child – and in light of the enhanced level of protection of those rights which has been brought about by the Charter of Fundamental Rights – be regarded as also creating in parallel a right to parental leave for the child, so that, if twins have been born, the grant of one period of parental leave constitutes an infringement of Article 21 of the Charter of Fundamental Rights of the European

[1] Not available in English (yet).

Union on the grounds of discrimination on the basis of birth and a restriction on the right of twins that is not permitted by the principle of proportionality?

2. If the answer to the preceding question is in the negative, does the term 'birth' in Clause 2.1 of Directive 96/34/EC mean that a double right to the grant of parental leave is created for working parents, that right being based on the fact that pregnancy with twins results in two successive births of children (twins), or does it mean that parental leave is granted for one birth, irrespective of how many children are thereby born, without any infringement in the latter case of equality before the law under Article 20 of the Charter of Fundamental Rights of the European Union?

Case C-123/10, Reference for a preliminary ruling from the *Oberster Gerichtshof* (Austria) lodged on 8 March 2010

Waltraud Brachner v Pensionsversicherungsanstalt

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

Questions referred by *Oberster Gerichtshof*

1. Is Article 4 of Directive 79/7/EEC to be interpreted as meaning that the annual pension adjustment system (valorisation) provided for in the law on the statutory pension insurance scheme falls within the scope of the prohibition of discrimination in Article 4(1) of that Directive?
2. If the answer to the first question is in the affirmative:
   Is Article 4 of Directive 79/7/EEC to be interpreted as precluding a national provision concerning an annual pension adjustment whereby a potentially smaller increase is provided for a particular category of pensioners receiving a small pension than for other pensioners, insofar as the provision in question adversely affects 25 % of male pensioners, but 57 % of female pensioners and there are no objective grounds for discrimination?
3. If the answer to the second question is in the affirmative:
   May a disadvantage for female pensioners arising from the annual increase in their pensions be justified by the earlier age at which they become entitled to a pension and/or the longer period during which they receive a pension and/or by the fact that the standard amount for a minimum income, provided for under social law (balancing supplement standard amount), was disproportionately increased, where the provisions concerning the payment of the minimum income provided for under social law (balancing supplement) require account to be taken of the pensioner's other income and the income of a spouse living in the common household, whereas in the case of other pensioners the pension increase takes place without account being taken of the pensioner's other income or the income of the pensioner's spouse?

C-104/10, Reference for a preliminary ruling from the High Court of Ireland made on 24 February 2010

Patrick Kelly v National University of Ireland

Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, and 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

Questions referred by the High Court of Ireland

1. Does Article 4(1) of Directive 97/80/EC entitle an applicant for vocational training, who believes that he or she has been denied access to vocational training because the principle of equal treatment was not applied to him or her, to information on the respective qualifications of the other applicants for the course in question and in particular the applicants who were not denied access to vocational training so that the applicant can 'establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination'?
2. Does Article 4 of Directive 76/207/EEC entitle an applicant for vocational training, who believes that he or she has been denied access to vocational training 'on the basis of the same criteria' and discriminated against 'on grounds of sex' in terms of accessing vocational training, to information held by the course provider on the respective qualifications of the other applicants for the course in question and in particular the applicants who were not denied access to vocational training?
3. Does Article 3 of Directive 2002/73/EC prohibiting 'direct or indirect discrimination on the grounds of sex' in relation to 'access' to vocational training entitle an applicant for vocational training, who claims to have been discriminated against 'on the grounds of sex' in terms of accessing vocational training, to information held by the course provider on the respective qualifications of the other applicants for the course in question and in particular the applicants who were not denied access to vocational training?
4. Does the nature of the obligation under Article 267, Paragraph 3 TFEU differ in a Member State with an adversarial (as opposed to inquisitorial) legal system and, if so, in what respect?
5. Can any entitlement to information under the aforesaid Directives be affected by the operation of national or European laws relating to confidentiality?

Case C-547/09, Reference for a preliminary ruling from the *Oberlandesgericht Innsbruck* (Austria) lodged on 28 December 2009

***Pensionsversicherungsanstalt v Andrea Schwab,* OJ C 100 of 17 April 2010, p. 14**

Directive 76/207/EEC, as amended by Directive 2002/73/EC, Directive 2006/54/EC, Directive 97/80/EEC, Directive 2006/54/EC and Directive 2000/78/EC

Questions referred by *Oberlandesgericht Innsbruck*

1. Should Article 2(2), first indent, and Article 3(1)(c) of Directive 76/207/EEC, as amended by Directive 2002/73/EC, and Article 2(1)(a) and (b) and Article 14(1)(c) of Directive 2006/54/EC be interpreted as meaning that direct sex discrimination (termination/dismissal of an employed doctor) by a public pension insurance fund may be justified?
2. Should Article 4(1) of Directive 97/80/EEC and Article 19(1) of Directive 2006/54/EC – and possibly Article 2(2), second indent, of Directive 76/207/EEC, as amended by Directive 2002/73/EC, and Article 2(1)(b) of Directive 2006/54/EC or Article 2(2)(a) in conjunction with Article 6(1) of Directive 2000/78/EC – be interpreted as precluding national legislation which, in the event

of actions for the annulment of terminations/dismissals inter alia on the grounds of sex, does not permit the consideration of social factors or interests, but only the assessment of evidence as to whether the sex discrimination was the predominant motive for the termination/dismissal or whether another reason to be substantiated by the employer predominated?

Case C-326/09, Action brought on 12 August 2009
***Commission of the European Communities v Republic of Poland*, OJ C 312 of 19 December 2009, p. 10**
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

Form of order sought
– declare that, by not adopting the laws, regulations and administrative provisions necessary to comply with Directive 2004/113/EC and in any event by not informing the Commission of the adoption of those provisions, the Republic of Poland has failed to fulfil its obligations under that Directive;
– order the Republic of Poland to pay the costs.

Pleas in law and main arguments
The time limit for transposition of Directive 2004/113 expired on 21 December 2007.

Reference for a preliminary ruling from the *Oberster Gerichtshof* (Austria) lodged on 4 September 2009
***Pensionsversicherungsanstalt v Dr Christine Kleist*, OJ C 282 of 21 November 2009, p. 29**
Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as amended by Directive 2002/73/EC

Questions referred by the *Oberster Gerichtshof*
1. Is Article 3(1)(c) of Directive 76/207/EEC to be interpreted - in the context of a system of employment law in which the general protection of employees against dismissal is determined by their social (financial) dependence on the job - as precluding a provision of a collective agreement offering special protection against dismissal, over and above the statutory general protection against dismissal, only until that point in time at which, in a typical case, there is a social (financial) safety net in the form of an old-age pension if men and women become entitled to that old-age pension at different times?
2. In the context of such a system of employment law, does Article 3(1)(c) of Directive 76/207/EEC preclude a decision by a public employer to terminate the employment of a female employee just a few months after she acquires the financial safety net of an old-age pension, in order to employ new workers who are already pressing to join the job market?

Decisions of the United Nations Committee on the Elimination of Discrimination against Women (CEDAW)

November 2009 – April 2010

***G.D. and S.F. v France*, 4 August 2009**
CEDAW/C/44/D/12/2007

G.D. and S.F, two French nationals, lodged a communication alleging a violation, by France, of Article 16, Paragraph 1(g) of the Convention, concerning the transmission of the family name to children and the ability to change it under national law, claiming to be victims of discriminatory legislation governing family names.

Both authors were automatically given their father's family name upon birth pursuant to a customary rule in force at the time. If a child was born within wedlock, it automatically received the family name of the father. After the divorce of both sets of respective parents, both authors lived with and used their mothers' family names. Both sought to legally change their family names in national proceedings under the Civil Code (Article 61-1) which were rejected as there was no 'lawful interest' of the parties. Furthermore, new domestic legislation on family names did not retroactively apply to them. They claimed that the measure constituted sex discrimination, inter alia because under French law fathers have a veto allowing them to oppose the transmission of the mother's family name.

France argued that the complaint was inadmissible because they had entered a specific reservation to Article 16 Paragraph 1(g), therefore the complaint was incompatible with the Convention as ratified by France. Secondly, it was proposed that the authors were not victims under Article 2 of the Optional Protocol. France argued that the beneficiaries of the right under Article 16 Paragraph 1(g) were married women or mothers. Both authors were neither married or living in a husband-wife relationship or had any children to transmit a family name to. Therefore, the lack of quality of victim was contested. Moreover, France stressed that the authors had not exhausted all domestic remedies available to them.

The Committee decided to declare the communication inadmissible on the basis that the authors failed to show that they had suffered any sex-based discrimination by bearing their fathers' family names from the perspective of victim status in their childhood. Therefore, they lacked the quality of victim within the meaning of Article 2 of the Optional Protocol.
http://www2.ohchr.org/english/law/docs/CEDAW-C-44-D-12-2007.pdf

***Dayras et al. v France*, 4 August 2009**
CEDAW/C/44/D/13/2007

The communication concerns seven French nationals, represented by the organization *SOS Sexisme*, claiming to be victims of a violation by France of the CEDAW Convention. Ms Dayras is the Chairperson of *SOS Sexisme*. The authors' submissions can be divided into groups relating to the inability to transmit the family name by a woman to her children under French law.

All authors submitted that the national Act of family names of March 2002 is discriminatory towards married women, as fathers are given the right to veto the transmission of the family name of their wives to their children, and also taking into

account the non-retroactivity of the Act. Therefore, this violates and limits the principle of equality between men and women.

The complaints can be split into three categories. Ms D and Ms Z alleged that they had chosen to remain childless because of the inability to transmit their family names. The second group of authors contended that the new domestic legislation will not benefit their children which allow married women in certain circumstances to transmit their name. Thirdly, three authors wished to take their mother's family name as their own. The Minister of Justice, however, had taken the view that they lacked a legal interest, and therefore legal proceedings would be unsuccessful.

France first requested that the reservation it entered upon ratification of the Convention to Article 16, Paragraph 1(g), be taken into account. Furthermore, some of the authors should not be considered victims within the meaning of the Optional Protocol. France also purported that the authors failed to substantiate that they had suffered any sex-based discrimination because they had been forced to take their father's family name. Additionally, arguing from the perspective of children they were not considered to be victims.

The Committee concluded the communication inadmissible in all three complaints because of a lack of quality of victim status under the Optional Protocol. Furthermore, the communication of the second group of complaints was also inadmissible because the children had already reached the age of majority. The third communication was also held inadmissible because not all domestic remedies had been exhausted (Article 4 Paragraph 1 of the Optional Protocol).
http://www2.ohchr.org/english/law/docs/CEDAW-C-44-D-13-2007.pdf

European Court of Human Rights Case Law Update

October 2009 – May 2010

S. H. and Others v Austria, 1 April 2010

The Artificial Procreation Act (*Fortpflanzungsmedizingesetz*, Federal Law Gazette 275/1992) regulates the use of medical techniques for inducing the conception of a child by means other than copulation (Section 1(1)). This case concerns various applicants that are directly affected by the Act. These applicants complained that the prohibition of heterologous artificial procreation techniques for *in vitro* fertilisation laid down by Section 3(1) and Section 3(2) of the Artificial Procreation Act had violated their rights under Article 14 read in conjunction with Article 8.

Since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground between the Member States, the Court considered that the margin of appreciation to be afforded to the respondent State must be a wide one. The Court assessed two distinctive situations: couples that use ova donation and couples that use sperm donation. The Court concluded that there were no reasonable and objective reasons brought forward by the Government that justified a difference in treatment between couples that are prevented from fulfilling their wish for a child by the prohibition of ova donation for artificial procreation under Section 3 of the Artificial Procreation Act and a couple which may make use of artificial procreation techniques without resorting to ova donation. The Court found that the difference in treatment between the first and second applicants who, to fulfil their wish for a child, could only resort to sperm donation for *in vitro* fertilisation and a couple which may lawfully make use of sperm donation for *in vivo* fertilisation had no objective and reasonable justification and was disproportionate.
http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=S.H.%20%7C%20others%20%7C%20v.%20%7C%20Austria&sessionid=54674838&skin=hudoc-en

Javaugue v France, 11 February 2010[1]

After the ECJ found in Case C-366/99 *Griesmar* [2001-I-9383] that the provisions of the French *Code des pensions civiles et militaires de retraite*, which made it an exclusive possibility for mothers of three children to take early retirement, were incompatible with Article 141 EC, Mr. Javaugue, a civil servant and father of three children, applied for early retirement. The Pension Fund however rejected his application, upon which Mr. Javaugue brought an action before the administrative court. Meanwhile, an Act of 30 December 2004 had amended the *Code* so as to grant the possibility of early retirement to civil servants of both sexes who were the parents of three children, *provided that they had interrupted their professional activities to provide care to all children in turn*. The new provisions were retroactively applied to all applications filed before 30 December 2004 which had not yet resulted in a final judgment. Consequently, Mr. Javaugue, who had not interrupted his professional activities, lost his case both before the administrative court and, on appeal, before the

[1] Summary by Jean Jacqmain.

Conseil d'État. He then lodged an application with the ECtHR for the violation of Article 6(1) of the Convention due to the retroactive application of a new condition (i.e. the interruption of professional activity). The Court found in his favour and held that the French Government could not justify the disputed provision.
http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Javaugue&sessionid=56328562&skin=hudoc-en (only available in French)

Zaunegger v Germany, 3 December 2009

The applicant is the father of a daughter born out of wedlock in 1995. The applicant and the mother of the child separated in August 1998. Their relationship had lasted five years. Until January 2001, the daughter lived with the applicant, whereas the mother had moved to another flat which was located in the same building. As the parents did not make a joint custody declaration (*gemeinsame Sorgerechtserklärung*), the mother obtained sole custody (*alleinige Personensorge*) pursuant to Article 1626a §2 of the German Civil Code (*Bürgerliches Gesetzbuch*). When the daughter moved to live with her mother, the applicant requested joint custody. Under German law, joint custody for parents of children born out of wedlock can only be obtained through a joint declaration, marriage or a court order under Article 1672 §1 of the Civil Code, with the third option requiring the consent of the other parent. The mother was unwilling to agree to joint custody. The applicant complained that his right to respect for his family life was infringed and that the application of Article 1626a §2 of the Civil Code amounted to unjustified discrimination against unmarried fathers on the grounds of sex and in comparison with divorced fathers.

The Court concludes that in respect of the discrimination at issue there was not a reasonable relationship of proportionality between the general exclusion of judicial review of the initial attribution of sole custody to the mother and the aim pursued, namely the protection of the best interests of a child born out of wedlock. The Court found that this constituted a violation of Article 14 of the Convention, in conjunction with Article 8.
http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=39737653&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=78330&highlight=

News from the Member States and EEA Countries

AUSTRIA – *Anna Sporrer*

Policy developments

In May 2010 the Minister for Women Affairs presented a general report on the situation of women in Austria consisting of a comprehensive chapter of statistics and other data on the demographic structure, education, employment, socio-economic issues, health and care, women in the rural areas, female migrants and the participation of women in politics. Another chapter contains academic contributions on developments in women's policy, employment of women as well as the economic situation of women in Austria.

Legislative developments

Amendment of the Federal Equal Treatment Act

The Federal Equal Treatment Act, applicable to the civil servants employed by the Federal State[1] has been amended.[2] In many aspects the amendments are dedicated to better promotion of women in the civil service and to strengthen the concept of anti-discrimination and de-facto equality. The Act now contains inter alia an explicit clarification that unequal treatment on grounds of pregnancy and the prohibition of work constitutes direct discrimination, a confirmation of the concept of immaterial compensation, the raising of the obligatory quota from 40 % to 45 % for all levels and functions, pay regulations for groups of employees with unbalanced gender representation as well as the right of the ombudspersons on equality affairs to take part in all meetings of commissions dealing with personnel and an invitation addressed to the social partners to take into account gender-balanced representation when nominating members for such commissions.

Act on registered partnership

Furthermore, a new Act on so-called 'Registered Partnership' has been passed,[3] introducing the right for same-sex couples to officially register before the public authorities as a couple and providing for equal treatment of those couples with spouses and hetero-sexual life partners in the field of civil law, penal law, labour law, social security, tax law and public law including the statutes for civil servants and others.

Administrative law: affirmative action plans for women

Under the Federal Equal Treatment Act, all federal ministries have to issue affirmative action plans for women, which have to be revised every other year and have to formulate concrete aims and goals for the advancement of women in all fields and at all levels. The action plans have the legal status of a legally binding regulation and are to be regarded as means of enforcement of the Federal Equal Treatment Act, which provides for legally binding provisions on the promotion of women, including the quota of 40 % for the representation of women in all levels and income classes. Thus, all action plans reaffirm de-facto equality between women and men as a major goal and all

1 *Bundes-Gleichbehandlungsgesetz*.
2 OJ I 153/2009.
3 OJ I 135/2009.

ministries commit themselves to proactive policies towards this aim. The action plans contain provisions on hiring and career advancement, job advertisements, protection against harassment, promotion of women in vocational training, career planning, adequate representation of women in commissions and other advisory and deciding bodies as well as measures for better reconciliation of work and family life for women and men. Furthermore, most of the action plans provide for binding goals for the percentage of women in areas where women are still under-represented, which have to be reached within the following two years. Several such action plans have recently been amended, in particular for the Federal Chancellery,[4] the Ministry for Labour, Social Affairs and Consumer Protection[5] and the Court of Audit.[6]

Case law of national courts

Constitutional Court: lower ticket prices for football games for women

The constitutional court rejected a claim of a male claimant,[7] who sued the Federal State for compensation of damages of EUR 20 in total because in the first six months of 2008 he had to pay higher prices for tickets for two football games than women. The claimant based his lawsuit on state liability, because Austria failed to implement Directive 2004/113/EC in due time: The term for implementation of this Directive expired on 21 December 2007 whereas the legislation implementing this Directive only went into force by 1 August 2008. The claimant claimed having been discriminated against on grounds of sex, because in his view the Austrian Football Federation, who organized the games, could not present a reasonable justification for the different prices. The defendant admitted having implemented the Directive with delay. It argued, however, that the claimant had failed to meet the preconditions for a claim based on state liability. In its written statement, the Federal State explained, that the Directive allows different treatment of women and men insofar as this can be justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. With reference to Recital 16 of the Directive and Articles 1-5 of the UN Convention on the Elimination of all Forms of Discrimination against Women, the Federal State cited the promotion of de-facto equality between women and men, the promotion of the interests of both sexes, the organisation of sport activities, the change of social and cultural patterns and the elimination of prejudices and overcoming gender role stereotypes as legitimate aims. Furthermore, the Federal State stated that the claimant did not sustain a loss and therefore there was no causality between the alleged infringement of EC law and the asserted harm. Even if the Austrian Football Federation had been obliged to sell the tickets to women at the same price as those for men, the claimant would have had to pay the full price. The claimant could only argue to have suffered harm, if he had had to pay a higher than the regular price, which was not the case. Even if the Directive had been implemented in time, the claimant would have had to pay the full price, therefore the delay in implementing the Directive could not have caused any of the asserted harm. The Constitutional Court followed the Federal State's argument and asserted that the claimant could not establish to have suffered harm in the amount of EUR 20 and had not proved to have been obliged to pay another price for the tickets than if the Directive had been implemented in time. Furthermore, the Constitutional Court referred to Article 8 Paragraph 2 of the Directive and noted that Austria had fulfilled this obligation by

4 OJ II 411/2009.
5 OJ II 472/2009.
6 OJ II 118/2010.
7 Constitutional Court 11 December 2009, A 1/09-18.

providing for immaterial damages in case of discrimination. The Court also observed that the claimant did not claim immaterial damages for the detriment in person and therefore the Court did not have to examine if the prices for the tickets for the relevant football games were discriminatory at all – in particular in view of the reasons for justification provided for in Article 4 Paragraph 5 and Article 6 of the Directive.

Although the core question, whether or not lower ticket prices for football games for women are discriminatory against men or can be justified though legitimate aims, was discussed in the written statements of the parties as well as during the public court meeting, the Constitutional Court avoided answering this question and rejected the claim at an earlier stage by ascertaining that the claimant could not establish having suffered material harm. Nevertheless – between the lines – the Court gave two interesting hints: Firstly, the court's decision allows the assumption that the Court would have answered the core question if the claimant had claimed immaterial damages for the detriment in person. Secondly, the citation of the reasons for justification provided for in Article 4 Paragraph 5 and Article 6 of the Directive also indicates that the Court would regard this differentiation as justified. In this context it appears most interesting that the Court also cites Article 6 of the Directive – allowing positive action – which was not put forward as an argument by the parties in the proceedings.

Supreme Court: annual pension adjustment system

The Austrian Supreme Court made a reference for a preliminary ruling to the European Court of Justice on several questions concerning the application and interpretation of Article 4 of Directive 79/7/EEC[8] in the context of the annual pension adjustment system. The first question concerned the application of the prohibition of discrimination enshrined in Article 4(1) of the Directive to those valorisations. The second question aims at clarifying whether or not the Directive opposes a provision that potentially causes a lower increase for beneficiaries of the smallest pensions under the circumstance, and that affects only 25 % of male but 57 % of female pensioners without objective justification. The third question concerns whether it is allowed to take into account the partner's income when calculating the pension of beneficiaries of the smallest pensions, mostly women, who are entitled to an additional benefit aimed at compensating the lower income.[9]

BELGIUM – *Jean Jacqmain*

Policy developments

Once again, the expert must report that the various authorities' attention remained focussed on economic and employment issues, while the ruling federal coalition remained poised in an unstable equilibrium constantly threatened by incidents on the institutional (linguistic) scene. Indeed, gender equality was hardly mentioned at all, except as an ideological argument in the ongoing controversy concerning Islamic female headgear, the actual pivot of which is 'personal or religious freedom v. neutrality of public institutions'.

8 Supreme Court 9 February 2010, 10OBS178/09p.

9 *Ausgleichszulage*.

Legislative developments[10]

Parental leave

The Belgian federal Parliament promptly complied with the ECJ's decision in Case C-116/08 *Meerts* (2009, unreported) when it adopted the Various Provisions Act (I) of 30 December 2009. Article 90, 2° of the former Act inserted a new Paragraph 3 in Article 105 of the Recovery Act of 22 January 1985, so that when an employee is dismissed while she/he is using a part-time leave, the payment in lieu of notice will be based on the full-time remuneration.

The new provision is strictly limited to parental leave. Consequently, the Parliament has condoned the case law of the Court of Cassation and the Constitutional Court, according to which the payment in lieu of notice must be based on the part-time remuneration in all other situations of part-time career break or time credit (some of which, however, may be closely related with parental leave, e.g. when an employee reduces her/his working time in order to care for a seriously sick child).

It should also be stressed that the new Paragraph 3 of Article 105 of the Recovery Act came into force on 10 January 2010, while the deadline for the transposition of Directive 96/34/EC was 3 June 1998. Now, one should recall that in Case C-187/98 *Commission v Greece* [1999-I-7731], the ECJ found that the Member State had failed to comply with its obligations under Directive 79/7/EEC, because when the necessary provisions to implement the Directive were adopted belatedly, they had no retrospective force.

Burka prohibited in public spaces

Due to occurrences of indignation locally aroused by the wearing of the burka (in a very limited number of cases) or the niqab (slightly more frequently), the Commission of Interior Matters of the House of Representatives (first House of the federal Parliament) adopted in March a proposal for a penal Act[11] to prohibit the wearing of any attire which prevents the identification of the wearer in public spaces, except under certain circumstances such as Carnival. Reasons of security were invoked, but the burka was branded an unacceptable sign of female subordination. The full House then adopted the Act on 29 April, but it is worth mentioning that as the proposal was tabled by Members of Parliament, the *Conseil d'État*'s legal opinion was not required as it would have been concerning a bill of law tabled by the Government.

Case law of national courts

Court of Cassation, judgment of 15 February 2010[12]

In the case of *Mrs Meerts v N.V. Proost*, the Court of Cassation delivered its final judgment. After the ECJ's decision in Case C-116/08 *Meerts* (2009, unreported), which resulted from the Court of Cassation's reference for a preliminary ruling, it was beyond dispute that given the purpose of Clause 2 of the European framework agreement on parental leave, the payment in lieu of notice must be based on the full-time (and not the part-time) remuneration when an employee is dismissed by her employer while she is using a part-time parental leave.

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10 All legal instruments quoted in this contribution are available on http://www.juridat.be, in French and Dutch, last accessed on 30 April 2010.

11 N°52-2495/001 on htpp://www.lachambre.be or dekamer.be, last accessed on 20 April 2010.

12 5.07.0027.N, unreported.

Consequently, the Court of Cassation quashed the judgment of the Labour Court of Appeal in Antwerp, which had decided otherwise, and referred the case to the Labour Court of Appeal in Brussels.

Labour Court of Appeal in Brussels, judgments of 15 June 2009[13] and 2 September 2009[14]

These two cases concern different aspects of the protection of maternity, combined with the principle of gender equality.

In the first one, an employer had dismissed an employee and paid her a remuneration in lieu of a notice period, while she was on sick leave due to two consecutive miscarriages. The circumstances ruled out an application of the provisions concerning the protection of maternity (Working Conditions Act of 16 March 1971), first because the employee had not informed the employer of her pregnancies, second because the protection against dismissal ceases to apply when the pregnancy is terminated other than by giving birth (even to a still-born child). However, as the employer had been informed of the cause of the employee's absence (her miscarriages), she challenged the dismissal as gender discrimination, relying on the Act of 7 May 1999 on equal treatment of men and women in employment, then in force.

In its judgment of 16 June 2009, the Labour Court of Appeal in Brussels referred to the ECJ's decision in Case C-506/06 *Mayr* [2008–I–1017] and accepted that there was indeed a *prima facie* suspicion of gender discrimination, which the employer did not seriously attempt to refute.

Concerning the compensation, the Court quoted C-460/06 *Paquay* [2007–I–8511]. In the light of the ECJ's decision, it appeared that the Act of 7 May 1999 did not implement Directive 76/207/EEC adequately as it failed to provide a minimal amount of fixed damages which could have been awarded to a victim of gender discrimination (a failure which was later remedied in the present Gender Act of 10 May 2007). Consequently, the Labour Court of Appeal awarded the employee EUR 5 000 as an equitable compensation.

In the second case, a tenured staff member of the Post Office, a public body, had been allowed to work half time, but she was notified that, for organisational reasons, she had to resume her full-time service on a certain date in 1999. When the management discovered that her maternity leave was to begin on the same day, they informed her that her full-time reappointment would be postponed until the end of the leave; consequently, under the regulations of the Post Office, her half-time pay would be maintained during the maternity leave instead of the full-time one. When the staff member challenged that decision, the Labour Court of Marche-en-Famenne quoted the ECJ in Case C-342/93 *Gillespie* [1996– I –1475], found that there was direct discrimination and ruled that the Post Office had to pay the remuneration corresponding to a full-time occupation. Unfortunately, the Labour Court of Appeal in Liège reversed the decision, accepting the Post Office's plea based on an irrelevant provision of its regulations and refusing to see any discrimination. Remarkably, the woman's trade union, the *Fédération générale du travail de Belgique*, considered that the case was worth fighting on principle and supported her appeal to the Court of Cassation, which quashed the judgment in the second instance because the Labour Court of Appeal had not countered the claimant's argument based on the domestic legislation concerning equal treatment with respect to working conditions (at the time, Act of 7 May 1999),

[13] *Chroniques de droit social*, 2010, p.19 with comments by J. Jacqmain.
[14] *Chroniques de droit social*, 2010, p.23.

taken together with ECJ case law. The case was referred to the Labour Court of Appeal in Brussels.

The latter envisaged a reference to the ECJ for a preliminary ruling, but the Post Office only persisted in relying on its regulations. Consequently, the Labour Court of Appeal simply found that the Post Office's decision to pay the remuneration on a half-time basis was not grounded adequately, and awarded the staff member the other half of her remuneration.

BULGARIA – *Genoveva Tisheva*

Policy developments

Impact of the financial and economic crisis on social policy

In late 2009 and early 2010, the financial and economic crisis clearly started showing itself in Bulgaria. In early 2010, the state budget showed an increased deficit and budgetary restrictions continued being implemented as anti-crisis measures. All measures taken by the Government up to now are considered to be pro-cyclical, as they cut expenditures and slow down the economy, which increases unemployment and the informal economy.

Meanwhile, Bulgaria is lagging well behind the other EU countries with respect to a series of development indicators, such as for average and minimum monthly income, tuberculosis, perinatal child mortality and some environmental indicators. An official poverty threshold of EUR 105 was set in 2010 to define the minimum income and to help formulate official social policy. However, it is far from the target of EUR 170 set for 2015 and thus Bulgaria remains an EU Member State that falls into the 'lower middle income country' category.

The crisis is accompanied by increasing inequalities and exclusion. Concerns about both the quality and quantity of human capital are growing. 10 % of the population accounts for 40 % of incomes and expenditures. This ratio is exacerbated by the declines in quality and increases in costs of basic education and health services, meaning that inequalities in opportunity are also growing. Low levels of income and education, and limited access to healthcare services bring about social, regional and ethnicity disparities, felt most acutely by the Roma minority.

In this context, forecasts from the trade unions and employers' organizations are quite pessimistic and foresee a two-digit unemployment rate. When adding the discouraged unemployed it may reach up to 20 %. In January 2010 the average registered unemployment rate was already 9.9 % and in some regions of the country it passed 15 %.

One of the anti-crisis measures is to rationalize the public administration and making it more efficient and effective, including with respect to absorbing EU funds. This is particularly necessary to complete the delayed timetable for upgrading Bulgaria's public infrastructure and avoid it becoming a bottleneck in economic growth, as well as for other productivity-raising measures, including in education and training.

The policy of cutting public expenditure can endanger the protection of human rights and gender equality. A draft law for amendments of the Protection against Discrimination Act is currently pending in the National Assembly. It limits the mandate of the Commission for Protection against Discrimination and reduces the number of its members from nine to five persons. This policy will put at stake the implementation of

legislation related to gender equality as a whole. It renders all hope for special equality legislation and respective gender equality bodies unrealistic.

Some positive trends are worth mentioning in the field of participation of women in decision making, although the elections for the European and the National Parliament in the summer of 2009 were held without special legislation encouraging women's involvement in politics and decision making. As a result of the European Parliament's campaign in favour of a 50:50 representation of men and women in the European Parliament and of the mixed election system, Bulgaria ranked among the countries with the most encouraging results in terms of the share of women of their members in the European Parliament (45 %). In the national parliamentary elections, however, the economic and party interests had a negative effect on equality. The share of women in the 41st National Assembly is approximately 22 % of all Members of Parliament. The women in Government only represent 16 %. A positive development was the election for the first time of a woman, Tsetska Tsacheva, as Chair of the 41st National Assembly, while in November 2009, Yordanka Fandakova was elected as the first female mayor of Sofia.[15]

The progress in this area is still at the stage of formal equality and more in terms of numbers and positions rather than translated into substantial gender equality policy.

Legislative developments

Protection of workers undergoing assisted reproductive treatment

Legislative changes were adopted at the end of 2009 that guarantee the protection against discrimination on the labour market for female workers or employees in the advanced stages of assisted reproductive treatment (in vitro). Their rights were made consistent with those of pregnant female workers and employees and breastfeeding mothers. This legal regulation is commendable in principle but does not correspond to the concept elaborated in the *Mayr* case (ECJ, C-506/06). Namely, the protection by the new provisions included in the Labour Code, in the Law on Public Servants and in the Protection against Discrimination Act covers a period of up to 20 days from the aspiration of the ovum until the transfer of the embryo. This protection, different from the principle adopted in *Mayr,* corresponds to the protection of pregnant workers. Nothing is said in the law about the situation of women undergoing the treatment prior to the implantation of the fertilized egg in their uterus and their protection against discrimination under the rules of the sex discrimination law. Obviously, the principle of protection of women as mothers prevailed in the solution adopted.

Revision of the Law on Protection against Domestic Violence (LPADV)

The changes to the Law on Protection against Domestic Violence (LPADV), which were prepared in 2008, were adopted by the 41st National Assembly and promulgated in the State Gazette of 22 December 2009. The campaign of the Alliance for Protection against Domestic Violence (a network of 9 NGOs) contributed to this process. The changes improved the effectiveness of the protection against domestic violence: the circle of the protected persons was expanded; emotional and economic violence was explicitly included in the notion of domestic violence; violence in the presence of a child is now regarded as emotional and psychological violence against the child; the duration of the protection by court order was extended from maximum 12 to maximum

[15] The situation of women's rights described by the author is also reflected in the report of the Bulgarian Helsinki Committee *Human Rights in Bulgaria in 2009*: http://www.bghelsinki.org/index.php?lg=en, last accessed on 5 July 2010.

