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

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- Gauging progress towards equality? Challenges and best practices of equality data collection in the EU
- Towards a better work-life balance for the self-employed?
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Introduction on the state of play

This is the sixth issue of the biannual European equality law review, produced by the European network of legal experts in gender equality and non-discrimination (EELN). This issue provides an overview of legal and policy developments across Europe, and as far as possible reflects the state of affairs from 1 January to 30 June 2017. The aim of the EELN is to provide the European Commission and the general public with independent information regarding gender equality and non-discrimination law, and more specifically the transposition and implementation of the EU equality and non-discrimination directives.

In this issue

This law review contains a section relating to the most recent case law of the Court of Justice of the European Union and of the European Court of Human Rights, and a section detailing the most recent developments in legislation, case law and policy on the national level.[1] It also contains four in-depth analytical articles. In the field of non-discrimination law, Melanie Hack of the Max Planck Institute for Social Law and Social Policy contributes an article which presents and analyses mandatory retirement age(s) in Germany from the perspective of the prohibition of age discrimination. Also in the field of non-discrimination, Katayoun Alidadi of the KU Leuven, University of Houston and the Max Planck Institute for Social Anthropology writes about the collection of equality data in the EU by analysing the legal frameworks, practices and key issues arising in all EU Member States. In the field of gender equality Marlies Vegter, the gender expert for the Netherlands, takes a look at the support that is provided at the EU and the national level to self-employed workers in the EU to create a better work-life balance. Finally, an overarching perspective is provided through an article authored by Catharina Germaine from the Migration Policy Group on the scope for non-discrimination and equality related considerations in the EU legal framework on public procurement.

Recent developments at the European Level[2]

On 26 April 2017, the European Commission launched the *European Pillar of Social Rights. Building a more inclusive and fairer European Union* and published a Communication on the European Pillar of Social Rights, as well as a Recommendation.[3] The Recommendation in particular addresses equal opportunities and access to the labour market in the first chapter. The Commission specifies in a section on gender equality that 'equality of treatment and opportunities between women and men must be ensured and fostered in all areas, including regarding participation in the labour market, terms and conditions of employment and career progression' and that 'women and men have the right to equal pay for work of equal value'. In addition, in a section on equal opportunities the Commission emphasises that 'regardless of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, everyone has the right to equal treatment and opportunities regarding employment, social protection, education, and access to goods and services available to the public' and the Commission recommends that 'equal opportunities of under-represented groups shall be fostered'. The second chapter *Fair working conditions* includes a section on work-life balance which emphasises that 'parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men

1 On the basis of information provided by the national experts, Franka van Hoof from Utrecht University drafted the sections regarding gender equality while Catharina Germaine from the Migration Policy Group drafted those regarding anti-discrimination and made the final compilation.

2 This section, as the rest of the Review, covers the period of 1 January to 30 June 2017.

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Establishing a European Pillar of Social Rights: COM (2017) 250 final and Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights.

shall have equal access to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way'. Finally, another section concerns the inclusion of people with disabilities and covers services as well as the labour market.

The same day, the Commission published a proposal for a Directive on work-life balance for parents and carers.[4] The aim of the proposed Directive is to 'achieve equality between men and women with regard to labour market opportunities and treatment at work through facilitating the reconciliation of work and family life for working parents and carers' (Article 1). The proposal – if adopted – would provide for individual rights of workers who have an employment contract or employment relationship to paid paternity leave, parental leave and carers' leave. Parental Leave Directive 2010/18/EU would be repealed.

In addition, a right to request flexible working arrangements for caring purposes would be introduced for workers with children up to a given age (at least twelve) and carers. Employers would have the obligation to consider and respond to such requests and to justify a refusal.

In February, the issue of equality data was particularly relevant,[5] with a European Parliament report being published on 'fundamental rights implications of big data: privacy, data protection, non-discrimination, security and law enforcement',[6] as well as a revised and updated version of the European handbook on equality data.[7] In addition to a thorough examination of the legal frameworks and practices in relation to equality data collection, the revised Handbook contains a number of recommendations directed at different levels of stakeholders and decision makers, both on European and on national level.

On 13 June 2017, the EU became a signatory party to the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention), which had already been signed by all EU Member States. The signature of the EU will contribute to the harmonization of legislation and policies at the national level and EU level, although accession now requires the adoption of the decisions on the conclusion of the Convention. These decisions will need the consent of the Parliament. Combatting all forms of violence against women is one of the European Commission's priorities for 2017, as is also shown by this year's awareness-raising campaign using the hashtag #SayNoStopVAW on social media.

The European Parliaments' Committee on Women's Rights and Gender Equality adopted a report in February on EU funds for gender equality. Members noted that budgets on promotion of gender equality were mostly spent in soft-policy areas and called for better internalisation of the principle of gender equality and mainstreaming in the budget allocation and spending of all EU policy areas.[8]

Finally, a number of relevant reports were published during this reporting period, including FRA's Fundamental Rights Report 2017 published in May which noted a generalised lack of a fundamental rights culture across institutions and societies, creating new challenges.[9] The European Commission also

4 Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM (2017) 253 final.

5 For a thematic article on the issue of equality data collection authored by Katayoun Alidadi, see below, pp. 15-27.

6 European Parliament report of 20 February 2017 on fundamental rights implications of big data: privacy, data protection, non-discrimination, security and law enforcement (2016/2225(INI)), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0044+0+DOC+XML+V0//EN.

7 Makkonen, T., European handbook on equality data – 2016 revision, EU Commission DG Justice and Consumers, Brussels, February 2017, available at: http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=43205.

8 European Parliament Committee on Women's Rights and Gender Equality Report on EU funds for gender equality (2016/2144(INI)), Brussels, February 2017, available at; http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0033+0+DOC+PDF+V0//EN.

9 Bridging the gap between policies and reality: FRA's Fundamental Rights Report 2017, Vienna, May 2017, available at: http://fra.europa.eu/en/press-release/2017/bridging-gap-between-policies-and-reality-fras-fundamental-rights-report-2017.

published its First Annual Report on the implementation of the List of Actions to advance LGBTI Equality, noting which priorities and issues the Commission is working on for each of the six areas of actions.[10]

Network publications and activities

With regard to gender equality, the Network has prepared a number of reports. A thematic Report on pay transparency, authored by Albertine Veldman has recently been published.[11] This report provides a legal analysis of the measures that are in place regarding pay transparency at the national level. The Network has also published a thematic report, authored by Petra Foubert, on the enforcement of the equal pay principle, including issues of compensation, reparation and sanctioning and the role of equality bodies. With regard to non-discrimination, two thematic reports are being finalised for publication. The first one is authored by Isabelle Chopin, Catharina Germaine and Judit Tanczos of Migration Policy Group and provides an analysis of the current state of enforcement of anti-discrimination rights specifically for Roma. The second thematic report related to non-discrimination is authored by Erica Howard and provides an in-depth analysis of the legal issues surrounding religious clothing and symbols in employment, following the recent landmark decisions delivered on 14 March 2017 by the CJEU in the *Achbita* and *Bougnaoui* cases.[12]

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

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10 Annual Report 2016 on the List of Actions to advance LGBTI Equality, EU Commission DG Justice and Consumers, Brussels, February 2017, available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54346.

11 Veldman, A. (2017), Pay transparency in the EU, European Commission, available at http://www.equalitylaw.eu/downloads/4073-pay-transparency-in-the-eu-pdf-693-kb.

12 These decisions are summarised below, on pages 58 and 59 respectively.

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Mandatory retirement age(s) in Germany

Melanie Regine Hack*

1. Introduction

Germany belongs to those countries that still operate with mandatory retirement age(s) to terminate an employment relationship. The existence of such age limits in Germany has been under debate for several decades.[1] The flames of this debate have been fuelled to a large extent by the implementation of the prohibition against age discrimination in German law via the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* – AGG).[2] Also from a socio-political angle compulsory retirement provisions have been put under pressure as their continuous use has been seen critically in times of the so-called double demographic change, that is low fertility rates, on the one hand, and the shrinking and ageing of the population due to longer life expectancy, on the other, two phenomena that lead to an increased number of older people in relation to younger people.[3] As a consequence of demographic change, the number of employees exiting working life due to having reached the general pension age outnumbers the number of persons newly entering the employment market after having fulfilled professional training.[4] Even though the labour participation rate of older employees in Germany has increased for the age group 65 to 69 years of age from 6.6 percent in 2006 to 15.4 percent in 2016, there is still room for improvement.[5] According to OECD data the average effective age of labour market exit in Germany in 2014 was 62.7 years for both men and women, which is below the normal pension age and the OECD average of 64.6 years for men and 63.1 for women.[6] It is noteworthy that a number of companies have become aware of the demographic challenges that several branches are confronted with and have started a rethinking process by establishing, in the past ten years, new corporate strategies to tackle the challenges of an ageing workforce. One instrument in this context has been the enactment of so-called demography-collective agreements.[7]

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1 See in-depth with further references Temming (2008), p. 303ff.

2 The AGG entered into force on 18.08.2006 and is based on Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung of 14.08.2008, see BGBl, Jahrgang 2006 Teil I, Nr. 39, S. 1897. For an overview as regards the drafting process and discussions surrounding the enactment of the AGG, see Over (2009), pp. 85ff.

3 Hack (2016), p. 31 with further references, see also as regards research findings in gerontopsychology where mandatory retirement provisions have to be viewed critically, p. 89ff. with further references.

4 See in detail Fuchs et al. (2017).

5 For the age group 60 to 64 years of age the increase was from 29.6 percent in 2006 to 55.7 percent in 2016, see Statistisches Bundesamt, Statistisches Jahrbuch 2017, chapter 13, p. 364, which is online available at: https://www.destatis.de/DE/Publikationen/StatistischesJahrbuch/Arbeitsmarkt.pdf?__blob=publicationFile; see in detail as regards the labour market participation of employees above the age of 65: Rhein (2016).

6 See on the OECD data: Pensions at a glance 2015, Germany.

7 An overview of such collective agreements can be accessed at: http://www.inqa.de/DE/Angebote/Publikationen/tarifvertraege-zur-gestaltung-der-qualitaet-der-arbeit.html?templateQueryString=Tarifvertr%C3%A4ge&resourceId=64804&csrftoken=DDECD6379BE181930EAE9DFB7D427E14&submit.y=13&submit.x=10&documentType_=PBBook&documentType_=DisposalImmo&documentType_=RentalImmo&pageLocale=de&input_=9758&documentType_.HASH=34db126fce0fd714eaff&documentType_.HASH=22bb136bfd1ad610ddea&documentType_.HASH=e01beee981c595cf71. See in this context in particular the New Quality of Work Initiative (INQA) being a joint initiative of the Federal Government, the states, the social partners, the social insurance partners, the Bertelsmann Foundation, the Hans Böckler Foundation and businesses, see: Demographic Change and Employment, A Call for New Corporate Strategies, Memorandum, available at: http://www.inqa.de/SharedDocs/PDFs/EN/memorandum-english.pdf?__blob=publicationFile.

Germany's law on mandatory retirement has been strongly influenced by the developments at the EU level and the case law of the CJEU and vice versa the references for preliminary rulings by the German courts which have led to a further clarification and concretization of the prohibition against age discrimination in EU law.[8] The *Mangold* judgment was the initial spark that led to a very controversial debate in Germany.[9] Since then the CJEU has had to deal with an increasing number of cases related to the prohibition of age discrimination. If one compares age with other grounds of discrimination that are protected in the Equality Directives, age clearly takes the lead. Age discrimination cases have especially gained momentum since 2015 when their number increased considerably. Of the age discrimination cases that have so far been decided upon by the CJEU, 10 concerned provisions on mandatory retirement, of which five were based on requests from German courts for a preliminary ruling.[10]

The CJEU may be criticized for having applied different standards of scrutiny in cases of mandatory retirement age limits, namely a soft versus a strict proportionality analysis when it comes to the application of the justification test as required by Framework Directive 2000/78/EC.[11] It seems, however, that general mandatory retirement age limits set at the age of 65/67 are the commonly accepted age for compulsory retirement in employment, if they are coupled with the general retirement age, an approach that has also been followed by German jurisprudence.[12] In Germany there is currently no tendency to abolish existing mandatory retirement provisions (with some exceptions), but rather to increase existing ones in line with the general pension age.

The following article will first give an overview of the current legal framework in Germany, in particular the most recent legal developments that are of relevance for the analysis of mandatory retirement provisions in Germany. Secondly, mandatory retirement age(s) that are laid down in collective agreements, work council agreements and the individual employment contract will be addressed. Even though the main focus rests on private-sector employees, the article will also thirdly touch upon mandatory retirement for civil servants. Finally, examples are given for specific retirement age limits that are lower than the statutory pension age.

8 See for further references to the German debate, Hack (2016), p. 193ff.

9 C-144/04 (Mangold), ECR 2005 I-9981; see for further references to an extensive number of dissertations that have analyzed the directive's implementation into German law and in particular the prohibition against age discrimination, Hack (2016), p. 193, fn. 937; see also the highly debated question whether *Mangold* was a so-called auf ultra vires, Hack (2016), pp. 194-195 with further references in particular to BVerfG, Beschluss vom 06. Juli 2010 – 2 BvR 2661/06, BVerfGE 126, pp. 286-331.

10 Mandatory retirement cases decided by the Court of Justice of the European Union (CJEU) are the following: C-411/05 (Palacios), ECR 2007 I-8531; C-388/07 (Age Concern), ECR 2009 I-1569; C- 341/08 (Petersen), ECR 2010 I-47; C-45/09 (Rosenbladt), ECR 2010 I-9391; Joined cases C-250/09 and C-268/09 (Georgiev); Joined cases C-159/10 and C-160/10 (Fuchs and Köhler), ECR 2011 I-06919; C- 447/09 (Prigge), ECR 2011 I-8003; C-286/12 (European Commission v. Hungary), ECLI:EU:C:2012:687; C- 141/11 (Hörnfeldt), ECLI:EU:C:2012:421 and recently C-190/16 (Fries), Judgment of the Court, 5 July 2017.

11 See on the standard of scrutiny, Hack (2016), p. 208 with further references. It has for example been argued by Schlachter that the CJEU has applied a 'control standard' as regards general mandatory retirement age limits as for example in C-45/09 (Rosenbladt), and a more rigorous standard of scrutiny in cases related to mandatory retirement age limits designed for specific professions like for example for statutory health-insurance dentists in Petersen, for university professors in Joined cases C-250/09 and C-268/09 (Georgiev) or pilots in C-447/09 (Prigge), see Schlachter (2011), p. 290.

12 The relevant CJEU cases in this regard are the following: Palacios C-45/09 (Rosenbladt) and C-141/11 (Hörnfeldt); in Germany, see most recently: BAG, Urteil vom 21.2.2017 – 1 AZR 292/15and BAG 05.03. 2013 – 1 AZR 417/12; BAG 21.09.2011 – 7 AZR 134/00; see for further references as regards the German jurisdiction: Waltermann (2015), p. 346; Brock (2016), p. 67; Koch, Altersgrenze, in: Schaub, Arbeitsrecht von A-Z, 20. Auflage 2016.

2. Legislative Framework in Germany

2.1 Terminology

In order to understand the legal situation in Germany, first the terminology has to be clarified. The notion of 'mandatory retirement' has to be distinguished from the concept of the pension age. The first case generally describes the automatic termination of the employment relationship after the employee has reached a particular chronological age and where the employee is obliged to retire.[13] The notion of the pension age describes the age at which individuals become entitled to a (state) pension, that in general has to be distinguished from the age at which employees retire from work.[14] The pension age and the mandatory retirement age may be interlinked by law.[15] However, it has to be kept in mind that in German terminology there is often no clear distinction between the notions of pensionable age and mandatory retirement age as, in most cases, it is generally referred to as the '*Altersgrenze*' (age limit) which is a more general term. The standard general pension age or so-called *Regelaltersgrenze* is defined in § 35 of the German Social Code Book VI (SGB VI). As clarified in the provision's second sentence the general pension age is reached after the insured person has attained the age of 67.[16]

2.2 Overview of legislation

When analysing mandatory retirement age(s) in Germany a number of laws both on federal and state law level are applicable. In German law, the pension age is often the benchmark for mandatory retirement ages that are laid down as statutory provisions in federal and state law and in collective agreements, in agreements at the plant level or as a contractual provision in individual employment contracts. An important feature when it comes to the relevant German legislation is that there is no specific code or piece of comprehensive legislation in the field of labour and employment law. Legislation is rather spread over a number of different acts.[17] Of particular relevance are the Social Code (*Sozialgesetzbuch)*, in particular Book VI, the dismissal protection legislation (*Kündigungsschutzgesetz* – KSchG), the Act on Part-Time Work and Fixed-Term Employment Contracts (*Teilzeit- und Befristungsgesetz* – TzBfG) and finally the General Equal Treatment Act.

One further important aspect is that the country in general does not have a statutory general applicable age limit to determine that the employment relationship of private-sector employees terminates after having reached a certain retirement age.[18] Despite this lack of codification as a statutory provision compulsory retirement age limits are instead usually codified in collective agreements.[19] It has been argued that the widespread use of such general age limits in Germany may be characterized as being the cost for a relatively high level of protection that older employees enjoy via the German dismissal legislation.[20]

2.3 Recent legal developments

Three recent reforms are of particular interest in the context of mandatory retirement in Germany: the first concerns the gradual increase of the general statutory pension age, the second concerns the

13 O'Cinneide (2005), p. 41.
14 Ibid., p. 41.
15 Hack (2016), p. 65.
16 See § 35 s. 2 SGB VI.
17 See in general: Foster/Sule (2002), p. 527; Foster/Sule (2010), p. 581; Brox/Rüthers/Henssler (2007), para. 114.
18 Senne (2006), p. 294, 298.
19 Backhaus, Kündigungsrecht, TzBfG § 15 Ende des befristeten Arbeitsvertrages, Rn. 25, 5. Auflage, 2017.
20 Temming/Rothermund (2010), p. 17. The role of age and seniority in dismissals according to the German KSchG will not be further addressed in this analysis. See for an extensive analysis in particular as regards conformity with the prohibition against age discrimination, Temming (2008), p. 145ff.; Temming/Rothermund (2010), p. 54ff.

enactment of a new statutory provision allowing for an extension of the employment contract beyond the general pension age, and the third concerns the introduction of the act on flexible retirement.

2.3.1 Increasing the general statutory pension age

One of the most fundamental legal adjustments is related to the gradual increase of the *Regelaltersgrenze* from the age of 65 to the age of 67 that started in 2012 and will last until 2029.[21] For public civil servants the pension age increases correspondingly.[22]

2.3.2 Fixed-term contracts beyond the *Regelaltersgrenze*

Since a law reform in 2014 employers and employees may agree to extend the employment relationship beyond the *Regelaltersgrenze* on a temporary work contract basis. These legal amendments came into force in July 2014 and were related to § 41 SGB VI, which was supplemented by a new statutory regulation. In the explanatory memorandum to the law reform it has been stressed that the new provision addresses the wishes of both employers and employees to extend working life for a definite period of time in conformity with the law. This wish has been taken into account with the enactment of § 41 s. 3 SGB VI, which states that if a clause in an employment contract lays down the terms for the termination of the employment contract on reaching the general pension age, it is now possible for the parties to the employment contract to postpone the termination date, if necessary, even several times.[23]

Prior to that only an unlimited contract was possible.[24] As required in § 41 s. 3 SGB VI an employer and an employee need to agree upon such a prolongation in good time, that is prior to the commencement of retirement. If the employment relationship has already come to an end due to having reached the *Regelaltersgrenze* the option to continue working according to § 41 SGB VI will not be applicable.[25] For § 41 s. 3 SGB VI to be applicable there shall be no intermittence in the employment relationship. This is even the case when the agreement to continue working has been signed hours after the official ending of employment due to having reached the age limit.[26] If the employee would like to keep on working for the same employer beyond the pension age, § 41 SGB VI would also not be applicable. If the employee who has reached the pension age wishes to continue working but for a new employer, employment could be based on a limited contract basis for up to 2 years via § 14 (2) S. 1 TzBfG without the necessity to refer to an objective reason (*Sachgrundlose Befristung*).[27]

In a situation where the employee in question has already been retired after having reached the pension age, but wishes to return to his former employer or the employer wants him to return, § 14 (2) s. 2 would be applicable. According to § 14 (2) s. 2 a fixed-term contract would be invalid if there was previously an either limited or unlimited contractual relationship with the same employer. As a consequence, the new law is not very helpful for these employees, who are not as fortunate as those who already have

21 See §§ 35, 235 SGB VI. The age limit in § 35 SGB VI has been raised to 67 according to the *Gesetz zur Anpassung der Regelaltersgrenze an die demografische Entwicklung und zur Stärkung der Finanzierungsgrundlagen der gesetzlichen Rentenversicherung* (*RV-Altersanpassungsgesetz vom* 20.04.2007, BGBl. 2007, I, p. 554ff.); see also Groß (2010), p. 27; see in detail § 235 (2) SGB VI and for an extensive overview: Rolfs, in: Erfurter Kommentar zum Arbeitsrecht, 17. Auflage 2017, § 41 SGB VI, Rn. 2-4.

22 See e.g. § 51 Bundesbeamtengesetz (BBG) – Federal Civil Service Act; see at the state level e.g. Art. 62 Bayerisches Beamtengesetz (Civil Service Act for Bavaria).

23 BT-Drs. 18/1489, 25.

24 Schlegel (2017), p. 244.

25 See on this aspect Kramer (2015), p. 145 with reference to Kleinebrink, DB 2014, p. 1491.

26 See Kramer (2015), p. 145.

27 See on this aspect Schlegel (2017), p. 244. It has to be kept in mind that German law generally differentiates between fixed-term contracts with an objective reason (*Befristung mit Sachgrund*) and fixed-term contracts without an objective reason (*Befristung ohne Sachgrund)*. The first case concerns contracts where the limited contract is justified by at least one of a specified number of reasons laid down in § 14 (1) TzBfG like, for example, a temporary need for additional work capacity. The second case concerns contracts that are limited up to a period of 2 years only. Here the law does not require an objective reason.

employment, or for an employer who wants to continue the employment relationship beyond the pension age. These persons are left empty-handed, despite the fact that they might have found a new employer who is willing to employ them, but only on a limited contract basis.[28] However, there is a loophole in the existing legal framework. Employers may nevertheless enter into a fixed-term contract for the duration of five years with employees who are older than 52 years of age, provided that the employee, prior to conclusion of the contract, has been unemployed for a period of at least four months, see § 14 (3) TzBfG, § 138 (1) No. 1 SGB III.[29] As criticized by *Schlegel* this is almost an invitation to older employees and their employers to end the employment relationship three to six months prior to the mandatory age limit if they are interested in extending the employment relationship beyond the *Regelaltersgrenze*. The employee has to file an unemployment claim and after three months of time off that is subsidized by the employment office, the employee and the employer may then enter into this five-year contract.[30] According to *Schlegel* this absurdity, that has to be shouldered by the contributors to the social security systems, could be addressed by simply allowing all employees to enter into limited employment contracts beyond the mandatory retirement age, irrespective of whether this should be the prolongation of an already existing employment relationship or an entirely new one.[31]

Doubts have also been expressed as regards the conformity of the new provisions on fixed-term contracts beyond the general pension age with the prohibition against age discrimination as manifested in EU and national law. The cause of concern is that the law does not contain any limitations when it comes to the length and number of contract renewals.[32] The main difference with temporary employment contracts is that these agreements on extending the employment relationship do not need to be based on an objective reason, as is otherwise required by § 14 (1) TzBfG.[33] However, such consecutive temporary employment contracts (*Kettenbefristungen*) run the risk of being age discriminatory and may thus violate the prohibition against age discrimination as manifested in EU and German law and, as a consequence, they would not be justifiable under the Directive's justification requirements.[34]

When taking a look at the legislative history of the new act, it becomes clear that the German legislator did not address, in any depth, the new provision's conformity with EU law. It has only been stated that the provision follows, without any contradiction, the CJEU's case law on agreements to terminate an employment relationship after a certain age (*Beendigungsvereinbarung*) and refers in this regard to the CJEU case of *Rosenbladt*.[35] As further stated, the new provision will not affect the application of such agreements as also in the future the automatica termination of an employment relationship due to having reached the *Regelaltersgrenze* may be agreed upon. Moreover, it has been emphasized that the social partners may in this regard consider the specific interests in their sectors.[36] Collective agreements may thus lay down provisions for employees that are more favourable when it comes to the termination of employment, which means that such provisions which are advantageous for certain employees will deviate from the statutory provision on termination in § 41 s. 3 SGB VI.[37]

In general, the new provision enables employers and employees to react in situations where, for example, a replacement in the post may not be easily found or where ongoing projects require employees with special expertise (who have already reached the age limit) to finish such projects or to instruct and advise newly appointed younger colleagues, according to the explanations by the Government.[38] While

28 Ibid.
29 Ibid.
30 Ibid.
31 Ibid.
32 Kramer (2015), p. 145, see also Bader, NZA 2014, p. 752f.
33 As regards the relation of § 41 s. 3 SGB VI with the TzBfG it has to be kept in mind that the provisions in TzBfG are not exclusive, § 23 TzBfG rather stipulates that regulations on part-time work and the limitation of employment contracts as laid down in other statutory provisions remain unaffected and thus valid.
34 See on these doubts Bader (2014), pp. 749-753, in particular p. 753.
35 BT-Drs. 18/1489, p. 25 with reference to C-45/09 (Rosenbladt).
36 BT-Drs. 18/1489, p. 25.
37 Bader (2014), p. 751.
38 BT-Drs. 18/1489, p. 25.

the provision's conformity with the prohibition against age discrimination has not been assessed and has rather been taken for granted, the question of its compatibility with the requirements set out in Council Directive 1999/70/EC concerning the framework agreement on fixed-term work has not been questioned at all. This is striking, as clause 5 of the Directive inter alia explicitly requires the member states to enact measures in order to prevent any abuse that may arise when making use of successive fixed-term employment contracts. Where no equivalent legal measures are available to prevent such abuse, measures should be introduced either alternatively or cumulatively requiring 'objective reasons justifying the renewal of such contracts or relationships' and/or determining 'the maximum total duration of successive fixed-term employment contracts or relationships' and/or 'the number of renewals of such contracts or relationships.'[39] In view of this it is more than questionable whether § 41 s. 3 SGB VI abides by the Directive's requirements as the provision neither stipulates the existence of an objective reason, nor says anything about the maximum total duration or the number of renewals of such fixed-term contracts.[40] In a worst case scenario the contract could be prolonged from day to day.[41]

In view of this potential non-conformity with EU law, the provision's de facto impact on the participation of older employees in working life remains to be seen as employers might be reluctant to apply the provision as they might, in the case of its non-applicability, be confronted with the risk of having entered into an unlimited employment contract.[42] In this context it has to be kept in mind that, as expressed in § 16 TzBfG, in cases where the fixed-term agreement would be void, the fixed-term contract is deemed to be concluded for an unlimited period of time. Neither the attainment of the pension age as stated in § 41 s. 1 SGB VI, nor the employee's opportunity to claim an old-age pension may per se constitute, according to German case law, an objective reason for entering into a fixed-term contract.[43] A limited extension of the employment contract may only be made, according to the German Federal Labour Court (*Bundesarbeitsgericht* BAG), provided that at the time of entering into the fixed-term agreement the employer had a concrete and overweighing interest based on personnel planning considerations.[44]

Since the *Mangold* judgment, reliance on the highly contested § 14 TzBfG may only be an ultima ratio solution and an option in cases where the operational need for the work is only temporary or in situations where the employee is merely hired to fill in for another employee.[45]

2.3.2 The Act on Flexible Retirement

With the enactment of the Act on Flexible Retirement (*Flexirentengesetz)*[46] the German legislator responded to calls from both the side of employers as well as from that of employees to be more flexible during the phase from working life to retirement, in particular to make it more attractive to extend a working career beyond the general pension age. In essence, with the new act the legal possibilities for pensioners to draw a pension while at the same time to keep on working have changed considerably.[47] The underlying aim of the new provisions on flexible retirement is that older employees do not exit

39 Clause 5 No. 1 a) to c) Dir. 1999/70/EC.
40 See on the criticism, among others: Bader (2014), p. 752 and Waltermann (2015), p. 348f.; Kiel (2016), p. 80f.
41 Rolfs, in: Erfurter Kommentar zum Arbeitsrecht, 17. Auflage 2017, § 41 SGB VI, Rn. 22.
42 Just recently the LAG Bremen has referred a case for a preliminary ruling to the CJEU concerning the conformity of § 41 s. 3 SGB VI with EU law, see LAG Bremen, Vorlagebeschluss vom 23.11.2016 – 3 Sa 78/16, NZA RR 2017, 290. So far the provision has not been subject to a CJEU decision. A clarification by the CJEU as regards the provision's conformity with EU law is therefore only to be decided upon in the future. See on this aspect Kiel (2016), p. 81, who inter alia refers in this context to the CJEU judgment in Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13 (Mascolo and others) Judgment of 26 November 2014, ECLI:EU:C:2014:2401. See also recently: Case C-16/15 (Pérez López), Judgment of the Court of 14 September 2016, ECLI:EU:C:2016:679; critically when it comes to the provision's conformity with EU law: Rolfs, in: Erfurter Kommentar zum Arbeitsrecht, 17. Auflage 2017, § 41 SGB VI, Rn. 22; Kramer (2015), p. 145; Bader, NZA 2014, p. 752: arguing for the provision's conformity with EU law ArbG Karlsruhe, 3. Kammer, Urteil vom 27.04.2016, 3 Ca 22/16 -, juris.
43 BAG, Urteil vom 11.02.2015 - 7 AZR 17/13, see in particular para. 25.
44 BAG, Urteil vom 11.02.2015 - 7 AZR 17/13, para. 25-28.
45 See § 14 (1) s. 2 No. 1 and No. 3 TzBfG. Te old version of § 14 (3) TzBfG was subject to the Mangold judgment.
46 Flexirentengesetz, zur Flexibilisierung des Übergangs vom Erwerbsleben in den Ruhestand und zur Stärkung von Prävention und Rehabilitation im Erwerbsleben vom 8. 12. 2016 – BGBl. I S. 2838.
47 See for an overview: Domnauer/Stosberg (2017).

working life immediately and retire, but that they rather choose a smooth and individually designed transition to retirement, where they will continue working, for example, on a part-time basis and combine the drawing of their pensions with additional earnings in a flexible manner.

With effect from 1 July 2017, the rules on drawing a (partial) pension and obtaining additional earnings have become more flexible and in doing so these possibilities may be better combined than in the past. In short, the measures introduced by the *Flexirentengesetz* shall make it more attractive for older persons to continue working. Belonging to these measures are: first, less ancillary wage costs; second, additional retirement expectancies (*Rentenanwartschaften*) for pensioners via employers' contributions to the old-age insurance; and, finally, more flexible supplementary income limits (*Hinzuverdientsgrenzen*).[48] After having reached the general pension age there is no supplementary income limit. According to a recent study these measures are generally seen as positive by companies, which in particular appreciate the abolition of contributions to unemployment insurance and the reformed and more generous options for supplementary income when receiving a partial pension before the general pension age.[49] However, it has to be noted that the new act on flexible retirement itself does not introduce a new legal basis for flexible agreements in employment contracts beyond the *Regelaltersgrenze*. It seems that the German legislator assumes that *de lege lata* the law offers sufficient leeway for the contractual design of a more flexible transition into retirement. First and foremost, recourse to § 41 s. 3 SGB VI is of relevance in this regard.

3. Mandatory retirement age(s) in collective agreements, work council agreements and individual employment contracts

3.1 Mandatory retirement in collective agreements

Mandatory retirement provisions are widely-used instruments in collective agreements to terminate employment relationships. In such cases the employment relationship automatically terminates when the age limit is attained without the need to dismiss the employee. But the employment relationship does not automatically per se terminate when the employee reaches the general pension age.[50] As clarified by § 41 s. 1 SGB VI employees' entitlement to a pension does not constitute a valid objective reason for dismissal. Thus, age limits need to be explicitly agreed upon in an individual employment contract, a works council agreement or in a collective agreement.[51]

Given that age limits in collective agreements and works council agreements constitute a limitation of the employment relationship, the age limit in question has to have an objective reason in the sense of § 14 (1) s. 1 TzBfG in order to be valid. The employer's interest in appropriate and sustainable personnel planning, in particular a balanced age structure, has been recognized as an objective reason in this regard. This interest outweighs the employee's interest in continuing the employment relationship.[52] The argument has been raised that the employee who exits working life due to having reached the general pension age is typically economically secured by the statutory pension and he/she may have benefited earlier in his/her career from positions that became vacant due to compulsory retirement provisions.[53]

48 The previous applicable supplementary income limit of EUR 450 for persons who had not reached the general pension age will be replaced by a ceiling of an additional income of EUR 6 300 per calendar year, § 34 (2) SGB VI; see for an overview: Czepek et al. (2017), pp. 4ff.; see also Czepek/Weber (2015).

49 In detail: Czepek et al. (2017), p. 4, in particular p. 5, Abbildung 3 as regards further options to make the transition from employment to retirement more flexible like the so-called *Altersteilzeit* and *Lebensarbeitszeitkonten*.

50 Klösel/Reitz (2014), p. 1367.

51 A work council agreement (*Betriebsvereinbarung*) can be defined as an agreement between the employer and the works council that is an institutionalised form of employee participation in companies, corporations and enterprises. See for further information: Weiss/Schmidt (2008), p. 170ff.

52 BAG, Judgment of 21.9.2011 – 7 AZR 134/10; BAG, Judgment of 8.12.2010 – 7 AZR 438/09; BAG, Urteil vom 5. 3. 2013 – 1 AZR 417/12, para. 30.

53 BAG, Urteil vom 5. 3. 2013 – 1 AZR 417/12, para. 30.

Moreover, the age limits have to be in conformity with the prohibition against age discrimination. Both the CJEU and the BAG acknowledge such a justification in § 10 S. 3 No. 5 AGG,[54] which states that 'agreements providing for the termination of the employment relationship without dismissal at a point in time when the employee may apply for the payment of an old-age pension' are to be regarded as permissible differences in treatment on the ground of age. It has to be noted that § 10 s. 3 No. 5 AGG has no corresponding provision in Art. 6 No. 1 Dir. 2000/78/EC. By establishing § 10 s. 3 No. 5 AGG the German legislator aimed to clarify that age could still be taken into account in the termination of employment relationships.[55] Given that one of the key aims of § 10 AGG was to enhance the protection of older employees against age discrimination, the provision's s. 3 No. 5 has given rise to vigorous debate in the German literature, in particular as regards the provision's conformity with the prohibition against age discrimination in EU law.[56]

To conclude, the BAG considers collectively agreed mandatory ages to be legitimate, provided that the termination of the employment relationship corresponds to the point in time where the employee reaches the general pension age. When it comes to works council agreements it has to be kept in mind that working conditions that have been subject to regulations in a collective agreement cannot be regulated in a works council agreement.[57]

In the course of reforming the general pension age also § 33 Abs. 1a TVöD (*Tarifvertrag für den* öffentlichen *Dienst)* – the collective agreement for the public service – has been amended.[58] According to the amended provision the employment relationship terminates at the end of the month in which the employee attains the general pension age and when he/she is entitled to the full pension amount without any deductions.

3.2 Mandatory retirement in works council agreements

Based on § 88 of the *Betriebsverfassungsgesetz* (BetrVG – Works Constitution Act) mandatory age limits may be determined for all employees of a company.[59] In order to meet the objective reason requirement as stipulated in § 14 TzBfG the age limit has to refer to a point in time at which the employee is entitled to a general pension from the statutory pension insurance. If this is a case, the age limit is considered to be in conformity with the prohibition against age discrimination.[60] Clauses in the individual employment contract that are more favourable to the employee in question may in principle not be derogated from in a subsequent works council agreement.[61]

In a recent judgment, the BAG has again confirmed the contractual authority of the parties to a works council agreement to enact mandatory retirement ages in works council agreements, but the Court at the same time demanded transitional rules for employees who are close to retirement.[62] In short, given that the contested provision did not take into account the special situation of employees who were close to retirement, the age limit, according to the BAG, was to be considered legally void. The

54 C-45/09 (Rosenbladt), para. 53; BAG, Judgment of 8.12.2010 – 7 AZR 438/09, para. 41.

55 BT-Drs. 16/1780, p. 36; see on the legislative history of § 10 s. 3 No. 5 AGG: von Roetteken, Torsten (2014), AGG, 36. update 07/14, § 10, para. 2 and para. 8 referring to BT-Drs. 15/5717, p. 9, 36 and BT-Drs. 16/1780, p. 9, 36.

56 See on this aspect Hack (2016), p. 199 with further references.

57 § 77 (3) Betriebsverfassungsgesetz (BetrVG); BAG, Urteil vom 5.3.2013 – 1 AZR 417/12.

58 *Änderungstarifvertrag Nr. 2 v. 31.3.2008 zum Tarifvertrag für den öffentlichen Dienst (TVöD) v. 13.9.2005*; see as regards mandatory retirement provisions in general § 33 (1) (a) TVöD, § 33 (1) (a) *Tarifvertrag für den öffentlichen Dienst der Länder* (TV-L); for an overview of the different applicable regulations on the federal and state level and in the relevant collective agreements: *Summer* (2009), pp. 164-168, p. 164f; see moreover *Wulfers/Hecht* (2007), pp. 475-483, in particular chap. 3.2.3 as regards the age limit in § 33 (1) (a) TVöD/TV-L and its conformity with Dir. 2000/78/EC.

59 See BAG, Urteil vom 5. 3. 2013 – 1 AZR 417/12, para. 23.

60 Müller-Glöge, Erfurter Kommentar zum Arbeitsrecht, TzBfG, § 22 Abweichende Vereinbarungen, § 22, Rn. 7-8 referring to BAG 05.03.2013, NZA 2013, 916.

61 Müller-Glöge, Erfurter Kommentar zum Arbeitsrecht, TzBfG, § 22 Abweichende Vereinbarungen, Rn. 8; see on the so-called favourability principle (*Günstigkeitsprinzip)* also in depth: Müller (2015), p. 70ff.

62 BAG, Judgment of 21.2.2017 – 1 AZR 292/15.

circumstances of the case were as follows: The plaintiff, who had been employed at the company for 44 years and who was nearly 65 years of age, was confronted with a mandatory retirement provision in a works council agreement that had only entered into force in 2013. According to this provision the employment relationship was to be terminated without a dismissal at the end of the month in which the employee achieved the general pension age limits according to which he was entitled to a statutory pension without deductions. Exempted were only those employees who, prior to the agreement entering into force, had already contractually agreed upon continuous employment beyond the general pension age. In its judgment the Court decided in favour for the plaintiff. The Court again stressed that parties to a works council agreement might determine an age limit that is co-related to the general pension age. Such age limits are subject to the contractual authority (*Regelungskompetenz*) of the parties to the works council agreement. However, they have to be in conformity with constitutional law, such as the employees' occupational freedom (Art. 12 (1) *Grundgesetz* (GG)). In view of this the BAG finally concluded that for employees close to retirement the principle of legitimate expectations had been violated.[63] Where mandatory retirement age limits have been introduced for the first time in a company, this principle of legitimate expectations requires that special consideration be given to the interests of employees who, at the time of the entry into force of the works council agreement, were already close to retirement. Due to their proximity to retirement this group of employees benefits only to a limited extent from such regulations. Opportunities for career advancement due to the age-related retirement of other employees hardly play a role.[64] Moreover, the Court stressed that employees near retirement have an interest that is worthy of protection in planning reliability for a period of time that is adequate in order to be able, if needed, to adjust their personal plans for the future in line with the changed legal circumstances.[65] According to the Court specific transitional rules for employees near retirement would therefore have been necessary. As the parties had to agree upon such rules the mandatory age limit in the works council agreement could not terminate the employment relationship, according to the Court. The Court explicitly referred to the different options for the parties involved to establish such transitional rules, such as generally exempting them from such a provision or offering these employees close to retirement individual opportunities to extend their contract or providing financial compensation.[66]

3.3 Mandatory retirement age(s) in individual employment contracts

In practice, mandatory retirement age limits are moreover often laid down in individual employment contracts, either as a result of individual negotiation or as a rule being agreed upon via pre-formulated generalized terms and conditions or by making reference to the relevant collective agreement. It has to be generally kept in mind that age limits in individual employment contracts have so far not been subject to a decision by the CJEU.[67] As far as the situation in Germany is concerned such age limits have to be justified by an objective reason.[68] Central arguments that are typically brought forward in the justification of such age limits are, first, whether the controversial age limit is linked to the statutory pension age, meaning the entitlement to a pension and the fact that the employee will then be safeguarded by the statutory pension scheme. The second line of arguments refers to the employer's need to ensure personal planning and a balanced age structure within the company.[69]

63 See on the principle of legitimate expectations (*Gebot des Vertrauensschutzes*) resulting from Art. 2 (1) in conjunction with Art. 20 (3) GG, BAG Urteil vom 21.2.2017 – 1 AZR 292/15, para. 19, 20.

64 BAG Urteil vom 21.2.2017 – 1 AZR 292/15, para. 19.

65 Ibid, para. 19, 20.

66 Ibid, para. 22, 23.

67 See on this aspect Backhaus, Kündigungsrecht, TzBfG § 15 Ende des befristeten Arbeitsvertrages, Rn. 117b, 5. Auflage, 2017.

68 See in detail Müller (2015), p. 68ff.; see in brief also: Bader (2014), p. 751 and Backhaus Kündigungsrecht, TzBfG § 14 Zulässigkeit der Befristung, Rn. 112, 5. Auflage, 2017.

69 See recently: BAG, Urteil vom 09.12. 2015 – 7 AZR 68/14, NZA 2016, 695; LAG Düsseldorf, Urteil vom 24.08. 2015 – 9 Sa 1202/14, BeckRS 2015, 72658, para. 80; LAG Schleswig-Holstein, 2. KAmmer, Urteil vom 03.09.2013, 2 Sa 152/13-' juris, para. 13, LAG München, Urteil vom 24.10.2013, 4 Sa 419/13, para. 17f.

4. Mandatory retirement for civil servants

Also when it comes to civil servants the German legal situation is rather complex as both regulations apply at the federal and state (*Länder*) level. Since 2008, the Civil Servants Status Act (*Beamtenstatusgesetz* – BeamtSTG) has laid down rules in its §§ 21ff. for the termination of the civil servant employment relationship.[70] In § 21 No. 4, in conjunction with § 25 BeamtSTG, it is generally laid down that tenured civil servants (*Beamte auf Lebenszeit*) have to retire when they reach the age limit.[71] As in BeamtSTG, no explicit age for compulsory retirement is laid down; it is up to the 16 states and the federation to determine the respective mandatory retirement ages.[72] For civil servants at the federal level, the general age limit of 67 is laid down in § 51 BBG.[73] For federal civil servants born after 1947, the age limit increases step by step until the age of 67.[74] In most of the states, the mandatory age limit is set at the age of 65, with a gradual increase up to the age of 67 in line with the pension reform amendments.[75]

Both on the federal level and in all *Länder*, an option to postpone an exit from active employment and thus the retirement start date is generally provided for civil servants in German law.[76] Interestingly enough, § 25 BeamtSTG neither stipulates nor prohibits such provisions at the *Länder* level.[77] In theory, an age limit may therefore be set at, for example, 75 or 80 or may even be abolished.[78] All regulations at the *Länder* level have in common that they operate with mandatory age limits. These age limits generally cover civil servants.[79] And in the majority of states the age limit is laid down at the age of 67 but there remains a possibility to postpone retirement for up to a maximum of three years, that is, up to the age of 70.[80] In general, the reason for such a postponement may be so-called *dienstliche Gründe* (official reasons) pertaining to the employer or following an individual request from the employee, provided that the so-called *dienstliche Interessen* (official interests of the service) do not conflict with the employee's request to extend his/her employment contract. In any case, the existence of *dienstliche Gründe* or *dienstliche Interessen* is an indispensable requirement for postponing the start of retirement in all the respective *Länder* provisions.

5. Specific mandatory age limits

Specific mandatory retirement age limits can be distinguished in two categories: the first category concerns mandatory retirement age limits that are laid down for the termination of the contractual relationship and age limits that are below the general pension age. To the second category belong statutory provisions that prohibit the further exercise of a specific profession after the individual in question has reached a certain age. Both types of regulation have been the subject of extensive case law at the EU as well as the national level.[81] In particular the highly debated mandatory retirement age limit for airline pilots as laid down in a collective agreement and which was the subject of the CJEU case

70 See for a brief overview of the legislative power in public employment regulations, Hack (2016), p. 284.
71 See moreover § 23 (1) s. 1 BeamSTG.
72 Bt-Drs. 16/4027, Entwurf eines Gesetzes zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern (Beamtenstatusgesetz – BeamtStG), p. 28; see also joined cases C-159/10 and C-160/10 (*Fuchs* and *Köhler*), para. 11. Prior to the enactment of the so-called *Föderalismusreform* (federalism reform), there was one general mandatory retirement age limit for civil servants which was laid down at the federal level and which the *Länder* also implemented in their legislation.
73 § 51 (1) BBG.
74 § 51 (2) BBG.
75 See in general with further references Hack (2016), p. 45ff, 283ff.
76 Ibid., p. 285f.
77 *Poguntke* (2011), p. 561.
78 See on this aspect also *von Roetteken/Rothländer/Burkholz/Kohde*(2013), in: von Roetteken, Thorsten/Rothländer, Christian (eds.), BeamtStG Kommentar zum Beamtenstatusgesetz, § 25 Ruhestand wegen Erreichens der Altersgrenze, IV. Ergänzung durch Landesrecht, 16. Update 12/13, para. 27, 29ff.; critical *Summer* (2009), p. 164, 166.
79 See for a critical analysis of regulations for university professors at the *Länder* level: Hack (2016), p. 289ff.
80 See for an overview Hack (2016), p. 286.
81 See Bayreuther (2015) referring in fn. 15 inter alia to case law concerning mandatory retirement for public authorized experts, notaries, pilots, cabin crew, police officers and professional governing mayors; see also the examples provided by Hack (2016), p. 70.

of *Prigge* has given rise to vigorous debate. Just recently the CJEU has again decided on mandatory retirement for pilots in Germany in the *Fries* case. While *Prigge* concerned an age limit that was set at the age of 60 and was thus far below the internationally applicable regulations which allow pilots to fly until the age of 65, the recent case had to deal with an age limit of 65.[82] The CJEU concluded in *Prigge* that the age limit of 60 for pilots constituted age discrimination that was not justifiable. In particular the CJEU emphasized that it could not be regarded as necessary in achieving the legitimate aim of air safety in view of the fact that at the international level the respective provisions explicitly allowed for the further engagement of pilots beyond the age of 60 in a multi-pilot crew setting and where the age limit was set at 65.[83] In line with that the CJEU has recently decided in *Fries* that the disputed age limit that prohibited holders of a pilot's licence who had attained the age of 65 from acting as pilots of aircraft engaged in commercial air transport was considered valid as, according to the CJEU, it could be justified by the aim of ensuring civil aviation safety in Europe in line with the relevant applicable international standards.[84]

Specific mandatory retirement ages that are lower than the pension age are for instance to be found in the police forces and for professional firefighters on a federal and state level. With the exception of the states of Hamburg and Sachsen-Anhalt, the age limit for police officers has generally been increased from the age of 60 to 62.[85] In general a differentiation is made when it comes to the given mandatory retirement age limit between police officers and firefighters, where the last-mentioned group in most of the states has lower age limits, often set at the age of 60.[86] By contrast the age limit for so-called voluntary firefighters (*freiwillige Feuerwehr*) has already been set at a higher age in several states. Interestingly enough, the Parliament of the state of Bayern has just recently decided to increase the age limit up to the age of 65, mainly in order to tackle demographic change.[87]

A further example of a 'special' age limit that was subject to the CJEU's jurisdiction in the *Petersen* case concerns the previously applicable mandatory retirement age for panel dentists that up until its abolition in 2008 was set at the age 68.[88]

Also the mandatory age limit for notaries, being another example of such 'special' age limits that is set at the age of 70, has been subject to several cases decided by the German Federal Court (*Bundesgerichtshof* – BGH) and the Constitutional Court (*Bundesverfassungsgericht* – BVerfG). The controversial age limit has been considered to be both in conformity with the German Constitution as well as the prohibition against age discrimination as manifested in EU law.[89] Also the age limits for officially authorised experts (öffentlich *bestellte und beeidigte Sachverständige)* were the subject of debate for several years until in 2012 the Federal Administrative Court (*Bundesverwaltungsgericht* – BVerwG) ruled that the age limit of 71 years constituted age discrimination that could not be justified.[90]

82 See for a critical analysis Hack (2016), 327ff.

83 C-447/09 (Prigge), para. 83; see on the German case law: BAG · Urteil vom 15. Februar 2012 · Az. 7 AZR 946/07, para. 47.

