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

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- Throwing the babies out with the bathwater: the CJEU, xenophobia and equality bodies after *Jyske Finans*
- EU equality law in the age of Brexit
- Promoting substantive gender equality through the law on pregnancy discrimination, maternity and parental leave

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Introduction on the state of play[1]

This is the seventh 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 July to 31 December 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 at the national level.[2] It also contains four in-depth analytical articles, the first of which has been authored by Vadim Poleshchuk, the Estonian non-discrimination expert of the Network. His article provides an analysis of linguistic requirements amounting to indirect or direct discrimination on the ground of ethnic origin with a particular focus on legislation and practice in Estonia. In the second article, Lilla Farkas, senior expert on racial or ethnic origin discrimination, provides an overarching analysis of the Court of Justice's approach to race discrimination in the *Jyske Finans* judgment and the significant role played by equality bodies in the enforcement of EU racial equality norms. The third article, authored by Christopher McCrudden, senior expert of the Network on EU and human rights law, explores the consequences of Brexit for the future of equality law in the UK and the EU of 27 Member States. In the fourth article, Jule Mulder from the University of Bristol, analyses the promotion of substantive gender equality through the law on pregnancy discrimination, maternity and parental leave.

Recent developments at the European Level[3]

On 19 July 2017, the European Commission launched a *Diversity and Inclusion strategy* for Commission staff,[4] to create a diverse working environment and inclusive culture which focuses on four main target groups: women, staff with disabilities, LGBTI people and older staff. Included in the Strategy is the *Diversity and Inclusion Charter* which sets out the guiding principles for the Commission's Human Resource policies, and contains a commitment to ensure staff diversity, to secure equal opportunities for all, to fight against discrimination, to train managers and HR services on existing barriers to equality and to communicate to employees on the implementation of that policy. In addition, the Strategy includes both cross-cutting measures that apply for all groups and individuals as well as targeted measures for the specific focus groups of the Strategy namely women, staff with disabilities, LGBTI people and older staff. The Commission thus commits to improving access and mobility facilities for staff with disabilities in the Commission buildings, to raising awareness and providing training for managers and staff on LGBTI issues, to monitoring any discrimination issues in the access to employment for older staff, and to achieving the target of at least 40% women in management by 1 November 2019. A process of

1 Throughout this Review, all hyperlinks were last accessed on 26 March 2018.
2 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.
3 This section, as the rest of the Review, covers the period of 1 July to 31 December 2017.
4 Communication of the Commission, *A better workplace for all: from equal opportunities towards diversity and inclusion*, COM (2017) 5300 final, available at: https://ec.europa.eu/info/sites/info/files/communication-equal-opportunities-diversity-inclusion-2017.pdf.

reporting, monitoring and further fine-tuning of proposed measures will lead to the publication of a first report in the spring of 2018. Although the Strategy is a welcome addition to the Commission's internal HR policies, the absence of any measures aiming at enhancing ethnic, racial or religious diversity was noted as a regrettable omission by several NGOs.[5]

In relation to the rights of Roma, the European Commission on 30 August 2017 published the results of an assessment[6] which looks at the level of implementation by Member States of the EU Framework for National Roma Integration Strategies[7] adopted in 2011 and aimed at advancing Roma inclusion in the areas of education, employment, health and housing. The assessment shows that while there have been slight improvements since 2011, they remain unequal and modest and the Commission therefore calls on the Member States for further efforts. Based on the assessment, the Commission will define the post-2020 Roma integration strategy, as called for by EU Member States.

The European Parliament has been active regarding rights for people with disabilities during the period covered by this law review. On 14 September 2017, the Members of the European Parliament adopted amendments to the Commission proposal for a *European Accessibility Act,*[8] which aims at adopting common accessibility requirements in the EU for key products and services, such as telephones, ticketing machines and banking services for people with disabilities. Negotiations are now underway between the Parliament and the Council. Regarding accessibility for people with disabilities, earlier in the year, on 6 July 2017, the Parliament also adopted a resolution to enhance adaptation for blind and visually impaired people of print materials such as books, newspapers and magazines.[9] The resolution encompasses rules such as copyright exceptions for blind people and their organisations, improved cross-border circulation of special format books between countries that have signed the Marrakesh Treaty,[10] or limited compensation schemes for publishers when their books are adapted into accessible format copies.

On 30 November 2017, the European Parliament adopted a resolution on the implementation by the EU and the Member States[11] of the European Disability Strategy 2010-2020 which lists key actions in its eight priority areas: accessibility, participation, equality, employment, education and training, social protection, health and external action. The Parliament urged the EU and its Member States to speed up their efforts to put the Strategy commitments fully into practice.

5 ENAR (European Network Against Racism), *Diversity in the European Commission: Open letter to Jean-Claude Juncker and Günther Oettinger* (4 September 2017), available at: http://www.enar-eu.org/Diversity-in-the-European-Commission-Open-letter-to-Jean-Claude-Juncker-and.

6 Communication from the Commission to the European Parliament and the Council, *Midterm review of the EU framework for national Roma integration*, COM (2017) 458 final, available at: https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-458-F1-EN-MAIN-PART-1.PDF.

7 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An EU Framework for National Roma Integration Strategies up to 2020*, COM (2011) 0173 final, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0173&from=EN.

8 European Parliament, *Amendments adopted by the European Parliament on 14 September 2017 on the proposal for a directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services*, P8_TA-PROV(2017)0347, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0347+0+DOC+PDF+V0//EN.

9 European Parliament, *European Parliament legislative resolution of 6 July 2017 on the proposal for a regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled*, P8_TA-PROV(2017)0313, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0313+0+DOC+PDF+V0//EN.

10 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013). It was adopted on 27 June 2013 in Marrakesh and was signed by the EU in April 2014.

11 European Parliament, *European Parliament resolution of 30 November 2017 on implementation of the European Disability Strategy*, P8_TA-PROV(2017)0474, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0474+0+DOC+PDF+V0//EN.

The Annual Fundamental Rights Colloquium was held on 20 and 21 November 2017. This year the theme of the colloquium was 'Women's Rights in Turbulent Times'.[12] It was a well-attended conference, bringing together key European decision-makers, civil society organisations, academics, media representatives and others, to reflect on the connection between women's rights and resilient democratic societies. After a key-note speech by Vice-President of the European Commission Frans Timmermans, the participants discussed a wide range of themes, including gender stereotypes, violence against women, and women's political and economic empowerment. On the occasion of this colloquium the Commission also published a gender equality Eurobarometer,[13] which explores citizen's views on themes connected to gender equality.

On 20 December 2017, the European Commission adopted the *annual 2018 Rights, Equality and Citizenship Work Programme*.[14] This programme awards grants for projects aiming at creating an area where equality and the rights of persons are promoted, protected and effectively implemented according to Regulation No. 1381/2013.[15] For the promotion of non-discrimination and equality, the annual 2018 Work Programme has put emphasis on certain specific topics including discrimination based on sexual orientation and LGBTI rights, discrimination and stereotypes towards Roma, discrimination based on race and/or ethnic origin, prevention of all forms of intolerance, combatting hate speech and promoting equality for women and men in public debates, in leadership positions in politics and in the corporate sector. The 2018 Programme will enable several funding initiatives to be launched with a total budget of approximately EUR 62.3 million.

In October 2017 the European Institute for Gender Equality (EIGE) published the 2017 Gender Equality Index.[16] This report contains detailed statistics of the state of gender equality in the EU between 2005 and 2015, addressing fields such as work, money, knowledge, time, power and health. The report shows how slow progress in terms of gender equality has been – and how all these different fields are interconnected. Finally, in December 2017 the EU Fundamental Rights Agency published the main results and findings of its second EU Minorities and Discrimination Survey ('EU-MIDIS II'),[17] thus providing valuable insights into the experiences of discrimination of 25,500 respondents with different ethnic minority and immigrant backgrounds from across all 28 EU Member States. The survey focuses on discrimination in different areas of life but also on police stops and criminal victimisation as well as awareness of rights and participation in society.