18 months; the conditions for the initiation of proceedings by representatives of the Social Assistance Agency were enhanced for cases of domestic violence against a child, against a disabled person and against a person under guardianship. The new provisions on state support and funding for the implementation measures for LPADV are extremely important to the effectiveness of the protection: annual adoption of the government programme on the prevention and protection against domestic violence; and, as of 2010, annual allocation of budget funds by the Ministry of Justice for NGO projects for prevention and protection of victims of domestic violence. The amendment of Article 296 of the Penal Code, which explicitly criminalised the failure to comply with court protection orders, also contributed to the more effective protection against domestic violence and implementation of the law.

Recently, the Regulation for the implementation of the LPADV was elaborated within the Ministry of Justice, with the participation of NGOs. It provides, among other things, for a mechanism for financial support of the NGOs dealing with protection against domestic violence.

New Family Code entered into force

The new Family Code was adopted in June 2009 and entered in force on 1 October 2009. Two major novelties in the draft Family Code had the potential to positively influence gender equality: First, the legal recognition of cohabitation and the liberalisation of the property relations between spouses. The second solution was included to some extent in the final version of the Family Code: together with common ownership it is possible to have a division of ownership and a regime regulated by a prenuptial agreement. In terms of the legalisation of cohabitation and some related consequences, however, the conservative trends in Parliament prevailed and the 40th National Assembly still left society with a narrow understanding of family, inconsistent with social realities.

National Referral Mechanism (NRM) for victims of trafficking

The progress in the creation of the National Referral Mechanism (NRM) for victims of trafficking was a major achievement in the field of legal regulation of human trafficking. The mechanism is being developed by the Animus Association Foundation and the National Anti- Trafficking Commission, in cooperation with other government and non-governmental organisations. The standard procedures and measures for the protection of the victims were developed in 2009, together with a concept for the interested institutions providing protection services to the victims. The mechanism will allow the victims of trafficking to be counselled and supported in selecting an organisation or an institution to address for the provision of social services, legal and psychological advice, protection in penal procedures, compensation, etc. The mechanism is ready for presentation to the members of the National Commission and for further adoption by the Council of Ministers. The goal is to have the NRM adopted and secured with financial support.

CEDAW and Convention on the Political Rights of Women

An important legislative development is the promulgation in the State Gazette on 2 March 2010 (No. 17/2010) of the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol, as well as the Convention on the Political Rights of Women. According to the Constitution of the Republic of Bulgaria, this promulgation makes these international instruments an

integrated part of domestic legislation and this also means that they prevail over Bulgarian law.

Equality body decisions/opinions

Review by the Commission for Protection against Discrimination (CPAD)

The struggle for gender equality and the necessity of changes and of more effective protection of women against discrimination were not reflected in the case law of the Commission for Protection against Discrimination (CPAD) for 2009. Its review indicates that the CPAD does not perform its statutory obligations to ensure effective proceedings in protecting claimants' rights and to complete these proceedings within the statutory deadlines. In early 2009, the CPAD closed file No. 26/2008 against the Ministry of Interior. In violation of the PADA (Protection against Discrimination Act), it took the CPAD nine months to collect the documents for the file. The complaint was withdrawn in the meantime. The review of file No. 217/2008 on the dissemination of alcohol advertisements that are abusive to women was also slow and showed a lack of understanding of the essence of gender discrimination. In 2008, the CPAD proceedings were terminated and the file was sent to the Commission for Consumers' Protection. In early 2009, the Supreme Administrative Court sent the file back to the Commission for a decision. Five months passed before the hearing was held. In May 2010 the case, initiated in September 2008, was still pending and no decision was announced.[16]

The lack of understanding of gender equality is confirmed in another decision of the CPAD from 2009. File No. 191/2009 was initiated on the grounds of 'personal status'. The claimant, a mother of a 5-month-old baby, complained of the lack of a ramp on a staircase at a cashier's office for utility bills. In decision No. 3/13.01.2009, the CPAD found a violation of the prohibition of discrimination against people with disabilities and against people with baby strollers. However, the CPAD did not discuss the existence of gender discrimination, although the claimant had clearly stated that she had addressed the Commission in the capacity of a mother of an infant aged 5 months.

In 2009, in cities with active NGOs, the courts issued immediate protection orders under the LPADV on a timely basis and the police were quick to enforce them. According to data from the Criminal Police Directorate-General, the total number of protection orders issued in the country between January and November 2009 was over 1000; according to data from the Alliance for Protection against Domestic Violence, for 2009 more than 1200 orders for protection were issued in the locations where members of the Alliance are active. Most of the court orders were issued in Plovdiv, Sofia, Haskovo, Burgas, Varna and Pernik. 88 % of the victims of domestic violence were women, and 10 % were children.

Six years after the entry into force of the PADA, there are judges in Sofia that cannot identify and decide cases of sexual harassment in the workplace. In cases of classical *quid pro quo* sexual harassment, the case is interrupted and delayed for 4-5 years, until the claim of illegal termination of the labour contract is proved in a final decision. Even after this proof, sexual harassment cases are not handled according to the rules of the PADA, and in particular the *prima facie* evidence rule, and women are exposed to further discrimination.

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[16] The practice of the CPAD was analysed by the author and M. Kadieva, attorney-at-law, also in the report of the Bulgarian Helsinki Committee *Human Rights in Bulgaria in 2009*: http://www.bghelsinki.org/index.php?lg=en, last accessed on 5 July 2010.

CROATIA – *Goran Selanec*

Policy developments

The deep economic recession that troubled Croatia in 2009 continued in 2010. Consequently, as one would expect, this problem continues to preoccupy the Government. Unfortunately, the Government found no interest in addressing the implications of the economic recession for the notion of equality between the sexes, especially its negative effects on women. In that sense, one can find no policy developments whatsoever in the area of sex equality in 2010 so far.

Legislative developments

New Labour Code entered into force

Croatia continued its EU harmonization efforts in 2010. One development that was of particular relevance for the area of sex equality was the new Labour Code (LC), which entered into force in January 2010.[17] The LC introduced several changes to the legal framework regarding sex equality.

First, in order to avoid multiplication of the legal definitions and accompanying risk of statutory conflicts, the new Labour Code does not include an explicit legal definition of prohibited discrimination. Article 5(4) of the LC simply stipulates the prohibition of direct or indirect discrimination in employment relations in accordance with 'special laws'. Consequently, the more elaborated definition of direct and indirect discrimination on grounds of sex, harassment on grounds of sex and sexual harassment applicable to all aspects of employment and participation on the labour market can be found in the 2008 Sex Equality Code and the 2008 Suppression of Discrimination Code.[18] The only definition of sex discrimination in the LC can be found in Article 83 that requires equal pay for men and women performing the same work or work of equal value.

Second, the old protectionist provisions inherited from the socialist era prohibiting employment of women in significant numbers of 'strenuous' jobs, prohibiting women working during nightshifts, sending mothers of young children on business trips or transferring them to a different place of work have been eliminated by the new Labour Code. At the same time however, it seems that the legislator was rather reluctant to completely abandon the inherited style of protection of female workers, especially the pregnant ones, notwithstanding any negative implications that such protection had for the individual autonomy of women. In that sense the following points are of significant importance.

Third, the new Code (Articles 67-74) maintained the extensive protection of pregnant workers provided in the old Labour Code. The majority of these provisions are more or less in accordance with the EU *acquis*, especially Directive 92/85/EEC. However, several problems remain. For example, Article 49 of the LC provides that the employer cannot employ pregnant women in nightshifts, except if a woman explicitly requests such work *and if* a medical doctor provides an opinion that such work is not harmful to her health or the health of the foetus. In my view such prohibition is inconsistent with Article 14 of Directive 2006/54/EC and Article 7 of Directive

[17] *Zakon o radu, Narodne Novine* 149/2009.

[18] *Zakon o ravnopravnosti spolova, Narodne Novine* 82/2008 (Sex Equality Act, Official Gazette No. 82/2008); *Zakon o suzbijanju diskriminacije, Narodne Novine* 85/2008 (the Suppression of Discrimination Act, Official Gazette No. 85/2008).

92/85/EEC. Furthermore, the new LC provides pregnant workers with the right to be transferred to another appropriate position that is not harmful to their health but is equally paid.[19] Such workers are also guaranteed the return to their previous position once their health is no longer under threat.[20] At the same time, however, Article 39 of the 1996 Protection at Work Act still provides a long list of jobs that are *a priori* prohibited for pregnant workers or workers who are breastfeeding regardless of the actual risk of a particular job for a particular individual.[21] Consequently, Croatian labour law remains inconsistent with the requirements of Article 4 and 5 of Directive 92/85/EEC.

It should also be noted that neither the new Labour Code nor the Sex Equality Act defines pregnancy discrimination as a form of sex discrimination. Keeping in mind the formalist approach to enforcement of statutory law favoured by the Croatian judiciary this may create some problems in practice. For example, the Croatian courts could easily refuse to extend the benefits of effective compensation of damages doctrine established by the ECJ in the *Von Colson* decision to pregnancy discrimination cases, arguing that the statutory text did not define unfavourable treatment on grounds of pregnancy as a form of sex discrimination.[22]

Furthermore, the new Labour Code has limited the freedom of workers who have taken a pregnancy, maternity or parental leave to use their leave in accordance with their personal interests. The Code requires such workers to inform their employer in writing if they plan to change the way in which they are using their leave or if they intend to use some of their leave-related rights that have not been completely exhausted.[23] However, the Code allows an employer to deny such request in the case of an unexpected increase in the size of work, force majeure and other similar cases of necessity.[24] The provision is questionable in light of the ECJ's case law, particularly the *Kiiski* decision.[25]

Equality body decisions/opinions

Payment of pregnancy allowances after in vitro insemination

One complaint currently pending before the Ombudsperson for Sex Equality deserves particular attention. The case concerns a practice of the Croatian Institute for Health Insurance (CIHI) regarding the payment of pregnancy allowances to pregnant women who started their employment during their pregnancy. In the concrete case, the CIHI denied the status of insured person to a pregnant woman who started her employment soon after the process of *in vitro* insemination during the resting period recommended by a medical specialist. The CIHI held that the fact that the claimant started her employment during her recommended resting period proved the fraudulent nature of her employment contract. The CIHI also found that the fact that the claimant had her formal residence in Rijeka while her employment contract stipulates Split as her place of employment confirms the fraudulent nature of the employment relation notwithstanding the employer's statement that the claimant could perform her job from home and that her presence was only required from time to time. Since the right to pregnancy

19 Article 68/2 of the Labour Code.
20 Article 68/5 of the Labour Code.
21 *Zakon o zaštit na radu, Narodne Novine* 59/1996.
22 Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* ECR [1984] 1891.
23 Article 70/1 of the Labour Code.
24 Article 70/2 of the Labour Code.
25 Case C-116/06 *Sari Kiiski v Tampereen kaupunki* [2007] ECR I-07643.

allowance is tied to a valid employment status, the CIHI basically empowered itself to deny the validity of the employment contract and accordingly invalidated the claimant's right to pregnancy allowance.

Since the case received significant media attention, the Sex Equality Ombudsperson issued a media statement in which she warned, without prejudging her final decision in the particular case, that any unfavourable treatment on grounds of pregnancy constitutes discrimination prohibited by Article 6 of the Sex Equality Act. The Ombudsperson also stated that in her final opinion concerning the particular case she will interpret the Sex Equality Act in accordance with the ECJ's decisions in cases such as *Dekker* or more recently the *Mayr* case.[26]

Case law of national courts

Two sexual harassment decisions of the first instance courts received widespread media attention in recent months. Unfortunately, at the time of writing of this report I had not managed to acquire a written text of the two judgments. It ought to be stressed that these decisions are not made public due to the dubious practice of the Croatian courts of keeping a great majority of their case law unavailable to the general public.

Knežević case

According to the media reports and the reports from the union officials who followed the proceedings, the Municipal Criminal Court in Zadar found Mr Knežević (a local manager of the retail chain *Interspaar*) guilty of the crime of violating the right to work and the crime of lustful acts because he harassed one of his female employees.[27] According to the reports, Knežević frequently questioned the victim about her underwear, offered her rides home and made inappropriate jokes about getting aroused when she got angry.[28]

If the media reports are correct, the Court held Knežević responsible for something called 'sexual mobbing', even though such act is not provided by Croatian law. Croatian law prohibits sexual harassment, which is described by both the Sex Equality Act and the Suppression of Discrimination Act and is explicitly defined as a form of *discrimination* on grounds of sex.[29] However, the Zadar Court apparently failed to recognize Knežević's behaviour as discrimination on grounds of sex. Rather, according to the media reports, in language that is typical for general mobbing claims, the Court argued that Knežević 'violated the victim's dignity which caused her feelings of fear and mental distress due to which she sought psychological support in the city hospital'. Furthermore, the reports suggest that in its reasoning the Court never relied on the Sex Equality Act or the Suppression of Discrimination Act. Moreover, the Court primarily relied on the Criminal Act provisions prohibiting the violation of the right to work and

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[26] C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* ECR [1990] I-03941; Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG*. ECR [2008] I-01017.

[27] Article 114 of the Criminal Code; Article 193 of the Criminal Code. *Kazneni zakon , Narodne Novine* 110/97., 27/98., 50/00., 129/00., 51/01., 111/03., 190/03., 105/04., 84/05. , 71/06., 110/07 and 152/08 (Criminal Code, Official Gazette No. 110/97., 27/98., 50/00., 129/00., 51/01., 111/03., 190/03., 105/04., 84/05. , 71/06., 110/07 and 152/08).

[28] http://www.vecernji.hr/vijesti/bivsi-sef-trgovackog-centra-osuden-seksualni-mobbing-clanak-104392; http://www.jutarnji.hr/zadar--voditelju-interspara-sest-mjeseci-za-seksualni-mobing/602153/, last accessed on 28 March 2010.

[29] Article 8 of the Sex Equality Act; Article 3 of the Suppression of Discrimination Act.

lustful acts, even though this Act explicitly provides that a denial of legally granted rights because of a person's sex constitutes a criminal offence.[30]

By treating the described behaviour as a 'simple' violation of a worker's dignity (mobbing), the Court apparently failed to recognize sexual harassment as form of discrimination of women and reduced it to a mere violation that happens to both sexes with the same frequency.

Udjbinac v Croatian Post case

The Zagreb Municipal Civil Court recently delivered a decision in the *Udjbinac v Croatian Post* case. According to the media reports, the case concerned a harassment claim against Mr Mijalić, who was an assistant director at the Croatian Post. Mijalić apparently harassed the claimant by acting violently and humiliating her.[31] It is reported that the witnesses stated before the Court that on at least one occasion Mijalić violently pushed the claimant against the wall of the main hall, screamed and insultingly swore at her. According to the reports, the Court found him responsible for harassment and awarded the claimant damages in the amount of approximately EUR 70 000 (approximately HRK 500 000).

Unfortunately, the media reports failed to specify the grounds of harassment. Again, they described the judgment as a decision based on mobbing. However, in contrast to the Zadar Court, the Zagreb Court reportedly argued that the claimant was 'deprived of [her] dignity, honour and reputation through discrimination and harassment by her superiors' indicating that this Court might have a better grasp of the notion of sexual harassment as a form of discrimination.

CYPRUS – *Lia Efstratiou-Georgiades*

Policy developments

National Action Plan for Gender Equality

In December 2009 the Council of Ministers approved the first National Plan 2010-2013 for Preventing and Combating Violence in the Family. The Plan was communicated to the NGOs in April 2010. The aim of the National Action Plan is to promote measures and policies for the prevention of violence in the family on a comprehensive and systematic basis and it has the following strategic targets: 1) following up of the problem of violence in the family; 2) prevention of violence in the family; 3) training of professionals for dealing with the matter; 4) application of legislation (Law which provides for the Prevention of Violence in the Family and Protection of Victims of 2000-2004);[32] 5) protection of victims of violence in the family; 6) coordination and evaluation of the application of the Action Plan.[33]

The National Action Plan against Trafficking of Persons (2010-2012) was approved by the Council of Ministers and published in April 2010. The Plan aims at creating a general framework for dealing with the issue of trafficking of persons by placing real targets which cover all parameters of the problem and by promoting specific actions through better and more constructive coordination.

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30 Article 106 of the Criminal Act.

31 http://www.jutarnji.hr/rekordna-odsteta--hrvatska-posta-zbog-mobinga-mora-isplatiti-pola-milijuna-kuna/605938/, last accessed on 28 March 2010.

32 Law No. 119(I)/2000, as amended by Law 212(I)/2004.

33 www.familyviolence.gov.cy, last accessed on 7 May 2010.

The Republic of Cyprus has adopted a series of measures for combating the crime of trafficking of persons. The most important measure is the Law[34] that came into force on 13 July 2007 and is fully harmonized with the *acquis communautaire* and International Conventions. Another important measure is a Law that ratifies the Council of Europe Convention for Action Against Trafficking of Persons. It is worth noting that Cyprus was among the first countries which adopted the said Convention. Another important measure is the setting up, on the basis of the aforesaid Law, of a Polythematic Coordinating Group against trafficking of persons, under the chairmanship of the Minister of Interior, as National Coordinator. The purpose of this Group is the formulation of policy, the taking of practical and operational measures and the coordination of actions for tackling the real dimensions of the problem and the working out of specific solutions.

The National Action Plan consists of nine chapters with specific targets and actions for materializing them, as well as deadlines, specifying the agencies responsible for carrying them out and the sources for funding the actions. The chapters are: Chapter I 'Coordination', Chapter II 'Prevention', Chapter III 'Locating and Recognizing of Victims', Chapter IV 'Protection and Support of Victims', Chapter V 'Suppression and Prosecution', Chapter VI 'Collection of Data', Chapter VII 'Training', Chapter VII 'International Cooperation' and Chapter IX 'Evaluation'.

It is worth noting that the National Action Plan does not include the issue of trafficking of children because it is considered that the nature and special characteristics of this group calls for the preparation of a separate Action Plan by the Social Welfare Services.

After the recent appointment of Mrs Erato Kozakou-Markoulli as Minister of Communications and Public Works, the Cypriot Government now has two female Ministers. The other one is Mrs Soteroulla Charalambous, who is Minister of Labour and Social Insurance.

Legislative developments

Amendments of Parental Leave and Leave on Grounds of Force Majeure Law

On 26 February 2010, Law No. 11(I)/2010 was published in the Official Gazette of the Republic No. 4232. This Law amends the Parental Leave and Leave on Grounds of Force Majeure Law of 2002[35] as follows: (a) A father is allowed to transfer to the mother part of his parental leave provided that he used at least two weeks; b) The employee is obliged to give to his/her employer at least three weeks written notice of the date of beginning and ending of his/her parental leave; c) The period of absence of an employee on parental leave is extended for reasons of force majeure.

The Parental Leave and Leave on Grounds of Force Majeure Law of 2002, as amended, implements Directive 96/34/EC. It entered into force on 1 January 2003.

The Law applied to all employees, men and women, who completed a continuous period of at least six months' employment with the same employer (Article 3).

Any employee parent is entitled to taking unpaid parental leave of a maximum of thirteen weeks in total for the birth or adoption of a child, in order for the parent to take care of and participate in the raising of the child (Article 4(1)).

According to Article 12(1) of this Law, any employee is entitled to taking, upon application, unpaid leave of up to seven days each year, on grounds of force majeure by

[34] Law No. 87(I)/2007 on Combating of Trafficking of Human Beings and for the Protection of Victims.
[35] Law No. 69(I)/2002, as amended by Laws 111(I)/2007 and 11(I)/2010 (Directive 96/34/EC).

reason of a family emergency and related to an illness or an accident of any dependent of the employee which makes the immediate presence of the employee indispensable. In case of a husband and wife, each of them is individually entitled to such leave (Article 12(3)).

Equality body decisions/opinions

Discrimination by employer during pregnancy

Mrs M. Th. submitted a complaint to the Ombudsman dated 1 June 2009 relating to pressure exercised on her by Mr. T., director of advertising company E., to quit her post because of pregnancy. The facts were as follows: Mrs Th. had been engaged by company E. on 1 October 2008 as financial director. Mrs Th. requested as a condition for her appointment to have one free afternoon because of another commitment. The employer accepted her condition, but failed to give her the main conditions of work in writing, contrary to the Information by the employer to the employee of the conditions governing the contract or employment relationship Law.[36] On 25 February 2009 Mrs Th. gave her employer a medical certificate stating that she was pregnant and that the expected date of delivery was the 20 September 2009. On 15 March 2009 the employer informed her that he had decided to make some changes to the working hours of his staff which included a reduction of the weekly working hours by 2 1/2 hours and that in the context of these changes she also had to work all afternoons. She protested on the basis of the agreement they had made upon her appointment. The employer's answer was, according to her assertions, that if she did not like the new arrangement she could quit her post.

On 6 April 2009 the claimant's doctor gave her leave of absence until 23 April 2009 because of a threat of abortion. According to her complaint, the employer asked her again to quit, because he could not allow his company to be exposed to its clients every time she needed to take leave of absence as her post was very important and said that if he had known that she intended to get pregnant he would not have recruited her. The same type of pressure was exerted by the employer on 11 May 2009 when she was given leave of absence again until 11 June 2009 because of a threat of abortion. The employer appeared annoyed by the leaves of absence of Mrs Th. and also doubted them on the phone with her doctor. Finally, Mrs Th. submitted her resignation.

The Ombudsman, after examining the complaint, reached the following conclusions: a) The company, under the pretext of restructuring the working hours of its staff, proceeded to introduce a one-sided change of the working conditions of Mrs Th., a few days after she made known her pregnancy and put her in a dilemma, telling her to quit if she did not like the new arrangement, and b) the treatment of Mrs Th. by the company was related to her pregnancy and aimed at forcing her to quit. This treatment constitutes direct discrimination on the ground of sex.

The Ombudsman is examining whether to impose a fine on the company and intends to make a Recommendation, after having had consultations with both parties. The Ombudsman has no authority to award damages to victims of discrimination on the ground of sex. This authority belongs to the Industrial Tribunal Court under the Equal Treatment between Men and Women in Employment and Occupational Training Law of 2002 to 2009. The complainant can apply to this Court for damages.[37]

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[36] No. 100(I)/2000 harmonizing Directive 91/533/EC.

[37] Ombudsman File No. A.K.I. 40/2009, dated 22 January 2010; www.ombudsman.gov.cy, last accessed on 30 June 2010.

Work transfer for reasons of pregnancy

The Accountant-General of Cyprus, by letter dated 9 September 2009, requested the Ombudsman, as Equality Authority, to advise on the way of handling requests from female casual and/or permanent employees of his office for transfer to the district of their residence for reasons related to pregnancy. This concerned employees who have been appointed on a casual basis and posted at ministries/departments in Nicosia to work on the management of various European Funds.

In examining the matter, the Ombudsman took into consideration the following laws and case law: The Equal Treatment of Men and Women in Employment and Vocational Training Laws of 2002-2009,[38] the case law of the ECJ,[39] the Maternity Laws of 1997 to 2008[40] and the Protection of Maternity (Safety and Health at Work) Regulations of 2002.[41]

All of the above-mentioned laws and regulations apply to all employees, whether they work on a full-time or on a part-time basis, for a fixed or indefinite period, continuous or not, either in the public or in the private sector.

Furthermore, the Ombudsman took into consideration the following: 1) The criteria for the transfer of employees used by the Accountant-General's Office, which are: a) the needs of the service especially in relation to the nature of accounting work and the responsibilities of the post; b) the knowledge and experience of the employees to be transferred; c) their family situation; and d) their seniority, 2) The fact that at the time of their recruitment, the prospective casual employees are informed in advance that if they are appointed they will be posted only in Nicosia, irrespective of their place of residence, 3) The fact that posts for accounting staff at the District Offices are very limited and are filled by a small number of permanent officers, 4) That according to the arguments of the Accountant-General's Office the request in question of female employees cannot be satisfied, not even by a temporary transfer, 5) That the Accountant-General's Office informed them that under the Public Service (Granting of Leave) Regulations of 1995[42] they have the right, if they wish, either to additional leave without pay up to 12 weeks after the expiry of their maternity leave, or to parental leave without pay as provided in the Parental Leave and Time Off on Grounds of Force Majeure Law.[43]

On the basis of all the above, the Ombudsman's opinion on the matter is that the Accountant-General's Office should include in the criteria applied for transfer of their employees to the town of their residence the pregnancy (or sickness related to pregnancy) of female employees who ask for such transfer. Also that, during the critical period after the child's birth, female employees should be given the possibility to use the facilities provided by law for the increased care of the child. Finally, the Ombudsman suggests that if the transfer, even temporary, to another post of a female employee whose pregnancy has been medically certified to be particularly problematic, is objectively impossible, then the only solution for her protection and the protection of the foetus is the granting to her of sick leave due to pregnancy.[44]

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38 Nos 205(I)/2002, 191(I)/2004, 40(I)/2006, 176(I)/2007, 39(I)/2009 implementation of Directives 2002/73/EC and 2006/54/EC.

39 C-421/92.

40 No. 100(I)/1997, as amended by Laws 45(I)/2000, 64(I)/2002, 109(I)/2007, 8(I)/2008, 43(I)/2008.

41 Administrative Rules 2002, Official Gazette 255/2002 (Directive 92/85/EOC).

42 Administrative Rules 101/95.

43 No. 69(I)/2002, as amended by Laws 111(I)/2007, 11(I)/2010.

44 Ombudsman File No. A.I.T. 3/2009, dated 23 February 2010; www.ombudsman.gov.cy, last accessed on 5 July 2010.

CZECH REPUBLIC – *Kristina Koldinská*

Policy developments

In the Czech Republic the electoral campaign is reaching its height. One of the important issues in this electoral campaign has been family policy. There has been discussion on the future amount of maternity benefit from sickness insurance and also about general support for families. Unfortunately, none of the political parties have focused seriously on harmonising family and private and working life, although the former political government[45] tried to introduce some measures to support the reconciliation of family and working life.

In fact it should be underlined that, in general, the theme of gender equality is not an issue for any of the important political parties.[46]

Legislative developments

There have been no very important legislative developments of late. The only minor aspect to be mentioned is the debate on the amount of maternity benefit and on the first three days without payment of the so-called care allowance. A law reduced the period of maternity leave and introduced a measure making the first three days of the care allowance, without payment of benefit, part of the sickness insurance system (Act No. 187/2009 Coll., on sickness insurance). It was proposed that the law be abolished, but the President vetoed the Bill that would have done so. Reduced benefits will therefore continue unless the Chamber of Deputies overrules the presidential veto.

Case law of national courts

Supreme Court decision on sex discrimination

The Supreme Court decided on the very important case of Ms Čauševič,[47] who applied for the position of financial director in a large company and argued that she was not accepted for the position because she was a woman. According to the Supreme Court, the employer did not discharge the burden of proof which fell on him, because he did not prove adequately that he had not discriminated against the appellant on ground of her sex.

The Supreme Court reversed the previous decision of the appeal court, ruling that the reasoning of that court, which held that the appellant had not proved the discrimination and thus had no claim, was incorrect.

Constitutional Court decision on racial discrimination

There is another case on racial discrimination which is worth reporting.[48] In 2001, in a pub in a city in North Bohemia, a statue was installed of a man holding a pole with the words 'For gypsies'. Some Roma from the city felt deprived of their dignity and asked the court to order the pub to offer its apology and redress the situation.

The general courts throughout the proceedings refused to order the pub to apologise or remedy its action. The city court found that the conduct of the pub could not be

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45 Since May 2009, the Czech Republic has had a caretaker government; the Government fell on 24 March 2009.

46 http://www.feminismus.cz/fulltext.shtml?x=2227615, last accessed on 30 April 2010.

47 21 Cdo 246/2008.

48 II. ÚS 1174/09.

defined as harassment, but did not present any relevant reasoning. During the appeal proceedings, the court of appeal did not pay any attention to the argument of the claimant that the statue and the words constituted harassment towards them.

The Constitutional Court concluded, however, that harassment in the sense of Directive 2000/43 could not be excluded and that the general courts had failed to examine the relevant argument of the claimant. Therefore, it concluded, the previous court decisions had not duly examined the case and the reasoning of those decisions was not convincing, meaning that the decisions were impossible to assess.

For these reasons, the Constitutional Court reversed the previous decisions and returned the whole case to the city court. This case is purely about racial discrimination, although it has a strong impact in dealing with discrimination cases in general, especially in dealing with burden of proof, which is very important also for gender issues.

Miscellaneous

Activities of the Czech ombudsman

As reported earlier, the Czech Republic finally adopted the Antidiscrimination Act, which entered into force on 1 September 2010. This Act envisages the Ombudsman - the public defender of rights – as the equality body.

As a consequence, several useful items of information regarding instruments for the defence against discrimination have been published on the Ombudsman's website, including, for example, a legal view on procedural matters connected with discrimination.[49]

There is good reason to expect that the Ombudsman's office will play an important role in discrimination disputes, especially in view of its high moral authority. It would be very useful if the Ombudsman also gained a significant role in discrimination procedures (according to the current Antidiscrimination Act, the role of the Ombudsman is quite weak). There are, however, no signs of such a development yet.

Conference 'Stop Rape'

In 2010, some important conferences have taken place, one of which was organised by the NGO Gender Studies, entitled 'Stop Rape'. This also included some contributions by lawyers discussing the topic from the point of view of previous and current legislation, and also presenting some opinions *de lege ferenda* on possible future developments in this area.[50]

First Czech Ombudsman deceased

The first Czech Ombudsman Otakar Motejl died on 9 May 2010. His death is widely seen by the general public as a great loss. He was not only the first Czech Ombudsman, but he also had great moral authority, not only in the legal environment.

In the near future, it will be very important to take a good decision on the successor of Mr Motejl. It is necessary to maintain the moral and legal authority of the Ombudsman's office for the future, also for the purposes of dealing with discrimination cases.

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[49] *Stanovisko veřejného ochránce práv k některým procesním aspektům antidiskriminačního zákona, zejm. věcné příslušnosti soudů*, available on http://www.ochrance.cz/diskriminace/pravni-stanoviska/stanovisko-vecna-prislusnost-soudu-leden-2010/, last accessed on 1 May 2010.

[50] http://www.feminismus.cz/fulltext.shtml?x=2227597, last accessed on 30 April 2010.

DENMARK – *Ruth Nielsen*

Policy developments

New Minister
On 23 February 2010, Lykke Friis became Minister of Gender Equality.

Denmark's infringement of the requirement to set up an independent equality body
Since 2002, by virtue of Directive 2002/73, the Member States and EEA countries have been obliged to designate Equality Bodies. Similar provisions are found in the Recast Directive (2006/54) and the Supply of Goods and Services Directive (2004/113/EC). The tasks of these bodies are the promotion, analysis, monitoring and support of equal treatment between women and men. They may form part of agencies with responsibilities at the national level for defending human rights or safeguarding individual rights. These bodies must have the competence to provide independent assistance to victims of gender discrimination, to conduct independent surveys concerning gender discrimination and to publish independent reports and make recommendations.

In Denmark, there is no Equality Body with the full range of competences as required in the gender equality directives. Denmark has an Equality Complaints Board which is empowered to deal with complaints about discrimination on grounds of sex, ethnic origin, religion, age, disability, sexual orientation, etc. from victims of discrimination. This body has no competence to conduct independent surveys concerning discrimination, to publish independent reports or to make recommendations on any issue relating to such discrimination and it cannot start cases on its own initiative. It is therefore not a monitoring body in the sense required by the above provisions. In matters of ethnic equality, the parallel requirement in Article 13 of Directive 2000/43/EC is correctly implemented in Denmark. In addition to the Complaints Board which is also competent in cases of ethnic discrimination, there is a provision in Section 10 of the Ethnic Equality Act that empowers the Danish Institute of Human Rights to promote ethnic equality. An easy way for Denmark to comply with the gender equality directives on this point would be to extend the competence of the Danish Institute of Human Rights to also cover gender equality.

The European Commission has commenced infringement proceedings against Denmark over the issue of independent bodies. On 20 November 2009, the Commission sent a reasoned opinion to Denmark. On 10 December 2009, the then Danish Minister of Gender Equality, was called to a meeting with a committee under the Danish Parliament to answer questions about what the Government would do in response to the Commission's criticism. The Minister answered that the Government planned to extend the competence of the Danish Institute of Human Rights so as to cover gender equality. At the time of writing (May 2010) no proposal for amending the Danish legislation to this effect had been presented to Parliament.

ESTONIA – *Anneli Albi*

Policy developments

As pointed out in earlier reviews, during the last two years the state budget has been reduced considerably and funds allocated to different state agencies have been cut. This

has also affected the situation of the Gender Equality and Equal Treatment Commissioner.