84 C-190/16 (Fries), Judgment of the Court, 5 July 2017.

85 In a recent judgment, the increase in the age limit for police officers in Bremen according to § 108 Bremisches Beamtengesetz (BremBG) has been considered to be justified and in line with the Constitution, see VG Bremen, Urteil vom 11.04.2017 – 6 K 1692/15. One of the key arguments for the justification that was brought forward was the need to increase the age limit in order to tackle the challenges caused by demographic changes, see in particular para. 24ff. and for an overview of the different applicable age limits at the state level para. 30. See, moreover, the justifiability of lower age limits for police officers and the legitimacy of a step-by-step increase in the age limit: BGH, Urteil vom 23.07. 2015 – III ZR 4/15 (OLG Hamm), NVwZ 2016, 90.

86 For an overview see: http://www.feuerwehrverband.de/fileadmin/Inhalt/FACHARBEIT/FB7_Sozialwesen/2016_03_DFV-Informationen_Altersgrenzen_JF_FF_BF_WF.pdf; See also VG Bremen, Urteil vom 11.04.2017 – 6 K 1692/15, para. 34.

87 http://www.sueddeutsche.de/news/politik/landtag---muenchen-landtag-hebt-altersgrenze-fuer-feuerwehrleute-an-dpa.urn-newsml-dpa-com-20090101-170620-99-926142.

88 C- 341/08 (Petersen), ECR 2010 I-47; see an extensive analysis with further references Hack (2016), p. 261ff.

89 BGH, Beschlüsse vom 22.03.2010 – NotZ 16/09, BGHZ 185, 30; vom 23.07.2012 – NotZ(Brfg) 15/11, DNotZ 2013, 76; und vom 25.11.2013 – NotZ(Brfg) 11/13; NotZ(Brfg) 8/13; und NotZ(Brfg) 12/13; BVerfG, Beschluss vom 05.01.2011 – 1 BvR 2870/10, NJW 2011, 1131.

90 BVerwG, Urteil vom 01.02.2012 – 8 C 24/11, DS 2012, 124.

6. Conclusion

It is beyond doubt that the workforce in Germany is steadily ageing due to demographic change. In view of this the continuous use of mandatory retirement age limits in labour relations seems like a relic of the last century as older employees should be motivated to remain rather than be forced to leave the workforce. This is needed in order to tackle the demographic challenges and the correlated pressure on the financial stability of the social security system.[91] Therefore the tendency towards more flexibilization at the end of working life that has been essential for the three highlighted law reforms is in principle a promising one. However, the aim of increasing the participation of older employees in working life by making use of the option of postponement according to § 41 s. 3 SGB VI could be obsolete if the provision should not de facto really be used, inter alia due to its potential non-conformity with EU law. If this should be the case this instrument would be nothing more than a 'toothless tiger'.[92] Even though, for example, the act on flexible retirement is only one piece of many in the jigsaw, it may at least contribute to facilitating and enhancing the opportunities of employees to further extend their working life and thus be an important step towards a smoother transition from working life to retirement instead of making use of rigid absolute mandatory retirement provisions. In any case, one thing is certain: to make it more attractive for both employees and employers to extend working life beyond currently existing mandatory retirement age(s) social law and labour law need to go hand in hand. This also holds true for the situation in Germany.

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91 Hack (2016), p. 368f.
92 Ibid., p. 373.

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Gauging progress towards equality? Challenges and best practices of equality data collection in the EU

Katayoun Alidadi*

1. Introduction: from norm-setting to practical implementation

Equality is one of the fundamental values of the EU[1] and a solid legal framework has been developed for the protection against different forms of discrimination across the EU. At this crucial moment that all Member States have duly implemented the two landmark equality directives adopted in 2000, namely the Racial Equality Directive (RED) and the Employment Equality Directive (EED), the focus has appropriately shifted from norm-setting to practical implementation of equal protection standards.[2] But how is the impact of these directives and other policy instruments that aim to realise progress towards equality assessed when it comes to the situation of groups at risk in the employment market, in housing or healthcare? Which targets are set and how do we verify if these are met? How can we collect evidence revealing particular disparities, obstacles or gaps in protection on the ground, perhaps calling for additional law or policy initiatives? And where are the good practices that deserve attention and wider consideration?

With the shift from norm-setting to practical implementation of equality standards, the issue of equality data collection in the EU has become key. But one can ask whether the EU and its Member States have a robust regime in place to assess development and progress, or if there is rather reliance on 'blind progress' in some cases.

The purpose of this article is to give a very brief overview of the state of affairs on **equality data collection** with regard to the discrimination grounds protected under Directives 2000/43 and 2000/78,[3] i.e. **race and ethnic origin, sexual orientation, disability, religion or belief and age**.[4] To an important extent, this article relies on the mapping and comparative exercise carried out under a recently completed European Commission-funded project called 'Analysis and comparative review of equality data collection practices in the European Union.'[5] More detailed information can be found in

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1 E.g. Article 2 and 3 TEU; Articles 10 and 19 TFEU; and Articles 20-21 Charter of Fundamental Rights of the EU.

2 European Commission, Joint report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, COM (2014) 2 final.

3 This means that it does not include any discussion of the gender equality directives or data collection regarding gender equality. [gender equality Directives 2004/113/EC and 2006/54/EC].

4 As anti-discrimination law in many Member States also covers other grounds or has an extended application sphere than the directives, data collection in relevant Member States can and ideally should go beyond collecting data on those grounds/application spheres.

5 The equality data collection (EDC) project ran from 7 September 2015 to 7 September 2016, and was coordinated by Human European Consultancy and the Migration Policy Group. I was involved in the project as the Senior Expert on Religion and Belief.

the publications issued under this **EU equality data collection project ('EDC project')**.[6] National governments, international organisations and the European Commission have routinely emphasised the need for equality data.[7] Yet the EDC project found that while there has been gradual progress in data collection practices across various Member States (unequally distributed across the various equality strands), there are still considerable gaps and shortcomings in our knowledge base, which remains patchy and often incomparable across Member States.[8] In various Member States the collection of (some forms of) equality data remains controversial or has led to public debate. Societal attitudes can also vary considerably and at times (fierce) objections have been raised against collecting certain forms of data or via certain methods of data collection such as discrimination testing.[9]

There are a number of European-level (comparable and reliable) sources to draw upon, but only a few are specifically tailored to enable a better understanding of the dynamics and the trends of discrimination on the ground. At the domestic level too, good practices can be detected, but projects often remain ad hoc, one-off and uncoordinated. Clearly, the situation differs depending on the discrimination ground. For certain grounds such as racial and ethnic origin, it is necessary to rely on proxy data which, however, do not capture the entirety of the picture. To enable an evidence-based approach to promoting equality, there is an urgent need to further enhance equality collection practices across the EU, to eradicate misgivings or misunderstandings regarding the legal framework and to utilise potential data sources to build solid equality indicators for assessing current policies and for generally advancing evidence-based policies.[10] In the European handbook on equality data written by Timo Makkonen ('Handbook'), updated as part of the EDC project, various recommendations were made to help Europe move into more promising directions to improve equality data collection efforts. Some of these are discussed below.

This article proceeds as follows. **Section 2** discusses the concept of equality data, the objectives pursued with equality data collection, collection methods and the main data sources. Collecting data is (and should be) purpose-driven rather than a (bureaucratic) goal in itself. Understanding the objectives is crucial and this should guide various decisions on collection methods and the identification of good practices. **Section 3** outlines the relevant legal framework of data collection in Europe, addressing the ambivalent role of privacy and data protection in this regard. **Sections 4 and 5**, respectively, seek to very briefly map the landscape of available (European and domestic) data sources as well as highlight (in a non-exhaustive way) good practices of equality data collection in Europe. Finally, the conclusion presents some recommendations.

6 See in particular, Timo Makkonen, *European handbook on equality data* (2016 revision), European Commission, Luxembourg: Publications Office of the European Union 2016, 127 pp.; *Analysis and comparative review of equality data collection practices in the European Union, Legal framework and practice in the EU Member States*, European Commission, Luxembourg: Publications Office of the European Union, 2017, 181 pp.; Lilla Farkas, *Analysis and comparative review of equality data collection practices in the European Union: Data collection in the field of ethnicity*, European Commission, Luxembourg: Publications Office of the European Union, 2017, 53 pp.; Mark Bell, *Analysis and comparative review of equality data collection practices in the European Union: Data collection in relation to LGBTI People*, European Commission, Luxembourg: Publications Office of the European Union, 2017, p. 22. All available at http://www.humanconsultancy.com/projects/equality-data-collection-in-the-eu (last accessed 6 August 2017).

7 See Makonnen, Handbook, p. 19, with references.

8 See Makkonen, Handbook, p. 13 for a summary of other EDC project findings.

9 Discrimination testing is a form of social experiment, where two or more individuals who are matched for all relevant characteristics other than the discrimination ground (e.g. religious appearance, disability or ethnic origin) apply for a job, a service or housing. This is repeated on numerous occasions and closely monitored to detect differences in treatment. While there is experience with the practice in most Member States (as well as the ILO), explicit legislative provisions on discrimination testing are rare and at times form a battle ground at national level.

10 Indicators, whether quantitative or qualitative, are instrumental as they allow measuring the degree of progress in achieving a particular goal and allow for meaningful comparisons. In the terminology of Eurostat an indicator is a 'Summary measure related to a key issue or phenomenon and derived from a series of observed facts. Indicators can be used to reveal relative positions and/or show positive or negative change.' (Eurostat, RAMON – Eurostat's Concepts and Definitions Database, see http://ec.europa.eu/eurostat/data/metadata).

2. Concept, objectives, methods and sources

2.1 Equality data

The term 'equality data' refers to different kinds of information that can tell us more about the nature, extent, causes, risk groups and dynamics of discrimination in different areas of society. The definition adopted within the EDC project was 'all types of disaggregated data used to assess the comparative situation of a specific group at risk of discrimination.'[11] This includes both quantitative and qualitative data, and indeed both are crucial for a better understanding and tracking of the complex phenomenon of discrimination, for assessing the impact of implemented policies and for developing insight into how to best tackle discrimination of particular risk groups in different areas. Some types of data and data collection are better tailored to answering certain questions than other types, but each has their own pros and cons, potentials and limitations. To collect personal information, different methodologies can be adopted but the most significant remains self-identification.[12] Other possibilities are third-party identification, auto-hetero perceptions or objective factors.[13]

2.2 Serving a wide array of purposes

Equality data is needed by various actors and its collection can serve a wide range of purposes essential in the fight against discrimination. Timo Makonnen lists six different uses:[14]

- Data is needed for **policy development and implementation** in areas such as employment, education, healthcare, provision of goods and services and criminal justice. A proactive approach towards identifying courses of action is more cost-effective than relying on trial and error. Also, some policies aim to correct problematically unequal situations. For instance, positive action programmes seek to correct past injustices and should be terminated once the objectives of the action have been achieved.[15] This assessment requires data on a continuous basis;
- (Statistical) data can be used in **judicial proceedings** involving (direct and indirect) discrimination and can be crucial for both complainants and respondents;[16]
- Data is needed to **report to international human rights monitoring bodies** including the UN treaty bodies and ECRI (the Council of Europe's European Commission against Racism and Intolerance)[17] when producing periodic country reports on the situation of human rights;
- Data is needed for **diversity monitoring** by businesses, government agencies and trade unions. In order to detect under- or over-representations of risk groups, organisations should be able to benchmark aggregate internal data against external data on the composition of the general population (e.g. census data);
- Data is needed for **awareness-raising and communication campaigns** or general advocacy by governments, the media, NGOs, equality bodies, minority organisations and others;

11 Regulation (EC) No. 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics defines data collection as 'surveys and all other methods of deriving information from different sources, including administrative sources.' (Article 3.5).

12 See Ringelheim and De Schutter, supra, 'The question has arisen more recently whether the principle of 'self-identification', which should allow each individual to decide for him- or herself to which category he or she should belong, is always compatible with the need for effective antidiscrimination strategies.'

13 Auto-hetero perception is a variant of self-categorisation whereby the respondent indicates which group(s) other people are likely to associate him/her with. In the case of third-party categorisation it is a third person, such as a police officer or employer representative, who does the categorisation. See Makkonen, Handbook, pp. 38-39.

14 Makkonen, Handbook, p. 19 et seq.

15 See O De Schutter, 'Positive action (Chapter seven)' in D Schiek, L Waddington and M Bell (eds), *Cases, materials and text on national, supranational and international non-discrimination law* (Oxford, Hart Publishing, 2007), 854.

16 E.g. Recital 15 EED.

17 ECRI since the 1990s has called on governments to collect ethnic data understood as 'statistics broken down by citizenship, national/ethnic origin, language and religion' in order to assess the effectiveness of policies targeting ethnic minority groups.

– Data, both of a quantitative and qualitative nature, is needed for **research** on the multidimensional phenomenon of discrimination. Research can rely on secondary data collection but can also perform primary data collection, e.g. conduct surveys tailored to the particular study. In turn, such research can inform policy debates and help shape more effective implementation policies.

In addition to these purposes, equality data collection also serves a **symbolic function**. The efforts to document and disseminate solid quantitative and qualitative data on (un)equal treatment conveys the message that the fight against discrimination is a priority and is worth public resources and attention. Moreover, public discussion of discriminatory experiences can have a **therapeutic effect** for some individuals.[18]

2.3 Data sources and collection mechanisms

Data is collected using several types of data collection mechanisms.[19] The three general methods of collecting data are **surveys**,[20] **administrative processes** (files kept by employment offices, educational facilities, courts, etc. in the course of general administration) and **observations.**

Sources of data include censuses (population surveys), social surveys such as household and labour surveys, administrative registers, events-based records such as crime reports and complaints, and findings of social experiments (e.g. discrimination testing/mystery calling). Each has its pros and cons and limitations, and provides more or less breadth or depth. For instance, discrimination testing can yield striking examples of unequal treatment and can work for the assessment of recruitment practices or access to services, but not for promotion in the workplace. Census information can provide reliable big picture data but for depth we must refer to surveys and research. Discrimination studies can use a variety of such sources or adopt (a combination of) experimental qualitative methods. Localised information may be difficult to compare but may be especially useful in planning policies on a smaller scale. Since there is no singular data source that can provide all the answers, coordinated and integrated analysis of a variety of quality sources becomes crucial. One can imagine a complex 3-D puzzle which requires gathering and scrutinizing different pieces to build a solid overview. The quality of data is assessed based on its reliability, validity, scope and cost effectiveness.[21] The following sections discuss some of the most prevalent sources, at EU and national levels, and highlights some promising practices.

Some equality data regards baseline information on the composition of population groups, other data points to disparities without necessarily implying discrimination as the main or only source, and yet other types of data may more directly point to perceptions of discrimination or discriminatory mechanisms at play.

Furthermore, although EU and national laws define what is to be understood under 'direct discrimination', 'indirect discrimination' and 'harassment', the term discrimination will mean different things to different people in everyday life. Non-actionable but hurtful comments can be seen as discrimination by some, while others dismiss these incidents. Such different notions feed into all data collection projects, even the most carefully designed ones. Apart perhaps from case-law reports, equality data that is collected does not necessarily point to discrimination in the strict legal term[22] but rather a social form of discrimination.

18 This explains some of the motivation behind individual and 'grassroots' sharing of anecdotes or experiences online or on social media, e.g. http://www.standaard.be/cnt/dmf20150323_01593585; Guy Stevens, '#dailyracism: 'Racisme is nergens een groter probleem dan in België'', De Standaard 23 March 2015.

19 A single data set, for instance victimization data, can be a source of both quantitative statistics as well as qualitative analysis. See Makkonen, Handbook, p. 31.

20 Distinctions can be made between surveys of the entire population (e.g. a Census) and surveys of part of the population; between one-time and longitudinal surveys; and between specialized and multi-subject surveys. Surveys are either interviewer-administered or self-administered.

21 See Makkonen, Handbook p. 31 for further discussion.

22 Discrimination in the strict legal sense refers to unequal treatment and does not require intentional action. Indirect discrimination, in particular, is a conceptually complex term so that collecting data on the prevalence of this form of

There should be a symbiotic relationship between data collection and anti-discrimination law; the two need not correspond exactly (i.e. only seek to measure what is legally prohibited) since new realities and needs which can necessitate new law or policies then remain hidden.

Finally, it can be noted that there are differences with regard to the discrimination grounds covered under RED and EED (racial or ethnic origin, sexual orientation, disability, age, religion or belief) when it comes to legal framework, useful sources, data collection practices, sensibilities and social attitudes.

3. Legal framework

The EDC project aimed at mapping the relevant domestic legal framework for equality data collection. It asked country experts from the 28 Member States whether different pieces of legislation **demanded, allowed or** rather **prohibited** the collection of data on the basis of ethnic or racial origin, religion or belief, sexual orientation, age and disability, as well as gender identity and multiple grounds.

It found that the collection of equality data is generally governed by two types of legal regulation: first, anti-discrimination legislation and, second, privacy and data collection legislation. It should be clear that each of these tug in different directions, even if they are both built on and seek to protect fundamental rights.

3.1 Equality and anti-discrimination norms

Many international and European legal instruments do not simply require States Parties to adopt legislation prohibiting discrimination, but often also place an obligation on them to take *positive measures* to ensure the respect of the right not to be discriminated against. This can include a duty to effectively investigate allegations of discrimination, as under the case law of the European Court of Human Rights, and implies the collection of reliable data.

One could argue that equality data and statistics are required to monitor the practical impact of the EED and RED and such general duty can be inferred.[23] In addition, under Article 13 of the RED, Member States are obliged to designate a body or bodies for the promotion of equal treatment which, among other things, are to conduct 'independent surveys concerning discrimination' and publish 'independent reports and making recommendations on any issue relating to such discrimination'. However, this merely relates to ethnic or racial origin discrimination. Also, since 'independent survey' is not further defined Member States have significant leeway. The directives also refer to the importance of statistical data to establish direct or indirect discrimination, but refer to national law and practice to fine-tune this part.[24]

Despite this, legal obligations under domestic law to collect equality data are rare across the EU, with **three important exceptions**. First, pursuant to Article 13 RED, most national equality bodies have a duty to monitor inequality and to publish reports on the prevalence of discrimination. While there is no parallel EU obligation with regard to the discrimination grounds under the EED,[25] most Member States

discrimination would be quite a challenge.

23 And under Article 338(1) TFEU the EU can adopt measures for the production of statistics necessary for the performance of the activities of the Union, this being a shared competence with the Member States. Additionally, there is an argument in favour of data collection based on positive action measures.

24 (Recital (15) in both directives: The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence).

25 Directive 2000/78 is silent on equality data collection, but is concerned with the 'effective implementation of the principle of equality' (e.g. Recitals 29-31). In contrast, the proposal for the so-called 'horizontal directive' initiated by the Commission in 2008 (COM(2008) 426 final) but since stalled would require Member States to have an equality body competent for the grounds of religion or belief, disability, age or sexual orientation (Article 12).

have extended the same regime that applies to ethnic and racial origin discrimination to various other grounds, not necessarily limited to those under the EED. But, the national practices differ considerably. Second, in relation to the discrimination ground of disability the situation is evolving.[26] In many Member States employers, in order the show compliance with legally imposed quota,[27] are required to collect data on the numbers of employees with disabilities. Additionally, under Article 31 of the UN Convention of the Rights of Persons with Disabilities (CRPD), ratified by the EU and (most of) the EU Member States,[28] States Parties 'undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect' to the Convention and disseminate and make this data accessible to persons with disabilities and others. Third, in the UK and Ireland all public bodies are under a positive duty to promote equal opportunities on the basis of all protected grounds and this is seen to require a data collection duty to demonstrate compliance.

3.2 Privacy and data protection

The production of equality statistics often involves the processing of sensitive, personal information. Under EU law, personal data can only be gathered legally for a legitimate purpose and under strict conditions. In collecting and processing equality data, Member States need to comply with privacy[29] and data protection legislation, which among other things seeks to ensure confidentiality.[30] Data protection is of crucial importance when discussing equality data collection, in part because an 'overly protective reading of the requirements of data protection laws', in particular with regard to 'sensitive data', has hindered equality data collection efforts.[31] The 'special categories of personal data' (commonly referred to as 'sensitive data') notably include all the equality grounds covered here except for age.

To be sure, data collection on equality is hardly antithetical to the objectives of data protection, as both are built on fundamental rights enshrined in the Charter of Fundamental Rights of the European Union. They can and need to be reconciled.[32] Despite this, it is hard to ignore that in practice in various Member States data protection has been framed to constitute a barrier to effective data collection. One good practice that merits consideration comes from the UK, where the collection of personal data related to equal opportunities is explicitly permitted under the United Kingdom Data Protection Act 1998. In Belgium, the national data protection authority/Privacy Commission issued an opinion confirming that the processing of sensitive personal data in order to implement the affirmative duty to promote the equal treatment of certain target groups (under the system set up by the Flemish Decree of 8 May 2002) was authorised and therefore consistent with the Belgian Federal Act on the protection of the right to private life with respect to the processing of personal data of 8 December 1992.[33]

At present, EU Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[34] still governs the processing of

26 'A wider obligation exists in Austria where employers have to provide comparative overviews of labour conditions according to the discrimination grounds.' Makkonen, Handbook p. 29.

27 The CRPD enables the adoption of positive action measures based on disability. See e.g. Article 5. 4 CRPD.

28 http://www.un.org/disabilities/documents/2016/Map/DESA-Enable_4496R6_May16.jpg (last accessed 5 August 2017).

29 E.g. Article 12 of the Universal Declaration of Human Rights; Article 8 of the ECHR; Article 17 ICCPR. These provisions relate to personal data that can be associated with an identifiable person and are not engaged by anonymized data. See Makkonen, Handbook, p. 24.

30 See also Article 31 CRPD.

31 J. Ringelheim and O. De Schutter, *Ethnic Monitoring. The Processing of Ethnic and Racial Data in Antidiscrimination Policies: Reconciling the Promotion of Equality with Privacy Rights*, Bruylant, 2010.

32 Makkonen, Handbook, pp. 8-9; 'The general conclusion in relation to the protection of personal data is that legislation regulates but does not prohibit the collection and processing of equality data. European and national law do however pose limitations that must be respected in all data collection activities.'

33 See *Commissie voor de bescherming van de persoonlijke levenssfeer*, Opinion No. 05/2008 of 27 February 2008 betreffende de monitoring van kansengroepen in de schoot van de Vlaamse Dienst voor Arbeidsbemiddeling en Beroepsopleiding.

34 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 – 31, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML. This builds on the Council of Europe's 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS Convention No. 108).

personal data in the EU. This Directive has been implemented in each of the 28 European Union Member States through national data protection laws but with significant variation in terms of substantive and procedural rules. These national data protection laws all include the general prohibition of processing 'special categories of personal data', which generally covers ethnic origin, religion or belief, health and sex life, although in some countries the list is more extensive. However, all provide for specific exceptions to the principle of prohibition to process sensitive data. In particular, they all include a general exception which authorises the processing of sensitive personal data with the (express) consent of the data subject, collection of data which is necessary for the defence or exercise of a legal right, or the processing by an employer of sensitive data relating to employees where this is required in order to comply with the employer's obligations under labour law. These *exceptions* provide a potential legal framework for the processing of equality data.

The fragmentation of national data protection laws was seen as a considerable obstacle to streamlined protection of fundamental rights in today's interconnected and digital economy and in 2012 the European Commission proposed a comprehensive reform of data protection rules. After four years of negotiations, the General Data Protection Regulation (GDPR) 2016/679[35] – heralding 'some of the most stringent data protection laws in the world'[36] – was adopted in 2016 seeking to harmonize the legal framework**.** The Regulation will be directly applicable throughout the EU from 25 May 2018 but in over 30 areas covered by the GDPR Member States are allowed a margin of manoeuvre to legislate differently in their domestic laws (this transposition needs to occur by 6 May 2018)**.** With regard to the processing of sensitive data, the Regulation to a very large extent maintains the provisions of the current Data Protection Directive with a general principle of prohibition covering '*any information* relating to an identified or identifiable natural person' that reveals 'racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of genetic data, biometric data, data concerning health or data concerning a natural person's sex life or sexual orientation'.[37] However, Article 9.2 includes an extensive list of exemptions, and at least one of the conditions must be met when an operation involves the processing of sensitive personal data.[38] The most relevant for equality data collection purposes are:

- Article 9.2. (a): explicit and specific consent (which meets the conditions set out in Article 7) by the data subject, except if EU or national law provides that consent cannot lift the prohibition;
- Article 9.2. (b): processing is necessary to carry out obligations in the field of employment and social security and social protection law, as authorized by law or collective agreement;
- Article 9.2. (f): processing is necessary in judicial proceedings, including to establish or defend against legal claims;
- Article 9.2. (j): processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with EU or national law.

As these examples clarify, the GDPR includes a margin of manoeuvre for Member States to specify situations and conditions for the lawful processing of sensitive data, so that national laws may still adopt different approaches towards collecting sensitive data and a continuing mapping of the legal landscape regarding data protection will be necessary for equality data collection advocates.

35 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

36 DLA Piper, 'Data Protection Laws of the World' available at https://www.dlapiperdataprotection.com/index.html?t=eu-section&c=FR (last accessed 7 August 2017).

37 Article 4 and 9.1 GDPR. 'To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly.' (Recital 26).

38 In addition to the more stringent conditions laid down in Article 9, Article 5, which lays down six qualitative data protection principles for the processing of personal data, must also be met. See Makkonen, Handbook p. 25; For more on data protection legislation, see FRA, Council of Europe – European Court of Human Rights, *Handbook on European data protection law* (2014), p. 73; See also Serge Gutwirth et al, *European Data Protection: In Good Health?* Springer, 2012; L.A. Bygrave, *Data protection law: Approaching its rationale, logic and limits*, Kluwer, 2002.

The GDPR does not render obsolete the need to 'myth bust' the notion that data protection legislation should preclude the processing of equality data.[39] That endeavour remains necessary. Yet it is not sufficient. In some cases, for instance in the case of sexual minorities or ethno-religious minorities, groups and persons affected by discrimination may have considerable reticence or resistance to voluntarily disclosing personal information or experiences.[40] After all, at various times in history such information was utilised not for equal opportunity reasons but to discriminate and stigmatise these groups of people. Explaining the purpose of data collection[41] as well as guaranteeing compliance with high EU data protection standards will be key to addressing people's reluctance to reveal sensitive information and to gather reliable information for equal opportunity purposes. Perhaps, the GDPR marks a moment to change the narrative to consider human rights and data protection not as an obstacle, but rather a facilitating factor offering limitations and safeguards that addresses people's reasonable concerns about privacy and confidentiality in our modern society.

4. EU-wide surveys

Much of the available information that can be used for equal opportunity purposes is collected for general statistical, administrative or societal reasons. While such data collection that is not necessarily designed with equality purposes in mind can be useful and cost effective, it comes with limitations. Over the last two decades, specific surveys have been conducted at the EU level and national levels that focus particularly on experiences of discrimination amongst particular groups, thus filling important gaps in our knowledge base. The challenge is to continue and build on such endeavours, including by turning ad-hoc exercises into more longitudinal studies which would enable the tracking of trends and developments.

4.1 EU-wide household surveys

The most relevant EU-wide surveys (producing comparable data across the Member States) include the EU-SILC, the LFS and the ESS.[42] The European Union Statistics on Income and Living Conditions (**EU-SILC**) is an annual survey on (un)employment, training, income, poverty, social exclusion and housing conditions covering all individuals aged 16 and over living in private households. It is carried out in all Member States (as well as in Iceland, Norway, Switzerland, Serbia and Turkey) and is based on EU legislation. Anchored in the European Statistical System (ESS), it provides timely and comparable cross-sectional and longitudinal, multidimensional microdata. It includes various proxies for discrimination, such as age, country of birth, citizenship and disability and various ad-hoc modules have included variables relevant to equality data.[43]

39 It can be noted that FRA advocated that 'EU data protection legislation that is currently under negotiation could clarify the place of sensitive categories in anti-discrimination data collection, and make explicit that the collection of sensitive data is allowed for the purpose of combating discrimination'. See FRA Opinion – 1/2013 [EU equality directives], 1 October 2013, p. 4.

40 E.g. the German country expert noted that 'Citizens themselves have a high level of sensitivity towards sensitive data collection. The Third Reich that collected and misused data i.e. on ethnicity and religion is the negative example that such data should never be collected. Citizens feel strongly about not allowing the state to make use of personal data as it is felt to be an instrument of control.' There are also historical reasons why many LGBT persons are reluctant to share information on their sexuality and there are considerable differences between the comfort level in Nordic countries as opposed to central and eastern European countries. In addition, there are general negative association of data collection, e.g. in the UK, see Martin Beckford, 'Your sex life? Religion? The boss wants to know', The Daily telegraph, 13 January 2011 (reporting on the equality duty with various references to George Orwell's Nineteen Eighty-Four; 'David Cameron's Big Society', 'Orwellian').

41 See Eurobarometer 263 on discrimination in the European Union in 2006 (75 % of respondents would agree to provide personal information as part of a census to help combat discrimination based on ethnic origin, 19 % would be opposed, while 6 % did not know). In the EU-MIDIS survey developed by the Fundamental Rights Agency a majority of respondents said to be willing to provide information on their ethnic origin as part of an anonymous census if this would help combat discrimination.

42 Other relevant surveys not discussed include the European Values Study (EVS), the European Health and Social Integration Survey (EHSIS) and the European Quality of Life Survey (EQLS). For more on these, see Makkonen, Handbook, pp. 64-65.

43 E.g. Access to services (2016), Social and cultural participation (2015), Material deprivation (2014), Wellbeing (2013) and Housing conditions (2012).

The Labour Force Survey (**LFS**) is a quarterly household sample survey which is intended to cover the complete resident adult population (people aged 15 years or over living in private households) of all Member States (as well as Candidate Countries and EFTA countries except for Liechtenstein) and is the main source of employment and unemployment statistics in the EU. The relevant proxies in the LFS also include age, citizenship and country of birth. In addition, some countries include supplementary variables, e.g. on disability or second-generation immigrants. Special (recurring) EU modules attached to particular LFS rounds have involved areas of interest for the various discrimination grounds. Notably, the 2014 LFS ad-hoc module addressed the labour market situation of migrants and their immediate descendants and a 2011 special module covered the employment of disabled people. One recommendation from the EDC project was that these EU-wide surveys should include more equality and non-discrimination specific data as this is a particularly cost-effective way of collecting reliable and comparable data.[44]

The European Social Survey (**ESS**) is a bi-annual and academically driven cross-national survey measuring attitudes, beliefs and behaviour patterns of diverse populations in 24 countries (including 18 EU Member States). It has been conducted since 2001 and includes various proxies/grounds of discrimination including age, sexuality, ethnicity ('colour or race', 'ethnic group', 'nationality' and 'language'), disability, and religion.

4.2 FRA surveys, Eurobarometer and more

As mentioned above, at the EU level the collection of equality data on a regular basis has been developed by the EU Agency for Fundamental Rights (**FRA**)[45] and the European Commission has conducted surveys that are specifically designed to measure or provide insights into (specific forms of) discrimination. Such data point to widespread levels[46] of discrimination and under-reporting for various risk groups.

FRA has conducted several large-scale EU-wide surveys on discrimination, for instance on LGBT people's experiences of hate crime and discrimination, as well as their level of awareness about their rights (2013), on transgender people (2013), on Roma (2012, in collaboration with UNDP), on migrants (the 2008 EU-MIDIS survey covering 23,500 persons with migrant or minority backgrounds, and the 2015 EU-MIDIS II covering 25,000 immigrants and Roma from across all 28 Member States), on Jewish people (2012), etc.[47]

In reviewing available equality data on LGBT persons, Mark Bell considers the FRA's 2013 EU LGBT survey to be

> '[a] major advance in equality data collection …. This remains the largest body of comparative data in Europe and it provides a key source on LGBT experiences across many dimensions of social life. The survey's methodology was based upon the circulation of a questionnaire mainly via "LGBT-related online media and social media". It reflects the experiences of 93,097 individuals who identified as LGBT and voluntarily completed the survey. While it is not possible to say with certainty that this was a representative sample of all LGBT people, the size of the dataset offers weight to the significance of its findings. It revealed the persistence of substantial discrimination across diverse walks of life, as well as strikingly different prevalence rates between EU Member States.'[48]

44 Makkonen, Handbook, p. 11.

45 FRA is the EU agency tasked with providing independent, evidence-based assistance and expertise on fundamental rights to EU institutions and Member States.

46 For instance, 21 % of respondents of the Special Eurobarometer 437 of 2015 said they had experienced discrimination in the last 12 months. This number is up from 16 % in 2009 and 17% in 2012. However, this rise can also be due to a better understanding of (the prohibition of) discrimination. In any case, this would translate to millions of incidents every year that can paralyze societal cohesion and solidarity.

47 For an overview of FRA surveys see http://fra.europa.eu/en/research/surveys (accessed 6 August 2017).

48 See Mark Bell, supra, p. 8.

This illustrates the need to consider innovative ways of collecting data on risk groups that may be hard to reach or reluctant to disclose information through general surveys and highlights the value of engaging in such broad survey initiatives.

Various Special **Eurobarometer** surveys have covered different discrimination grounds. Flash Eurobarometer 345 (Accessibility) focused on accessibility issues for disabled citizens living in the EU. Special Eurobarometer 393 (Discrimination in the EU in 2012; 27 Member States) and Special Eurobarometer 437 (Discrimination in the EU in 2015; 28 Member States) included questions on perceptions and experiences of discrimination in the EU, rights awareness, effectiveness of national measures and policies to fight discrimination as well as the willingness of citizens to provide personal details for purposes of equal opportunities, linked to a variety of discrimination grounds (gender, age, ethnic origin, sexual orientation, gender identity, disability, other reasons).

In addition, other NGOs or civil society actors have also conducted cross-national surveys on discrimination, for instance the European Network against Racism in Europe (ENAR) and the Open Society Foundations on Roma and Muslims in Europe.

With regard to tracking ethnic and racial origin data, Lilla Farkas notes that 'EU statistics do not employ uniform categories and they have an overwhelming focus on citizenship, although some ask about racial and ethnic origin in open questions'.[49] Farkas lists the limitations of the proxy approach which 'at the European level is wrought with the same difficulties as it is wrought at the national level in the majority of the Member States' since 'indicators have been developed to measure the integration of migrants, not of ethnic and racial minorities'. She notes some good practices at the European level (ESS has experimented with new sets of questions relating to ethnic origin and the Fundamental Rights Agency also combines questions on ethnic and geographic origin, as well as religion), although the representatives of the ethnic communities living in Europe have not been consulted. 'Given the discrepancies and controversies relating to the definition of categories, data pertaining to certain racial groups – for instance Afro-Germans or Swedish Muslims may be lacking.' Farkas argues that '[r]acial categories are the prerequisite of more efficient data collection and therefore there is clear need to explore the most effective and viable options of collecting equality data on grounds of racial or ethnic origin.'[50] Indeed, a direct approach to collecting relevant data may be called for, yet it is also clear that many actors are reticent about the categorisation exercise that this implies.

5. Domestic sources of equality data

When it comes to the national data sets, sources, methods, categories used, and practices, they are all heavily influenced by national context. The first national source is the **census**. While most EU countries still take traditional population censuses, in the sense of 'universal enumeration based on field operations carried out at a specific moment',[51] there are several examples of Member States who are able to utilise well-developed register systems to compile all or most of the census data on population demographics (e.g. Finland, Denmark, Germany, Norway, Sweden, the Netherlands). In Belgium, the classic census was replaced in 2011 by an administrative census based on the National Register of natural persons. In Slovenia, in 2002, the traditional census was replaced by the compilation of data already available in different national population registers.

49 Lilla Farkas, supra, pp. 40-41.

50 Ibid. In constructing such categories, Farkas sees an important role for consultation with minority communities. She considers the social construction of Muslims as a racial group as necessary since '[n]ot all the racial categories are constructed by European societies on the basis of skin colour only and this has to be acknowledged in the way they are named.'

51 See Makkonen, Handbook, p. 53. See also conference on European Statisticians (CES), recommendations for the 2020 censuses of population and housing, New York and Geneva, 2015.

Traditional censuses can differ considerably in the kind of data they include. For instance, the Irish 2011 census collected data on same-sex couples. A number of countries collect data on religious affiliation or practice, often on a voluntary basis (e.g. Estonia, Hungary, Bulgaria, Cyprus, Romania, Austria,[52] the UK), while others do not. Some countries collect data on ethnic origin, while others rely on proxy data such as country of birth or citizenship. The reasons for particular approaches can be practical but are often (also) normative. For instance, the categories of racial and ethnic origin utilised in the UK or Hungarian context would not make sense in France, Germany, Belgium or Spain, because of the different composition of minority groups there but also objections against such categorisation, by the Government or by NGOs. Therefore, the EDC project did not 'propose the adoption of a uniform and standardized model of data collection across Europe. This follows from the recognition of the fact that the EU member States are heterogeneous in many respects, including in their statistical infrastructure.'[53]

With regard to censuses, many good practices relate to the method of analysis and dissemination. It should be clear that releasing easily comprehensible reports and visualisations of data is more useful than providing access to raw data. A good example is Hungary, where the Central Statistical Office (CSO) publishes ground-specific assessments of census data, including 'Data on belonging to a national minority', 'People living with disabilities', 'Religion and religious communities'.

In addition to census data, national level sources will include **household surveys, administrative registers, justice system data** and case-law reports,[54] **victimisation and complaints data**, research reports (which analyse different data sets and/or supplement data by using innovative methodologies) and **discrimination testing**. Government statistical offices, equality bodies, NGOs, Ombudsmen and Ombudswomen, research centres and universities, minority organisations and others can play important and constructive roles. It is here that **many good practices** can be mentioned.[55] For instance, in **Croatia** the Zagreb-based NGO Centre for Peace Studies in cooperation with the Office of the Ombudsperson conducted three surveys on attitudes and awareness regarding discrimination with the aim to enhance existing anti-discrimination policies. The survey conducted in 2013, for example, inquired about the importance of national and religious identity, attitudes towards granting citizenship to immigrants, and attitudes towards certain ethnic, religious and political groups. The **French** Trajectories and Origins Survey took place in 2008 and was organised by the National Institute of Statistics and Economic Studies (Insee) and the French Institute for Demographic Studies (Ined). The purpose of the survey was to understand the extent in which geographical background is in itself a factor contributing to inequality or to limitations in the access to the different resources of life in society (housing, language and education, work, public services and social benefits, contraception, health, nationality, social networks and relationships, etc.). The survey explored migratory paths, education, training and employment, living environment and housing, discrimination, community practices and more. Notably, second-generation migrants reported discrimination experiences more often than first-generation migrants and people from Sub-Saharan African countries indicated the highest rates of discrimination.

Conversely, in 2011 **Italy** organised the Survey on Discrimination by Gender, Sexual Orientation and Ethnic Origin (Istat survey). The survey provided some highly relevant and interesting data.[56] For instance, about one million people, aged 18-74, declared that they were homosexual or bisexual, but a higher

52 In the course of the 2011 Austrian population census a public debate on the legitimacy of asking about religious affiliation led to many people refusing to answer the question on religion in the census (even though this was required). After the 1991 Slovenian Census which included a question on ethnic affiliation and religion, there were several initiatives for a Constitutional Review and public debates on the legitimacy of such questions.

53 Makkonen, Handbook, pp. 14-15.

54 Case law is a valuable source for qualitative research as decisions reveal important aspects about the contexts in which discrimination takes place as well as motives, reasons and arguments advanced by the parties and evaluated by the courts. The RELIGARE project (2010-2013) set up a database consisting of domestic case law dealing with select issues of religious freedom and discrimination in 9 Member States. The texts of full judgments are available with summaries in English and commentaries written by a legal expert. Unfortunately, this database is currently no longer being updated. http://religaredatabase.cnrs.fr (last accessed 7 August 2017).

55 These and other examples of good practices are listed in the EDC project publications, see supra.

56 Makkonen, Handbook, p. 66.

number said that during their lives they had fallen in love or had sexual relations with or felt sexual attraction to people of the same sex. About 61.3 % of people aged 18-74 believed that homosexuals are very or somewhat discriminated against. While the majority of respondents (62.8 %) agreed that a homosexual couple should have the same rights as a married couple, a minority of persons interviewed believed that a homosexual person should not work as a teacher (41.4 %), as a doctor (28.1 %) and as a politician (24.8 %).

In **Cyprus**, the Ministry of Transport and Works in collaboration with the Ministry of Labour, Welfare and Social Insurance carried out a survey in 2014 with 444 questionnaires on the accessibility of buildings housing public services, in order to identify buildings in need of accessibility improvements. Following this survey, the Ministry of Labour, Welfare and Social Insurance submitted a proposal, which was approved, to the Council of Ministers for the accessibility improvement of buildings leased by public services.

Governments may enhance research efforts by commissioning studies. **The Netherlands** is a good example here, as Dutch ministries regularly commission governmental data collection institutions, Statistics Netherlands, independent research institutes, NGOs or universities to conduct research on the impact of or experiences with specific types of discrimination, using the reports as a starting point for further policy measures/equality planning at local and national level.

Similarly, in **Slovenia**, the publicly funded Institute for Labour and Family Research (ILFR) conducts sociological research in the field of social and family policy, social protection, the labour market and employment policy, the results of which are fed into legislative and policy processes.

Discrimination testing, as indicated above, has been used in many Member States but often lacks an explicit legal framework which, inter alia, regulates their admissibility and evidentiary value in judicial proceedings. In **France**, since the end of the 1990s, the anti-racist association SOS Racisme has organised highly publicised discrimination testing at the entrances of nightclubs, in the fields of employment and regarding housing. Such testing was recognised as admissible evidence by the Court of Cassation in June 2002 and discrimination testing was enshrined in the Law of 31 March 2006 on Equal Opportunities. In **Belgium**, the legal anchoring of discrimination testing is an ongoing goal for a coalition of NGOs setting up a protest movement *Actieplatform Praktijktesten Nu*.[57]

6. Conclusion: towards an evidence-based promotion of equality?

This article sought to give a very brief overview of the state of affairs on equality data collection in the EU, as a way of introduction to the issue. In order to assess the impact of existing equality legislation and policies in all European countries, there is an ongoing need to collect, analyse and monitor the living realities regarding discrimination across different spheres of life, including employment, education and housing. Such information is also essential to guide and fine-tune approaches actively fighting discrimination on the basis of racial or ethnic origin, sexual orientation, disability, religion or belief and age and to make evidence-informed decisions about future measures on these and other discrimination grounds. During these critical times in which Europe moves from norm-setting to practical implementation of equality standards, it is of vital importance to enhance equality data collection, both in terms of fine-tuning the legal framework as well as of developing and exchanging good practices. Laws *mandating*

57 The issue of mystery calls and discrimination testing is contentious in the Belgian context. On 23 February 2015, Belgian newspapers reported on a mystery call initiative conducted by a minority organization (*Minderhedenforum*) on 251 service voucher companies (*dienstenchequebedrijven*) of which 2 out of 3 (62.5 %) had no qualms in excluding ethnic minorities when requested. There have also been 'undercover' media investigations of temp agencies similarly illustrating the pervasiveness of discrimination against ethnic-cultural minorities. See Tinne Kenis and Ico Maly, 'Racisme in de interimsector: een straatje zonder einde?' *DeWereldMorgenbe* 16 September 2010, http://www.dewereldmorgen.be/artikels/2010/09/16/racisme-de-interimsector-een-straatje-zonder-einde (last accessed 7 August 2017). This triggered debates and investigations at Flemish and the federal level, but legislators have so far failed to adopt a legal framework for discrimination testing, instead preferring self-regulation by businesses.

equality data collection are rare (see above for exceptions) and data protection directives' provisions on 'sensitive data' have been –consciously or unconsciously – misread as deterrents to data collection efforts. This situation is unlikely to change under the new Data Protection Regulation, that will apply starting May 2018, without targeted action.

While all Member States have developed some measures to produce equality data related to the grounds of ethnic origin, age, religion, disability and sexual orientation, few Member States have developed a systematic and institutionalised framework[58] and they should be further guided and encouraged to improve data collection.[59] Ideally such solutions should be institutionalised to ensure their long-term viability.

The EDC project makes a number of key recommendations in this respect. First, EU Member States need to tap into the existing data sources at EU level (EU-wide surveys) and national level, taking advantage of already existing data to analyse and report on equality and non-discrimination issues. This helps to avoid costly duplication of data collection efforts. Second, each EU Member State needs to conduct a mapping exercise in order to investigate what data are available and can be used as equality data sources. Third, to enhance comparability and compatibility of data from various sources, differences in definitions, classifications and categorisation need to be identified and addressed, both at EU level and national level. Last but not least, all stakeholders can enhance the acceptance of data collection for equality and non-discrimination purposes by explaining the purposes of data collection and the fact that data protection safeguards are fully respected. Carefully considering and adopting these recommendations can go a long way towards improving equality data collection in the EU.

58 One exception is Finland, which has taken a systematic approach towards collection and dissemination of equality data.
59 Makkonen, Handbook, recommendation p. 11.

Towards a better work-life balance for the self-empoyed?

Marlies Vegter*

1 Introduction

In September 2015 EU President Juncker announced the European Pillar of Social Rights in order to 'build a fairer Europe and to strengthen its social dimension'.[1] The aim of the Pillar is, inter alia, to improve the working and living conditions in Europe. The Pillar pays specific attention to self-employed workers. Self-employment is seen as a vehicle for economic growth. At the same time the Commission acknowledges that all working parents and carers, thus including the self-employed, need support in creating a good work-life balance and may need more income protection than is presently available[2] According to Chapter II, point 5 on 'Secure and adaptable employment', the European Union wishes to encourage entrepreneurship and self-employment. Point 12 on 'Social Protection' adds: 'Regardless of the type and duration of their employment relationship, workers, and under comparable conditions, the self-employed, have the right to adequate social protection'. Under point 9 on 'Work-life balance' it is mentioned that: 'Parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services.'[3] It can be argued that this starting point of the Pillar includes not only employees but self-employed as well

Following the launch of the Pillar, the European Commission adopted a proposal for a directive on the work-life balance for parents and carers on 26 April 2017.[4] The proposal includes a right for fathers (paternity leave) to take at least 10 working days off around the birth of a child,[5] extends the right to parental leave until the child turns 12 (8 years at present)[6] and introduces a carer's leave of five days per year in case of sickness of a direct relative,[7] all paid at the level of, at least, sick pay.[8] The current proposal extends the existing forms of flexible working arrangements available to parents returning from parental leave to all carers and workers with children up to a given age which shall be at least twelve. The draft directive does not apply to the self-employed, as the scope of the Directive includes all workers who have an employment contract or employment relationship.[9] As the Directive lays down minimum standards, Member States can extend it to cover the self-employed if they wish.

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1 http://ec.europa.eu/social/main.jsp?langId=nl&catId=89&newsId=2786&furtherNews=yes, accessed 21 August 2017.

2 See for example the press release on the social pillar (http://europa.eu/rapid/press-release_IP-17-1006_en.htm, accessed 17 October 2017, with the emphasis on improving the work-life balance of *all* working parents and carers, thus including self-employed, and on providing self-employed with social security cover.

3 *The European Pillar of Social Rights in 20 principles*: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en, accessed 24 October 2017.

4 http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1494929657775&uri=CELEX:52017PC0253 (COM (2017) 253 final), accessed 21 August 2017.

5 Article 4.

6 Article 5.

7 Article 6.

8 Article 8.

9 Article 2.

Furthermore, the Commission announced that it is starting a consultation of social partners on access to social protection, to define possible new rules in this area.[10] The Commission wants to ensure that self-employed workers and people working in non-standard employment[11] have access to social protection coverage and employment services on the basis of their contributions.

It is not clear whether the need for measures concerning the work-life balance of self-employed workers will be part of the consultation. However, as will be described in more detail in the next section, research has shown that the self-employed also struggle with the reconciliation of work and private life, maybe to a greater extent than employees. Therefore the question is relevant if the measures in the proposal for a directive should not be extended in the future to the self-employed or if other measures are more suitable. This question will be further explored in this article. Before doing so, some factual information will be provided about the number and characteristics of self-employed workers in the EU countries and about their work-life balance.