Network publications and activities

On 1 December 2017, the Network held its annual legal seminar, including a fascinating keynote address delivered by Olivier De Schutter of the Catholic University of Louvain, Belgium. In addition, thematic workshops were organised in relation to the issues covered by the thematic reports published that year by the Network.

12 The programme, background documents and conclusions of the colloquium can be accessed at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=115277.

13 European Commission Directorate-General for Communication, Special Eurobarometer 465: Gender Equality 2017, available at: http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2154.

14 Commission implementing decision of 20 December 2017 on the adoption of the work programme for 2018 and on the financing of the Rights, Equality and Citizenship Programme, COM(2017) 8518 final, available at: http://ec.europa.eu/research/participants/data/ref/other_eu_prog/rec/wp/rec-awp-2018_en.pdf.

15 Regulation (EU) No. 1381/2013 of the European Parliament and the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014-2020, O.J. L354/62, available at: https://publications.europa.eu/en/publication-detail/-/publication/92c0dc56-76ce-11e3-b889-01aa75ed71a1/language-en.

16 EIGE, *Gender Equality Index 2017: Measuring gender equality in the European Union 2005-2015* (published 10 October 2017), available at: http://eige.europa.eu/rdc/eige-publications/gender-equality-index-2017-measuring-gender-equality-european-union-2005-2015-report.

17 FRA, Second European Union Minorities and Discrimination Survey – Main Results, published 6 December 2017, available at: http://fra.europa.eu/en/publication/2017/eumidis-ii-main-results.

Five such thematic reports have been published recently. As regards gender equality, Petra Foubert of the University of Hasselt wrote a report for the Network on the enforcement of the equal pay principle. This is the oldest principle in EU gender equality law, but one that remains notoriously difficult to enforce in practice. Linda Senden and Sonja Kruisinga of Utrecht University co-authored a report on gender-balanced company boards in Europe. Eugenia Caracciolo di Torella and Bridgette McLellan, University of Leicester, wrote a report for the Network on gender equality in the context of the collaborative economy. With regard to non-discrimination law, the Network published a thematic report on Roma and the enforcement of anti-discrimination law, authored by Isabelle Chopin, Catharina Germaine and Judit Tanczos of the Migration Policy Group, on the basis of the assessment by the Network's non-discrimination experts of current gaps, challenges and positive developments in relation to non-discrimination rights of Roma. In addition, a thematic report was published on the timely and highly relevant issue of religious clothing in employment, authored by Erica Howard of Middlesex University. In addition to these thematic reports, the Network also published its annual Comparative analyses of non-discrimination law in Europe 2017 and of gender equality law in Europe 2017, as well as two issues of the present Equality law review.

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

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* Please note that the previous non-discrimination expert for Czech Republic, David Zahumenský, contributed to this issue.
** Please note that the previous gender equality expert for France, Sylvaine Laulom, contributed to this issue.

Professional linguistic requirements, proportionality and challenges for Estonia

Vadim Poleshchuk*

The legal aspects of language-related issues in the labour market are rarely addressed in academic literature. Professional linguistic requirements are viewed as fair by default by a majority of the population, and this has to do with the role that official or national languages play in a modern nation state. People who suffer from disproportionate requirements are often disadvantaged members of society. Moreover, most European countries do not have detailed statutory language-related rules, and this issue relates to the sphere of private transactions and implicit arrangements in which employees are clearly the weaker party.

The first section of this article considers professional linguistic requirements in the context of anti-discrimination provisions of EU law: the prohibition of nationality discrimination (in the framework of freedom of movement) and the prohibition of ethnic or racial discrimination (as provided in the Racial Equality Directive). It will be shown that in all cases the principle of proportionality plays a key role in assessing the potentially discriminatory nature of professional linguistic requirements. The practical weaknesses of the popular proportionality test will be demonstrated in the second section of this article, which is devoted to the Estonian case study: The language regulations of Estonia and some characteristic pieces of national case law will be presented in the wider social and historical context.

The argument presented in this article is that the analysis of professional linguistic requirements in the framework of nationality or racial/ethnic discrimination trips on the obstacle of the proportionality test, the result of which will be affected not so much by legal as by historical, political, cultural and other considerations. In this regard, the protection offered by EU anti-discrimination legislation may be inadequate.

I Language-based issues and labour-market discrimination in the EU

Introduction

Normally, the link between ethnicity and language is not called into question, although language practices can be quite diverse, especially in the case of numerous immigrant communities.[1] Modern Western nations have ethnic origins, but it is inappropriate to equate national and ethnic identity,[2] although the 'ethnic core' of a particular nation may still influence the 'social norm' in terms of language, culture and

* Vadim Poleshchuk is the national expert on non-discrimination for Estonia for the European network of legal experts in gender equality and non-discrimination.

1 Carmen Fought, Language and Ethnicity, CUP, 2006; Joshua A. Fishman, (ed.) Handbook of Language and Ethnic Identity. New York: OUP. 1999.

2 The renowned scholar of nationalism Anthony Smith describes and specifies the differences between national identity and ethnic, regional and other identities in: Anthony D. Smith, The Ethnic Origins of Nations, Wiley, 1991.

traditions. The situation in Central and Eastern Europe differs remarkably, while for historical reasons it is quite common for them to identify a nation with a dominant ethnic group, and in this context, in this part of Europe national and ethnic minorities are often viewed as alien and inorganic components of the 'national organism'.[3]

In young nation states, language initially plays a dual role, on the one hand, facilitating the unification around a single 'cultural core', and on the other hand, promoting economic modernization. For many European countries, a rigid language policy resulted in outstanding linguistic and cultural unification of society.[4] The 'national language' is often more than just a means of communication, and language has an important symbolic value in itself. For this reason, linguistic requirements can have not only a pragmatic, but also an emotional basis, especially in the CEE region.[5]

Although historically the official or national language could be an instrument of domination and oppression, in a modern liberal democracy it is rather viewed as a means of society integration and cohesion. The objects of integration policies are both traditional (autochthonous) groups and immigrant communities. In social and political sciences there are different views on whether these groups can enjoy equal public support and protection. A very popular approach is that the scope of the rights of immigrant communities to maintain their particular identity (including language) will be much more limited than that of 'traditional' groups;[6] but this approach also has passionate critics.[7] It should be borne in mind, however, that international human rights instruments establish certain guarantees for speakers of minority and regional languages, especially the prohibition of discrimination in the enjoyment of rights.[8]

Language-based issues can be especially relevant in the labour market. Employment and the necessary language skills are considered an important factor for the inclusion of immigrants (and other minority groups) into society that increases their chances of success in life.[9] In spite of this, there is also evidence that even second-generation immigrants may become victims of prejudice because of attributed linguistic competency or incompetency.[10] In the United States there is case law that deals with the applicability

3 Vojn Dimitrijevic, The Fate of Non-members of Dominant Nations in Post-Communist European Countries, Jean Monnet Chair Papers, No. 25, 1995.

4 In this regard, a classical example is France: in the 19th century the French central Government engaged in systematically combating multilingualism – first and foremost through educational policy – for the purposes of unification and economic development of the country. See in more detail: Eugen Weber, Peasants into Frenchmen, The Modernization of Rural France, 1870-1914, Stanford University Press, 1976.

5 Furthermore, as explained by George Schöpflin, '[e]ach and every nation in Central and Eastern Europe is beset by a deep fear about its survival. They see threats to their existence from their neighbours and, for that matter, in global trends. The past – memory – is seen as malign and the future is potentially dark, hence the defence of the language, the "keystone of the nation", is understood as a transcendental duty imposed on all members of the cultural community. This duty is superior to human rights, to collective rights, to individual rights, to democracy, to constitutional provisions, to international covenants, whatever, and it is insisted on with an obstinacy that only makes sense if the fear of extinction is recognised'. George Schöpflin, Language and Ethnicity in Central and Eastern Europe: Some Theoretical Aspects, Politička misao, Vol. XXXIII, (1996), No. 5, pp. 99-107 (at 106).