On 30 April 2010 the Human Rights Centre of Estonia published a report of human rights in Estonia 2008-2009.[51] Among other topics, the authors of the report analysed the institutional framework of gender equality and implementation of the principle of equal treatment. It is pointed out in the report that before the Equal Treatment Act (ETA) entered into force in 2009, there was one Gender Equality Commissioner in Estonia, but according to the ETA the Commissioner's tasks were expanded and she was nominated as a Gender Equality and Equal Treatment Commissioner. According to the Explanatory Memorandum of the draft of the ETA (Draft Act No. 384) additional costs upon the entering into force of the ETA, such as creating the Office of the Commissioner, hiring additional advisers and increasing operating costs were foreseen (the prognosis of the Commissioner's budget was EUR 281 000(EEK 4.4 million). However, under the budget of the Ministry of Social Affairs of 2009, no additional resources were allocated to the Commissioner. In fact, the budget of the Commissioner was even reduced in 2009. Whereas in 2008 the Commissioner's budget was EUR 60 716 (EEK 950 000), in 2009 the budget was reduced to EUR 59 000 (EEK 923 254). There are only two people working in the office of the Commissioner: the Commissioner and an advisor; the budget deficit has forced the Commissioner to work on a partial workload basis (75 %) since May 2009. Thus the report concludes that the actual purpose – protection from discrimination – has not been achieved, because the State has not provided sufficient funds, which has had a severe impact upon the ability of the Commissioner to fulfil her tasks to promote equality and to help the victims of discrimination. The reduction in the funding of the Commissioner's activities, while adding new competences to her mandate, indicates that the Commissioner's work does not fall among the priorities of the Government.[52]

Legislative developments

Amendments to Gender Equality Act in effect

On 24 September 2009, Parliament adopted the Act to amend the Gender Equality Act (317 *UA*). The amendments took effect on 23 October 2009. The following amendments were made to the Gender Equality Act (GEA):

1. the definitions of direct and indirect discrimination and harassment were brought in line with the definitions in the EU directives;
2. the concept of harassment on the grounds of sex was introduced into the GEA;
3. prohibition of victimization was extended beyond employment;
4. the following issues concerning gender discrimination with regard to access to goods and services are now regulated: an exemption concerning sex-segregated services was introduced; the right to request compensation is extended beyond the field of employment; an obligation to provide explanation for less favourable treatment for service providers was introduced;
5. a prohibition to request family-related data by employers or by recruitment agencies was introduced;

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[51] *Human Rights in Estonia 2008-2009*. Annual Report of the Human Rights Centre at the Tallinn Law School of the Tallinn University of Technology. Available in English on: http://www.humanrights.ee/files/I%C3%95_aruanne_EN_final_1.pdf, last accessed on 30 April 2010.

[52] *Human Rights in Estonia 2008-2009*. Annual Report of the Human Rights Centre at the Tallinn Law School of the Tallinn University of Technology, pp. 36-37. Available in English on: http://www.humanrights.ee/files/I%C3%95_aruanne_EN_final_1.pdf, last accessed on 30 April 2010.

6. an obligation to involve non-governmental organizations in the promotion of gender equality is now included.

Draft of statute for Commissioner of Gender Equality and Equal Treatment sent for consultations

According to Article 15(6) of the ETA, the Government of the Republic should adopt the statute of the Commissioner, which establishes the organisation of the activities of the Commissioner and his or her Office. Although this provision took effect on 1 January 2009 and the earlier statute was invalidated, the statute has not yet been adopted by the Government.

On 11 February 2010 the Ministry of Social Affairs presented the draft of the statute, which was sent for consultations with other ministries. It is pointed out in the Explanatory Memorandum of the draft that it might be necessary to amend the Gender Equality Act and State Budget Act so that the budget of the Commissioner will be independently provided in the state budget, as at present the budget of the Commissioner constitutes part of the general budget of the Ministry of Social Affairs and the budget of the Commissioner is not separately provided for in the state budget. The Explanatory Memorandum of the statute points out the great difference between the actual budget of the Commissioner in 2009 and 2010, and the prognosis of the budget when the ETA was adopted (please see above). In the Explanatory Memorandum it is also noted that from the perspective of independence it may be somewhat problematic that the Ministry of Social Affairs manages the issues concerning office, IT, accounting and personnel for the Commissioner.

Case law of national courts

Constitutional review of the Police Service Act

On 20 November 2009 the Supreme Court *en banc* (i.e. the full court) declared that Articles 49(3) and 49(4) of the Police Service Act are unconstitutional and invalid to the extent that these provisions provide that a female police officer born in 1948 is dismissed from the police service earlier than a male police officer born in the same year.[53]

Earlier that year, the Administrative Chamber of the Supreme Court had initiated constitutional review proceedings regarding Article 49(3) of the Police Service Act. The Chamber found that this provision gives rise to differential treatment of women and men born in 1948, and therefore it was necessary to review whether this provision is in compliance with Article 12 of the Constitution (the right not to be discriminated on the grounds of sex).

According to the Act, police officers can be accepted for police service, depending on the actual position, until the age of 55 or 60. However, according to Article 49(3), with the permission of the head of the Police Board, a police officer may be employed in the police service until he or she reaches the pensionable age provided for in Article 7 of the State Pension Insurance Act. According to this provision, the general pensionable age is 63. Article 7(2) stipulates that in order to gradually equalise the pensionable age of men and women, the right of women born between 1944 and 1952 to receive an old-age pension arises prior to reaching the general pensionable age, at the ages envisaged in the Act. For women born in 1948, the respective age is 60 years and

[53] Judgment of the Supreme Court of 20 November 2009, No. 3-3-1-41-09. The text of the judgment is available in English on: http://www.nc.ee/?id=1103, last accessed on 30 April 2010.

6 months. The claimant in this case objected to being released from the police service on the basis of Article 49(3) of the Police Service Act when she reached the age of 60 years and 6 months. The pensionable age of male police officers born in 1948 is 63.

The Supreme Court *en banc* found that there is no reasonable justification for the dismissal of female police officers from service at an earlier age than male police officers. The Supreme Court disagreed with the reasoning of the District Court which had found that the difference of treatment between female and male police officers was in compliance with the Constitution. The District Court had seen this as an optimal compromise between two conflicting interests: on the one hand, the interest of the police officer to continue the service, and, on the other hand, the interest of the State to hire younger persons into the service. The Supreme Court found that it is not acceptable that the State's interests would be given greater weight at the expense of female police officers, with the reasoning that they could receive the old-age pension in the case of an earlier dismissal. The Supreme Court took the position that it is not justified to interfere with female police officers' right to choose one's occupation and, differently from male police officers, to eliminate the possibility to earn a higher income than the pension merely because the police officer can receive a police officer's old-age pension. Further, the Supreme Court stated that as a result of the difference in the length of service, the female police officers would also receive a lower police pension.

The Supreme Court declared the dismissal of the claimant unlawful and awarded compensation in the amount of six months' remuneration. The reinstatement to the service was not possible because the claimant had not requested this during the earlier stages of the proceedings.

The above case was decided on the basis of the Constitution. After this decision, the claimant decided to bring a further claim on the basis of the Gender Equality Act, which provides greater opportunities in terms of compensation for discrimination. The claimant submitted to the Administrative Court a new complaint finding that her dismissal from the police service constituted discrimination on the grounds of sex, asking the Court to declare her dismissal from the police service invalid and claiming compensation on the basis of the GEA. The Administrative Court (in the first instance) found that the dismissal did not constitute discrimination, but was caused by objective circumstances, because the dismissal had been based upon the imperative provision of the Police Service Act.[54]

FINLAND – *Kevät Nousiainen*

Policy developments

Report on implementation of the Act on Equality between Women and Men

When a major amendment of the Act on Equality between Women and Men (Act 609/1986, amendment 232/2005) was adopted in 2005, the Parliament requested that the Government monitor and report on the implementation of the Act by the end of 2009. The required report was delivered to the Parliament's standing Employment and Equality Committee in January 2010.

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[54] *Halduskohus ei pidanud naispolitseiniku vabastamist sooliseks diskrimineerimiseks* ('Administrative Courts does not consider dismissal of female police officer discriminatory'), *Postimees Online*, 16 April 2010. Available on: http://www.tartupostimees.ee/?id=250850, last accessed on 30 April 2010.

The report provided information on civil and criminal law cases on gender discrimination, and the state of equality planning at Finnish workplaces. The employers' duty to conduct equality planning was extended to an obligation for 'pay mapping', aimed at reducing the gender pay gap. According to the report, employers were well aware of the obligation for equality planning. However, only 62 percent had actually made an equality plan; such plans were more often made in the public than in the private sector. Employers should carry out the equality planning in cooperation with representatives of the employees, but it was unclear how this was to be done. Employee organisations reported problems in obtaining information on pay. Pay mapping should be done as part of regular equality planning, and contain an analysis of how women and men are situated in different tasks and how their jobs are classified and paid, assess the gender pay gap, and further close the pay gap by appropriate measures. The report shows that the provision has not been effectively implemented.

The provision of the Act on Equality on pay mapping does not specify how jobs are to be classified and compared. Guidelines on how to proceed are given both by the Equality Ombudsman and by the employers' organisations. The employers' organisations' guidelines recommend a less detailed model, and do not favour comparisons across collective agreements. Thus they are not very helpful for the purpose of reducing the pay gap, as the pay gap in Finland for the most part consists of a different evaluation of typically male and female jobs in the gender-segregated labour market. The Ombudsman's guidelines recommend a detailed mapping of all pay components, and comparison of pay across collective agreements; the trade unions recommend a similar approach. The employers' guidelines are used by most employers, however. The government report states that pay mapping is often performed without a clear aim and without analysing which pay differentials are acceptable and which are not, without a comparison across professional groups and without appropriate information on the pay structures. The report recommends that the provisions on pay mapping be amended. Clear guidelines are needed on how pay comparisons are to be made, pay information be available, and comparisons made across personnel groups, and how the process is to be conducted in cooperation with personnel.[55]

Report on impact of gender equality policies

The Government is also preparing a report to Parliament on the impact of gender equality policies during the last ten years. Both government reports on gender equality to Parliament - the one already presented on the Act on Equality and the one still under preparation on equality policies - are based on a number of studies.

Case law of national courts

Sexual abuse, work discrimination and sexual harassment

The Supreme Court, in a recent decision,[56] has clarified the contents of various provisions related to sexual harassment. A male director had harassed several young female fixed-term employees who worked at night in transport services for the sick. The prosecutor referred to a Penal Code provision on sexual abuse and a Penal Code provision on work discrimination. Further, the case involved sexual harassment under the Act on Equality between Women and Men, and harassment under the Occupational Safety and Health Act. Sexual abuse is characterised by abuse of a dominant position,

[55] *Selvitys eduskunnan työelämä- ja tasa-arvovaliokunnalle naisten ja miesten välisestä tasa-arvosta annetun lain toimivuudesta. Sosiaali- ja terveysministeriö* 29 January 2010.

[56] Decision KKO:2010:1.

which in the case in question was present, because the employees were in a position of dependence as fixed-term workers who had just finished their education and started their professional careers, and were harassed by their superior. The Occupational Safety and Health Act requires that the employer undertakes measures to remove sexual harassment that is detrimental to the employee's health. By being guilty of sexual abuse, the director was also guilty of violating the provision on work safety offence under the Penal Code. The defendant claimed that the Penal Code provision on work discrimination could not be applied to measures that fulfil the definition of discrimination under the Act on Equality between Women and Men.

According to the Supreme Court, the Act on Equality, the Employment Contract Act and the Occupational Safety and Health Act all aimed at gender equality at work. The fact alone that an employer had omitted to remove sexual harassment was to be considered as discrimination. Sexual harassment is manifestly an act that violates equal treatment, which requires no comparator. Thus the Supreme Court upheld the decision of the lower courts which found the defendant guilty of sexual abuse, work discrimination and occupational safety offence, as well as discrimination against the four victims on the ground of sex under the Act on Equality. The decision clarified the complicated relations between various provisions, but also draws attention to the vulnerable position of young women working under fixed-term contracts, which are common especially among young women in Finland.

Fixed-term employment contracts and outsourcing of public services

The Supreme Court found[57] that a private company supplying day-care services based on a contract with a municipality had the right to conclude several subsequent employment contracts with a kindergarten teacher, because the company's contract with the municipality was always concluded for one year only. The teacher had worked under several such contracts during several years, until she was dismissed during absence for a family-related leave in 2005. The contract between the municipality and the company ended in 2006. In a previous case, the Supreme Court had found that a public employer could not refer to budget reasons as a ground for fixed-term work, if the need for the work was continuous.[58] In the present case the appellate court found, however, that a private employer was not to be regarded in the same light as a public one. The company in question only provided services for the municipality, and was therefore entitled to use fixed-term contracts repeatedly for its personnel. According to the Supreme Court, although the company had provided childcare services since 1997 and needed competent personnel in providing them, it was completely dependent on its contract with the municipality being renewed each year. A dissenting member of the Court held that merely the uncertainty of the continuation of the contract between the municipality and the company was not a valid ground for using fixed-term employment contracts repeatedly.

[57] Decision KKO:2010:11.
[58] Decision KKO:1993:70.

FRANCE – *Sylvaine Laulom*

Policy developments

There are currently strong debates in France on the need of a law prohibiting women from wearing the niqab or burkas in public places. A parliamentary commission of inquiry on the wearing of the niqab and burkas, set up in July 2009, published its report on 26 January 2010. After six months of fierce debates on the burka, the commission considers that wearing a niqab or burka is a practice which contradicts the fundamental values of the French Republic, especially freedom and dignity for women. The report mainly proposes measures to protect women and stresses the importance of education. It proposes educational programmes to prevent radicalisation and measures to discourage the stigmatisation of Muslim communities. However, the commission reached no consensus on the need to adopt a law specifically prohibiting the wearing of the full Islamic veil in public places. Three days after the publication of the report, the Prime Minister, François Fillon asked the *Conseil d'Etat* for its opinion on how a law could prohibit wearing a niqab or a burka.[59] The *Conseil d'Etat* in its report considers that a general prohibition will not be constitutional. However, some MPs still argue that a law is necessary. The *Conseil d'Etat* considers that the principle of sex equality could not justify a general prohibition as it would be contrary to the individual freedom of each woman. A limited prohibition for security reasons or in specific spaces could be possible but not a general one. Despite the opinion of the *Conseil d'Etat*, Nicolas Sarkozy, who sees the burka as a 'sign of subservience and debasement' contrary to the principle of sex equality, announced on Wednesday 21 April that a law prohibiting the wearing of a burka in public spaces will soon be adopted.

Legislative developments

Revision of mothers' pension rights

The 2003 law on pensions maintained specific rights for mothers in statutory schemes as was allowed by Article 7 of Directive 79/7. Article L.351-4 of the Social Security Code still included a difference between men and women in statutory old-age pension schemes by granting advantages to mothers who have raised children. In 2009, the *Cour de Cassation*,[60] applying Article 14 of the European Convention of Human Rights, held that such difference of treatment between men and women is contrary to the Convention; it could only be allowed if there is an objective and reasonable justification of this difference. Thus a man, father of 6 children he had raised, could ask for the same pension benefits as a woman. The decision of the *Cour de Cassation* follows a deliberation of the HALDE, which took the same position and asked the legislator to modify the Social Security Code.[61] The decisions of the *Cour de Cassation* gave a strong incentive to the legislator and a new provision included in the law to finance social security in 2010 was adopted in December 2009.[62] As for civil servants, a specific right for women linked to maternity is maintained: increased insurance coverage for pensions in the private sector for a maximum of one year for women who

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59 *Conseil d'Etat* 'Etude relative aux possibilités juridiques d'interdiction du port du voile intégral', Rapport adopté par l'Assemblée générale, 25 mars 2010.

60 Cass. 2ème civ. 19 février 2009, n°07-20668, Bull. II 53.

61 Délibération n°2005-43 du 3 octobre 2005 and Délibération n° 2008-237 du 27 octobre 2008.

62 Article 65 de la loi n° 2009-1646 du 24 décembre 2009, loi de financement de la Sécurité Sociale pour 2010.

have given birth to one or more children. For the second year, the mother will continue to benefit from another increase of insurance coverage for the children born before 1 January 2010, except if the fathers can prove, in the year following the publication of the law, that they have raised their children on their own. For the children born after 1 January 2010, the mother will continue to benefit from an increased insurance coverage for a second year, if there is agreement between the father and the mother, expressed in the six months following the child's 4th birthday. If there is disagreement between the parents, the advantage will be granted to the parent who can prove that he/she has contributed more and for a longer period to the education of the child. If both parents have contributed equally to the child's education, the benefit will be divided into two.

Gender parity on company boards?

In July 2009, a report was published on the situation of gender equality at work. Among other measures, the report recommended the adoption of quota in company boards. A Bill on this issue, introduced by an MP, has been presented to the Bureau of the National Assembly. The Bill is currently being discussed in Parliament. A text was adopted by the National Assembly on 20 January and it is now to be discussed by the Senate. The Bill proposes a representation of 20 % of women in company boards in the three years after the adoption of the law, and of 40 % (and not 50 % as was initially proposed) in the six years after the adoption of the law. Public enterprises will also have to respect this quota. To avoid the adoption of a law on this issue, companies have started to appoint women to their boards to show that a mandatory provision is not necessary.

Case law of national courts

No paternity leave for women

Two women concluded a 'civil solidarity pact' (a formalised contract drawn up between two persons to legalise their domestic partnership). One of them gave birth to a child, and the second one asked for the benefit of paternity leave. When it was refused, she claimed that this was discrimination based on sex. The *Court de Cassation* (2ème civ. 11 March 2010, n°09-65853) refused to consider the existence of sex discrimination. The paternity leave is a right recognised to the father of a child and there is no discrimination in refusing the benefit of this right to the partner of the mother. The conclusion of the Court de Cassation was not surprising, as paternity leave cannot be given to someone who is not the father. French law does not recognise the right for homosexual couples to adopt children. Thus the parenthood of the second woman could not be recognised and the benefit of paternity leave could be refused. However, the case is interesting as it shows the increasing demand of homosexual partners to have access to the same family rights as heterosexuals have.

Right to return to the same job after maternity leave

At the end of their pregnancy leave, workers have the right to return to the same job or to an equivalent or similar job. In this particular case, a worker was working as a teacher with an assistant. After her maternity leave, the director of the school wrote to her to inform her that she would be working in a class with another teacher. She refused to continue working under these conditions. The *Cour de Cassation* (Cass. Soc. 3 February 2010, n°08-40.338) considers in this case that the employer violated his/her obligation to offer the worker the same job or a similar job. The new job offered was

different from the previous one as she lost part of the management of the class. The breach of the contract should then be analysed as a dismissal without a serious and genuine reason which gives rise to a compensation. The case is a good example of the control of the courts on the modifications of jobs after maternity leave.

Recognition of discrimination without a comparator

In a decision of 10 November 2009 (Cass. Soc. n°07-42849), the *Cour de Cassation* states that 'the existence of discrimination does not necessarily imply a comparison with other workers'. In the relevant case, a woman asserted having been discriminated against because of her participation in a strike. After the strike, in 1985, she asserted that her career was much slower than before the strike. The Court of Appeal dismissed her case because she did not compare her situation with the situation of colleagues in the same position. In the opinion of the *Cour de Cassation*, the Court of Appeal should have analysed if the slowing down of her career and the difficulties in her work after her participation in the strike did not logically suggest discrimination. In the decision, the *Cour de Cassation* did not refer to the definition of discrimination, a definition which seems to imply a comparison, as discrimination is defined as a situation where a person is treated in a less favourable way than another person. Thus the *Cour de Cassation* seems to adopt a wider approach of discrimination, and a situation could be proved to be discriminatory if it is possible to demonstrate that the unfavourable situation is due to a prohibited ground. However, it seems difficult to establish less favourable treatment without a comparator. In fact here it may be possible to compare the situation of the worker before and after the strike. It is true that there will be no comparison with other workers to establish a presumption of discrimination. The employer could then establish that the difference of treatment is not based on discrimination. He/she could do that, for example, by establishing that other non-striker workers were treated in the same way. The comparison comes back into the picture here.

Dismissal after maternity leave

Article L.1225-4 of the Labour Code provides that the employer cannot dismiss a woman during her pregnancy, during her maternity leave and during the four weeks following the end of her maternity leave. However, a dismissal is possible for a gross misconduct not connected to the pregnancy or when the employer cannot maintain the contract of employment for a reason not connected to the pregnancy. Even in these situations, the employer cannot give notice of the dismissal during the pregnancy leave. However, there was uncertainty on the application of this rule during the four weeks following the maternity leave. In a decision, the *Cour de Cassation* (Cass. Soc. 17 February 2010, n°06-41392) held that during these four weeks of protection the dismissal of a pregnant worker was possible (but only if the dismissal is not connected to the pregnancy).

Equality body decisions/opinions

The annual report of the HALDE

Every year, the HALDE, the French equality body, reports on its activities in an annual report addressed to the President of the French Republic, the Prime Minister and the Parliament. The 2009 report was published in March 2010. It gives some very interesting information on the activities of the HALDE. In 2009, 10 545 claims were recorded by the HALDE, representing a 21 % increase as compared to 2008. Origin

remains the most frequently cited ground (28.5 %) and sex represents only 9 % of the claims made (among these claims, 2.5 % concern pregnancy). However, the Report notes an increase in the number of claims based on sex. Concerning sex discrimination, the Report notes that the HALDE has used comparative analysis in pay discrimination and has presented its observations, in a number of cases, before tribunals. Among the positive results reported, the HALDE presents the results of two actions for pay discrimination based on gender where the tribunals, following the comparison analysed proposed by the HALDE, ordered EUR 95 646 and EUR 51 570 as compensation for the workers. The nullity of a dismissal linked to pregnancy was also awarded a compensation of EUR 206 000 for the worker.

GERMANY – *Beate Rudolf*

Policy developments

Care allowance (Betreuungsgeld)

The public discussion about introducing a 'care allowance' (*Betreuungsgeld*) continued after the publication of a study on the effects of such payments in Finland and Norway.[63] The care allowance is scheduled to be introduced in 2013, but details are still to be determined. It is intended to be paid to parents who choose not to send their children to childcare institutions. According to the study by an academic institution commissioned by the Federal Ministry of Finance, the introduction of a care allowance had resulted in a decrease of children in childcare and of women's employment. It found that the main beneficiaries were women working part-time, low-income families and immigrant families, and that mostly children in need of education were negatively affected. The Government emphasised that the care allowance need not be a monetary payment, but that vouchers for educational activities were a viable alternative. According to opposition spokespersons, vouchers will be discriminatory if they are reserved for low-income families and if families with higher incomes receive money.

Legislative developments

Part-time family care leave

The appointed Minister for Family, Senior Citizens, Women and Youth proposed a framework for introducing the right to a part-time family care leave which is to be financed through a working hours account. According to this plan, employees can reduce their working hours to 50 % to care for sick or elderly family members. During this time and for a maximum of two years, the employer will remain obliged to pay 75 % of the salary. After their return, employees will be obliged to work full time, but will continue to receive only 75 % of their salary until the account has been evened. Small and medium-sized enterprises can have the difference of 25 % of their employee's salary covered by an interest-free loan of a state-owned bank (the *Kreditanstalt für Wiederaufbau, KfW*). To insure employers against the risk of incapacity to work, employees shall be obliged to take out insurance. This framework will now have to be developed into a detailed legislative proposal.

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[63] Zentrum für Europäische Wirtschaftsforschung (of the University of Mannheim), *Fiskalische Auswirkungen sowie arbeitsmarkt- und verteilungspolitische Effekte einer Einführung eines Betreuungsgeldes unter 3 Jahren*, ftp://ftp.zew.de/pub/zew-docs/gutachten/Endbericht_Betreuungsgeld2009.pdf, last accessed on 27 May 2010.

Quota for company boards

The legal committee of the Federal Parliament rejected a proposal to introduce a quota of 40 % for boards of companies that are listed on the stock exchange that have not reached an equal representation of women and men before 2017.[64] The spokesperson of the Christian Democratic Party (*CDU*) considered that it was too early to introduce a quota, while a spokesperson for the Liberals (*F.D.P.*) considered a strict quota to be too rigid and argued that there were not enough qualified female candidates.[65] Similarly, the petitions committee of the Federal Parliament rejected a woman's proposal to introduce a quota of 50 % for companies listed on the stock exchange. This petition had been supported by less than 600 persons. The committee majority argued that a quota was not 'appropriate' and would be incompatible with EU law.

Ban on Islamic headscarves for teachers in public schools rejected

The parliament of the state of Rhineland-Palatinate (*Land Rheinland-Pfalz*) rejected the opposition's proposal to introduce a ban on Islamic headscarves for teachers in public schools. Spokespersons for the parliamentary majority considered it arbitrary to generally assume that a woman wearing a headscarf for religious reasons held opinions in violation of the federal constitution.

Case law of national courts

Federal Labour Court (Bundesarbeitsgericht), judgment 8 AZR 77/09 of 18 March 2010

The decision concerned the question of whether a local administration can reserve the position of a gender equality ombudsperson to female candidates. A man whose application for the position of ombudsperson had been rejected because of his sex, had brought a claim for compensation because of sex discrimination. The Federal Labour Court held that being a woman was a genuine and determining occupational requirement in this case because the city could show that the focus of that ombudsperson's activities required being a woman. Her main task was to help integrate immigrant women and girls, and to counsel them, especially in cases of gender-based discrimination. The Court considered that these activities were geared towards immigrant women in problematic personal situations, which they would not readily reveal to men or where they expect only a woman to be able to present appropriate solutions.

The case is important because for the first time, the Court explained the conditions under which sex can be an occupational requirement. In an earlier case, the Court had held that in general, a gender equality ombudsperson need not be a woman.[66] It is noteworthy that the expectations of third parties (immigrant women) were considered to justify a different treatment based on sex. The Court implicitly recognised the legitimacy of this expectation, which is grounded in the legally-protected interest in the protection of one's privacy.

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64 Documents of the Federal Parliament (*Bundestagsdrucksache*), No. 17/797 of 24 February 2010, proposal by the opposition party The Greens (*Bündnis90/Die Grünen*), http://dip21.bundestag.de/dip21/btd/17/007/1700797.pdf, last accessed on 16 April 2010.

65 Proposal for a Decision and Report of the Legal Committee (*Beschlussempfehlung und Bericht des Rechtsausschusses*), documents of the Federal Parliament (*Bundestags-Drucksache*) No. 17/1274, http://dip21.bundestag.de/dip21/btd/17/012/1701274.pdf, last accessed on 27 May 2010.

66 Federal Labour Court, judgment of 12 November 1998 (8 AZR 365/97), http://www.lexrex.de/rechtsprechung/entscheidungen/searchresults/391.html, last accessed on 7 April 2010.

Miscellaneous

Survey on gender equality measures in privately-owned companies

The Institute for Labour Market and Occupation Research (*Institut für Arbeitsmarkt- und Berufsforschung*, *IAB*) of the Federal Agency of Employment (*Bundesagentur für Arbeit*) presented its representative survey of companies carried out in 2008.[67] It reported no increase in the number of companies that have taken measures to increase equality of opportunities for men and women; as in 2002 and 2004, 90 % of the companies surveyed had not introduced any such measures. The 10 % that did take such measures are the largest German companies; they employ about 20 % of the female workforce. The survey shows the lack of effectiveness of the political agreement for the promotion of gender equality in the private sector entered into by the Federal Government and the top associations of German industry (*Spitzenverbände der deutschen Wirtschaft*) in 2001 to avoid legislation.

Atlas on Gender Equality in Germany

This atlas on Gender Equality is the first of its kind in Germany. It compiles data and statistics on 30 indicators of gender equality, such as the percentage of women in parliaments, universities or part-time employment and reproduces them in maps and tables.[68]

Comparison of gender pay gap in public and private sectors

The Federal Ministry for Family, Senior Citizens, Women and Youth published a study comparing the gender pay gap in the public sector and in private employment.[69] It finds a markedly higher pay gap in the private sector (for the reference years 2007 and 2008). Moreover, women are more present in higher wage groups in the public sector than in the private sector. According to the study, this may be due to better possibilities in the public sector for reconciling work and family life, or a better promotion of women's *de facto* equality there. Nevertheless, the study finds a need for further action in the public sector as well, for example in the field of education.

Expert opinion on prohibition of burka

The academic service of the Federal Parliament (*Wissenschaftlicher Dienst des Deutschen Bundestags*) reportedly produced an expert opinion on the question of whether a general ban of wearing a burka in public is constitutional.[70] The study was commissioned by a Member of Parliament. The Service finds that a general ban would violate the State's duty of neutrality in religious matters. Moreover, the State's duty to promote women's *de facto* equality does not justify a prohibition and is contrary to the wishes of the women concerned. In the opinion of the Service, a general ban on burkas would not become constitutional after a constitutional amendment because such

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67 http://doku.iab.de/forschungsbericht/2009/fb0409.pdf, last accessed on 14 December 2009.

68 http://www.sozialministerium-bw.de/fm7/1442/Gleichstellungsatlas%202.%20Auflage.pdf, last accessed on 27 May 2010.

69 Bundesministerium für Familie, Senioren, Frauen und Jugend (BMFSF) *Der Verdienstunterschied von Frauen und Männern im öffentlichen Bereich und in der Privatwirtschaft*, 2009, http://bmfsfj.de/RedaktionBMFSFJ/Abteilung4/Pdf-Anlagen/verdienstunterschiede-oeffentlicher-dienst,property=pdf,bereich=bmfsfj,rwb=true.pdf, last accessed on 27 May 2010.

70 Reported by the daily paper *Der Tagesspiegel* on 4 May 2010, http://www.tagesspiegel.de/politik/burka-verbot-waere-verfassungswidrig/1813524.html, last accessed on 27 May 2010. The study is not available on the website of the Service, http://www.bundestag.de/dokumente/analysen/2010/index.html, last accessed on 27 May 2010.

amendment would infringe upon the core of religious freedom, which derives from human dignity and hence cannot be changed by a constitutional amendment.

GREECE – *Sophia Koukoulis-Spiliotopoulos*

Policy developments

ECJ finds Greece in breach of Article 141 TEC regarding occupational pensions

In a judgment rendered on 26 March 2009 (Case C-559/97), the ECJ found Greece in breach of Article 141 TEC (now 157 TFEU), because it maintained in force provisions concerning different retirement ages and different minimum service requirements for men and women in the Greek Civil and Military Pensions Code, which is an occupational scheme. This judgment was followed by a wide and vivid debate on the measures that the Government should take in order to comply with it, the more so as a more general reform of the social security system is pending, which seems to be accelerated by the above judgment. Trade unions expressed their opposition to the increase of pensionable ages, while the Government, linking the social security reform with the financial crisis, called for a social dialogue on this issue and set up a Commission of Experts, which should propose solutions to all social security problems. However, no Bill relating to social security has yet been presented.

Women's NGOs demand gender equality measures to be taken simultaneously

Press conference of the Greek League for Women's Rights

On 8 February 2010, the Greek League for Women's Rights (GLWR) gave a press conference under the title *Proposals relating to imminent reforms: social security, employment, taxation*. The representatives of the GLWR stressed that the early withdrawal of women from the labour market does not solve their employment problems, which are reflected in social security, and that both men and women need support when they wish to start a family and raise children, something very difficult in view of the high youth unemployment and the precarious position of young persons on the labour market. Therefore, the social security reform should be a 'package' with measures ensuring effective gender equality and the harmonisation of professional and family obligations by both men and women. The representatives clarified that the ECJ judgment, and more generally Article 141 EC (now 157 TFEU), concerns only occupational schemes – not statutory ones, such as the scheme of the main social security agency for workers on a private-law contract (*IKA*).[71] They also underlined that no measure would be effective unless the mechanisms of control, in particular the Labour Inspectorate, are reinforced. They then went on to propose concrete measures that should accompany the social security reform.[72]

This press conference was attended by several journalists and representatives of other NGOs. The GLWR proposals were reported in the media and blogs.

Demands presented to competent ministers by twenty-eight women's NGOs

On 16 February 2010, on the initiative of the GLWR, a petition under the title *Petition of Greek women's organisations for measures for substantive gender equality to be*

[71] Organisation for Social Security (Ίδρυμα Κοινωνικών Ασφαλίσεων – *IKA*) governed by Act 1846/1951.