In this respect it is important to note that there is not one, conclusive, definition of a self-employed worker.[12] From a legal perspective a self-employed person is most often defined as someone who is not an employee, i.e. does not work for an employer with an employment contract under the authority of the employer. Directive 2010/41 defines the self-employed as 'all persons pursuing a gainful activity for their own account, under the conditions laid down by national law'.[13] Member States put different groups in this category. At one end of the spectrum one can find sole contractors who work alone and sometimes have only one or two clients, while at the other end there are self-employed workers who run a company and employ personnel themselves.

This article uses the definition of Directive 2010/41, which includes both sole contractors and business owners. The emphasis will be on the work-life balance of the individual, whether he/she is a sole contractor or owns a company and employs others.

2 Numbers and characteristics of self-employed workers in the EU and their work-life balance

The number of self-employed workers in the EU has remained stable, at least since 2008 and has remained at around 30 million people. In 2008, the number was 30,598,000 and in the first quarter of 2017 it was 30,288,000.[14] Within the Member States the numbers of self-employed fluctuate more strongly than they do in the EU as a whole. For instance, in the Netherlands and the United Kingdom the number has increased in recent years, while in Spain, Germany and Romania the numbers of self-employed workers have declined.[15] Self-employed workers make up almost 15 % of the entire working population in the EU.[16] The largest numbers of self-employed can be found in the southern countries,

10 http://europa.eu/rapid/press-release_IP-17-1006_en.htm, accessed 17 October 2017.

11 The Commission defines 'non-standard employment' as 'all forms of work other than full time, open-ended employment in a subordinate and bilateral employment relationship'. This definition is derived from the ILO report on non-standard employment of November 2016 (http://www.ilo.org/global/publications/books/WCMS_534326/lang--en/index.htm) and refers to, inter alia, temporary work, part-time work, temporary agency work and other multi-party employment arrangements, disguised employment relationships and dependent self-employment.

12 See for a discussion regarding the definition of self-employed; European Network of legal Experts in the Field of Gender Equality, Catharine Barnard and Alysia Blackham, *Self Employed: the implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity* (2015), pp. 13-16 available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/self_employed_en.pdf.

13 Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, *OJ L 180, 15.7.2010,* pp. 1–6.

14 http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsq_esgan2&lang=en, accessed 17 July 2017.

15 UK: 3.648 million in 2008 and 4,311.5 in 2017; NL: 1,022.3 in 2008 and 1,301.3 in 2017; Spain: 3,306.9 in 2008 and 2,907.9 in 2017; Romania: 1,561.8 in 2008 and 1,227.3 in 2017 and Germany: 3,971.8 in 2008 and 3,631.7 in 2017. http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsq_esgan2&lang=en, accessed 17 July 2017.

16 I. Hatfield, *Self-employment in Europe*, January 2015, p. 8. To be found at https://www.ippr.org/files/publications/pdf/self-employment-Europe_Jan2015.pdf, accessed 20 July 2017.

especially in Greece, and the smallest numbers in northern European countries, including Sweden, Denmark and Norway. In the northwest, the Netherlands and the UK have a relatively high proportion of self-employed workers, around 15 %.[17]

In the European Union women account for about one third of the total number of the self-employed.[18] Women tend to operate in one-person companies in the sectors of healthcare, education and culture especially,[19] but there are variations among the Member States. Female self-employment tends to be higher in southern/eastern European countries. This does not mean there is more work for women in those countries, but rather that, because of a lack of other employment possibilities, women more often try to earn an income as a self-employed person.[20] The gender pay gap between self-employed men and women is rather large. The largest gaps, amounting to 50 %, can be found in the UK, Germany and the Netherlands.[21]

In academic literature[22] it is pointed out that, in general, self-employed workers in the various countries are relatively satisfied with their work-life balance and well-being compared to employees.[23] This is especially the case if the choice for self-employment was a positive one rather than one made because there was no better work available. This conclusion is confirmed by Izzy Hatfield, who observes, with reference to the 2010 European Social Survey (ESS), that self-employed workers have higher levels of satisfaction with their work than employees. An explanation for this high level of satisfaction is that there are significant advantages in being self-employed, including managing their own time and in that way their own work-life balance.[24]

This overall satisfaction of self-employed when compared to employees, does not mean that self-employed do not experience difficulties in finding a balance between their work and their family life. On the contrary, about one third of the self-employed does report difficulties in this respect. A considerable part of them feels that work intrudes on their family life.[25] This is a higher percentage than in the case of employees. Causes may be traditional job demands such as working hours, work pressure and job insecurity, but also factors such as the kind of business (consumer-oriented or not) and the political, economic and cultural context which impact on the well-being of the self-employed.[26] Self-employment can provide flexibility which could contribute to establishing a better work-life balance, but it can also result in unpredictable or irregular working hours. In addition, the lack of job security and insufficient access to social protection can create stress.[27]

17 Eurostat, Labour Force Survey, 2017 (Q1).

18 Eurostat Q1, 2017. See also K. McCracken, S. Marquez, C. Kwong, U. Stephan, A. Castagnoli and M. Dlouhá, *Women's Entrepreneurship: closing the gender gap in access to financial and other services and in social entrepreneurship*. Published by the European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens Rights and Constitutional Affairs, 2015, p. 13.

19 Eurostat Q1, 2017.

20 I. Hatfield, *Self-employment in Europe*, January 2015, p. 16-18. To be found at https://www.ippr.org/files/publications/pdf/self-employment-Europe_Jan2015.pdf, accessed 20 July 2017.

21 https://www.atria.nl/epublications/IAV_B00110892.pdf, p. 17, accessed 20 July 2017.

22 See inter alia the doctoral thesis by Anne Annink which was published in March 2017: *Busyness around the Business, a cross-national comparative research of the work-life balance of self-employed workers*, diss. Rotterdam University, the Netherlands, 2017, p. 277. To be accessed at https://reader.ogc.nl/63bf3791-a23d-4f02-9b20-880cba97308b.epub/, 31 July 2017.

23 The study was worldwide, based on European Social Surveys, the Global Entrepreneurship Monitor and on in-depth interviews with self-employed workers in the Netherlands, Spain and Sweden.

24 I. Hatfield, *Self-employment in Europe*, January 2015, p. 27-28. To be found at https://www.ippr.org/files/publications/pdf/self-employment-Europe_Jan2015.pdf, accessed 31 July 2017. With reference to European Social Survey 2010 (ESS 2010).

25 A. Annink and L. den Dunk, 'De positie van vrouwelijke zzp'ers in Nederland', *Atria*, 2014, pp. 18-20. See https://www.atria.nl/epublications/IAV_B00110957.pdf, accessed 20 July 2017.

26 A. Annink, *Busyness around the Business, a cross-national comparative research of the work-life balance of self-employed workers*, diss. Rotterdam University, the Netherlands, 2017, p. 208-209. To be accessed at https://reader.ogc.nl/63bf3791-a23d-4f02-9b20-880cba97308b.epub/, 31 July 2017.

27 Peer Review in Social Protection and Social Inclusion, DG Employment, Social Affairs & Inclusion, Synthesis Report – Reconciling Family Life and Entrepreneurship, June 2017, p. 1. To be accessed through http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, 31 July 2017.

The balance between work and private life is experienced in a different way by men and women, but it is difficult to say whether women struggle more in this respect than men. In some countries, like the Netherlands, Belgium, Slovenia and Norway women are more satisfied than men, whereas in Denmark, Estonia and Sweden men are more content. In most other countries the differences between men and women are small.[28]

Research shows that in many European countries especially women, but also parents in general, choose to become self-employed to make it easier to combine work with the care for their family.[29] Self-employment enables them to combine income, flexibility and control over their work and childcare.[30] However, working as a self-employed person rarely breaks the traditional division of tasks. E.g. in the Netherlands self-employed women frequently work part-time. According to OECD statistics, in 2008 Dutch self-employed women worked approximately 24 hours per week (men nearly double the number of hours).[31] In this respect the work pattern of self-employed women is very similar to the work pattern of women in employment in the Netherlands. In other EU countries self-employed women tend to work more hours, but the traditional gender division pops up in other ways, for example because women arrange their work in such a way that they can take care of their children, e.g. by working in the evenings.[32]

In short, one can say that self-employment is important for the economy and for creating employment opportunities. Also, it offers advantages in the field of flexibility and the reconciliation of work and private life. On the other hand, self-employed workers experience difficulties in reconciling work and family and may suffer stress due to unpredictable or irregular working hours, lack of job security and insufficient access to social protection. In the Netherlands for example, this applies especially to female self-employed workers.[33] Self-employment may give them the chance to work at hours during which they do not have to care for their children or other relatives, and in that way enable them to perform paid work in situations where this would otherwise not always be possible. However, self-employment does not necessarily lead to a better work-life balance, especially because the traditional division of tasks appears to remain intact, whether a woman is self-employed or works in employment.

The aim of the European Commission is to strengthen the rights and improve the conditions for working parents and carers – self-employed not excluded – to reconcile work and family responsibilities. In addition the Commission wishes to provide adequate social protection to all types of workers, both employees, workers in non-standard employment and self-employed people.[34]' The question then arises if and if so, to what extent these aims are currently put into practice at the EU level and to what extent new measures are desirable. In this respect it is interesting to have a look at measures that already exist in various Member States, since they might be an inspiration for the EU when considering new arrangements. In the next sections an overview will be given, both of the arrangements existing at the EU level and of the regulations in a number of Member States.

28 A. Annink and L. den Dunk, 'De positie van vrouwelijke zzp'ers in Nederland', *Atria*, 2014, p. 20-21. See https://www.atria.nl/epublications/IAV_B00110957.pdf, accessed 20 July 2017.

29 Eurofound, 2007.

30 A. Annink, *Busyness around the Business, a cross-national comparative research of the work-life balance of self-employed workers*, diss. Rotterdam University, the Netherlands, 2017, Chapter 4. To be accessed at https://reader.ogc.nl/63bf3791-a23d-4f02-9b20-880cba97308b.epub/, 31 July 2017.

31 A. Annink and L. den Dunk, 'De positie van vrouwelijke zzp'ers in Nederland', *Atria*, 2014, p. 18. See https://www.atria.nl/epublications/IAV_B00110957.pdf, accessed 20 July 2017.

32 A. Annink and L. den Dunk, 'De positie van vrouwelijke zzp'ers in Nederland', *Atria*, 2014, p. 22 with further references. See https://www.atria.nl/epublications/IAV_B00110957.pdf, accessed 20 July 2017.

33 A. Annink and L. den Dunk, 'De positie van vrouwelijke zzp'ers in Nederland', *Atria*, 2014, p. 22-23. See https://www.atria.nl/epublications/IAV_B00110957.pdf, accessed 17 October 2017.

34 See in this respect point 12 of the European Pillar of Social Rights in 20 principles: "Regardless of the type and duration of their employment relationship, workers, and under comparable conditions, the self-employed, have the right to adequate social protection.": https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en, accessed 24 October 2017.

3 Existing and proposed EU legislation with respect to the work-life balance of the self-employed

The European Pillar of Social Rights explicitly mentions the self-employed with respect to social protection,[35] but also the principles in the Pillar on encouraging entrepreneurship and self-employment[36] and on the work-life balance of parents and people with caring responsibilities,[37] are relevant to self-employed workers. However, these principles do not provide for specific rights, nor does the rest of the Pillar of Social Rights. The Pillar contains principles that need to be implemented by more concrete legislation. The first concrete legislative deliverable of the Social Pillar is the proposed directive on work-life balance for parents and carers.[38] The EU proposal applies to workers only, but Member States may go beyond the minimum requirements of this Directive and adopt rights in order to facilitate the work-life balance of self-employed workers. In addition the Commission announced that it is starting a consultation of social partners on the access to social protection, also for the self-employed. Whether this consultation will lead to specific measures in this area is not clear yet, of course.

In the field of equal treatment of men and women there is a legislative framework applying to self-employed workers: Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity. The aim of this Directive is not predominantly to protect self-employed workers, but rather to ensure that male and female self-employed workers are treated equally. In some areas the Directive offers specific protection to self-employed workers; however, this is mainly directed at assisting spouses/life partners[39] of self-employed workers (mainly in agriculture) and at pregnant self-employed women. For the latter group a maternity allowance has been introduced.[40] Female self-employed workers are entitled, on the basis of Article 8 of the Directive, to 'a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks'. An allowance is sufficient when it is at least equivalent to the benefit in the case of sickness and/or the average loss of income or profit in relation to a comparable preceding period subject to any ceiling laid down under national law and/or another family-related allowance. The Member States also have to take measures to ensure access to any existing services supplying temporary replacements or to any existing national social services. The Member States may provide that access to those services is an alternative to the maternity allowance.

Self-employed workers are also, in some respects, covered by Directive 79/7[41] on social security and Directive 2006/54[42] on equal treatment of men and women in employment and occupation, but also here the main goal is equal treatment, not protection of the self-employed.

The only real protection that EU law offers to self-employed workers – in general and to their work-life balance in particular – is therefore a maternity allowance or, alternatively, a temporary replacement for the pregnant worker. In other respects, EU law guarantees that, if some kind of benefit or other form of protection is offered to either male or female self-employed workers, the other sex is entitled to the same arrangement. However, equal treatment does not necessarily lead to an improved work-life balance. The principle of equal treatment only comes into the picture when some measures have already been taken for either men or women. The principle does not oblige Member States, however, to introduce

35 Point 12.
36 Point 5.
37 Point 9.
38 COM (2017) 253. The Directive applies to all workers, men and women, who have an employment contract or employment relationship (Article 2).
39 Articles 2 (b), 6, 7(1), 8(1) and (4) of Directive 2010/41.
40 This is an important change compared to the previous Directive 86/613/EC.
41 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ L 6 of 10 January 1979, pp. 24-25.
42 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26 July 2006, pp. 23-36.

rights for self-employed workers. Therefore it is worthwhile to reflect on further measures the EU might take. In this respect the EU can learn from measures that have already been taken by Member States. A number of these measures will be discussed in the next section.

4 Regulations on the work-life balance of the self-employed in various Member States

On 20 and 21 June 2017, a peer review was held in Brussels on the reconciliation of family and entrepreneurship.[43] During this peer review, government representatives and independent experts of eight countries – Belgium, the Netherlands, Estonia, Germany, Ireland, Sweden, Italy and Spain – and representatives from the European Commission, the Belgian Union of Self-Employed Entrepreneurs and UCM (a Belgian organisation representing the self-employed) described the existing measures in their respective countries concerning self-employed workers and discussed possible future regulations. The results were laid down in several country reports and in a synthesis report.[44] They give an interesting insight in the various regulations which apply to self-employed workers.

The country reports show major differences in social protection systems and work-life balance measures for the self-employed across the eight participating countries.[45] Differences emerged inter alia in terms of coverage (universal or contribution-based), type of support (flat-rate or income based-allowances, service vouchers or childcare services), level and flexibility of support and source of funding (general taxation or social contributions, compulsory and/or voluntary).

Estonia and Sweden, for example, have universal social protection systems that do not differentiate according to employment status and therefore apply to both employed and self-employed workers. These systems provide relatively long-term, high and flexible maternity, paternity and parental benefits. In Sweden, parents are allowed to go on leave for 18 months during the child's first year. The parents can divide the number of days between them as they please, but 90 days are assigned to each parent individually and cannot be transferred to the other. The leave can also be taken part-time.[46] Social protection and work-life balance measures are largely funded through income taxation not only in Sweden, but also in Estonia. Furthermore Estonia and Sweden have a rather extensive system of childcare services that are available to both employed and self-employed workers.[47]

In Italy, Spain, Ireland and Belgium the welfare regimes are based on social insurance systems that distinguish between employees and self-employed. Maternity leave is available for all workers, but concerning other parental leaves and benefits different regimes apply to employed and self-employed. If a regulation for leave or benefits is open to self-employed workers, the social security contributions and other conditions differ from those that apply to workers in employment. Usually measures for the self-employed are less generous than for the employed.[48]

43 Peer Reviews are part of the Open method of Coordination, used by the European Commission, and have the aim to promote discussion and mutual learning. More information on Peer Reviews in general can be found at http://ec.europa.eu/social/main.jsp?catId=1024&langId=en, accessed 29 August 2017. See for more information on the Peer Review mentioned in this article http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 29 August 2017.

44 The reports are available through the website of the European Commission, department of Employment, Social Affairs & Inclusion: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 31 July 2017.

45 The country information provided below is available at: http://ec.europa.eu/social/main.jsp?catId=1024&langId=en&newsId=2842&moreDocuments=yes&tableName=news, accessed 24 October 2017.

46 Peer Country Comments Paper of Sweden, p. 2. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

47 Peer Country Comments Paper of Estonia, page 7-8 and the Synthesis Report of the Peer Review on 'Reconciling Family Life and Entrepreneurship', p. 7, Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

48 Synthesis Report of the Peer Review on 'Reconciling Family Life and Entrepreneurship', pp. 8-10, Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

Germany and the Netherlands fall somewhere in between the universal systems of Sweden and Estonia on the one hand and the insurance-based systems of the other countries on the other hand. Both in Germany and in the Netherlands the self-employed do not have to contribute and are not covered by the social security systems that apply to employees. Self-employed workers can conclude insurance to cover themselves through private schemes or voluntary payments. However, all parents are eligible for parental and child benefits, which are financed through taxation.[49]

4.1 Maternity leave

There is only one measure that exists in all eight countries with respect to work-life balance measures and that is a maternity leave for self-employed women. This results from the obligation in Directive 2010/41 to introduce this leave into national law.[50] However, there are considerable differences in the way the leave has been structured. Variations exist with respect to:

- the length of the leave;
- whether the leave can be taken part-time or not;
- whether the maternity benefit can be used to pay for a replacement for the pregnant woman;
- the amount of the payment;
- whether the payment is tax-financed or paid by social security;
- whether the payment is dependent on having paid social security premiums;
- whether the women concerned have to continue to pay premiums during and in the period after the leave.

4.2 Service vouchers

The Belgian system has a service-vouchers scheme, known as 'maternity aid', which is specifically directed at self-employed mothers who resume their professional activity after maternity leave and subsequently need to juggle household and childcare responsibilities. These women are given the right to use service vouchers to contract workers from certified enterprises to perform a range of household tasks. The vouchers are a means of payment for those chores. The vouchers are financed by the Belgian Government. In the other seven countries no such system exists. In Belgium the vouchers are greatly appreciated. They are, however, rather expensive (EUR 4,294,728 in 2016), which makes the likelihood of it being introduced in other EU Member States rather small.[51]

4.3 Carer's leave

Belgium furthermore has specific arrangements for leave for self-employed workers in order to take care of a relative. They can apply for full or partial monthly benefits, depending on whether they prefer to temporarily suspend their work totally or just partially. The relative must have a serious or terminal illness, which makes care by the self-employed person necessary. Evidence of the illness is determined by means of a medical certificate issued by the attending physician. The self-employed are also entitled to the benefit in the case of providing care to a disabled child. The idea is that the break from work is temporary. The allowance is paid on a monthly basis during the interruption of the work. The allowance amounts to EUR 1,168.73 in 2017 for a total interruption, and half this sum for a partial interruption. It is paid by the social insurance fund. The allowance is limited to a maximum of twelve months over the

49 Synthesis Report of the Peer Review on 'Reconciling Family Life and Entrepreneurship', p. 10-11, Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

50 See Article 8 of the Directive: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:180:0001:0006:en:PDF, accessed 29 August 2017.

51 Host Country Discussion paper of Belgium, p. 10 and p. 15-16. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

course of an entire career as a self-employed person and it cannot be cumulated with other benefits, such as incapacity benefits, maternity allowance and pension.[52]

In other countries comparable systems exist, but usually only for employees. However, in Spain self-employed workers can also, provided they have paid sufficient social security contributions and are replaced by an employee, temporarily cease their activities to devote themselves to family needs. The self-employed worker then receives a 100 % benefit equal to the premium for insurance against illness, for a maximum of 12 months.[53] Sweden also has an arrangement for self-employed workers who take care of a temporarily sick child. The arrangement is the same as for employees.[54]

4.4 Paternity leave and parental leave

Paternity leave for self-employed fathers exists in Spain and Ireland. In Spain 10 of the 16 weeks of maternity leave may be transferred to the father (which happens in barely 5 % of the cases) and spouses of self-employed mothers are entitled to a maximum of 4 weeks of leave. The amount of payment depends on the social security contributions made.[55] Fathers in Ireland are entitled to a paternity benefit of EUR 235 for two weeks, provided that they have paid social security contributions.[56]

In various other countries, no separate paternity leave exists, but fathers can take up parental leave around the birth of their child. Paternity leave differs from parental leave in the sense that paternity leave is open only to fathers and is explicitly meant to be taken around the birth of their child, but if an arrangement for this leave is lacking, parental leave may be used for this purpose.[57]

The word 'leave' is somewhat misleading here. As a rule, when there is an entitlement to paternity and/or parental leave, this means that the parent involved has a right to an allowance during a certain period (the leave period). In Germany, for example, as regards parental leave, working parents are entitled to a parental allowance during twelve months for an amount of a maximum of EUR 1,800 net per month. It is also possible to claim half the amount during a period of 24 months.[58] In Sweden, the worker who takes parental leave is entitled to an allowance of 77.6 % of his/her previous earnings, up to a ceiling of EUR 680.67 per week, during 390 days. During the remaining 90 days of the leave an amount of EUR 18.45 per day applies (in 2017).

4.5 Additional regulations

In addition to the arrangements mentioned above, some countries have other measures in place, such as a special fund for self-employed women (in Ireland),[59] child allowances for all parents financed from

52 For a full overview of the facilitations for informal caregivers and cared-for people in Belgium, see F. De Wispelaere and J. Pacolet, *ESPN Thematic Report on work-life balance measures for persons of working age with dependent relatives 2016*. Available at: http://ec.europa.eu/social/main.jsp?catId=1135&langId=en&moreDocuments=yes. See also the Host Country Discussion Paper of Belgium, p. 11-13. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

53 Peer Country Comments Paper of Spain, p. 3. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

54 Peer Country Comments Paper of Sweden, p. 5. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

55 Peer Country Comments Paper of Spain, p. 4. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes.

56 Peer Country Comments Paper of Ireland, p. 5-6. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

57 See about the difference between paternity and parental leave also the Commission proposal for a directive on work-life balance for parents and carers, in particular the detailed explanation of the specific provisions of the proposal.

58 Peer Country Presentation by Udo Brixy, Germany, p. 3-4. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

59 Peer Country Comments Paper of Ireland, p. 6-7. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

general resources (the Netherlands and Estonia),[60] a bonus of EUR 800 for each new-born (in Italy)[61] and a scheme for occupational diseases and accidents that also includes the self-employed (in Spain).[62]

5 Suggestions and conditions for improvement of the position and work-life balance of the self-employed

Some of the measures outlined in the previous section may be suitable to become part of future European legislative initiatives. In the author's view it would be good if similar legislation as is now proposed for employees in the draft directive on work-life balance would come to apply to self-employed workers as well. There would be different ways to reach such a goal. Extending the scope of the present draft proposal would be one way, but since this is not the option chosen by the EU so far, perhaps a new legal instrument would have more chance. Of course this would need sufficient political support. In this respect it is worth considering that, since it proved possible to prescribe maternity leave for self-employed women, as in Directive 2010/41, it should also be conceivable to introduce a paternity leave for the partner of the self-employed woman. The same applies to parental leave and carer's leave. These types of measures can be extended to self-employed workers as well without it being necessary for the Member States to implement drastic changes to their social security system and tax system. Of course, Member States are, also at present, free to offer these kinds of regulations to self-employed workers as well, but so far there are large differences in the provisions that are currently in place in the Member States. Therefore, more harmonisation or coordination of regulations for self-employed workers at European level would be welcome in the author's view.

More work-life balance rights for the self-employed would entail financial obligations. As mentioned above, the draft directive on work-life balance for workers stipulates that during the various forms of leave employees are entitled to a benefit of, at least, sick-pay level. It appears desirable to grant the same level of protection to the self-employed. In return, Member States would of course have the right to require self-employed to pay premiums for these arrangements.

Introducing these types of measures might be complicated, especially since in some Member States, for example the Netherlands, self-employed workers fall almost completely outside the scope of the social security system. Introducing different types of leave for self-employed workers might make it necessary to restructure the social security system, which, of course, is no small matter. On the other hand, in the past, the Netherlands did have legislation in place on income protection for self-employed workers in case of incapacity for work/invalidity, so it is not impossible.

When considering measures to facilitate work-life balance for self-employed workers, it is worthwhile to keep in mind the conclusions of the peer review on family life and entrepreneurship, especially because it became clear that the self-employed cannot simply be equated to employed workers. Actually, it seems to work the other way around: several messages which emerged from the peer review appear to apply not only to the self-employed, but also to employees.[63]

60 Peer Country Comments Paper of the Netherlands, p. 2 and Peer Country Comments Paper of Estonia, p. 6. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

61 Peer Country Comments Paper of Italy, p. 3. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

62 Peer Country Comments Paper of Spain, p. 7. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

63 Synthesis Report of the Peer Review on 'Reconciling Family Life and Entrepreneurship', p. 2-3 ('Key learning elements from the Peer Review'). Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

One of these messages is the need for flexibility, especially with respect to the take-up of maternity, parental and carer's leave.[64] A flexible take-up of these leaves can help self-employed workers to continue their activity and to improve their work-life balance. For self-employed women it is especially important that maternity leave can, in any case after a few weeks, be taken part-time, because it is difficult for them to stop their work entirely. This may lead to a loss of clients and a serious reduction of business. Working part-time can be a solution. Another possibility is to enable these women to hire a substitute during the period of maternity leave. However, this only works if the substitute is able to provide a service that is of the same level as the service that the self-employed pregnant worker herself offered. This is not always the case, as contacts with clients may be personal and/or the work involved may be of a specialist nature.

Another point that came up during the peer review was the need for transferability of leave so as to enable the self-employed to transfer part of a leave to the partner of the self-employed or a relative (particularly in the case of single parents).[65] One needs to be careful here, however, because transferability may also lead to the woman/mother taking the entire leave or most of it. Therefore, it is worth considering granting part of a leave to parents individually and to make another part transferable. In addition, the transferability of rights such as pension entitlements, health insurance, sick pay and the various forms of leave in case of changes in employment status – from self-employed to employed and back, and from one form of employment to the other – would help workers. This is a complicated issue though, because it would entail eliminating the different treatment of employed and self-employed workers which is standard in many countries.

Thirdly, it was observed during the peer review that the extension of public social protection and work-life balance support to include the self-employed would require additional funds and social security contributions from the self-employed.[66] Determining the height of the contributions is complicated. If the contributions are variable or voluntary, self-employed may opt out or choose to pay the lowest contributions possible. This may lead to under-insurance. On the other hand, compulsory and/or fixed contributions may be too high for some self-employed workers, especially if they are just starting their business. In countries where, so far, the self-employed are not covered by the social security system, as in the Netherlands, they may resist the introduction of mandatory contributions.[67]

Lastly, it is important to emphasize the need for transparency. It is important for self-employed workers to have easy access to data about the contributions they have to pay and the rights they can obtain in return.[68]

6 The gender dimension

What applies to self-employed workers in general also applies to women. However, in some respects the position of self-employed women differs from that of men. As pointed out earlier in this article, across the EU approximately one third of the self-employed working force are women. They mostly work fewer hours than men, have a lower income and work in sectors in which payment is often modest, such

64 Synthesis Report of the Peer Review on 'Reconciling Family Life and Entrepreneurship', p. 11-12. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.
65 Synthesis Report of the Peer Review on 'Reconciling Family Life and Entrepreneurship', p. 11-12. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.
66 Synthesis Report of the Peer Review on 'Reconciling Family Life and Entrepreneurship', p. 12-13. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.
67 Three organisations that represent a relatively large number of self-employed (sole contractors) in the Netherlands informed the Government by letter of 28 June 2017 that most of their 'members' oppose compulsory social insurance: https://www.zzp-nederland.nl/actueel/nieuws/zzp-nederland-biedt-informateur-zalm-oplossing-wet-dba, accessed 31 July 2017.
68 Synthesis Report of the Peer Review on 'Reconciling Family Life and Entrepreneurship', p. 13-14. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

as healthcare, education, childcare or personal care (hairdressing, beautician and the like).[69] Measures which might help to strengthen the position of self-employed women are, inter alia, the development of a solid system for combining work and family, especially through maternity, paternity, parental and care leave, and investments in the sectors in which many self-employed women work. In addition, the Belgian system of service vouchers might be helpful, since it helps those who use the vouchers, but can also be seen as a way to reduce the use of undeclared work in the area of care and domestic services, work that is usually done by women. Furthermore, one may think of specific forms of training, directed especially at women, in particular in financial awareness and entrepreneurship. Research shows that female self-employed workers often have less experience than men and therefore have less confidence in their entrepreneurial skills.[70] This may make them reticent to take risks. Training that provides tools for growing one's business and gaining more insight in financial matters may help women to overcome this reticence and become more confident. In turn this can positively affect their work-life balance. Also mentoring programmes in which starting female entrepreneurs are supported by more experienced entrepreneurs may be useful in this respect.[71]

Of course men, and especially fathers, should not be forgotten. During the peer review it was mentioned more than once that, in order to improve the work-life balance of the self-employed, fathers should be encouraged to do their share, especially by taking up paternity and parental leave and to share the care work.[72] Helpful measures in this respect are extending a leave in case of joint take-up, granting part of the leave to parents individually, so as to prevent that only women take up leave, and to provide for an income-based allowance during leave rather than a flat one, so as to reduce income loss.[73]

7 Conclusion

In conclusion, one can say that it is important to support self-employed workers, both from an economic point of view and to help them to create a better work-life balance. Self-employed workers make up approximately 15 % of the working population in the EU, and as such play an important role in the economies and societies of the Member States. They deserve support in the field of combining their work and their private life that is comparable to that given to employees. The EU wishes to provide this support, as is clear from the Social Pillar, but the current and proposed regulations at the EU level are mainly aimed at workers. Further arrangements are desirable and exist in different Member States. Some Member States have already taken several measures to support the self-employed, but not all Member States have these regulations and, in addition, there are large differences in the level of protection offered. In the author's view, further steps at EU level could guarantee a basic protection for all self-employed workers, comparable to the protection employees receive. In the author's view extension of the draft directive on the work-life balance of employees to cover self-employed workers as well would have been an option, but this is not the path the European Commission has taken; perhaps wisely so, because it might be better to not try to tackle all issues at once. However, as the author sees it, self-employed workers should receive a comparable protection to employees with respect to their work-life balance and should be given the right to entitled to paternity, parental and carer's leave. In doing so the need for flexibility of self-employed workers should be taken into account, by allowing them to take leave

69 Elaborate data about self-employed women can be found in the EU-report: *Statistical Data on Women Entrepreneurs in Europe*, 2014. Available at: http://ec.europa.eu/DocsRoom/documents/7481/attachments/1/translations/en/renditions/native, accessed 30 October 2017.

70 See inter alia the briefing by EIGE on *Women's entrepreneurship in the EU*, Library European Parliament, 30/04/2013, esp. p. 2-3. Available at: http://eige.europa.eu/docs/2041_LDM_BRI(2013)130517_REV1_EN.pdf, accessed 30 October 2017.

71 For further suggestions see A. Annink and L. den Dunk, 'De positie van vrouwelijke zzp'ers in Nederland', *Atria*, 2014, p. 26. See https://www.atria.nl/epublications/IAV_B00110957.pdf, accessed 22 August 2017. The European Commission has also launched several programmes in this respect. See for more information https://ec.europa.eu/growth/smes/promoting-entrepreneurship/we-work-for/women_nl, accessed 27 October 2017.

72 Synthesis Report of the Peer Review on 'Reconciling Family Life and Entrepreneurship', p. 16. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

73 Synthesis Report of the Peer Review on 'Reconciling Family Life and Entrepreneurship', p. 16. Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=1024&newsId=2842&furtherNews=yes, accessed 30 October 2017.

part-time, so as to prevent them having to suspend their business entirely. Another aspect is the need for transparency about the contributions to be paid and the rights to be received in return. Whether self-employed workers must be covered by social security systems is a complicated question and one that, in view of the large differences between the systems in the Member States, can best be answered by the Member States themselves.

Specific attention is needed for the position of women. As pointed out in this article, the burden of combining work and care still lies mainly with women. In this respect there is not much difference between female employees and female self-employed workers. When one wishes to support women in reconciling entrepreneurship and private life and in that way enable them to invest more energy into their business, tailored measures might be suitable. In this respect one can, apart from the various kinds of leave, think of service vouchers as used in Belgium, investments in the sectors in which many self-employed women work and the provision of training and mentoring programmes that are especially directed at female entrepreneurs. Furthermore, it would help women if men, especially fathers, are involved as well, e.g. by granting paternity or parental leave specifically to fathers and to provide for an income-based allowance during the leave. Again, this applies to all working parents, whether they work in employment or in a self-employed capacity.

The growing importance of public procurement to achieve social goals

Catharina Germaine*

This article aims at exploring the need and potential scope for considerations related to equality and non-discrimination within public procurement, analysing in particular the EU legal framework and looking at its transposition in a few selected Member States. After providing a brief introduction (1) relating the historical use and the societal value of social goals in public contracts, the article provides some of the concepts and definitions (2) of relevance for the article. The following section presents the EU legal framework on public procurement (3), briefly highlighting the most important developments introduced with the adoption of the current Directives. The main part of the article then explores the scope for social considerations within the current framework (4), by focusing on each of the different phases of the public procurement procedure and relating briefly some types of anti-discrimination and equality clauses that can be considered. Finally, the conclusions (5) provide some reflexion on the relevance and importance of social clauses in public procurement and on the ways forward.

1. Introduction

The importance of public buyers is indisputable, with public procurement accounting for approximately 14 % of the combined GDP of all EU countries.[1] The potential impact of these buyers on the ways in which providers of goods, works and services conduct their business is therefore equally indisputable. In the interest of principles such as the freedom to conduct a business and the equal, transparent treatment of contractors, the applicable legal framework limits the ways in which public authorities can use their influence as buyers for purposes that are not related to the subject-matter of each contract.

Nevertheless, it is undoubtedly also in the interest of public authorities and of societies in general to combat and prevent discrimination and to aim at achieving full equality among all groups of the population. While on an individual level discrimination and unequal opportunities prevent individuals from reaching and making use of their full potential, on a societal level these phenomena prevent societies from tapping into the full spectrum of their available resources. As such, public authorities can and should use all means which are available to them to ensure and enhance equality of treatment and of opportunities. One of many roles that public authorities can play in this regard is to use public procurement both to set an example and to impact directly on the behaviour and activities of providers of goods, works and services. The European Commission actively encourages such strategic use of public authorities' purchasing power,[2] which would in this sense also coincide with the overall objectives of the Europe 2020 Strategy for smart, sustainable and inclusive growth.[3]

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1 European Commission (DG Internal Market, Industry, Entrepreneurship and SMEs), Single Market Scoreboard Performance per policy area – Public Procurement, available at: http://ec.europa.eu/internal_market/scoreboard/_docs/2017/public-procurement/2017-scoreboard-public-procurement_en.pdf, p. 2.

2 See in this regard: Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement, available at http://ec.europa.eu/social/BlobServlet?docId=6457&langId=en.

3 Communication from the Commission Europe 2020-A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, Brussels, 03.03.2010, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF.

Public procurement has been used as a tool to achieve social purposes since long before the EU was founded. Both in Europe and in North America, governments initially used their influence as public buyers in the 19th century to ensure workers' rights with regard to, for instance, working hours.[5] Throughout the 20th century, public procurement has been used to achieve more and more diverse purposes, targeting different groups in society. Persons with disabilities were for instance targeted following World War I while some governments started encouraging ethnic minority businesses in the 1950s and 60s.[6] From the 1980s onwards, gender equality became a more common purpose of social considerations in public procurement, in particular on a regional and local level.[7]

Historic use of public procurement to achieve social goals

1840: Executive order issued by US President Martin Van Buren to establish 10-hour working day for those working under certain government contracts.[4]

A strong commitment from public authorities to combat discrimination and promote equality requires a wide range of actions and measures in different fields and areas, both in their role as employers and in all other aspects of their activities such as executing public powers and administering public life. Integrating equality and non-discrimination into their public procurement strategies is one way in which such a commitment can present itself. Such a commitment can, for instance, take the form of value statements being communicated to all partners, providers and suppliers or of more specific clauses included into public contracts.

Before examining the legal framework on public procurement and analysing the possible scope for the integration of the principles of equality and non-discrimination into public contracts, this article will briefly discuss the most relevant concepts and definitions.

2. Concepts and definitions

Contracting authorities are defined by the Public Contracts Directive as 'the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.'[8]

Public procurement is defined by the Public Contracts Directive as 'the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.'[9]

Sustainable public procurement achieves or aims to achieve the appropriate balance between economic, social and environmental considerations – the 'three pillars of sustainable development.'[10] A sustainable public procurement policy relies on a holistic approach to corporate social responsibility, as illustrated and called for by a number of guides and reports, for instance by the European Commission[11] or the United Nations.

4 McCrudden, C. (2004), *Using public procurement to achieve social outcomes,* National Resources Forum 28, p. 258, with references.
5 Mainly the United States and the United Kingdom, but also France to a certain extent. For specific examples, see McCrudden, C. (2004), *Using public procurement to achieve social outcomes,* National Resources Forum 28, p. 258.
6 McCrudden, C. (2004), *Using public procurement to achieve social outcomes,* National Resources Forum 28 (2004), pp. 257-267.
7 *Ibid*.
8 Article 2(1)(1) of Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ('Public Contracts Directive').
9 Article 1(2) of the Public Contracts Directive.
10 Green and Sustainable Public Procurement, information from the European Commission, available at: http://ec.europa.eu/environment/gpp/versus_en.htm.
11 See in this regard Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement, available at http://ec.europa.eu/social/BlobServlet?docId=6457&langId=en.

The environmental 'pillar', generally referred to as Green Public Procurement, is sometimes considered as the most important aspect of sustainable procurement and is far more developed than the social pillar. For instance, a platform of Local Governments for Sustainability (ICLEI Europe) is providing support to local authorities across Europe for the development of 'green' procurement policies.[12] For its part, the European Commission provides a specific webpage dedicated to information and awareness specifically about 'Green Public Procurement'.[13]

Socially sustainable/responsible public procurement implies that public authorities purchase goods, works and services in a socially and ethically responsible way. Their aim is thus to generate benefits not only for themselves but also more generally for society, while striving to achieve social awareness and objectives such as, for instance, equality or non-discrimination. As such, socially responsible public procurement allows public authorities to directly contribute to high social standards in business and to send a strong message to their partners and economic operators. Suppliers and providers are forced to achieve social objectives if they want to be competitive and social considerations become ultimately an integrated part of the general business mindset.[14]

3. EU public procurement framework

The European Communities were already partially regulating public procurement in the 1960s and 1970s, with the original purpose of banning Member State practices to either prohibit the use of foreign products or impose the use of national products in public procurement.[15] In 2004, the more developed and complete common framework was established through the adoption of two public procurement directives by the European Parliament and the Council.[16] This framework was mainly aiming to complete the single market and to ensure equality among economic operators from all EU Member States, but after 10 years of application, it required some modernisation to face the challenges of rapidly evolving and digitalised markets. Criticism of the previous framework concerned a lack of flexibility and a heavy administrative burden, excluding, to a large extent, small and medium-sized enterprises to the benefit of bigger economic operators. Following an extensive public consultation process,[17] as well as extended debates in the Council and in the Parliament, the current 'Public Procurement Package' was thus adopted in 2014, and is composed of three Directives:

12 For further information, see: http://www.iclei-europe.org/home/.

13 Green and Sustainable Public Procurement, information from the European Commission, available at: http://ec.europa.eu/environment/gpp/index_en.htm.

14 Thien Uyen Do (2013), 'In the face of diversity: public procurement to promote social objectives', *European Anti-discrimination law review*, Issue 16, p. 11.

15 See for instance *Directive de la Commission 66/683/CEE du 7 novembre 1966 portant élimination de toute différence de traitement entre les produits nationaux et les produits qui, en vertu des articles 9 et 10 du traité, doivent être admis à la libre circulation, en ce qui concerne les dispositions législatives, réglementaires et administratives qui interdisent l'utilisation desdits produits importés et qui imposent l'utilisation de produits nationaux ou qui subordonnent un bénéfice à cette utilisation*, OJ 220, 30.11.1966, p. 3748, http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:31966L0683&from=EN.

16 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.04.2004, pp. 1-113, and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.04.2004, pp. 114-240.

17 Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market, Brussels, 27 January 2011, COM(2011) 15 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0015:FIN:EN:PDF.

- Directive 2014/24/EU,[18] the 'Public Contracts Directive', repealing Directive 2004/18/EC on public works, supply and service contracts;
- Directive 2014/25/EU,[19] the 'Utilities Directive', on procurement by entities operating in the water, energy, transport and postal services sectors, repealing Directive 2004/17/EC;
- Directive 2014/23/EU,[20] the 'Concessions Directive', on the award of concession contracts.

The objectives of reforming the legal framework were to 'make it easier and cheaper for small and medium-sized enterprises (SMEs) to bid for public contracts, [to] ensure the best value for money for public purchases and [to] ensure respect [for] the EU's principles of transparency and competition.' In addition, one of the main innovations of the new framework was to 'allow for environmental and social considerations, as well as innovation aspects to be taken into account when awarding public contracts.'[21]

All EU Member States were to transpose the three Directives by 18 April 2016, the date on which the previous legal framework was effectively repealed and replaced. By 15 June 2017, all but three Member States (Austria, Luxembourg and Spain) had adopted some legislation with the aim of transposing the new public procurement package.[22] The extent to which the transposing legislation is in compliance with the Directives is currently under evaluation by the European Commission, while the application of the new provisions is well under way with concrete implications for new public contracts.

The main principles and provisions of the Public Contracts Directive ('the Directive') can be briefly summarised as follows. A public authority that wishes to purchase goods, works or services with an estimated value equal to or greater than the thresholds as defined by the Directive (Article 4), is required to procure for those goods, works or services EU-wide. Even when the estimated value does not reach the relevant threshold, and the full legal framework of the Directive is therefore not applicable, the general principles of EU law apply, in particular the free movement of goods, freedom of establishment and the freedom to provide services. As a consequence, contracting authorities also need to abide by principles such as equal treatment, non-discrimination and transparency for instance, irrespective of the estimated value of the contract. While the full regime of the Directive applies to purely commercial services, some specific types of services are excluded from the scope of the Directive[23] or benefit from

Public Contracts Directive, Article 4: Threshold amounts

'This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:
(a) EUR 5 186 000 for public works contracts;
(b) EUR 134 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities (...);
(c) EUR 207 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities (...);
(d) EUR 750 000 for public service contracts for social and other specific services listed in Annex XIV.'

18 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, 28.03.2014, OJ L 94/65 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN.
19 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 28.03.2014, OJ L 94/243, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014L0025-20160101&from=EN.
20 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94/1, 28.03.2014, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0023&from=EN.
21 European Commission's Growth website, available at: https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en.
22 State of play of transposition of Public Procurement Directives: Information based on the meetings of Commission Government Experts Group on Public Procurement – Update of EXPP meeting of 15 June 2017, available at: http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=33993&no=3.
23 See in this regard Articles 7-12 of the Public Contracts Directive.

specific regimes.[24] In addition, a specific lighter regime applies to 'social and other specific services,' which refrains from imposing a specific procedure,[25] and includes the possibility of reserving contracts dealing solely with certain health, social and cultural services for some organisations if they fulfil certain conditions.[26]

Although we are focusing this article on the Public Contracts Directive, it is appropriate to briefly mention the other two components of the public procurement framework. Firstly, the Utilities Directive, similar to its predecessor, is applicable to entities – public purchasers as well as some public and private companies – operating in the water, energy, transport and postal services sectors. It provides for a lighter and more flexible public procurement regime than the Public Contracts Directive, which is justified by the specificities of the markets in these sectors. To a large degree, however, the provisions of the Public Contracts Directive that are relevant for the purpose of using public procurement to promote equality or combat discrimination are generally mirrored in the Utilities Directive.[27] As such, the importance of taking social and environmental considerations into account is equally recognised in these specific sectors.

In contrast to the other two components of the framework, the Concessions Directive does not replace an existing directive but rather fills, to a certain extent, a gap in the previous legislative framework. The lack of clear EU rules on the awarding of concession contracts was considered to create legal uncertainty and barriers to the free provision of services. A concession is defined by the Directive as a 'contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works [or the provision and management of services] to one or more economic operators the consideration for which consists either solely in the right to exploit the works [or the services] that are the subject of the contract or in that right together with payment' (Article 5(1) a and b). The Concessions Directive does not prescribe a specific procedure for the awarding of concessions and is thereby much less detailed in its provisions than the other two directives in the framework. Nonetheless, it does include several references to social and environmental considerations which mirror, to a certain extent, those of the Public Contracts Directive.[28]

4. Social considerations in the Public Contracts Directive

The new Directive provides a wide array of possibilities for Member States and indirectly for contracting authorities to 'support social responsibility in the economy,'[29] and thereby to consider the principles of equality and non-discrimination throughout the different stages of the public procurement procedure. Before examining the different ways in which such considerations can be included in each of the different phases of the procedure, it is necessary to analyse briefly the principle of compliance with environmental, social and labour law obligations, which constitutes one of the main advances of the Public Contracts Directive.

1. 'Principles of procurement': Mandatory compliance with environmental, social and labour law obligations

The first of the 'General rules' which are applicable to all public procurement procedures, whether they fall within the material scope of the Directive or not, are the 'Principles of procurement' stipulated in Article 18. While Article 18(1) lists principles that were already included in the previous Directive such as

24 This concerns subsidised contracts and research and development services (Articles 13-14) and procurement involving defence or security aspects (Articles 15-17).
25 See in this regard Articles 74-77 of the Public Contracts Directive.
26 See in this regard Article 77 of the Public Contracts Directive.
27 See for instance Article 36(2) and Annex XIV of the Utilities Directive.
28 See for instance Article 30(3) and Annex X of the Concessions Directive.
29 See *Supporting social responsibility in the economy through public procurement*, available at: http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8667&lang=en&title=Supporting-social-responsibility-in-the-economy-through-public-procurement (last accessed 5 July 2017).

equality and non-discrimination of economic operators, transparency and proportionality, the following sub-paragraph is a new and highly relevant addition to the EU legal framework on public procurement.

Article 18(2) explicitly obliges Member States to 'take appropriate measures' to ensure that economic operators comply with applicable environmental, social and labour law obligations when performing public contracts. The relevant obligations are those established by EU law, national law, collective agreements or the international provisions listed in Annex X to the Directive. This annex includes several ILO Conventions and international treaties, including ILO Conventions 111 on Discrimination (Employment and Occupation)[30] and 100 on Equal Remuneration.[31]

ANNEX X
List of International Social and Environmental Conventions referred to in Article 18(2)

- ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise;
- ILO Convention 98 on the Right to Organise and Collective Bargaining;
- ILO Convention 29 on Forced Labour;
- ILO Convention 105 on the Abolition of Forced Labour;
- ILO Convention 138 on Minimum Age;
- ILO Convention 111 on Discrimination (Employment and Occupation);
- ILO Convention 100 on Equal Remuneration;
- ILO Convention 182 on Worst Forms of Child Labour;
- Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer;
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention);
- Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention);
- Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its 3 regional Protocols.

Article 18(2) thus sets out a mandatory obligation for the Member States (and not for the contracting authorities directly) to ensure, to a certain extent, socially responsible public procurement.

Recitals 37 to 40 provide some guidance and background for Article 18(2), in particular as regards the objectives of this provision. Recital 37 clarifies that the environmental, social and labour legal frameworks which apply where the works are executed or the services are provided are the ones that need to be applied throughout the performance of the contract. However, this should in no way prevent the application of terms and conditions of employment that are more favourable to workers, as the legal frameworks of the place of the performance of the contract should be set as minimum conditions. Nonetheless, where the workers already benefit from better conditions, those should be respected.

Recital 38 further specifies that in the case of services that are based in or provided from one Member State but whose place of execution is in another, it is the place of the execution of the service that should be taken into account for the purposes of determining the applicable environmental, social and labour legal frameworks.