6 The Canadian experience of acknowledgment and support to multiple cultural traditions (policies of multiculturalism) was widely accepted firstly in the countries of the West, and thereafter beyond, both regarding traditional groups and (even more importantly) regarding immigrant communities. It would have been naïve however to expect full 'cultural neutrality' from a nation state. John Rex maintained that providing multiculturalism was possible through recognising collective rights for differences in the private domain, as opposed to the public domain; minority language belonged to the private domain. Will Kymlicka in the frequently cited work 'Multicultural Citizenship' laid out a theory rationalising the unequal treatment by the State of 'traditional' and 'immigrant' communities, where the first enjoyed many more rights to sustain their particular identity. See for more details: Rex J. Ethnic Minorities in the Modern Nation State. Working Papers in the Theory of Multiculturalism and Political Integration, London, 1996; Kymlicka, W., Multicultural Citizenship, Oxford, 1995.

7 John Packer, 'Problems in Defining Minorities', in Fottrell, D. and Bowring, B. (eds.) Minority and Group Rights towards the New Millennium, Martinus Nijhoff Publishers, 1999.

8 Fernand De Varennes, Equality and Non-Discrimination: Fundamental Principles of Minority Language Rights, 6 Int'l J. on Minority & Group Rts. 307 (1999); Myres S. McDougal, Harold D. Lasswell, Lung-chu Chen, Freedom from Discrimination in Choice of Language and International Human Rights, Southern Illinois University Law Journal 151 (1976).

9 See e.g. Christian Dustmann and Francesca Fabbri, Language proficiency and labour market performance of immigrants in the UK, The Economic Journal, Volume 113, Issue 489, pp. 695-717.

10 Arnfinn H. Midtbøen (2014) The Invisible Second Generation? Statistical Discrimination and Immigrant Stereotypes in Employment Processes in Norway, Journal of Ethnic and Migration Studies, 40:10, 1657-1675.

of professional language requirements, as well as other language restrictions in the workplace.[11] Unfortunately, in the European Union there are almost no publications that analyse language practices in employment along the same lines (especially outside the area of freedom of movement of workers).[12]

Linguistic requirements and EU anti-discrimination rules

A. Freedom of movement of workers: nationality discrimination and language

EU law allows us to consider language restrictions in employment in the context of freedom of movement provided for in Article 45 TFEU. According to Article 3 of Regulation (EU) No. 492/2011,[13] in the context of freedom of movement of persons, Member States may impose 'conditions relating to linguistic knowledge required by reason of the nature of the post to be filled'; similar provisions can be found in Article 53 of Directive 2005/36/EC[14] that deals with regulated professions. 'Language obstacles' to freedom of movement could be considered by the ECJ as discrimination on the basis of nationality[15] (a general ban of such discrimination is in Article 18 TFEU).

In the very first case devoted to the linguistic aspects of the free movement of workers (*Groener*),[16] the ECJ recognised the right of a Member State to pursue a language policy in which requirements for mastering the official language could be established even in a workplace where this language was not in use at all. However, the place of work at stake in this particular case – a lecturer of art at a college – was very specific and the sphere of education has always been of key importance for the ideology of a nation state.[17] However, it is quite often overlooked that the Court also called for proportionality of linguistic requirements:

> The EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language. However, the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States.[18]

The Court repeatedly returned to the question of the proportionality of language-related measures. For example, in *Haim* the ECJ formulated the following standard regarding linguistic requirements: 'they must be applied in a non-discriminatory manner; they must be justified by overriding reasons based

11 Evangelina Fierro Hernandez, National-Origin Discrimination: Language-Based Issues, 19 Preventive L. Rep. 18 (2001); Robert R. Oliva, English-Only Rules in the Workplace: The Ninth Circuit Attempts to Redefine the Parameters, 7 N.Y.L. Sch. J. Hum. Rts. 99 (1990).

12 One of few examples: D. Kochenov, V. Poleshchuk, and A. Dimitrov (2013). Do professional linguistic requirements discriminate? A legal analysis: Estonia and Latvia in the spotlight. European Yearbook of Minority Issues 10, pp. 137-187.

13 OJ L 141, 27.5.2011, pp. 1-12.

14 OJ L 255, 30.9.2005, pp. 22-142.

15 For analysis of relevant ECJ case law before 2013 see: Ulla Iben Jensen, The Language Requirements under EU Law on Free Movement of Workers, Analytical Note for 2013 for The European Network on Free Movement of Workers within the European Union, October 2013 – updated February 2014.

16 ECJ, Judgment of the Court of 28 November 1989, Case C-379/87, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee*. Before 2011 the 'linguistic exception' was provided in then valid Council Regulation No. 1612/68, Art. 3(1) (OJ L 257, 19.10.1968, pp. 2-12).

17 As formulated by the ECJ, the importance of education for the implementation of a language policy 'must be recognized. Teachers have an essential role to play, not only through the teaching which they provide but also by their participation in the daily life of the school and the privileged relationship which they have with their pupils. In those circumstances, it is not unreasonable to require them to have some knowledge of the first national language. The proportionality claim was repeated in other ECJ cases, which concerned language rules in the labour market and freedom of movement of workers'. *Groener*, para. 20.

18 *Groener*, para. 19.

on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective'.[19]

In *Angonese*[20] the ECJ in fact recognised that legitimate linguistic requirements may also concern a minority or regional language (in this particular case: German in the Italian province of Bolzano).

Both in *Angonese* and later in *Commission v Belgium* the Court found that the language competence should not be proved by means of one particular diploma issued only in the territory of a Member State.[21]

Treaties demand from European institutions, as a general principle, a respect for the 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government' (Article 4(2) TEU). Article 167(1) TFEU stipulates the following demand in the domain of culture: 'The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore…' It seems that the Court fully respects 'cultural identity' and does not hinder the 'flowering of the cultures', recognizing the right of a Member State to pursue a specific language policy in the labour market. Simultaneously, the Court sets a requirement of proportionality of claims. In some cases, the ECJ also recognizes as not being in line with EU law any requirements that complicate access to the labour market of a Member State, such as unfair procedures of obtaining certificates of proficiency in the official or regional language.

In *Wilson*, the Court, in essence, relieved lawyers of the need to pass a language exam before being registered with the competent body of another Member State in order to practice there under his or her home-country professional title;[22] however, the possibility of a language verification requirement was recognized in all cases mentioned above. In a practical manner, for the national court, the main challenge should be to decide whether the linguistic requirements are *proportionate*, and whether they are an obstacle to freedom of movement, constituting discrimination on the ground of nationality.[23] It is clear that the relevant protection against discrimination might be invoked only by EU citizens if their case includes a cross-border element.

B. Racial and ethnic discrimination and language

In international human rights law, language discrimination has been explicitly prohibited for a long time. Most importantly, the International Covenant on Civil and Political Rights – ICCPR (Article 2(1)) and the International Covenant on Economic, Social and Cultural Rights (Article 2 (2)) both ensure to all individuals the rights recognized in these UN covenants without distinction of any kind, including 'language'. The same approach is used in Article 14 of the Council of Europe's (CoE) European Convention on Human Rights (ECHR). Furthermore, Article 27 of the ICCPR guarantees to ethnic, religious or linguistic minorities the right to enjoy their own culture, to profess and practise their own religion, or to use their own language 'in community with the other members of their group'. Specific language-related rights are provided in the CoE Framework Convention for the Protection of National Minorities.

19 ECJ, Case C-424/97, Judgment of the Court of 4 July 2000, *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein*, para. 57.

20 ECJ, Case C-281/98, Judgment of the Court of 6 June 2000, *Roman Angonese v Cassa di Risparmio di Bolzano SpA*.

21 ECJ, Case C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, Judgment of the Court of 6 June 2000, para. 44, para 46; ECJ, Case C-317/14, Judgment of the Court (Sixth Chamber) of 5 February 2015, *European Commission v Kingdom of Belgium*, para. 35.

22 ECJ, Case C-506/04, Judgment of the Court (Grand Chamber) of 19 September 2006, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg*, para. 77.

23 On the limits of a proportionality test in the context of the ECJ free movement case law: Barend van Leeuwen, Rethinking the Structure of Free Movement Law: The Centralisation of Proportionality in the Internal Market, 10 European Journal of Legal Studies, 235, 2017.