[72] See the GLWR website: www.leaguewomenrights.gr (in Greek), last accessed on 2 May 2010.

taken simultaneously with the regulation of pensions was signed by twenty-seven big women's NGOs and the Marangopoulos Foundation for Human Rights (MFHR).[73] It was addressed to the Minister of the Interior, the Minister of Finance, the Minister of Education, the Minister of Employment and Social Security and the Minister of Justice. After stressing that lower pensionable ages for women cannot be considered positive measures under the Greek Constitution (Article 116(2))[74] and EU law, the NGOs demanded measures that should constitute a 'package' with the social security reform, in particular measures by which inequalities to the detriment of women will be eliminated and the harmonisation of family and professional life by men and women will be achieved. A list of concrete demands regarding matters for which these Ministers are competent was included in the petition, such as the following:

Measures relating to employment
- the principle of equal pay for work of equal value must be effectively implemented, in particular through the equalization of wages paid in practice and the abolition of indirect discrimination against women;
- more professions where women are the majority and which are detrimental to their health must be labelled 'unhealthy', so that they enjoy the protection granted for 'unhealthy' professions, including earlier retirement;
- the effective exercise of the right of parents to parental leave in the public and the private sector must be ensured; examples of discrimination in law and in practice in both the public and the private sector were given and it was deplored that parental leave in the private sector is unpaid and pay is not replaced by state benefits;
- the number of crèches and kindergartens must be increased and their quality must be improved, while their schedules must be adapted to the parents' working hours.

The NGOs stressed that no measure in the field of employment can be effective unless the mechanisms of control, and in particular the Labour Inspectorate, are reinforced.

Measures relating to social security
- the ECJ judgment does not concern statutory schemes, such as the *IKA* (see above);
- EU law does not impose any method of pensionable age equalization; thus, for example, flexible pensionable ages may be provided, while specific lower pensionable ages may be maintained for constitutionally protected categories, such as widows/widowers having at least three children, divorced parents having the guardianship of at least three children, single parents or parents of handicapped children, provided that the retirement conditions are the same for men and women.

Measures relating to taxation
According to Articles 5 and 74(4) of the Income Taxation Code (ITC) (Act 2238/1994), although the income of each spouse is taxed separately, they must submit a common tax return and it is the husband that has to submit it to the competent tax authority. Spouses can (and must) each submit a separate tax return only if they are separated or if one of them has been declared bankrupt or is under tutorship. The certification of the tax due or the refund of a tax amount that corresponds to the wife's income is made in the name

[73] See the GLWR website: www.leaguewomenrights.gr (in Greek), last accessed on 2 May 2010.
[74] On positive measures under the Greek Constitution see *Greece*, in *European Gender Equality Law Review* No. 2/2009, pp. 55-57: http://ec.europa.eu/social/main.jsp?catId=641&langId=en, last accessed on 1 May 2010.

of the husband. This has led to several prejudices to the detriment of married women, such as the following:

– if the husband does not submit a tax return, the wife is liable to sanctions for tax evasion;
– if an amount of tax has to be refunded to the wife, it is considered that it is the husband who can cash it; the wife may cash it only if she presents a power of attorney by her husband to this effect.[75]

The NGOs, stressing the discriminatory effects of the spouses' obligation to submit a joint tax return, demanded that each spouse be enabled to submit her/his own tax return. The same demand had been submitted by the General Secretariat for Gender Equality (GSGE), a governmental agency established by virtue of Article 27(2) of Act 1558/1985 and currently under the Minister of Justice, whose mission is to plan, implement, and monitor the implementation of gender equality policies.

NGOs repeat call on competent ministers

On 27 April 2010, the GLWR and the MFHR wrote a new letter, on behalf of the twenty-eight NGOs, signatories of the petition mentioned above, to each of the Ministers to whom this petition had been sent, attaching to the letter the demands included in the said petition for which each Minister is competent. Recalling the NGOs' position that a possible increase of women's pensionable age must be part of a 'package' with the measures aimed at ensuring effective gender equality, the letter stressed that the measures proposed can contribute to the acceptance of the social security measures to be taken.[76]

Legislative developments

Amendment of Taxation Act

Meanwhile, Act 3842/2010 'on the re-establishment of justice in taxation and the combat against tax evasion',[77] although it does not abolish the requirement that spouses submit a common tax return, has amended Article 74 ITC (see above) to the effect that the certification of the tax due by each spouse must be made separately (Article 8(16) Act 3842/2010).[78]

This development, although it does not wholly respond to the demands of the GSGE and the NGOs, brings about an important improvement of the situation of married women as regards taxation.

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[75] On the discriminatory effects of the spouses' obligation to submit a common tax return see P. Petroglou 'The obligation of spouses to submit a common tax return constitutes direct discrimination against married women. Reflections on the occasion of the imminent tax reform' *Social Security Law Review* No. 2/613 (February 2010) pp.89-94.

[76] See the GLWR website: www.leaguewomenrights.gr (in Greek), last accessed on 2 May 2010.

[77] OJ A 58/23-4-2010.

[78] See press release of the GSGE dated 3 May 2010 (in Greek), on the GSGE website: http://www.isotita.gr/var/uploads/Press/03052010_neo_forologiko_nomosxedio.pdf, last accessed on 4 May 2010.

HUNGARY – *Csilla Kollonay Lehoczky*

Policy developments

Parliamentary elections in April 2010

Hungary had parliamentary elections in April 2010 and this dominated the previous six months, subordinating all issues to the elections and the election campaign. At the same time, the last efforts of the outgoing Government to improve some economic indicators of the country and its only measures regarding any gender issue were the continued attempts to improve the overall employment rate of the country with special regard to women through controversial measures.

This only resulted in the elimination of the already faint presence of gender issues in politics – most policy makers think of gender issues as a no-problem area. The programmes of the competing political parties simply did not address gender equality as a separate issue. In most party programmes, if women were mentioned, it was in connection with family policies to support the improvement of demographic changes. Even the *LMP*, a new party in Parliament, using the slogan 'Politics can be different' and becoming popular for their fresh, 'civilian' and 'green' approaches, and with a strikingly high proportion of women (5 out of 16) in their parliamentary fraction, made no mention whatsoever of gender issues in their programme, which devoted over 70 pages to a chapter on 'Strategy of an inclusive society'.

It is not yet known who will be in charge of employment matters, the number of Ministers having been decreased from 16 to 8. It is highly probable that it will fall under the Minister for Economic Affairs, who seems to be in favour of increasing the number of jobs, among other things, by flexibilization of employment contracts and conditions, increasing part-time employment, teleworking, and other atypical forms of employment. These options, in an optimistic interpretation, might create genuine opportunities for women but the impact yet remains to be seen.

Similarly, it might be interpreted as an encouraging sign that the Minister who will presumably be responsible for social matters talks about families, children and parents instead of mothers, i.e. contrary to the vocabulary used in the previous period, not automatically associating the issue of childcare with women. It remains to be seen whether this optimism regarding the approach to gender roles by the new Government is justified.

Legislative developments

No significant legislation or administrative regulation has been adopted in the last six months regarding gender equality.

The legislative Acts radically reducing childcare leave and increasing the pre-conditions for entitlement[79] entered into force on 1 May 2010 without changes, in spite of the strong criticism on them. The new Government has promised to abolish them immediately upon taking power. However, this seems to have been postponed until 2011.

These changes – and others tightening the availability of cash allowances – have triggered slight adjustments in the relevant social regulations (e.g. admitting children to pre-school before reaching the age of three, creating the otherwise unavailable regular

[79] Mentioned in the *European Gender Equality Law Review* No. 2/2009.

social assistance for persons with children under 14 who cannot accept work due to the local lack of childcare facilities, etc.)

Case law of national courts

Pay discrimination on ground of health condition

A late 2009 decision of the Supreme Court found discrimination on the ground of health condition, in a case that might an impact on cases of gender discrimination. An employer changed its wage policy and connected 1/3 of the previous salary to work evaluation and also to being present at least 85 % of the working hours. The employee, although meeting the quality requirements, was denied the 1/3 supplement because he was present less than 85 % of the working hours. The Court qualified this as unjustified discrimination on the ground of health.[80] The case might have an impact on cases in which absence due to a sick child was the reason for declining the payment of salary supplements, where, in the past, the courts found this type of measure reasonable when necessary for the efficient operation of the employer.[81]

Equality body decisions/opinions

Harassment of Roma woman by a Mayor

In September 2009 the ETA (Equal Treatment Authority) for the first time used its power to initiate an *ex officio* procedure, after a complaint from a member of the Roma minority self-government. This first case in which the ETA proceeded to use its own power was a case against a Mayor in a neighbourhood with a large Roma population. The Mayor made the allegation that some Roma women intentionally harmed their foetus in order to damage their mental or physical health with the purpose of drawing higher amounts of child allowance. The ETA found that this statement – which was then widely spread across the media by its opposition – violated the dignity of pregnant Roma women and Roma women in general and created a hostile and degrading environment for them, thus constituting discrimination in the form of harassment. The ETA ordered the cessation of the violation and, after the Court of the Capital City had turned down the appeal against the decision it acquired final and binding force.[82]

Wage discrimination by two employers in case of transfer

The ETA imposed fines on two employers when a female lawyer was paid 67 % less than her male colleague by the transferring employer and when this continued after the transfer by the transferee. The two new graduate lawyers were hired in a competition, with some time difference. While the transferor claimed a difference in the quality of work of the two employees this was not accepted by the ETA because both applicants met the requirements published in the competition advertisement and they were treated differently from the very beginning: the claimant and another female applicant (who left the firm) were informed that starters all received approximately EUR 700 and this

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80 *Kfv*.III.37.155/2009/6.sz.

81 See the case mentioned in *European Gender Equality Law Review* No. 1/2009, Hungary, court cases, second case.

82 *EBH* 1475/2009 sz. It might be added that while the decision received acknowledgement from equality groups and the Mayor's political party (*FIDESZ*) withdrew his candidacy for this office, the Mayor ran as 'independent' candidate in the elections, without party support and, defeating the other candidates, was elected to Parliament. He is now the sole independent representative in the new Parliament.

would be raised after the probation period (which was untrue). The male applicant, on the other hand, was asked about his pay demands, and was offered approximately EUR 1 200 (somewhat less than he had requested). This attitude during the interview was considered as discriminatory in itself and also in conjunction with putting the claimant into a lower wage category (for persons with secondary education) than the male starter (put in the category for higher education graduates in non-managerial position). It was clear from the facts of the case that the employer wished to prevent the claimant from obtaining information on the salary of the male colleague, but she was still able to ask him and obtain the information. The employer referred to language knowledge and length of experience on the side of the male. However, it was revealed that it did not check or reward such attributes in the same way for the female applicants.

The ETA imposed a fine of EUR 7 500 to the transferor and of about EUR 4 000 to the transferee. However, it could not award the back pay for the difference.[83]

Employment discrimination with regard to small child

A woman applying for a physical job (stitching) was rejected and she complained that it was due to her declaration on the application form that she had a child in pre-school and had declared lack of help in the family. The employer claimed another reason (unavailability of the woman for overtime and problems with the start of the working hours) and asserted that such information on the child and unavailable family help had not been requested, but was voluntarily declared by the applicant. However, its statements regarding the reason of rejection were inconsistent and evidence showed that the claimant worked under a similar work schedule at her former workplace. Furthermore, documentary evidence revealed that all women employed in the factory had given such information and all who were employed with a small child had declared the availability of help within the family. Thus, the ETA established that the refusal to hire her was due to her motherhood and this constituted unlawful discrimination under the Equality Act. The ETA imposed a fine of about EUR 2 000 and prohibited future discrimination.[84]

Sex and age discrimination in advertisement

A brasserie advertised the post of a bartender for female, preferably young applicants. Upon a claim from a civil organization, the ETA found sex and age discrimination and prohibited the discriminatory conduct for the future.[85]

Miscellaneous

Out of the 386 Members of Parliament elected for four years in April 2010, 35 in total are women. This is 9 %, the lowest percentage in the last twenty years. There are no women among the Ministers, and there are three women among the expected thirty secretaries of state in the eight Ministries.

[83] *EBH* 1363/2009. sz.
[84] *EBH* 43/2009.sz.
[85] *EBH* 1054/2009.sz.

Policy developments

A new plan of action against gender-based violence was introduced by members of the Government on the international day of women's rights on 8 March 2010.[86]

The Prime Minister in a speech at the Shelter for Women celebrating its 20th anniversary introduced the intended action plan.[87] She said that the Government was firm in its decision underlying the cooperation agreement of the government parties to incorporate an action plan against human trafficking. According to an amended provision of the general penal law it is illegal to pay for prostitution.[88] At present, there are plans to adopt the so-called Austrian model of protection against domestic violence (as a matter of public concern, law and order and not as a private matter) and likewise to abolish exemption clauses allowing 'nudity places' to operate on exemptions.

The new action plan, according to the Prime Minister, is under construction and is intended to be effective for the years 2011-2015. The future Council of Europe Convention on preventing and combating violence against women and domestic violence constitutes the framework and the Government intends to sign it no later than in early 2011. The Council of Europe Convention is comprehensive and entails various positive obligations for its states parties to protect women against any kind of violence, to strengthen the provisions of the penal codes, to educate professionals in dealing with violence and provide remedies for victims, improve treatment for perpetrators, increase research and the collection of data.

The Government has decided to present a fully-fledged action plan on the legendary Iceland *women's day off* on 24 October 2010, when 35 years have passed since all Icelandic women stopped work and gathered together in the centre of Reykjavík in 1975.

Legislative developments

No relevant legislative developments have occurred during the period under review.

Case law of national courts

Paternity leave

Straumur Investment Bank appealed the decision of a District Court which held that the bank had violated the Act on Maternity/Paternity Leave No. 95/2000 in a case of a former male employee. The District Court ruled in favour of the claimant in his claim of order of priority for his claim of a certain amount during the insolvency process of the bank. The claimant asserted that his dismissal had been a violation of Article 30 of the Act on Maternity/Paternity Leave, which does not permit to dismiss an employee due to the fact that he has given notice of intended paternity leave under Articles 9 and 26 of the Act without reasonable cause. The parties to the case disagreed on the cause of the dismissal. The Investment Bank maintained that other reasons than the intended paternity leave were behind the dismissal. In this case, the appellant bore the burden of proof that unlawful reasons did not motivate them. The dismissal was in writing and stated the financial crisis as the cause compelling the bank to dismiss employees. Due to

[86] http://www.felagsmalaraduneyti.is/frettir/frettatilkynningar/nr/4895, last accessed on 3 May 2010.
[87] http://www.forsaetisraduneyti.is/frettir/nr/4192, last accessed on 3 May 2001.
[88] Article 206 amended by Law no. 54/2009, adopted on 17 April 2009.

huge losses preceding and in the wake of the collapse of the banking system in Iceland, the bank was forced to resort to such measures as discharging employees in an attempt to reorganize its operation. The Supreme Court held that in light of the bank's reasoning of the necessity of discharging employees, due to the collapse of the banking system, it had been permitted to dismiss the defendant.

Appointment of associate professor

The Centre for Gender Equality on behalf of an employee in a case against the University of Iceland[89] initiated legal action to seek court recognition that the University had violated the Gender Equality Act in not appointing a female applicant as associate professor. The claimant sought redress on behalf of the female computer engineer who had applied for the position of associate professor. Out of four applicants for the post in the computer engineering sector in the engineering department of the University, an evaluation committee held that two were qualified, the said female applicant and a male applicant whom the Faculty Board preferred. The Rector of the University asked for more substantial reasoning underlying the choice for the male applicant and not the equally qualified female applicant. After receiving the Faculty Board's opinion, the Rector confirmed their choice. The Centre for Gender Equality on behalf of the female applicant brought charges against the University of Iceland and demanded compensation for the woman. The Supreme Court held in its decision that the reasoning of the Faculty Board had not been based on illegitimate grounds when placing emphasis on the teaching experience of the male applicant. The reasoning had been sufficiently objective and there had been no violation of administrative procedural principles or the then prevailing law on gender equality.[90]

Equality body decisions/opinions

Equal pay for equal work

The Gender Equality Complaints Committee delivered a ruling on 11 November 2009 finding Kaupthing Bank in breach of the wage equality provision of the Gender Equality Act No. 10/2008, which states that women and men working for the same employer shall be paid equal wages and enjoy equal terms of employment for the same jobs or jobs of equal value. By 'equal wages' it is meant that wages shall be determined the same way for women and men. The criteria on the basis of which wages are determined shall not involve gender discrimination. Workers shall at all times, upon their choice, be permitted to disclose their wage terms.[91]

The female applicant worked as an investment advisor in the bank from early 2005 and from the end of that year as an advisor to professional investors. She was dismissed in October 2008. The woman claimed that a male colleague doing the same job had enjoyed significantly higher wages. Therefore she claimed that the bank had violated Article 25 of the Gender Equality Act which prohibits discrimination regarding terms of employment, stating: Employers must not discriminate between men and women in wages and other terms of employment on grounds of their gender. If likelihood is adduced, that a woman and a man working for the same employer receive different wages for the same work, or for work of equal value, then the employer shall

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89 *Hrd.* 25/2009, 15 October 2009; Centre for Gender Equality on behalf of Anna Ingólfsdóttir against the University of Iceland.

90 Gender Equality Law No. l 96/2000 replaced by Gender Equality Law No. 10/2008 which became effective on 6 March 2008.

91 Case No. 2/2009. *A gegn Kaupþing banki hf.*

demonstrate, if there is a difference in their wages, that the difference is explained on grounds other than their gender.

The bank rejected the claim that the difference in wages was based on gender discrimination but maintained that the jobs they were doing had not been 'of equal value' due to different backgrounds; the male employee had higher education, more job experience and had been doing the job for a longer time. The Complaints Committee's ruling was that the respondent bank had succeeded in proving that the difference in wages was based on objective and reasonable grounds. However, the respondent bank was found to have discriminated against the female employee as it had not been able to prove that a huge difference in terms of employment (bonus payments) during 2006 had been based on other factors than gender.[92]

The rulings of the Gender Equality Complaints Committee are binding for parties to each case. The Committee's rulings cannot be referred to a higher authority.[93] The Gender Equality Complaints Committee may decide that the party against whom the complaint is directed is to pay the claimant the costs of bringing the complaint before the Complaints Committee, providing that the Committee's conclusion is in the claimant's favour. If a ruling of the Gender Equality Complaints Committee is in the claimant's favour but the respondent does not accept the Complaints Committee's ruling and brings an action to have it annulled by the courts, the claimant's legal costs, both at the District Court and the Supreme Court level, shall be paid by the Treasury.[94]

IRELAND – *Frances Meenan*

Policy developments

National Strategy on Domestic, Sexual and Gender-based Violence 2010-2014

On 9 March 2010 the Minister for Justice, Equality and Law Reform launched its first-ever National Strategy on Domestic, Sexual and Gender-based Violence.[95] The strategy will operate over a five-year period between 2010 and 2014. The Strategy sets out a plan for 'whole-of-government' action involving six government departments, their agencies and up to 100 non-governmental organisations. The strategy aims to provide a strong framework for sustainable intervention to prevent and effectively respond to domestic, sexual and gender-based violence. The Strategy identifies four high-level goals which it seeks to achieve, namely to promote a culture of prevention and recognition through an increased understanding of domestic, sexual and gender-based violence; to deliver an effective and consistent service to those affected; to ensure greater effectiveness of policy and service planning; and to ensure efficient and effective implementation of the strategy.

Gender balance on state boards

As part of its gender equality objective, the State has for a number of years committed itself to achieving 40 % female representation on all State Boards and committees under the aegis of each of the government departments. In December 2009, Ministers

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92 Case No. 2/2009. *A gegn Kaupþing banki hf.*

93 Cf. Article 5 of the Gender Equality Act No. 10/2008.

94 Cf. Article 5 of the Gender Equality Act No. 10/2008.

95 http://www.justice.ie/en/JELR/Final%20Electronic%20NS%20full%20doc%203%20March.pdf/Files/Final%20Electronic%20NS%20full%20doc%203%20March.pdf, last accessed on 28 April 2010.

reaffirmed their commitment to increasing the level of female participation in decision making towards the internationally recommended norm of 40 %. All Ministers agreed to take proactive measures in departments in order to achieve that target for female participation on State Boards.

Legislative developments

Civil Partnership Bill 2009

The Civil Partnership Bill 2009[96] proposes to introduce a civil partnership scheme for same-sex couples together with a variety of rights, obligations and protections. The Bill further provides for a regime for dissolution of such partnerships mirroring the laws on judicial separation and divorce. In addition the Bill allows for certain redress to be made available to co-habiting couples who are not married or registered in a civil partnership including maintenance, property or pension adjustment orders or provisions from the estate of a deceased cohabitant. The Bill also proposes to substitute the term 'civil status' for 'marital status' throughout the Employment Equality Acts 1998-2008. This will have the effect of extending the prohibition on discrimination on the grounds of marital status to prohibit discrimination based on a person being in a civil partnership or formerly in a civil partnership which has been dissolved. There are similar provisions for the Equal Status Acts 2000-2008.

At the time of writing the Bill has passed the First and Second Stages of the legislative process and is currently being debated before the Select Committee on Justice, Equality and Law Reform.

Guardianship of Children Bill 2010

The Guardianship of Children Bill 2010[97] was introduced to the *Oireachtas* by means of a Private Members Bill on 1 April 2010 and is currently at the Second Stage in the legislative process. The Bill provides for automatic guardianship right for both the natural mother and father of any child born after the passing of the Bill irrespective of marital status. The Bill further substitutes new Sections 11A and 11B into the Guardianship of Infants Act 1964 which provide for a presumption in favour of joint custody and the child's right of access to both of its parents, grandparents and person acting *in loco parentis*. Finally, the Bill would also provide for automatic registration of the father on the birth certificate unless there is an objection by either parent. If an objection is raised, the Registrar of Births, Deaths and Marriages must refer the matter to the District Court for directions.

Female Genital Mutilation Bill 2010

The Female Genital Mutilation Bill[98] was presented to the *Oireachtas* on 15 April 2010 by means of a Private Members' Bill. The Bill states that it shall be an offence to perform any procedure for the genital mutilation of any woman or girl. The Bill does not allow for any defence of consent to the procedure and any such procedure will only be lawful where it is shown that the procedure was carried out by a registered medical practitioner and that he honestly believed on reasonable grounds that such a procedure was necessary to safeguard the life or health of the woman or girl concerned or to correct a genital abnormality or malformation. The Bill further proposes to have extra-territorial effect and any procedure carried out outside of the State may be prosecuted

[96] No. 44 of 2009.
[97] No. 13 of 2010.
[98] No. 14 of 2010.

under this Bill where the person concerned is a citizen of Ireland or is ordinarily resident in Ireland. Upon conviction on indictment a person is liable to a fine or imprisonment for up to 14 years, or both.

Case law of national courts

Unequal treatment under sexual offences legislation

In *D (M) (a minor) v Ireland and Others*[99] *the* applicant was charged under Section 3 of the Criminal Law (Sexual Offences) Act 2006[100] with having sexual intercourse with a child under the age of 17. The applicant was aged 15 at the time of the alleged offence and the girl was aged 14. Under Section 5 of the Act a female child under the age of 17 will not be guilty of an offence under the Act by reason only of engaging in an act of sexual intercourse. The applicant brought a High Court challenge claiming that the exclusion provided for under Section 5 of the 2006 Act breached his right to equality before the law.

In holding against the applicant, Dunne J. found that the immunity provided to female children did amount to discrimination on the ground of gender. Nonetheless, she found that Article 40 Section 1 of the Constitution did allow for discrimination founded on difference of capacity or social function provided such measures were not invidious, arbitrary or capricious. She pointed out that the immunity extended only to the limited set of circumstances where full sexual intercourse has taken place. She further pointed out that the legislation provided for immunity only from the one area of sexual activity that can result in pregnancy, the risk of which is only borne by girls. Accordingly, she held that in deterring such activity the State was entitled 'to place the burden of criminal sanction on those who bear the least adverse consequences of such activity'. Accordingly, she held that the immunity went no further than necessary to achieve its objects and refused the applicant's claim.

Conditions of employment and access to promotion

The claimant argued before the Equality Tribunal that she had been discriminated against on the grounds of gender in relation to the conditions of her employment and access to promotion. She further argued harassment on the same ground and that she was victimized for bringing her claim. She had commenced working with the respondent in 1971. Following her return from a career break in 2003 she claimed she was placed in a 'dummy' job and that a less experienced and less qualified younger man was being groomed to take over the promotion she would have expected to obtain in the normal course. She maintained that when a number of promotion opportunities arose in the summer of 2003 her immediate supervisor discouraged her from applying for the roles, suggesting a different role instead.

On accepting the other role she became concerned that she was being frozen out of the mainstream of the marketing department. A job specification for her role was not agreed until June 2004, she did not receive any increase in remuneration, she was allocated no budget and her promotion was never formally announced. She further contended that any tasks assigned to her were below her competences and that she was not involved in any marketing team meetings. She pointed out that the only meetings she attended during this time were with her immediate supervisor and the Human Resources Manager. There were no disciplinary issues and she contended that these

[99] [2010] I.E.H.C. 101.
[100] No. 15 of 2006.

meetings were designed to intimidate her into leaving the company. At a meeting on 22 October 2004 after a number of questions which the claimant believed to be discriminatory she was offered an exit package. The claimant refused this offer. She contended that in response to this refusal the respondent tried to freeze her out of the company by first cancelling her subscription fees and other expenses owing to various professional marketing and transport institutes. When a promotion opportunity arose which the claimant was interested in, she was obstructed in a number of ways and ultimately excluded from the interview process. The post was ultimately awarded to a younger male candidate. The claimant was of the view that she was more qualified than him.

She also pointed out that she was excluded from the respondent's table at a function in circumstances where all other male employees were invited to sit at the table. The claimant was left feeling distressed and humiliated by this incident.

The Equality Officer held that having regard to the presence of the Human Resources Manager at meetings in the absence of any disciplinary issues, the non-payment of subscription fees, the refusal to sign off on annual leave and expense claims and the exclusion of the claimant from the respondent's table at a function, that a *prima facie* case of discrimination had been established which had not been rebutted. The claimant was awarded EUR 126 000, being two years' salary, for the effects of discrimination and EUR 63 000, being one year's salary, for the effects of victimisation.[101]

ITALY – *Simonetta Renga*

Policy developments

Gender mainstreaming and centre-right policies: the trade-off between jobs and fundamental rights

As regards general labour law, the centre-right Government has introduced legislative interventions in the labour market which seem to be more and more inspired by the logic of 'exchanging' the increase of the percentage of employment with a 'loosening' of workers' protection. These changes mainly affect the weaker part of the labour market, including women. In particular, the reduction of the average level of workers' protection, together with the serious economic crisis in Europe and the consequent further increase of unemployment, tend to marginalize all issues regarding people's fundamental rights to the advantage of the main issue of finding a job, whatever it is. So equal opportunities also run the risk of being perceived as luxury policies by the workers themselves.

A recent Bill of the Government, finally approved by the Senate on 3 March 2010 and including a wide range of amendments also on labour disputes and the rules regulating labour relationships, is a good example of this phenomenon.[102] The Bill was sent back to Parliament by the President of the Republic, who very rarely exercises this power. The President, considering the extreme heterogeneity and complexity of these provisions, which have an undoubted social impact, invited the Parliament to a further

[101] *Z v A Transport Company* DEC-E2009-105.

[102] See http://www.senato.it/leg/16/BGT/Schede/Ddliter/34862.htm, last accessed on 2 May 2010, for a dossier on the legislative procedure and http://www.dplmodena.it/29-04-10DDLCollegatoLavoro.htm, last accessed on 2 May 2010, for the last version of the text approved with amendments by one chamber of Parliament on 29 April 2010.

examination of the text so as to achieve a reasonable aim of reform within a framework of clear guarantees and a better balance between legislation, collective agreements and individual contracts.[103]

In particular, one of the hot topics in the reform is the introduction of arbitration as a private and alternative form of justice, which may be accepted by the worker at the beginning of the working relationship. This provision has been strongly criticized by one of the major trade unions (*CGIL*) as at the moment of recruitment, when his will is not really free, the worker cannot give up the fundamental right of access to justice provided by Article 24 of the Constitution. This type of promotion of private justice would represent a dangerous attempt affecting all other workers' rights. This could especially affect women who would probably suffer from the reform both as particularly weak contracting parties (considering that their unemployment percentage is particularly high) and as subjects with a higher risk of suffering unfair treatment, as they show to be very reluctant to bring discrimination cases to court through the regular free instruments of public justice.

Following the reassessment requested by the President of the Republic, the enforcement of this rule will probably be excluded for disputes on unfair dismissals as already provided by a Common Declaration signed by trade unions (except *CGIL*) and the Government before and in expectation of the issue of the Decree. Nevertheless, similar criticism could still be addressed to this rule as regards all other disputes about working conditions.

The Decree includes many other provisions, e.g. regarding the rules of leave and time off for disabled workers, the time limit for judicial action, the limit of judicial control of unfair dismissal and transfer, the limits to the awarding of damages in cases of nullity of a fixed-term contract, which is a large and remarkable change in the rules in force which can also have a certain impact on female employees, a high percentage of whom are employed in precarious jobs.

No gender mainstreaming seemed to have influenced the text. It is true that the discussion of this Bill began many months ago, when the new provision of Decree No. 5/2010 amending Article 1 of the Code for Equal Opportunities, stipulating a general obligation to take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities at all levels and by all subjects/actors, was not in force yet.

Certainly, the strong under-representation of women in politics, which was confirmed once again by the results of recent administrative elections (13.3 % of female representatives on average in the Regional Council, but with no female representatives in certain regions in the South of Italy such as Calabria), actually does not help the promotion of gender mainstreaming. On this point however, 'good news' can be recorded as regards an initiative announced by the National Equality Adviser: a taskforce on equal opportunities, in which trade unions, the Network of Equality Advisers, employers' associations, lay and religious associations and the competent Minister and Local Authorities can join forces.[104] Towards this goal, the taskforce asks all subjects involved to sign the Chart for Equal Opportunities and Equality at Work, which was launched in Italy in 2009 following the similar successful initiatives promoted in France and Germany. It is a declaration of intent, signed by several organizations of all dimensions, to achieve and spread human resources policies free of

[103] Message of the President of the Republic to Parliament, published on http://www.senato.it/service/PDF/PDFServer?tipo=BGT&id=472803, last accessed on 30 April 2010.

[104] http://www.italiannetwork.it/news.aspx?ln=it&id=17720, last accessed on 2 May 2010.

all types of discrimination and aimed at making the most of different talents. Although the taskforce is still a vague project and involves the common risks of 'all-inclusive' initiatives, the realization of the idea of all subjects in different fields joining 'forces', of giving prominence to equal opportunities issues and of opening a debate on neutral and specific legislative interventions to be analysed would surely be an important step in the enforcement of equal opportunities policies.

Another positive sign to be recorded is the presentation in Parliament of three interesting Bills on the introduction of a quota system for the appointment of managing directors of listed companies, where at present in Italy women cover only 2.1 % of places on company boards.[105] The texts of the Bills are very similar and are aimed at ensuring a balance in gender representation in the boards of directors by providing that female directors shall not be less than one third of their male colleagues in listed companies. This compulsory measure is highly criticised and its supporters have already answered the expected objection regarding the shortage of qualified female directors: a personnel analysis conducted by the Professional Women's Association prepared a list of 73 women 'ready for board'. Nevertheless, women involved in the promotion of equal opportunities, such as the economist Fiorella Kostoris, also underline the opportunity to promote measures that do not affect the freedom of choice of shareholders, such as the 'comply or explain' method, i.e. the possibility to ask for an explanation when only few women are candidates. Although neither political parties nor the press highlighted these Bills, and although the pressure for the adoption of weaker measures (more appreciated but perhaps not as efficient as compulsory ones) will probably prevail, the existence of a debate promoted by different political parties on this subject is already a success in itself and hopefully shows new attention for this issue.

Legislative developments

The implementation of the Recast Directive

The Government recently passed Decree No. 5 of 25 January 2010, which implemented the Recast Directive. The Decree was approved some months after the deadline for the implementation of Directive 54/2006/EC but finally ensured an overall positive accomplishment of this task.

Article 1 of Decree No. 5/2010 provides for several amendments of the Code for Equal Opportunities. The title of Article 1 of the Code now refers not only to the ban on discrimination but also to equal opportunities between men and women as well as to gender mainstreaming. Then, the text of the Article provides for a general obligation to take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities at all levels and by all subjects/actors.