30 ILO Convention 111 on Discrimination (Employment and Occupation), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312245.

31 ILO Convention 100 on Equal Remuneration; http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111.

Explicit reference to Article 18(2) should be made in the technical specifications. In addition, cross-references are highly recommended in the awarding of contracts, exclusion grounds, abnormally low tenders and subcontracting.

2. Technical specifications

The provisions of Directive 2014/24/EU that regulate the technical specifications[32] do not make any reference to Article 18(2), although this latter provision applies to 'the performance of contracts,' which should be understood in a broad sense. As such, it would be possible for national legislation transposing the Directive to refer, already in the provisions relating to the technical specifications, to the mandatory social considerations set out in Article 18(2).

Article 42 provides that the technical specifications 'shall lay down the characteristics required of a works, service or supply.' In this regard, these characteristics may refer to the process or method of production or provision of the work, supply or service, as well as to a specific process for another stage in their lifecycle. The Directive further specifies that characteristics required as technical specifications do not need to 'form part of [the] material substance' of the contract, as long as they are linked to the subject-matter of the contract,[33] and are proportionate to its value and objectives. As such, inter alia social characteristics related to the promotion of equality and non-discrimination may be included in the technical specifications provided that they are linked to the subject-matter of the contract. In addition, Article 42 also explicitly requires the technical specifications for all procurement which is 'intended for the use of natural persons' to take into account accessibility criteria for persons with disabilities or design for all users, 'except in duly justified cases' (Article 42(1)(4)).

It should also be noted that contracting authorities may require an environmental or social label in the technical specifications, award criteria or contract performance conditions, should they wish to purchase works, supplies or services with specific characteristics (Article 43).[34] As such, the requested label would constitute proof that the works, products, supplies, services or processes in question correspond to specific (inter alia) social characteristics, related for instance to diversity monitoring or gender equality policies. Pursuant to the principle of equivalence, contracting authorities are required to accept equivalent labels or other appropriate means of proof.

- Linking equality or anti-discrimination to the subject-matter of the contract as defined within the technical specifications allows the contracting authority to mainstream such considerations throughout the stages of the procedure and the execution of the contract.
- Referring to diversity (or other social) labels in the technical specifications allows the contracting authority to set the standard for potential contractors and to specify the social characteristics required by the works, supplies or services.

3. Selection and exclusion of contractors

Exclusion grounds:

Article 57 of the Public Contracts Directive provides an exhaustive list of situations in which contracting authorities are either required (*mandatory grounds for exclusion*) or allowed (*discretionary grounds*

32 See Article 42 and Recitals 74 to 77 of Directive 2014/24/EU (the Public Contracts Directive). Other social criteria are taken into account in this area, but not the mandatory requirements to which Article 18(2) refers.

33 In this regard, see the further clarifications below in sub-section 4, Award of the contract.

34 Article 2(1)(23) of the Public Contracts Directive defines labels as 'any document, certificate or attestation confirming that the works, products, services, processes or procedures in question meet certain requirements.'

for exclusion) to exclude an economic operator from participating in a procurement procedure. One of the optional exclusion grounds which is new in the Public Contracts Directive is the situation when a contracting authority can demonstrate 'by any appropriate means' that an economic operator has been in violation[35] of the applicable environmental, social or labour law obligations as referred to in Article 18(2).[36] In this regard, Recital 101 lists some examples of 'grave professional misconduct' which could cause contracting authorities to exclude an economic operator, mentioning, for instance, violations of rules on accessibility for disabled persons. In transposing the Directive, the Member States had the possibility of making one or more of the optional exclusion grounds – including that relating to violations of applicable legal obligations – mandatory for contracting authorities. An in-depth analysis of transposition laws would be necessary to determine to which extent Member States have made use of this option, but would reach beyond the limitations of this paper. A brief examination of a sample of five Member States shows, however, that neither Belgium, Ireland, Sweden nor the UK have made the discretionary exclusion ground related to a violation of environmental, social or labour law mandatory.[37] By contrast, the French legal framework provides for the mandatory exclusion of any economic operator that has been found guilty of a violation of any of a series of labour law provisions, including those prohibiting discrimination, or of the Penal Code provision which establishes the full list of protected grounds under French law.[38]

As regards the evidence that economic operators may adduce to establish that none of the exclusion grounds are applicable to them, the Directive requires contracting authorities to accept the 'European Single Procurement Document' (ESPD). This document is an updated self-declaration by the economic operator of its financial status, abilities and suitability and can be based on the template provided by the European Commission.[39]

Abnormally low tenders:

Where the price proposed by a tender appears to be abnormally low in relation to the works, supplies or services, the contracting authority is required to request explanations from the economic operator, which may in particular relate to the obligations referred to in Article 18(2).

The contracting authority will assess the explanations provided and is explicitly required by the Directive to reject the tender if it is established that it is abnormally low because it does not comply with the applicable obligations referred to in Article 18(2).[40] Recital 40 clarifies that 'Control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders. The necessary verification for that purpose should be carried out in accordance

35 Although the relevant provision, Article 57(4)(a), does not specify whether the violation needs to be present or past, by simply indicating that the contracting authority demonstrates 'a violation', Recital 101 refers in this regard to economic operators that 'have proven' to be unreliable.

36 Article 57(4(a)).

37 Belgium: Law on public procurement (*Loi relative aux marchés publics*) of 17 June 2016, Article 69(1), available at: http://www.publicprocurement.be/sites/default/files/documents/2016_06_17_loi_marches_publics_wet_overheidsopdrachten.pdf; Ireland: European Union (Award of Public Authority Contracts) Regulations 2016, of 5 May 2016, Regulation 57(8)(a), available at: http://etenders.gov.ie/Media/Default/SiteContent/LegislationGuides/european_union_award_of_public_authority_contracts_regulations_082016.pdf; Sweden, Public Procurement Act 2016:1145 (*Lagen om offentlig upphandling*), of 1 December 2016, Chapter 13, §2, available at: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-20161145-om-offentlig-upphandling_sfs-2016-1145; UK: Public Contracts Regulations 2015 of 4 February 2015, Regulation 57(8)(a), available at: http://www.legislation.gov.uk/uksi/2015/102/pdfs/uksi_20150102_en.pdf.

38 France, Ordinance No. 2015-899 on public procurement of 23 July 2015 (*Ordonnance relative aux marchés publics*), Article 45(4), available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030920376&fastPos=1&fastReqId=164702160&categorieLien=cid&oldAction=rechTexte.

39 Article 59(1(a)). See also the European Single Procurement Document Service, available at: https://ec.europa.eu/tools/espd/filter?lang=en (last accessed 5 July 2017).

40 Article 69(3) of the Public Contracts Directive.

with the relevant provisions of this Directive, in particular those governing means of proof and self-declarations.'

- Contracting authorities can include explicitly in the technical specifications that economic operators will be excluded from participating in the procurement procedure when the contracting authority can 'demonstrate by any appropriate means' a violation of the equality and anti-discrimination provisions referred to in Article 18(2), or specifically, for instance, the rules on accessibility for persons with disabilities.
- The technical specifications can also include a clause requiring tenderers to provide a self-declaration by which they declare that they are not in violation of any equality or anti-discrimination obligations referred to in Article 18(2) or in national law.

4. Award of the contract

Right not to award a contract:

Article 56 provides that contracting authorities '*may* decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18(2)' (emphasis added). The use of the term 'may' rather than 'shall' opened the door for the Member States to potentially leave to the contracting authorities the option of awarding or not awarding a contract to a tenderer because it does not respect the environmental, social and labour obligations that have been set according to Article 18(2) (irrespective of the tender being the most economical offer). Considering in particular the mandatory nature of Article 18(2), it would by contrast be more in line with the spirit of the Directive if Member States made it mandatory not to award the contract to such tenderers, and it could be argued that it would have been preferable if this had been imposed directly by the Directive. A thorough analysis of transposition laws would be required to determine whether any Member States have made use of this option. Among the small sample of transposition laws analysed for the purposes of this paper it can be noted that in Belgium the provision which transposes Article 56 of the Directive stipulates that when a contracting authority establishes that the tenderer violates any of the applicable environmental, social or labour law obligations *and where a violation of this obligation is subject to criminal prosecution*, the authority 'shall' decide not to award the contract to that tenderer. If, however, such a violation is established but it does not amount to a criminal offence, the decision whether to award the contract to that tenderer is at the discretion of the authority.[41] Compromises such as that found by the Belgian legislator in this case should be considered as good practices when Member States remain strongly attached to the freedom and flexibility of contracting authorities.

Award criteria (MEAT / BPQR):

One of the most important social considerations in the public procurement framework and one of the biggest steps forward with the new Directives is related to the award criteria of contracts. Under the previous legal framework, Article 53(1) of Directive 2004/18/EC gave contracting authorities the option of awarding contracts either on the basis of the lowest price only or on the basis of an evaluation of the 'most economically advantageous tender' (MEAT). Although this second option provided authorities with the possibility of taking various criteria into account – provided that they were linked to the subject-matter of the contract -, in practice many contracts were awarded on the basis of the lowest price only.[42]

41 Belgium, Article 66(1) of the Law on public procurement 2016.

42 See for instance European Commission (2015), European Semester Thematic factsheet – Public procurement, available at: https://ec.europa.eu/info/sites/info/files/european-semester_thematic-factsheet_public-procurement_en.pdf, p. 6.

By contrast, Article 67(1) of the new Public Contracts Directive stipulates that contracting authorities shall base the award of the contract on the 'most economically advantageous tender,' thereby removing the option of awarding contracts solely based on price. Further, Article 67(2) explicitly allows contracting authorities, when determining the most economically advantageous tender, to make an assessment of the 'best price-quality ratio' (BPQR) by taking qualitative, environmental and social criteria into account. The crucial condition of the link between such criteria and the subject-matter of the contract remains under the current framework, although two important modifications have been introduced in the new Directive in this regard.

First, Directive 2014/24/EU *explicitly* mentions social criteria and provides examples such as 'quality, including (...) accessibility, design for all users, [and] social characteristics (...)' Recital 92 offers some further guidance for assessing the award criteria, mentioning that 'Contracting authorities should be encouraged to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs.' Recital 93 adds that social aspects, including aspects such as the social integration of disadvantaged persons or members of vulnerable groups among the persons assigned to performing the contract should also be taken into account as factors other than solely the price or remuneration where national provisions determine the remuneration of certain services or set out fixed prices for certain supplies.

In 2016, there were eight Member States where more than 80 % of all procurement procedures were still awarded on the basis of **price alone** (the Czech Republic, Croatia, Greece, Cyprus, Lithuania, Malta, Portugal and Slovakia). By contrast, there were five Member States where less than 20 % of all procedures were awarded on the basis of price alone (France, Ireland, the Netherlands, Poland and the United Kingdom). In these countries, additional award criteria related to quality were thus considered in a large majority of procedures.[43]

Secondly, Article 67(3) of the Public Contracts Directive provides the following definition of the all-important concept of the link with the subject-matter of the contract:

> 'Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:
> (a) the specific process of production, provision or trading of those works, supplies or services; or
> (b) a specific process for another stage of their life cycle, even where such factors do not form part of their material substance.'

The previous Directive did not define this concept, leaving national contracting authorities and courts to determine its limits and thereby define the scope of possible award criteria 'linked to the subject-matter of the contract.' In some Member States, the interpretation of this necessary link was quite restrictive, requiring that award criteria relate to intrinsic characteristics of the works, supplies or services to be provided under the contract. Such interpretations severely hampered contracting authorities' opportunities to consider social criteria at the stage of the award of the contract.[44] In 2012, however, the Court of Justice of the EU provided some well needed guidance on the interpretation of this concept in the case of *Commission v the Netherlands*.[45] The case concerned a tendering procedure launched by the Dutch province of North Holland for the supply of coffee machines and the products necessary to make them function (coffee, tea, sugar, etc.). As the contracting authority requested the products to be used to

43 European Commission (DG Internal Market, Industry, Entrepreneurship and SMEs), Single Market Scoreboard Performance per policy area – Public Procurement, available at: http://ec.europa.eu/internal_market/scoreboard/_docs/2017/public-procurement/2017-scoreboard-public-procurement_en.pdf, p. 7.

44 See for instance regarding France: Conseil d'Etat, decision of 10 May 1996, *Fédération nationale des travaux publics*; Cour administrative d'appel de Douai, 29 September 2011, *Région Nord-Pas-de-Calais*.

45 CJEU, *Commission v the Netherlands*, judgment of 10 May 2012, case C-368/10.

bear a specific, private fair-trade label, the Commission initiated infringement proceedings against the Netherlands, considering that this requirement was too specific and did not allow for fair competition. Agreeing with the Commission in this regard, the Court did however clarify that there is some scope for award criteria to include fair-trade requirements. Following in this regard the Opinion of Advocate General Kokott, the Court held that 'there is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof' (para. 91). Although requiring a specific private label was thus too specific, contracting authorities were by no means prevented from imposing fair-trade requirements in general. By confirming this approach of the Court of Justice to the concept of the link with the subject-matter of the contract, Article 67(3) of the new Public Contracts Directive impedes restrictive interpretations on the national level.

Recital 97 specifies, however, that 'the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place.' Recital 98 further underlines that it is 'essential' that award criteria 'concerning social aspects of the production process relate to the works, supplies or services to be produced under the contract.' Finally, it is important to note that in order to ensure the equal opportunities of all potential tenderers, any equality or non-discrimination clause included as an award criterion would need to be clear, precise and unambiguous so that it cannot reasonably be interpreted differently by different potential tenderers.[46]

- Contracting authorities could specify in the award criteria that the contract will not be awarded to the tenderer submitting the most economically advantageous tender when it is established that it does not comply with Article 18(2).
- Actions or initiatives in the fields of equality or anti-discrimination can also be included as an award criterion counting for a certain percentage of the scoring and indicating that tenderers need to provide a concrete plan for the actions to be undertaken;
- Non-mandatory questionnaires on equality and non-discrimination actions can be used as an additional award criterion to differentiate the two best tenderers if they achieve the same overall score. Such a criterion would be implemented only under exceptional circumstances but would play an awareness raising role.

5. Performance of the contract

Contract performance conditions:

Social considerations can also be included in the conditions for the performance of the contract as long as they are linked with the subject-matter of the contract, as defined above, and indicated in the call for competition or procurement documents. As is specified in Recital 104, such conditions should therefore generally be compatible with the Directive 'as long as they are not directly or indirectly discriminatory and are linked to the subject-matter of the contract.' Article 70 of the Directive specifically mentions that these conditions can include social or employment related considerations, while Recital 98 provides further examples including 'the implementation of measures for the promotion of equality of women and men at work, increased participation of women in the labour market, reconciliation of work and private life, compliance with fundamental ILO Conventions, recruitment of disadvantaged persons (...)' Contracting authorities are thus left with a wide variety of possibilities to include equality and non-discrimination clauses into the contract performance conditions. In France, Article 38 of Ordinance 2015-899 on public procurement explicitly provides, in addition to the possibility for contracting authorities

46 See in this regard Article 67(4) of the Public Contracts Directive.

to take environmental, social and labour law-related considerations into account, that the contract performance conditions may take into consideration the measures adopted by the economic operator to combat discrimination.[47] This provision which specifically mentions non-discrimination measures was added by the recent Law on Equality and Citizenship of 27 January 2017. By inciting French contracting authorities to give specific consideration to non-discrimination policies and measures, this provision clearly goes one step further than the Directive's requirements.

- Contract performance conditions can include a requirement that the contractor has an integration/diversity/equality policy in place throughout the duration of the contract, covering employment and working conditions of all staff involved in the performance of the contract.
- Tenderers can be required to choose a certain number of specific actions and initiatives in the field of equality/anti-discrimination to which they commit for the duration of the performance of the contract if it were to be awarded to them.[48]
- Contractors can be required to submit a progress report at a certain stage of the execution of the contract, detailing the actions and initiatives undertaken in the fields of equality and/or anti-discrimination.
- Contracting authorities can include in all public contracts a standard clause by which the contractor generally commits to the fight against and the prevention of discrimination.

6. Reserved contracts

Finally, another important step of progress in the reformed procurement framework is the enhanced possibility of reserving certain contracts for economic operators or organisations that meet specific requirements. This possibility, as set out in Article 20 of the Public Contracts Directive, should be read taking into account recital 36, which explains that 'Employment and occupation contribute to integration in society and are key elements in guaranteeing equal opportunities for all. In this context, sheltered workshops can play a significant role. The same is true for other social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups. However, such workshops or businesses might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States should be able to reserve the right to participate in award procedures for public contracts or for certain lots thereof to such workshops or businesses or reserve performance of contracts to the context of sheltered employment programmes.'

While the previous Directive already provided for the possibility of reserving contracts for sheltered workshops employing 'a majority' of persons with disabilities 'who cannot carry out occupations under normal conditions,' the new Public Contracts Directive extends this possibility to not only organisations reserved for persons with disabilities but also to those reserved for or favouring 'disadvantaged workers'. In addition, the requirement of a majority of disabled workers has been reduced to 30%, widening the scope of potential reserved contracts.

47 'Les conditions d'exécution d'un marché public (…) peuvent aussi prendre en compte la politique menée par l'entreprise en matière de lutte contre les discriminations.'

48 Example: City of Vienna gender equality clause in all public procurement; see ISM Corum, MPG, BUYDIS, 2014.

City of Ghent implements innovative anti-discrimination clause in substantial public contracts

Since 2010, the City of Ghent has had a general anti-discrimination clause in all its public contracts, stating the commitment of the contractor to equal opportunities and the fight against discrimination. Suspecting however that the clause had little concrete effect on the behaviour and policies of its contractors, the City launched an investigation in 2015 into the existence of discrimination in employment among its contractors. The research was carried out by a professor of Ghent University and used situation testing to show that candidates with foreign origins[49] had 30% less chance of being invited for a job interview.

These results prompted the City to develop a revised clause based on Article 7 of the law adopted in 2016,[50] which transposes Article 18(2) of the Public Contracts Directive. The new clause is framed as a contract performance clause and is based on contractors' self-evaluation of measures and policies with regard to anti-discrimination. It aims at allowing the City – in the case of labour intensive contracts amounting to more than 300 000€ and lasting more than two years – to 'coach' contractors who are in need of further support and assistance to develop effective anti-discrimination policies. The clause is innovative in the sense that it provides for monitoring as well as financial sanctions in case of non-compliance. The City of Ghent will be piloting the new clause from 2017 until 2019 for 10 selected contracts.

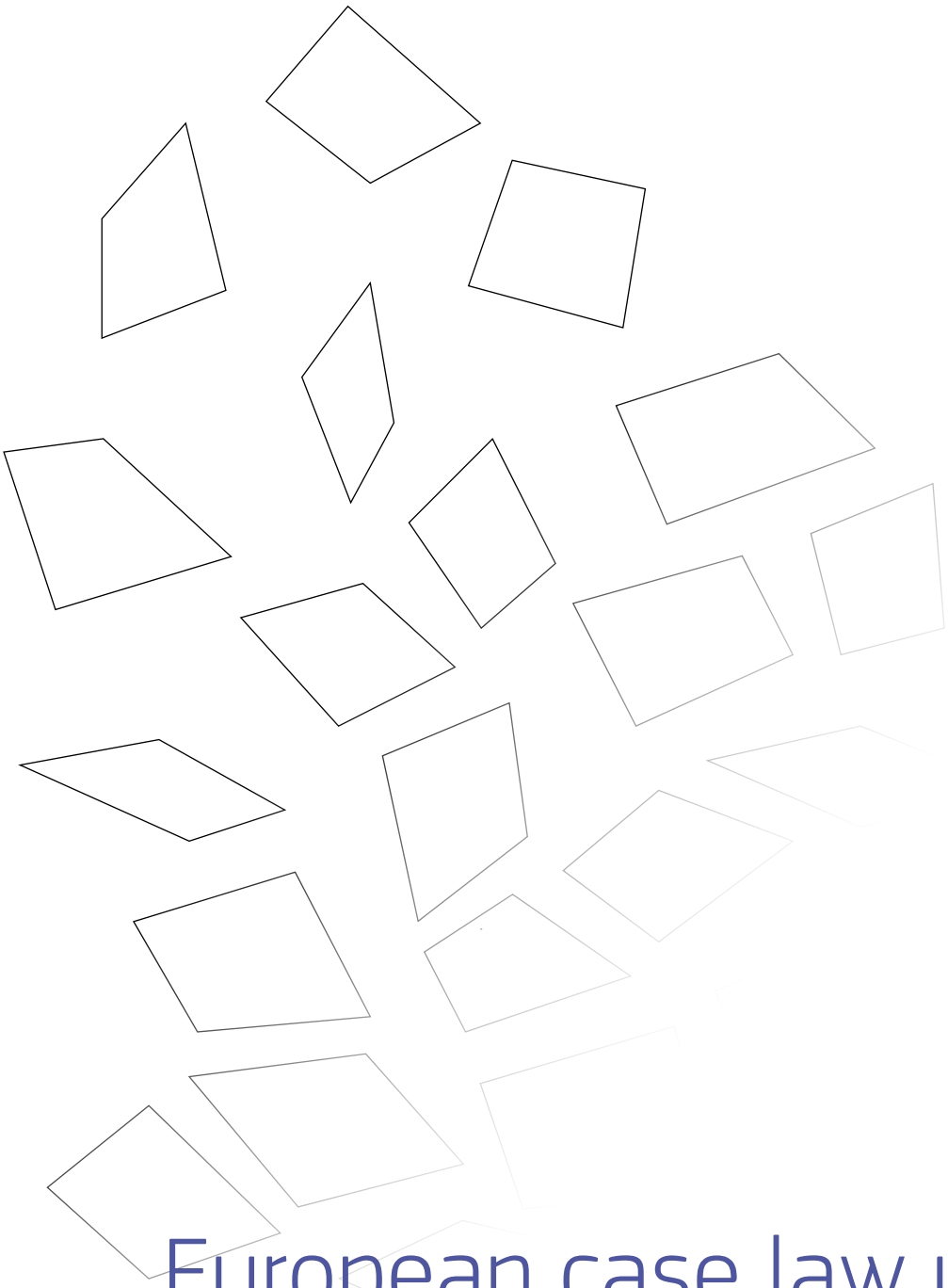
5. Conclusions

Public authorities have a central and influential role in their local communities. Adopting a holistic approach to equality, non-discrimination and diversity throughout the different aspects of their position and activities would allow contracting authorities to have a positive impact on local societies. In particular, this paper has aimed at providing a brief analysis of the legal framework on public procurement and the ways in which contracting authorities can use their specific role as buyers to advance equality. While the previous generation of EU public procurement law already provided a certain scope for environmental and social considerations, the clarity and specificity needed to encourage public buyers to venture towards such considerations was lacking. The current Public Procurement Package is aimed at ensuring the necessary clarity and encouragement, although, arguably, the occasion has been missed with regard to some specific provisions. In particular, Member States' and – to a certain extent – contracting authorities' flexibility and margin for manoeuvre were often favoured to the detriment of legal certainty and progress towards effectively imposing compliance with the applicable environmental, social and labour law obligations. Further encouragement will therefore be needed, such as the French example of indicating explicitly in the transposing legislation that anti-discrimination policies and measures can be taken into account by the contract performance conditions. This should be highlighted as a good practice, in particular if specific analysis were to show that this provision is being effectively used by contracting authorities.

In addition to the different ways in which contracting authorities can include equality and non-discrimination as considerations in the different phases of the procurement process, many other often more general initiatives and activities can and should be adopted to inform partners and economic operators and to raise awareness. When exercising their roles as employers, as administrators of public life and as central information points within their communities, public bodies should aim at mainstreaming equality, non-discrimination and diversity considerations so as to lead by example and influence other local employers, companies and the general public. Due to the financial importance of public procurement in Europe, this however remains one of the potentially most effective means to bring about positive change.

49 All the candidates had Belgian nationality and education as well as work experience in Belgium. The only distinguishing factor in each pair of testers was that one had a 'Belgian sounding name' while the other had a name which suggested foreign origins.

50 Law on public procurement (Loi relative aux marchés publics) of 17 June 2016.



European case law update

This section provides an overview of the main latest developments in gender equality and non-discrimination cases pending or decided by the Court of Justice of the EU and the European Court of Human Rights, from 1 January to 30 June 2017.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE GENERAL OPINIONS

Gender

Case C-98/15 – *María Begoña Espadas Recio v. Servicio Público de Empleo Estatal*, Opinion of Advocate General Sharpston, delivered on 16 March 2017, ECLI:EU:C:2017:223

This reference for a preliminary ruling was submitted by Social Court No. 33 of Barcelona, Spain and concerns the scope of Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, and the compatibility of national rules that distinguish between 'horizontal' and 'vertical' part-time workers when determining unemployment benefits with Directive 97/81/EC and Directive 79/7/EEC.

The claimant in the proceedings before the national court, Ms Espadas Recio, is a Spanish national. Between 1999 and 2013 she worked part-time as a cleaner only on certain days of the week (a so-called 'vertical' working arrangement). This differs from horizontal working agreements where the hours are spread out evenly over five working days. After Ms Espadas Recio's employment ceased in 2013, she was granted 420 days of unemployment benefit by the Servicio Público de Empleo Estatal ('the SPEE'). However, if Ms Espadas Recio had worked under a so-called horizontal working agreement she would have been granted 720 days of benefit. Ms Espadas Recio challenged this decision and instituted proceedings before the referring court contesting the duration of her unemployment benefit.

The referring court first wanted to know whether Clause 4 of the Framework Agreement on part-time work, incorporated in Directive 97/81, applies to the unemployment benefit in the main proceedings, funded by the worker and her employers. The AG held that the Framework Agreement only applies to the employment conditions of part-time workers, and that social security benefits which do not form 'pay' within the meaning of Article 157(2) TFEU are excluded from the scope of the Framework Agreement. AG Sharpston attests that the benefit is not an 'employment condition' and is closer to a state-administered social security scheme, and that therefore the Framework Agreement does not apply to the benefit in the main proceedings.

The referring court then asked whether the prohibition of sex discrimination, laid down in Article 4 of Directive 79/7, precludes the benefit scheme at stake. AG Sharpston holds that although the scheme is not directly discriminatory, a greater proportion of women than men are adversely affected by it, as 70-80 % of part-time workers, and more specifically 70-80 % of workers with 'vertical employment contracts', are women. The AG concluded that this difference in treatment creates an 'illogical and punitive anomaly', especially because part-time workers in low-paid jobs may not choose to work 'vertically' voluntarily, but are obliged to do so by their employer. The AG concluded that the national rule at issue is precluded by Article 4 of Directive 79/7.

Case C-531/15, *Elda Otero Ramos v. Servicio Galego de Saúde et Instituto Nacional de la Seguridad Social*, Opinion of Advocate-General Sharpston, delivered on 6 April 2017, ECLI:EU:C:2017:287

Gender

This request for a preliminary ruling was submitted by the High Court of Justice of Galicia, Spain, and seeks guidance on whether the case at hand falls within the scope of Directive 2006/54/EC and on the interpretation of the rules reversing the burden of proof as laid down in Article 19 of Directive 2006/54/

EC in cases where the applicant claims that the principle of equal treatment has not been applied to them on grounds of sex.

The claimant in the proceedings before the referring court, Ms Otero Ramos, is a nurse who was breastfeeding her daughter. She was refused a certificate that she requested from the Instituto Nacional de la Seguridad Social ('the INSS'), attesting that her working circumstances placed her, as a breastfeeding mother, at risk. With this certificate, Ms Otero Ramos could have had her contract suspended and receive a financial allowance. The INSS argued that it was not established that Ms Otero Ramos' working conditions adversely affected her health or that of her child. Her post was classified as risk-free, and a doctor's report stated that the claimant was 'fit' to work and that there were no health risks for her as a breastfeeding mother in carrying out her job. On 11 July 2012, Ms Otero Ramos challenged the INSS' decision before the national social court. Her claim was supported by a report from her line manager indicating that her job did pose various health risks to a breastfeeding mother.

Ms Otero Ramos appealed to the referring court, which sought guidance on whether the applicants' claim falls within the scope of Directive 2006/54, and in particular, if Article 19 on the burden of proof, applies and how this should be read in the light of the provisions of Directive 92/85 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.

AG Sharpston firstly explained how the protective provisions of Directive 92/85 must be read. Article 4(1) of this Directive requires that a thorough assessment of the potential risks for pregnant workers and workers who have recently given birth or are breastfeeding takes place. The AG explained that this assessment should not be generic and should take into account the differences between individual women. Risks are different for pregnant and for breastfeeding women, and employers need to ensure that workers who are breastfeeding are not exposed to risks that could damage health or safety for as long as they continue to breastfeed.

If the referring court determined that the assessment of the working conditions had not been carried out in a satisfactory manner, and did not comply with Directive 92/85, it should be considered whether Ms Otero Ramos' claim falls within the scope of Directive 2006/54, especially Article 19 of that Directive. The AG disagreed with a restrictive interpretation of Directive 2006/54 and held that Article 19(1) was triggered, because failure to conduct a proper assessment under Directive 92/85 constitutes less favourable treatment of a breastfeeding worker. Such treatment in turn constitutes sex-based discrimination. Therefore, Article 19(1) applies to claims such as that of Ms Otero Ramos. This means that, after Ms Otero Ramos establishes a prima facie case of incorrect application of Directive 92/85, the burden of proof shifts to the respondent.

Case C-174/16 – *H. v. Land Berlin*, Opinion of Advocate General Mengozzi, delivered on 26 April 2017, ECLI:EU:C:2017:306

Gender

This reference for a preliminary ruling was submitted by the Administrative Court of Berlin, Germany. It concerned the right to return to the same job and the maintenance of rights acquired or being acquired after the return from parental leave, as regulated in the Parental Leave Directive 2010/18, and the equal treatment of men and women in matters of employment and occupation.

Ms H. is a civil servant in the Land of Berlin who had been promoted to an executive post in 2011 on the condition of successful completion of a two-year probation period. From July 2011 until February 2015 she was absent, due to pregnancy-related sickness, maternity and parental leave. In September 2014, the Land of Berlin informed her that she was to be reinstated to her former post, while another person was instated in the position she had been on probation for. The Land of Berlin held that it had not been possible to assess Ms H's performance because she had been absent during the entire probation period,

and that she could therefore not be given the executive post. Moreover, in accordance with Paragraph 97 of the Landesbeamtengesetz (Land Civil Service Law, 'LBG'), the probation period could not be extended.

The questions asked by the referring court sought to ascertain whether Paragraph 97 LBG is compatible with the rights guaranteed by Directives 2006/54 and 2010/18, and what the consequences of any incompatibility might be or what kind of 'compensation' is due to Ms H.

AG Mengozzi firstly discussed the compatibility of the impossibility to extend the probationary period with Directive 2010/18 and the revised Framework Agreement on parental leave. Clause 5(2) of the revised Framework Agreement establishes the worker's right after a period of parental leave to return to the same job, or, if that is not possible, to a similar job. Furthermore, rights acquired or in the process of being acquired, must be respected. The AG rejected the Land of Berlin's claim that these rights are only provided to the worker during the mandatory minimum period of parental leave of four months. Furthermore, Ms H. could not be criticized for the length for her absence because; she was promoted while she was pregnant and already on sick leave; her requests for parental leave had been accepted by her employer in accordance with national law; when states determine the maximum period of parental leave, interests of both employers and employees are carefully considered; and lastly because the Land of Berlin did not properly communicate the possible consequences of her absence to the applicant. In conclusion, the AG found that Paragraph 97 LBG has the effect of discouraging a worker from taking leave which runs counter to the objective of the revised Framework Agreement. Thus, Clause 5(2) of the Framework Agreement precludes such national legislation

The AG then discussed the compatibility of Paragraph 97 LBG with Directive 2006/54. Article 14(1)(a) of this Directive prohibits sex discrimination. The referring court stated that, in general, more women than men take parental leave in the Land of Berlin. Assuming that this applies to civil servants too, the AG holds that this constitutes indirect discrimination. The AG finds the aim of the national regulation - to ascertain the competences of the employee - legitimate, but finds the general, inflexible and absolute character problematic. The aim of reviewing the aptitude of an employee can also be conducted upon return from parental leave. The less favourable treatment is thus not necessary for achieving the aim, meaning that Directive 2006/54 also precludes Paragraph 97 LBG.

Finally, the referring court asked whether there were possible legal consequences other than the continuation of the probationary period after the end of the parental leave. AG Mengozzi referred to the obligations in Article 4(3) TEU and the specific obligations in the Directives, which requires Member States to take measures in case of a breach. It is for the referring court to make sure that the measure chosen ensures effective and efficient legal protection, has a genuine dissuasive effect with regard to the employer and is proportionate to the injury suffered. The AG held that it would not be consistent with those requirements simply to permit Ms H. to participate in a new selection procedure, because that would not provide penalty, compensation or dissuasion. If Germany does not take adequate measures to restore Ms H.'s rights, she could bring action for damages against the State in the national courts for failure to properly implement the requirements of the Directives.

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REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

Case C-406/15, *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control*, judgment of 9 March 2017, ECLI:EU:C:2017:198

Disability

The case was referred to the Court of Justice by the Bulgarian Supreme Administrative Court and concerned the dismissal of a civil servant with an intellectual disability, who claimed before the referring court that she should have benefited from the protective measures awarded to employees with disabilities in case of dismissal.[1] Those protective measures being limited to employees and not extended to civil servants however, she was dismissed according to the legal framework applicable to all civil servants, which did not contain any specific measures for those with disabilities.

The referring court phrased four questions, one of which was declared inadmissible by the Court of Justice for failure to specify the link with the case before the referring court. The remaining questions concerned the interpretation of Directive 2000/78/EC, in particular of its Article 7, in light of the UN Convention on the Rights of Persons with Disabilities. In its analysis, the Court noted early on that the condition of the claimant before the referring court constituted a disability within the meaning of the Directive as interpreted by the Court, and that the case fell within the material scope of the Directive. It then underlined, however, that the difference in treatment at hand was not based on the ground of disability but rather on the nature of the employment relationship, which is not a protected ground under the Directive. The national provision at hand could also not be found to amount to indirect discrimination on any of the protected grounds.

Responding to one of the referring court's questions however, the Court of Justice confirmed that the national provision which provides protective measures to employees with disabilities amounts to a positive action measure falling within the scope of Article 7(2) of the Directive. On this basis, the Court recalled that when pursuing an objective of EU law, as Bulgaria was when adopting and implementing this national provision, Member States are required to respect fundamental rights and the general principles of EU law. Referring thus to the general principle of equal treatment which requires comparable situations to be treated equally and different situations to not be treated the same way, the Court noted that the situation of a civil servant with a disability must be compared with that of an employee with the same disability, keeping in mind the purpose of the legislation at hand. In this regard, the Court noted that the distinction between the two situations did not appear to be sufficient in the light of the purpose of the contested legislation which was to protect employees with disabilities not on the basis of the nature of their employment relationship but on the basis of their state of health. The Court concluded that it is for the referring court to determine whether the situations are indeed comparable and if so whether the difference in treatment is objectively justified.

Finally, responding to the remaining question referred, the Court of Justice recalled that if the referring court were to find that the general principle of equality has not been adhered to, the only valid solution to re-establish equal treatment would be to extend the protection already benefiting employees with disabilities, who in this case are favoured by the current system, to civil servants with disabilities as well.[2]

1 See also *European equality law review*, Issue 2016/1, pp. 67-68.
2 For a summary of the referring court's final ruling following the CJEU judgment, delivered on 15 May 2017, please see below pp. 68-69.

Case C-157/15, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, Grand Chamber judgment of 14 March 2017, ECLI:EU:C:2017:203

Religion or belief

The Grand Chamber of the Court delivered this landmark judgment, together with the *Bougnaoui* judgment reported below, as the first Court of Justice judgments regarding alleged discrimination on the ground of religion or belief. The case was referred by the Belgian Court of Cassation and was initially brought by a claimant who was employed by a private company which had an unwritten but commonly known policy prohibiting the wearing of any religious, political or philosophical clothing or symbols at work. Having worked there for three years, the claimant announced that she, as a practising Muslim, was going start to wear her hijab (headscarf) at work, and was subsequently dismissed. The question referred to the Court of Justice concerned direct discrimination only.[3]

Examining the concept of 'religion', which lacks a definition in the Employment Equality Directive, the Court cited both Article 9 of the European Convention of Human Rights, which covers the 'freedom, either alone or in community with others and in public or private, to manifest [one's] religion or belief, in worship, teaching, practice and observance' and Article 10(1) of the EU Charter of Fundamental Rights.

The Court went on to examine whether the employer's practice at hand amounted to a difference in treatment on the basis of religion and if so, whether it amounted to direct discrimination. By requiring all employees to dress neutrally, without any visible signs of a religious, political or philosophical nature, the Court noted that the employer's practice did treat them all in the same way and could therefore not amount to direct discrimination.

The Court went one step further than the question referred however, by providing some additional guidance as to whether the employer's practice could eventually amount to indirect discrimination and if so whether it could be found to be objectively justified. In this regard, the Court noted that it 'must be' considered legitimate for an employer to wish to display a policy of religious, political and philosophical neutrality towards its clients, and that this wish is related to the freedom to conduct a business which is recognised by the Fundamental Rights Charter. It further recalled that the pursuit of this aim 'allows, within certain limits, a restriction to be imposed on the freedom of religion' (Paragraph 39), citing the *Eweida and others* judgment of the ECtHR. The Court then noted that such a policy 'must be' considered appropriate to achieve that aim, as long as it is 'genuinely pursued in a consistent and systematic manner' (Paragraph 40). In this regard, the Court underlined that it was

> 'for the referring court to ascertain whether [the employer] had, prior to [the claimant's] dismissal, established a general and undifferentiated policy of prohibiting the visible wearing of signs of political, philosophical or religious beliefs in respect of members of its staff who come into contact with its customers.'(Paragraph 41)

Finally, regarding the proportionality of the employer's policy, the Court noted that if the referring court were to find that the prohibition of wearing religious, political and philosophical signs or clothing covered only those employees who interact with customers, that policy 'must be' considered to be strictly necessary to achieve the aim pursued and must therefore pass the applicable proportionality test. The Court left the final appreciation of whether the employer in the case at hand was in a position to propose another position, which would not involve any visual contact with customers, to the claimant instead of dismissing her.

3 See the Opinion of Advocate General Kokott delivered on 31 May 2016, ECLI:EU:C:2016:382. For a detailed summary of the facts of the case and of the Opinion, see *European equality law review*, Issue 2016/2, pp. 62-65.

Case C-188/15, *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v. Micropole SA*, Grand Chamber judgment of 14 March 2017, ECLI:EU:C:2017:204

The case was referred by the French Court of Cassation and concerned, similar to the *Achbita* case reported above and ruled on on the same day, a female Muslim employee who was dismissed for refusing to remove her Islamic veil at work. The claimant had been working as an engineer for the employer for several years and had during that time been wearing the headscarf during working hours. Part of her work duties involved contact with customers and sometimes work at their premises, and she had been informed when she was first employed that wearing the headscarf might be a problem in some of those situations. Following a mission to one customer's premises, the employer had been informed by the customer that its employees had been uncomfortable and that they did not want the employer's services to be performed anymore by a person wearing the veil. The employer informed the claimant and requested her to remove her veil when in contact with customers, which she refused. She was subsequently dismissed.[4]

The question referred to the Court of Justice asked whether the wishes of a customer under circumstances such as those at hand could amount to a genuine and determining occupational requirement under Article 4(1) of the Employment Equality Directive. Having examined the issues related to the concept of religion as in the *Achbita* case,[5] the Court noted that the information available to it did not clarify whether the referring court had considered that the case at hand concerned a difference in treatment directly or indirectly based on the religious beliefs of the claimant. The Court then underlined that if the referring court were to find that the dismissal was based on the claimant's non-compliance with a rule existing at the employer's undertaking, prohibiting the display of any religious, philosophical or political signs or clothing, it would need to be determined whether that apparently neutral rule resulted in a difference in treatment on the ground of religion or belief. If so, the Court noted that the difference in treatment could eventually be justified, and referred in this regard to the judgment in *Achbita*.

If the referring court were to find, however, that no such established rule existed at the undertaking, it would indeed be necessary to determine whether the condition not to wear an Islamic veil could constitute a genuine and determining occupational requirement under these circumstances. In this regard, the Court recalled that such a requirement cannot be based on one of the protected grounds itself, in this case religion, but can only be based on a characteristic related to such a ground. The Court then pointed out that Recital 23 of the Directive specifies that it is only in very limited circumstances that a characteristic related to religion can constitute a genuine and determining occupational requirement. Citing Article 4(1) directly, the Court further noted that such a characteristic may only constitute such a requirement due to 'the nature of the particular occupational activities concerned or of the context in which they are carried out' (Paragraph 39). On this basis, the Court finally concluded that

> 'the concept of a 'genuine and determining occupational requirement', within the meaning of that provision, refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.' (Paragraph 40)

4 See the Opinion of Advocate General Sharpston delivered on 13 July 2016, ECLI:EU:C:2016:553. For a detailed summary of the facts of the case and of the Opinion, see also *European equality law review*, Issue 2017/1, pp. 49-51.

5 For a brief summary of this analysis, see immediately above, p. 58.

Case C-668/15, *Jyske Finans A/S v. Ligebehandlingsnævnet, acting on behalf of Ismar Huskic*, judgment of 6 April 2017, ECLI:EU:C:2017:278

Racial or ethnic origin

The case was referred by the High Court of Western Denmark and concerned the interpretation of the Racial Equality Directive in the field of access to goods and services. The specific issue at stake before the referring court was the legality of an internal procedure of the credit institution Jyske Finans with regard to persons applying for a loan to purchase a car. The procedure required additional proof of identity, in the form of a copy of a passport or residence permit, from those applicants who had produced as a form of identification a driving licence indicating as country of birth a non-Member State of the EU or of the European Free Trade Association (EFTA). The initial claimant argued that the difference in treatment which caused this additional procedure amounted to discrimination on grounds of racial or ethnic origin, while the credit institution argued that it was required to abide by the additional internal procedure in view of its obligations under the rules on the prevention of money laundering.[6]

Examining first the possibility of direct discrimination, the Court noted the importance of determining whether a difference in treatment on the ground of country of birth could be considered 'directly or inextricably linked to' ethnic origin. Citing its case law in *CHEZ*, the Court then recalled that 'the concept of "ethnicity" has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds'.[7] (Paragraph 17) Noting that a person's country of birth might be included in the list of criteria establishing his or her ethnicity, the Court underlined that it cannot be the only and decisive criterion and therefore concluded that there is no direct or inextricable link between country of birth and ethnic origin. The Court further confirmed this conclusion by noting that 'it cannot be presumed that each sovereign State has one, and only one, ethnic origin' (Paragraph 21).

The Court then analysed whether the practice could constitute indirect discrimination, recalling that such a conclusion would require a given ethnic group to be put at a particular disadvantage. In this regard, the Court refuted the argument put before it that the specific ethnic origin of the initial claimant was irrelevant as in any case persons of 'Danish origin' were put in a favourable position as they were not required to provide additional proof of identity. To this end, the Court noted that the 'favourable' treatment was extended to all those born in an EU or EFTA Member State and that the comparison to determine indirect discrimination must be more precise and specific than one which would compare 'persons of a "given ethnicity" with "other persons"'. Following the same reasoning, the argument that the practice would put at a disadvantage 'persons whose ethnic origin is that of a country other than a Member State of the European Union or the EFTA' was also refuted.

The Court thereby concluded that the practice at hand could not be found to amount to either direct nor indirect discrimination on the ground of racial or ethnic origin.

6 For a detailed summary of the facts of the case, of the questions referred by the national court and of the Opinion of the Advocate General, see *European equality law review*, Issue 2017/1 pp. 52-53.

7 CJEU, *CHEZ Razpredelenie Bulgaria*, C83/14, 16 July 2015, EU:C:2015:480, Paragraph 46.

European Court of Human Rights

Gender

Talpis v. Italy, application No. 41237/14, Chamber judgment of 2 March 2017

This case concerned the domestic violence experienced by the applicant and the subsequent death of the applicant's son as a result of the domestic violence.

The applicant, Elsaveta Talpis, a Romanian national living in Italy, had been the victim of violent abuse by her husband since they were married. Ms Talpis reported incidents of domestic abuse of her daughter and herself to the police on several occasions, which were recorded in police reports. Ms Talpis lodged an official complaint against her husband for bodily harm, ill-treatment and threats of violence on 5 September 2012. She urged the authorities to take prompt action to protect her and her children. On 4 April 2013, seven months after the complaint was lodged, the police questioned the applicant for the first time, after which Ms Talpis decided to mitigate the allegations. On 25 November 2013 A.T. attacked his wife Ms Talpis with a knife. Their son, who tried to separate the two, was killed by his father during the struggle. Ms Talpis was also stabbed several times by her husband in the chest whilst trying to escape.

In January 2015, A.T. was sentenced to life imprisonment for the murder of his son and the attempted murder of his wife, for carrying a prohibited weapon and for the ill-treatment of Ms Talpis and her daughter. He was also ordered to pay Ms Talpis damages.

Ms Talpis lodged a complaint against the State of Italy with the European Court of Human Rights claiming that the Italian authorities had failed to comply with their obligation to provide protection against domestic violence which resulted in the death of her son and her own attempted murder. She relied on Article 2 (right to life), Article 3 (prohibition of inhuman or degrading treatment) and Article 8 (right to respect for private and family life). Ms Talpis also complained that she had suffered discrimination as a woman on account of the inaction of the authorities, and also relied on Article 14 (prohibition of discrimination) in conjunction with Articles 2 and 3.

The Court held that the Italian authorities had failed to provide any protective measures after Ms Talpis had lodged a complaint and after she had expressed her concern for her daughter's and her own life. Moreover, the delay caused by only questioning the applicant seven months after she had lodged her complaint, had inevitably deprived the applicant of the immediate protection that she required considering the seriousness of the situation. By failing to take prompt action on the complaint, the domestic authorities had created a situation of impunity which contributed to the recurrence of the acts of violence committed by Ms Talpis' husband. Consequently, the Court concluded that the national authorities had lacked the necessary diligence and had failed in their obligation to protect the lives of Ms Talpis and her son. The Court therefore found a violation of Article 2 of the Convention.

With regard to Article 3 (prohibition of inhumane or degrading treatment), the Court noted that the violence, bodily harm and psychological pressure Ms Talpis had been subjected to, were sufficiently serious to qualify as ill-treatment within the meaning of Article 3 of the Convention. The Court pointed out that in the judicial treatment of cases of violence against women, the national authorities had to take account of the victim's situation of particular insecurity and moral, physical and/or material vulnerability, and to assess the situation accordingly, as promptly as possible. The Court noted that there was no acceptable reason for the inaction of the authorities, or for the delay of seven months to start investigations after the applicant had lodged a complaint. The Court therefore also found a violation of Article 3 of the Convention.

With regard to Article 14 of the Convention, the Court reiterated that under its case law, the State's failure to protect women against domestic violence breached their right to equal protection of the law and that this failure did not need to be intentional. In this case, the authorities had been made well aware of the risks and yet they had failed to take the appropriate steps to protect the applicant and unnecessarily delayed the criminal investigations. Ms Talpis had therefore been the victim, as a woman, of discrimination contrary to Article 14 of the Convention. It therefore found a violation of Article 14 of the Convention combined with Articles 2 and 3.

The Court held that Italy was to pay Ms Talpis EUR 30,000 in respect of non-pecuniary damage and EUR 10,000 in respect of costs and expenses.

Škorjanec v. Croatia, application No. 25536/14, Chamber judgment of 28 March 2017

Racial or ethnic origin

The applicant and her partner, who is of Roma origin, were attacked by two men who expressed racial hatred while violently beating mainly the applicant's partner but also to a certain degree the applicant herself. The police investigated the attack and subsequently the State Attorney's Office brought criminal charges against the two assailants but only as far as the attack against the applicant's partner was concerned. In response to the applicant's claim that the racially motivated attack targeted not only her partner but herself as well, the State Attorney's Office explicitly mentioned the fact that the applicant was not of Roma origin as the reason why she could not have been the target of the attack. The case brought before the Court concerned the failure of the Croatian authorities to sufficiently examine the racial motive of the attack against the applicant.