In some jurisdictions, there are few controversies related to the intersection between language and racial, ethnic or nationality discrimination. For instance, the U.S. Equal Employment Opportunity Commission that enforces federal laws prohibiting employment discrimination clearly treats language as a form of 'national origin' discrimination and singles out (with references to US case law) accent discrimination, fluency requirements and various restrictive language policies, such as English-Only rules.[24]

In the EU, language is not listed as an independent ground for discrimination in the TFEU. Nevertheless, language requirements can also be considered in the context of EU rules regarding discrimination based on racial or ethnic origin (general prohibition of such discrimination is contained in Article 10 TFEU). Established at the level of treaties, principles of non-discrimination are embodied in the implementing acts, such as anti-discrimination directives. For our topic, a special role is played by Directive 2000/43/EC[25] (the Racial Equality Directive). This Directive prohibits racial and ethnic discrimination *inter alia* in work-related areas and makes a clear distinction between direct and indirect discrimination.

According to Article 2(1) of the Directive, 'direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'. As for indirect discrimination, it shall be taken to occur 'where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

A reasonable question is what kind of racial or ethnic discrimination – direct or indirect –potentially discrimination based on linguistic requirements could amount to. At first glance, it seems that such discrimination can only be indirect (insofar as language skills are 'an apparently neutral provision, criterion or practice' linked to a particular racial or ethnic origin). In this context, the possibility to set language requirements is limited by the principle of proportionality.

Additionally, in our opinion, language requirements can also result in direct ethnic discrimination.

In three relatively recent cases that dealt with the rights of LGBT people, the ECJ found it right to apply the rules on direct discrimination, because according to national rules, sexual orientation made it impossible to access certain employment-related rights, such as a survivor's pension in *Maruko*,[26] a supplementary occupational retirement pension in *Römer*[27] or some benefits, such as days of special leave and a salary bonus in *Hay*.[28] As the Court worded in the last case, '[t]he difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed'.[29]

In these ECJ cases, direct discrimination was associated with an unalienable characteristic (sexual orientation). The presence of such characteristic causes the individual to automatically be ineligible for some benefits, even if this particular characteristic is not indicated as a reason for unequal treatment. While language skills can normally be improved or altered, some relevant individual characteristics

24 EEOC Enforcement Guidance on National Origin Discrimination, 18 November 2016, available at: https://www.eeoc.gov/laws (visited 1 March 2018).
25 OJ L 180, 19/07/2000 P. 0022 – 0026.
26 ECJ, Case C-267/06, Judgment of the Court (Grand Chamber) of 1 April 2008, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, para. 72.
27 ECJ, Case C-147/08, Judgment of the Court (Grand Chamber) of 10 May 2011, *Jürgen Römer v Freie und Hansestadt Hamburg*, para. 52.
28 ECJ, Case C-267/12, Judgment of the Court (Fifth Chamber) of 12 December 2013, *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, para. 44.
29 ECJ, Case C-267/12, Judgment of the Court (Fifth Chamber) of 12 December 2013, *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, para. 44.

are also unalienable, for instance the first language. Establishing a requirement to speak a particular language as a mother tongue would automatically exclude most representatives of various minority groups or foreigners. Language-related direct ethnic discrimination may also arise in a situation where an individual is automatically treated less favourably due to attributed (ascribed) characteristics, linked to ethnicity, nationality or origin: for example, the widespread prejudice that people X speak X but do not speak Y or speak poor Y cannot by default justify their unequal treatment.

Linguistic requirements in the labour market will also amount to direct ethnic discrimination when such requirements are not 'neutral' because their implementation inevitably restricts the rights of representatives of a particular ethnic or racial group and such effect of these requirements is easily predictable or even desirable for authorities/employers.[30]

Prohibition of direct discrimination in the Racial Equality Directive on points of fact is absolute, exclusions may only be genuine and determining occupational requirements (Art. 4) and positive action to prevent or compensate for disadvantages linked to racial or ethnic origin (Art. 5).

According to Article 4 of the Racial Equality Directive, genuine and determining occupational requirements may be an exception to any forms of discrimination. Difference in treatment which is 'based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'. This exception is not automatic; it may be activated by Member States (presumably, through specific legislation or official policy).

Without doubt, professional linguistic requirements might be interpreted as a type of genuine and determining occupational requirements, insofar as language (linguistic proficiency) is also 'a characteristic related to racial or ethnic origin'. In practice, this exception may, where applicable, be used extensively to justify difference of treatment based on language/linguistic requirements.[31] Such occupational requirements will be further analysed in the sections below.

C. Proportionality test

As explained above, there is no prohibited discrimination if professional linguistic requirements are 1) a legitimate and proportionate 'neutral criterion or practice' (in case of alleged indirect discrimination), or 2) a legitimate proportionate 'genuine and determining occupational requirement' (in case of alleged direct discrimination). One way or another, the key to assessing the discriminatory character of language requirements is the question of their proportionality.

The principle of proportionality was developed in the first place within the framework of constitutional law and legal theory.[32] This principle is also set out in Article 5(4) TEU. Nowadays it is the only general

30 There are historical examples when language skills were used for non-admission of particular groups to some benefits, for example, 'dictation tests in a European language' in Australia. In the past, these tests were established in a way as to prohibit particular minorities (e.g. the Japanese) to enter the country. (E. L. Piesse, Japan and Australia, 4 Foreign Aff. 475 (1926), at 478). In fact, it was an example of direct rather that indirect ethnic/nationality discrimination.

31 Especially in case of direct ethnic discrimination. The situation regarding indirect discrimination is different. According to the Racial Equality Directive, both alleged indirect discrimination and genuine and determining occupational requirements (GDOR) may be justified if they are proportionate. However, the scope of application of GDOR-related rules is more limited as compared with the general exception provided for indirect discrimination. Most importantly, the definition of GDOR includes new elements, which establish links to particular occupational activities. In the context of indirect discrimination, the rules on GDOR therefore become a duplication of the proportionality test.

32 Julian Rivers, Proportionality and Variable Intensity of Review, 65 Cambridge L.J. 174 (2006); A. Barak, Proportionality: Constitutional rights and their limitations, CUP, 2012; D.M. Beatty, The Ultimate Rule of Law, OUP, 2004. Robert Alexy, Theory of Constitutional Rights, Oxford; OUP, 2002); Robert Alexy, 'Constitutional Rights, Balancing, and Rationality', 16 (2) Ratio Juris (2003),131; Mattias Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice', 2 International Journal of Constitutional Law (2003), 574-596.

principle of the EU law deriving from the laws of the Member States.[33] The first proportionality test was formulated by the ECJ in 1990 in *Fedesa*, later to be repeated in other cases:[34]

> The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.[35]

This is comparable to 1) the above-mentioned ECJ judgment in *Haim* that linguistic limitations in the context of the free movement of workers must be justified by overriding reasons (i.e. be *legitimate*), must be suitable for securing the attainment of the objective which they pursue (i.e. be *appropriate or sustainable*), and must not go beyond what is *necessary* in order to attain that objective; 2) Article 2(1) of the Racial Equality Directive, where indirect discrimination will not be taken to occur if a disadvantageous neutral provision, criterion or practice is objectively justified by a *legitimate* aim and the means of achieving that aim *are appropriate* and *necessary*.

Article 4(1) of Directive 2000/43/EC on genuine and determining occupational requirements is less specific: It refers only to legitimate aim and proportionality. However, it might be presumed that in relevant cases the ECJ will interpret the latter principle as in *Fedesa* or *Haim.*

At the national level, the study of the permissibility and proportionality of linguistic requirements may arise at two levels: in the context of the protection of constitutional rights (such as the prohibition of discrimination or equality before the law), or at the level of rights provided for by separate laws (subject to availability of appropriate norms in national anti-discrimination legislation). In addition, language requirements can be introduced both by individual employers in specific cases, and established by national, regional or local authorities.

In any case, the proportionality test in the context of professional linguistic requirements will begin with the question whether these requirements are legitimate. In fact, the answer to this question will determine the entire course of the proportionality check.