The Decree also introduces some slight changes aimed at improving the efficacy of the equality bodies' action, although within the present budget constraints. New tasks are entrusted to the National Equality Adviser, which is to conduct independent surveys, publish independent reports and make recommendations on the implementation of gender equality. The tasks of the Equal Opportunities National Committee (EONC) have been integrated and specified as well. As regards the evaluation of the positive action plans by the EONC, which is a crucial step in the effective implementation of equal opportunities, the Decree provides a method which enables an objective and technical assessment. The Decree also entrusts the EONC with

[105] http://www.italiannetwork.it/news.aspx?ln=it&id=17513, last accessed on 2 May 2010.

the task of stimulating social dialogue on equality issues; the EONC is then required to exchange information with the EU bodies that operate in the field of equal treatment and to promote the dialogue with non-governmental organizations.

Further remarkable changes regard the notion of discrimination and in particular Article 25 of the Code for Equal Opportunities; here less favourable treatment related to pregnancy, motherhood or fatherhood, also adoptive, as well as to the respective rights, are finally considered as direct gender discrimination. Similarly, less favourable treatment based on a worker's rejection of or submission to harassment or sexual harassment shall be considered discrimination under Article 26, as amended by the Decree.

The Decree introduces some minor changes as regards the ban on discrimination in access to work, which now more clearly includes professional training, career and all working conditions. Similarly the ban on discrimination related to marital or family status or pregnancy is also extended to motherhood and fatherhood, also adoptive.

As regards social security, the Decree extends the ban on direct and indirect discrimination to occupational pensions.

Several provisions regard remedies and defence of rights. In this area, there were no gaps in the implementation of the EU Directive; the changes are therefore aimed at strengthening their effectiveness.

A further step towards the full implementation of the EC Directive was taken by giving associations and organisations which promote gender equality the competence to take action in individual judicial procedures on behalf of the claimant.

As regards victimisation, the EC provision has been transposed in a very wide meaning. Judicial remedies provided by the Code have been extended to employees and all other persons who are victim of detrimental treatment by their employer in reaction to obtaining compliance with the principle of equal treatment between men and women.

A 'weak' transposition regards the prevention of all forms of discrimination. Indeed, the new Article 50-bis of the Code merely provides that collective agreements can adopt specific measures, including guidelines and codes of best practice, but does not mention any kind of incentive for it.

Equalization of pensionable age of men and women in public employment

Act 3.8.2009, No. 102 equalizes the pensionable ages of men and women in the civil servants sector, following C-46/07 of the Court of Justice (*Commission v Italy*). The rule, however, will only be fully operative in 2018. Before that time, for women the pensionable age will be increased, starting from 2010, by one year every two years. To put it differently, for women the pensionable age will be fixed at 61 in 2010, at 62 in 2012, at 63 in 2014, at 64 in 2016 and at 65, thus equalling that of men, in 2018.

The pensionable age of 60 years, which includes the right to carry on working until the age set for men, is still applied to those women who fulfilled their contributions and age conditions before 31 December 2009.

Moreover, according to Article 22, from 2015 on, every 5 years, the pensionable age will be increased for all, men and women, in proportion to the increase of the life expectancy registered by the National Statistics Institute and validated by Eurostat. The mechanisms of this adjustment are not clear, as they are due to be enacted through a regulation of both the Ministry of Labour and that of Economy and Finance; Article 22 only provides a ceiling in the 2015 pensionable age increase of three months.

It must be indicated that the equalization has taken place by way of increasing the pensionable age of women up to the limit provided for men rather than the opposite.

Thus the equalization has a negative effect, as could have been predicted given the budget constraints and the progressive increase of life expectancy in Europe.

Case law of national courts

Night work and family care

A judgment of the Tribunal of Civitavecchia of 14 July 2009, recently published,[106] ruled for the first time on Article 53 of the Code for the Protection of Motherhood and Fatherhood,[107] which stipulates the right not to perform night work for working mothers of children up to three years old or alternatively for fathers, if the parents live together; for working mothers or fathers who are single parents taking care of children up to twelve years old living with her/him; and for female or male employees who take care of a seriously disabled person.

The case, brought to court by an air hostess of the national airline, focused on the interpretation of the concept of 'right not to perform night work'.

According to the worker - who had signed an individual agreement accepting work shifts covering 24 hours at the beginning of the relationship - the right not to perform night work involves that the worker can always refuse it, as the clause of the individual agreement cannot invalidate a right which could not yet be claimed at the moment of the signature.

The ruling of the Tribunal of Civitavecchia, by contrast, finds the contractual clause absolutely clear, considering the characteristic of air freight and the specific organizational needs of the business. The clause is regarded as consistent with the level of protection provided by Article 53 of the Code and involves that the worker who had already accepted to perform the job on shifts including night work is not allowed to refuse it.

The judgment shows a very strict interpretation of the provision. It discloses all the risks of policies of 'giving rights' instead of 'introducing bans' for such delicate subjects. The choice of the Tribunal, which ruled that the right not to perform night work is 'waived' by the worker by signing a clause at the beginning of the working relationship, caused some confusion on the effectiveness of the protection provided by Article 53. Nevertheless, it must be said that the judgment was published in a very short extract and it is not fully clear whether the claimant was already aware of the conditions provided by Article 53 when she signed the clause. Actually a realistic choice of accepting or refusing night work can be made only when the worker is in a relevant family situation and the decision of the Tribunal would seem to deprive the right from its effectiveness.

Equality body decisions/opinions

The case of the 'showgirls' of Trenitalia

During the selection procedure for the staff of the Bologna Eurostar Club Service of Trenitalia, the Italian railway company, only young, good-looking girls were employed with just a few years of experience. At the same time, men and older women who were working at this service were invited to change position within the company and those

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[106] Tribunal of Civitavecchia, 14 July 2009, published in *Rivista Giuridica del Lavoro e della Previdenza Sociale* (2009) p. 821.

[107] Decree No. 151 of 26 March 2001 on the Sustenance of Motherhood and Fatherhood, published in OJ N. 96 of 26 April 2001, http://www.parlamento.it/leggi/deleghe/01151dl.htm, last accessed on 2 May 2010.

who did not accept the change were transferred to the ticket office. The Eurostar Club is a reception service with dedicated facilities for clients owning special cards. Trade unions asked the company for a consultation on the issue, but received no answer. In the end, the trade union *FILT-CGIL* brought the case before the regional Equality Adviser of Emilia Romagna, Rosa Maria Amorevole, asserting collective gender discrimination.

The local Newspaper *Corriere di Bologna* reported on the case and decided to launch an opinion pool on the issue, asking people if, in their view, discrimination had been involved or if it is up to the company to choose its workforce according to the characteristics, even aesthetical ones, of the applicants. At the time of writing, 56 % of 907 voters think that there has been discrimination and 44 % think that it is up to the company to freely choose its workers.

Sticking to the terms reported by the *Corriere di Bologna* and by trade unions, the selection procedures for access to employment of Trenitalia appear to be discriminatory on grounds of gender and age, according to our legislation. The same goes for the invitation to change position or the transferral to other services of men and older women working at the Eurostar Club, which amounts to discrimination in working conditions.

The Equality Adviser is now preparing the case and then, if she is convinced of the existence of collective gender discrimination, she can either promote a conciliation between the parties or bring the case to court.

A group of labour law scholars and experts on equal opportunities declared as definitely inappropriate the launching of an opinion pool on the issue. To this end, a letter of complaint has been sent to the Editors of the *Corriere di Bologna, La Repubblica, l'Unità, il Manifesto* and relevant websites. The letter stresses, in the first place, that the discriminatory nature of certain conduct has to be evaluated by the competent bodies and not by the popular feelings of non-expert persons. Moreover, it is emphasised that, although legislative choices and policies can obviously be a matter for public discussion, the same cannot be applied to the legal qualification of facts. Finally, the letter confirms that the workers' dignity and professionalism call for a decision to be delivered on the issue at a conciliation level or as a result of legal proceedings, rather than through opinion pools.

LATVIA – *Kristīne Dupate*

Legislative developments

In the second half of 2009 and early 2010 there have been several important legislative developments concerning the implementation of EU gender equality law.

Employment

On 4 March 2010, Parliament (*Saeima*) adopted amendments to the Labour Law.[108] These amendments were discussed by the social partners and MP's for two years. Several of the amendments concern EU gender equality law, ensuring more precise implementation of Directives 2002/73 and 2006/54.

The amendments delete the words 'in comparable situation' from Article 29(6) providing the definition of indirect discrimination, thus bringing it into line with the requirements of EU law. This amendment was made due to the infringement procedure

[108] Official Gazette (OG) No. 47, 24 March 2010.

initiated by the Commission in June 2009. Article 29(5) is amended by including the express provision stating that any less favourable treatment on the grounds of pregnancy, maternity or paternity leave has to be considered as direct discrimination. Article 152(1) providing for periods of absence which must be included into the employment period granting the right to paid annual leave has been amended by the right to paid annual leave for fathers, or adoptive parents, who take care of their child until the 70th day after its birth, in the event of the mother's death or inability to take care of her child.

However, some of the amendments do not correct all imprecisions with regard to the implementation of EU gender equality law. Articles 60 and 95 providing for equal pay and the equal treatment principle, respectively, will provide for an extended term for bringing a claim before court. Instead of the currently provided month, the term will be three months. However, taking into account that the general term for claiming a violation of employment rights provided by Article 31(1) is two years, it is clear that even this extended term is incompatible with the principle of procedural equivalence under EU law. Article 101(11) will allow employers to dismiss an employee on account of long-term incapacity for work, which is currently prohibited. With regard to sex equality there is an obvious shortcoming, because Article 101(11) does not explicitly prohibit dismissal on the grounds of absence due to pregnancy-related illness. In addition, the amendments do not include any solution for provisions on the calculation of the average salary which under certain circumstances may be discriminatory against workers who due to pregnancy-related illness, maternity leave and childcare leave could not perform work during a period of 12 months. The 'Informative Reference'[109] to the Labour Law is to be amended by including a reference to Directive 2006/54. This means that the legislator considers Directive 2006/54 to be fully implemented by the current amendments, while actually there are gaps in the implementation of not only Directive 2006/54 but also Directive 2002/73.

Access to and supply of goods and services

On 8 September 2009 the Cabinet of Ministers adopted Regulations No.1002 'Regulations on the use of differential treatment in the determination of insurance premiums and insurance indemnities'.[110] Regulations No.1002 were adopted on the basis of Article 5^1 of the Law on Insurance Companies and their Supervision.[111] Regulations No.1002 allow the determination of insurance premiums and insurance indemnities according to sex as a determining factor in life insurance. They provide that differential treatment is allowed starting from 1 October 2009. It follows that the legislator considered that the use of actuarial factors was prohibited before 1 October 2009. Such a strange provision indicating that any use of actuarial factors was prohibited in Latvia for some time was included due to the fact that the use of actuarial factors was indeed prohibited as from 5 March 2009, when Article 5^1 of the Law on Insurance Companies and their Supervision came into force. This allowed the use of actuarial factors on the basis of regulations of the Cabinet of Ministers only, which had not been adopted then. The second concern with respect to the compatibility of implementing measures regards time limits of notification on the retention of actuarial factors. According to Article 5(2) of Directive 2004/113, Latvia was under the obligation to notify the Commission on such a decision before 21 December 2007.

[109] An 'Informative Reference' is included the end of each national law implementing any of the EU directives. It provides which EU directives particular law implements

[110] OG No. 145, 11 September 2009.

[111] OG No. 35, 4 March 2009.

Latvia failed to do so. Third, Article 5(2) of Directive 2004/113 permits proportionate differences in premiums and benefits which are based on accurate actuarial and statistical data. Regulations No.1002 do not provide for any proportionality indicator, nor do they refer to accurate actuarial and statistical data.

Self-employed persons

On 25 February 2010 *Saeima* adopted amendments to the Law on prohibition of discrimination of natural persons performing economic activities.[112] The amendments provide protection for natural persons with regard to the access to self-employment and were adopted to avoid a further infringement procedure against Latvia on improper implementation of Directive 2002/73. A specific amendment concerns the implementation of Article 3(1)(a) of Directive 2002/73.

Case law of national courts

Case law of the national courts demonstrates a lack of understanding of the concept of indirect discrimination. A particular case concerns Directive 79/7 with respect to indirect discrimination in statutory social insurance with respect to the entitlements related to childcare.

In Latvia, the right to statutory social insurance allowances and their amount depends on contributions made to the statutory social insurance budgets in the periods preceding the origination of the social risk (for example unemployment, sickness). During parental leave, the State insures the parent instead of himself/herself, but in a minimal amount, as if the parent earned a gross monthly salary of only EUR 70 (LVL 50). Consequently, if, for example, unemployment occurs in a particular period after this childcare leave, the person involved is entitled to an unemployment allowance in a minimal amount.

This legal regulation and its application is currently being contested before the Administrative Court. A particular claimant was fired two months after she returned to work after parental leave. Although her regular monthly earnings were EUR 1 422 (LVL 1 000) and normally her unemployment allowance should have been 50 % of her salary (EUR 711 or LVL 500), for the purposes of the calculation of unemployment allowance the six preceding months are taken into account and four months of those coincided with her parental leave, meaning that her unemployment allowance only amounted to EUR 512 (LVL 360).

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 any exceptions as provided by Article 7(1)(b) of Directive 79/7. On 3 July 2008 the Administrative District Court dismissed her claim.[113] Recently, on 26 February 2010, the Administrative Regional Court also dismissed the claim entirely.[114] Both decisions provide the same argumentation: since both sexes enjoy equal rights to parental leave there was no discrimination. Reference to the definitions of indirect discrimination provided by Article 2^1 of the Law on Social Security and Article 4(1) of the Directive 79/7 as

[112] OG No. 43, 17 March 2010.

[113] Decision in case No. A42522707; A22847-08/3, available in Latvian on www.tiesas.lv, last accessed on 28 April 2010.

[114] Decision in case No. A42522707; AA 43-0071/10/6 available in Latvian on www.tiesas.lv, last accessed on 28 April 2010.

interpreted by the ECJ, for example, in the decision in Case *Commission v Belgium*,[115] were not taken into account. The Court also ignored that on 5 July 2007, the Ministry of Welfare in a press release admitted that the right to unemployment allowance is less favourable for women, since they constitute the majority of persons who use rights to parental leave.

LIECHTENSTEIN – *Nicole Mathé*

Policy developments

***Exhibition on balancing work and family*[116]**

The Office for Equal Opportunities has recently created an exhibition presenting information on balancing work and family life, which can be rented by firms and is then installed for a certain period in the firm. This exhibition will create opportunities in the firms to address several issues regarding gender equality and will initiate discussions about it.

***Father's Day 17 March 2010*[117]**

To make men aware of their role as fathers, the idea of Father's Days has been promoted in Liechtenstein. They take place every two years, alternately in companies, kindergartens and schools. For one day, fathers can visit the 'workplace' of their child, and children can go to work with their father or another man who plays a large role in their life to get an insight into his professional world.

The care and education of children today is the task of both women and men. Men are very important for the development of children and young people as a role model and male figure of identification and to complete the female role. The Father's Day project will make men aware and support them in their role as fathers. Also, children will get to know their father in his professional role and be motivated to think about their own professional future.

***Training course in politics (Politiklehrgang) 2010*[118]**

On 12 March 2010, the seventh interregional training course in politics for women started and it will end on 20 November 2010 by the awarding of certificates. Registration was possible until 15 February 2010. The course will enable and encourage women to promote their ideas and potential in political committees and in public.

Miscellaneous

***Reconciling family and professional life*[119]**

A vital concern for the Government in the field of reconciling family and professional life is the offer of enough places for external childcare services. It is important that

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[115] Case C-229/89, *Commission of the European Communities v Kingdom of Belgium*, *European Court reports 1991 Page I-02205*.

[116] http://www.llv.li/pdf-llv-scg-leitfaden_fuer_praktische_fragen_version_ii_sept.09__2_-2.pdf, *Leitfaden zur Wanderausstellung „Beruf und Familie in Balance"*, 2009 Office for Equal Opportunities, last accessed on 28 April 2010.

[117] Press release of the Information Office Liechtenstein, dated 10 March 2010.

[118] http://www.frauenwahl.li/aktuelle-projekte/politiklehrgang/Folder.pdf/view, last accessed on 28 April 2010.

[119] Press release of the Information Office Liechtenstein, dated 18 December 2009.

quality standards for external childcare with respect to personnel and number of places are respected. The Government will finance new projects for structures of external childcare services.

Equal Pay Day[120]

In Liechtenstein, events related to Equal Pay Day on 11 March 2010 were organised to attract attention to the fact that women in Liechtenstein have to continue working until 11 March of the following year in order to have the same salary for equivalent work as men who achieved this salary already on 31 December of the previous year. Events organised by women's organisations on Equal Pay Day are meant as initiatives to raise awareness among the public and to initiate changes.

Business Day for women 2010[121]

The Business Day took place for the third time in Vaduz on 13 April 2010 and focused on the topic 'Women – Power – Enterprises'. The Business Day brings together a large number of women occupying key positions. The economic forum analyses the specific needs of female managers and entrepreneurs and how they think and act. The Government of Liechtenstein is the supporting institution of this economic forum. It is meant for female managers, entrepreneurs and students, as well as for women and men from the world of economics. The Business Day offers the opportunity to network and the more people attend, the more creative and innovative the exchange will be.

LITHUANIA – *Tomas Davulis*

Case law of national courts

The right to take childcare leave for fixed-term employees

The Lithuanian Labour Code of 4 June 2002[122] already contained a number of substantial guarantees for pregnant employees and employees on childcare leave. For instance, Article 132 of the Code prohibits the termination of the contract of employment with a pregnant woman from the day on which her employer receives a medical certificate confirming the pregnancy, and for another month after maternity leave, except for some extraordinary cases, or after the end of a short-term (up to 2 months) contract of employment. In addition, the contract of employment cannot be terminated with employees raising a child (children) under the age of three, if there is no fault on the part of the employee concerned. The law was silent on the right of employers to terminate the employment contract with an employee on parental leave and the duty of employers to grant parental leave even to fixed-term employees or in the case of envisaged termination of the contract. The prohibition to terminate the contract of employment with an employee on parental leave is found in Article 131(1) No. 1: the term of the contract shall be *ex lege* prolonged for the period of the application of the leave. The question was still open as regards the right to request parental leave in case of the approaching termination of the employment. This issue is mainly governed by the statutory regulation of social state allowances.

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[120] http://www.llv.li/pdf-llv-scg-newsletter_02-2010.pdf, Newsletter of the Office for Equal Opportunities, February 2010, last accessed on 28 April 2010.

[121] Press release of the Information Office Liechtenstein, dated 18 February 2010, www.businesstag.li, last accessed on 28 April 2010.

[122] State Gazette, 2002, no. 64-2569.

The Sickness and Maternity Social Security Law of 21 December 2000[123] consolidates the right to social security allowances only for the period of the leave granted by the employer. In other words, if the contract of employment is terminated, this deprives the employee from the right to social security allowance. With regard to this, the courts developed the doctrine of the absolute right of an employee to request parental leave, if the conditions for parental leave are met.[124] Employers must grant parental leave for the requested period (which can only be taken until the child's third birthday) without any regard to the moment that the employment is terminated. This same principle has been recognised and already applies to the right to maternity leave and, presumably, will be applicable to paternity leave as well. In other words, the employee is now entitled to ask for the leave at any time of the employment and the employer must not terminate the contract but is obliged to grant the leave. The contract of employment can be terminated after the leave.

Equality body decisions/opinions

Plans to merge national equality bodies rejected

After a few months of discussions, the merger of the Office of the Equal Opportunities Ombudsperson with the offices of other ombudsmen was not approved by the Human Rights Committee of Parliament. In the end, the Board of Parliament accepted this decision. The plans to reduce the number of publicly financed monitoring institutions were supported by the initiative to cut public spending. Considering the tasks and competences of the Office of the Equal Opportunities Ombudsperson to be of particular importance, the members of the Parliamentary Committee decided to keep the institution working in an unchanged institutional framework. The main arguments presented by the Committee were related to the necessity to implement EC equality legislation, the necessity to maintain an achieved level of human rights standards and the danger of violations of equality legislation in the face of economic difficulties.

Instead, it was agreed to reduce the number of ombudsmen responsible for supervision of the activities of public administration.

Budget of national equality Ombudsperson reduced by one third

The year 2010 marks the second year in a row with significant reductions in public spending. The drastic cutbacks of institutional budgets of state institutions in 2010 affected the Office of the Equal Opportunities Ombudsperson as well. Its budget has been diminished from approximately EUR 405 000 (LTL 1.4 million) to approximately EUR 209 000 (LTL 1 million). The institutional employees' salary funds have been decreased from EUR 205 000(LTL 712 000) to EUR 170 000(LTL 584 000). The level of funds now equals the level of the year 2006 despite the fact that the competences of the Office have gradually been increased. In 2005, the Office was made responsible for the supervision of the implementation of all anti-discrimination law, including race, origin, disability, age, religion and sexual orientation, and in 2008 the new grounds of nationality, social origin and language were added. The allocated funds are clearly insufficient to fulfill the tasks of the Office properly and to finance other projects.

[123] State Gazette, 2000, no. 111-3574.
[124] Case No. 2A-1078-56/2009 of the High Administrative Court of the Republic of Lithuania.

Statistics on investigation of complaints

The Office of the Equal Opportunities Ombudsperson announced that the Office received 161 complaints in 2009, compared to 222 complaints in 2008 and 164 complaints in 2007. The number of gender-related complaints remained the same as in 2008 (44). 61 % of all claims were initiated by men and only 39 % by women. 46 complaints were related to discrimination in the field of employment and occupation, 46 in the area of goods and services, 27 complaints were related to the activities of the public institutions and agencies, and 10 % were related to education.

The number of gender-related complaints tends to remain the same but, despite the slight increase in the share of these complaints as part of the total, their relevance for the practical implementation of gender equality has constantly been decreasing over the years. First of all, the increase in the number of these complaints can be attributed to the fact that quite many of them are brought by men or in the area of provision of goods and services. Secondly, the share of the new type of complaints, i.e. complaints related to the newly added prohibited grounds of discrimination, was significant (social origin – 25, nationality - 10, language - 3) and constituted nearly 25 % of all complaints. It seems that the initial purpose of the Office has been marginalized and the discrimination on other grounds, especially on social origin, is gradually becoming the main area of activity. For example, on 15 February the Ombudsperson decided on a case of discrimination of individual home owners in buying gas for heating at a higher price compared to flat owners.[125] Another proposal to broaden the competence of the Office of Equal Opportunities Ombudsperson was formulated by the Chairman of the Parliamentary Committee for Human Rights, suggesting to include the circumstance of 'family status' under the definition of social origin in Article 2 p. 6 of the Law on Equal Opportunities.[126] All these initiatives may explode the number of non-gender related complaints and weaken the practical implementation of gender equality legislation.

Miscellaneous

Jurisdiction of national court in sexual harassment case involving foreign embassy

On 23 March 2010 the European Court on Human Rights delivered a landmark judgment in the case *Cudak v Lithuania*.[127] The main legal problem in the case concerned the immunity of the State from foreign jurisdiction, but originated from a case involving the termination of a contract of employment. In 1999, following a sexual harassment case, Ms Cudak was dismissed by the Polish embassy in Lithuania, where she had been working as a receptionist and telephonist. She brought an action for unfair dismissal before the civil courts, which declined jurisdiction on the basis of the doctrine of state immunity from jurisdiction. The courts held that the applicant's employment relationship was one of a public-law nature (*acta jure imperii*) and not of a private-law nature (*acta jure gestionis*) because her secretarial and switchboard-related responsibilities had 'facilitated, to a certain degree, the exercise by the Republic of Poland of its sovereign functions'. The Grand Chamber of the ECHR regarded this as a violation of the right of access to a court (Article 6 §1 of the Convention). According to the ECHR, the mere assertion that the applicant could have had access to certain

[125] Press release of the Human Rights Committee of Parliament of 2 December 2009, http://www3.lrs.lt/pls/inter/w5_show?p_r=6275&p_d=93605&p_k=1, last accessed on 15 February 2010.

[126] See the Draft Amendment no. XIP-1736 of the Law on Equal Opportunities, http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=365343, last accessed on 18 May 2010.

[127] Application no. 15869/02.

documents or could have been privy to confidential telephone conversations is not sufficient to state that the duties in question were of importance for Poland's security interests. The Court also underlined the importance of the investigation of the Equal Opportunities Ombudsperson. The fact that the applicant's dismissal and the ensuing proceedings originally arose from acts of sexual harassment that had been established by the Lithuanian Equal Opportunities Ombudsperson, with whom the applicant had filed her complaint, can 'hardly be regarded as undermining Poland's security interests'. The Court held that Lithuania is to pay the applicant EUR 10 000 in respect of pecuniary and non-pecuniary damages.

LUXEMBOURG – *Anik Raskin*

Policy developments

Parental leave

The so-called Luxembourg 'social model' is characterised by a dialogue between the Government and the social partners (employers and trade unions). This dialogue has an institutional dimension. It concerns important economic and social questions. The aim is to agree on measures before engaging in legislative procedure.

In the context of the crisis, the Government has announced that measures have to be taken in order to re-establish budget balance over the next few years.

After the first rounds of consultation, it appears that the Government has proposed to reduce the duration of parental leave from six to four months. There are no further details available, as negotiations are still ongoing.

National Action Plan on Equality for women and men

The Government has adopted the second Action Plan on Equality for women and men, which covers the period from 2009 to 2014.

The Plan was presented to the social partners and NGOs on 1 February 2010. Its content is based on the Beijing Platform for Action paper. Social partners and NGOs were asked how they could contribute to the implementation of the Plan.

Most of the measures listed by the Plan are analyses of the situation and measures to raise awareness among the general public.

Gender pay gap

In January 2010, the Members of Parliament discussed the persistent gender pay gap and how to act against it.

Equal pay for women and men for the same work or for work to which equal value is attributed was introduced by Grand Duchy Regulation in 1974. The present Government announced its intention to review this Regulation in order to accord more investigative power to the *Inspection du Travail et des Mines* (Labour Inspectorate Agency).

Legislative developments

Positive actions on the labour market

On 20 January 2010, the Minister of Equal Opportunities presented a Bill to Parliament concerning the positive measures in place regarding the labour market. The main purposes of the Bill are:

– to create better understanding of the legal framework regarding positive actions;
– to simplify projects by encouraging collaboration from the very beginning.

More generally, the proposed amendments are meant to focus on the concept of gender equality. The present legal framework emphasises the concept of 'underrepresented sex' and employers tended to implement specific measures which were not necessarily promoting gender equality.

Sexual and reproductive rights

In Luxembourg, abortion is legal during the first 12 weeks of pregnancy under the following circumstances:
– when the continuation of the pregnancy or the living conditions that may result from the birth are likely to endanger the physical or mental health of the pregnant woman;
– when there is a serious risk that the child will be born with a serious disease, physical malformation or considerable mental defects;
– when the pregnancy can be considered as resulting from rape.

A physician's statement concerning the existence of the circumstances is required.
Beyond the 12-week period, abortion is permitted only if there is a very serious threat to the life or health of the pregnant woman or of the child to be born. The serious threat must be certified by two qualified physicians.

On 20 January 2010, the Minister in charge of Justice presented Bill No. 6103. The Government intends to extend the indications for legal abortions by adding 'social reasons'. It also proposes to implement a second mandatory consultation before abortion.

Access to and supply of goods and services

At present, Luxembourg legislation accords lower protection against discrimination on the ground of sex than on the five other grounds protected by law (race or ethnic origin, disability, age, religion or belief, sexual orientation). Regarding sex discrimination the protection does not apply to the content of media and advertising nor to education.

On 21 April 2010, the Government presented a Bill in order to amend the law of 21 December 2007 implementing Directive 2004/113/EC. The aim is to accord the same protection to the six grounds of discrimination protected by law by including equal access to and supply of good and services for women and men in the areas of media, advertising and education.

Political decision making

A proposal to amend the law on elections was presented to Parliament by a Member of Parliament in March 2010.

It proposes to oblige political parties to institute gender parity on candidate lists. It also regulates how to proceed when candidates reach the same score by proposing to give preference to the candidate of the underrepresented sex. The same should be applied in case of prohibition for two candidates to accept a mandate in case of close family links.

Equality body decisions/opinions

Round table on gender equality

The *Centre pour l'Egalité de Traitement* or *CET* (Centre for Equal Treatment) is concerned with discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. It has been organising six round table discussions, each one focussing on one of the six grounds that the Centre covers. The round table discussion on gender equality took place on 19 April 2010. It concentrated on gender equality on the labour market.

FYR OF MACEDONIA – *Mirjana Najchevska*

Policy developments

As a general remark, it can be stated that the policy developments in the Republic of Macedonia are very controversial and contradictory.

On the one hand, there is formal acceptance of very advanced policies, legal changes and projects which should have an impact on the laws and institutions. Yet, these activities usually end in action plans, reports and/or conclusions which are not implemented; hence, they do not produce any actual change.[128]

On the other hand, the patriarchal system of values is becoming even more powerful due to the conservative Government being very strongly connected both with the Orthodox Church and (through the ethnic Albanians in the Government) with the Islamic community, which has an increasing impact on everyday life (introduction of religious education in the formal education system, campaigns against abortion, support for having three, four and more children and decreasing the support for early childhood care).

Public participation of women

The latest development in the political scene shows the results of such policies. In the last local self-government elections, not a single female mayor was elected (in the previous term there were three female mayors). Also, the number of female Ministers in the Government has now been decreased to only two.

The positive impact of the Electoral Law (which determines that every third place on the electoral lists for Parliament be reserved for the less represented sex) still shows good results and 32.8 % of parliamentarians are women. A special commission of female parliamentarians has been established (Parliamentarian commission for equal opportunities between men and women),[129] as well as a lobby group for gender equality. However, the changes are still only formal, with no direct impact on policy developments on the level of everyday life.

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[128] http://www.zdruzenska.org.mk/default.asp; http://www.esem.org.mk/Root/mak/_docs/Izvestaj%20za%202009%20za%20napredok%20na%20Makedonija%20za%20rodovata%20ednakvost.pdf; http://rodovaramnopravnost.gov.mk/index.php/mk/knowledgebase?task=summary&cid=65&catid=71 last accessed on 4 May 2010.

[129] http://www.sobranie.mk/?ItemID=988772D659F5CF448B41939158D69EC9, last accessed on 4 May 2010.

Promotion of gender-responsive budgeting

At the beginning of 2009 the Sector for Equal Opportunities started the implementation of a one-year programme for the promotion of gender-responsive budgeting as an instrument for the advancement of gender equality. The aim of the project was promotion and introduction of the gender perspective in social policy and in budgeting policies and processes.[130] The results of the activities should be seen in the next few years. So far, many similar projects have finished without further sustainable development and implementation in practice.

Coordinators of gender equality are appointed in 14 ministries and 9 administrative government bodies; however, there is no information on their work.

Legislative developments

Law on equal opportunities for women and men

With the last amendments to the Law on equal opportunities for women and men,[131] in 2008, EU law was further transposed at national level. The proper definitions for direct and indirect discrimination were introduced, as well as for harassment and sexual harassment. EU law is also transposed at national level with the amendments to the Labour Law.[132] Special programmes for implementation of the Law on equal opportunities for women and men[133] on the local level have been developed. In 79 out of 84 municipalities, a commission on gender equality has been established with an assigned coordinator. The members of the commissions are municipal councillors.[134] Training and education in the field of gender equality were the first steps in their work. In 2009, the UNDP launched a project entitled 'Support to Women's and Men's Equal Opportunities Commissions at local Government Units'. In assessing the current situation, the UNDP stressed the 'lack of documents that explain the actual duties and detailed scope of responsibility of the members of the commissions and coordinators': there are no specific criteria that should be fulfilled in order to be a member of the commission and the commissions perform no visible activities.

According to the studies on the implementation of the Law on equal opportunities for women and men, the implementation is only formal (establishment of the commissions). However, there are no real activities in the direction of noteworthy changes or visible results. Most of the commissions have no work programmes; they do not have any meetings and perform no activities.[135]

Law revisions

In 2009 changes were made to the Labour Law and a new Article was introduced on mobbing (mental harassment at the workplace).

Article 24 of the Labour Law includes an obligation for employers to ensure sex equality in the announcement of vacancies.

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[130] http://www.mtsp.gov.mk/WBStorage/Files/Rodova%20Analiza%20ANGLISKI%2001%20MART%202010.pdf, last accessed on 4 May 2010.

[131] http://www.mtsp.gov.mk/WBStorage/Files/ZEM.pdf, last accessed on 4 May 2010.

[132] Labour Law (revised) Official Gazette of the Republic of Macedonia, No. 16/2010.

[133] http://www.mtsp.gov.mk/WBStorage/Files/ZEM.pdf, last accessed on 4 May 2010.

[134] http://www.mtsp.gov.mk/?ItemID=463B79E2DAE454468BBCDFEC8D2D7845, last accessed on 4 May 2010.