The Court examined the case and recalled the obligation of States Parties to examine by all available means a possible racist motive of any crime committed, which falls upon them under Article 3 (prohibition of torture and inhuman or degrading treatment or punishment) in conjunction with Article 14 (prohibition of discrimination) of the Convention. In this regard, the Court held that this obligation

> 'concerns not only acts of violence based on a victim's actual or perceived personal status or characteristics but also acts of violence based on a victim's actual or presumed association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic.' (Paragraph 56)

The Court thus noted that the Croatian authorities had limited themselves and their investigation to the fact that the applicant was in fact not of Roma origin herself, without considering the possibility of her being either perceived by the attackers as being of Roma origin or being in fact attacked herself because of her affiliation with her partner. The Court consequently concluded that the national authorities had failed to take into account and establish the link between the racist motive of the attack and the applicant's relationship with her partner, resulting in a violation of the procedural aspects of Article 3 in conjunction with Article 14. The applicant was awarded EUR 12,500 as non-pecuniary damages in addition to the costs and expenses incurred.

A.P., Garçon and Nicot v. France, application Nos 79885/12, 52471/13 and 52596/13, judgement of 6 April 2017

Gender

This case involved three French transgender persons who lodged cases with French courts for legal recognition of their gender change by way of modifying their birth certificates. At the time of the facts of the case, French law required that two conditions be met for legal recognition of gender change. Firstly, applicants needed to present proof of suffering from a 'syndrome of transsexuality', and secondly, applicants needed to have undergone medical treatment by which they 'irreversibly changed their physical appearance to the opposite sex'.

The French courts dismissed the applicants' requests for legal recognitions of their gender change, because they deemed that the applicants had not undergone the necessary medical and surgical treatment. In their complaints to the European Court of Human Rights, all three applicants relied on Article 8 (right to respect for private life). E. Garçon and S. Nicot also invoked Article 14 (prohibition of discrimination) taken together with Article 8, and A.P. Article 6 (right to a fair hearing).

The Court noted that the second condition stipulated by French law – irreversible change to physical integrity – implied undergoing a type of medical treatment which involves a high probability of sterility. The Court subsequently held that the State enjoys only a narrow margin of appreciation here, as the physical integrity and sexual identity of the applicants are at stake. Making the legal gender recognition of transgender persons conditional on an non-voluntary sterilization procedure, creates an impossible dilemma for the applicants: either they relinquish the full exercise of the right to respect for their physical integrity, or they waive recognition of their gender identity and thus the right to the full exercise of that same right. This constitutes a violation of Article 8.

As to the condition of proving that the respondents suffered from a gender identity disorder, the Court noted that many States use this criterion and that it does not directly affect an individual's personal integrity. The Court concluded that the State has a considerable margin of appreciation to impose such a condition. The State had therefore not violated Article 8 in this regard.

The Court noted that a complaint under Article 14 taken together with Article 8 was admissible, but it was not necessary to examine it separately, as a violation of Article 8 had already been established. A complaint under Article 6 Paragraph 1 was admissible as well, but the facts did not raise any issue that had not yet been determined under Article 8.

The Court considered that the finding of a violation of Article 8 of the Convention constituted just satisfaction, and awarded Garçon and Nicot, each, EUR 958.40 for costs and expenses.

Bălşan v. Romania, application No. 49645/09, Chamber judgment of 23 May 2017

This case concerned allegations of domestic abuse and the failure of the Romanian authorities to provide effective protection against the alleged abuses.

The applicant, Ms Bălşan, a Romanian national, and her children had been subjected to violence by Ms Bălşan's husband (N.C.) throughout the course of her marriage. Between 2007 and 2008, during the divorce of Ms Bălşan and N.C., the abuse intensified. The violent abuse was so intense that she needed medical care on several occasions. In 2007 Ms Bălşan lodged complaints against N.C. with the prosecutor's office and the police chief, and pressed criminal charges with a superior prosecutor, a district court and a higher court. Despite the fact that Ms Bălşan's accusations were supported by medical reports and statements by her mother, brother and daughter, N.C. was acquitted of criminal prosecution. The prosecutor concluded that, although N.C. had caused harm, his actions had not endangered society. The applicant's requests for damages and protective measures were denied, and N.C received an administrative fine. An appeal submitted by Ms Bălşan was dismissed as ill-founded. In 2008, Ms Bălşan reported five new incidents to the police, accompanied by medical reports. She informed the authorities of her fears for her life. However, the prosecutor's office again decided not to press charges against N.C.

The applicant lodged a complaint with the European Court of Human Rights on 4 September 2009. Ms Bălşan alleged that the authorities had failed to protect her from repeated domestic violence and that despite her numerous complaints they had failed to hold her husband accountable for his abuse. The Court examined the case under Article 3 (prohibition of inhuman and degrading treatment) and Article 14 (prohibition of discrimination).

The Court reiterated that Articles 1 and 3 of the Convention impose positive obligations upon States. States should take measures to prevent ill-treatment and are obliged to conduct effective official investigation if an individual raises an arguable claim regarding such treatment. Furthermore, States should establish and apply a system of punishing domestic violence and provide safeguards for the victims.

When investigating the merits of the case, the Court held, in contrast to the Romanian Government that the ill-treatment of Ms Bălşan falls within the scope of Article 3. The Court noted that the Government had been made well aware of N.C.'s violent behaviour, and that there had been significant delays in the investigation. N.C. received no criminal sanctions, and the applicant's appeal against the decision to impose an administrative fine for a criminal offence was dismissed by the domestic courts. Ms Bălşan, lacking the financial means, was denied a court-appointed lawyer and the court did not respond to Ms Bălşan's request for protective measures. The Court found that the approach of the authorities left the legal framework without purpose and was inconsistent with international standards. The Court concluded that the State had not adequately protected Ms Bălşan, and that therefore there had been a violation of Article 3.

On its own initiative, the Court communicated a complaint under Article 14, read in conjunction with Article 3. The Court reiterated that failure by a State to protect women against domestic violence breaches their right to equal protection. The Court referred to the Istanbul Convention, which defines violence against women as a form of discrimination. The Court also considered, based on official statistics, that domestic violence is tolerated and perceived as normal by a majority of Romanians. The number of victims increases every year, and only a small number of reported incidents are followed up on. Moreover, the number of shelters for victims of domestic violence provided by the State is limited. These considerations are in line with an earlier report by the CEDAW Committee, which expressed concern about the limited protection and support for victims in Romania.[8]

The Court found that the Romanian authorities did not sufficiently acknowledge the problem of domestic violence in Romania, and that they displayed a discriminatory attitude towards the applicant as a woman. The Court concluded that there had been a violation of Article 14 in conjunction with Article 3 and Ms Bălşan was awarded EUR 9,800 in damages.

8 Thirty-fifth session of the United Nations Committee on the Elimination against Women, concluding comments in respect of Romania, CEDAW/C/ROM/CO/6, 15 May to 2 June 2006.

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

This section provides an overview of the main latest developments in gender equality and non-discrimination law (including case law) and policy at the national level in the 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey, from 1 January to 30 June 2017.

AT Austria

LEGISLATIVE DEVELOPMENTS

Lower Austria passes Anti-Discrimination Act extending protection beyond employment

All grounds

As the last of the nine Austrian provinces, Lower Austria adopted a new Anti-Discrimination Act on 26 January 2017, published on 13 March 2017 and in force since 14 March 2017.[1] This Act adds to the existing Lower Austrian Equal Treatment Act which covers the area of employment only.

The new Act extends the protection beyond the minimum standards set out in the relevant European directives, by covering the grounds of ethnic affiliation, sex, religion or belief, disability, sexual orientation and age in the following fields: self-employment and occupation, including selection criteria, recruitment conditions and promotion; access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations; social protection, including social security and social healthcare advantages; education; access to and supply of goods and services which are available to the public, including housing. Until the adoption of this Act, Lower Austria was the only province to protect only the ground of 'ethnic affiliation' beyond employment.

The Act is modelled on other provincial anti-discrimination acts and closely follows the main definitions contained in Directives 2000/43/EC and 2000/78/EC, although one provision causes some concern. Paragraph 4/5 contains a general clause for exceptions from protection against discrimination, if the different treatment is objective and appropriate, justified by a legitimate aim and the means to achieve this aim are appropriate and necessary. This provision therefore seems to allow justifications even in cases of direct discrimination on the basis of ethnicity, which would be in breach of Directive 2000/43/EC.

Internet source:
https://www.ris.bka.gv.at/Dokumente/LgblAuth/LGBLA_NI_20170313_24/LGBLA_NI_20170313_24.pdfsig.

Adoption of legislation prohibiting the wearing of face-covering pieces of clothing in public spaces and buildings

Religion or belief

On 28 March 2017, despite an impressive number of explicitly negative statements and expert opinions, the Government adopted a decision to submit to Parliament a bill prohibiting the wearing of face-covering pieces of clothing in public. The bill was originally proposed by the Minister of Foreign and European Affairs and Integration and is called 'Anti-face-covering Act'. On 16 May 2017, the bill was adopted by Parliament.[2]

The aim of the new Act is to make it a punishable act (administrative fine of up to EUR 150) 'to cover one's facial features by means of clothing or other means in such a way that they are no longer recognisable in public space or public buildings.' In its preparatory explanatory notes and in its § 1, the Act clarifies that its purpose is to facilitate integration 'via the strengthening of participation in the societal living together', and underlines that 'integration is a process involving society at large' which is 'based on

1 Lower Austrian Anti-Discrimination Act (*Niderösterreichisches Antidisktiminierungsgesetz*), Lower Austrian Provincial Law Gazette No. 24/2017 of 13 March 2017, in force since 14 March 2017.

2 Austria, Federal Act on the prohibition of covering the face (Anti-face covering Act), BGBl I No. 68/2017, adopted on 16 May 2017, published in the Official Federal Law Gazette on 8 June 2017, coming into force on 1 October 2017, available at: https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2017_I_68/BGBLA_2017_I_68.html.

personal interaction'. Although the bill does not explicitly refer to religious clothing, the public debate was entirely focused on a 'ban on burqas'.

Internet source:
https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2017_I_68/BGBLA_2017_I_68.html
(Official Federal Law Gazette I No. 68/2017; German).

Belgium

CASE LAW

Dismissal based on multiple discrimination; health and maternity

A female employee of a private firm took extended sick leave during which she was treated for cancer. She then informed her employer that she was pregnant; once her maternity leave had ended, she was again on sick leave. Finally, she was dismissed and received pay in lieu of a period of notice.

The employee challenged the dismissal on different grounds. With the support of the Institute for Equality of Women and Men ('the gender agency' as meant in Directive 2006/54/EC), she claimed that her employer had breached the provisions on the protection of maternity (Article 40 of the Employment Conditions Act of 16 March 1971) as well as the prohibition of gender discrimination (Article 6 of the 'Gender' Act of 10 May 2007). At the same time, with the support of the Inter-federal Centre for Equal Opportunities UNIA (the national equality body as meant in Directive 2000/43/EC), the employee claimed that the employer had breached the prohibition of discrimination grounded on 'health status', one of the numerous criteria listed in the 'General Antidiscrimination Federal Act' of 10 May 2007. The employee held that, concerning the protection of maternity, the facts of her case were similar to those of the CJEU's Case C-460/06 *Paquay* [2007-I-8511], i.e. that during the period when the right of dismissal was restricted, the employer had manifested that he intended to terminate the contract when the period of protection was over. However, the Labour Court of Ghent (division of Kortrijk) found that the employee had not adduced sufficient evidence of such a manifestation of intention. Similarly, when the employee claimed that there had been gender discrimination related to maternity, as in the CJEU's Case C-177/88 *Dekker* [490-I-3941], which involved the employer's desire to give the plaintiff's position to the woman who had replaced her during her maternity leave, the Labour Court found that the employer had stated convincingly that his preference rested on a comparison of the two employees' qualifications.

Concerning 'health status', the *prima facie* case was self-evident and the Labour Court found that the employer had not demonstrated that the dismissal was grounded on other considerations than the employee's health status. Consequently, the Labour Court decided that fixed damages equal to six months' remuneration, as provided in Article 18 of the General Antidiscrimination Federal Act, were due.

Internet source:
Labour Court of Ghent (division of Kortrijk), 25 October 2016, *Algemene Rol* n°15/382/1, unreported.
All legal texts available in Dutch and French on www.juridat.be, accessed on 21 March 2017.

BG Bulgaria

LEGISLATIVE DEVELOPMENT

Extension of coverage for childcare leave

Gender

On 1 June 2017, several amendments to the Labour Code entered into force. The amendments provide the possibility to extend maternity leave and parental leave.

Amendments have been adopted in Article 163 of the Labour Code providing leave for adopting parents. Additionally, some of the solutions for adopting parents have been extended to parents taking care of children who are placed outside the family as a measure of child protection under the Law on Child Protection.

A female worker or employee taking care of a child placed outside its own family as a protective measure under the Law on Child Protection (close relatives or acquaintances, or a foster family) has the right to the same leave as a mother has after giving birth.

With the consent of the (adoptive) mother, the (adoptive) father can benefit from the parental leave for the remaining 410 days once the child has reached 6 months of age. If the father is unknown, or if the woman is the sole adoptive parent of a child, this leave can be used by one of the mother's parents. When the (adoptive) father is deceased, the leave can be used by one of the parents of the (adoptive) mother or (adoptive) father. When the child is placed within a family as a protective measure, the father may, with the consent of the mother, make use of the leave (for the remaining 410 days) after the child has been with the family for six months.

In cases of the full adoption of a child, and if the adoptive mother and father are married or if they cohabit, the adoptive father of a child under five years of age has the right to 15 days of paternal leave from the day of the adoption.

In all cases the leave periods are recognized for seniority (length of service) and compensation is paid according to the Code for Social Insurance, under the same conditions as the compensation for the biological mother and father.

The proposed new solutions are innovative for Bulgaria and will provide for better protection for children in childcare, for adoptive parents and for families where children are placed outside their biological family. By introducing the changes, the principle of gender equality as enshrined in EU law is fully respected.

Internet source:
Labour Code -www.lex.bg/laws/ldoc/1594373121, amendments with S.G. No. 98/2016.

CASE LAW

Supreme Administrative Court ruling following referral to CJEU on civil servants with disabilities

Disability

The claimant has an intellectual disability and was a civil servant at a government agency until February 2014 when she was made redundant. She appealed against the redundancy order, claiming that she should have benefited from the protection provided to disabled employees under Article 333 (1.3) of the

Labour Code, based on which employers have a duty to ask the Labour Inspectorate for prior permission to make disabled employees redundant. The Sofia City Administrative Court (SCAC) rejected her claim, holding that the Civil Servant Act applied to her rather than the Labour Code. The Civil Servant Act does not provide for such protection, nor does it refer to the Labour Code in that respect. The claimant appealed.

In May 2015, the Supreme Administrative Court (SAC) referred a series of questions to the Court of Justice of the EU (CJEU), concerning whether the Convention on the Rights of Persons with Disabilities (CRPD), the Charter of Fundamental Rights of the EU and Directive 2000/78/EC should be interpreted as allowing a difference of treatment between civil servants with disabilities on the one hand and employees with the same disabilities on the other.[3]

On 9 March 2017, the Court of Justice delivered its ruling, finding that such a distinction 'does not appear to be sufficient in the light of the aim pursued', in particular considering that an employee and a civil servant with the same disability may be employed by the same administration.[4] The CJEU held that the referring court was to establish whether this amounted to a violation of the principle of equal treatment under national law. If this were the case, the court was to re-establish equal treatment by granting civil servants with disabilities the same benefits as those enjoyed by employees with disabilities, favoured by that system.

The SAC ruled in the case on 15 May 2017, finding that the difference in treatment at hand did amount to a violation of the principle of equality and repealing the redundancy order affecting the claimant.[5] Taking into account the fact that the claimant's position involved no exercise of public power, the SAC found that there was no legitimate reason not to apply the same protection to civil servants and employees with the same disability and with the same responsibilities and qualifications. It held that advance protection against dismissal for persons with disabilities was a positive measure that should apply to the entire group characterised by the relevant disabilities, and not merely to part of that group. The lower court will rule on the claimant's claim for compensation.

Internet source:
http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/885a8cb7a15655bac225810f004c3d1d?OpenDocument (in Bulgarian).

Croatia

HR

LEGISLATIVE DEVELOPMENT

New act on protection against domestic violence

Gender

Draft Act No. 67 on Protection against Domestic Violence passed its first reading in the Croatian Parliament on 8 February 2017.[6]

3 Bulgaria, Supreme Administrative Court Ruling No. 8771 of 16 July 2015 in administrative case No. 12369/2014, *Petya Milkova v. the Privatisation and Post-Privatisation Agency.*
4 CJEU, Case C-406/15, *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control*, judgment of 9 March 2017. See also the summary of this ruling above, p. 57.
5 Bulgaria, Supreme Administrative Court Decision No. 6014 in case No. 1236/2014, of 15 May 2017.
6 The final draft was adopted in the second reading on 4 July 2017, after the cut-off date of this report, and published in the Official Gazette No. 70/2017. It enters into force on 1 January 2018.

The adoption of a completely new Act on Protection against Domestic Violence, which is to replace the Act on Protection against Domestic Violence from 2009 (hereinafter: the 2009 Act) is primarily aimed at eliminating the current potential overlap between the categorisation of certain acts as criminal offences or as minor (misdemeanour) offences. It is also considered that the 2009 Act, which has been in force for more than six years and which replaced the previous Act on Protection against Domestic Violence from 2003 (Official Gazette Narodne novine No. 116/03), needs to be adapted to the current legal framework, especially after the new Criminal Code entered into force in 2013 (Official Gazette Narodne novine Nos. 125/11, 144/12, 56/15 and 61/15).

The Criminal Code introduced a definition of family members and close persons which is relevant for the application of that Code, as well as, after the amendments in 2015, reintroducing the criminal offence of family violence into the Criminal Code. In practice, this meant that some acts were prosecuted partly as minor and partly as criminal offences. The European Court of Human Rights has already found that Croatia has violated the principle of *ne bis in idem* in such cases (e.g. the case of *Maresti v. Croatia*, No. 55759/09).

Another reason for the adoption of a completely new Act, according to the Government which initiated the amendment, is that the Act needs to be adapted to international standards (more precisely, the Istanbul Convention which is awaiting ratification, and Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315/57; hereinafter Directive 2012/29/EU).

Internet source:
Draft Act No. 67 on Protection against Domestic Violence; http://www.sabor.hr/prijedlog-zakona-o-zastiti-od-nasilja-u-obitel0001.

Amendments to the Gender Equality Act

Gender

Draft Act No. 68 on Amendments to the Gender Equality Act passed its first reading in the Croatian Parliament on 8 February 2017 and was finally adopted in the second reading on 30 June 2017 and published in the Official Gazette No. 69/2017.[7]

The main objective of the amendment is to align the definition of victimisation in Article 2 of the Gender Equality Act (Official Gazette *Narodne novine* No. 82/08) with the broader definition of victimisation in the Anti-Discrimination Act (Official Gazette *Narodne novine* Nos. 85/08 and 112/12). The adopted Act also contains several minor methodological adjustments. Draft Act No. 68 actually replaced Draft Act No. 63 on Amendments to the Gender Equality Act, which contained identical amendments and which was tabled with the Croatian Parliament in May 2016, with a proposal to adopt the Act through an urgent procedure. However, Draft Act No. 63 was not adopted at that time as the Government which was in office stood down on 16 June 2016 and Parliament was dissolved.

CASE LAW

Potentially discriminatory provisions in contracts between a Croatian hospital and resident physicians

Gender

The Croatian Association of Hospital Doctors (HUBOL) informed the Ombudsperson on Gender Equality about a discriminatory provision in a standard contract on residency between the General Hospital of

7 The Act entered into force on 22 July 2017, after the cut-off date of this report.

Sisak and resident physicians. A provision in employment contracts between resident physicians and one General Hospital (in the town of Sisak) stipulated that 'in the case of the incapacity of the resident physician to perform work obligations after the completion of the residency period, and if that incapacity is longer than 30 days per year (maternity leave, parental leave, sick leave or other circumstances), the work obligation is prolonged in proportion to the time of incapacity for work.'

The Ombudsperson confirmed that she is investigating this case of potential gender discrimination as information thereon has appeared in the media.

Internet sources:
HRT (Croatian Radio Television), Dnevnik 20 February 2017:
https://hrti.hrt.hr/#/video/list/category/125/dnevnik..
Internet news portal Index.hr: http://www.index.hr/vijesti/clanak/sramota-u-sisackoj-bolnici-lijecnica-ne-smije-ostati-trudna-nakon-specijalistickog-ispita/951688.aspx.
Ombudsperson for Gender Equality: http://www.prs.hr/index.php/priopcenja-prs/2148-pravobraniteljica-komentirala-javno-pismo-hubol-a.

POLICY DEVELOPMENTS

Plans for the ratification of the Istanbul Convention in 2017

Gender

On 7 March 2017, the Minister of Demography, Family, Youth and Social Policy announced the formation of a working group for the ratification of the Istanbul Convention, which is the first concrete step towards its ratification after Croatia signed the Convention in 2013.

Although the decision of the Ministry forming the working group and nominating its members, as well as appointing its mandate, is dated 17 February 2017, it was not until 7 March 2017 that it was announced and published on the website of the Ministry on 8 March 2017. The Minister of Demography, Family, Youth and Social Policy announced the formation of the working group at a thematic session of Parliament's Committee for gender equality, held at the Croatian Parliament on 7 March 2017. The next day, the body representing the MPs belonging to the Socialist Democratic Party (SDP; the biggest opposition party in Parliament) announced that it had filed a motion to Parliament for the adoption of the Act on the ratification of the Istanbul Convention.

Internet source:
Ministry of Demography, Family, Youth and Social Policy: http://www.mspm.hr/vijesti-8/radna-skupina-za-izradu-nacrta-prijedloga-zakona-o-potvrdjivanju-konvencije-vijeca-europe-o-sprecavanju-i-borbi-protiv-nasilja-nad-zenama-i-nasilja-u-obitelji/4481.

Strategy on Equalisation of Opportunities for persons with disabilities 2017-2020

Disability

On 20 April 2017, the Government adopted the new Strategy of Equalisation of Opportunities for persons with disabilities 2017-2020,[8] replacing the previous strategy which covered 2007 until 2015. The new Strategy directs the implementation of the policies for people with disabilities with the goal of advancing and strengthening their protection and making Croatian society sensitive and well-adjusted to ensure equal opportunities and active participation in society by combating any form of discrimination and strengthening social solidarity.

8 National Strategy of Equalisation of Opportunities for Persons with Disabilities from the year 2017 until the year 2020, 20 April 2017, Official Gazette 42/2017 (Nacionalna strategija izjednačavanja mogućnosti za osobe s invaliditetom), available at: http://narodne-novine.nn.hr/clanci/sluzbeni/2017_04_42_967.html.

The Strategy comprises 16 strategic fields, including family life, upbringing and education, health protection, social welfare and pension insurance, habitation, mobility and accessibility, employment and labour, etc., as well as risk and humanitarian crisis situations. It contains approximately 200 activities which should be carried out by the state and local authorities, scientific institutions and organisations of civil society. As reported by the Ministry of demography, family, youth and social policy which was competent for creating the Strategy, it contains clearer indicators, yielding a more realistic insight into the actual results of the measures, compared to the previous Strategy. Further improvements include activities related to inclusion into the labour market, obligation of accessibility of education, the removal of structural barriers and awareness raising.[9]

CY Cyprus

LEGISLATIVE DEVELOPMENT

New legislation on paternity and maternity leave

Gender

The Cabinet of Ministers has approved a number of legislative draft measures protecting paternity and maternity leave which have now been submitted to Parliament for a vote. The draft legislation covers, for the first time in Cyprus, inter alia, the right of fathers to paternity leave.

The first bill approved by the Cabinet of Ministers is the Protection of Paternity Leave Law of 2017.[10] This new law introduces two weeks of paternity leave for fathers whose spouse has given birth, who have received a child through surrogacy, or who have adopted a child up to 12 years old. According to the bill, paternity leave is to be taken within a period starting from the first day of the birth/adoption and ends 16 weeks later. This period may be extended due to either premature labour and/or multiple pregnancies. At the same time, the draft law regulates issues relating to the right in question, including, inter alia, how to file a request for paternity leave, the safeguarding of employees' rights, the obligations of employers and the penalties for committing offences related to this right.

The second approved legislative draft is the Protection of Maternity (Amendment) Law of 2017 and deals with surrogacy.[11] It amends the basic law so that women receiving a child through surrogacy will have the right to maternity leave as well as all other rights provided by the current legislation to biological and adoptive mothers. In addition, this law includes a provision that regulates the right of the surrogate mother to maternity leave for a period of 14 weeks after birth.

The third draft law approved by the Cabinet is the Social Insurance (Amendment) Law of 2017 which includes provisions connected to both the new Protection of Paternity Leave Law and the amendment of the Protection of Maternity Law.[12] Specifically, this law provides for the amendment of an existing provision so that mothers who receive a child through surrogacy and surrogate mothers will be entitled to maternity allowance for the period specified in the Protection of Maternity Law. Moreover, the same legislative draft adds a new provision which gives the right to paternity allowance to fathers whose spouse has given birth or received a child through surrogacy or in the case of the adoption of a child up to 12 years old. Another existing provision is to be amended to grant the right for the continuation of maternity or paternity allowances in cases where a person is absent from Cyprus in order to accompany

9 Media report available on: https://www.vecernji.hr/vijesti/usvojena-nacionalna-strategija-izjednacavanja-mogucnosti-za-osobe-s-invaliditetom-do-2020-1164505, accessed on 14 July 2017.
10 Law N. 117(I)/2017 – Published in the Official Gazette Part 1 no. 4615 on 24.07.2017.
11 Law N. 116(I)/2017 – Published in the Official Gazette Part 1 no. 4615 on 24.07.2017.
12 Law N. 115(I)/2017 – Published in the Official Gazette Part 1 no. 4615 on 24.07.2017.

a newborn child who needs hospitalisation abroad, provided that this is approved by the Director of Social Insurance Services after returning to Cyprus.

Finally, other amendments regulating issues concerned with a widow's pension have been made to the Social Insurance (Amendment) Law of 2017. It specifically addresses the situation in which a marriage takes place after the retirement of the husband. The marriage needs to have lasted for at least five years to receive access to a widow's pension. In Cyprus, there is only a widow's pension, a widower's pension does not exist.

CASE LAW

Ombudsman report on legislation precluding persons with an intellectual disability from acquiring Cypriot citizenship

Disability

The claimant was the mother of a 36-year-old man with an intellectual disability ('the son') whose application for the acquisition of Cypriot citizenship had been rejected as he was not of 'full capacity'. 'Full capacity' is indeed set as a precondition for naturalisation in the Archives and Population Law.[13] The claimant and her family had all acquired citizenship through naturalisation, except the son. She filed a complaint with the Ombudsman's office against the rejection by the Ministry of Interior of her son's application for citizenship.

With references to Articles 3, 12(1), 12(2) and 18(1) of the CRPD and of the ratifying law,[14] the Ombudsman established that disability cannot justify exclusion of any person from naturalisation procedures, highlighting the obligation of all signatories to the CRPD to amend and adapt legislation, regulations, customs and practices which lead to discrimination against persons with a disability.[15] The report cited a recent UN paper on the meaning of discrimination in the CRPD[16] which stresses that deeply embedded attitudes among public officers are reflected in legislation and policies, often preventing equal treatment and favouring discrimination in violation of the CRPD. The report stated that this law is a typical example of such attitudes, leading to multiple discrimination where disability is intertwined with nationality, since the precondition of 'full capacity' does not apply to Cypriots. Citizenship becomes a right and a privilege only for the 'able', which is an attitude of stereotyping and prejudice violating the spirit and the letter of the CRPD. Further, the report noted that every reference to legal capacity as a precondition for access to rights violates Article 12 of the CRPD.

The report concluded that the Archives and Population law contravenes Article 12 of the CRPD, which ranks higher than any law on national level. As such, the law must be interpreted as precluding discrimination on the ground of disability and the applicant's application for naturalisation must be re-examined in light of this. In addition, the Ombudsman filed a request with the Attorney General with a recommendation to prepare a legislative amendment, removing the requirement of 'full capacity' from the prerequisites for naturalisation.

Internet source:
http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/78055D2C9EBD67D0C22580CF00356750/$file/1%20%CE%A3%CE%91%CE%91%2040%2016%20%CE%91%CE%9A%2048-13-26012017.doc?OpenElement.

13 Cyprus, Law on population archives (No. 141(I)/2001, Article 111, available at: http://cylaw.org/nomoi/enop/ind/2002_1_141/section-sc1884ab23-838d-dc25-776c-ec2739536ae9.html.

14 Cyprus, Law ratifying the Convention for the Rights of Persons with Disabilities and the Optional Protocol to the Convention No. 8(III)/2011, of 4 March 2011.

15 Cyprus, Report of the Independent Authority for the Promotion of the Rights of Persons with Disability, File No. S.A.A. 40/2016, 26 January 2017.

16 UN Office of the High Commissioner for human rights (2016), *Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities*, 9 December 2016, available at www.refworld.org/docid/58ad862d4.html.

Accommodation of disabled student's needs in education

Disability

The claimant's son had a visual disability and had therefore benefited from accommodation measures at school such as being exempted from attending certain classes. At the end of the school year, the student's grades were the highest in the school, but were retroactively lowered by the school to match those of the second-best student (who had no disability and therefore received no accommodation). The school claimed that it would be 'unfair' if a student who had benefited from accommodation measures was announced as the best graduate, ahead of those who had not received such measures. The claimant contacted the Commissioner for the Rights of the Child ('the Commissioner'), who approached the school and the Ministry of Education. The school argued that reasonable accommodation measures should not offer 'preferential treatment' but should only ensure equality. The Director of Secondary Education of the Ministry of Education further argued that the Ministry aims primarily at promoting 'the values and virtues of humility, the recognition of the value of others and the willingness to share credits with our fellow human beings'.

The Commissioner noted that discrimination may occur not only as a result of differential treatment of persons in a comparable situation but also when persons in different situations receive the same treatment, to the extent that they are thus refused equal opportunities. In this regard, the Commissioner noted that the school had given the student the impression that the accommodation measures he was benefiting from had the distorted result of giving him an unfair advantage over other students, which had to be balanced off through the lowering of his grades. The Commissioner was particularly critical of the position of the Ministry of Education, which essentially suggested that the student should be prepared to share the title of best graduate as a matter of humility and charity.

The Commissioner recommended that special attention be paid where children with disabilities are involved and the rights-based approach must replace the charity-based approach. Accommodating the needs of students with disabilities does not cause injustice for other students by giving the disabled student an 'advantage', but rather ensures equal opportunities and equal access to education.[17]

Internet source:
http://www.childcom.org.cy/ccr/ccr.nsf/All/26811A7ED4D65F27C22580C000213A1F/$file/11%2017%2007%2005%20217_%CE%A0%CF%8C%CF%81%CE%B9%CF%83%CE%BC%CE%B1_%CE%BC%CE%B5%CE%AF%CF%89%CF%83%CE%B7%20%CE%B2%CE%B1%CE%B8%CE%BC%CE%BF%CE%BB%CE%BF%CE%B3%CE%AF%CE%B1%CF%82%20%CE%BB%CF%8C%CE%B3%CF%89%20%CE%B1%CE%BD%CE%B1%CF%80%CE%B7%CF%81%CE%AF%CE%B1%CF%82-final_to_publish.docx.

Unlawful dismissal of a pregnant woman

Gender

Mrs 'M.X', the Applicant in this case, worked for M.P.M. Eurocars Ltd in the Marketing Department. On 18 January 2012, the Applicant informed her supervisor and the director of the company that she was pregnant.

On 30 April 2012, M.P.M. Eurocars Ltd informed the Applicant by letter that the company's business and assets had been sold and taken over by the company Demstar Automotive Ltd, and that she would continue her employment in the new company under the same conditions. However, on the same day, the Applicant received a notice from the new company Demstar Automotive Ltd that her employment would be directly terminated on the ground of redundancy. At that time, she was in her fifth month of pregnancy, a fact that her new employer was made aware of during the transfer of business.

17 Finding of the Commissioner for the Rights of the Child, January 2017, file No. G.E.P. 11.17.07.05.217.

The Applicant submitted her case against Demstar Automotive Ltd to the Industrial Disputes Court in which she claimed: (a) damages for the unlawful or untrustworthy termination of her services by the Defendant; (b) damages for a violation of the Maternity Protection Law No. 100(I)/1997 as amended; (c) damages for the loss of her career; (d) any other compensation that she would be entitled to. The Defendant rejected all her claims and stated that the termination of her services was on grounds of redundancy and in particular that in its company there was no position which was relevant to her duties.

The Court considered her dismissal to be a violation of Directive 92/85/EC and of the Maternity Law. The Court concluded that her dismissal constituted direct discrimination on the ground of sex; it could not be justified and was therefore illegal. The Court also concluded that the Defendant had failed to prove that pregnancy was not the reason for her dismissal.

The Court, by taking into consideration the circumstances of the Applicant's dismissal and the damage suffered as a result of the unlawful dismissal, held that the Defendant should pay the Applicant, as reasonable compensation, the sum of EUR 22 000 plus interest, and the sum of EUR 2 000 to cover legal expenses. This is the highest compensation awarded by the Industrial Disputes Court in cases of a violation of the laws protecting maternity.

This landmark decision by the Industrial Disputes Court was delivered on 28.12.2016 and it was published on the official legal website of Cyprus (www.cylaw.com) in March 2017.

Internet source:
http://cylaw.org/cgi-bin/open.pl?file=/apofaseised/erg/2016/1420160881.htm.

POLICY DEVELOPMENTS

The UN Committee on the rights of persons with a disability published its concluding observations regarding the implementation of the CRPD

Disability

On 12 April 2017, the UN Committee on the rights of persons with a disability published its concluding observations regarding the implementation of the CRPD, highlighting among other things the following areas of concern which must be addressed in order to ensure compliance with the Convention:

- the failure to incorporate a human rights-based approach to disability in legislation;
- the insufficient collaboration with and resources for representative organisations of persons with disabilities, and the failure to review national laws and policies in collaboration with them;
- the lack of any representative organisation of persons with intellectual disabilities;
- the weak implementation of the National Disability Action Plan (2013 – 2015), and the need to adopt a new action plan in collaboration with the representative organisations of persons with disabilities and to allocate adequate funding for its implementation;
- the lack of legislation recognising the denial of reasonable accommodation as a form of disability discrimination in all areas of life;
- the term 'persons with special needs' used in national legislation being problematic and the possibility for it to hamper the application of the human rights-based approach foreseen in the CRPD;
- the lack of awareness-raising campaigns and low level of awareness;
- the lack of legislation or mechanisms to address multiple and intersectional discrimination and the lack of disaggregated data on cases of such discrimination;
- non-voluntary confinement and treatment, intrusive therapy without informed consent, substituted decision-making and guardianship still being legal and practised routinely;
- a significant number of persons with disabilities still being institutionalised;
- limited data collection in all fields;
- insufficient financial resources afforded to the monitoring mechanism.

The UN Committee also raised concerns as regards, among other things, the equal access of persons with disabilities to asylum procedures, to welfare, health, the labour market, information, public websites, the environment, transport, inclusive education, telephone-based emergency service and the justice system.

Following the publication of the UN's concluding observations, the Ombudsman's office, which is the designated body under Article 33 for monitoring the implementation of the CRPD, issued a public statement highlighting its contents.[18] A few days later however, the Ombudsman issued another statement, which may cause some concern as it uses derogatory terms such as 'persons with mental deprivation' instead of 'persons with intellectual disabilities' and seems to attempt to attenuate the criticisms of the concluding observations.[19]

The UN Committee's contribution offers valuable insight into Member States' specific duties and obligations under the CRPD. In addition to listing necessary changes to the law, the UN Committee demands public expenditure, confronting the intention of the Government to implement the Action Plan of 2013-2015 without any budget. It remains to be seen whether the UN recommendations will be taken on board.

Internet source:
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCYP%2fCO%2f1&Lang=en.

The UN Committee on racial discrimination publishes concluding observations regarding the implementation of the CERD

Racial or ethnic origin

On 12 May 2016, the UN Committee on the Elimination of Racial Discrimination published its concluding observations on the progress reported by the Cypriot Government on the implementation of the CERD.[20] A central issue flagged was the tension generated by the protracted conflict between the Greek Cypriot and Turkish Cypriot communities and the human rights issues which ensue as a result. The Committee also highlighted the following areas of concern:

- No data is collected on the enjoyment of economic and social rights by ethnic groups and the representation of ethnic minorities in state and public institutions;
- No data is available as regards court cases where the CERD was invoked or where the legal provision on racial motivation as an aggravating factor was applied;
- Legislative gaps flagged in previous reporting rounds have not been addressed and there is no information on the efforts to repeal discriminatory laws, regulations and policies;
- The Ombudsman cannot appoint his or her own staff and lacks the financial and human resources necessary to independently, impartially, and effectively carry out its mandate (hence its classification as B status by the Global Alliance of National Human Rights Institutions);
- There is a lack of accountability of perpetrators of racist stereotypes and hate speech in the public sphere, and of violence against migrants, Turkish Cypriots and Muslim minorities, due to insufficient legislation and/or enforcement;

18 Commissioner for Administration, *Statement of the Independent Authority for the promotion of the rights of persons with disability regarding the concluding observations for Cyprus of the UN Committee for the rights of persons with disability*, 3 May 2017. Available at: www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/824FC7D97EB3FAA7C2258115003816C8?OpenDocument.

19 Commissioner for Administration, *Complementary Statement of the Independent Authority for the promotion of the rights of persons with disability regarding the concluding observations for Cyprus of the UN Committee for the rights of persons with disability*, 8 May 2017. Available at: www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/5449A767BA8C8E57C225811A0030FB7A?OpenDocument.

20 The CERD was ratified by Cyprus through the adoption of the Law ratifying the Convention on the elimination of all forms of racial discrimination No. 12/1967, adopted on 30 March 1967, available at: http://cylaw.org/nomoi/arith/1967_1_012.pdf, as amended.

- There is no comprehensive strategy for Roma inclusion, whilst the Roma continue to face discrimination and challenges such as racist attacks, unemployment, inadequate housing, low school attendance and high school dropout rates.
- Asylum seekers are faced with limited reception facilities and discrimination in accessing both welfare and the labour market, as a result of policies restricting them to agriculture, livestock or fisheries and denying them social assistance if they are categorized as 'wilfully unemployed', regardless of individual circumstances.
- Domestic workers are vulnerable to exploitation and abuse, and are excluded from the new national action plan on integration of migrants currently being formulated.
- The low number of complaints for racial discrimination reported by the Government and the even fewer prosecutions and convictions may signify barriers in invoking the rights foreseen in the CERD.
- The failure to produce information on the training of state bodies, local government bodies, associations, law enforcement officers, judges and lawyers, or on any action plans or other measures to implement the Durban Declaration and Programme of Action.

Amongst the several recommendations issued, the UN Committee flagged the following as important: the compilation of a Roma inclusion strategy and the allocation of adequate resources to it; the expansion of reception conditions for asylum seekers and the removal of the obstacles to their equal access to employment and welfare; the removal of the restriction for domestic workers to change employers, their inclusion into the long-term residence scheme and into the new national action plan on migrant integration; the adequate registration, investigation and prosecution of complaints for racial crime; and public education campaigns to ensure that the right to judicial recourse is accessible to victims.

Interestingly, the UN Committee was not reluctant to term as racial discrimination restrictions essentially relating to the entry and residence of third-country nationals, which fall outside the scope of the Racial Equality Directive.

The gaps highlighted by the report are to a large extent the product of the Government's austerity agenda but also suggest a lack of political will to adopt the equality agenda. A typical manifestation of the mentalities nurturing this negative political climate was the response of the Attorney General, a few days after the publication of the UN report, to an NGO's request to prosecute the Archbishop for hate speech, with reference to the latter's comments on state television that Turkish people are uncivilized and unclean Orientals who have a dozen children each. The Attorney General found that the Archbishop's statements did not violate the law on hate speech because they were aimed at criticizing the policy of Turkey to send Turkish settlers to the north of Cyprus and thus change the country's demographic character, which is a war crime. The Attorney General concluded that there is evidence that the Turkish settlers 'come from Anatolia, have low educational and cultural background and have children with worrying regularity'.[21] The Attorney General did not produce the evidence he invoked and did not define the concept of 'low cultural background'.

Following the Attorney General's refusal to prosecute the Archbishop, the NGO initiated a private criminal case against the Archbishop, to then apply to the ECtHR if the court fails to deliver a conviction.[22] This follows a similar incident last year where the NGO Accept LGBT asked the Attorney General to prosecute the Archbishop for homophobic speech, to which the Attorney General failed to respond.

Internet source:
http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CYP/INT_CERD_COC_CYP_27472_E.pdf.

21 Office of the Attorney General of the Republic, Letter to executive director of KISA, 24 May 2017, available at https://www.pio.gov.cy/MOI/pio/pio2013.nsf/AC1BF5A7F6C06684C225812B003BDCA6/$file/SKM_C3110170525130300-2.pdf.

22 KISA (2017), *Press release: No tolerance and no excuse for hate speech and hate crimes*, available at https://kisa.org.cy/no-tolerance-and-no-excuse-for-hate-speech-and-hate-crimes/.

CZ Czech Republic

POLICY DEVELOPMENT

Amendments to the Sickness Insurance Act for a better Life-Work balance

Gender

The Czech Parliament recently adopted an amendment to the sickness insurance act (Act No. 148/2017 Coll., amending Act No. 187/2006 Coll.) introducing paternity leave. A proposal for another amendment to the sickness insurance act, which introduces a long-term caring benefit, is still pending and it will probably not be adopted before the general election in October 2017.

The new sickness insurance benefit – paternity benefit – envisages one-week paid leave for fathers who will be paid 70 % of their daily salary, in order to take care of the mother and the newborn child. The benefit can be provided until the child reaches six weeks of age.

The purpose of the proposed long-term caring benefit is to provide adequate compensation for a loss of income due to the interruption of work for taking care of a person in need of long-term care. This provision will affect women more than men, since the majority of carers are women. The benefit will be part of the sickness insurance system. The Labour Code, in connection with long-term care, shall be amended as well, so that the employer will be obliged to provide the employee with the same position after s/he returns from the care leave. At the same time, it has been proposed during the debate in Parliament that the employer shall have the possibility not to agree to provide long-term care leave.

Both amendments shall contribute to a better harmonisation of family and working life.

Internet source:
http://www.psp.cz/sqw/historie.sqw?o=7&t=1029, http://www.psp.cz/sqw/historie.sqw?o=7&t=821.

DK Denmark

CASE LAW

Hearing ability as a genuine and determining occupational requirement for a gardener

Disability

The claimant was deaf and had an internship position as a gardener at a cemetery. When several gardener positions opened, he informed the manager that he would like to apply, but was told that the manager was looking for gardeners who could independently make arrangements with relatives about gardens and maintenance. The manager wrote: 'Your disability makes this impossible. I'm sorry'.

The claimant argued that he had been discriminated against because of his hearing impairment, while the employer argued that a gardener at a cemetery must be able to provide professional customer service. This includes professional advice to relatives of newly deceased who are grieving and often come to the cemetery unannounced. The employer argued that it would be impossible for the claimant to perform this task, due to his disability.

The Board of Equal Treatment held that according to the Act on Compensation for Persons with Disabilities in the Labour Market, the claimant was entitled to a sign-language interpreter for up to 20 hours a week at no cost for the employer. The Board then argued that the employer never made a concrete

assessment of whether the claimant could have performed the communicative tasks with customers – or the most important aspects thereof – if reasonable accommodation had been established in the form of sign-language interpretation or a reorganisation of tasks. Furthermore, the Board argued that the employer had not disputed that the claimant was qualified for the tasks that were not related to customer communication or service.

On this basis, the Board concluded that the employer had failed to establish that it would have imposed a disproportionate burden to appoint the claimant. Further, the employer had not proven that the claimant was not competent, capable and available to perform the most important tasks of the job.[23] The Board therefore awarded approx. EUR 3,360 in compensation (DKK 25,000).

Internet source:
https://www.retsinformation.dk/Forms/R0710.aspx?id=186904.

School regulations prohibiting the exercise of religious rituals

Religion or belief

The claimant was a student at a vocational school and argued that the newly adopted school regulations prohibiting the exercise of religious rituals constituted discrimination on the ground of religion. The claimant was a Muslim saying her prayers at the school at the time of the introduction of the new regulations. The school argued that the regulations had been adopted because unrest, conflicts and insecurity had been caused by students saying their prayers at the school, notably in classrooms and in the entrance hall of the school.

The Board of Equal Treatment noted that only Muslim students performed religious rituals at the school when the new regulations were introduced, and were therefore the only ones affected by the regulations. The claimant had thus established a *prima facie* case of indirect discrimination. The Board then found that the regulations were objectively justified by a legitimate aim, which was to secure a safe and peaceful learning environment and that the prohibition of performing religious rituals was an appropriate means to achieve that aim.

The five members of the Board disagreed on the issue of whether the means to achieve the aim pursued were necessary. Four of the members focused on the incidents where students, including the claimant, had said their prayers in classrooms and hallways, causing inconvenience to the other students and to teachers. They therefore concluded that the prohibition had been necessary and thus that indirect discrimination because of religion had not taken place.[24]

One board member submitted a dissenting opinion, arguing that the school had failed to consider other less intrusive measures to secure the necessary peace and safety at school, thus concluding that the prohibition was not necessary and that the claimant had been indirectly discriminated because of her religion.

The case illustrates, despite the differing opinions, that vocational schools are not obliged to assign student facilities for prayer and other religious rituals.

Internet source:
https://www.retsinformation.dk/forms/R0710.aspx?id=192312.

23 Denmark, Board of Equal Treatment, decision No. 9155 of 27 February 2017.
24 Denmark, Board of Equal Treatment, decision No. 9647 of 27 April 2017.

POLICY DEVELOPMENT

Recommendations from ECRI on school segregation in Denmark

Racial or ethnic origin

ECRI describes in its fifth report on Denmark that an education gap persists between ethnic Danes and ethnic minorities. Only 62 % of pupils belonging to ethnic minorities finished school with adequate skills for further education, while this number was 87 % for ethnic Danes.

ECRI refers to its previous recommendations in its fourth report to tackle the problem of school segregation and expresses its concern that new developments suggest that such practices continue. ECRI particularly expresses its concern that one specific school in Aarhus (the Langkaer upper secondary school) in September 2016 divided its new students into three classes with a 50 % limit of non-ethnic Danes each, while the other four classes were comprised solely of pupils from ethnic minorities.

ECRI recommends that the Danish authorities take urgent measures to end this ethnic segregation in the Langkaer school and to prevent any such practices in Danish schools in the future. ECRI reiterates its previous recommendations to 'combat school segregation by devising, in consultation with all the parties concerned and taking into account the socio-economic dimension (employment and housing) policies to avoid, in the best interests of the child, pupils from minority groups being overrepresented in certain schools [...]'.

In September 2016, the Danish Institute for Human Rights (DIHR) had submitted a complaint to the Board of Equal Treatment in the Langkaer case claiming that the school practice constituted discrimination based on ethnic origin. On 15 March 2017, DIHR published a statement that it had agreed with the school on an out-of-court settlement concluding the case before the Board.[25] In the statement, DIHR underlined that dividing classes according to ethnicity amounts to illegal discrimination, irrespective of the intentions of the school. The school took note that the practice amounted to discrimination and agreed not to use names of pupils as a criterion for dividing its classes in the future. It underlined however that there had been no intention to discriminate and that as far as the school was aware no one had been placed in a disadvantageous situation compared to others due to this practice. The statement does not describe any specific efforts to combat future ethnic segregation in the Langkaer school.

The Danish Government's position in relation to ECRI's report comments on the Langkaer school settlement, without describing any measures to combat ethnic school segregation in Denmark in general.

Internet source:
ECRI Report on Denmark (fifth monitoring cycle), published on 16 May 2017:
http://hudoc.ecri.coe.int/eng/ - {"ECRIIdentifier":["DNK_PR_V_2017_247_ENG"]}.

25 Danish Institute for Human Rights (DIHR) statement regarding an out-of-court settlement between DIHR and Langkaer school (*Forlig i sag om fordeling af elever på grund af etnicitet*), 15 March 2017, available at: https://menneskeret.dk/nyheder/forlig-sag-fordeling-elever-paa-grund-etnicitet.