An important issue here is the ability to determine whether such linguistic requirements can be disconnected from the nature of occupation activities. As shown above, in *Groener* the ECJ allowed a broad interpretation, recognising the right of Member States to conduct language policy to protect and support the official language and to introduce linguistic recruitments even if there is no need to use this language in a particular workplace. Thus, assessment of the legitimacy of language requirements in case of nationality discrimination and the freedom of movement was placed in a wider social context, and went beyond the demands of the labour market and the specific occupation activities.

According to the Racial Equality Directive, genuine and determining occupational requirements are the only relevant justification in the context of alleged direct ethnic or racial discrimination (in addition to positive action measures). These occupational requirements establish a link between language

33 Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' Cambridge Yearbook of European Legal Studies, Vol. 15, 2012-2013, p. 4.

34 ECJ, Joined Cases C-133/93, C-300/93 and C-362/93, Judgment of the Court (Fifth Chamber) of 5 October 1994, *Antonio Crispoltoni v Fattoria Autonoma Tabacchi and Giuseppe Natale* and *Antonio Pontillo v Donatab Srl*., para 41; Case C-180/96, Judgment of the Court of 5 May 1998, *United Kingdom v Commission*, para 96; Case C-189/01, Judgment of the Court of 12 July 2001, Jippes, *Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren and Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v Minister van Landbouw, Natuurbeheer en Visserij*, para 80; etc.

35 ECJ, Case C-331/88, Judgment of the Court (Fifth Chamber) of 13 November 1990, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health*, ex parte: Fedesa et al., 1990, para 13.

requirements and the nature or context of occupation activities. However, it remains an open question whether in such cases the ECJ will apply an extensive interpretation similar to *Groener*. Considering the fact that direct ethnic or racial discrimination is not tolerated in international human rights law, the standard of proof must be much higher there than in the cases of nationality discrimination.

As for indirect ethnic or racial discrimination, the legitimacy of the measure is not limited by the nature of the position or the profession at stake, at least according to the Racial Equality Directive. If in the future the ECJ demonstrates a benevolent approach to the language policy justifications, then the question of legitimacy of language measures can become a mere formality also in cases of indirect discrimination.

Nevertheless, international law provides us with certain guidelines on what measures of language policy could be recognised as breaching human rights. First of all, professional linguistic requirements may restrict the freedom of expression,[36] while they prescribe the use of a particular language in a particular situation[37] (two extreme examples – the guaranteed use of the official language upon issuance of a driver's license and during the sale of groceries). Such restrictions may be permissible in international human rights law only in very specific conditions.[38] In practice, only language requirements in the public sector (such the use of language upon issuance of a driver's licence) could almost always be recognised as legitimate by default; in the private sector (e.g. sale of groceries) such automatic approval is hardly appropriate.

The next two stages of the proportionality test – appropriateness and necessity of particular linguistic requirements – will depend very much on circumstances of a particular case, while the final stage – the proportionality *sensu stricto* – is when judges need to sum up, and weigh all the arguments, especially public interests/benefits versus individual restrictions/disadvantages. This last stage strongly depends on findings of the first stage (legitimacy), since understanding of the legitimacy of language rules influences the interpretation of public interests/benefits.

The *sensu stricto* test has been criticised 'since it apparently undermines the whole rationality of the proportionality principle, namely to provide some objective predetermined structures according to which the court's reasoning should be conducted in hard cases. Thus, with reference to the *stricto sensu* test, the court could arguably decide either way.'[39] In assessing the proportionality *sensu stricto*, judges will be influenced by dominant notions of the public good in the relevant society, 'social norm', typical approaches to balancing public and private interests, or even by a request in society for 'historical justice', etc. At this stage, the question finally leaves the sphere of law and enters the sphere of public morals, politics and, quite often, nationalistic myths.

36 A similar argument was used by the first OSCE High Commissioner on National Minorities Max van der Stoel in his letter to Estonian Minister of Foreign Affairs Toomas-Hendrik Ilves of 26 March 1999 (Ref. 60/99). See for more details: Poleshchuk V. Advice not welcomed: Recommendations of the OSCE High Commissioner to Estonia and Latvia and the Response, Munster, 2001, pp. 65-71.

37 In the famous communication related to the use of language in commercial advertising, the UN Human Rights Committee emphasized that Article 19 (2) ICCPR 'must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, […], of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression …' The Committee did not agree 'that any of the above forms of expression can be subjected to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others'. UN, Human Rights Committee, Communication No. 359, 385/89, *Ballantyne, Davidson and McIntyre v Canada*, CPR/C/47/D/359/1989 and 385/1989/Rev.1, 5 May 1993, Section 11.3.

38 According to Article 19(2)-(3) ICCPR, the right to freedom of expression may be restricted out of respect for the rights or reputations of others, for the protection of national security or of public order (*ordre public*), or of public health or morals. Article 10(2) ECHR lists the following possible restrictions: the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. The legitimacy of professional language measures should be evaluated considering these restrictions of the freedom of expression.

39 Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law', European Law Journal, Volume 16 No. 2, 2010, pp. 158-185, at 165.

The proportionality test does not guarantee that the outcome will each time be reasonable, moderate and consistent with human rights.[40] Also, the independence of the court cannot guarantee the appropriate result, since judges are part of society and they may share popular attitudes and prejudices. In the next section of the article, we will demonstrate the difficulties faced by the application of the proportionality test at the level of an individual Member State.

II The case study of Estonia

The role of language in Estonia

A. Language and ethnic composition

Due to historical and geographical factors, Estonia is a country with a very large share of people for whom the national language is not their mother tongue. According to the 2011 census, Estonian was a native language for 68.5 % of the population, Russian for 29.6 % and other languages for 1.9 %.[41] Furthermore, for major ethnic groups, the language correlates with the declared ethnicity. According to the 2011 census, Estonian was the native language for 97.4 % of ethnic Estonians, and Russian was the first language for 98.7 % of ethnic Russians.[42] Russian is also widely used by other minority groups.

The main groups of national minorities in the interwar period were Russians, Germans, Swedes and Jews who were granted the right to create non-territorial cultural autonomies.[43] Estonian independence was lost in the years of World War II and it was restored only in 1991. In the post-war period, under the Soviet rule a significant number of people from other parts of the USSR moved to the country, which demographically markedly strengthened the Russian language, which *de facto* had an official status in the Soviet Union. The threat of 'minorization' on their own territory[44] triggered existential fears in Estonians; in the early 1990s, the main political forces considered it right to facilitate the 'repatriation' of representatives of ethnic minorities.[45]

B. Language and the Constitution

According to the original version of the preamble of the Estonian Constitution (1992), the Estonian State 'must guarantee the preservation of the Estonian nation and the Estonian culture through the ages'. 'Estonian nation' is an ethnic term (distinct from the 'people of Estonia', this term could also be found in the preamble).[46]

40 For more criticism of the proportionality principle see: Urbina, Francisco J. (2012) 'A Critique of Proportionality,' American Journal of Jurisprudence: Vol. 57: Iss. 1, Article 3, pp. 49-80; Gregoire C. N. Webber, Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship, 23 Canadian Journal of Law and Jurisprudence 179 (2010); Stavros Tsakyrakis, Proportionality: An assault on human rights? International Journal of Constitutional Law, Volume 7, Issue 3, 1 July 2009, pp. 468-493.

41 Estonia, Statistics Estonia, public database at: pub.stat.ee, Table PC0431 (visited 1 March 2018).

42 Estonia, Statistics Estonia, public database at: pub.stat.ee, Table PC0442 (visited 1 March 2018).

43 See for more details: Vadim Poleshchuk, 'Russian National Cultural Autonomy in Estonia', in Tove H. Malloy, Alexander Osipov, Balazs Vizi (eds.) Managing Diversity through Non-Territorial Autonomy. Assessing Advantages, Deficiencies, and Risks, Oxford University Press, 2015, pp. 229-248.

44 Due to demographic losses, as well as large-scale industrialisation projects it was indispensable to draw specialists and workforce from outside the country. This resulted in migration with stupendous demographic changes. In the first place, the share of Estonians in the population dropped dramatically: in the census of 1934, they constituted 88% of residents in Estonia, but in the census of 1989 – 62% (although their numbers had at that time achieved the post-war maximum). For figures see: Tiit, E-M., Eesti rahvastik. Viis põlvkonda ja kümme loendust (Estonian population. Five generations and ten censuses), Tallinn: Statistical Office, 2011, p. 40, 58.