[135] http://www.zdruzenska.org.mk/article.asp?id=454, last accessed on 4 May 2010.

The most significant legal change is the adoption of the Law on Prevention and Protection from Discrimination.[136] The Law will actually enter into force in 2011. The Law will transpose EU law at national level.

In the new Anti-discrimination Law, the grounds of unlawful discrimination are listed in Article 3 (Grounds of Discrimination), and repeated in Article 5/3 as part of the definition of discrimination. It covers all the directives' grounds except sexual orientation, covering an even wider range,[137] and includes two reserve clauses: one specific and open-ended one ('belonging to a marginalized group', and defining that marginalized group (Article 5/11) rather widely) and one general and open one ('any other ground'). However, the new Anti-Discrimination Law includes no provisions on the process of harmonisation of all other national laws with this one. The requirement that sanctions be 'effective, dissuasive and proportionate' does not seem to be met by Macedonian legislation even the with adoption of these new laws.

Case law of national courts

There is no case law regarding any ground of discrimination.

Equality body decisions/opinions

The quasi-specialized equality body was established with the adoption of the Law on equal opportunities of women and men: the Sector for Equal Opportunities, which is part of the Ministry of Labour and Social Policy.[138] This unit runs all projects connected with gender equality, performs analyses and is responsible for drafting and implementing the National Action Plan.

The protective mechanism which has a mandate to work on individual claims (as part of this unit) should be the Agent for equal opportunities for women and men, part of the Ministry of Labour and Social Policy. However, so far this Agent has not been appointed.

The Ombudsman is also competent to react in cases of discrimination on the ground of sex. The mandate of the Ombudsman is very broad and includes investigation, research, reports and opinions.

The Ombudsman's office received only one claim based on discrimination on the ground of sex in 2009.[139] The related information was prepared by the Ombudsman's office in 2009 on issues of discrimination.[140] This information includes no separate conclusions or recommendations specifically on discrimination on the ground of sex.

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[136] The Law on Prevention and Protection against Discrimination was adopted in April 2010, and published in the Official Gazette of the Republic of Macedonia, No. 50/2010.

[137] 'Additional' grounds are: gender, language, citizenship, social origin, personal or social status, property status and health condition.

[138] http://www.mtsp.gov.mk/?ItemID=380B6B1D444D5047B575F402122ED94A, last accessed on 4 May 2010.

[139] http://www.ombudsman.mk/comp_includes/webdata/documents/Godisen%20izvestaj-2009.pdf, last accessed on 4 May 2010.

[140] http://www.ombudsman.mk/comp_includes/webdata/documents/Zastapenost%202009.pdf, last accessed on 4 May 2010.

Miscellaneous

Government campaigns

The Government is running several campaigns to promote traditional relations between women and men (campaign for third child, against abortion). Even the campaigns against domestic violence or human trafficking are designed in such a way as to promote traditional values and a very passive position of women. There are no debates on discrimination on the ground of sex and the Government's general approach toward the gender issue is as if the problem ahs already been solved. Its main interest is connected with domestic violation and human trafficking.

In the perception of citizens, discrimination on the ground of sex is still very much present (40 % of the respondents in the Eurobarometer research[141] think that there is such discrimination). Still, discrimination on the ground of sex is ranked 5th out of six grounds.

MALTA – *Peter G. Xuereb*

Policy developments

Quotas in Parliament

A question to arise in April 2010 was that of quotas to assist women in obtaining seats in Parliament. Views on this remain divided, also among incumbent female Members of Parliament themselves. The view that women do not require the assistance of positive action appears to be losing ground, in my view. However, the Prime Minister, Dr. Lawrence Gonzi, has declared that he is not a believer in the need for positive action in this area. It therefore appears that there is no sufficient political will to make any change in this respect for the foreseeable future. In the meantime, the Government has finally nominated a woman as one of the three nominees for the European Court of Human Rights in Strasbourg (Council of Europe). In the last two years, the Government's list was returned because it did not feature any women among the nominees, and the incumbent Maltese judge has continued in office pending the submission of a new list that complied with the gender requirement.

Maternity leave

In connection with the Commission proposal for a Directive extending the period of maternity leave, there has been strong reaction from the employers' associations, whose main objection is that in the current economic situation the coming into effect of any such proposal to increase maternity leave would constitute a difficult cost for employers to bear and would undermine their profitability and ability to stay in the market. So far, the Maltese Government has taken this line in all relevant fora, including the Council. Nevertheless, it appears that there may be movement in the direction of supporting the proposal should an appropriate formula for the funding of the new measure be found, whether at European or national level.

[141] V. Petroska-Beska & M. Najcevska *Barometer of equal opportunities*, MCMS, Skopje, 2009.

Legislative developments

Equalising the position of part-time and full-time employees

After much delay, legislation has now been passed equalising the position of part-time and full-time employees as to conditions of work. New legislation brings part-time workers' salaries and leave entitlements into line with those enjoyed by full-time workers. This has been done by further amendment of the Part-Time Employees Regulations, which had been modelled on the Part-Time Workers' Directive. Initially, the right to pro-rata entitlements, such as vacation leave and sick leave, was limited to those whose part-time work was their principal employment, i.e. who worked twenty or more hours per week and paid national insurance contributions. This right has been gradually extended over the years. The issue of equality of treatment has often been discussed and this new legislation is the reply to the need to bring Maltese law fully into line with EU law by addressing an issue of main concern to women in Malta who are often limited to working, or even choose to work, on a part-time basis for reasons of family responsibility.[142] Based on the new amendments, all part-time employees have the same rights irrespective of the hours worked and of whether this employment is their 'primary' employment or not. However, the impact on employers was an issue and the Government has therefore decided to gradually phase in this measure . Those employed on or after 12 March 2010, the date of entry into force of the regulations, are immediately covered by the new rules. Those who were already in employment on that date will be covered by them from 12 September of this year. The changes have been made by the Part-time Employees (Amendment) Regulations 2010,[143] which amend the Part-Time Employees Regulations of 2002,[144] and also by the Minimum Special Leave Entitlement (Amendment) Regulations 2010,[145] which amend the Minimum Special Leave Entitlement Regulations of 2007.[146]

Parental leave entitlement

The Parental Leave Entitlement (Amendment) Regulations of 2010[147] amend the Parental Leave Entitlement Regulations of 2003[148] in order to specify the limited circumstances in which an employer may temporarily postpone the granting of parental leave for justifiable reasons related to the operation of the place of work, and to regulate the setting of alternative dates when leave may be used, if the place of business is a small enterprise employing not more than ten people, all this to prevent that the requested parental leave is postponed indefinitely.

Equality body decisions/opinions

No recent publications by the equality body

The Maltese equality body (the National Commission for the Promotion of Equality) is not effectively empowered to make decisions. Its main role is advisory (to the

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[142] See for example, Lisa Vella *Part-Time Employment and Social Legislation in Malta*, Bank of Valletta Review, No. 38, Autumn 2008, pp.29-46.

[143] Legal Notice 117 of 2010. Legal notices, which enact secondary legislation under the main legislation (in this case the Employment and Industrial Relations Act of 2002), can be accessed on www.doi.gov.mt/EN/legalnotices/2010, last accessed on 1 July 2010.

[144] Legal Notice 427 of 2002.

[145] Legal Notice 118 of 2010.

[146] Legal Notice 432 of 2007.

[147] Legal Notice 175 of 2010.

[148] Legal Notice 225 of 2003.

Government), while it is also empowered to investigate complaints, seek an out-of-court solution, or, with the approval of the complainant, assist in litigation. The latest report of the NCPE was published in March of 2009, and was the fifth annual report of the NCPE since it was established. It sets out, without providing detail, the number and range of complaints received. It also sets out the activities of the NCPE over the previous year, including awareness-raising efforts, research studies and funded projects, and information about its activities in its advisory role. There has recently been a change of key personnel in the person of the chief executive of the NCPE. The annual report for the year 2008 and previous years can be accessed on the new NCPE website on www.equality.gov.mt.[149] The annual report for 2009, which was expected around March of this year, had not been published on the NCPE website at the time of writing of this report.

Miscellaneous

While there have not been any court judgments of note, there may soon well be litigation in relation to an unfair dismissal claim related to pregnancy. The case is high profile due to the fact that the employer is a large transnational group of companies based in Malta and the employee was a high-level officer working at head office. To date, the alleged discrimination has not been brought before the courts.

The National Council of Women of Malta organised a public dialogue event in April with the theme: *Women in Public Life – A Changing Scenario*. A full and frank debate was conducted by the speakers and the audience, which included key figures from enterprise, the unions and Government. The central message was that more women in employment, and more women in senior positions, are the key to economic stability and growth. Discussion also focused on the EU proposal to extend maternity leave and parental leave. While the position of women (and men) employed in the public sector has been improved through a stream of family-friendly measures, this has served to highlight the public/private sector split when it comes to best practice. However, among other things, it emerged at this public dialogue forum that it could well be possible that the social partners find a way forward by agreeing a formula which involves the Government bearing part of the cost of maternity leave, a cost which is currently borne by the employer.[150] While the latter may well remain the case for the first fourteen weeks, the forum considered the possibility of a new 'burden-sharing' formula for any new extended period of maternity leave. The employers' associations had first been arguing that the extension of the period of maternity leave under the current economic conditions and the current funding obligations would damage the profitability of firms in Malta and have a counterproductive effect.

THE NETHERLANDS – *Rikki Holtmaat*

Policy developments

Debate on under-representation of women in leading positions in business

In the autumn of 2009, a renewed debate arose about the under-representation of women in leading positions in business. The discussion was initiated by a petition

[149] Last accessed on 1 April 2010.

[150] See the website of the National Council of Women of Malta, on www.ncwmalta.com, last accessed on 30 April 2010.

which was signed by about 200 women in leading positions in the Netherlands, and was printed by the *Volkskrant,*[151] one of the major newspapers in the country. The petition pleads for quotas, as all soft-law measures that have been applied until now do not seem to be very effective. According to the authors, the number of women in leading positions in all companies now amounts to 6 %, and will only be 12 % in 2035 in the most positive scenario. However, the official target of the Dutch Parliament is to reach 30 %. Ad Scheepbouwer, President of the executive board of the Dutch multinational KPN, joined the discussion by stating publicly that KPN will make certain high positions only available to female applicants in the future. Right after that, the *Commissie Gelijke Behandeling* (Equal Treatment Commission (ETC): the national equality body) published a press communication in which they repeat the principles derived from case law of the European Court of Justice. The ETC says that positive measures may be justified, but that a personal and individual assessment of each candidate for a post remains obligatory. Meanwhile, a majority of the Second Chamber of the Dutch Parliament has passed an amendment which obliges large companies (> 250 employees and an annual turnover of > EUR 35 000 000) to establish a share of women in leading positions of at least 30 %. If a company does not reach this target, this must be explained in the annual report, accompanied by an introduction of new measures which will be applied by the company in order to reach the target.[152] This concerns an amendment to an article of the Dutch Civil Code that contains regulation concerning the monitoring of the executive board of large companies in general. This amendment is not yet in force, as the First Chamber still has to decide on it.

It will be very interesting to see how a quota system such as the one that KPN is planning to apply will be assessed by the ETC and by the Courts, as it does not seem to comply with the requirements of EU law in this respect.

Equality body decisions/opinions

In the last quarter of 2009 and the first 4 months of 2010, several interesting cases have been decided by the Equal Treatment Commission (ETC).[153]

University discriminates against female researcher by not giving her a chance to be appointed as lecturer[154]

It is a well-known fact that in the Netherlands, the percentage of female lecturers and (assistant and full) professors at the universities lags far behind when compared to the percentage of female students and PhD candidates.[155] A woman who was a well-respected and successful researcher (working on various temporary contracts) at one of the main universities in the country, applied for a position as lecturer (in a permanent job), but was not even invited for a job interview. Although there was no direct

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[151] http://extra.volkskrant.nl/opinie/artikel/show/id/4215/Vrouwen:_geduld_en_tijd_zijn_op, last accessed on 29 April 2010.

[152] *Kamerstukken II*, 2009-2010, 31763 no. 14, http://www.geencommentaar.nl/parlando/index.php?vars=/cgi/showdoc/session=anonymous@3A5095179133/action=bib/query=1/pos=0, last accessed on 6 April 2010.

[153] To be found on the website of the Equal Treatment Commission: http://www.cgb.nl, last accessed on 6 April 2010.

[154] ETC Opinion 2009-96, 30 October 2009, http://www.cgb.nl/node/14960/volledig, last accessed on 17 March 2010.

[155] See the *Monitor Female Professors in the Netherlands*, published by the Network of Female Professors (*LNVH*), to be downloaded from http://www.lnvh.nl/files/downloads/125.pdf, last accessed on 23 April 2010.

evidence that her sex had played a role in this decision, the ETC concluded that, on the basis of statistical evidence about the low percentage of female lecturers and professors at the particular faculty of this university, it was possible that the university had discriminated against her. It then scrutinized the selection procedures, and found that these were not transparent, and that the criteria for the job had been changed during the procedure. The ETC concluded that these circumstances contributed to the suspicion that the woman had been discriminated against on the ground of her sex. The university did not succeed in proving that no discrimination had taken place (shifting of the burden of proof!). This case is a good example of how the systemic disadvantaged position of women in certain jobs (especially above the glass ceiling) should be taken into account when investigating an individual case of (alleged) discrimination on the ground of sex.

Physical test for army fire brigade personnel not discriminatory on the ground of sex[156]

Dutch army personnel working in the fire brigade is regularly required to meet a physical condition test in which a norm is set for the amount of oxygen that the body can absorb within a minute. A female fire fighter at an army airport had failed this test on several subsequent occasions and was not permitted to work in that position any longer; she was reassigned to another position.

The Equal Treatment Commission (ETC) found that the applied test is indirectly discriminatory for women, because generally speaking women (especially above the age of 25) are less able to meet the required value. However, the ETC accepted an objective justification for setting this requirement. It concerns positions in which army personnel is subjected to an extreme physical burden, even more so when the army is involved in peace-keeping operations abroad. The Ministry of Defence has stated that it has the policy that all personnel of a fire brigade unit, male and female alike, must be able to perform the same work, in order to guarantee the safety of the victims of a fire as well as the co-workers. The test is used as a predicting factor of the actual performance of the fire brigade personnel in extreme circumstances. This is an example of multiple indirect discrimination (on the grounds of age and sex). However, the ETC did not treat it as such, but chose to concentrate on indirect sex discrimination. The ETC accepts the validity of scientific reports in which the applied standard is considered as a proper and solid way of establishing a person's physical condition and rejects the claimant's statements that other ways of testing are available.

Employer harasses victim of sexual harassment[157]

A woman working at an IT company complained about sexual harassment by one of her colleagues, as well as about sex discrimination and harassment by two members of the management team of the company. The ETC found that the first fact was proven; the second fact was not substantiated with enough evidence to make a shift of the burden of proof possible. However, an employer is obliged to investigate (internally) any complaint about (sexual) harassment and sex discrimination in due time and thoroughly/correctly, and has to take adequate measures when harassment/ discrimination appears to be involved. When failing to fulfil these obligations, the employer can be held responsible for not offering a working environment safe from harassment/discrimination; i.e. for that reason, the employer can be held guilty of

[156] ETC Opinion 2009-128, 30 December 2009, http://www.cgb.nl/node/15011/volledig, last accessed on 6 February 2010.

[157] ETC Opinion 2010-12, issued on 30 September 2009 and published on 1 February 2010, http://www.cgb.nl/oordeel/2010-12, last accessed on 26 February 2010.

discrimination. In the case at hand, these obligations were violated in many ways. In addition to this, in the case of the sexual harassment by the colleague, the employer issued a measure (by means of an e-mail message) in which it was ordered that the victim and the perpetrator had to take coffee and lunch breaks separately and in which both were summoned to avoid all contact with each other. Especially the tone of this last message was very intimidating for the victim, suggesting that both parties were equally responsible for the situation of sexual harassment and threatening that she would be sanctioned if she did not comply with these rules of non-contact. The ETC held that this message in itself was intimidating and formed a violation of the non-discrimination norm in the equal treatment legislation.

It is remarkable that the ETC found that the employer himself was guilty of harassing the victim in the way that the (disciplinary) measures were announced to her. This means that the employer, in addition to being accountable and liable for not offering a safe working environment in this respect (which norm had been violated in this case), can also violate the non-discrimination (i.e. the non-harassment) norm himself when the responses to such claims and the measures taken are 'intimidating' in themselves. However, the definition of harassment (in Dutch *intimidatie*; intimidation) requires that there is a link with the discrimination ground of sex. This link was found by the ETC in the fact that the original sexual harassment – which caused the intimidating measure – was indeed linked to the sex of the victim. Both the way in which the harassment clause was applied to the employer and the way in which the link with sex discrimination was constructed are a novel way of interpreting the norms concerning harassment in Dutch equal treatment legislation.

Access to party/discotheque only for men who are accompanied by a woman or for women who are not accompanied by a man[158]

In two recent cases, the ETC decided that there was (unjustifiable) direct discrimination on the ground of sex where women who were not accompanied by a man got easier access to a party or discotheque than men (either or not accompanied by a woman), or where men who were not accompanied by a woman were denied access.

The first case concerned a complaint about a discothèque in Amsterdam, where several men and women had observed a difference in treatment on the ground of race (or ethnic origin) and sex. The ETC found no proof of racial discrimination, but concluded that the policy that women who were not accompanied by a man had easy access while a woman who was accompanied by a man was denied access constituted discrimination on the ground of sex (against men). Since this was considered a case of direct sex discrimination, no (objective) justification grounds were examined by the ETC in this case.

In the second case, the claimants stated that the policy not to allow men without a female partner into a beach club was discrimination on the ground of sex and/or sexual orientation. The ETC concluded that the contested rule makes a direct distinction on the ground of sex. For this direct discrimination no (legally accepted) justification ground could be brought forward. As for the claim that this (also) constitutes indirect discrimination on the ground of sexual orientation, the ETC concluded that indeed the particular house rule (negatively) affects homosexual men, because they cannot visit the club with their partner, while heterosexual men can. The beach club had given as an objective justification that the house rule contributed to the good atmosphere and to

[158] ETC Opinion, ETC 2010-17 of 11 February 2010 and ETC 2010-19 of the same date, http://www.cgb.nl/node/15047/volledig and http://cgb.nl/node/15048/volledig, last accessed on 29 April 2010.

avoiding aggressive behaviour on the side of the (male) visitors. Since the club did not strictly apply the rule and since other means of achieving the goal of a good atmosphere are possible, this defence was not accepted by the ETC. Therefore, the beach club had also discriminated indirectly on the ground of sexual orientation.

Both cases demonstrate that the ETC has little sympathy for bars, discos or clubs that want to maintain a certain 'gender balance' in their public. Especially the second case demonstrates that the arguments that were brought forward by the owner of the club (maintaining a good atmosphere/avoiding male 'aggressiveness') are not seen as a valid reason for such a policy. The ETC might have elaborated a bit more on the gender stereotypes that form the basis for such policies. Men are seen as aggressive/fight-seekers, unless they are accompanied by 'appeasing' women.

The second case is an example of intersectionality of discrimination grounds. One and the same rule can have detrimental/exclusionary effects for individuals, although it is not clear whether the discrimination is on the ground of sex or sexual orientation. However, the ETC did not treat it as such, but discussed the grounds separately.

Access to a women-only hammam denied to a man[159]

A man requested to have a complete body massage in a women-only *hammam* (bathhouse) and was refused this service. Subsequently, he filed a complaint with the ETC, stating that this refusal constituted discrimination on the ground of sex in the area of goods and services. The General Equal Treatment Act makes an exception for making distinctions in cases where sex is a determining factor. In a special Decree on Equal Treatment (*Besluit gelijke behandeling*, of 1994) it is clarified in which situations this may be the case. Article 1, sub i of this Decree mentions the situation when a particular service can be provided only to men or to women: e.g. beauty salons or hairdressers that offer services only for women or only for men, or pregnancy gymnastics. In this case, it concerns a hammam, which offers special services that are only for women, including a total body massage by a female masseuse. Decisive for this kind of massage is that it is an intensive, physically intimate massage, which is done by women in a setting where there are only women present. The ETC takes into consideration that the Memorandum of Explanation to the Decree mentions that the exception mentioned in Article 1, sub i of the Decree not only pertains to situations where the physical differences between the sexes play a decisive role, but (with a view to the protection of private life) also to situations where personal views or emotions of the persons involved play a role, e.g. in situations where bodily contact is involved, such as nursing and bodily care for persons. Feelings of shame may play an important role in such cases. The ETC concludes that the total package of services that the hammam provides to its female clients is determined by bodily contact between their clients and between clients and staff in an intimate setting. This means that the hammam falls under the exception mentioned in the Decree.

The case is interesting from the point of view that men-only or women-only services are often seen as a form of discrimination that cannot easily be excused. Here we see a case where the (explicitly legal) exception to this rule is being applied.

Using 'previously earned pay' as a standard may result in unequal pay[160]

A female teacher complained about unequal pay as compared to a male colleague. It concerned work of equal value. Nevertheless, the male teacher got a much higher salary

[159] ETC 2010-49 of 23 March 2010, http://www.cgb.nl/node/15094/volledig, last accessed on 6 April 2010.

[160] ETC Opinion 2010-44, http://cgb.nl/node/15089/volledig, last accessed on 23 March 2010.

which was not solely explicable by factors that had nothing to do with sex discrimination (e.g. the number of years of work experience as a teacher). Decisive factors for determining the right step on the pay scale was inter alia the salary that was earned in the job previous to the job in which one is about to be appointed. It appeared that according to these criteria, the female teacher (by her previous and her current employer) had been put in the right step of the pay scale. However, her male colleague had obtained a much higher initial step when he started working as a teacher because before that time he used to have a job as an ITC specialist. According to the ETC, the criterion 'previously earned salary' may cause neglecting relevant work experience of an applicant or (positively) taking into consideration non-relevant factors. In this case, the school had not discriminated against the female teacher in this respect. It appeared that the discrepancy between her pay and that of her male colleague may have been caused by the fact that in his case, when he started to work as a teacher, non-relevant work experience had led to a relatively high salary. Now that the school had not properly investigated whether his relatively high salary was indeed justified by relevant job experience or job performance, it failed to prove that the discrepancy in salary had nothing to do with pay discrimination against the female employee. From this case it appears that the criterion 'previously earned salary' can cause pay discrimination because the male comparator has often had a relatively high salary in a previous job. By (also) looking at this side of the pay difference, the ETC has shown to have an open eye for the multiple and often difficult procedure to establish causes of unequal pay of women.

Miscellaneous

Report on victimisation by Equal Treatment Commission

In January 2010 a study into the issue of victimisation was published by the Equal Treatment Commission (ETC).[161] It concerns the first *large-scale* research into this topic in the Netherlands. Previous smaller studies in 1985, 1999 and 2006, had shown that victimisation is indeed a problem. Not only does complaining about discrimination often lead to serious negative consequences for the victims, but many victims also choose not to make official complaints out of fear of victimisation. The new research confirms these findings. The research consisted of 4 different empirical studies among different 'target groups'. The general outcome of these studies is that in a considerable number of cases people are victimised as a consequence of (in-officially or officially) complaining about discrimination. Also, a great number of people choose not to make any complaints out of fear of negative consequences. Out of the 824 employees taking part in one of the studies, 14 % had experiences with discrimination; 60 % of them in the end did not succeed in what they hoped to achieve with their complaints; and 19 % experienced outright negative consequences of making complaints about discrimination, varying from maltreatment to dismissal. Of the persons who had filed a complaint with the ETC, 90 % said to be happy to have been engaged in this procedure. However, only one third of these persons stated that they had not experienced any kind of victimisation. The qualitative research (in-depth interviews and questionnaires with professionals) revealed that a number of factors determine the seriousness and the

[161] Marieke van Genugten & Jörgen Svensson *Dubbel de dupe? Een studie naar de benadeling van werknemers die ongelijke behandeling aan de orde stellen* (Twice the victim? Study into negative consequences for employees who have raised issues concerning unequal treatment) University of Twente/CGB, 2010. To be downloaded from http://cgb.nl/webfm_send/506 (in Dutch), last accessed on 6 February 2010.

prevalence of victimisation. These are most importantly the (long) time it takes to deal with a complaint and the route of a formal complaints procedure. The researchers found that serious forms of victimisation most often occurred in case of discrimination on the ground of race, sex or disablement, where it concerned a case of discriminatory treatment at work by colleagues and direct supervisors, and where the claimant was in an isolated position at work.

The report shows that it is certainly not enough to have a prohibition of victimisation in place, but that much more needs to be done in terms of having in place an informal complaints procedure, having counsellors at work who can confidentially deal with complaints, and giving training to persons working for personnel departments and managers.

NORWAY – *Helga Aune*

Policy developments

Parental leave (fathers' quota)

The political parties are preparing for the elections in the autumn of 2010, where seats in Parliament and possible change of Government are at stake. Two conservative parties, *Høyre* and *Fremskrittspartiet*, are quite vigorously proposing to abolish the fathers' quota of the parental leave. The parties refer to the liberal idea that individuals should decide for themselves, without the interference of legislative requirements, on how to organize their private lives and parental leave.[162] None of the parties pay any attention to the stereotypical gender roles as a limitation of individual choices. Interestingly, the main employers' organisation (*NHO*) declared its support for the fathers' quota in an article in newspaper *VG* on 10 May 2010.[163]

Equal pay

The Government has announced that it will present a proposal to Parliament during the autumn of 2010, in which among various other measures, a discussion of the responsibilities of the social partners and the political/public authorities will be given attention.[164] This is a follow-up of the Equal Pay Committee's White Paper NOU 2008:6 *Kjønn og lønn* (Gender and Pay) delivered on 1 March 2008. The proposal will be open discussion in Parliament.

Committee on gender equality politics

The Norwegian Government has appointed a new Committee to explore issues affecting Norwegian gender equality politics regarding issues such as life patterns/choices of men and women, ethnicity and class. The Committee consists of members of various professions and is chaired by Professor Hege Skjeie who has an extensive background in gender issues. The Committee is to deliver its report as a White Paper in two years.[165]

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[162] http://www.dagbladet.no/2010/05/09/nyheter/politikk/pappapermsjon/11647322/, last accessed on 9 May 2010.

[163] See article by Kristin Skogen Lund, president of *NHO*, paper edition of *VG*, pp. 54-55.

[164] http://www.regjeringen.no/nb/dep/bld/aktuelt/nyheter/2010/Stortingsmelding-om-likelonn-kommer.html?id=594362, last accessed on 10 May 2010.

[165] http://www.ldo.no/no/Klagesaker/Arkiv/2010/Diskriminering-pa-grunn-av-kjonn/, last accessed on 10 May 2010.

In this project, the Government is searching for facts which I hope will in turn result in specific measures to fight the structural patterns reproducing gender-stereotypical barriers hindering equal opportunities for men and women.

Advisory board to the Minister of Equality
The Minister of Children, Equality and Social Integration Mr Audun Lysbakken appointed a Women's Board in January 2010. The function of the Board is to contribute to the debate on various issues on gender equality including new areas which perhaps have not received so much attention yet. The Board consists of 31 women of various backgrounds: some are famous and some are not, some are ethnic Norwegian and some are not. The Board does not have a fixed mandate, but its task is to provide the Minister with input and ideas regarding the gender equality challenges of today. The Board is to complete its work by the summer of 2010.[166]

Legislative developments

Increased protection against discrimination because of pregnancy
An important amendment to the Gender Equality Act of 9 June 1978 no. 45 must be noted:[167] a new prohibition against asking about pregnancy and family status and plans about family during the hiring process, in Section 3, second paragraph, no 2, last sentence.[168] These types of questions will be regarded as direct discrimination according to the same Section.

Religious communities; equal legal position under discrimination legislation
Previously, religious communities were granted the discretion to discriminate on the basis of gender and sexual orientation when it came to internal religious matters. Through amendments to the Anti-Discrimination Act, religious communities are now under the same legislative regime of the test of proportionality with respect to the possibility to discriminate.[169, 170] Parliament enacted the amendments on 23 March 2010 and the amendments are in force from 9 May 2010.[171]

Paid parental leave independent from mothers' paid work
The Government presented a proposal to Parliament to amend the legislation regarding fathers' right to paid parental leave on 5 March 2010, see amendments to the National Insurance Act of 28 February 1997 no. 19, Sections 14-12.[172] The amendments will make fathers' rights to receive pay during their parental leave independent from mothers' rights to leave, as until now it was conditioned on the mother being employed

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166 http://www.regjeringen.no/nb/dep/bld/pressesenter/pressemeldinger/2010/Kvinnepanelet.html?id=592578, last accessed on 10 May 2010.
167 Enacted on 9 April 2010 no. 12, in force from 9 April 2010 according to resolution of 9 April 2010 no. 501.
168 http://www.lovdata.no/all/tl-19780609-045-0.html#2, last accessed on 9 April 2010.
169 Enacted on 9 April 2010 no. 12, in force from 9 April 2010 according to resolution of 9 April 2010 no. 501.
170 http://www.regjeringen.no/nb/dep/bld/pressesenter/pressemeldinger/2010/Stiller-strengere-krav-til-trossamfunnene.html?id=600028, last accessed on 9 May 2010.
171 http://www.regjeringen.no/nb/dep/bld/pressesenter/pressemeldinger/2010/Stiller-strengere-krav-til-trossamfunnene.html?id=600028, last accessed on 9 May 2010.
172 http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-19970228-019.html&emne=folketrygdlov*&&, last accessed on 9 May 2010.

for at least 50 %.[173] It is suggested that the amendments will be enacted before the summer and be in force as of 1 July 2010.

Case law of national courts

There are two court cases regarding gender equality issues from Civil Courts, and no cases from the Labour Court during the period January 2010 - April 2010.

Municipal Court case (09-136827TVI-OSFI)[174]

The East Finnmark Municipal Court delivered a judgment on 17 March 2010 granting a female fire constable a total of EUR 54 223 (NOK 450 000) in compensation (300 000 in compensation and 150 000 in redress) for discrimination in violation of the Gender Equality Act Sections 3 and 17, and the Working Environment Act Section 13-9 first paragraph and Section 13-1 first paragraph. As very few discrimination cases exist at the Appeal Court and Supreme Court level, the judgments of the Municipal Court level are noteworthy.

A woman had been employed as a part-time fire constable (reserve corps) since 2001 on various temporary contracts. She applied for a temporary position in 2005 as well as a permanent position in 2006. She did not get either of these positions. The woman made a complaint to the Ombud in 2006. The Ombud concluded in December 2007 that the woman had been discriminated due to her age, as the Municipality had set an age limit for applicants of forty. The Ombud did not find that the woman had been discriminated because of her gender. The Municipality appealed the Ombud's decision to the Tribunal, which on 8 April 2008 ruled that the woman had been the victim of both discrimination due to age as well as gender. On 28 August 2009, the case was brought before the Municipal Court by the woman, who demanded compensation and redress for wrongful discrimination.

The Court found that the woman had been discriminated against, as the Municipality had disregarded the qualification principle as well as the rule in the Collective Agreement regarding proactive measures allowing employing the member of the underrepresented sex in cases where the applicants are of equal qualification. Examples of the discrimination she had been exposed to at the workplace were that she was the only employee who had to beg for work (being assigned on the work schedule), contrary to her male colleagues who were just assigned work. She was also the only one who had experienced that her name had been removed from the work schedule/list of volunteers. These observations were confirmed by employee representatives testifying before the Court. Many of the witnesses confirmed that it was not easy to be the only woman among twenty men. The Court concluded that because of the discrimination she had been victim of, those problems were used against her in the Municipality's reasoning, evaluating her as less suitable for the position than the men who were employed instead of her. These were both unreasonable and unjustifiable arguments in the evaluation of the applicant's qualifications. The Court found that the claimant was equally qualified if not better qualified and should have been given the position if she had not been discriminated against.

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[173] See prop. 80 L (2009-2010) *Endringer i folketrygdloven, kontantstøtteloven og barnetrygdloven (rett til fedrekvote uavhengig av mors stillingsandel mv.*: http://www.regjeringen.no/nb/dep/bld/dok/regpubl/prop/2009-2010/Prop-80-L-2009-2010.html?id=594677, last accessed on 10 May 2010.

[174] The judgment is not yet available in the case database Lovdata.no. The case was not appealed.

Municipal Court case (TOSLO-2009-154182)[175]
A female teller in a bank received notice of termination, stating as reason that over time she had had too many large discrepancies in the amounts of her teller. The employee did not accept the reason for the termination but claimed that the true reason for the notice was that she had been on sick leave because of her pregnancy. The Court found the pregnancy to be the true reason for the notice of termination, in violation of GEA Section 3(2) and WEA Sections 15-8 and 15-9. The notice of termination was deemed invalid and the woman maintained her position. As the woman had suffered no economic loss, no compensation was awarded.