Estonia

LEGISLATIVE DEVELOPMENT

The addition of an article on sexual harassment in the Penal Code

In 2014, Estonia signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). In 2015-2016, legal amendments were prepared in order to comply with the Istanbul Convention. The Ministry of Justice proposed amendments to the Penal Code ('PC') concerning stalking, female genital mutilation, forced marriages and the prohibition of buying sexual services from trafficking victims, whereby the minimum requirements of the Istanbul Convention were taken into account. According to the Istanbul Convention, sexual harassment is subject to criminal or other legal sanctions. In Estonia, sexual harassment is defined and prohibited by the Gender Equality Act (GEA).[26] In 2009-2017, there were no court cases concerning sexual harassment due to the fact that civil proceedings are costly and time consuming and because of the poor enforcement of the GEA.

In February 2017, a Bill amending the Penal Code (442 SE) was presented to Parliament's Legal Affairs Committee.[27] The Bill did not propose to make sexual harassment a criminal offence. However an MP, and a member of the Legal Affairs Committee, proposed an amendment to making sexual harassment a criminal offense. The Ministry of Social Affairs and several civil society organizations[28] have supported the proposed legal amendment on sexual harassment to the PC. However, there were also strong voices against this amendment. The Minister of Justice has stressed that sexual harassment as a criminal offence could lead to over-criminalisation.

Sexual harassment was discussed at several Legal Affairs Committee meetings in April and May of 2017. Finally, a compromise was reached and it was decided that sexual harassment is a misdemeanour and should be placed under Offences against Equality in the Penal Code. The new Article 153.1 of the PC defines sexual harassment as 'an act of a physical sexual nature committed intentionally against somebody's will and aiming to degrade,' which is punishable by a fine of up to 300 fine units[29] or detention. A legal person can be held accountable for sexual harassment and may be punished with a fine of up to EUR 2 000.

Extrajudicial proceedings concerning misdemeanors are conducted by the Police and Border Guard Board, which will not help with the development of a legal conceptualisation of sexual harassment. The amendments to the Penal Code were adopted on 14 June 2017.

Internet sources:
CEDAW Committee (2016), Concluding observations on the combined fifth and sixth periodic reports of Estonia:
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fEST%2fCO%2f5-6&Lang=en, accessed 31 May 2017.

26 Article 3 of the GEA states that sexual harassment is direct discrimination based on sex. A definition of sexual harassment is provided in Article 3(1)(5) of the GEA. Unfortunately, sexual harassment is seen in connection with employment and an employer should ensure that employees are protected from gender-based harassment and sexual harassment in the working environment. https://www.riigiteataja.ee/en/eli/521012016001/consolide, accessed 31 May 2017.

27 Karistusseadustiku muutmise ja sellega seonduvalt teiste seaduste muutmise seadus 385 SE (Amendments to the Penal Code and Associated Acts 385 SE), https://www.riigikogu.ee/tegevus/eelnoud/eelnou/f9a7291c-8c46-4ad8-a740-4e1c55c83964/Karistusseadustiku%20muutmise%20ja%20sellega%20seonduvalt%20teiste%20seaduste%20muutmise%20seadus, accessed 31 May 2017.

28 Estonian Union for Child Welfare, Estonian Women Lawyers' Association, NGO Life Line (Eluliin) and representatives of the Women's Shelters.

29 Article 47(1) of the PC stipulates that for a misdemeanour, a court or a body conducting extrajudicial proceedings may impose a fine of 3 up to 300 fine units. A fine unit is the base amount of a fine and is equal to EUR 4.

Karistusseadustiku muutmise ja sellega seonduvalt teiste seaduste muutmise seadus 385 SE (Amendments to the Penal Code and Associated Acts 385 SE), https://www.riigikogu.ee/tegevus/eelnoud/eelnou/f9a7291c-8c46-4ad8-a740-4e1c55c83964/Karistusseadustiku%20muutmise%20ja%20sellega%20seonduvalt%20teiste%20seaduste%20muutmise%20seadus.

Women underrepresented in politics

Gender

In April 2017, 14 MPs proposed amendments to Article 28 of the European Parliament Election Act, to Article 34 of the Municipal Council Election Act and to Article 29 of the Riigikogu Election Act, proposing a zipper system for candidates' lists. The proposed amendments were rejected by Parliament on 13 June 2017. The Ministry of Social Affairs supported the amendments, while the Ministry of Justice opposed the proposal. The Government Office did not take a position on this matter.

Women's political participation slightly increased in the period between 1992 and 2015. Men still dominate parliamentary seats in Estonia, but the share of women has increased from 5 % in 1992 to 27% in 2017. Furthermore, more women participate in local government councils. In the local elections of 2013, 40 % of the candidates and 31 % of the elected councillors were female. The Estonian electoral list system does not regulate the candidates' position on the lists. Therefore, parties can place women at the bottom of electoral lists. Some parties have to some extent agreed on placement mandates, but there are no written rules about the hierarchical order of men and women candidates on electoral lists.

The draft amendments to electoral laws proposed to structure candidate lists according to a zipper system, alternating men and women on the list. The draft was discussed with invited officials in the Constitutional Committee meeting on 8 June 2017. Both positive and negative aspects of the zipper system were taken into account. Members of the Committee agreed that there should be more women in politics. Arguments opposing the amendments evolved around the measures to attain the goal of increased female representation in politics. Zipper systems and legislated candidate quotas were considered to be inadequate measures. Members were sceptical about the positive effect of gender quotas, and considered administrative intervention to be doubtful overall. The Committee members held that introducing these amendments is anti-democratic and against the will of the general public.[30] The Committee members accepted that the zipper system for candidates' lists constitutes positive discrimination, but they assumed that there could be a negative outcome. What kinds of negative consequences were not explained. Supporters of the initiated amendment stated that the introduction of gender quotas might increase women's political participation. The final decision by the members of the Constitutional Committee was to send the amendments to Parliament for a first reading, but they did not give their support to these amendments.

On 13 June 2017, the first reading of the amendments, combined in draft act 424 SE, took place in Parliament. The Parliamentary debate was dominated by male MPs, who brought forward several arguments based on their assumption of women's low interest in politics and decision-making. In the end, draft act 424 SE was not supported by Parliament.

Internet sources:
Euroopa Parlamendi valimise seaduse, kohaliku omavalitsuse volikogu valimise seaduse ja riigikogu valimise seaduse muutmise seadus 424 SE (Amendments to the European Parliament Election Act, to the Municipal Council Election Act and to the Riigikogu Election Act 424 SE): https://www.riigikogu.ee/tegevus/eelnoud/eelnou/e4abb30f-d54e-4103-971b-7d31fa277286/Euroopa%20Parlamendi%20

30 According to the findings of Gender Equality Monitoring, 85 % of respondents were against legal gender quotas in the parliamentary election process in 2015. However, 28 % of respondents supported the idea that parties have gender equality among candidates. Source: Soolise võrdõiguslikkuse monitoring 2016 (Gender Equaliaty Monitoring 2016), http://enut.ee/files/soolise_vordoiguslikkuse_monitooringu_raport_2016.pdf (in Estonian), accessed 15 June 2017.

valimise%20seaduse,%20kohaliku%20omavalitsuse%20volikogu%20valimise%20seaduse%20ja%20riigikogu%20valimise%20seaduse%20muutmise%20seadus, accessed 13 June 2017.
Riigikogu stenogramm, 13. Juuni 2017 (Shorthand Report by Parliament of 13 June 2017): http://stenogrammid.riigikogu.ee/et/201706131000#PKP-21194 (in Estonian), accessed 15 June 2017.

Former Yugoslav Republic of Macedonia

CASE LAW

Second decision of the Constitutional Court on discrimination due to different retirement ages for men and women

Gender

With the introduction of the possibility to delay the retirement age in July 2014, discriminatory amendments were made to the Law on Labour Relations, the Law on Administrative Clerks and certain other special laws containing provisions on retirement. The amendments stipulate that women can delay their retirement age from 62 to 65, while men can delay their retirement age from 64 to 67. They can do so by giving a written statement to their employer before 31 August of the year in which they want to invoke this right.

In 2015, a group of university professors and NGOs lodged a complaint at the Constitutional Court. Additionally, three months later, a group of administrative executives lodged another complaint regarding the provision on the retirement age in the Law on Administrative Clerks. On 29 June 2016, the Constitutional Court of the Republic of Macedonia adopted a decision by which it nullified the part of the amendment concerning the differentiation in retirement age based on sex, while leaving the part concerning the prolongation of the retirement age as such in force. Thus, the final outcome is the possibility to postpone one's retirement up to the age of 67, regardless of sex.

On 1 February 2017, the Constitutional Court of the Republic of Macedonia adopted a second decision, No. U. 121/2015, regarding the postponement of the retirement age, declaring null and void the relevant provision of the Law on Administrative Clerks stipulating different retirement ages based on gender. The Court placed the administrative workers under the Law on Labour Relations, which stipulates the possibility of a postponed retirement age at 67 regardless of the worker's sex. The Decision does not refer to any other laws with provisions concerning the retirement age.

There were no controversial discussions or debates on this issue in the public arena, whilst academics and NGOs stand unified in favour of the possibility of a delayed retirement, but the age at which this is set should be the same for all workers regardless of sex.

Both of these decisions by the Constitutional Court create a rather complicated, but nevertheless well based system of retirement. Women fulfil the retirement requirement at 62 with a minimum of 15 working years, and they may delay their retirement to 67, if they file a specific and formal request to this effect. This constitutes, according to a previous decision by the Constitutional Court, positive discrimination (U.No.: 114/2014-0-1). For men, the minimum age of retirement is 64, but the age for a prolonged retirement is also 67. Employers cannot oppose a request for prolonged retirement.

Internet sources:
Constitutional Court Decision U. No.: 121/2015-0-1 from 01 February 2017 http://www.ustavensud.mk/domino/WEBSUD.nsf.

Information on the portal Academic: http://www.akademik.mk/ustavniot-sud-ukina-odredba-od-zakonot-za-administrativni-sluzhbenitsi-protivustavni-se-razlichnite-uslovi-za-prestanok-na-rabotniot-odnos-za-zheni/.
Constitutional Court Decision U. No.: 114/2014-0-1 from 29 June 2016: http://www.ustavensud.mk/domino/WEBSUD.nsf.

POLICY DEVELOPMENT

Annual reports of the national equality body and the Ombudsman

All grounds

The two national Human Rights Institutions with competences on equality and protection against discrimination – the Commission for Protection against Discrimination (CPAD), which is the national equality body, and the Ombudsperson – published their annual reports for 2016. The Ombudsperson reported a rise in the number of discrimination cases compared to 2015, while the number of cases reported to the CPAD continued to drop.

The CPAD received 60 cases in 2016, as opposed to 70 cases in 2015 and 106 cases in 2014. In its annual report, the CPAD attributes the decrease in reporting, among other factors, to a lack of financial resources,[31] without further explaining this link. The report also indicates the distribution of cases received per discrimination ground: '18 % on personal or social status, 17 % on ethnicity, 15 % on political affiliation, 13 % on gender, 12 % on health status, 10 % on other beliefs, and so on'.[32] The trends from previous years are therefore more or less confirmed. As regards the fields, 40 % of cases concerned the field of employment and labour relations, 25 % concerned access to goods and services, 13 % public information and media, 8 % judiciary and administration and 14 % in education, science and sports.

According to the Ombudsperson's report, 69 cases were filed as 'non-discrimination and equitable representation' cases. The Ombudsperson has added a category of cases on 'persons and children with disabilities', under which it reports having received 15 cases in 2016. As was the case in the previous year, the Ombudsperson's report does not contain detailed statistics on the relevant grounds and fields, although it does indicate that an existing trend of most cases concerning employment seems to be confirmed. Similarly, the ground of ethnicity continues to be most often invoked. Finally, the report shows that the percentage of discrimination cases filed to the Ombudsperson rose by 20 % compared to 2015.

Both reports are an opportunity for the public to become familiar with the work of these institutions, which remains otherwise unavailable. This is even more so as regards cases of discrimination specifically, as this information is usually not released to the public throughout the year.

Internet sources:
Ombudsperson (Народен правобранител) 2016 Annual Report. Ombudsperson Website. http://ombudsman.mk/upload/Godisni%20izvestai/GI-2016/GI-2016.pdf.

Commission for Protection Against Discrimination (Комисија за заштита од дискриминација) 2016 Annual Report. CPAD Website. http://kzd.mk/sites/default/files/Godisen_izvestaj_2016_finalen.pdf.
All hyperlinks last accessed: 18 May 2017.

31 'The drop is due, among other issues, also to lack of financial resources for the operation of the Commission.' Commission for Protection against Discrimination (Комисија за заштита од дискриминација) 2016 Annual Report. CPAD Website. http://kzd.mk/sites/default/files/Godisen_izvestaj_2016_finalen.pdf.
32 Ibid.

Underrepresentation of women in politics

Gender

On 31 May 2017, in accordance with the Constitutional deadlines, the Macedonian Parliament elected a new Governmental Cabinet. Out of the 26 members of the Cabinet, only four are female, which is exactly 15 %. Three of the four are Social Democrats (SDSM), while one is a member of a minor coalition partner. None of the two ethnic Albanian political parties in the Cabinet proposed female candidates for a ministerial position.

However, for the first time a female minister was elected to lead the Ministry of Defence, which is considered an important post with responsibility for defending the country's sovereignty.

The Electoral Law obliges Parliament to have one-third female representation. This obligation was respected during the early Parliamentary Elections on 10 December 2016. However, there is no such obligation concerning the governmental Cabinet. Nevertheless, the percentage of women in the new Cabinet has doubled compared to the previous one.

Internet sources:
New Cabinet of the Government: http://vlada.mk/?q=node/12802&language=mk.
Election of the Government: http://www.sobranie.mk/sessiondetails.nspx?sessionDetailsId=59679564-147b-4f50-b8fa-570e972be26d.

France

FR

CASE LAW

National Corsican Trade Union promoting the 'corsicanisation' of hiring in Corsica

Racial or ethnic origin

The national Corsican trade union announced its candidacy to the national elections of trade union representation, advocating in its electoral propaganda the 'corsicanisation of employment'.

The major mainstream trade unions challenged the admissibility of this candidacy on the basis of Article L2122-10-6 of the Labour Code which states that candidates must 'comply with requirements of republican values'. The claimant organisations consider that the Corsican trade union pursues an illegal and discriminatory purpose.

The case was brought before the Social Chamber of the Court of Cassation, which took the opportunity to provide some specification on the concept of 'republican values'. It stated that a trade union which promotes direct and indirect discrimination on the ground of origin, referring to the letter of the law, does not satisfy this requirement.

However, it also stressed that the claimants bear the burden of establishing facts from which it can be presumed that the respondent trade union has effectively promoted discriminatory behaviour. The Court thus opened the scope of possible future action in this field, by explicitly holding that promotion of discrimination falls within the prohibited behaviour. The Court did however underline the importance of accommodating freedom of political expression and to avoid indirect censorship. In this case, the Court therefore held that 'corsicanisation of employment' is a means of promoting local hiring which does not amount to promotion of discrimination or violation of republican values.[33]

33 France, Court of Cassation, Social Chamber, Decision No. 16-2579312 of 12 December 2017.

Internet source:
https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000033631545&fastReqId=322200566&fastPos=1.

DE Germany

LEGISLATIVE DEVELOPMENT

Amendments to the Penal Code regarding the prosecution of stalking

Gender

On 10 March 2017, the statute on the improvement of the protection against stalking entered into force, amending the Penal Code and the Criminal Procedure Code.

Until then, the relevant Section 238 of the Penal Code required, among other things, that the personal life of the victim of stalking was seriously impaired, e.g. that the victim felt compelled to move house or change jobs and acted accordingly. This requirement severely hampered the prosecution of stalking, especially to the disadvantage of victims who resisted the pressure to change their lives fundamentally. Moreover, the prosecution of stalking was at the discretion of the state attorney under the Criminal Procedure Code because stalking was qualified as a subject of private prosecution.[34]

Under the amended Section 238 of the Penal Code, the requirements for prosecuting a stalker have been lowered. Now, the *general suitability* of the stalking actions to impair a victim's life is sufficient without the requirement for the victim to actually undergo detrimental lifestyle changes. And by amending the Criminal Procedure Code, state attorneys are generally obliged to prosecute stalking when it is reported.

Freedom from violence is the basis for the enjoyment and exercise of all fundamental and human rights. It is suggested that 12 % of the population in Germany become victims of stalking at least once in their life, and the vast majority (80 %) of these victims are female. The former requirements of the Penal Code punished victims who resisted giving up their jobs or leaving their homes and made it nearly impossible to prosecute even very persistent stalkers. And the qualification of stalking as a subject of private prosecution gave the harmful impression that stalking, despite the fact that it qualifies as gender-based violence, was a private problem. But on the contrary, especially when committed by (ex-)partners, spouses or relatives, gender-based violence is a legal problem to be solved primarily by the state. The improvement of the protection against stalking is one more step in the direction of the implementation of the Istanbul Convention.

Internet source:
Statute on the improvement of the protection against stalking of 10 March 2017:
https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Stalking.html.

New Statute on Maternity Protection

Gender

On 29 May 2017, the Statute on the Protection of Mothers at work, in training and at universities was published in the official Journal of Laws. The statute embodies a new regulation of the law on maternity protection, and its main parts will enter into force on 1 January 2018. Some regulations have entered into force on 30 May 2017, such as the postnatal protection period which is extended from eight to twelve weeks after the birth of a disabled child. The statute also explicitly covers protection against dismissal for women who have suffered a miscarriage after the 12th week of pregnancy.

34 See also *European equality law review*, Issue 2017/1, pp. 88-89.

The personal scope of maternity protection is extended and now covers any person (irrespective of his/her gender) who is employed or working as an intern/trainee (including pupils and students) or a volunteer working in a sheltered workshop for persons with disabilities or in a special ecclesiastical service or who is working from home or a quasi-subordinate worker. In special regulations, civil servants, judges and soldiers are guaranteed the same protection level as any other pregnant or breastfeeding employee.

Night work (as night training or night studies) is prohibited between 10 pm and 6 am regardless of the working sector's special needs, and may be allowed with the consent of the pregnant or breastfeeding worker between 8 pm and 10 pm. Working during the postnatal protection period of eight weeks is prohibited. Sunday work is prohibited as well but may be allowed under special regulations and with the consent of the pregnant or breastfeeding worker. Changes to regular working hours are prohibited for pregnant or breastfeeding employees.

In a paradigmatic change, the law covers a hierarchical range of employers' duties to guarantee protection and safety for pregnant or breastfeeding employees. The first and primary task is the substantial reshaping of the work environment. Only when the required level of safety cannot be reached by such a reshaping or when the reshaping would require a disproportionate effort can the employer require a change of workplace. And if safety can neither be guaranteed by reshaping the work environment nor by a change of workplace, the employer is not allowed to employ a pregnant or breastfeeding woman any longer. By qualifying the reshaping of the work environment as priority and the prohibition of work as a last resort, pregnancy and breastfeeding might leave the status of special obstacles for a successful working life and may become part of a comprehensive concept of occupational safety (influenced by Union law requirements). A newly established commission for maternity protection will develop further guidelines concerning risk assessment, technical safety, occupational medicine and hygiene.

During maternity leave, dependent employees are entitled to 'maternity protection wages' equal to the amount of their last net income. Pregnant or breastfeeding persons insured under the statutory health insurance scheme including sickness benefits are entitled to maternity allowances equal to the amount of these sickness benefits (usually 70 % of their former income). Pregnant or breastfeeding persons not insured under the statutory health insurance scheme are entitled to maternity allowances amounting to a maximum of EURO 210 in total. The statute does not cover an explicit right to return to the former or an equivalent workplace after the maternity protection period.

The changes were hard-won. A first draft from March 2016 covered special working protection rules, dispensation and several employment prohibitions. With regard to Directives 92/85/EEC and 2006/54/EC the German Women Lawyers' Association had heavily criticised this first draft for confirming discriminatory structures of maternity protection as alien to the world of employment and employment prohibitions as the method of choice instead of fostering the autonomy and inclusion of pregnant persons and restructuring systems of health and safety at work.

The new regulation of maternity protection focuses on the personal autonomy of pregnant and breastfeeding employees by reshaping the work environment prior to workplace changes and employment prohibitions. The personal scope covers employees, quasi-subordinate workers, trainees and students as well as any pregnant or breastfeeding person irrespective of his/her legal gender status. But self-employed persons are not covered and the statute does not contain a right to return to their former or an equivalent job.

Internet sources:
The German Women Lawyers' Association's criticism of the first draft:
https://www.djb.de/Kom-u-AS/K1/st16-05/.
Second draft on the new regulation of maternity protection of 28 June 2016:
http://dip21.bundestag.de/dip21/btd/18/089/1808963.pdf.

The German Women Lawyers' Association's statement on the second draft:
https://www.djb.de/Kom-u-AS/K1/st16-21/.
Statute on the Protection of Mothers at work, in training and at universities of 23 May 2017:
https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*[@attr_id=%27bgbl117s1228.pdf%27]#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl117s1228.pdf%27%5D__1508768624264.

Statute on the Ratification of the Istanbul Convention

Gender

On 1 June 2017, the German Federal Parliament adopted a statute on the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

Germany signed the Istanbul Convention immediately upon its establishment in 2011. However, its ratification was delayed because under the German Constitution, the full conformity of German law with the Convention is required before ratification. Whether the implementation of Article 36 of the Istanbul Convention requires substantial amendments to the definitions of rape and sexual assault within the Criminal Code was a controversial topic of discussion for quite some time. Thorough amendments to the Penal Code regarding rape and sexual assault in 2016 were a necessary precondition to start the ratification process. The federal statute is the last necessary step before the actual ratification of international treaties concerning matters of federal legislation. Thus, the ratification of the Istanbul Convention is to be expected very soon.

Under Article 78 of the Istanbul Convention, the German government declared reservations concerning Article 59(2) and 59(3) as well as Article 44(1)(e) of the Istanbul Convention, thus diminishing the protection for female refugees and migrants who are victims of domestic violence. The statute on the ratification incorporates these reservations and thus weakens the protection for one of the most vulnerable groups. Reservations to Article 59(2) and (3) are permitted under the Convention.

The draft ratification statute was accompanied by a ministerial memorandum claiming that no further legislative amendments were necessary to attain the full conformity of German law with the Istanbul Convention. This assertion is questionable and may lead to further controversies in the implementation process.

Internet sources:
Draft of the Statute on the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (as adopted by Parliament and including the ministerial memorandum):
http://dip21.bundestag.de/dip21/btd/18/120/1812037.pdf.
Parliamentary information on the adoption:
https://www.bundestag.de/dokumente/textarchiv/2017/kw22-de-haeusliche-gewalt/507528.
Press release by the Federal Ministry for Family, Senior Citizens, Women and Youth of 2 June 2017:
https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/gemeinsam-in-europa-den-schutz-von-frauen-vor-gewalt-staerken/115120.

Sexual orientation

Legalisation on same-sex marriage

On 30 June 2017, the German Parliament (*Bundestag*), passed a law which introduces the possibility of same-sex marriage. To this end, the Civil Code was amended and the regulations on marriage now include a clause which clarifies that marriage is concluded for life between persons of different or of the

same sex.[35] Couples having previously concluded same-sex registered partnerships can opt to change their partnership into a marriage or to remain in the registered partnership. No such partnerships can be concluded in the future. The marriage of same-sex partners gives them equal access to all legal rights connected to this legal institution, including adoption.

Considering the existing political opposition to the bill, it is considered likely that it will be challenged before the German Federal Constitutional Court (*Bundesverfassungsgericht*). It is legally debatable whether the Court would find the bill to be compatible with the protection of marriage (Article 6) in the German Basic Law.

Internet source:
https://www.bundestag.de/#url=L2Rva3VtZW50ZS90ZXh0YXJjaGl2LzIwMTcva3cyNi1kZS1laGUtZnVlci1hbGxlLzUxMzY4Mg==&mod=mod493052.

CASE LAW

Judicial definition of pay discrimination

A female freelance worker sued her employer, a public broadcaster, because she discovered that her male colleagues who were doing the same or equivalent work were paid significantly more. The defendant confirmed that male colleagues doing equivalent work were paid a higher salary than the claimant, but denied discrimination. The pay difference was explained by different collective agreements for freelancers and permanent employees, on the one hand, and differences in seniority (employment period for the same employer) between the claimant and other (male) freelancers, on the other.

The Labour Court of Berlin decided that the claimant had not been discriminated against on the ground of sex. Article 157 TFEU does not provide any regulations for equal pay, but prohibits sex discrimination. The Court could not identify any discrimination on the ground of sex, but justified differentiations in pay based on seniority and different contract arrangements for freelancers and permanent employees. The Court stated that unequal pay for the same or equivalent work could not in itself indicate discrimination. Since the Court did not find any discrimination, it rejected the claimant's request for information about the pay structure and the salaries of male colleagues performing equivalent work.

During the public hearing, the judge explained that higher remuneration would mainly depend upon contractual freedom and negotiating skills, supposedly more pronounced in men. The judge recognised that maternity and childcare periods would often lead to shorter periods of employment for women, resulting in less seniority and thus lower wages. In its opinion, however, these factors as such do not constitute discrimination.

The procedure is now pending before the State Labour Court of Berlin-Brandenburg.

The Court emphasised the idea that there is no legal rule providing for the same pay for the same or equivalent work, neither in German law in general nor under Article 157 TFEU, while at the same time ignoring (or contributing to) discriminatory structures. The claimant was performing a defined task and received a fixed monthly salary which challenges the idea that she was a freelancer working under totally different circumstances compared to her male colleagues with a permanent working contract. Collective agreements are not beyond judicial review and must comply with constitutional and EU law. Moreover, the Court put special emphasis on the lack of seniority, while the judge stated that maternity and childcare periods severely diminish the chances for women to achieve positions of seniority.

35 Germany, Section 1353 Paragraph 1 sentence 1 of the Civil Code as amended, Bt. Drs. 18/6665; 18/12989.

Several organisations, among them the German Women Lawyers' Association, strongly criticised the decision and the judicial remarks. They pointed out that the Court should have focused on the equivalence of the actual work performed and the working conditions as well as the comparability of qualifications, not on seniority and disputable collective agreements.

Internet sources:
Press release by the Labour Court of Berlin:
http://www.berlin.de/gerichte/arbeitsgericht/presse/pressemitteilungen/2017/pressemitteilung.556652.php.
Newspaper report on the oral hearing and the public announcement of the decision:
http://www.berliner-zeitung.de/kultur/fall-birte-meier-darum-darf-das-zdf-eine-frau-schlechter-bezahlen-als-maenner-25660522.
Press release by the German Women Lawyers' Association:
https://www.djb.de/Kom-u-AS/K1/pm17-07/.

Religion or belief

Admissibility of headscarf in the courtroom by legal trainee

The claimant is pursuing the second part of legal education following her university degree in law. This implies working as a trainee (*Referendar/Referendarin*) as a public employee serving in various legal positions including courts, prosecution and administration. As such, she was requested to take on certain official functions, including for instance the questioning of parties to court proceedings under the supervision of a judge. The claimant wears a headscarf due to her Muslim belief, but the administration ordered that she could not fulfil any functions in which she visibly displays her religious belief to parties of the proceedings. The exclusion from such functions shall not have negative consequences for the evaluation of her performance and shall be compensated in this respect by other achievements. The complainant asked for a temporary injunction to allow her to fully participate in the trainee programme.[36] The exclusion from parts of it would, she argued, violate her rights to personal identity, freedom of religion, and freedom of profession, and would discriminate against her.

The Federal German Constitutional Court did not grant a temporary injunction, arguing that the possible violations of the claimant's fundamental rights were limited.[37] Granting her the possibility to fulfil judicial functions wearing a headscarf would, in contrast, endanger state neutrality and the freedom of religion of the parties to the court proceedings.

A final decision on the merits of the case will follow, although the Court already emphasised the importance of the religious neutrality of the State, especially of the judiciary, and the freedom of parties not to be confronted with religious manifestations of members of the judiciary. This raises the question whether the Court will follow a stricter line of argument than in its recent case law on the permissibility of headscarves of teachers.[38]

Internet source:
http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/06/rk20170627_2bvr133317.html.

36 A temporary injunction, if granted, is not based on the merits of the case but on the possible negative consequences of granting or not granting it.
37 Germany, Federal Constitutional Court, Order of 27 June 2017, No. 2 BvR 1333/17.
38 See for instance Federal German Constitutional Court, BVerfGE 138, 296. See also European equality law review, Issue 2017/1, p. 91.

Greece

EL

CASE LAW

Elimination of upper age limit in call for applications of a Municipal Benefit Enterprise

Age

On 23 May 2017, the Greek Ombudsman published its successful intervention as an equality body in a case that concerned age discrimination in a call for applications of a Municipal Benefit Enterprise. The referral to the Ombudsman was submitted in 2016, challenging an upper age limit of 60 years to apply for a position as music instructor with the Benefit Enterprise of the Municipality of Oropos (KEDO).

The Ombudsman addressed KEDO and highlighted that the introduction of an upper age limit as a prerequisite for employment or work is in general prohibited, and can be permitted only by way of exception under specific and strict circumstances and following a clear and exact justification. It requested from KEDO to consider lifting this age limit, given that there is no specific reason requiring its preservation. KEDO immediately responded to the Ombudsman's intervention, re-evaluated the call for applications so as to eliminate the age limit and established a new one at 67 years, which is the upper retirement age.

Internet source:
https://www.synigoros.gr/?i=equality.el.imageworkpublic.429075.

Parental leave for judges

Gender

Article 53(2) of the Civil Servants' Code (CSC)[39] granted mothers and fathers a nine-month period of paid parental leave. However, according to Article 53(3) CSC, fathers whose wives do not work are not entitled to this leave, unless their wives are unable to look after the child due to illness or injury. A judge, Mr. Maistrellis, was refused parental leave on the basis of this provision as it also applied to judges. He brought an action for the annulment of the refusal before the Council of State (the Supreme Administrative Court; CS). This provision was repealed[40] following a letter of warning from the European Commission, but in the meantime it had already been reproduced in Paragraph 24 of Article 44 of the Judges' Code[41] in sex-neutral language: 'a judge whose spouse does not work is not entitled to parental leave unless his/her spouse is unable to look after the child due to illness or injury.' As the impugned refusal relied on Article 53(3) CSC, it was this provision, not the sex-neutral provision that was applicable to the case. The CS (judgment 1113/2014) referred the following question to the CJEU: whether Directives 96/34 and 2006/54 precluded national provisions such as that of Article 53(3) CSC. The CJEU in *Maistrellis*,[42] recalling that Directives 96/34 and 2006/54 provide for an 'individual right' to parental leave after the birth or adoption of a child, ruled that these Directives preclude national provisions, such as that of Article 53(3) CSC.

The CS judgment in compliance with this ruling (the 'post-Maistrellis CS judgment') is still pending. However, even after the CS upholds his action, Mr. Maistrellis may again be refused parental leave on the basis of the sex-neutral provision, which is still on the books. He will then have to resort to the CS once again, while his child will have exceeded the age up to which the leave is granted. He will thus not be able to enjoy his leave and both the CS and the CJEU judgments will have no *effet utile*.

39 Civil Servant' Code: Act 3528/2007, OJ A 26/09.02.2007.
40 By virtue of Article 6(2) of Act 4210/2013, OJ A 254/21.11.2013.
41 By virtue of Article 89 of Act 4055/2012, OJ A 51/12.03.2012.
42 CJEU *K. Maïstrellis* v. *Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton*, Case C-222/14, ECLI:EU:C:2015:473.

However, in a recent judgment the CS Plenum (2511/2016) declared the sex-neutral provision of the Judges' Code to be unconstitutional, and upheld an action by a female judge for the annulment of the refusal to grant her parental leave because her husband did not work. This ruling should have a positive impact on the pending 'post-Maistrellis CS judgment'.

Moreover, while it concerns the repealed sex discriminatory provision, not the sex-neutral one, the Maistrellis ruling contains a sentence with a broader scope: '[the Directive does] not in any way provide that one of the parents can be denied the right to parental leave, inter alia, because of the employment status of his or her spouse.'[43] This creates an obligation for the Greek State not to apply and to repeal the sex-neutral provision of the Judges' Code, and in any event to grant parental leave to Mr Maistrellis. Therefore, also by virtue of the above CS Plenum judgment, the post-Maistrellis CS judgment should uphold Mr Maistrellis' action. All state authorities have the obligation to implement EU law.[44] Therefore, the Ministry of Justice – which refused to grant leave to Mr Maistrellis – is, in compliance with the CJEU Maistrellis ruling, under an obligation to grant him leave without waiting for the post-Maistrellis CS judgment.

Internet source:
Full text of CS 2511/2016, with a comment by A. Argyros (in Greek), available at: http://www.lawnet.gr/news/ste-25112016-plkeimeno-oi-dikastikoi-leitourgoi-dikaiountai-tin-goniki-adeia-anatrofis-teknou-sx-aarguros-36453.html?ref=RSS, accessed 12 September 2017.

POLICY DEVELOPMENT

Ombudsman's Annual Report 2016

All grounds

In March 2017, the Ombudsman, which is the national equality body, published its Annual Report 2016, describing its work in the public sector.[45] In 2016, the Ombudsman examined 219 cases of alleged unequal treatment, 48 of which were considered beyond its jurisdiction, because they were insubstantial or because the applicants failed to provide the necessary information for further investigation. The Ombudsman found that no unequal treatment had taken place in 24 cases, while some violation was found in 56 cases. The Ombudsman succeeded in convincing the administrative authorities to comply in 37 of those cases, while the administration refused to comply in 19 cases.[46] The remaining 91 cases were still being examined. Overall, 60 cases were related to employment, 55 to education and 104 to the supply of goods, services and housing.

The report pays specific attention to several issues, including the application of anti-discrimination law to the system of benefits for the long-term unemployed and Roma housing. In the field of education, the Ombudsman continued to investigate a number of cases concerning the best integration of Roma children into the school environment. When investigating a series of complaints, the Ombudsman visited a large number of settlements and schools throughout the country, cooperating with authorities and services which deal with this issue. The Ombudsman referred to the Ministry of Education, highlighting the particular consideration that should be taken with regard to the specificities of this group and the factors which prevent their regular school attendance. As regards disability in education, the Ombudsman received fewer complaints than in previous years regarding the lack of resources to ensure the functioning of 'special education' and the support for students with special educational needs.

43 CJEU *Maïstrellis*, Paragraphs 29, 31 and 36 (emphasis added).
44 See the leading CJEU Case 14/83 *S. von Colson and E. Kamann* [1984] ECR I-1891, Paragraph 26.
45 Until 7 December 2016, the Ombudsman's mandate covered only the public sector. It was then extended to cover the private sector as well, through the adoption of the new anti-discrimination law, Act 4443/2016.
46 When the administration refuses to comply, the Ombudsman has no authority to impose its opinion and can only include this refusal in its Report.

In 2016, the Ombudsman also received a significant number of complaints concerning the same issue: the provision of an upper age limit (40) for filling positions based on a priority listing in the permanent staff of the Distributors Branch at the Hellenic Post Office. The Ombudsman stated that the age limit would only be justified if no other, less severe means existed to attain the organisational objective, while it should be clear that the age limit constitutes a genuine and determining requirement for the exercise of that profession.

Internet source:
https://www.synigoros.gr/resources/ee2016-14-diakriseis.pdf.

Hungary

CASE LAW

Racial or ethnic origin

Application of the rules of evidence in a situation when the victim of discrimination is alone

A Roma woman filed a complaint against a local hospital, alleging that she had been harassed when admitted to the hospital to give birth. While in labour, she was told to stop shouting or else a midwife would slap her and put a pillow over her face, while the gynaecologist threatened to call for a psychiatrist who might place her child in care, in which case she would not receive a family allowance, and saying 'you, Gypsies, only give birth for the money'. When receiving the complaint from the Equal Treatment Authority, the hospital management ordered an internal investigation, forwarding the complaint to the concerned doctor. The doctor was in charge of the investigation and produced a detailed letter which refuted the complaint and was signed by all the witnesses who were present (the gynaecologist, a resident, two midwives and a cleaner), on behalf of the hospital. The hospital management submitted this letter as their defence along with a brief statement. In the course of the Authority's investigation, the hospital's witnesses were heard not only in relation to the incident, but also with regard to the circumstances of the internal investigation.

The Equal Treatment Authority concluded that there had been harassment based on affiliation with a national minority and colour.[47] It examined whether the gynaecologist had actually made the impugned statement, and if so, whether it constituted harassment. Although the five hospital workers denied the complaint, the Authority accepted that the statement had been made. It based this conclusion on the fact that the victim had consistently sought a remedy for several months, her consistent and realistic description of the event and the fact that she was able to clearly distinguish between the hospital workers who violated her rights and who did not. The Authority also took into account the fact that the internal investigation was not led by an independent person or body, but the concerned physician himself, and that the witnesses were not heard separately, but wrote a joint letter. Considering that the impugned statement had been made, the Authority concluded that harassment could easily be established, as the statement was definitely capable of creating a humiliating environment for the complainant whose dignity was violated. The Authority ordered that its decision be published on the hospital's website for 60 days and imposed a fine of approximately EUR 1,600 (HUF 500,000). The hospital did not request a judicial review of the decision.

Internet source:
http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/03eac3ef1bb0b0e3cfa176a8a660b20b/349_2016.pdf.

47 Hungary, Equal Treatment Authority, Decision No. EBH/349/2016, December 2016 (reported on 4 February 2017).

Constitutional Court abolishes municipal decree on burka ban

Religion or belief

The mayor of Ásotthalom (a village on the Southern border of Hungary) is a well-known right-wing extremist. On 23 November 2016, the municipal council adopted a decree to amend the 'Rules of Communal Cohabitation'. The amendment reads as follows:

It is forbidden in public premises to

a) perform calls for muezzin, because it is capable of disturbing public peace and causing fear, alarm and indignation among local residents;

b) wear burqas, chadris, niqabs covering the whole body, head and the whole face or a part of it as well as bathing suits covering the whole body, including the so-called burkini;

c) carry out any type of propaganda activity that presents marriage as anything different from a life partnership between a man and a woman as stipulated in the Fundamental Law, including any type of activity in public premises, with special regard to performances, demonstrations, billboards, leaflets and audio-advertisements;

d) carry out any type of propaganda activity that violates the Fundamental Law by acknowledging as the basis of a family, any relation other than marriage or the relationship between parent and child, including any type of activity in public premises, with special regard to performances, demonstrations, billboards, leaflets and audio advertisements.

On 20 December, the Commissioner for Fundamental Rights (the Ombudsman) filed a petition with the Constitutional Court, asking that the amendment be abolished because it violated several provisions of the Fundamental Law. First, it severely restricted fundamental rights although only Acts of Parliament may do so. Furthermore, the Ombudsman argued that the amendment violated the requirement of equal treatment by only banning the external manifestations of one particular religion, whereas no similar ban was prescribed for any other religion. Finally, the ban targeted one particular view in the debate on the concept of marriage and family, thereby interfering with the freedom of expression on a content basis.

In April 2017, the Constitutional Court declared the amendment null and void with retroactive effect.[48] It pointed out that while municipal decrees on the norms of communal cohabitation may inevitably concern fundamental rights, municipal councils are not authorised to adopt legislation (decrees) that would directly impact or limit the exercising of such rights. On this basis, the amendment passed by the Ásotthalom municipal council was unconstitutional.

Three of the 14 judges presented a concurring opinion to the decision, emphasising – 'with a view to the problems stemming from the obvious threats caused by the Islamisation of Europe' – that while they agree with the decision on a procedural basis, this should not be interpreted as excluding the possibility of restricting the practising of the Muslim religion through Acts of Parliament. The Court avoided the substantive issues raised by the Ombudsman's petition (freedom of religion and expression, non-discrimination, etc.), concentrating only on the formal, procedural issues.

Internet source:
http://public.mkab.hu/dev/dontesek.nsf/0/47B426E665B28347C125808E00439F1D?OpenDocument.
http://alkotmanybirosag.hu/kozlemeny/alaptorveny-ellenes-a-muszlim-vallas-gyakorlasat-valamint-a-hazassag-es-a-csalad-fogalmarol-szolo-velemenyt-korlatozo-asotthalmi-szabalyozas/.

48 Hungary, Constitutional Court, Decision No. II/2034/2016 of 11 April 2017.

POLICY DEVELOPMENT

A new wave of misogynist and anti-gender policies endangers the ratification of the Istanbul Convention

Gender

On 21 May 2017, two political statements from right-wing political leaders made it clear that the main right-wing party alliance 'FIDESZ-KDNP' (Fiatal Demokraták Szövetsége – Kereszténydemokrata Néppárt: Alliance of Young Democrats – Christian Democratic People's Party) has no intention to ratify the Council of Europe Convention on preventing and combating violence against women and domestic violence. The leader of the youth wing of KDNP stated that current legislation in Hungary protects women to a sufficient extent; therefore there is no need to ratify the Convention. He also stated that the ratification would politically be a 'very precarious' measure. Szilard Nemeth, the vice president of the FIDESZ, further explained that: 'The Istanbul Convention is not about the equality of women, nor is it about the rights of women, rather it is 'very sneaky' gender politics.' This statement is a clear departure from and contradicts the declaration of the vice president of the parliamentary justice committee who said in February 2017, that the Hungarian legislator is working on establishing the legislative background for the ratification of the Istanbul Convention.

As evidenced by recent public statements, the current Hungarian political establishment seems reluctant to introduce any policy measures encouraging women to enter the labour market. Until recently the FIDESZ, at least in rhetoric, did not openly refuse the ratification of the Convention. Labelling the Istanbul Convention as a measure of 'worrying gender politics' reveals, however, that the political leadership has no intention to ratify the Istanbul Convention.

Internet sources:
https://444.hu/2017/04/04/nougyekkel-nem-foglalkozom-mondta-orban-a-washingtoni-nagykovet-kirugasarol.
http://www.fidesz.hu/hirek/2017-02-01/a-fidesz-tamogatja-az-isztambuli-egyezmeny-kihirdeteset/.
http://hirtv.hu/ahirtvhirei/demonizalja-a-noket-vedo-egyezmenyt-nemeth-szilard-1395549.
http://hirtv.hu/ahirtvhirei/nemeth-aki-teleszuli-aze-a-vilag-1395766.

Ireland

IE

LEGISLATIVE DEVELOPMENT

New draft Domestic Violence Bill 2017

Gender

The Domestic Violence Bill 2017 repeals earlier legislation and consolidates matters with respect to domestic violence. The Bill includes provisions which must be enacted in order for Ireland to be able to ratify the Council of Europe Convention ('the Istanbul Convention') on preventing and combating violence against women and domestic violence. The Convention was signed by Ireland in November 2015. The proposed legislation re-enacts various orders to include safety orders, barring orders (there will no longer be a co-habitation requirement of six months for interim barring orders and also the new provision of emergency barring orders), and protection orders (an order prior to the determination of an application for a safety order or a barring order). All orders will be expanded to impose a prohibition on electronic communication. There is to be a new provision providing for emergency barring orders. The Minister for Justice and Equality stated that this provision is 'transformational' and 'will put life and limb ahead of property and allow a person in a dangerous situation to get a temporary barring order ....' A person can apply for an emergency barring order when he or she has lived in an intimate and committed relationship

with the perpetrator without being their spouse or civil partner or where he or she is the parent of an adult perpetrator. The Minister stated that '[t]he most significant element of this new provision is that a person can apply for an emergency barring order even if they have no legal or beneficial interest in the place concerned or if they have an interest which is less than that of the person against whom the order is sought. Emergency barring orders will only be granted where there are reasonable grounds to believe that a person is at immediate risk of harm.' Such order will be granted without notice to the perpetrator and will take effect for up to eight working days. Once such an order has expired, another order cannot be made for one month unless the court is satisfied that there are exceptional circumstances. This is to ensure that such an order is a temporary measure only. If there are extraordinary circumstances in the case, it will be up to the court to decide whether to grant another such order.

There are also proposed provisions in respect of forced marriage. Again, this provision is to enable Ireland to ratify the Istanbul Convention. It will be an offence to use violence, threats, undue influence, duress or coercion to cause another person to marry. It will be an offence to remove people from the State with the intention that they will be forced into marriage abroad. There is also a provision for children to give evidence by a televisual link in civil proceedings; furthermore, the views of the child are to be taken into account when they are the subject of an order.

The Bill also provides that the Courts Service will have to provide information on domestic violence support services to victims in order to comply with Directive 2012/29/EU.

Unusually, the draft legislation was introduced in the *Seanad* (the upper house) rather than the *Dáil* (the lower house). This approach is more usually considered when legislation is urgent. The draft legislation, however, protects the property rights of the owner of property over which there may be a barring order, an interim barring order or an emergency barring order.

The Bill is at committee stage in the *Seanad* and will proceed in due course to the *Dáil*. It is difficult to establish a time frame for the passage of this legislation through Parliament. There may be a number of amendments to the draft legislation.

Internet sources:
http://www.oireachtas.ie/viewdoc.asp?DocID=34491&&CatID=59. Accessed 26 May 2017.
http://www.justice.ie/en/JELR/Pages/PR17000033. Accessed 26 May 2017.

CASE LAW

Access to housing

Gender

The complainant alleged that she was discriminated against by reason of her civil and family status by the respondent, a letting agent, in that she was treated unlawfully in the provision of goods/services in that she was refused accommodation. On 17 April 2016, the complainant emailed the respondent asking to view a particular two-bedroom apartment. She was advised that the apartment was only suitable for two tenants. She replied stating that she was a single mother with one toddler and that she was looking to rent under the social welfare allowance scheme. This means that the rent is paid directly to the landlord's bank account by Dublin City Council. She asked if this was agreeable. The letting agent replied that the landlord was agreeable to being paid under the social welfare scheme but that the landlord was looking for a couple to let the apartment to. The complainant did not pursue this apartment. She took this as a one-parent family being refused access to housing. The complainant did not consider that the matter had anything to do with affordability and is now living in an apartment with the same monthly rental.

The respondent is a well-established licensed letting agent. The allegation that the complainant was refused the accommodation because she is a single mother was denied, and the agent argued that there was no intention to discriminate. The agent stated that from a practical and economic view that it is better to have two people to rent but that if a single person can show that they can afford the rent that is fine. The respondent stated that the major concern is affordability and profile.

The adjudication officer, in his decision dated 5 April 2017, considered that the complainant had a prima facie case arising from the email of 18 April 2016 where it was stated that 'the landlord is looking for a couple here I'm afraid, apologies on this' as prohibited conduct that had taken place. The adjudication officer considered that the word 'apologies' brought closure to the communication and that it would appear that the complainant, a single mother, was treated less favourably than a couple would have been in the circumstances. The adjudication officer considered that there was discrimination on the civil status ground and awarded the complainant EUR 3 000, the equivalent of two months' rent in compensation for the effects of discriminatory conduct.

This case resulted in a considerable amount of publicity when it was published. The decision that there was discrimination on the civil status ground is clear. The adjudication officer did not consider that there was a prima facie case of discrimination on the family status ground on the basis that she was a single mother.

Internet source:
https://www.workplacerelations.ie/en/Cases/2017/April/ADJ-00004060.html. Accessed 31 May 2017.

Publication of decisions with the names of the parties

All grounds

Prior to the commencement of the Workplace Relations Act 2015, the Equality Tribunal issued the names of the parties to decisions under the Employment Equality Act 1998 (as amended), the Equal Status Act 2000 (as amended) and the Pensions Act 1990 (as amended) unless there were matters of a personal nature contained therein (e.g. sexual harassment).

The Irish Human Rights and Equality Commission ('the IHREC') has published a useful Information Note on the operation of the Workplace Relations Act 2015. Rule 7 of the Procedures of the WRC states 'After the completion of the investigation, a written decision will issue within 28 working days or as soon as is practicable. All parties and witnesses will be anonymised and all decisions will be published on the website www.workplacerelations.ie.' The IHREC states that this rule is not applicable to the claims under the Employment Equality Acts and the Equal Status Acts.

The Workplace Relations Act 2015 is complicated legislation and it amends all employment legislation concerning practice and procedure. There is a general provision in section 41(14) that decisions shall be published on the internet and that the names of the parties should not be identified. Claims for statutory unfair dismissal etc. would fall within the scope of this section. However, proceedings under the Employment Equality Acts and the Equal Status Acts do not fall within the scope of this subsection. Therefore, this part of Rule 7 in the Procedures is incorrect. However, there remains a discretion with the adjudicator as to whether the names of the parties will be stated. Therefore, the parties to a claim can make an application to the adjudicator as regards the anonymisation of the names of the parties. Therefore, the original system effectively remains. The Note states that an adjudication officer has discretion concerning the publication of the names of the parties and must take into account the requirements of constitutional justice and that remedies for breaches of these Acts are effective, dissuasive and proportionate.