45 Hallik K. 'Rahvuspoliitilised seisukohad parteiprogrammides ja valimisplatvormides' ('Views on national policy in party programmes and election platforms'), in Heidmets V. (ed.) Vene küsimus ja Eesti valikud (Russian issue and Estonian option), Tallinn: Tallinna Pedagoogikaülikool, 1998. p. 95.

46 Järve P. Ethnic Democracy and Estonia: Application of Smooha's Model, Flensburg, 2000, p. 7.

This part of the preamble has been used by courts of law to decide concrete legal disputes. Considering in 1998 the issue of requirements for elected members of municipal councils to know Estonian, the Constitutional Review Chamber of the Supreme Court with the reference to the preamble concluded that 'the Estonian language is an essential component of the Estonian nation and culture, without which the preservation of the Estonian nation and culture is not possible'.[47]

In 2006, the Estonian Parliament submitted an amendment to the Constitution for adding to the said part of preamble the word 'the [Estonian] language' (*keel*). This amendment of the text of the Constitution by one word occurred in February 2007, when the second successive composition of Parliament voted in favour.[48] The explanatory note to the draft law includes references to the abovementioned decision of the Supreme Court. In addition, it states that

> [o]ur care for our beautiful language needs much stronger symbolic and legal guarantee. The constitutional valuing of the Estonian language would significantly elevate the prestige of learning the state language and its daily use among residents of Estonia, whose mother tongue is some other language.[49]

Article 6 of the Constitution, which defines the status of Estonian as a national/official ('state') language, is part of Chapter I, which can only be changed in a referendum (Article 162 of the Constitution). Thus, the principle of official monolingualism can be safely attributed to the fundamentals of the constitutional order. However, the Constitution also provides for the possibility of using the language of the majority of the region's population in the internal work of local governments (Article 52) and using the minority language in contact with local and regional authorities (Articles 51).

In recent years, language issues could also be treated in Estonia by referring to the necessity to support the process of democratic involvement.[50]

National legislation and its effect

A. The principle of non-discrimination

Article 12 of the Constitution proclaims the principle of equality before the law, as well as the prohibition of discrimination on an open list of grounds; ethnicity, race, colour, language and origin and some other grounds are listed separately. There is consensus among Estonian legal experts that the Constitution has direct effect, is applicable in 'all spheres of life which are regulated and protected by the State',[51] and establishes a prohibition of discrimination in horizontal relations.

The limitation on the principle of non-discrimination is the general provision in Article 11 of the Constitution: 'Rights and freedoms may only be circumscribed in accordance with the Constitution. Such circumscription must be necessary in a democratic society and may not distort the nature of the rights and freedoms circumscribed'.

47 Estonia, Judgment of the Constitutional Review Chamber of the Supreme Court of 4 November 1998 in case No. 3-4-1-7-98 от 04.11.1998, Part 3.

48 Estonia. Riigi Teataja I 2007, No. 33, art. 210.

49 See the Explanatory note to draft law 974 SE (X *Riigikogu*), official site of the *Riigikogu*, at: http://www.riigikogu.ee (visited 1 March 2018).

50 Proposition of Chancellor of Justice to *Riigikogu* No. 16 of 2 July 2012 'Eestikeelse hariduse piisav kättesaadavus' ('On adequate access to education in Estonian'), Section 10, at: http://www.oiguskantsler.ee/et/seisukohad/seisukoht/ettepanek-riigikogule-eestikeelse-hariduse-piisav-kattesaadavus (visited 1 March 2018).

51 Lõhmus, K. 'Võrdsusõiguse kontroll Riigikohtus ja Euroopa Inimõiguste Kohtus' ('Control over Equality in the Supreme Court and in the European Court of Human Rights'), Juridica, No.2, vol. 11, 2003, p. 109.

In considering the issue of discriminatory restriction of fundamental rights, the Supreme Court resorted to a proportionality test. Moreover, in a 2011 age discrimination case, the Supreme Court dismissed the earlier arbitrariness test in favour of a three-step proportionality test, where the norm or measure is assessed in terms of suitability, necessity and proportionality in the narrowest sense.[52]

Certain rules relating to non-discrimination existed in labour legislation even before independence was restored.[53] Currently, Directive 2000/43/EC has primarily been transposed through the adoption of the Equal Treatment Act (2008).[54] In terms of racial and ethnic discrimination, its scope (Article 2) coincides with the Racial Equality Directive; the definition of direct and indirect discrimination (Article 3), as well as of genuine professional requirements (Article 10) in the law is almost identical to what this Directive stipulates.

However, Article 9 (1) of the Equal Treatment Act also stipulates that the Act

> … shall be without prejudice to measures laid down by law, which are necessary for the maintenance of public order, for public security, for the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. Such measures shall be proportionate to achieving their aim.

This provision contradicts the Racial Equality Directive, since it allows exceptions to the prohibition of direct ethnic discrimination under conditions other than genuine professional requirements (Article 4) and positive action measures (Article 5).

To sum up, the Estonian judiciary may consider ethnic and linguistic discrimination in two ways. First, as a limitation of the constitutional right (Article 12 of the Constitution). In this case, the text of the Constitution fails to distinguish between direct and indirect discrimination, and the existing limitation will be analysed using a three-step proportionality test. Second, in the context of the norms provided for in the Equal Treatment Act. In this law, there is a clear distinction between direct and indirect discrimination. The proportionality test should only apply to the latter. However, Article 9(1) also allows this test in the case of direct discrimination, although this is certainly contrary to the EU law. The rules on genuine professional requirements are also applicable.

B. Professional linguistic requirements

In most EU Member States professional linguistic requirements are formulated on a case by case basis by employers; most governments have limited themselves to the regulation of only certain important occupations, such as medical professions. However, a few Member States, including Estonia, have detailed general language regulations in both the private and the public sector.[55]

Professional linguistic requirements were established in Estonia for the first time when the Law of the Estonian Soviet Socialist Republic on Language (1989) entered into force.[56] The adoption of this law was aimed at solving the problem of disproportionate bilingualism and additionally protecting the language of the indigenous population in Estonia. Establishing Estonian as the (only) working language of institutions, organizations and enterprises (Article 12), the law provided an opportunity for individuals

52 Estonia, Judgment of the Supreme Court *en banc* of 7 June 2011 in case 3-4-1-12-10, points 34-35.

53 The Code of Labour Laws (1972) banned direct or indirect infringement of rights or direct or indirect preferences in access to employment on the grounds of sex, race, ethnic origin or attitude to religion (Article 18 (2)). Kodeks zakonov o trude Estonskoi SSR. Oficialny tekst s izmeneniyami i dopolneniyami na 1 yanvarya 1985 goda, Tallinn: Eesti Raamat, 1985.

54 Estonia, Equal Treatment Act (*Võrdse kohtlemise seadus*), 11 December 2008, Riigi Teataja I 2008, 56, 315.

55 Ulla Iben Jensen, The Language Requirements under EU Law on Free Movement of Workers, Analytical Note for 2013 for The European Network on Free Movement of Workers within the European Union, October 2013 – updated February 2014, p. 22. These Member States are Estonia, Latvia and Lithuania, whose independence was restored quite recently – in 1991. Furthermore, Estonia and Latvia both have numerous minority populations.