Norwegian Equality Tribunal's decision no. 41/2009
The Norwegian Equality Tribunal's decision no. 41/2009 of 12 March 2010 concerns a man who claimed to have been the victim of discrimination due to gender, as he had not been employed as the head of a department for property taxation at a municipality. The man claimed he had been passed over due to the fact that he had informed the employer of his wish to be off on parental leave during the months of May and June in 2009. The man asked the Municipality in an e-mail if his wish for parental leave was the drawback of his application and the response was that 'he was on to something there'. Based on this, the Tribunal found reason to believe that the parental leave had affected the man's opportunity to succeed in the application process. The burden of proof shifted to the Municipality, as provided in the Gender Equality Act (Section 16). The Municipality was unable to present any documentation that could provide reason to disregard the right to parental leave. The Municipality had violated GEA Section 4, second paragraph, as well as Section 3.

Equality body decisions/opinions

Decision 07/874 by the Equality and Anti-Discrimination Ombud
A Russian woman employed in a municipality as chief engineer claimed to be discriminated against in violation of Article 5 of the Gender Equality Act, on equal pay. The woman compared herself with two male Norwegian employees in chief engineer positions as herself and with equal length of work experience. The employer claimed that the reason for the difference in pay was based on a difference in the quality of the work delivered by the woman. The employer did not however provide any evidence supporting this explanation. On the contrary, the employee presented a document where compliments were paid to her from the employer in regard to her well-performed work. The Ombud found that the employer had not been able to provide evidence that the difference in pay was based on other reasons than gender. The Ombud's conclusion was that the employer had violated Article 5 of the Gender Equality Act.

POLAND – *Eleonora Zielińska*

Policy developments

In recent months, no significant changes can be observed in the overall attitude towards gender equality, although some minor positive legislative developments should be noted. There has been no substantial progress in the process of implementation of the

[175] http://www.lovdata.no/, last accessed on 10 May 2010.

Service Directive 2004/113/EC. Just the opposite: the chances for acceleration of the harmonisation process have been diminished. As a result of the liquidation of the Department of Women, Family and Counteracting Discrimination of the Ministry of Labour and Social Policy, which was previously charged with the implementation of equality directives, the responsibility of pursuing the draft law implementing the Service Directive has been transferred to the Government Plenipotentiary for Equal Treatment – currently the only existing Polish unit officially playing the role of equality body.[176] The sudden death of the Human Rights Defender (Ombudsman), in the presidential plane crash near Smoleńsk postponed negotiations regarding the transfer of a part of the equality body's mandate to the Ombudsman's office (encompassing involvement in resolving individual cases). Depending on the person who will eventually be appointed to this office, the strongly critical assessment of the decision of the Prime Minister in this matter, made by feminist and lesbian NGOs, may be altered. Some recent positive developments to be reported in Poland are the presentation of a draft law on the equal representation of women and men on lists of candidates to parliamentary and local elections (the draft law is currently under scrutiny of the parliamentary commission).[177]

This is particularly important given the fact that several female deputies with long parliamentary experience, remarkable individuals, lost their life in the catastrophe mentioned above. As a promising sign may also be seen the declaration made by the Minister of Science and High Education that she will introduce the requirement of balanced representation of women and men in all decision-making and monitoring bodies in the field of science and higher education, hence increasing the role of women in the management of science.[178] The same may be said about the 'government plan on development and consolidation of state finances for the years 2010-2011' which, in the field of education, provides for increased access to different childcare allowances (crèches, kindergartens), as well as the raise of the wages of teachers.[179]

Legislative developments

New rules on class-action lawsuits

On 18 January 2010, the long-awaited regulations on pursuing claims in group proceedings, also known as class-action suits, were published in the Journal of Laws.[180] The new regulation defines group proceedings as court proceedings in which claims of a single type are pursued by at least 10 people, with the same or analogous factual basis. The governmental draft law was supposed to provide the possibility to apply class

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[176] On 19 January 2010 the Council of Ministers accepted the programme for the first six months of 2010, in which the Plenipotentiary is indicated as the body responsible for the draft law and Chancelleries of Prime Minister as the body that should prepare the draft. http://www.mpips.gov.pl, last accessed on 29 April 2010.

[177] http://wyborcza.pl/1,76842,7560238,PO_jednak_nie_wymysla_parytetu.html, last accessed on 2 May 2010.

[178] http://dziennik.pl/kobieta/article580833/Polska_nauka_potrzebuje_parytetow.htmlhttp://dziennik.pl/wydarzenia/article402530/Wladza_w_nauce_dla_kobiet.html?service=print, last accessed on 2 May 2010.

[179] http://www.polityka.pl/rynek/ekonomia/1502675,1,rzad-przedstawil-plan-dla-finansow-publicznych.read, last accessed on 29 April 2010.

[180] JoL 2010 no. 7, item 44. Parliament has decided to introduce into the Act's wording six months of *vacatio legis,* the reason for which has been given as: 'New regulations may profoundly change the management of litigation risk'. The law will enter into force on 18 July 2010. See parliamentary debate, on http://isap.sejm.gov.pl/DetailsServlet?id=WDU20100070044, last accessed on 28 April 2010.

action in all kind of civil matters, also deriving from employment. The upper Chamber of Parliament (Senate), under the pressure of employers[181] and under the influence of a lobby of banks and insurance institutions, has drastically limited the scope of application of such actions, explaining that a new concept such as the group action should first be introduced as a test for selected fields of application.[182] The law of 17 January 2010 (Article 1(2)) stipulates that group proceedings are allowed in cases where issues of consumer protection, product liability or tort liability arise, with the exception of the protection of personal goods. Given the lack of clear criteria enabling the classifying of acts as tort liability, in my opinion, such formulation does not prevent this type of claims from being lodged in cases deriving from employment (when e.g. the employer is guilty of violating the principle of equal treatment, resulting in material damages caused to a group of employees). The opinions expressed in this respect, however, differ.[183] Class actions may be applied in the situation of unequal treatment in access to certain goods or services when the victims of discrimination may be considered as consumers.

Group proceedings are lodged by a group representative, who must be a group member or a city consumer ombudsman. He must also be represented by a lawyer. The court decides whether the group proceedings are allowed in the case lodged, although a positive decision of the court may be questioned. If the appeal is not successful, the court is authorized to order a press announcement regarding the institution of group proceedings, in which substantial information is given to allow other potential members of the group to join the case. The Polish law has accepted the opt-in rule, whereby only persons who have declared their willingness to join the proceedings actually become party to them. Their participation in the group proceedings is dependent on the agreement of the defendant, who has the right to object. When the list of members of the group is final, the case is further processed by the court. In the ruling, the court is obliged to name all members of the group. If a monetary claim was submitted, the judgment of the court must indicate the level of damages awarded to each member of the group.[184] Since, as has been mentioned, the decision on whether the filed case is allowed lies within the mandate of the court, and keeping in mind the imprecise formulation of the legal provisions, the practical scope of application of the class action is to be finally established by case law.

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[181] Organisation of employers *Lewiatan* counted this change of the draft law as one of its lobby successes. Compare: http://.www.pkpplewiatan. pl, last accessed on 28 April 2010.

[182] Senate Print no.698 Z of 2 December 2009, www.senat.gov.pl/k7/kom/ku/2009/256.p., last accessed on 28 April 2010.

[183] Such possibility seems to include the President of Civil Chamber of Supreme Court; http://prawo.gazetaprawna.pl/artykuly/380056,sejm_doprecyzowal_ustawe_o_pozwach_zbiorowych.html, last accessed on 28 April 2010. One of the deputies from the party *PiS* (of law and justice), who during the parliamentary debate declared in the name of her party to vote against this change, argued: 'This change has far–reaching consequences for employee matters. It is beyond doubt that in particular for employers organised in large trade networks (corporations) the individual employee has no chance for effective defence of his/her rights in court claims and in particular is not able to persuade the employer to recognise at least part of his rights and to persuade him to conclude a conciliatory agreement. This is the main reason why this sphere of life should necessarily be covered by the group-action law'; http://orka2.sejm.gov.pl/Debata6.nsf/main/65357510,Bartus, last accessed on 28 April 2010.

[184] See more in English on the proceedings http://www.warsawvoice.pl/view/21740, last accessed on 29 April 2010.

Protection of maternity and paternity

Parliament has passed a draft law amending the Labour Code, which explicitly safeguards the same level of protection for men taking leave after the birth of their children as agreed for women on maternity leave.[185] This law remains in close relation to two amendments of the Labour Code dealing with parental benefits, adopted in 2008, as reported in the Polish contribution to *European Gender Equality Law Review* 2/2009. The amendment of the Labour Code introduced by the law of 5 November 2009 has, among other things, provided for an explicit guarantee for continuance of the labour contract of an employee who is a father and takes advantage of the opportunity to take part of the maternity leave instead of the mother of their child. This amendment safeguards the male employee's right to return to the former position, or a position equivalent to the one occupied before, with the same remuneration as the employee would be receiving had he not taken maternity leave. Additionally, the law extends this guarantee to all other kinds of maternity/paternity leaves which have been introduced by amendments of the Labour Code of 6 December 2008 (in force as of 1 January 2009). This covers the additional maternity leave (or additional leave for the father, the terms of which are the same as those of maternity leave) and the special paternity leave, non-transferable to the mother of the child. Pursuant to the amendments, also other special protective measures shall apply to all kinds of leaves mentioned above, connected with the birth or adoption of a child, which were previously provided for in case of maternity leave only (e.g. the prohibition of the dissolution of the labour contract). The introduction of the provision explicitly safeguarding the same level of protection for men taking a leave after the birth of their child as for women on maternity leave should be positively evaluated, since it makes the law in force fully clear. However, such frequent posterior changes of the legal provisions are undesired, since they contradict the principle of stability of law and might have a negative impact on the legal awareness among the public. In addition, its introduction provokes the question whether an interpretation *per analogiam* may still be allowed, e.g. to the benefit of the father of the child, where the law includes provisions applying to the mother, while leaving unregulated some issues relating to fathers, which are applicable to them as well. It should be mentioned that not all rights agreed in the Labour Code regarding fathers who are employees exist with respect to the military and police officers, who are bound by service contracts subject to specific laws. The regulations in this respect are inconsistent since fathers who work in the military are in a better situation than fathers who work as policemen and both are treated worse in comparison with other employed fathers (see for details Newsflash 2010-01-PL). The situation requires changing.

Change of the Labour Code in relation to vocational training

On 9 April 2010, the *Sejm* (lower chamber of Parliament) passed some amendments to the Labour Code. This change of the law was the result of a judgment of the Constitutional Tribunal, which considered the previous regulation (Article 103 of the Labour Code), transferring the detailed regulation of this issue to executive legal acts, to be contrary to the Constitution.[186] Although this amendment is not directly connected with the issue of equal treatment, it is important to stress that the statutory regulation of these rights in the Labour Code and the obligations of employers resulting from them, may raise the awareness of both employees and employers, while motivating employers

[185] Law of 5 November 2009 , JoL 2009, no. 219, item 1704.

[186] Judgment of 31 March 2009 r., K 28/08, published JoL 2009, no. 58, item 485, http://www.trybunal.gov.pl, last accessed on 2 May 2010.

to improve compliance with the equal treatment principle with respect to benefiting from vocational training**.**

Article 103 of the Labour Code, as amended, provides for a definition of the term 'raising of qualifications' as well as a detailed catalogue of employees' rights connected with enjoyment of vocational training (such as the amount of paid vocational training, leaves, free time from work e.g. for travelling to the place of training, for preparation for different types of exams or preparation of diploma work and other optional allowances, such as the employer covering the costs of training, costs of transportation, manuals etc). The law also stipulates an obligation to conclude a special contract with the employee (unless the employer does not intend to continue employment with the employee after the training is completed). The contract should provide a way of reimbursing the costs of training if the contract is violated.[187]

Case law of national courts

Important court decisions in sexual harassment cases

Some positive developments can be observed in relation to case law on sexual harassment. The district court in Piotrków Trybunalski on 2 February 2010 rendered a judgment condemning the *Samoobrona* political party leader A. Lepper and his party colleague S. Łyżwiński for sexual harassment and other sexual violence. It was the first lawsuit for sexual harassment involving persons in such high political positions.[188] The sex affair was one of the pretexts to break the coalition of the parties *PiS* and *Samoobrona*, which led to premature elections in 2006, as a result of which *PiS* was not able to form a government and *Samoobrona* was thrown out of Parliament. Although the verdict of the Court is not final, it may already have a positive impact on other similar cases awaiting justice (e.g. the pending case of the former president of *Olsztyn*). It should also constitute a warning for other abusers of power and it may be expected that other victims of sexual harassment will feel encouraged to sue their oppressors.

The facts in this case are as follows.

Three years ago, Aneta Krawczyk, the Chief of the office of former deputy S. Łyżwiński informed the daily newspaper *Gazeta Wyborcza* about a common practice among *Samoobrona* party leaders, making many women dependent, for employment in the deputies' offices or having their names put on the party's electoral lists, on their submission to sexual intercourse. The party leader A. Lepper (vice premier and deputy at the time) was charged with sexual harassment of 2 women and the deputy S. Łyżwiński, among others, with sexual harassment of 4 women and rape of one. Both of the accused pleaded not guilty. The prosecutor requested 2 years and three months of imprisonment for A. Lepper and 5 years of imprisonment for S. Łyżwiński. The court proceedings, which at the request of the victims took place *in camera*, confirmed the accusations. As a result, both of the accused were convicted to the sentences requested by the public prosecutor, although the legal qualification of the perpetrator's conduct in

[187] http://orka.sejm.gov.pl/SQL.nsf/ustawyall?OpenAgent&6&65, last accessed on 29 April 2010.

[188] It should be mentioned that the ECtHR judgment of 23 March 2010 *Cudak v Lithuania* Application no. 15869 concerned an official of the Polish Embassy in Lithuania, who sexually harassed a Lithuanian employee of the Embassy; http://cmiskp.echr.coe.int/tkp197/view., last accessed on 26 March 2010.

the case of Lepper was changed to receiving non-material profits while performing a public function (corruption, Article 228 of Penal Code).[189]

PORTUGAL – *Maria do Rosário Palma Ramalho*

Legislative developments

New legislation concerning marriage between persons of the same sex

The Portuguese National Parliament has approved new legislation concerning the right to marry a person of the same sex, following the proposal of the Socialist Party, which is now part of Government. This legislation (Decree of the National Assembly No. 9/XI, of 11 February 2010)[190] changes the rules of the Civil Code regarding this issue, which until now stipulated civil marriage as a contract necessarily concluded between a woman and a man.

The main justification for this legislation, presented by the Government, is the development of the institution of marriage over the years, and the general principle of non-discrimination, more specifically non-discrimination on the grounds of sexual orientation.

However, a strong movement against this view spread in many circles and alternative proposals were also submitted to Parliament, either proposing a different contract for this situation (and thus leaving the civil marriage contract unchanged), or proposing the suspension of the legal process and the call for a national referendum on this subject. These other solutions were rejected by Parliament, and the Bill was approved with the votes of the Socialist Party, of the Communist Party and of the *Bloco de Esquerda* Party (extreme left-wing party).

This opposing movement, along with the social delicacy of the subject, explains the difficult process of this piece of legislation. After the final approval of this piece of legislation by Parliament, the President submitted it to the Constitutional Court, in order to analyse its conformity with the constitutional references to the right to marry. The Constitutional Court decided, by a huge majority, that the legislation was in line with the Constitution (Decision from the Constitutional Court No. 121/2010, of 8 April 2010).[191]

Therefore, unless the President exercises a political veto over the legislation - which is still possible but not probable - this legislation will be published and will enter into force in a few days.

The new Act allows two persons of the same sex the right to conclude a civil marriage contract (Article 1).

In order to implement this right, the Act makes several changes to the rules of the Civil Code regarding civil marriage contracts. The main one is the introduction of a new definition of marriage contract (Article 1577 of the Civil Code) as 'the contract concluded between two persons that aim to found a family in a life-long commitment, under the terms of this Code', thus eliminating the traditional requirement that the two

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[189] http://lodz.gazeta.pl/lodz/1,35153,7502110,Koniec_procesu_Leppera_i_Lyzwinskiego.html and http://www.pomorska.pl/apps/pbcs.dll/article?AID=/20100211/KRAJSWIAT/107279183, last accessed on 26 March 2010.

[190] Published in the National Parliament Journal (DAR, I S A, No. 42/XI/1, of 1 March 2010), available on www.assembleiadarepublica.pt, last accessed on 2 March 2010.

[191] *Acórdão do Tribunal Constitucional* nº 121/2010, de 8/04/2010, on www.tribunalconstitucional.pt, last accessed on 2 May 2010).

parties are of different sex. The Act also eliminates all other references of the Civil Code regarding marriage contracts that mention the different sex of the persons, such as the expressions 'husband' and 'wife' as well as the traditional cause for the annulment of the contract, which was the fact that the persons involved had the same sex (Articles 2 and 4 of the Act).

All rights and duties attached to civil marriage contracts are therefore extended to the marriage between persons of the same sex with this new Act. The only exception is the right to adopt (which the Civil Code grants to married couples, under Article No. 1979); this was expressly left out of this new Act (Article 3).

ROMANIA – *Roxana Tesiu*

Policy developments

Impact of economic crisis on social policy

In accordance with the trend registered throughout 2009, gender equality developments continued to receive very little attention from state bodies and relevant implementation bodies. The public arena discourse is the captive of the economic crisis throughout the country and of very intensive debates on financial measures in need of being addressed by the Romanian Government. There are multiple initiatives currently under discussion in the public arena with regard to decreasing salaries, pensions, as well as various state allowances, including those granted for parental leave and childcare.

National strategy and action plan on equal opportunities

However, one important policy step has recently been registered with regard to enhancing the gender equality strategy in Romania. On 15 April 2010 two important documents were approved: the 2010-2012 National Strategy on equal opportunities for women and men and the General actions plan for implementing the National Strategy on equal opportunities for women and men.[192] Both documents emanated from the National Agency for Equal Opportunities that had the support of an inter-ministerial working group. The Strategy is structured alongside two main gaps identified with regard to gender equality implementation in Romania:

– the low awareness on gender equality in mass media and public administration structures; and
– the lack of consistent legal framework provisions with regard to addressing gender-based discrimination complaints. Such a reality is caused by the fact that there are two public bodies addressing gender-based discrimination complaints: the National Council for Combating Discrimination and the Agency.

In addition to the above-mentioned gaps, the Agency also identified several threats jeopardizing the adequate implementation of gender equality policies in Romania:

– the economic crisis;
– the labour market dynamics;
– insufficient promotion of the social campaigns in mass media; and

[192] Government Decision No. 237 of 24 March 2010 on the approval of the National Strategy on equal opportunities for women and men for 2010 – 2012 and on the approval of the General actions plan for implementing the National Strategy on equal opportunities for women and men for 2010 – 2012, published in the Official Gazette No. 242 of 15 April 2010.

– communication deficiencies between public institutions on the one hand, and civil society and social partners on the other hand.

Strategy objectives:
In order to address the identified gaps affecting the implementation of the gender equality policies, the Strategy is built on a central objective stated as 'the improvement of the implementation frame of all gender equality policies aimed at achieving *de facto* equality between women and men at all levels of economic, social, cultural and political life'. This general objective is paralleled by eight specific objectives:
– introducing the gender perspective at all education levels;
– combating the gender stereotypes in the education system;
– reducing the gender pay gap;
– encouraging the reconciliation between private and professional life;
– promoting the gender perspective in social life;
– encouraging women's balanced participation in decision making;
– mass-media awareness with regard to gender equality between women and men; and
– monitoring the implementation of the indicators included in the Beijing Action Platform.

The formulation of the general and specific objectives of the Strategy continues to reflect the lack of concrete measurable actions possible under these objectives. The very general and ambiguous formulation does not appear to offer any possibility to identify the steps to be taken in order to facilitate the achievement of the objectives. Furthermore, the actions designed to translate the specific objectives into measurable output unfortunately lack consistency and the amplitude required to address the need for action as expressed by the objective. For example, the specific objective of introducing the gender perspective at all education levels is proposed to be achieved through the following actions:
– concluding a collaboration protocol between the National Agency and the Minister of Education, Research, Youth and Sport;
– preparing a handbook on how to integrate the gender perspective into preschool activities (to be available in 5000 copies); and
– training on gender equality for teaching staff active in the pre-school education system.

Another relevant example is related to the specific objective of reducing the gender pay gap. While the gender pay gap remains one of the most important areas of discrimination and differences between women and men, drastically affecting women,[193] the actions designed to implement this specific objective remain mainly decorative and repetitive when compared to the previous 2006-2009 National Strategy on equal opportunities for women and men. The planned actions aimed at achieving the objective of reducing the gender pay gap consist of 'organizing round table discussions at the national level with regard to raising awareness of the importance of reducing the gender pay gap, editing promotional materials on the gender pay gap and promoting the organization of the round table discussions in the local mass media'. Specific quantitative indicators for measuring the output of the actions planned to achieve the

[193] For 2007, the gender pay gap in Romania represented 12.7 % in the general economy, with a pay gap of 28 % in the industrial sector (data from the National Strategy on equal opportunities for women and men for 2010 – 2012).

objective of reducing the gender pay gap are stated as being the number of participants in the planned round table, the number of flyers edited for promoting the need for reducing the gender pay gap in Romania, as well as the number of conclusions of the round table discussion that will be organized. Hence, there is an obvious gap between the size of the gender pay gap topic and the tools identified for addressing such topic.

Overall, while articulating a national strategic paper on addressing gender equality policies and specific implementation is extremely important to take coherent and consistent action aimed at reducing gender inequality in Romania, the effort of strategizing should be accompanied by investments in redressing measures that are proportional to the size of the issues.

SLOVAKIA – *Zuzana Magurová*

Policy developments

National Action Plan for Gender Equality

Organizations dealing with issues of women's human rights disagree with the draft National Action Plan for Gender Equality for the years 2010-2013 (NAP) drawn up by the Ministry of Labour, Social Affairs and Family, the adoption of which will be decided by the Government in May of this year. The organizations explained the reasons of their disagreement to the Government in the open letter as well as at the meeting of the Council of Government for gender equality.

The main problem of the draft NAP is that it was not preceded by public and expert discussion, leading to the elaboration of a comprehensive and conceptual document. Due to many weaknesses in the submitted draft, NGOs have requested the Government not to approve this document in its present form, but to complete it with active involvement of all interested ministries and non-government organizations and to adopt a quality document with adequate financial coverage.

In the area of economy and social affairs, the effort to develop mechanisms for the cross-sectional application of the gender aspect in all measures and decisions, to which the Government has committed itself in its Manifesto, is lacking.

In the area of education, the objective of the NAP is to include the gender issues in the pedagogic and organizational instructions, although the content and process of implementation are not clearly defined. The education of teachers and pedagogic managers, who should have been the main actors in the enforcement of gender equality in education, is fully absent.

The NAP does not sufficiently deal with the area of healthcare and reproductive health which has key importance for the area of gender equality. It does not contain measures to solve multiple discrimination of certain groups of women – e.g. Roma women, single mothers, non-heterosexual women or older women. It also omits many institutional solutions, such as the creation of the function of Deputy Prime Minister for gender equality, without which the long-awaited changes in the area of gender equality cannot be achieved. The solution of issues of women's access to justice is equally unsatisfactory. On the one hand, the NAP mentions the support of temporary compensatory measures, but on the other hand, it does not propose any changes in the relevant legislation that is required for their implementation.

Equality body decisions/opinions

Report on the observance of human rights including the principle of equal treatment in the Slovak Republic for the year 2008

Under the Antidiscrimination Act, the Slovak National Centre for Human Rights ('the Centre') acts as the sole institution safeguarding equality, by assessing the observance of the right to equal treatment according to the Antidiscrimination Act. The Centre annually elaborates and publishes the Report on the Observance of Human Rights including the awareness of the equal treatment principle in the Slovak Republic for the previous calendar year.[194]

The Centre monitors and evaluates the observance of the fundamental rights and freedoms, including children's rights, as well as the observance of the principle of equal treatment in the Slovak Republic. The chapter in the report entitled 'The principle of equal treatment and prohibition against discrimination' is highly general and not very critical.

In 2008/2009, the Centre examined dozens of claims regarding gender inequality. Maternity as a ground of unequal treatment was claimed most frequently; several cases concerned sexual harassment, termination of employment on the ground of pregnancy, etc. The majority of these cases referred to unequal treatment in employment or similar legal relations.

Also in the course of 2009, the Centre dealt with claims of discrimination on the ground of pregnancy. Although the Labour Code and other labour regulations provide for the protection of pregnant women, the Centre received many complaints concerning the dismissal of female employees during their probation period.

Although exact statistics of pregnant women dismissed in their probation period are not available, this trend is increasing. In the probation period, when both parties, i.e. the employer and the employee, have the right terminate the employment without further formal procedure, this right is often abused by employers.

The Centre also dealt with the issue of equality of remuneration, but it only mentioned this phenomenon without making proposals for solution, and in particular improvement, of the situation.

The Centre refers to the unwillingness of victims of discrimination to solve their situation by legal action, which consists in the overall distrust of the judicial system, financial and time exigency of legal proceedings, but also in the lack of information and ignorance of legal remedies. The result is a long-term small number of valid court decisions.

In spite of the initiative of the Centre from previous years that courts should include in their statistics the identification of filed and decided actions concerning the violation of the principle of equal treatment by grounds and areas of antidiscrimination law, records on cases related to the violation of the principle of equal treatment still do not exist, so the said information only has an indicative character.

According to the Antidiscrimination Act, the Centre is an institution to which the state authorities are obliged to submit reports on the justification of continuation of adopted temporary compensatory measures. However, in 2009 the number of state authorities that used the possibility to adopt temporary compensatory measures for disadvantaged groups under the conditions laid down by the Antidiscrimination Act did not increase.

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[194] This report is currently available in the Slovak version on the Slovak National Centre for Human Rights' website: www.snslp.sk, last accessed on 3 May 2010.

The Centre only received information from a number of ministries and from the Office of the Government Plenipotentiary for Roma communities. The Ministry of Education did not supply any information at all and from the information provided by the Ministry of Labour, Social Affairs and Family of SR it results that it has not defined the category of special temporary compensatory measures.

The Centre believes that this is caused by the lack of clarity in the provision of the Antidiscrimination Act on the submission of reports to the Centre, as well as in the ambiguous opinion of the expert public and affected bodies regarding the application of temporary compensatory measures in practice.

As in 2009 the changes to temporary compensatory measures, extending the number of entities authorized to adopt temporary compensatory measures, were not implemented, the Centre repeatedly noted that the classification of municipalities, larger territorial units and employees among the entities authorized to adopt temporary compensatory measures could help to ensure the equality of opportunities in practice and to meet expectations related to the elimination of social and economic discrimination, as well as discrimination on the ground of age and handicap.

As in the period under review a wider discussion of the interested state institutions with respect to the subject of temporary compensatory measures did not take place, the Centre has the ambition to enhance the visibility of this subject in the year 2010.

A major weakness of the report is the fact that the Centre as equality body fully disregarded the issue of temporary compensatory measures on the ground of sex, which are still missing in national legislation. The Centre was expected to be much more critical in this area.

Miscellaneous

Report of the Public Defender of Rights[195]

The Public Defender of Rights is not competent to decide on violations of fundamental rights, and neither is he authorised to decide on violations of the principle of equal treatment. However, if he finds a violation of fundamental rights and freedoms he is obliged to inform the affected public administration body and propose appropriate measures.

In March 2010, the Public Defender of Rights submitted to the National Council of the Slovak Republic the report on his activity. In this report he presents information about violations of fundamental rights and freedoms of natural and legal persons and about other weaknesses in the activity of public administration bodies identified by him for the period from March 2009 to February 2010.

In a separate chapter of his report, the Public Defender of Rights deals with the issue of children's rights and stresses his willingness to fulfil tasks of an independent mechanism for enforcement of the Convention on the Rights of the Child.

However, the report does not contain a similar chapter devoted to women's rights. It generally deals with the protection of fundamental rights and freedoms of persons with different sexual orientation or persons who have changed sex, and recommends that Parliament should pay attention to the issue of equality of persons 'LGBT' also at legislative level. It is necessary to recall the political and international commitments of the Slovak Republic concerning the observation of the principle of equality in rights and non-discrimination on the ground of sex and sexual orientation, declared in

[195] This report is currently available in the Slovak version on the Public Defender of Rights' website: www.vop.gov.sk, last accessed on 3 May 2010.

international documents. In this context the Public Defender of Rights refers to the recent decision of the European Court of Human Rights in the matter of impossibility of succession of homosexual partners which according to the court in Strasbourg constitutes discrimination and also violates the right to family life.

SLOVENIA – *Tanja Koderman Sever*

Policy developments

Activities of the Office for Equal Opportunities

Among the activities of the Office for Equal Opportunities what deserves mentioning is the publication of the Annual Report on the work of the Advocate of Equality for 2009[196] and its submission to the Government in April 2010. According to the report the number of gender discrimination cases in 2009 increased. The Advocate dealt with 74 cases of alleged discrimination on various grounds, out of which 16 cases were gender discrimination cases. When hearing a case, the Advocate focused on raising public awareness and giving general information regarding discrimination issues rather than on assessment of the facts and resolving disputes.

In addition, the Office for Equal Opportunities organized a conference on the pension reform from the gender perspective for the experts in this field (representatives of the Government, academic researchers, interest groups, employers, NGOs, women's groups in political parties and trade unions). The conference was organized as part of a series of public discussions on the draft amendments to the Pension and Invalidity Insurance Act. The participants discussed the reasons for keeping the different pensionable ages for men and women, abolition of the advantages granted to persons who have brought up children, actuarial factors, the most vulnerable groups of women and the effects of the reforms on women and men from different perspectives. The summary of suggestions, opinions and views of the conference were submitted to the proposer of the pension reform.

Another conference organized by the Office for Equal Opportunities was a conference on the draft law on Elections to the General Assembly. Participants of the conference (representatives of the Office for Equal Opportunities, the Ministry of Public Administration and other experts from university faculties and NGOs) assessed the draft law as a step forward compared to the current law.

Annual report of the Labour Inspectorate

At the end of March 2010, the Slovene Labour Inspectorate published the Annual Report for 2009.[197] According to this report, inspectors had found 13 violations concerning the prohibition of discrimination, sexual and other harassment and bullying.

Government activities

Pursuant to Article 9 of the Act Implementing the Principle of Equal Treatment, the Government adopted the Decision on the Establishment, Composition, Organisation and Tasks of the Government Council for the Implementation of the Principle of Equal treatment (hereafter the Council) and the Decision on Appointment of the Members of

[196] http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/ZagovornistvoPorocilo2009.pdf, last accessed on 20 May 2010.

[197] http://www.id.gov.si/fileadmin/id.gov.si/pageuploads/Splosno/porocilo_2009.pdf, last accessed on 20 May 2010.

the Council in November 2009. The Council is an expert and consultative body of the Government for the implementation of the principle of equal treatment and was established in order to monitor and evaluate the position of individual social groups in view of the implementation of the principle of equal treatment. In carrying out its duties, the Council will cooperate with the competent state bodies and other institutions operating in the field of equal treatment of persons and prevention of discrimination based on personal circumstances. It is composed of 13 members: 7 representatives of civil society and 6 representatives of the Government or state institutions. The Council held its first meeting on 30 November 2009. It discussed multiple discrimination in the scope of the project 'Equal in Diversity' and defined priority tasks of the project. In its third meeting on 2 March 2010, the Council discussed the implementation of the Resolution on the National Programme for Equal Opportunities for Women and Men in 2008 and 2009, and focused on unequal treatment based on gender regarding access to and supply of goods and services (different prices for women and men for hairdresser's services were explicitly mentioned).

In February 2010 the Government appointed a new Director of the Office for Equal Opportunities for a term of five years. Tanja Salecl was the Director of the Office for Equal Opportunities several years ago and has now performed duties as acting director since last November. Furthermore, the Government empowered Barbara Žgajner Tavš, a former member of the General Assembly, to perform the duties of the Advocate of Equality due to the termination of the employment relationship of the current Advocate of Equality Domen Zupan in January 2010. His employment relationship was terminated due to the findings of the Civil Service Inspector that he did not fulfil conditions for the position of Advocate.