Whilst not mentioned in the Note, it would appear that claims in respect of a pensions equality claim under the Pensions Acts should also fall within the exception as set out in the Note, i.e. that s. 41(14) does not apply.

There has been considerable criticism of the Act of 2015 in that, inter alia, the decisions of the WRC do not contain the names of the parties and thus there is no dissuasive effect in relation to discriminatory matters.

Internet sources:
https://www.ihrec.ie/blanket-anonymity-rules-not-apply-discrimination-decisions-irish-human-rights-equality-commission/. Accessed 5 May 2017.
http://www.lrc.ie/en/Publications_Forms/. Accessed 19 May 2017.
http://www.irishstatutebook.ie/. Accessed 19 May 2017.

POLICY DEVELOPMENT

Irish State recognises Traveller ethnicity

Racial or ethnic origin

On 1 March 2017, the Taoiseach (Prime Minister) announced that the State formally recognises Travellers as an ethnic group. A report issued by the Irish Parliament's Joint Committee on Justice and Equality in January 2017 had recommended such a move at the earliest date possible, acknowledging that several international human rights bodies were critical of Ireland's stance on the issue. Traveller rights organisations have welcomed the development, as has the national equality body, the Irish Human Rights and Equality Commission.

According to the Taoiseach's statement, the policy change will 'create no new individual, constitutional or financial rights' but 'could have a transformative effect on relations between Travellers and wider society'. He further reported that a national Traveller and Roma inclusion strategy would be published shortly.

Irish laws that implement the Racial Equality Directive provide for a distinct Traveller community ground in addition to a race ground, which covers 'race, colour, nationality or ethnic or national origins'. In several court decisions, it has been found that Travellers could not invoke the race ground either because there was inadequate evidence that they constitute an ethnic group,[49] or because it was considered that no additional protection would be afforded by advancing a complaint on both grounds.[50] The recent recognition by the State clarifies that Travellers can also lodge discrimination complaints under the race ground. It should also ensure that domestic courts and tribunals take account of the Race Directive in all cases concerning Traveller rights that fall within its material scope.

Internet sources:
http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017030100051?opendocument.
http://www.oireachtas.ie/parliament/media/committees/justice/Report-on-the-Recognition-of-Traveller-Ethnicity-20-01-17.pdf.

49 E.g. *Mrs X (on behalf of her son, Mr Y) v A Post-Primary School*, DEC-S2010-009, at Paragraph 4.17, https://www.workplacerelations.ie/en/Cases/2010/February/DEC-S2010-009-Full-Case-Report.html; *Mrs K (on behalf of her son) v A Primary School*, DEC-S2011-003, at Paragraph 4.15, https://www.workplacerelations.ie/en/Cases/2011/January/DEC-S2011-003-Full-Case-Report.html.

50 E.g. *Mrs Z (on behalf of her three children) v A National School*, DEC-S2010-055, at Paragraph 4.9, http://www.lrc.ie/en/Cases/2010/December/DEC-S2010-055-Full-Case-Report.html.

Iceland

CASE LAW

Man discriminated against in access to employment

The Gender Equality Complaints Committee (hereafter the Committee) found the District Commissioner to have violated Article 26 (1) of the Gender Equality Act No. 10/2008 which prohibits an employer from discriminating on the ground of gender in access to employment.

The Office of the District Commissioner advertised three vacant posts in April 2016 in the fields of reception, general office work and assistance with legal matters. There were 54 applicants, seven were invited for job interviews, of which two were male and five female. The male claimant was not among those called for an interview. Out of the seven interviewees, two men and two women were offered the jobs and all declined. The three remaining women were offered the jobs and the man received an email where he was informed of the decision. He complained to the Gender Equality Complaints Committee when he found out that one of the women who had been hired was his fellow student at the law faculty, pointing out that there were numerous more women working for the District Commissioner and that he was as equally qualified as the women who had been hired.

The Committee delivered a ruling on 30 January 2017 finding the Reykjavík District Commissioner to have violated the Gender Equality Act No. 10/2008 (GEA hereafter) in appointing three women but ignoring a male applicant for the same job, whilst it was evident that he had more professional experience than the women who were hired.[51]

The Committee held that the District Commissioner had not been able to prove that other factors than gender had determined the decision when the women were hired.

The defendant assessed the qualifications of the applicants based on job experience in the area of service, where applicants had had direct contact with the receivers or customers. The Committee held that the man's application showed more experience than that of one of the female applicants who had been invited for an interview. This comparison ought to have given the defendant an incentive to interview the man who was not given an opportunity to further prove his qualifications. The reasoning of the defendant that the claimant had not revealed a special interest in getting the job ought to have been checked in an interview as they did with the female applicants. The Committee ruled that the District Commissioner had violated Article 26, paragraph 1, which prohibits employers from discriminating on the ground of gender when offering employment.

Internet sources:
http://www.urskurdir.is/Felagsmala/KaerunefndJafnrettismala/2017/01/30/mal-nr-4-2016-1.
http://www.ruv.is/frett/syslumadur-snidgekk-karl-og-braut-log.

51 Iceland, Gender Equality Complaints Committee, Case No. 4/2016.

IT

Italy

Gender

LEGISLATIVE DEVELOPMENT

New rules on self-employment and smart working

Decree Law N. 81/2017 on Self-employment and Smart Working was issued on 22 May 2017. The law proposes changes that could help to reconcile work and family life. It introduces changes to further improve the maternal and paternal rights of autonomous workers, and changes that provide for an opportunity to have more flexible working arrangements which can be particularly family friendly.

The first 14 articles apply to all 'autonomous' (i.e. self-employed) workers, including professionals (but not to entrepreneurs and small entrepreneurs).

The new provisions aim to strengthen the rights and the welfare of people in this category for which the Government has also been requested to reduce the requirements in order to have access to maternity rights. Some improvements involve the protection of motherhood and fatherhood for those workers who are registered in the so-called *gestione separata*, which is a compulsory pension scheme covering quasi-independent workers and similar categories (including professionals in those categories which do not have their own pension schemes).

Under Article 8 paragraph 7 of the Law, autonomous workers will be entitled to six months of paid parental leave, which may be taken until the child has reached the age of three years. Moreover, Article 13 provides an allowance for maternity leave irrespective of the actual absence from work, as well as what is already provided for professionals. These provisions are also enforceable in cases of adoption or foster care.

Article 14 states that in case of pregnancy autonomous workers engaged in a continuous business activity will have the right to suspend their working relationship with their customer for a maximum period of 150 days until their child reaches the age of one year. During this period, the worker can be substituted by a colleague or by her business partner if they have one. However, the customer reserves the right to object to this.

Articles 18 to 23 provide for the so-called smart-working rules. Working activities may be performed in a more flexible way in terms of both location and working hours.

Law N. 81/2017, which applies to both the private and public sectors, actually sets out a very soft framework and is mainly aimed at boosting the widespread adoption of smart working. The explicit goals of the new provisions are that of increasing productivity and furthering a reconciliation of work with family life.

The extension of parental leave to self-employed working fathers is an important step forward. However, the right to suspend the working relationship in the case of pregnancy, and the right of substitution cannot be enforced exactly as in the working relationship. In fact, the customer can refuse the postponement or the substitution.

As regards the second part of Law N. 81/2017, we can see that, although recent experimental smart-working initiatives carried out by multinational companies have provided good results in terms of productivity and work-life balance, the pattern chosen by the legislators gives rise to some doubts. Indeed, this different way of organising working activity, where the results are crucial, is allowed for all kinds of jobs, with no percentage limits on total working time, and the arrangements are mainly

governed by an individual agreement. There seems to be a risk that such soft legislation will not prevent smart working from producing an effect which is opposite to that of achieving a work-life balance for workers in less secure positions – of whom women still make up the majority.

Internet source:
Law N. 81 of 22 May 2017, published on OJ N. 135 of 13 June 2017:
http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2017-06-13&atto.codiceRedazionale=17G00096&currentPage=1, accessed 14 June 2017.

CASE LAW

Supreme Court ruling on rules applicable to employment contracts with disabled workers

Disability

The claimant had a disability and worked for a private employer on a short-term contract signed in accordance with a special law aiming to foster the integration of persons with a disability in the job market.[52] The legislation applicable to short-term contracts requires an express reason to conclude a contract of a limited length, but the employer was of the understanding that the law fostering employment of disabled persons had a special nature compared to the general legislative decree on short-term contracts,[53] and had not provided any such specific reasons. When the claimant's contract ended, the employer aimed to conclude new short-term contracts with other disabled workers for the same job, with the practical effect of excluding workers with a disability from the possibility to conclude long-term contracts. The claimant brought the case to court, and on appeal it reached the Supreme Court.

According to the Supreme Court, there was no reason to apply implicitly a derogation to the general legislation on regulating short-term contracts, as this would amount to discrimination against workers with a disability in breach of Directive 2000/78/EC and the UNCRPD. The Supreme Court did not explore the nature of the discrimination but examined the potential application of 'the duty to provide reasonable accommodation' for workers with a disability. According to the Court, this duty aims to respect the principle of equal treatment and not to allow derogations to the application of a law on fixed-term contracts for workers with a disability. The Supreme Court found that the conduct of the employer had been discriminatory and ordered it to provide for a specific reason to conclude fixed-term contracts, also when they are concluded with persons with a disability.[54]

Internet source:
http://www.europeanrights.eu/public/sentenze/Corte_di_Cassazione_17867_discriminazione_contratti_a_termine_disabilit.pdf.

Dismissal found to be direct sex discrimination

Gender

A working mother was dismissed after she refused to relocate to another workplace (more than 300km from the original workplace) upon her return from parental leave. The request to relocate from the employer came once the period of protection granted by Article 56 paragraph 1 of Decree No. 151/2001 had elapsed (this article provides for a working mother's right to return to the same workplace and job at the end of her maternity leave and to maintain this until the child is one year old).

The Court of Cassation's judgment No. 3052 of 6 February 2017 deemed that the dismissal of the working mother, based on her refusal to be transferred, did not relate to objective organisational reasons, but in fact concealed discriminatory treatment. The Court declared the worker's transfer from Florence

52 Italy, Law No. 68/1999.
53 Italy, Legislative Decree No. 368/2001.
54 Supreme Court Judgment, No. 17867/2016 of 9 September 2016.

to Milan to be null and void, as it was specifically intended to secure the working mother's resignation/ dismissal. In fact, the employer permanently hired another worker who had substituted the working mother during her parental leave. In accordance with the judgment, this showed that the transfer was actually intended to make her redundant. As a consequence, the judges deemed the dismissal, which was based on the worker's refusal to move to Milan, to be discriminatory.

In this case, the special protection of maternity was no longer enforceable, but the court demonstrated particular sensitivity regarding the direct discrimination issues. Indeed, the judges firmly rejected all objections linked to the organisational needs of the firm by underlining the employer's real plan, which was clearly proved by the substitution of the working mother by a person hired on a permanent basis.

Internet source:
Court of Cassation judgment No. 3052 of 6 February 2017, published in Diritto & Giustizia 2017, and www.lanuovaproceduracivile.com/wp-content/uploads/2017/02/3052.doc, accessed 12 March 2017.

Sexual harassment and the burden of proof

Gender

A case of discriminatory dismissal[55] was recently heard by the Court of Cassation which ascertained that sexual harassment by the employer had taken place. The victims were two women employed under precarious contracts: one was dismissed and the other resigned after refusing the employer's advances.

The Court of Cassation's judgment finally confirmed the preceding two decisions (of 8 September 2012 by the Tribunal of Pistoia, and of 24 October 2013 by the Court of Appeal of Florence) where the judges determined that there had been sexual harassment and ordered the employer to refund non-patrimonial damages to both the two victims and to the Regional Equality Adviser, who pursued an independent action for gender discrimination.

In particular, the claimant appealed against the enforcement of the partial reversal of the burden of proof, provided for under Article 40 of Decree No. 198/2006. The Court rejected this objection and affirmed that proof of sexual harassment could be provided by the testimony of witnesses reporting similar sexual harassment by the employer at the beginning of their working relationship, as corroborated by statistical proof consisting of a high number of dismissals with no apparent reason among young female workers just after their recruitment. In fact, according to the judges, these elements of fact were a suitable basis for a presumption of the existence of the discriminatory behaviour and, as a consequence, for considering it to be up to the defendant to demonstrate that there had been no discrimination.

The most interesting feature of the reasoning for this judgment is the justification of the extension of the partial reversal of the burden of proof to cases of sexual harassment, since Article 26 of Decree No. 198/2006, which states that 'any less favourable treatment based on a worker's rejection of or submission to harassment on the ground of sex or sexual harassment is regarded as discrimination,' does not expressly rule on this matter.
The Court confirmed this wide interpretation, stating that any case concerning the equal treatment of two groups involves a 'ternary' assessment, where a comparison is made of the equal or different treatment received by the two groups. Following EC directives and case law developments, especially referring to C303-06 Coleman, the court ruled that in cases of sexual harassment the comparator can be found in a negative differential treatment, that is the non-existence of male victims of sexual harassment, which has a presumptive content whereby a percentage of female workers experience this behaviour.

Internet source:
Cass.sez.lav. n.2386 of 15 November 2016, published in Massimario di Giustizia Civile 2017, and

55 Italy, Court of Cassation No. 2386 of 15 November 2016, published in Massimario di Giustizia Civile 2017.

https://www.wikilabour.it/GetFile.aspx?File=%2FAAA_Segnalazioni%2F2016%2FCassazione%2FCassazione_2016_23286.pdf, accessed 12 March 2017.

National court decision on harassment by political party through hate speech

Racial or ethnic origin

The extreme-right political party Lega Nord and two of its local branches published several posters against 32 asylum seekers who were to be hosted in a reception centre in the city of Saronno. The posters contained negative and hateful messages qualifying the asylum seekers as '*clandestini*' ('illegals'). Two associations claimed that the publication of the posters amounted to harassment prohibited by antidiscrimination law, in particular by Article 2 of Legislative Decree No. 215/2003 and Article 43 of Legislative Decree No. 286/1998.

The Tribunal of Milan found that qualifying asylum seekers as 'illegals' amounts to discrimination.[56] According to the Tribunal the term '*clandestini*' means those who enter or stay irregularly in a country, against the laws in force on entry and treatment of aliens, while asylum seekers enjoy a fundamental right to seek protection because they fear persecution. Describing asylum seekers as 'clandestini' is both incorrect and insulting, as the term has gained a negative and insulting connotation, thus creating an intimidating and hostile environment. According to the Tribunal, invoking the freedom of expression protected by Article 21 of the Italian Constitution does not make the behaviour legitimate, since in the balance between human dignity and equality on the one hand, and freedom of expression on the other, it is the former that prevails as a fundamental principle of Italian law.

The Tribunal ordered the defendants to publish this decision in one local and one national newspaper. Moreover, they were ordered to pay EUR 5,000 as compensation for damages to each Association.

Internet source:
https://www.asgi.it/wp-content/uploads/2017/02/ASGI-NAGA-BORGHI-DAVIDE-2-TRIBUNALE-DI-MILANO-ORDINANZA-DEL-22.2.2017.pdf.

Supreme Court decisions on collective discrimination and legal standing of associations

Racial or ethnic origin

Two related cases were brought before the Supreme Court, both concerning rejections by the National Social Security Institute (INPS) of third-country nationals' applications for a benefit for households having at least three minor children. In both cases, the third-country nationals claimed that the rejection amounted to discrimination, in breach of Article 11 of Directive 2003/109/EC on the right to equal treatment of long-term residents. The Tribunal in first instance and the Court of Appeal in second instance upheld the complaints but INPS appealed to the Supreme Court. The actions were brought to Court by the individual parties and by two associations, ASGI and APN. INPS contested their legal standing because while they are allowed to act against discrimination on ground of race and ethnic origin (Legislative Decree No. 215/2003), there is no express provision also allowing them to act against discrimination on the ground of nationality. Moreover, INPS contested that this was a case of collective discrimination, because the exclusion of third-country nationals was provided for by an administrative act, with only potential discriminatory effects.

The Supreme Court found firstly that the two associations had legal standing to act against discrimination on ground of nationality, notwithstanding the lack of express provisions. In this regard, the Court held that there is a general approach in favour of the extension of legal standing of associations when there is a case of discrimination. It therefore interpreted the provisions on discrimination on grounds of nationality in accordance with those regulating discrimination on racial or ethnic origin. Secondly, the Supreme Court held that a collective action against discrimination may also be brought against an administrative act

56 Tribunal of Milan, Decision No. R.G. 47117/2016 of 22 February 2017.

that has a dissuasive effect on municipalities and on physical persons potentially affected by the act, persuaded not to apply for the benefit.

Moreover, the Court noted that Directive 2003/109 provides for the right to equal treatment of long-term aliens without providing for remedies. Therefore, national remedies apply (according to Articles 19 and 47 TEU) and must comply with the principles of equivalence and effectiveness. According to the principle of equivalence, civil action against discrimination provided for by Legislative Decree No. 215/2003 (implementing the Racial Equality Directive) and Article 28 of Legislative Decree No. 150/2011 on civil procedural rules are to be applied, thus extending the right to legal standing to associations also on when claiming discrimination on the ground of nationality.[57]

Internet sources:
https://www.asgi.it/wp-content/uploads/2017/05/Corte_di_Cassazione__sez_lavoro__sentenza__n_11165_del__8517__pres_D%E2%80%99Antonio__est_Riverso__INPS_avv_Coretti_Stumpo_e_Triolo_c_ASGI__APN_.pdf.
https://www.asgi.it/wp-content/uploads/2017/05/Corte_di_Cassazione__sez_lavoro__sentenza__n_11166_del__8517__pres_D%E2%80%99Antonio__est_Riverso__INPS_avv_Coretti_Stumpo_e_Triolo_c_ASGI__APN_.pdf.

LI Liechtenstein

LEGISLATIVE DEVELOPMENT

The amended Gender Equality Act changes the former Office for Equal Opportunities into the Office for Social Services

All grounds

On 1 January 2017, a new law entered into force changing the Office for Equal Opportunities, which dealt with equal opportunities issues, into the Office for Social Services. Articles 18 and 19 GLG (Gender Equality Act) provided for the Gender Equality Commission and the Office for Equal Opportunities, but Article 18 GLG was abolished and Article 19 GLG was amended by a new GLG on 23 December 2016 (LGBl. 2016/505). By abolishing Article 18 GLG, the institution of the Gender Equality Commission was also officially abolished. Pursuant to Article 19 (1) and (2) (d) GLG, it is committed to working towards legal and de facto gender equality. The Office for Social Services shall prepare opinions and participate in the process of the creation of law proposals insofar as this is relevant for gender issues. The competences of the Office for Social Services have not changed compared to those of the former Office for Equal Opportunities.

The former Article 19(3) GLG explicitly stated that the Office for Equal Opportunities would be independent with respect to its tasks of counselling public authorities and the private sector, engaging in public relations as well as conducting studies and making recommendations concerning appropriate measures for public authorities and the private sector. This Article 19(3) no longer exists regarding the Office for Social Services. Social dialogue is guaranteed in Article 19(2)(e) GLG where the Office for Social Services shall cooperate with public or private institutions; the government report explains that the term institutions shall also include the social partners. According to Article 19(2)(h) GLG the Office for Social Services will exchange information with the competent European institutions which are active with regard to protection against gender discrimination.

57 Italy, Supreme Court Decisions No. 11165/17 and No. 11166/17.

In addition to this, a new independent institution called the Association for Human Rights *(Verein für Menschenrechte, VMR)* has been established by law.[58] The creation of this institution followed repeated demands from many non-governmental organisations calling for a comprehensive national anti-discrimination law and further efforts to strengthen the credibility of Liechtenstein's human rights policies.[59] Its main task is to protect and promote human rights in Liechtenstein according to Article 4(1) of the Law on the VMR (VMRG). In addition, the Association works towards a comprehensive national anti-discrimination act. It brings together various tasks previously performed by different governmental offices and NGOs in Liechtenstein. Pursuant to Article 1(2) VMRG, the Association has also integrated the functions of the Ombudsperson's Office for Children and Young People.

Internet sources:
For more details see the website of the Office for Social Services with the new chapter 'equal opportunities' since January 2017: http://www.llv.li/#/117687/chancengleichheit, accessed 8 June 2017.
Legislation of Liechtenstein see: https://www.gesetze.li/ (authentic version since 1 January 2013), accessed 8 June 2017.

Parliament questions the Government on actions in the disability insurance system to prevent unequal treatment

Disability

In May 2017, Parliament questioned the Government on the accuracy of the criteria and procedures for people with disabilities requesting access to vocational training. The request was made by a Member of Parliament of the political party 'Freie Liste', based on their interviews among stakeholders and employees of the public disability insurance. The party had reached the conclusion that a person must have earned a certain level of income before the disability arises (approx. EUR 73 600) and must have a disability degree of at least 20 % to receive social benefits for vocational training. Thus, persons with a lower income are disadvantaged compared to high earners. This position was not supported by other political parties, and the Liechtenstein disability associations did not make any official statements in this context.

As a response, on 5 May 2017, the Government explained to Parliament that, based on the current legal definition in Article 43 of the Disability Act, a request for vocational training is verified based on various criteria. One of these criteria is the economically relevant income earned before the disability arose. But the Disability Act defines no threshold to be eligible for vocational training measures supported by the disability insurance. In addition, the Government made it clear that measures of the disability insurance to support vocational training for people with a disability degree of less than 20 % are also possible if a reasonable cost/benefit relation exists.

The legally defined criteria, as part of the standardised social security system, differentiate in a comprehensible manner. The Government made it clear that it is not the task of the disability insurance to improve a person's professional situation by vocational training. Thus, persons with no significant disability degree who can change their profession without specific vocational training measures, afterwards facing the same or only a little lower income, do not have a legal right of multiannual social security benefits from the disability insurance. In this case, this person might only receive reduced support to enable him/her to enter into new and reasonable job possibilities. Thus, the Government argued that there was no evidence of discrimination on any ground.

58 Liechtenstein, *Gesetz vom 4. November 2016 über den Verein für Menschenrechte in Liechtenstein (VMRG)*, LGBl. 2016, no. 504, available at: https://www.gesetze.li/lilexprod/lgsystpage2.jsp?formname=showlaw&lgblid=2016504000&version=1&search_text=Menschenrechte&search_loc=text&sel_lawtype=conso&compl_list=1&rechts_gebiet=0&menu=0&tablesel=0&observe_date=26.01.2017.

59 See *European equality law review*, Issue 2016/2, p. 114.

Internet source:
http://alt2.gmg.biz/pdf.aspx?xsl=http://www.landtag.li/config/anfrage2pdf.xslt&xml=http://www.landtag.li/files/temp/kleineanfrage_150561.xml

MT Malta

LEGISLATIVE DEVELOPMENT

New Co-habitation Act

Gender

Sexual orientation

The Act[60] is intended to regulate cohabitants by introducing rights and duties depending on the status of the cohabitants. It introduces three different forms of cohabitation; de facto cohabitation, cohabitation by means of a contract between the parties and cohabitation by means of a unilateral declaration.

The legislation regulates the status of cohabitants for both those of different sex as well as those of same-sex couples in order to protect vulnerable parties in any cohabiting arrangement. A couple in such a situation has rights such as next of kin rights in case of medical care, the right not to testify against each other in court, rights of succession, the right to remain in the couple's common home in the event that one of the partners dies and the right to be entitled to non-contributory social assistance in case the cohabitant is married but does not have his/her own income, the right to an invalidity pension, the right to a widow's pension, the right to a retirement pension, the right to the payment of an old-age pension, the right to unemployment benefit, and the right to maternity benefits and maternity leave benefit.

This law is based on the principle of unjustified enrichment. This is the case when one of the partners stays at home enabling the other partner to work. The law ensures that dependants who cohabit would not be left vulnerable in the case of separation, sickness or death.

Internet source:
http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=28387&l=1.

ME Montenegro

CASE LAW

Reduction of pension fees for mothers of three or more children

Gender

On 18 December 2016, the Government of Montenegro adopted the budget for 2017, in which the pensions for mothers of three and more children were reduced by 25 %. On 28 December 2016, the Law on Amendments to the Law on Social and Child Protection was adopted by the Parliament of Montenegro (Official Gazette of Montenegro No. 1/17). In April 2017, the Constitutional Court ruled on several applications questioning the constitutionality of the amended law, mainly claiming that the amended law was unconstitutional and that the acquired rights of the mothers could not be abolished with retroactive effect.

60 Malta, Act XV of 2017, adopted on 7 April 2017.

The Constitutional Court delivered its Decision on 19 April 2017, by which it abolished the lifelong pension for the mothers concerned. This resulted in many protests by mothers and a great deal of public criticism, as well as certain announcements that justice would be sought at the ECtHR in Strasbourg.

Consequently, the Law on the Execution of the Judgment of the Constitutional Court of Montenegro U-I No. 6/16 of 19 April 2017 was adopted by Parliament and it entered into effect on 30 June 2017.

The Law abolishes this pension for the mothers concerned, but it also lays down that temporary compensation will be provided for periods of different duration depending on the different situations in which mothers are in. Namely, according to Article 2, for beneficiaries who have terminated their employment in order to receive the lifelong pension amounts, the law establishes the right to monthly compensation, to the net amount of EUR 193 up to a maximum of EUR 336 per month, for a period of three or five years, or until they retire, depending on the circumstances related to their previous working status. This amount is increased when there have been contributions to pension and disability insurance. Also, the beneficiaries have the right to healthcare during the period in which they receive this compensation. According to Article 5, those beneficiaries whose right to the previous pension had been suspended in order to be able to apply for and make use of the lifelong pension amounts based on having a family of three or more children shall be able to continue exercising the right to the previous pension. According to Article 6, beneficiaries who were previously registered with the Employment Service as receiving a lifelong pension based on having a family of three or more children shall be able to reregister and obtain the rights of unemployed persons.

The Ministry of Labour and Social Welfare announced that the competent Centres for Social Work, which are in charge of the implementation of the law at the municipal level, can decide to suspend the execution of the decision to compensate mothers of three or more children by 12 July 2017.

The Law on the Execution of the Judgment of the Constitutional Court of Montenegro has respected the Court's decision to abolish lifelong pensions for the mothers concerned. Bearing in mind that the principles of restitution and compensation for the legitimate expectations of the mothers have been respected by the law, the protesting mothers' claims that their acquired rights have been violated and that there is no legal certainty are unfounded.

Internet sources:

https://www.slobodnaevropa.org/a/28586111.html.
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http://www.antenam.net/ekonomija/42877-mrss-majke-koje-su-primale-naknadu-od-17-jula-da-rjesavaju-status.

NL The Netherlands

LEGISLATIVE DEVELOPMENT

Ministerial Decree regarding a general duty to realise accessibility for persons with disabilities

Disability

As of 1 January 2017, the Disability Discrimination Act (DDA)[61] imposes a general, proactive duty on all those bound by it to 'at least gradually' realise accessibility for people with disabilities, unless this creates a disproportionate burden (Article 2a(1)).[62] The material scope of this provision is wide, covering employment as well as access to goods and services including housing and education. To further implement this provision, a Ministerial Decree was adopted and entered into force on 21 June 2017.[63]

The Decree clarifies that measures that are easy to achieve in terms of effort and cost shall be taken immediately while interpretation will still be needed to clarify the 'disproportionate burden' criterion with regard to the gradual realisation of accessibility through more complex and burdensome measures.

In addition, the Decree requires the Minister of Security and Justice to promote the development of action plans to realise general accessibility in all sectors covered by the DDA in cooperation with representative organisations of persons with disabilities (Article 2), to monitor the gradual realisation of general accessibility, and to report to Parliament on the progress made on a yearly basis.

The Ministerial Decree is an important step towards realising more general accessibility for persons with disabilities in addition to the duty to provide reasonable accommodation in individual cases.

Internet source:
http://wetten.overheid.nl/BWBR0039653/2017-06-21.

CASE LAW

No discrimination by denial of reasonable accommodation for pupil with Down Syndrome

Disability

A pupil with Down Syndrome had been attending a mainstream primary school for eight years, receiving individual assistance, when his development deteriorated and he started to show inappropriate behaviour such as yelling and running away. His support was adjusted, but this did not improve the situation. After some time, when the pupil's behaviour started affecting the functioning of the class, the school no longer considered it feasible to further accommodate his specific needs and referred him to the special education system.

The parents opposed this decision and brought a complaint to the Netherlands Institute of Human Rights (NIHR), the national equality body. They argued that notably due to the ratification by the Netherlands of the Convention on the Rights of Persons with Disabilities (CRPD), the national legislation should

61 Netherlands, Act of 3 April 2003 regarding the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease (*Wet van 3 april 2003 tot vaststelling van de Wet Gelijke Behandeling op grond van handicap of chronische ziekte*), Staatsblad 2003, 206.

62 The relevant amendment of the DDA was adopted in 2016 as part of the acts on ratification and implementation of the Convention on the Rights of Persons with Disabilities, but its entry into force was postponed to 1 January 2017. See https://zoek.officielebekendmakingen.nl/stb-2016-215.html.

63 Netherlands, Decree General accessibility for persons with a disability or chronic illness (*Besluit algemene toegankelijkheid voor personen met een handicap of chronische ziekte*) of 7 June 2017, Staatsblad 2017, 256 of 20 June 2017, available at: http://wetten.overheid.nl/BWBR0039653/2017-06-21.

be interpreted as requiring a stricter assessment of compliance with the duty to provide reasonable accommodation, as the CRPD requires inclusive education and explicitly prohibits segregation.

The NIHR found that the school had not violated its duty of reasonable accommodation as laid down in Article 2 in conjunction with Article 3 of the Disability Discrimination Act (DDA)[64] as its efforts to accommodate the pupil's needs had been sufficient.[65] Further accommodation would pose a disproportionate burden on the school. As far as the CRPD is concerned the NIHR pointed out that during the time that the pupil attended the school the Netherlands had not yet ratified this Convention. In addition, the NIHR held that even if international developments were to lead to a more far-reaching duty to realize inclusive education going beyond the level of reasonable accommodation required by Article 2 in conjunction with Article 3 DDA, this duty cannot be imposed on individual educational institutions such as the school at issue as the consequences of a more far-reaching duty would affect the Dutch educational system as a whole. The NIHR's conclusion that the school's efforts had been sufficient followed the decision of the Dispute Settlement Commission on Inclusive Education with which the parents had also lodged a complaint.[66] The NIHR is a quasi-judicial body which issues non-binding Opinions. Its opinions are generally followed by the courts.

The NIHR did not explicitly address the point whether the CRPD indeed requires an 'absolute' right to inclusive education and prohibits segregated or special education, as the complainants argued, which would go beyond what the DDA requires. (The DDA explicitly allows for special education).

Internet source:
NIHR Opinion 2017-41 of 4 April 2017 can be found at:
https://mensenrechten.nl/publicaties/oordelen/2017-41/detail.

Ombudsman considers municipal housing policies regarding Roma discriminatory

Racial or ethnic origin

The Dutch Ombudsman has been receiving many complaints regarding proper housing opportunities submitted by Roma, Sinti and Travellers who object to the policy of many municipalities to reduce or minimize the number of caravan or trailer sites. In 2016, Ombudsman initiated an investigation and in May 2017 it released its report.[67]

The Ombudsman concluded that municipal authorities discriminate against these groups in their housing policies by not making available a sufficient number of caravan or trailer sites. Instead of treating them the same as other people looking for housing, the principle of equality requires municipal governments to treat them differently in order to respect their cultural identity and accommodate the specific housing needs it causes. The Ombudsman made several recommendations to both the national and local governments to develop non-discriminatory housing policies that will cater to the needs of Roma, Sinti and Travellers by making available a sufficient number of trailer locations.

The approach of the Ombudsman goes in the same direction as the constant position of the national equality body, the Netherlands Institute for Human Rights (NIHR). In its opinions rendered under the General Equal Treatment Act, the NIHR has held that such policies violate the non-discrimination standards

64 Netherlands, Act of 3 April 2003 regarding the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease (*Wet van 3 april 2003 tot vaststelling van de Wet Gelijke Behandeling op grond van handicap of chronische ziekte*), Staatsblad 2003, 206.

65 Netherlands, NIHR Opinion No. 2017-41 of 4 April 2017, available at: https://mensenrechten.nl/publicaties/oordelen/2017-41/detail.

66 Netherlands, Dispute Settlement Commission on Inclusive Education (*Geschillencommissie Passend Onderwijs*), 22 December 2015, https://onderwijsgeschillen.nl/sites/default/files/107032.pdf.

67 Netherlands, Ombudsman, 'Woonwagenbewoner zoekt standplaats. Een onderzoek naar de betrouwbaarheid van de overheid voor woonwagenbewoners' (*Trailer inhabitant looking for trailer site. An investigation into the reliability of the public authorities for trailer inhabitants*), dated 17 May 2017.

laid down in the GETA.[68] Although the findings and recommendations by the Ombudsman are not legally binding, they are very authoritative and carry much weight. The issue being on the Ombudsman agenda will no doubt add to the pressure on the authorities to comply with the recommendations.

Internet source:
https://www.nationaleombudsman.nl/system/files/onderzoek/DEF%20Rapport%202017060%20Woonwagenbewoner%20zoekt%20standplaats.pdf.

POLICY DEVELOPMENT

Extension of the statutory regulation on the number of women on company boards

Gender

By the end of 2015 the provisions in the Dutch Civil Code (DCC), which determined that Boards of Directors and Supervisory Boards must have at least 30 % of women in their midst, expired. This regulation had formed part of Dutch law since 2013. Following the regulation, the situation improved somewhat in the years 2013-2015, but not considerably. The percentage of women on Boards of Directors increased from 7.4 % to 9.6 % and the percentage on Supervisory Boards from 9.8 % to 11.2 %. In 2015, 14.2 % of companies had 30 % of women on their Boards of Directors while 17.8 % had 30 % of women on their Supervisory Boards. However, 75 % of boards and nearly two-thirds of Supervisory Boards had no female members at all.

Because of the poor results, the government proposed to extend the law until 1 January 2020. Both Chambers of Parliament have adopted this proposal, respectively on 19 January 2017 and on 7 February 2017. The new provisions will continue to exist until 1 January 2020 and will then lapse.

The content of the provisions has remained the same. Large companies (approximately 4,900 in total) have to include at least 30 % women on their boards. If they do not meet this criterion, they must explain the reason for this in their annual report.

The regulation can be distinguished from the legislation to implement Directive 2014/95/EU on the disclosure of non-financial and diversity information. A separate law is being drafted to implement this directive. The government sees the 30 % regulation as a partial implementation of a diversity policy, specifically with respect to sex. The extension of the provisions in the DCC will be accompanied by various policy initiatives. A programme entitled 'Women to the Top' has been developed. As part of this programme, letters have been sent to members of Supervisory Boards asking them to devote attention to a better balance between men and women and requesting them to nominate 'board ready' women. This has resulted in the formation of a databank with approximately 1 000 'board ready' women. In addition, the Minister of Education (who also deals with gender equality) and the chairman of the largest employers' association have asked that attention be given to this topic both in interviews and during meetings, and they have engaged two influential people to actively contact members of company boards.

The extension of the provisions on the percentage of women on boards can be positively evaluated, as it keeps the subject on the agenda. The less positive aspect is that the statutory provisions have had little effect and that it can be doubted whether this situation will improve in the coming years. Apparently it is difficult to really persuade boards to appoint more women. The Labour Party has announced that it wants to introduce a quota if the present regulation has no effect. The Democratic Party opposes such a quota, however. It is doubtful whether there would be a majority in this respect in Parliament.

Internet sources:
https://www.eerstekamer.nl/wetsvoorstel/34435_verbetering_evenwichtige, accessed 10 February 2017.

68 See e.g. NIHR opinion 2016-19, available at the website of the NIHR https://www.mensenrechten.nl/publicaties/oordelen.

https://www.rendement.nl/nieuws/id19185-wetsvoorstel-aangenomen-voor-vrouwen-in-de-top.html, accessed 10 February 2017.

Hotline for pregnancy discrimination

Gender

Approximately 43 % of women on the labour market who have given birth to a child have been faced with possible discrimination because of their pregnancy or maternity in 2016. This number has not changed since 2012, which means that on the labour market there has not been a reduction in the extent of discrimination due to pregnancy. The highest risk of discrimination is run by women who have a temporary or flexible employment contract. What often happens is that new contracts are amended or not extended at the last moment. In addition, pregnant women miss out on bonuses and other financial rewards more often than their non-pregnant colleagues. Also, employers tend to assess their performance more critically in comparison to other employees.

With a view to reducing pregnancy discrimination the Netherlands Institute of Human Rights (NIHR) has opened a hotline on 22 May 2017 where women who feel discriminated against can turn to. In this way, the NIHR hopes to gain more knowledge about the risks that pregnant women face, about the consequences of the non-extension of employment contracts and about the various types of discrimination in this area. The NIHR therefore calls on all women who have been confronted with pregnancy discrimination to contact the hotline through www.mensenrechten.nl/zwangerschapsdiscriminatie.

The NIHR emphasises that temporary employment agencies and comparable bureaus have a specific responsibility not to act in breach of equal treatment law. They have to examine whether employers that use their services do not send a woman away because of her pregnancy and they have to address the hiring companies if they act in a discriminatory way.

The NIHR rightly points out that pregnancy discrimination is a very persistent phenomenon. Even though the law is clear, many employers continue to avoid employing pregnant women because of the costs involved. The initiative of the NIHR is a good one, as it gives pregnant women more information about their rights and might have some deterrent effects as far as employers are concerned. However, it is not to be expected that the hotline will create a major change in this respect.

Internet source:
www.mensenrechten.nl/zwangerschapsdiscriminatie, accessed 26 May 2017.

Norway

NO

LEGISLATIVE DEVELOPMENT

Reform of the anti-discrimination and gender equality legal framework

All grounds

On 16 June 2017, two new pieces of legislation were adopted by Parliament: one comprehensive Discrimination Act, largely replacing the previous legal framework which was distributed across several different acts; and another Act reorganising the equality bodies.[69] Both laws will be in force as of 1 January 2018.

69 The Act on Gender Equality and Anti-Discrimination of 16 June 2017, No. 51; and the Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (AOT) of 16 June 2017, No. 50.

The newly adopted comprehensive Discrimination Act contains only a few elements that do not already form part of existing legislative implementation. Both acts do, however, contain some relevant improvements. For instance, the new Discrimination Act not only covers public spheres of life but also private or personal relationships. It also provides improved protection against discrimination because of pregnancy and the use of parental leave, and explicitly prohibits multiple discrimination and intersectionality.

The revised Act regulating the equality body transfers the individual complaint mechanism from the Equality Ombud to the Equality Tribunal. The current role of the Ombud will remain unchanged with regard to proactive promotion of equality and combating of discrimination on the one hand and of monitoring compliance of Norwegian law and practice with obligations pursuant to the CEDAW, CERD and CRPD on the other. The Ombud will also continue to have legal standing to bring discrimination complaints to court on behalf of identified victim(s) or to intervene in legal cases concerning discrimination, as co-counsel or *amicus curiae.*

The Equality Tribunal will handle individual complaints, as the only administrative complaint mechanism. The Tribunal will be given powers to award redress/ compensation for non-monetary damage in cases where a breach of the anti-discrimination legislation is found. A complaint to the Equality Tribunal will interrupt limitation periods for claims, and decisions of the Tribunal will be directly enforceable in cases where compensation has been awarded. The Tribunal will remain a collegial tribunal with no full-time employees, but will be supported by a staff/secretariat of full-time employees who will prepare the cases.

It has been a political decision to relocate the Tribunal secretariat staff to Bergen, which may imply that a number of the current staff may resign, which could be an impediment to the effective functioning of the Tribunal in the short term.

Internet sources:
The Equality and Non-Discrimination Act of 16 June 2017 No. 51 at:
https://lovdata.no/dokument/NL/lov/2017-06-16-51?q=diskriminering.
The Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (AOT) at:
https://lovdata.no/dokument/NL/lov/2017-06-16-50?q=diskriminering.

CASE LAW

Religion or belief

Gender

Medical practitioner's freedom of religion to refuse to perform certain procedures

The claimant was employed by a municipality as a general medical practitioner but her contract was terminated due to her refusal to insert intrauterine devices (IUDs). Before entering into the contract in 2010, the doctor had informed the employer about her Roman Catholic beliefs and that she would neither refer patients for abortions nor insert IUDs, as these can act as abortifacients. This was accepted based on the then-existing tradition of conscience protection for doctors. The doctor has never received complaints from patients on her reservations.

The Norwegian system of general practitioners is based on a subsidised, tax-payer funded healthcare system, while there are specific regulations on the role and duties of medical practitioners. In 2014, following the ECtHR judgment in the case *Eweida and Others v. the United Kingdom*,[70] the relevant regulations were changed to prevent medical practitioners from refusing to carry out specific tasks based on reasons of conscience. In the preparatory works of the revised regulations, the right of patients to receive public health services in an equal, non-discriminatory and adequate manner is seen as crucial.

70 ECtHR, 15 January 2013, *Eweida and Others v. the United Kingdom* (Application No. 48420/10).

The duty of medical personnel to provide adequate care to patients and their right to reserve against tasks on conscientious grounds were balanced against a possible weakening of the front-line-service in the healthcare and a weakening of women's reproductive health. These regulatory changes were implemented on 1 January 2015.

When her contract was terminated, the medical practitioner brought an action against the employer, claiming a violation of her freedom of conscience according to Articles 9 and 14 of the ECHR. Neither the gender equality directives, nor the Employment Equality Directive were referred to as legal arguments in the case.

In February 2017, the Court found that the termination of the contract did not violate the claimant's freedom of conscience and freedom of religion, and that it was not invalid because of a lack of justification.[71] In his reasoning, the judge relied heavily on the ECtHR judgment in *Eweida and Others*. The judge found that the right to limit a persons' freedom of conscience is prescribed by law, and for the protection of the rights and freedoms of others in line with ECHR Article 9(2). He further held that the right of women to have all their health issues seen to by their general medical practitioner must be given more weight than the protection of the medical practitioner's freedom of conscience.

The Court did not assess the rights of the doctor versus the rights of an actual female patient, as the employer could not substantiate that there were any actual patients on the doctor's list that had requested the need for, and been refused, such a service.

This case is the first in Norway where a medical professional has sued to protect her conscience rights.

Poland

PL

CASE LAW

Question to the Constitutional Tribunal regarding the 500+ child support programme

Gender

The new family benefit law which excludes firstborn children from the 500+ benefit in cases where families do not meet the income criteria can negatively affect the situation of single-parent families and especially that of single mothers. The Woivodship Administrative Court (WSA) in Gdańsk decided to send a legal question to the Constitutional Tribunal (TK). It asked the constitutional judges to decide whether the provisions preventing the possibility of obtaining benefits for the first child in the family, except in cases where a special social income criterion has been met, violate constitutional values, and especially whether a refusal to pay the benefit in every case when the income criterion has been exceeded is in compliance with the rules of equal treatment and social justice.

As a rule, Article 5 of the Law of 11 February 2016 on state aid for raising children (JoL 2016 item 195) provides that the benefit is granted for every second and third child who is a minor. The income criterion therefore only applies to parents claiming support for their first or only child. This criterion amounts to PLN 800 (approx. EUR 200) per month per person in the family, or PLN 1 200 (approx. EUR 300) if the family is raising a child with disabilities. At the same time, the law does not provide for the ability to grant the benefit in exceptional situations where the income criterion has not been met. The court provided the example of two two-person families, one receiving an income of PLN 1 615.64, which is PLN 15.64 above the income limit, and the other earning PLN 1 500, thus qualifying for the benefit. As a consequence, the income of the second family rises to PLN 2 000. According to the administrative court it is possible to

71 Norway, Court of first instance (Aust-Telemark tingrett), Judgment of 9 February 2017 in Case No. TAUTE-2016-109909.

draft the right to the 500 plus programme in a way that is compliant with the rules of equality and social justice without violating another constitutional value, the protection of public finances. As an example, the court highlighted the 'zloty for zloty' rule, which is applicable in the case of family benefits. According to this rule, the amount of support is reduced by the same amount by which the income criterion is exceeded.

Internet sources:
http://orzeczenia.nsa.gov.pl/doc/ECB12AA3E1.
http://praca.gazetaprawna.pl/artykuly/1012773,tk-kryteria-przy-500-przekroczenie-progu-dochodowego.html?utm_source=mailing&utm_medium=bezplatny&utm_campaign=23-stycznia-2017-r.

Indirect discrimination by Catholic Church refusing to employ supporter of same-sex partnerships

Sexual orientation

Religion or belief

The claimant is a publicly well-known media personality who signed a petition on social media for legalising civil partnerships (of both opposite and same-sex partners). Shortly afterwards, he was informed that his services were no longer wanted for a radio concert organised by the Catholic Church. The priest organising the concert informed him that it was because he supports gays (allegedly using insulting words). In the absence of a signed contract, the claimant argued that there had been an oral agreement requesting his services for the concert, based *inter alia* on the fact that his name appeared in promotional material for the concert and that previous collaboration between the parties had been agreed orally as well.

The claimant sued the local Roman Catholic Diocese for compensation for violation of the rule of equal treatment on the ground of sexual orientation by association (direct discrimination and harassment). He claimed approximately EUR 900 (PLN 3750) as compensation for damages for himself and approximately EUR 300 (PLN 1250) for the Polish Society for Anti-Discrimination Law [PTPA], which represented him.

The Court of first instance dismissed the lawsuit, stating that there was no binding contract between the parties.[72] Regarding discrimination, the Court held that the claimant had not provided sufficient evidence to shift the burden of proof. It also held that the respondent, as a part of the Catholic Church, had a right to refuse collaboration with persons who support ideas that the Church does not agree with. The Court relied on Article 5.7 of the ETA stating that the ETA shall not apply to 'limitation by churches and other religious associations (...) of the access to professional activity or performance thereof due to religion, denomination or belief, provided that the type or conditions of performance of such professional activity make religion, denomination or belief a genuine and determining occupational requirement set for a given natural person, proportionate to the accomplishment of legitimate aim of the differentiation of situation of this person; this applies also to the requirement for employed natural persons, that specifies the obligation to act in good faith and be loyal to the ethics of church, other religious association or organisation, whose ethical rules are based on religion, denomination or belief'.

The claimant appealed.

The Court of second instance found that there had indeed been a binding oral contract between the parties, to which the ETA was applicable. The Court further held that the claimant had provided sufficient evidence to shift the burden of proof to the respondent. The respondent had not proved that there had been no discrimination, consequently the Court found that the breach of the oral contract had amounted to indirect discrimination on the ground of belief (although the claimant had claimed discrimination by association on the ground of sexual orientation).[73]

72 Sąd Rejonowy in X; 16 December 2016; *YZ, PTPA on behalf of YZ v. Catholic Diocese of H.*; reference number: I C 1326/15.
73 Sąd Okręgowy in S; 22 March 2017; reference number: 75/17.

The Court also stated that Article 5.7 of the ETA did not apply. As the concert was not of a religious nature, the beliefs of the claimant (being in line with the Catholic Church doctrine or not) could not constitute a genuine and determining occupational requirement.

Based on ETA (Article 13), the Court awarded the claimant compensation for discrimination at approximately EUR 250 (PLN 1000), which corresponded to the remuneration that he would have received for the two concerts planned. Based on legal provisions stipulating that an appropriate sum may be paid to a designated social cause, in connection with the ETA,[74] the Court awarded the same amount to PTPA as well.

Court ruling on refusal to provide printing service for LGBT initiative

A small printing company refused to print a roll-up of the Civil Society Organization LGBT Business Forum, with the explanation from an employee that 'we do not contribute to the promotion of the LGBT movement in our work'. Following complaints by LGBT organisations and a motion by the Ombud, the police filed a motion to the court to fine the company for discrimination in the provision of services.[75]

Sexual orientation

The Lodz-Widzew District Court imposed a fine on the printer of approximately EUR 45 (PLN 200) in a simplified procedure (without a hearing of the parties) in July 2016. The case was then brought to the attention of the media and caused a highly controversial debate. The Minister of Justice (Prosecutor General) published a statement on the website of the Ministry, stating that the verdict was unconstitutional, suggesting that the judge was uneducated and giving instructions as to what the verdict should have been. The Minister claimed that the verdict 'stifled the freedom of thought, beliefs and views' 'imposed coercion' on citizens instead of protecting their rights and freedoms, including that to pursue business.[76] The statement has been strongly criticised as a threat to the independence of the judiciary and the impartiality of individual judges.[77]

The conservative think-tank Ordo Iuris launched a petition to amend the Code of Petty Crimes by deleting the relevant legal provisions as they were being used by promoters of radical ideologies to limit the freedom of thought and economic activity. The more than 16,000 signatures were officially presented to the Vice Minister of Justice in December 2016 together with the proposal of amendment.[78] The Ombud was also severely attacked by media and politicians in the context of this case, for defending LGBTI people instead of 'normal citizens'.