56 Estonia, ENSV Ülemnõukogu ja Valitsuse Teataja 1989, 4, 60.

to use the Russian language as a guaranteed option (Article 3). After the restoration of independence and the adoption of the Constitution of 1992, the new Language Act[57] came into force in 1995. The new rules rather concerned restrictions on the public use of any language, except for the national language. Under significant international pressure, the law was changed in 1999/2000, *inter alia* establishing the principle of proportionality of language requirements in the labour market.[58]

In 2011, the new Language Act was adopted with the aim 'to develop, preserve and protect the Estonian language and ensure the use of the Estonian language as the main language for communication in all spheres of public life' (Article 1). The law retained the requirement of proportionality of language requirements in Article 23:

(1) Officials and employees of state agencies and of local government authorities, as well as employees of legal persons in public law and agencies thereof, members of legal persons in public law, notaries, bailiffs, sworn translators and the employees of their bureaus shall be able to understand and use Estonian at the level which is necessary to perform their service or employment duties.
(2) The requirement for employees of companies, non-profit associations and foundations and for sole proprietors, as well as the members of the board of the non-profit associations with the compulsory membership to be proficient in Estonian to the level that is necessary to perform their employment duties shall be applied if it is justified in the public interest.
(3) The mandatory levels of language proficiency shall be established based on the language proficiency levels defined by the Common European Framework of Reference for Languages compiled by the Council of Europe [...]
(4) The requirements for proficiency in and use of the Estonian language for officials, employees and sole proprietors shall be established by a Regulation of the Government of the Republic. The regulation governs the requirements for proficiency in and use of Estonian of persons specified in subsections (1) and (2) of this Article, in accordance with the character of work and the situation of the use of language at work or in the position [...]

Appropriate government regulation was adopted in 2011[59] and it applies a 'sector approach', referring to groups of professions rather than to individual professions. The content of individual linguistic requirements[60] is highly controversial. In 2014, the UN Committee on the Elimination of Racial Discrimination recommended Estonia to 'ensure that language requirements in relation to employment are based on reasonable and objective criteria and are linked to the needs for the performance of each individual job' and 'to continue to be mindful of indirect discrimination effects of public policies on vulnerable groups'.[61] The European Commission against Racism and Intolerance (ECRI), a Council of Europe body, has repeatedly recommended that the Estonian authorities further strengthen the Equal Treatment Act by prohibiting discrimination based on language and citizenship.[62] Concerns regarding Estonian language policies have also been raised by Amnesty International.[63]

57 Estonia, Riigi Teataja I 1995, 23, 334.
58 See for detailed analysis: Poleshchuk V. Advice not welcomed: Recommendations of the OSCE High Commissioner to Estonia and Latvia and the Response, Munster, 2001, pp. 65-71.
59 Requirements for proficiency in and use of Estonian language for an official, employee and self-employed person (*Ametniku, töötaja ning füüsilisest isikust ettevõtja eesti keele oskuse ja kasutamise nõuded*), Estonia, Riigi Teataja 14.02.2018, 10.
60 The minimum proficiency requirements are subdivided into three broad levels: Basic User: A1 and A2; Independent User: B1 and B2; Proficient User: C1 and C2. However, the lowest (beginner's) A1 level and the C2 level, which is near-native proficiency, are not officially required in Estonia and it is not possible to pass the respective official examinations.
61 UN, Committee on the Elimination of Racial Discrimination, Concluding observations on the combined tenth and eleventh periodic reports of Estonia, 22 September 2014, CERD/C/EST/CO/10-11, Section C.
62 CoE, European Commission against Racism and Intolerance (2010), Report on Estonia (4th monitoring cycle), adopted 15 December 2009, published 2 March 2010, ECRI (2010), Section 51; CoE, European Commission against Racism and Intolerance (2015), Report on Estonia (5th monitoring cycle), adopted 16 June 2015, published 13 October 2015, ECRI (2015), Section 13.
63 Amnesty International, 'Estonia. Linguistic Minorities in Estonia: Discrimination Must End', AI Index: EUR 51/002/2006, 7 December 2006. Available at http://www.amnesty.org.

The implementation of the requirements of the Language Act is supervised by a special national body, the Language Inspectorate,[64] which *inter alia* has the right to check the level of Estonian language proficiency and to make a proposal to revoke valid certificates, to refer an employee to retake the exam, to make a proposal to an employer to terminate a contract of employment with an employee, etc. (Article 31). This body was created as early as in 1990 (then called the National Language Board).[65]

C. Trends in language proficiency

In the last Soviet census of 1989, only 14 % ethnic Russians declared good mastery of Estonian[66] as their second language and 1 % as their native language.[67] Estonia also had some language enclaves: for example, in the third largest border city of Narva, 93 % of the population spoke Russian as their first language in 1989.[68]

The introduction of official language requirements was intended to dramatically change the situation where interethnic communication was mainly in Russian, including communication between Estonians and other groups. In the 1989 Language Act, the use of the Estonian language was formulated as an unconditional right that concerned both the public and the private sector (Article 2). This approach is also maintained by the current legislation (Article 8 of the Language Act of 2011).

In the 1990s, the administration of linguistic issues mainly took place through instructions and control, since no systematic policy of integration had been introduced yet.[69] In spite of this, rigid language policies led to a rapid increase in the proportion of ethnic non-Estonians who spoke the national language. For example, among ethnic Russians from 1989 to 2000, this share more than doubled, to 40 %.[70] However, this increase then slowed down and the 2011 census showed that 42.5 % of ethnic Russians could speak Estonian.[71]

According to the study 'Interethnic Relations in Estonia' (2016), ethnic minorities were much more likely than ethnic Estonians to believe that during the past two years they had been discriminated at work or in their search for work: due to ethnicity (14.4 % versus 1.1 % for Estonians), due to their native language (16.0 % versus 1.3 %), because of age (13.6 % versus 4.0 %), and because of a health condition (7.0 % versus 2.8 %).[72]

The authors of the 'Integration Monitoring 2017' commissioned by the Ministry of Culture came to the conclusion that the differences in the situation of ethnic minorities and Estonians in the labour market had not significantly decreased in the previous decade. 'The knowledge of Estonian improves the situation of non-Estonians, but in this case the position of Estonians is better. Representatives of other ethnic origin

64 *Keeleinspektsioon.*

65 *Eesti Vabariigi Riikliku Keeleamet*. On the Establishment of the National Language Board of the Republic of Estonia (Eesti Vabariigi Riikliku Keeleameti moodustamise kohta). Eesti Vabariigi Valitsuse määrus 23. novembrist 1990.a. No. 238, at: https://www.riigiteataja.ee/akt/29796 (visited 1 March 2018).

66 Statistical Office of Estonia. Population of Estonia by Population Censuses I, Tallinn, 1995, Table 2.28.

67 Respondents at the census were asked about 'free' mastery of some other language of the peoples of the USSR (meaning just one language). Free mastery of the language was defined as the skill to read, write and speak fluently, or to speak fluently (Ibid, p.14). Therefore, due to the formulation of the questions, the data on proficiency in Estonian in 1989 could well include underestimation, but they still testify to the problems of linguistic competence in the local Russian community.

68 Statistical Office of Estonia. 2000 Population and Housing Census: Citizenship, Nationality, Mother Tongue and Command of Foreign Languages II, Tallinn: Statistical Office of Estonia, 2001, Tables 12 and 15.

69 Vihalemm T., Siiner M. 'Language Policy Initiatives in Relation to Social Structure', in Estonian Human Development Report 2010/2011: Baltic Way(s) of Human Development: Twenty Years On. Tallinn: Estonian Cooperation Assembly, 2011, p. 120.

70 Statistical Office of Estonia. 2000 Population and Housing Census: Citizenship, Nationality, Mother Tongue and Command of Foreign Languages II, Tallinn: Statistical Office of Estonia, 2001, Table 40.

71 Estonia, Statistics Estonia, public database at: pub.stat.ee, Tables PC04442 and PC0443 (visited 1 March 2018).

72 Note: 27.4% of Estonians and 8.2% of non-Estonians did not work and/or did not look for a job for the past two years. The study 'Interethnic relations in Estonia' was conducted in January 2016 by the sociological firm 'Saar Poll' (Estonia). It was commissioned by the ALDE group of the European Parliament. A representative sample consisted of 619 people. The research materials are in the archives of the author who participated in the drafting of the questionnaire.

have lower employment rates, higher unemployment rates and they estimate that they are less safe in the labour market. Among the employed there are fewer ethnic non-Estonians among those who have reached high positions ... Analysis shows that people of other ethnic origin are more likely to experience unequal treatment, and they view their origin as an essential factor affecting their labour prospects.'[73]

In spite of these sociological findings, in Estonia there is almost no case law dealing with discrimination on the ground of ethnic origin or language, also in the employment field.

Professional language requirements and discrimination

A. Nationality discrimination

A relatively small number of EU nationals who are not Estonian citizens reside in Estonia.[74] In connection with this, there is no information about any court cases that concern the linguistic aspects of the free movement of workers.