Another activity of the Government that needs to be mentioned is the adoption of the Report on the Implementation of the Resolution on the National Programme for Equal Opportunities for Women and Men for the period 2008-2009[198] in April 2010. The Report was drawn up by the Office for Equal Opportunities on the basis of reports of ministries and government offices on the implementation of the activities under their responsibility. After its adoption by the Government, it was submitted to the General Assembly. In addition, the Government adopted the third periodical plan for the implementation of the Resolution on the National Programme for Equal Opportunities for Women and Men for the period 2010-2011.[199] The second periodical plan is the implementing act for the National Programme for Equal Opportunities for Women and Men setting out priorities and activities for the implementation of the objectives and measures thereof in particular areas of the national programme to be carried out over the next two years. Among the important objectives of this plan is to maintain a commitment to implement gender equality measures in these times of economic and financial crisis, particularly in the areas of employment, social inclusion, participation in decision-making processes, respecting dignity and integrity, and the elimination of all forms of violence against women.

[198] http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/UEMPorociloReNPEMZM0809.pdf, last accessed on 20 May 2010.

[199] http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/UEMPeriodNacrtReNPEMZM1011.pdf, last accessed on 20 May 2010.

Case law of national courts

It is rather unusual that Slovene people, who often litigate for various reasons, rarely decide to bring gender equality cases to court. This is why there is no case law worth mentioning in the area of gender equality in the past seven months.

Equality body decisions/opinions

Gender discrimination found in a case of unlawful dismissal
The Advocate of Equality working within the Office for Equal Opportunities decided in a case of alleged discrimination in employment. He found discrimination based on gender in a case of unlawful dismissal. A worker was dismissed because of being pregnant. The Advocate informed the initiator of the case about her legal rights.

Gender discrimination found in a case regarding access to and supply of goods and services
In November 2009, the Advocate decided in a case of alleged unequal treatment based on gender regarding access to and supply of goods and services. A male initiator complained about having been discriminated against because the entrance fee to a certain nightclub was charged only to men. The Advocate in a written opinion found entry fees charged only to men directly discriminatory towards men.

Miscellaneous

Academic monograph: 'Equal Opportunities in Slovene Diplomacy'
The Ministry of Foreign Affairs presented a research project and academic monograph entitled 'Equal Opportunities in Slovene Diplomacy'. Participants in the survey, which covered the period from the beginning of Slovene diplomacy to the beginning of 2009, mainly agree that women in Slovene diplomacy have more problems than men, primarily because of the care for their family. Although most respondents were not directly discriminated against on grounds of gender, it turned out, however, that gender is a barrier to a career as diplomat for Slovenia, because of family obligations. In addition, diplomats have often highlighted among the obstacles faced in their careers the difficulties associated with the employment of their partner.

SPAIN – *Berta Valdés*

Policy developments

Women's Participation Council
The *Consejo de Participación de la Mujer* (Women's Participation Council) has been created to provide advice and put forward proposals on equality policies implemented by the Government. The Council will also draw up reports on preliminary draft laws and draft royal decrees on a state level, and on the Strategic Plan for Equal Opportunities. It is a government body for dialogue between women (27 women's organisations across Spain) and representatives from the public authorities, also including the most important trade unions and business organisations. This will allow women to play a role in public policies and make progress towards real implementation of the principle of equal treatment and opportunities for women and men. The Council

has a particularly important role in ensuring that mainstreaming principles are applied when drawing up laws on a national level.

I Strategic Plan for the Equality of Women and Men in Andalusia 2010-2013
The I Strategic Plan for the Equality of Women and Men in Andalusia 2010-2013 has been adopted. It aims to create the conditions and structures to reach the effective equality of opportunities in Andalusian policies. The Plan develops 8 action lines (integration of gender perspective in public policies, education, conciliation, health, social welfare, participation and image and mass media), each with concrete objectives and the measures to be adopted, covering more than 300 activities. The strategic directives of the Plan are three: Mainstreaming, Conciliation and Co-responsibility and Empowerment of Women. To fulfil the Plan's objectives, a monitoring and evaluation system is designed, including the following structures:

– the Interdepartmental Commission for the Equality of Women and Men: its function will be monitoring the actions of the Andalusian Government's administration in gender equality as well as the preparation of new Strategic Plans every four years;
– gender Equality Units: they will apply and evaluate the measures of the Plan in all 8 lines of action and elaborate an annual report;
– the *Consejo Andaluz de Participación de las Mujeres*: citizenship participation concerning gender equality;
– the Technical Commission of the Strategic Plan: implementation, evaluation and coordination of the plan.

Policy developments related to equality plans in Catalonia
Law 3/2007 for effective equality between women and men states the obligation for companies with over 250 workers to have a company equality plan, but equality plans are voluntary for smaller companies. It is hoped that the corporate equality plans will be highly effective instruments for achieving real equality between women and men. For this reason, regional governments of autonomous communities are providing economic and technical aid to medium-sized enterprises for implementing these plans. In Catalonia there has been a recent call for applications for subsidies to establish plans for equal opportunities for men and women. The aim of the subsidies is to help companies of 30 or more workers to implement an equality plan negotiated with workers' representatives to encourage equal opportunities for both men and women.

Policies towards equality in the city council of Gijón
The development of the national and autonomous laws of equality creates the opportunity for local governments to implement different measures in order to make equality more effective. To this end, the Gijón city council includes conditions relating to equality policies in contracts signed with private companies, and subsidies awarded to the same. It will give preference to companies with established equality measures or plans that bid for council tenders. It will also review all municipal grants to ensure they include equality criteria and will include equality-related issues in the competitive exams for public office. These measures were included in Gijon's Local Charter for Equality (2010-2014), where the city council undertakes to promote the use of non-sexist language and provide training in gender equality for all municipal personnel.

Legislative developments

Law 2/2010 on Sexual and Reproductive Health and the voluntary interruption of pregnancy

After intense social debate, the Law on sexual and reproductive health and voluntary interruption of pregnancy was finally passed, although some of the most controversial provisions have been eliminated or substantially modified after parliamentary debate. The Law recognizes the right of freely-decided maternity and guarantees that women will have the possibility of making a decision during the first 14 weeks. The interruption of pregnancy in this case is conditional on at least three days of reflection after the woman receives certain information in relation to pregnancy and its interruption. The decision of women of 16 and 17 years old does not require the legal consent of the parents or tutors, although they must be informed, unless this fact would cause a risk of violence in the family. The abortion will also be possible with different time limits, and even without a time limit, in cases of serious risk for the health of the woman or anomalies in the foetus. The Law also determines the objectives of public policies in the matter of sexual and reproductive health, with measures in the sanitary and educative scope.

General Law 7/2010, on Audio-visual Communication, of 31 March 2010

This law aspires to promote a more inclusive and fair society and with respect to publicity and mass media specifically establishes the prevention and elimination of gender discrimination. The main rights of the public are regulated in the first part of the law and one of them is to receive plural audio-visual communication which cannot incite hatred, gender discrimination or discrimination because of any personal or social circumstance. Audio-visual communication must also respect human dignity and constitutional values, with special attention to the eradication of attitudes enhancing situations of inequality for women.

Draft legislation: law of Castilla-La Mancha on equality between men and women

The draft law of Castilla-La Mancha on equality between men and women, which establishes active anti-discrimination measures, aims at eradicating inequalities. The draft law will develop and extend the basic directives included in national equality legislation, and provide incentives for companies willing to voluntarily implement equality plans. The measure is aimed at companies employing between 50 and 250 workers.

Miscellaneous

Balanced composition of company boards

Balanced representation between women and men on the boards of major companies is regulated in Article 75 of Law 3/2007 on real equality between women and men. Although balanced composition should be reached within the limits of the eight-year timeline established by the law, it is slowly being put into practice as shown in the report presented by the Minister for Equality to the cabinet council. The report gives statistics reflecting the presence of women on public and private company boards during the 2004-2009 period. The report is based on an analysis of 79 public and 139 private companies quoted on the stock exchange, with particular emphasis on IBEX-35 companies. The report includes the target that public companies should achieve a 30%-70% balance by the start of 2011, and a second phase with a target of a 40%-60%

balance by 2012. With regard to the private sector, the measures put forward recommend that large companies should endeavour to achieve balanced representation by 2015.

SWEDEN - *Ann Numhauser-Henning*

Legislative developments

No longer room for positive action accessing university education
As of 1 August 2010 the current possibility to give preferential treatment to equally qualified applicants of the underrepresented sex as regards admission to higher education will be abolished.[200] Until now, the regulation in Chapter 7 Section 12 of the (1993:100) Ordinance of Higher Education has mostly been used to give preference to male applicants, women being over-represented in many educational programmes. Some of these current practices have been considered illegitimate in the courts (see below).

Case law of national courts

There is no significant case law concerning sex discrimination from the Swedish Labour Court in the last six months. However, a few cases from the ordinary court system deserve to be mentioned.

Alleged discrimination on the grounds of pregnancy-related physical problems
Four cases from the Stockholm District Court (judgments 2009-11-03, T 10670-07, 10671-07, 10702-07 and 15410-07) concerned four pregnant women with pregnancy-related physical problems that were denied sickness benefits with reference to pregnancy being 'a natural state' and not an illness. According to the Swedish Public Insurance Act, *Lagen om allmän försäkring* (1962:381), there is a right to income-related sickness benefits for employed persons not being able to work due to illness. The ability to work must be reduced by at least 25 %. Sickness benefits in cash are provided by decision of the National Insurance Board (*Försäkringskassan*) in the first instance. Such a decision can be appealed against, at the County Court (*Länsrätten*), at the Administrative Appeal Court (*Kammarrätten*) and, eventually, at the Supreme Administrative Court (*Regeringsrätten*).

Four different women, all pregnant, were denied sickness benefits by *Försäkringskassan* despite them being prevented to work during parts of their pregnancy due to (mainly) pregnancy-related back problems. Ms A (a pre-school teacher) had, according to her doctor, a total loss of ability to work from week 33 of her pregnancy. The medical expert of *Försäkringskassan* regarded her problems 'a natural' consequence of her pregnancy and *Försäkringskassan* denied her sickness benefits arguing that 'a right to sickness benefits requires the pregnancy to deviate from what could be regarded as 'the normal process of pregnancy' in that there were complications amounting to 'illness'. 'Illness' was defined as any abnormal physical or psychological condition not related to the normal process of life'. Only certain quite specific complications during pregnancy were regarded as such 'abnormal' conditions

[200] Internet source and additional information: http://www.regeringen.se/sb/d/12473/a/141904, last accessed on 23 March 2010.

amounting to illness. Ms B (a nurse) suffered from back problems which prevented her to perform her work from week 26 of her pregnancy, Ms C (a bus driver) lost her capacity for work for 50 % due to pregnancy-related problems as of week 21 of her pregnancy and later on for 100 %, and Ms D (a labour inspector) was unfit for work due to diverse problems for 50 % as of week 31 of her pregnancy. All three (B, C and D) were also denied sickness benefits by *Försäkringskassan* based on the same line of argument. All four women received sickness benefits later in accordance with their applications to the County Court.

The Equality Ombudsman brought the four situations of alleged discrimination to Stockholm District Court arguing that a non-pregnant person suffering from symptoms of the same kind and severity would have been provided sickness benefits.

The Court stated that pregnancy-related discrimination amounted to direct sex discrimination with a reference to the *Dekker* case. It then proceeded to discuss whether the three requirements of detrimental treatment, comparable situation and causality were relevant. The decision by *Försäkringskassan* was considered to amount to detrimental treatment despite the fact that it was changed later on by the County Court and thus never took legal effect. The *Försäkringskassan* argued that pregnancy-related problems could never be compared to those of a non-pregnant person but the County Court found the situation comparable with that of a (hypothetical) non-pregnant person with symptoms of the same kind and severity. Moreover, the Court found a prima facie case of discrimination to be at hand – the decisions of *Försäkringskassan* were supposedly related to pregnancy and a non-pregnant person with the same symptoms would have been provided sickness benefits – whereas *Försäkringskassan* had not managed to prove otherwise. Indemnification was set at approximately EUR 5 000 (SEK 50 000) each.

This decision may prove very important for pregnant women in Sweden in that pregnancy-related problems will qualify for sickness benefits more often. Until now, women had to use their limited days of parental leave benefits in this situation. It is also interesting that the decision by *Försäkringskassan* was considered to amount to detrimental treatment despite the fact that it was changed later on by the County Court and thus never took legal effect.[201] However, the case has been appealed. Another 18 parallel cases have additionally been brought to court by the Equality Ombudsman (*DO*).

Illegitimate positive action accessing university education

In its judgment of 21 December 2009 (Case T3552-09) the Appeal Court (*Svea Hovrätt*) found positive action treatment when admitting students to the veterinary programme at *Sveriges Lantbruksuniversitet* to be contrary to both the then applicable Swedish legislation (the 2001:1286 Equal Treatment of Student at Universities Act) and EU law. Since female students by far outnumbered male students in this educational programme, in a limited quota for applicants coming from a certain type of secondary education (*folkhögskolekvoten*) and when applicants had equal merits, male students were given priority in access to the programme. This treatment was mainly based on labour market reasons (both sexes being represented among veterinarians) and reasons connected to the social study environment (both sexes being represented).

The Court, although accepting a certain scope for positive action, found the preferential treatment to be disproportionate. To, in practice, totally exclude female students in this quota group from accessing the programme was, according to the Court,

[201] http://www.do.se, last accessed on 10 December 2009.

probably unacceptable *per se* and at least not proportionate to the limited effect that this measure had on the number of students of each sex – the group concerned 5 out of 100 openings - and its discriminatory effect on female applicants. Indemnification was set at approximately EUR 3 500 (SEK 35 000) to each female applicant.

TURKEY – *Nurhan Süral*

Policy developments

Initiatives to establish an equality body

In January 2010, the Government proposed the introduction of an Anti-Discrimination and Equality Board for the long term to create a society where differences are respected. The Board's task is to help people who face discrimination for one or more reasons. The decisions of the Board will be binding and it will also be authorized to impose administrative sanctions, namely fines. The Board is to actively promote equality as well as ensure that individuals have access to justice if they are treated unfairly. In such cases, the decision of the Board will serve as an expert witness report before the court. The Government aims to produce its final plans after more discussions.

Case law of national courts

Nursing

Turkey's Constitutional Court deleted the term 'women' in two of the articles of the Nursing Law as a result of which nursing can now be practised by both men and women. The decision, rendered on 23 July 2009, became effective with its publication in the Official Gazette on 19 March 2010.

Miscellaneous

Controversy over headscarf issue

The Turkish Armed Forces Pension Fund (*OYAK*), established in 1961, has gained financial power over time. Fifty-one percent of Renault's Bursa plant is owned by OYAK, while the rest is owned by Renault. Turkish-French carmaker OYAK-Renault has banned women wearing headscarves from entering a company facility in Bursa where its employees can shop. An employee at a Bursa plant wanted to go shopping at the Renault facility with his wife, mother and father on 27 February 2010. While the worker and his wife were allowed entry to the facility, his mother, who was wearing a headscarf, was not allowed in. The security guards at the gate told the worker that the company's management ordered them not to allow anyone wearing a headscarf into the facility. When employees of the Bursa plant contacted the metal sector workers' union Türk Metal about the incident, the union officials said the decision was the company management's choice; hence, they could do nothing to change the situation. The management of the Renault facility in Bursa said management made such a decision due to repair work at the facility. The workers later received an e-mail from the human resources department telling them not to bring their family members to Renault's shopping facility in the weekends.

On 24 March 2010, students protested in front of the Izmir Municipality which did not grant them discount bus passes because they were wearing headscarves in their application photos.

On 26 March 2010, pupils of a pre-school class were taken to visit the Toy Museum, part of the Faculty of Education of Ankara University. Women wearing headscarves who planned to accompany their children were told they would not be allowed to enter the museum.

In Turkey, wearing headscarves is banned in public buildings and at universities. The Turkish Armed Forces (*TSK*) also implement a strict ban on headscarves and do not allow women wearing a headscarf to enter its facilities. Turkey's ban on headscarves at universities dates back to the 1980s but was significantly tightened after 28 February 1997, when army generals ousted a Government they deemed too Islamist. The ruling AK Party attempted to lift the ban earlier last year, a move that was cited as evidence when a closure case was filed against the party on the grounds that it had become a focal point of 'anti-secular activities'.

THE UNITED KINGDOM – *Aileen McColgan*

Legislative developments

The Equality Act: an introduction

The Equality Bill finally passed through Parliament in April 2009 and received Royal Assent as the Equality Act 2010. The date of its implementation into law is uncertain as a result of the May 2010 change of Government.

The Act weighs in at some 239 pages. Its consolidating and rationalizing functions are certainly to be welcomed. However long, the Act is easier to master than the current thicket of discrimination legislation. Valuable also is the elimination of unnecessary complexities, the definition of harassment for example being harmonised across the protected grounds as 'unwanted conduct related to a relevant protected characteristic' (Section 26) ('relevant protected characteristics' being listed as (Section 26(5)) age, disability, gender reassignment, race, religion or belief, sex and sexual orientation), although the material scope of the harassment provisions varies across the protected characteristics. Oddities remain, such as the absence of any prohibition on indirect pregnancy discrimination (which may of course however also amount to indirect sex discrimination) and the retention of a provision to the effect that discrimination connected with gender reassignment periods of absence is discriminatory only if unreasonable and involving less favourable treatment of the person than had s/he needed the period of absence in connection with sickness or injury (Section 16). More fundamental, the Act is a disappointment to those who hoped, however optimistically, for radical improvement to current, largely individually focused, domestic equality law. This is particularly apparent in the case of the equal pay provisions, considered further below.

Sex discrimination

Section 13(1) defines as 'direct discrimination', less favourable treatment 'because of a protected characteristic', Section 13(6)(b) providing that 'in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth'.

The replacement of the familiar 'on the ground of' with 'because of' was controversial because of concerns that it would result in the loss of the case law

establishing the width of 'on the ground of'.[202] The Explanatory Notes to the Bill stated (Paragraph 73) that the use of the words 'because of' 'does not change the legal meaning of the definition, but rather is designed to make it more accessible to the ordinary user of the Bill', Solicitor-General Vera Baird resisting an attempted amendment to restore the 'on grounds of' terminology on the basis that the terms were 'synonymous' and that the use of 'because of' would make the legislation more accessible to non-specialists.[203] In its report on the Bill, however, the Joint Committee on Human Rights expressed concern (Paragraph 80) that, although 'The Government is to be applauded for its concern for attempting to ensure the definition of direct discrimination is phrased in accessible terms' 'the previously used test in direct discrimination (…) has acquired a clear and definite interpretation through case-law (…) [and] little is gained by replacing 'on grounds of' with 'because of', the change creating the risk of 'the emergence of alternative interpretations'.'[204]

One particular change which was required by EU developments was the extension of the prohibition on discrimination to cover that which resulted from the victim's association with someone having a protected characteristic, this as a result of the decision of the ECJ in *Coleman v Attridge Law & Anor*[205] that Directive 2000/78/EC prohibited discrimination against a woman because of her son's disability. The prohibition of discrimination 'on the ground of' race, sexual orientation and religion or belief by the existing provisions was broad enough, on the case law which had developed under the Race Relations Act 1976,[206] to cover this as well as discrimination on grounds of *perceived* status, not expressly discussed in *Coleman* but clearly within the very broad approach to discrimination adopted by the ECJ in that case. Disability, age and sex discrimination, however, were prohibited only insofar as the characteristic relied on was related to the claimant him or herself.

'Dual discrimination'

In an addition to the Bill as it was originally published, Section 14 of the 2010 Act now provides that '(1) A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.' Section 14(2) goes on to list the 'relevant protected characteristics' as '(a) age; (b) disability; (c) gender reassignment; (d) race; (e) religion or belief; (f) sex; [and] (g) sexual orientation'.

The recognition of dual discrimination was a response to the growing call for legislation to accommodate multiple discrimination claims, that is, claims of discrimination arising from the combination of, or the intersection between, protected characteristics. The new provision (by definition) applies only to two grounds, does not cover indirect discrimination or harassment and does not extend to discrimination on grounds of maternity, pregnancy, marriage or civil partnership.

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[202] See for example Michael Rubenstein in *Equal Opportunities Review*, June 2009, issue 189, p. 23.
[203] PBC Deb, 16 June 2009, coll. 242.
[204] Twenty-Sixth Report of 2008-09, 'Legislative Scrutiny: Equality Bill', www.publications.Parliament.uk/pa/jt200809/jtselect/jtrights/169/169.pdf.
[205] Case 303/06 *Coleman* [2008] ICR 1128.
[206] In particular, *Race Relations Board v Applin* [1975] AC 259 at 289, *per* Lord Simon; *Mandla v Dowell Lee* [1983] 2 AC 548 at 563, *per* Lord Fraser; *Showboat Entertainment Centre Ltd v Owens* [1984] ICR 65.

Positive action

Part 11 of the 2010 Act is entitled 'Advancement of Equality'. Chapter 2 'Positive Action' contains two provisions. The first (Section 158) is a general provision allowing proportionate actions intended to 'enabl[e] or encourag[e] persons who share the protected characteristic to overcome or minimize' disadvantage connected with the characteristic' to meet the needs of 'persons who share a protected characteristic (…) that are different from the needs of persons who do not share it', or to 'enabl[e] or encourag[e]' participation in an activity by persons who share a protected characteristic, where the level of participation of those persons in that activity 'is disproportionately low'. Section 158 does not apply, however, to recruitment or promotion, these areas of activity being governed by the more problematic Section 159 which provides as follows:

> 159 Positive action: recruitment and promotion
> (1) This section applies if a person (P) reasonably thinks that—
> (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic, or
> (b) participation in an activity by persons who share a protected characteristic is disproportionately low.
> (2) Part 5 (work) does not prohibit P from taking action within subsection (3) with the aim of enabling or encouraging persons who share the protected characteristic to—
> (a) overcome or minimise that disadvantage, or
> (b) participate in that activity.
> (3) That action is treating a person (A) more favourably in connection with recruitment or promotion than another person (B) because A has the protected characteristic but B does not.
> (4) But subsection (2) applies only if—
> (a) A is as qualified as B to be recruited or promoted,
> (b) P does not have a policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it, and
> (c) taking the action in question is a proportionate means of achieving the aim referred to in subsection (2)(…)

The first of these provisions is to be welcomed as a clear recognition that symmetry of approach is not an absolute. The second, however, is problematic, in particular because Section 159(4)(b) appears to allow the use of positive action only as a 'one off' and not by way of a policy to redress disadvantage.

Exceptions

Religious organisations

Schedule 9 sets out the exceptions to the prohibitions on employment-related discrimination. The significant change which has been made to the GOQs ('Genuine Occupational Qualification') in the course of the passage of the 2010 Act is found in Paragraph 2 (Paragraph 3 providing for a religion and belief GOR ('Genuine Occupational Requirement') for religious organizations in materially identical form to the current Regulation 7(3) of the R&B Regulations). Paragraph 2 provides that

prohibitions on discrimination on grounds of sex, sexual orientation, gender reassignment, marriage and civil partnership do not apply to appointments

> 'for the purposes of an organised religion' where the discrimination occurs 'so as to comply with the doctrines of the religion' or 'because of the nature or context of the employment … so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers'.

The Equality Bill in its original form required that the GOR was a proportionate way of complying with the doctrines of the religion or of avoiding conflict with beliefs. In addition, the clause provided that employment would only be classified as being for the purposes of an organised religion if it 'wholly or mainly involves (a) leading or assisting in the observation of liturgical or ritualistic practices of the religion, or (b) promoting or explaining the doctrine of the religion (whether to followers of the religion or to others)'. The Bill (as it then was) was amended in the House of Lords under pressure from the religious lobby. In its Fourteenth report of 2009-10 the JCHR pointed out at Paragraphs 1.6-1.8 that the Lords' amendments would not alter the required legal interpretation of the provisions in line with EU law, but lamented (Paragraphs 1.7 and 1.8) the loss of clarity arising from the removal of the express proportionality requirement and definition of employment for the purposes of an organised religion:[207]

> 1.9 In its reasoned opinion infringement No. 2006/2450, Paragraphs 15-20, which is usually confidential but which has found its way into the public domain,[3] the European Commission takes the view that Article 4(1) of the 2000/78/EC Directive:
>
> > Contains a strict test which must be satisfied if a difference of treatment is to be considered non-discriminatory: there must be a genuine and determining occupational requirement, the objective must be legitimate and the requirement proportionate. No elements of this test appear in Regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 ... [The] Commission maintains that the wording used in regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 is too broad, going beyond the definition of a genuine occupational requirement allowed under Article 4(1) of the Directive.
>
> 1.10 The Commission further stated that:
>
> > The wording of the 2003 Regulations contradicts the provision under Article 4(2) of the Directive which provides that permitted differences of treatment based on religion 'should not justify discrimination on another ground'.
>
> This is not reflected in Schedule 9(2)(8) of the Equality Bill.
>
> 1.11 In the absence of any narrowing or clarification of either Schedule 9(2) or 9(3) we share the view of the European Commission that UK law does not comply with the Framework Equality Directive.

Equal pay

The Equal Pay Act 1970 will cease to exist with the implementation of the Equality Act 2010. The basic structure for equal pay claims remains (that is, a successful equal pay claim results in the inclusion of an equality clause in the claimant's contract (Sections 66-68), such a claim generally requiring that the claimant establishes, as before, that she is employed in like work, work rated as equivalent or work of equal value with an actual male comparator employed by the same or an associated employer at the same

establishment or at one in which common terms and conditions apply (Sections 64-65, 79). The Act expressly applies (Section 64) to those holding personal or private offices, as well as to employees,[208] and reduces to statutory form the case law on maternity pay (Sections 72-76). Section 70 provides that no sex discrimination claim is available where an equal pay claim would succeed, or would succeed in the absence of a Genuine Material Factor defence (section 1(3) Equal Pay Act 1970). In what may prove a significant change, however, Section 71 provides that *direct* sex discrimination in pay may be challenged by reference to a hypothetical comparator, though *indirect* discrimination in pay, which is far more prevalent, may not be so challenged. For those cases which proceed by way of a real comparator, the genuine material factor defence (Section 1(3) Equal Pay Act 1970) is now found in Section 69 of the 2010 Act which is intended to clarify the existing position whereby direct sex discrimination in pay cannot be justified, whereas indirect discrimination can. There has been some uncertainty as to whether non-discriminatory differences require to be justified.[209] This is settled by Section 69, subject to any questions of EU law.[210]

Also worthy of note are the much-vaunted Sections 77 and 78. The former provides that it is unlawful (as a form of victimisation) to treat a worker less favourably because they have engaged in discussions about pay and 'protected characteristics' (sex, race etc), and further that any contractual term purporting to restrict such discussions is void. Section 78 provides for Regulations (which will not be passed until at least 2013) which may 'require employers to publish information relating to the pay of employees for the purpose of showing whether, by reference to factors of such description as is prescribed, there are differences in the pay of male and female employees'. Such Regulations will only apply to employers having at least 250 staff. Their detail is yet to be determined, and it is unlikely that any Regulations will be passed if (as is widely expected) a Conservative Government takes office as a result of the May 2010 general elections.

The JCHR was critical of the failure of the Government to make significant changes to the existing provisions on equal pay, pointing out at Paragraph 186 that the Bill 'does not establish new procedures for providing arbitration in equal pay disputes nor does it impose positive duties on employers to take steps to monitor and respond to patterns of pay inequality' and calling attention to recent critical comments of the CEDAW Committee on pay inequality in the UK (Paragraphs 188-190). The Committee welcomed the provision permitting direct challenges to be brought to direct discrimination in pay but referred to the ECHR's call for this to apply in cases of indirect discrimination also (Paragraph 187). This was not heeded.

Finally

Miscellaneous other changes include (Section 9(5)) the provision of a Ministerial power to include caste as an aspect of race and the widening of the powers of tribunals to make recommendations and the definition of gender reassignment. Thus Section 124(2) permits tribunals, where a claim of discrimination is made, to 'make an appropriate recommendation', defined by Section 124(3) as 'a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate—(a) on the complainant; (b) on any other person'. As before, failure to comply with a

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[208] In which case the required comparator is adjusted (Section 79).

[209] Most recently see the discussion in *Gibson & Ors v Sheffield CC* [2010] EWCA Civ 63, [2010] IRLR 311.

[210] *Brunnhofer v Bank der Österreichischen Postsparkasse AG*, C-381/99 [2001] ECR I-4961; see, however, the decision of the EAT in *Villalba v Merrill Lynch & Co Inc & Ors* [2007] 1 ICR 469.

recommendation may result in an award (or an increased award) of compensation (Section 124(7)), but recommendations are not enforceable. Whereas the Sex Discrimination Act 1975, as amended, protected against less favourable treatment 'on the ground that [a person] intends to undergo, is undergoing or has undergone gender reassignment' (Section 2A) and defined gender reassignment as 'a process which is undertaken under medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex, and includes any part of such a process' (Section 82(1)), the 2010 Act prohibits less favourable treatment 'because of', indirect discrimination in connection with, etc. the 'relevant protected characteristic' of gender reassignment. Section 7 then provides that 'A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex'. The effect of this is to remove the requirement for medical involvement in the actual or planned process of reassignment.

In an attempt to avoid the difficulties posed by comparators in victimisation claims the Act redefines victimisation (Section 27) as occurring where an individual is subjected to a 'detriment because' he or she has done or is believed to have done a protected act, subject to the proviso that (Section 27(3)) 'Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith'. The burden of proof is reversed in victimization as in other claims under the Act.

Case law of national courts

Chagger v Abbey National plc [2010] IRLR 47, Da'Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR 19

In this case the Court of Appeal ruled that an employer who had unlawfully discriminated by dismissing an employee could be liable to pay compensation in respect of the stigma resulting from the employee having taken discrimination proceedings against the former employer, where there was evidence that others had been unwilling, as a result of such proceedings, to employ the dismissed employee. He had unsuccessfully applied for over 100 jobs after his dismissal. The amount of money awarded was very significant: EUR 1 489 622 (£1 325 322) to cover future losses on the presumption that the claimant would never work again in financial services. The Court of Appeal ruled that 'the original employer must remain liable for so-called stigma loss' even where the actions of the third party employers are unlawful as victimisation. Although this case concerned race discrimination the precedent it establishes is equally applicable in cases of sex discrimination. The same is true of the disability discrimination case of Da'Bell, in which the EAT (Employment Appeal Tribunal) uprated the bands for compensation for injury to feelings established by the Court of Appeal in *Chief Constable of West Yorkshire Police v Vento (No. 2)* (2003).

X v Mid-Sussex Citizens Advice Bureau [2010] IRLR 101

In this case the EAT ruled that a volunteer worker who did not have a contract was not protected by the Disability Discrimination Act 1995 as a 'worker' The principle established by the case is equally applicable in cases of sex discrimination. The claimant argued that volunteer work fell within the meaning of the term 'occupation' for the purposes of Council Directive 2000/78/EC, and that 'occupation' had a wider scope than 'employment'. Mr Justice Burton, however, ruled that 'occupation' in this

context referred to the qualifications and professional requirements needed for access to employment or promotion, the definition of 'worker' under EU law 'consistently include[ing] the existence of mutual rights and duties (not applicable where there is no contract) and remuneration (not applicable in relation to voluntary workers).' The EAT ruled that Council Directive 2000/78/EC did not impose any obligation on Member States to protect voluntary workers who did not have a contractual arrangement. The Court of Appeal has recently granted leave to appeal, and may well end up referring the matter to the ECJ.

Gibson v Sheffield City Council [2010] IRLR 331

The question for the Court of Appeal here was whether, in a case in which it had been established that a pay-related factor adversely impacted on women, an employer could escape liability under the Equal Pay Act 1970 *without* showing objective justification if s/he could establish that the difference in treatment was attributable to a difference other than gender. (This would not be possible after the implementation of the Equality Act 2010 but was accepted by an earlier decision of the Court of Appeal in *Armstrong v Newcastle upon Tyne NHS Trust*.[211]) *Gibson* involved pay gaps arising from productivity bonuses paid for male-dominated, but not for female-dominated, jobs. Notwithstanding the provisions of the Equality Bill 2009, as it then was, the Court of Appeal ruled that *Armstrong* was correct, Smith LJ explaining that an employer can escape any finding of indirect discrimination by showing that the factor which resulted in the disparate impact was not causally linked to the claimant's protected characteristic. This, with respect, is entirely incorrect as it confuses direct and indirect discrimination; it is clear that the necessary causation for an indirect discrimination claim is established by the disparate impact itself, assuming that it is sufficient. On the facts of the case, and despite this very unhelpful reasoning, the Court of Appeal accepted that the difference in pay was 'tainted' by sex (this because of the sex-segregated nature of the work) and that the employers would have to justify the pay differential.

[211] [2006] IRLR 124.