In the meantime, the verdict was appealed and the second instance court delivered its ruling in March 2017.[79] The Court found that the respondent was guilty and that their convictions did not amount to a 'just cause' for refusing to provide the service. However, the Court waived the punishment. The verdict was appealed.

In May 2017, the Regional Court in Łódź rejected the appeal and upheld the ruling of the court of second instance. The Court underlined in the oral justification that the sentence had no ideological connotation,

74 Poland, Articles 24 and 448 of the Civil Code.
75 The case was brought under Article 138 of the Code of Petty Crimes which subjects to a fine anyone who, inter alia, refuses to provide a service without just cause.
76 Translations provided by the non-discrimination expert of the European network of legal experts in gender equality and non-discrimination. The full statement is available, in Polish at: https://ms.gov.pl/pl/informacje/news,8476,oswiadczenie-ministra-sprawiedliwosci-prokuratora.html.
77 See for instance the statements of the Judges' Association Iustitia, available at http://www.iustitia.pl/uchwaly/1507-opinia-iustitii-w-sprawie-skargi-krs-do-trybunalu-konstytucyjnego; and of the Helsinki Foundation for Human Rights, available at http://www.hfhr.pl/ministerstwo-sprawiedliwosci-krytykuje-wyrok-sadu-rejonowego-stanowisko-hfpc/; as well as the letter sent to the Minister by the Ombud, available at https://www.rpo.gov.pl/sites/default/files/RPO%20do%20Zbigniewa%20Ziobro%2029.07.2016.pdf.
78 http://www.ordoiuris.pl/wolnosc-gospodarcza/ordo-iuris-w-obronie-praw-przedsiebiorcow.
79 District Court for Lodz-Widzew; 31 March 2017.

and was simply an expression of the principle of equality before the law. At the time of writing, the written justification of the ruling had not been published.

However, the Minister of Justice announced that once he receives the written justification, he will challenge the case both in a cassation procedure before the Supreme Court and before the Constitutional Tribunal to challenge the Code of Petty Crimes as limiting the freedom of conscience and freedom of enterprise.

Conviction for denying entry to a shop to a mother with her child in a pram

Gender

The district court for Warsaw-Wola delivered a prescriptive judgment on 5 December 2016[80] convicting the owner of a shop of refusing to provide a service without a justified cause, as he had asked a mother with her child in a pram to leave the shop (Article 138 of the Code on Contraventions). For this contravention, the court imposed a fine of PLN 20, which is the lowest possible fine provided by law. According to Article 24 of the Code on Contraventions, a fine can be between PLN 20 and PLN 5 000. Furthermore, the court exempted the owner from paying court fees.

The facts as presented constitute a violation of anti-discrimination laws. Article 12 of the Law of 3 December 2010 on the Implementation of (some) EU Provisions on Equal Treatment, unified text JoL 2016 Item 1219 (hereafter the Anti-Discrimination Law), is not clear as regards the protection of maternity. This provision only refers to the consequences of violating the rule of equal treatment with regard to pregnancy and maternity leave (as well as other childcare-related leave). Nevertheless, given the improper (in this regard) transposition into Polish law of Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in access to and the supply of goods and services, the court should have directly applied Article 4 of this regulation, which generally refers to maternity. Thus, the court should have awarded the mother damages, in accordance with Article 13 of the Anti-Discrimination Law. Another issue of concern with regard to this ruling is the remarkably low amount of the fine. It is difficult to conceive how such a low fine could be regarded as fulfilling the standard requirements of punishment: effectiveness, proportionality and dissuasiveness. This is further emphasised by the fact that the defendant was exempted from paying court fees. All of this shows that the court must have regarded the action of the convicted person as resulting in a particularly low level of social harm.

Internet source:
The ruling has not been published. Information provided by courtesy of the Polish Society for Anti-Discrimination Law, which is an NGO.

RO Romania

LEGISLATIVE DEVELOPMENT

Senate rejects draft bill aiming to abrogate Anti-discrimination Law

All grounds

After being fined in May 2016 by the national equality body the National Council for Combating Discrimination (NCCD) for homophobic statements, a then Member of Parliament submitted a draft law calling for the repeal of Law 48/2002 (which is the law ratifying Ordinance 137/2000, the national anti-discrimination act). The explanatory memorandum supporting the draft invoked the alleged 'anti-Romanian' character of the national equality body, its alleged control by the Hungarian Democratic Union

80 District Court for Warsaw-Wola; 5 December 2016, case no VW 4937/16.

and the allegation that it supports terrorism. It further claimed that the NCCD was working to nullify 'Romanian values, traditional Christian values and the rights of Romanians in their own country.'

The Government sent its advisory opinion supporting the rejection of the draft law on 28 October 2016 and the Legal Committee and the Human Rights Parliamentary Committee in the Chamber of Deputies rejected the bill on 8 November. Another negative opinion was filed by the Government on 24 February 2017.

Despite all rejections, on 28 February 2017 the bill was tacitly adopted due to the failure of the Chamber to discuss the bill in the plenary. Tacit adoption of bills means that drafts which are not discussed and rejected in time are considered adopted and move to the Senate.

On 14 March 2017, the plenary of the Romanian Senate rejected the bill. The vote was 101 for the rejection, 2 abstentions and no vote against. The Senate prioritised the vote in response to media and civic protests caused by the tacit adoption of the bill.

Internet source:
https://www.senat.ro/ProgramLucruZi.aspx?Zi=2017-03-14&ComisieID=69718c4c-e30d-45ed-91a3-e62e2fce9ae5.

POLICY DEVELOPMENT

National equality body publishes annual activity report for 2016

All grounds

On 20 April 2017, the National Council for Combating Discrimination (NCCD) released its annual report for 2016 including statistical data on the petitions received in 2016, analysis of the remedies provided, information on court cases, examples of cases and awareness-raising activities, as well as personnel and budgetary information. Out of the 842 petitions received, the largest number related to the ground of 'social category' (314), followed by disability (83), ethnicity (81), age (31), nationality (30), language (25), sexual orientation (8), religion (7), HIV status (4) and race (3). Some 357 petitions were related to access to employment, 180 were on access to public services, 149 on the right to dignity, 46 on access to education, 22 on access to public spaces, and 10 on housing. The total of 842 petitions received in 2016 indicates an increase compared to 2015, when the institution received 752 petitions.

The NCCD found discrimination in 112 cases and issued 111 fines, 53 warnings, 44 recommendations, 8 decisions to continue monitoring the situation and in 63 cases the perpetrators were ordered to publish notifications of the NCCD decision in the media. Notably, in 2016 in one single decision against the Ministry of Labour, the National Agency for Payments and Social Inspection and 34 city mayors, the NCCD ordered accumulated fines in a total of approximately EUR 69,000 (RON 314,000) which is higher than the total amount of all fines issued in 2015. The case was based on monitoring following prior decisions from 2014 and 2015 on the failure of local authorities to ensure access to local transportation for persons with locomotor disabilities.

Regarding the court cases in which the NCCD was involved in 2016, the report shows that the NCCD's decisions were challenged before the administrative courts in 351 cases. The courts decided in favour of the NCCD in 236 cases in 2016, while 281 are still pending. In addition, the NCCD has a legal obligation to participate as an expert institution in civil cases on grounds of the anti-discrimination legislation. In this regard, the institution reports participation in 750 cases (of which 365 are new cases filed in 2016).

The annual budgetary allocation was approximately EUR 1,175,380 (RON 5,318,000) and the executed budget was approximately EUR 1,105,000 (RON 4,999,000) with a total budget including external funds

of approximately EUR 1,242,000 (RON 5,621,000). Of the 89 staff positions needed, 70 positions were budgeted but the institution had to function with only 63 employees.

Internet source:
Report available in Romanian and in English at: http://cncd.org.ro/2017-04-20-raportul-de-activitate-al-cncd-anul-2016.

RS Serbia

CASE LAW

Discrimination on multiple grounds in access to public services

Gender

Racial or ethnic origin

The claimant is a woman of Roma ethnic origin whose ex-partner had been convicted in 2015 for subjecting her to domestic violence. In June 2016, the claimant reported to the social workers that the relationship between her and her ex-partner was again very bad, and that her daughter had now also been the victim of domestic violence. The social worker did not detect any fear in the daughter, and the mother's claims were rejected as non-credible due to the fact that she herself was angry repeatedly with her daughter in the social worker's presence. In addition, the social worker claimed that medical evidence did not show any sign of physical violence or neglect of the child, although a medical report from 27 June 2016 noted that the girl had a blue haematoma.

On 14 September 2016, the claimant reported domestic violence once more. Initially, the social workers refused to let her submit a written report, and only accepted following the intervention of a lawyer providing legal assistance on behalf of an NGO. As a justification for refusing to let the claimant submit a written report, the social worker claimed that the claimant was extremely upset and angry, causing communication with her to be very difficult. In addition, the social worker warned the claimant that she could be criminally convicted for false reporting, insinuating that she was lying about the violence, and that her daughter could be taken away from her.

On behalf of the claimant, the lawyer submitted a complaint to the Ministry of Labour, Employment, Veterans and Social Affairs against the social workers, for failure to take measures to protect the claimant and her daughter from violence. The Ministry conducted an investigation and concluded that the concerned social workers had not sufficiently dealt with this case in accordance with the standards of professional work. An additional complaint of discrimination was also submitted before the Commissioner for the Protection of Equality (CPE), claiming that Roma women very often do not receive efficient and timely legal protection due to negative stereotypes, resulting in this case in discrimination against the claimant by the social workers.

On 2 June 2017, the CPE published its decision, noting that although the legal framework against domestic violence is very solid, its implementation is still weak in general and even more so with regard to Roma women specifically. When they report domestic violence, they are often faced with weak institutional support as violence is considered to be a part of Roma traditions and way of living. The CPE therefore concluded that it is likely that in this case discrimination occurred especially due to the refusal to take the claimant's statement despite their obligation to conduct an investigation to assess the case and determine measures of action. This obligation was particularly strong considering the ex-partner's previous conviction. The CPE acknowledged that there are still gender stereotypes, prejudices and discriminatory attitudes deeply rooted and widespread among professionals working to prevent and prosecute violence against women. The CPE finally pointed out that domestic violence against women

is a form of discrimination and a serious violation of women's human rights that threatens society as a whole.

The CPE relied in its decision on several important sources, such as Article 21 of the Constitution prohibiting discrimination, among others, on ethnicity and sex. It particularly emphasised the importance of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence[81] and its Article 20 which stipulates the obligation of all parties to take all necessary legislative and other measures and provide victims with access to health and social care services, adequate equipment of those services and training of employees to assist victims. It also invoked the European Convention on Human Rights and standards established by the European Court of Human Rights.[82] The CPE also referred to several articles of the Law on the Prohibition of Discrimination[83] that were violated in this case: Article 2, Paragraph 1(1) prohibiting discrimination, among other things, on nationality; Article 15 that prohibits discrimination by public officials and describes it to be a more severe form of discrimination; and Article 24 that prohibits discrimination against national minorities. In addition, the CPE relies on Article 4 of the Law on Gender Equality[84] prohibiting discrimination based on sex, and Article 29 that prohibits domestic violence and requires protection of all family members. Finally, the CPE also relied on the Family Law[85] defining domestic violence, the Law on Social Protection[86] prohibiting discrimination and defining the manner of provision of social services, as well as on the Strategy for Social Inclusion of Roma for 2016-2025,[87] Strategy for Prevention and Protection from Discrimination,[88] the Rules on the Organisation, Norms and Standards of work of the Centre for Social work,[89] the General Protocol on the Treatment and Cooperation of Institutions, Bodies and Organisations in a situation of Violence against Women in Family and in Partnerships,[90] and the Special protocol on the treatment by centres for social work – guardianship bodies in cases of domestic violence and women in partnership relations.[91] All these legal acts prescribe a duty to protect persons from domestic violence.

Internet source:
http://ravnopravnost.gov.rs/prituzba-a-protiv-centra-za-socijalni-rad-zbog-diskriminacije-po-osnovu-pola-i-etnicke-pripadnosti-u-oblasti-pruzanja-usluga/.

81 Serbia, The Law on the Ratification of the Convention on Preventing and Combating Violence against Women and Domestic Violence *Official Gazette of the Republic of Serbia*, No. 12/13, 5 February 2013.
82 See for instance ECtHR, *Eremia v. Republic of Moldova*, App. No. *3564/11,* judgment of 28 May 2013.
83 Serbia, Law on the Prohibition of Discrimination, *Official Gazette of the Republic of Serbia,* No. 22/2009, 26 March 2009.
84 Serbia, Law on Gender Equality, *Official Gazette of the Republic of Serbia*, No. 104/2009, 16 December 2009.
85 Serbia, Family Law, 18/05, 72/11 и 6/15, 24 February 2005.
86 Serbia, Law on Social Protection, *Official Gazette of the Republic of Serbia,* No. 24/2011, 4 April 2011.
87 Serbia, Strategy for social inclusion of Roma for 2016-2025, *Official Gazette of the Republic of Serbia*, No. 26/16, 10 March 2016.
88 Serbia, Strategy for Prevention and Protection from Discrimination, *Official Gazette of the Republic of Serbia*, No. 60/2013, 10 July 2013.
89 Serbia, Rules on the Organisation, Norms and Standards of work of the Center for Social work, *Official Gazette of the Republic of Serbia*, No. 58/08, 37/10, 39/11, 1/12, 6 June 2008.
90 Serbia, General Protocol on the Treatment and Cooperation of Institutions, Bodies and Organizations in a situation of Violence Against Women in Family and in Partnerships, adopted by the Government on 24 November 2011.
91 Serbia, Special protocol on the treatment of centers for social work – guardianship bodies in cases of domestic violence and women in partnership relations, adopted by the Ministry of Labour, Employment, Veterans and Social Affairs in March 2013.

SK Slovakia

CASE LAW

Ministry of Education decision potentially deepening school segregation of Roma children

Racial or ethnic origin

For many years, the primary school district of the village Šarišske Michaľany also covered the nearby village Ostrovany, where a large marginalized Roma community lived. Mostly Roma children from this community attended the municipal school in Šarišske Michaľany, while non-Roma children from this village attended the other primary schools in the region. Due to a lack of resources, the municipality of Šarišské Michaľany terminated the joint district area as of the school year 2015/2016. When the municipality of Ostrovany was unable to secure an agreement with any of the other school districts in the area to ensure the school attendance of local children, it approached the District School Office.

While the District School Office was looking into the issue, the municipality established its own primary school close to the Roma community to accommodate local children, including two 'zero grade' classes attended only by Roma children. Considering its very limited capacities, the District School Office ordered the primary school in Šarisské Michaľany to enrol those children from Ostrovany who could not be accommodated in the new school. The municipality of Šarišské Michaľany challenged the administrative decision of the District School Office before the Ministry of Education.

On 16 March 2017, the Ministry of Education upheld the decision of the District School Office and ordered the two villages to be joined for the purposes of the primary school district. The Ministry disregarded the arguments of the municipality of Šarišske Michaľany regarding its insufficient capacities which could force the local school to start educating some children in the 'afternoon shift', and the insufficient effort of the District School Office to thoroughly identify available capacities of other primary schools in the region. The newly established primary school near the marginalized Roma community will therefore accommodate the education of (Roma) children attending 'zero' and first-grade classes.

Internet source:
Decision of the Ministry of Education, Science, Research and Sport of the Slovak republic No. 2017-1466/12257:2-10A0 from 16 March 2017 (in Slovak):
http://www.sarisskemichalany.sk/dokumenty/uradna_tabula/2017_rozne/Rozhodnutie%20MSVVaS%20SR%20o%20urceni%20spolocneho%20skolskeho%20obvodu%20zo%20dna%2016_03_2017.pdf.

Dismissal of a female employee based on direct sex discrimination

Gender

The District Court of Zvolen issued a long-awaited verdict on 17 March 2017 in the case of a senior researcher, V. Petrášová, who sued her previous employer, the National Forestry Centre (NLC). The court decided that the notice she received of the termination of her employment in 2009 was invalid because it was based on discrimination. The verdict, however, is not yet final as the NLC may appeal. Once the verdict becomes final, the court will also decide on other claims which the applicant has made in proceedings concerning her salary and compensation for non-pecuniary damages.

The dispute started in 2008 when the complainant prepared two project ideas for projects approved by the 'Agricultural Paying Agency' (APA). She subsequently prepared proposals for both projects, which were worth more than SK 4 million (almost EUR 140 000). After she completed the project proposals, the NLC failed to submit them to the APA.

This happened shortly after the new head of the NLC was appointed. Nobody explained to the complainant why the projects had not been submitted.

Rather than Petrášová's project proposals, the NLC submitted a project proposal prepared by her male colleague who seemed less qualified based on his educational background and experience in the field.

Despite the fact that Petrášová continued preparing further projects, the NLC had no internal rules in place for the submission of project proposals, and did not choose to submit any other project by the applicant.

Following other incidents, the NLC proposed to change Petrášová's working contract, explaining that she did not have any projects to coordinate. With such a change, her salary would decrease and this would stand in the way of her career growth.

Petrášová considered the change to be discriminatory and refused to sign it. She was subsequently dismissed by her employer which claimed that due to organisational changes she had to be made redundant.

The District Court of Zvolen (the court of first instance) issued a verdict in 2012 in which it regarded the dismissal to be invalid,[92] but it did not state discrimination as a reason. The Banská Bystrica Regional Court (the appellate court) confirmed the ruling in 2013.[93]

The ruling was however dismissed by the Supreme Court in 2015,[94] which returned the case to the Regional Court stating that the dismissal was indeed discriminatory. The Regional Court returned the case to the District Court of Zvolen.

In its verdict of 17 March 2017, the District Court of Zvolen[95] finally held that the dismissal was invalid for the reasons identified in earlier decisions, but also for being discriminatory in several ways. The court held that the applicant had been subjected to direct sex discrimination based on the fact that her projects were not submitted to the APA whilst a similar project prepared by her aforementioned less-qualified male colleague was submitted. The circumstances under which the applicant's projects had not been submitted to the APA were also described by the court as 'harassment'. This also qualifies as a form of discrimination which was demeaning and humiliating to the applicant and restricted her freedom of scientific research.

The court also noted that the discriminatory treatment of the applicant had been initiated by its new Director General. This Director General had been replaced by the applicant in a previous position at the forestry section of the Slovak Agricultural Ministry several years before this incident. He alone took the decision regarding her dismissal – despite not having any direct employment relationship with her and despite the fact that, pursuant to the NLC's applicable organisational rules, a written proposal for the redundancy of a particular employee should have been presented by other senior employees within the NLC management. Their testimonies show that they never proposed to dismiss the applicant.

The decision is ground-breaking because, despite anti-discrimination legislation being in place in Slovakia since 2004, there have been very few cases in which a court has ruled that a woman has been discriminated against on the ground of sex.

Internet source:
The decision of Supreme Court can be found (in Slovakian) at:
http://www.supcourt.gov.sk/data/att/61938_subor.pdf.

92 Slovakia, Decision No. 7C/11/2010-353 of 3 December 2012.
93 Slovakia, Decision No. 16CoPr/2/2013-400 of 20 June 2013.
94 Slovakia, Decision No. 5 Cdo 56/2014 of 24 March 2015.
95 Slovakia, Decision No. 7C/11/2010-818 of 17 March 2017.

Landmark decision of the District Court ruling in favour of Roma woman discriminated against in access to employment

Racial or ethnic origin

In 2011, the claimant sued the town of Spišská Nová Ves ('the town') for discriminating against her by not selecting her for one of three vacant positions of terrain social workers, financed by the Social Development Fund. The persons selected for the positions were less qualified than the claimant and did not fulfil the criteria listed as 'advantages', although the claimant did. The 'advantages' were experience with terrain social work, speaking the Roma language and being of Roma origin (although the latter two were listed as advantages by the Social Development Fund only).

In 2012, the District Court dismissed the complaint as manifestly ill-founded and its decision was confirmed in 2013 by the Regional Court in Košice. Upon the claimant's complaint, the Constitutional Court ruled on 1 December 2015 that the regional court had violated the claimant's rights to a fair trial and to an effective remedy. It quashed the decision and ordered the national general courts to deal with the case again.

On 23 March 2017, the District Court in Spišská Nová Ves decided the case again, finding that the respondent had discriminated against the claimant on the ground of her Roma ethnic origin.[96] The Court concluded that the claimant had met her burden of proof and established a *prima facie* case of discrimination. The respondent did not submit any evidence to dispute the presumption of discrimination, and did not provide any reasonable arguments why the advantages listed by the Social Development Fund were not included into the selection process set by the respondent. Finally, the respondent did not provide any reasonable explanation on the selection of the other applicants who were less qualified and had less training and relevant experience than the claimant.

With regard to the remedies, the Court concluded that discrimination as such interferes with the victim's human dignity, and also pointed out a preventive function of the financial compensation towards future potential discriminatory treatment. It ordered the respondent to send a written apology to the claimant, to pay non-pecuniary damages in the amount of EUR 2,500 and to pay 50 % of her legal costs. The Court thus partially dismissed the claimant's claim for EUR 5000 in non-pecuniary damages and 100 % of her legal costs. The claimant has appealed these parts of the decision.

This appears to be the first national court decision in favour of a Roma claimant in a case of racial discrimination in access to employment.

Internet source:
https://www.poradna-prava.sk/sk/dokumenty/nepravoplatny-rozsudok-okresneho-sudu-v-pripade-diskriminacie-romskej-zeny-v-pristupe-k-zamestnaniu/.

POLICY DEVELOPMENT

Adoption of updated action plans for the Strategy for integration of Roma

Racial or ethnic origin

On 22 February 2017, the Government adopted the updated action plans of the Strategy for integration of Roma up to 2020 for the period of 2016 – 2018 in the areas of education, employment, health and housing as well as a new action plan in the area of financial inclusion. The action plans were prepared and proposed by the Office of the Plenipotentiary of the Government for Roma Communities.

96 Slovakia, District Court in Spišská Nová Ves, *V.P. against Town of Spišská Nová Ves,* decision of 23 March 2017 delivered on 24 April 2017, No. 8 C 268/2016 – 523.

According to the information publicly reported by the Office of Roma Plenipotentiary, the action plans supplement the existing Strategy by elaborating on its strategic scopes and reacting to the programme of the new Government, which was produced after the parliamentary elections in March 2016. The action plans are meant to have a direct impact on policies supporting the creation of workplaces as well as an impact on school policies, in particular education at primary and secondary level, pre-school education and development of inclusive education. They aim to significantly contribute to the inclusion of marginalised Roma communities and contribute to the Government's effort to fight poverty.

The action plans contain 31 goals divided into 5 thematic areas: education, employment, health, housing, and financial inclusion. They also contain 59 concrete measures and 95 detailed activities. The concrete measures are linked to the quantitative indicators, which will enable the Office of Roma Plenipotentiary to monitor and evaluate the implementation of these measures.

The action plans contain a number of policy measures that may contribute to the inclusion and equal opportunities of socially excluded members of the Roma minority in Slovakia, provided that they are effectively implemented and their long-term sustainability in the future is secured.

Internet source:
Resolution of the Slovak Government No. 87/2017 regarding the updated action plans of the Strategy for the integration of Roma up to 2020 for the years 2016-2018 and the proposal of the adopted action plans (in Slovak only):
http://www.rokovania.sk/Rokovanie.aspx/BodRokovaniaDetail?idMaterial=26278.

Slovenia

SI

POLICY DEVELOPMENT

The newly reformed national equality body issues its first annual report

All grounds

The new Advocate of the Principle of Equality, appointed at the National Assembly of the Republic of Slovenia on 25 October 2016,[97] released the Advocate's first Annual Report since 2012. Since the recent reform of the mandate and functioning of the equality body, this report aims at raising awareness of all stakeholders about the personal and material scope of the Advocate's competence, its tasks and duties and about the new forms of discrimination prohibited under the new law. The report also outlines the process of the establishment of the new body and the current state of play concerning the development of the new institution.

Since November 2016, the Advocate has employed two lawyers for case work and is currently in the process of searching for more appropriate work premises.[98] The annual budget foreseen for the work of the Advocate in 2017 was initially EUR 200,000 but was increased by EUR 50,000 in April 2017 for additional material costs. In order to ensure that the equality body starts functioning properly, the Advocate has approached a number of state structures to request support, such as the Human Rights Ombudsman, the Government General Secretariat, or the Ministries of Labour, Family, Social Affairs and Equal Opportunities; Public Administration; and Finance. In order to substantiate the requests for additional resources, the Advocate informed all stakeholders about the new extensive tasks the equality body is expected to carry out, the case load taken over from its predecessor, and the human resources

97 Decision of the national Assembly of the Republic of Slovenia of 25 October 2016.
98 Advocate of the principle of Equality, Annual Report for 2016, pp. 61-70. The report is not yet available online but has been sent to the non-discrimination expert of the Network by e-mail.

development plan for the following years. Further, the Advocate also asked for meetings with the Prime Minister, Speaker of the National Assembly and the President of the Republic, which are to take place in the following months, in order to acquaint them with the needs of the new body to serve groups affected by discrimination.[99]

At the time of reporting, no cases had been decided since the appointment in November 2016, although the report does include statistics on the pending cases. From his predecessor, the new Advocate took over 278 cases initiated between 2012 and 2016 which have not been closed yet.[100] In 2016, 68 complaints were received by the Advocate. From these, 17 complaints refer to disability and 8 to gender discrimination, while other personal grounds are represented in lower numbers or are unspecified.[101]

In 2013, the Advocate's predecessor had stopped releasing annual reports as a sign of protest against the insufficient capacities of the equality body. Hence, the sole release of the report is a positive sign that the strengthened equality body will apparently be more functional in the coming years.

Internet link source:
Advocate of the Principle of Equality, Annual Report for 2016, 2017 (in Slovenian only): http://www.zagovornik.gov.si/si/informacije/osvescanje/novice/novica/date/2017/04/20/letno-porocilo-za-leto-2016/index.html.

ES Spain

CASE LAW

The Supreme Court recognises the right to full remuneration in two cases related to pregnancy and maternity

Gender

In January 2017, the Supreme Court delivered two judgments of great importance in which it recognized the right to full remuneration in the case of pregnancy and maternity leave.

In its judgment of 24 January 2017 (appeal No. 1902/2015) the Supreme Court ruled in favour of the right to full remuneration in the case of a medical worker who had been exempted from night shifts and other professional obligations due to the fact that these work obligations could pose a risk to her pregnancy. The performance of night shifts and other professional obligations are rewarded with a specific remuneration called a 'bonus for continued attention' (*complemento de atención continuada*) whose payment was denied to the claimant by the hospital during the time she was exempted from these duties because of her pregnancy. Prior to her pregnancy she complied with these obligations and, accordingly, received the established bonus for continued attention.

Article 26 of Law 31/1995, of 8 November 1995, for the prevention of risks in the workplace, establishes an obligation for employers to adapt a working situation to a pregnant employee. However, it does not mention any consequences that this may have regarding the payment of the employee. The Supreme Court's judgment of 24 January 2017 recognized the right of the pregnant worker to receive full payment, including the above-mentioned 'bonus for continued attention,' even though she had been exempted from the professional duties connected to this bonus. The main argument presented by the Supreme Court was that if she would have temporarily stopped working due to her pregnancy she would have

99 Ibid., p. 70.
100 Ibid., p. 8.
101 Ibid., p. 35.

received a periodic payment equal to her whole salary including the bonus for continued attention from the social security system. Based on this fact, the Supreme Court came to the conclusion that if she continues to work, she must also receive the same remuneration from her employer (the entire salary including bonuses).

In its judgment of 10 January 2017 (appeal No. 283/2015) in another case, the Supreme Court recognised the right to receive a full salary, including bonuses from the first day upon returning from maternity leave. In applying the collective employers' agreement literally, the claimant's employer only gave her a bonus in the second month after returning from maternity leave, given that the right to it was generated from the productivity of the previous month. However, the Supreme Court considered that an employee should not be placed at a disadvantage from being on maternity leave, which meant that she should have received the bonus from the first day upon her return to work.

Both judgments demonstrate the Supreme Court's intent to guarantee that pregnant employees and employees who are on maternity leave should not suffer any economic disadvantage by exercising their rights.

Internet sources:
Article 26 of Law 31/1995, of 8 November 1995, for the prevention of risks in the workplace:
https://www.boe.es/buscar/doc.php?id=BOE-A-1995-24292, accessed 15 March 2017.
Articles 3, 6 and 8 of Law 3/2007, of 22 March 2007, for effective equality between women and men:
https://www.boe.es/buscar/doc.php?id=BOE-A-2007-6115, accessed 15 March 2017.
Judgment of the Supreme Court of 10 January 2017 (appeal No. 283/2015):
http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7920557&links=%22283%2F2015%22&optimize=20170130&publicinterface=true, accessed 15 March 2017.
Judgment of the Supreme Court of 24 January 1017 (appeal No. 1902/2015):
http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7950828&links=%221902%2F2015%22&optimize=20170306&publicinterface=true, accessed 15 March 2017.

Discrimination on the ground of religion due to prohibiting religious pieces of clothing at work

Religion or belief

The claimant was hired to provide customer services at an airport in 2007 and informed her employer in December 2015 that she intended to start wearing the Islamic veil (hijab) during working hours as an expression of her religious beliefs. After having initially authorised her to do so, the employer changed its position and prohibited the claimant from wearing the veil at work. The employer imposed seven increasingly serious disciplinary sanctions, including a two months' suspension for 'very serious failure'.

The claimant brought an action before Social Court No. 1, Palma de Mallorca, which found sufficient indications that the fundamental right to religious freedom had been breached, and declared the burden of proof reversed onto the employer. The employer invoked the defence of its corporate image to argue that all employees in the passenger service department must comply with written rules of uniformity established by the company that do not allow the use of garments not mentioned therein. The claimant argued however that she had been discriminated against, notably because other workers can visibly wear necklaces with Christian religious symbols.

In February 2017, the Court found that there had been a violation of the claimant's fundamental right to religious freedom, and that she had been discriminated on the ground of religion. The Court therefore declared the seven sanctions imposed by the employer to be null and void, ordering the employer to

cease the violation and to pay the claimant the remunerations due as well as compensation for the damage caused.[102]

Although the Court recognised the employer's right to impose on its employees the use of a uniform, it underlined that this right ceases if it collides with a fundamental right, such as religious freedom. The Court further noted that the employer in this case had not invoked any kind of prejudice or impairment caused by the conduct of the worker to its corporate image.

Supreme Court case on the unfair dismissal of a female employee undergoing fertility treatment

Gender

In its judgment of 4 April 2017 (appeal No. 3466/2015) the Supreme Court ruled on the case of a female worker who had been dismissed whilst she was undergoing fertility treatment. The dismissal took place very early on in the process, when the complainant was not yet pregnant and the fertility treatment was still taking place in the laboratory. The employer was aware of the fertility treatment during the time of her dismissal.

The employer held that it was not a discriminatory dismissal but simply an 'unfair dismissal' (*despido improcedente*). According to Spanish legislation, if the dismissal is unfair, the employer has to pay a severance payment, but is not obliged to reinstate the unfairly dismissed worker in his/her job. However, if the dismissal is declared discriminatory by the Court, the dismissal is declared null and void, which means that the worker has to be reinstated in his/her job.

Despite the fact that the woman was not yet pregnant, the Supreme Court considered that the dismissal had to be considered discriminatory following the ruling of the CJEU in its judgement of 26 February 2008.[103] Therefore, the female worker had to be reinstated in her previous job.

Internet source:
Judgement of the Supreme Court of 4 April 2017 (appeal No. 3466/2015): http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8003649&links=&optimize=20170502&publicinterface=true, accessed 5 June 2017.

POLICY DEVELOPMENT

The Spanish Government withdraws subsidies for university education in gender equality and subsidies for small businesses to promote equality between men and women

Gender

On 1 February 2017, the Minister of Health, Social Services and Equality was asked to explain before the Senate of Spain why the Ministry had withdrawn its subsidies to promote gender equality which the Government had committed itself to in 2016. The subsidies were intended to be used for university education in gender equality, and to promote equality between men and women in small businesses. The minister did not give any justification for this withdrawal, and she did not commit herself to restoring the grants. Spain has a large amount of small businesses which are not obliged to have equality plans and therefore the subsidies were very important to promote equality at this level. However, the Ministry of Finance issued an order on 20 July 2016 which closed the expenditure budget and halted operations with the objective of limiting public spending. The withdrawal of the subsidies had a great social impact

102 Spain, Social Court No. 1 of Palma de Mallorca, judgment of 5 February 2017 in Case No. 0031/2017.
103 CJEU Case C-506/06, *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG.*

and was the subject of discussion in the media.[104] For this reason, the Socialist Party called the Minister to appear before the Senate on 1 February 2017.

The Government's withdrawal of the subsidies to promote equality between women and men was intended to diminish public spending in 2016. The measure has been strongly criticised since the measures to promote equality between women and men have been the first ones which have been used to lower public spending.

Internet source:
http://www.eldiario.es/sociedad/ministra-Igualdad-explicaciones-suspension-igualdad_0_607889363.html.

Sweden

SE

LEGISLATIVE DEVELOPMENT

No legislative proposal regarding a gender balance on company boards

Gender

In September 2016, a Government ministry report (Ds 2016:32) suggested an amendment to the Companies Act in order to increase the share of women on company boards. The Government declared its intention to present a legislative proposal in late February 2017, requiring at least 40 percent representation of each sex on boards of companies listed on the stock exchange.

In January 2017, the Parliamentary Committee on Civil Affairs stated that the gender balance of company boards shall continue to be a matter for company owners to decide upon themselves. The declaration by the Committee was a clear message that a majority in Parliament would vote against the planned legislative proposal.

Following the Parliamentary Committee's declaration, the Minister for Enterprise and Innovation, Mikael Damberg, announced that the Government had abandoned its plans to present a legislative proposal regarding gender representation on company boards.

Internet source:
http://www.regeringen.se/4a58e0/contentassets/d5335167a2ee4e17b4dd025c3a78b784/jamn-konsfordelning-i-bolagsstyrelser-ds-201632.
Government ministry report Ds 2016:32 (available in Swedish only).

CASE LAW

National court decision on the adaptation of a workplace to accommodate religious beliefs

Religion or belief

The claimant was employed as a nurse and went through professional training to become a midwife, although she refused to perform some of the duties regarding abortions or contraceptives due to her religious beliefs. When she applied for a position as a midwife, her employer rejected the application and refused to adapt the position to her faith. The employer also refused to allow her 'education salary' for

104 Http://www.europapress.es/epsocial/igualdad/noticia-psoe-tambien-pide-senado-recuperar-subvenciones-promover-igualdad-universidad-empresas-20170127115156.html, accessed 22 February 2017. Http://www.eldiario.es/sociedad/ministra-Igualdad-explicaciones-suspension-igualdad_0_607889363.html, accessed 22 February 2017. Http://cadenaser.com/ser/2017/01/23/sociedad/1485155927_383582.html, accessed 22 February 2017.

the last two terms of the midwife training, because they believed that she would not be working as a midwife for them. The claimant brought a case before the Labour Court, claiming violations of both the Swedish Discrimination Act and ECHR Articles 9, 10 and 14.

The Labour Court found that the rejection of the claimant's application could not amount to direct discrimination as no applicant who refused to do some of the tasks would have been hired, irrespective of their religious beliefs. The Court then examined whether the requirement on midwifes to do some tasks regarding abortions could amount to indirect discrimination on the ground of religious belief.

The government bill to the Abortion Act stipulates that counties shall avoid hiring midwifes or other staff who for religious reasons are against abortions, as a woman consulting a midwife should always be able to discuss abortion if she so wishes. The Court therefore gave preference to the societal interest of having a high standard of healthcare and found that this constituted a valid justification of the negative impact for the claimant. The Court did not discuss the provisions of the ECHR in any detail.[105]

The outcome of this case was expected. The claimant received support from right-wing American Christian groups, and the case has been strongly mediatised. It is very likely that the claimant will appeal the decision with the aim of bringing the case before the European Court of Human Rights.

Internet source:
http://www.arbetsdomstolen.se/upload/pdf/2017/23-17.pdf.

Court of Appeal confirms that Roma registration by police constituted discrimination

The famous Roma registration case started in September 2013 when it was revealed that the police had been registering more than 4000 persons of Roma origin or having a relationship with a Roma person.

Racial or ethnic origin

Throughout these proceedings, several authorities have examined the circumstances of the register and have found violations of the Data Protection Act but the position of the police that it did not register ethnic data was never disproven.[106] In May 2014, the majority of the registered persons were each awarded approximately EUR 550 (SEK 5000) by the Chancellor of Justice as compensation for the violation of Section 48 of the Data Protection Act.[107] The violation was not related to the ethnic origin of the registered persons and focused on the technical characteristics of the register; that it was impossible to see whether a person was suspected of any crime and to remove people once registered.

Among the more than 4000 victims, 11 persons were assisted by the NGO Civil Rights Defenders to bring a case before the Stockholm District Court, which delivered its decision on 10 June 2016.[108] On appeal, the Svea Court of Appeal upheld the decision of Stockholm District Court on 28 April 2017.[109]

Before the Court of Appeal, the Swedish State admitted for the first time that the registration amounted to discrimination as the ethnic origin of the registered persons was a contributing factor for the registration. This was found to be sufficient for a finding of ethnic discrimination under Articles 8 and 14 of the ECHR.

105 Sweden, Labour Court, Case No. 23/17, *E.G. v. Jönköping County*, decision of 12 April 2017.
106 Sweden, Commission on Security and Integrity Protection, decision of 11 December 2014, available at: http://www.sakint.se/dokument/rapporter-och-uttalanden/Uttalande-PM-Skaane-Uppfoeljning-Kringresande.pdf; Equality Ombudsman, decision of 20 February 2014, available at: http://www.do.se/globalassets/stallningstaganden/ovriga/stallningstagande-beslut-med-rekommendationer-till-polismyndigheten-gra-2013617.pdf; Public prosecutor, decision of 20 December 2013, Case No. AM-139971 (not available online); Parliamentary Ombudsman, decision of 17 March 2015, available at: http://www.jo.se/PageFiles/6353/5205-2013.pdf.
107 Sweden, Chancellor of Justice, decision of 7 May 2014 in Case No. 1441-14-47.
108 Sweden, Stockholm District Court, Case No. T 2978, *Fred Taikon and others v. Swedish State through the Chancellor of Justice,* decision of 10 June 2016. See also *European equality law review*, Issue 2016/2, p. 136.
109 Sweden, Svea Court of Appeal, Case No. T 6161-16, *Fred Taikon and others v. Swedish State through the Chancellor of Justice,* decision of 28 April 2017.

As the State failed to prove that any other valid reason had influenced the registration process, the Court of Appeal found a violation of the Police Data Act as well.

All other authorities dealing with this case failed to find any discrimination. They have been very critical of the police but have abstained from going further than saying that it cannot be ruled out that ethnic profiling by the police took place. The key to the finding of discrimination was the use of a shared burden of proof regarding discrimination according to Article 14 of the ECHR, as would have been applied under the Discrimination Act.

Internet source:
http://www.svea.se/Om-Svea-hovratt/Nyheter-fran-Svea-hovratt/Romer-far-skadestand-for-att-de-funnits-med-i-Kringresanderegistret-enbart-pa-grund-av-etniskt-ursprung/.

POLICY DEVELOPMENT

Government initiative to create a public authority for gender equality

Gender

In December 2016, the Government appointed an inquiry chair to prepare and form a new public authority in the area of gender equality. In Sweden, all administrative authorities are organised as independent public bodies, headed by a Board or a Director-General, appointed by the Government.

The Gender Equality Authority, which will be headed by a Director-General, will have the following tasks:

- contribute to a strategic, coherent and sustainable governance in the area, and to the efficient implementation of gender equality policies;
- monitor, provide analysis, coordination and the necessary support in the area of gender equality;
- allocate and distribute financial support to projects that promote gender equality and women's organisations;
- coordinate, implement and evaluate the national strategy to prevent and counteract violence against women, including violence and oppression in the name of honour; and
- support the Government also in other matters regarding gender equality, such as matters that arise within the framework of international cooperation.

The authority shall be ready to start working on 1 January 2018.

Internet source:
http://www.regeringen.se/contentassets/fd7240295cab45df8130384abdb600fa/mal-och-myndighet---en-effektiv-styrning-av-jamstalldhetspolitiken-sou-2015_86.pdf. (only available in Swedish).

United Kingdom

UK

LEGISLATIVE DEVELOPMENT

The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 entered into force on 6 April 2017

Gender

The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 came into force in the UK on 6 April 2017. It applies to employers with 250 or more employees on the 'snapshot' date of 5 April. Affected employers must now annually publish certain information about gender pay gaps:

1. The difference in the mean and median hourly rate of pay for male and female employees;
2. The difference between the mean and median bonuses paid to male and female employees over the 12-month period ending 5 April, and the proportion of male and female employees receiving a bonus in that period; and
3. The proportions of male and female employees in each of the four pay quartiles of the employer's overall pay distribution.

Employers may (but are not obliged to) also publish a narrative explaining any pay gaps/disparities and any action/plans they have to address them.

The legislation is supported by guidance from ACAS (Advisory, Conciliation and Arbitration Service).

The Office for National Statistics in the UK reported a gender pay gap (based on men's and women's median gross hourly rate) of 18.1 % in 2016. Having announced in 2015 an intention to 'end the gender pay gap in a generation' this legislation is a key part of the Government's strategy to achieve this.

Internet sources:
http://www.legislation.gov.uk/ukdsi/2017/9780111152010.
And see ACAS guidance at: http://www.acas.org.uk/index.aspx?articleid=5768.

CASE LAW

Father wins sex discrimination case regarding shared parental leave

Gender

The Shared Parental Leave Regulations (2014) allow parents to share leave entitlement following the birth of a child. The mother must take two weeks leave immediately after the birth (Employment Rights Act 1996 S.72(1) and Maternity and Parental Leave Regulations 1999 (Reg. 8)) in order to recover from childbirth, but the remaining leave entitlement can be shared between the parents. In relation to pay: statutory maternity pay is, during the first six weeks of leave, paid at 90 % of the mother's average weekly earnings (with no upper limit) and, thereafter, paid at a basic rate (GBP 140.98 per week or 90 % of salary if that is lower) for the remaining 33 weeks leave entitlement. Shared parental leave (SPL) is paid, from day one, at the statutory rate (GBP 140.98 per week). Employers are able to 'top up' the statutory entitlement to both maternity pay and shared parental leave by paying some or all of it at a higher rate if they wish to do so.

The employers in the present case operated an enhanced maternity leave policy, providing employees with 26 weeks service, 14 weeks enhanced maternity pay (followed by 25 weeks at the statutory rate). They did not, however, offer enhanced pay in relation to their shared parental leave scheme. This case involved a father who claimed that his employer had directly discriminated against him on the grounds of his sex (contrary to S.13 of the Equality Act 2010) because he, unlike a female comparator claiming maternity leave, was not entitled to enhanced pay if he took SPL. Mr Ali, the claimant, accepted that the two weeks compulsory leave are ring-fenced for women recovering post childbirth, but argued that the remaining 12 weeks of the 'enhanced' scheme ought to apply to him when taking SPL. The employment tribunal upheld his claim for sex discrimination stating that because of the difference in policy he was 'deterred from taking the leave and was less favourably treated as a man' (para. 5.38).

The tribunal also warned against 'generalised assumptions' that mothers are always best placed to undertake care-giving post childbirth and 'should get the full pay because of that assumed exclusivity' (para. 5.41). In this particular case the father was, the tribunal found, 'best placed to perform that role' because his wife was diagnosed with postnatal depression and, crucially, 'he was asking for the leave to perform the same role his female comparator would have performed with full pay' (para. 5.42).

This employment tribunal decision is a first instance decision (and hence not binding) and there is no obligation on employers to offer enhanced shared parental leave pay because they offer enhanced maternity leave pay. In an earlier (unreported) employment tribunal case, *Hextall v Chief Constable of Leicester Police,* a policy similar to the one applied here, offering an enhanced pay scheme in relation to maternity leave only, was not found to be discriminatory. In a different (unreported) employment tribunal case, *Snell v Network Rail*, a policy of giving mothers on shared parental leave full pay, but paying only statutory minimum pay to partners on the same scheme, was found to be indirectly discriminatory.

Internet source:
Ali v *Capita Customer Management Limited,* Employment Tribunal Decision Case No.1800990/2016 (24/1/17) available at: https://www.gov.uk/employment-tribunal-decisions/mr-m-ali-v-capita-customer-management-ltd-1800990-2016.

Justification of indirect age discrimination in employment

Age

The claimants were police officers who challenged their compulsory retirement, claiming that it amounted to indirect age discrimination. The police forces needed to reduce staff numbers and therefore applied Regulation A19 of the Police Pensions Regulations 1987 which allows for compulsory retirement once an officer has served for 30 years, thereby qualifying for a pension of two thirds of the average pensionable pay. The claimants argued that the use of Regulation A19 was indirectly discriminatory on grounds of age, as others with less service were not required to retire. The respondents argued that the use of Regulation A19 was the only lawful means by which they could reduce their staff numbers, and so its use was justified.

The Employment Tribunal (ET)[110] upheld the claims of indirect age discrimination but this decision was reversed by the Employment Appeal Tribunal (EAT).[111] On 24 March 2017 the Court of Appeal (CA) upheld the decision of the EAT.[112] The decision to reduce the number of police officers to the fullest extent available was taken in the interests of achieving certainty in terms of costs reduction. It was not for the ET to devise an alternative scheme involving the loss of fewer posts. As no other method of selection was lawful, the decision to limit dismissals to police officers with more than 30 years' service cannot be called into question. The CA determined that the only possible conclusion was that the application of Regulation A19 was justified and that the claimants had no valid claim for age discrimination.

The high level of job security in this case (only those who were eligible for retirement could be made redundant) left very little discretion to the employer. As there was no alternative means of reducing the number of police officers, the use of Regulation A19 was not disproportionate. The Court could not reject justification on the basis that the respondent could have pursued a different aim which would have had a less discriminatory impact.

Internet source:
http://www.bailii.org/ew/cases/EWCA/Civ/2017/191.html.

Supreme Court ruling on the establishment of indirect discrimination

Racial or ethnic origin

The case was brought by civil servants who had failed a generic Core Skills Assessment test ('CSA') which all civil servants were required to pass in order to become eligible for promotion. The CSA bore no correlation to the post for which a candidate intended to apply (and in respect of which a candidate who had passed the CSA would have to pass a second, job-specific test). The evidence was that the success

110 ET/1307406/2011, 5 February 2014.
111 UKEAT/0189/14/DA, 8 July 2015.
112 United Kingdom, *Harrod & Ors v Chief Constable of West Midlands Police & Ors* [2017] EWCA Civ 191, decision of 24 March 2017.

rate of Black and Minority Ethnic (BME) candidates was 40.3 % of that of white candidates, and that of candidates aged 35 or over was 37.4 % of that of younger candidates. The Court of Appeal had ruled that it was insufficient for the claimants to establish a statistical disparity in success rates in the CSA in order to bring a *prima facie* claim of age and race discrimination. Rather, they would have to point to the reason why the CSA had disadvantaged them as BME and older candidates.[113] The case was appealed to the Supreme Court.

The Supreme Court overruled the Court of Appeal.[114] It reinstated the position that it is not necessary to establish the reason for the particular disadvantage caused to the claimant. It is sufficient to show that a provision, criterion or practice causes the disadvantage suffered by the group and the individual claimant, for instance by statistical evidence. It remained open to the respondent to justify the requirement to pass the skills assessment. The claims were remitted to be determined by the Employment Tribunal in accordance with the judgment.

Internet source:
http://www.bailii.org/uk/cases/UKSC/2017/27.html.

113 EWCA Civ 609, 22 June 2015.
114 United Kingdom, Supreme Court, *Essop and others v Home Office (UK Border Agency)* [2017] UKSC 27, ruling of 5 April 2017.

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