The issue of professional linguistic requirements was raised by the European Commission at the negotiations on Estonia's accession to the EU. The problem was finally addressed by the introduction of the principle of proportionality in 1999/2000.[75] The practical implementation of this principle by Estonian courts will be discussed below.

Professional linguistic requirements are not applied 'to persons who work in Estonia temporarily as foreign experts or specialists' (Article 23 (5) of the Language Act). However, this provision cannot be interpreted too broadly to cover all those who enjoy the right of free movement. For foreign lecturers and researchers, the exception is temporary: 5 years (Article 23 (5)). Most likely, this is in line with the judgment in *Groener*, taking into account the role that higher education and science play in society. However, in any case, the language demands must be proportional.

Another issue is the procedure that needs to be used to prove the required proficiency in Estonian. Importantly, Estonian language proficiency examinations are organised by only one publicly funded institution INNOVE. It does not organize regular testing in other EU countries, although this may happen sporadically. For instance, in 2018 the exam can be passed only in the territory of Estonia (four times a year for each level) and in Helsinki, Finland (only for levels B1 and B2, one exam per year for each of these levels).[76] Only those who have finished basic, secondary or higher education in Estonian are exempt from the examination (Article 26 (3) of the Language Act).

In Estonia, it is not allowed to use a language proficiency certificate issued by any other body or educational institution. Estonian regulation and practice do not comply with the above-mentioned judgments in *Angonese* and *Commission v Belgium*, where similar requirements were considered an obstacle to the freedom of movement and discrimination on the ground of nationality.

73 Märt Masso, 'Tööturg' ('Labour Market'), In: K. Kaldur et al, Eesti ühiskonna integratsiooni monitooring 2017, Uuringu aruanne (Integration Monitoring of the Estonian Society 2017, Report of the Study), Balti Uuringute Instituut, 2017, p. 50.

74 According to the data of the census of 2011, Estonia hosted 6,792 EU citizens other than citizens of Estonia: This represented as little as one half per cent of the total population. Estonia, Statistics Estonia, public database at: pub.stat.ee, Table PC0421 (visited 1 March 2018).

75 For more details: Vadim Poleshchuk, Estonia, Latvia and the European Commission: Changes in Language Regulation in 1999-2001, Open Society Institute, [2010], https://www.opensocietyfoundations.org/sites/default/files/estonia-latvia-languages-20020117.pdf.

76 Estonia, Innove, Information provided at: http://haridusinfo.innove.ee/UserFiles/Tasemeeksamid/Eesti_keele_eksam_eng.pdf (visited 1 March 2018).

B. Ethnic discrimination

Direct ethnic discrimination

The Estonian judiciary have avoided the possibility of considering the issue of systemic restrictions for Estonian non-native speakers in the labour market.[77] However, in 2011, the Commissioner for Gender Equality and Equal Treatment – the Estonian equality body – drafted an opinion concerning access to the civil service of a representative of a local minority community who was proficient in Estonian.[78]

> X. applied for a position at the Ministry of Foreign Affairs where one of the requirements was a 'very good knowledge of the Estonian language'. The applicant with a typical non-Estonian name had previously studied in Estonian at a higher education institution. In his CV he indicated Russian as his first language and chose C1 as his level of proficiency in Estonian. He failed to get through the initial round due to alleged insufficiency of his Estonian. The Ministry informed that they expected applicants to speak Estonian at C2 level. X. filed an application with the Commissioner who came to the conclusion that the Ministry of Foreign Affairs had discriminated against X. due to his ethnicity.
>
> In her opinion,[79] the Commissioner claimed that ethnic origin and mother tongue are closely interconnected. She also presumed that X. had been treated less favourably compared to native speakers of Estonian due to existing prejudices regarding ethnic non-Estonians' proficiency in the official language. Furthermore, the requirements of the Ministry of Foreign Affairs (Estonian at C2 level) exceeded the officially established requirement for public officials. The Ministry did not attempt to check the actual proficiency level of X. The Estonian language proficiency of native speakers of foreign languages must be controlled at a level equal to that of native Estonian speakers, i.e. without special attention paid to native speakers of other languages. The Ministry failed to provide arguments to justify unequal treatment of ethnic Estonians and non-Estonians in recruitment procedures.

This case is related to language, but it is an example of direct, rather than indirect, ethnic discrimination. In this case, the reason for the failure at the competition was the native language of X., closely related to his ethnicity. The applicant had a degree in Estonian and he was not required to take the exam and receive a certificate. He indicated the level of language that was required for public officials (C1) and which, if necessary, could be proved in the exam. One should agree with the Commissioner that the applicant was a victim of the prejudice that his level of Estonian would not be good enough because of his origin, and this predetermined unequal treatment of him as compared to other applicants for whom Estonian was the first language.

77 In 2006, the Tallinn District Court considered a case which concerned an increased pension for former policemen who had been in service during a specific period (1991-1994) and who were still in service at the entry into force of the amendments (2004). The claimant argued that the relevant provisions were discriminatory in respect of ethnic minority members who had to leave the police service in great numbers before 2004 due to the absence of Estonian citizenship or poor proficiency in the Estonian language, but who had been in service at the time considered for the increased pension. The court did not consider this issue on the grounds that the claimant had not proved that he belonged to this group. Estonia, Judgment of the Tallinn District Court (*Tallinna Ringkonnakohus*) of 5 September 2006 in administrative case No. 3-06-905, para. 13.

78 According to scholars, '[t]he requirements established for proficiency in the Estonian language for civil servants are so strict that almost half of the second- or third-generation Estonian-Russians who obtained their qualifications in the educational system of the independent Estonian Republic are not able to meet these requirements'. Ellu Saar, Jelena Helemäe, 'Ethnic Segregation at the Estonian Labour Market', In: Estonian Human Development Report 2016/2017, Estonia at the Age of Migration, available at: https://inimareng.ee/en/immigration-and-integration/ethnic-segregation-in-the-estonian-labour-market/.

79 Estonia, Commissioner for Gender Equality and Equal Treatment, Opinion of 16 August 2012, available at: http://www.volinik.ee/wp-content/uploads/2018/02/16.08.2012_arvamus.pdf (visited 1 May 2018).

The opinion on this case was a great step forward, as Estonian courts had previously refused to deal with language issues in the context of the Racial Equality Directive.[80]

The Equal Treatment Act (ETA) is to ensure the protection of persons against discrimination on grounds of ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation (Article (1(1)). However, Article 2(3) states that this law does not preclude the requirements of equal treatment in particular due to family-related duties, social status, representation of the interests of employees or membership in an organization of employees, level of language proficiency or duty to serve in defence forces.[81] In practical terms, it long remained unclear whether the ETA could be applied in cases of discrimination on grounds not explicitly mentioned in its Article 1(1). In 2017, the judges of the Supreme Court gave their interpretation when considering the issue of compensation for discrimination of a person dismissed due to membership of a trade union. The Court found it possible to apply the relevant norms of the Equal Treatment Act, but explained that there should be a violation of the employment contract for the ETA norms on compensation to be activated for damage caused by discrimination on 'other' grounds.[82] Since language proficiency is specifically mentioned in Article 2(3), it should also be possible to apply these norms of the Equal Treatment Act in case of violation of the employment contract, if there is unequal treatment based on language proficiency. This implies that provisions on direct and indirect discrimination are also applicable in such cases.

Indirect ethnic discrimination and proportionality

Language requirements can constitute indirect discrimination insofar as they are 'disadvantageous' for ethnic minorities (but only if they are not objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 3 of the Equal Treatment Act)). As explained above, the requirement of proportionality is also contained in the Language Act as an abstract norm, irrespective of the fight against discrimination.

One way to justify language demands, including in the labour market, is to emphasise their universality. Could discrimination be at hand if requirements are the same for everyone?

> L.J. was a prison public official of minority origin. He was released from service due to his unsuitability for the position. He claimed to be a victim of discrimination on the grounds of ethnic origin and age.
>
> Initially, for the position held by L.J. the Government established the requirement of possessing an Estonian language proficiency certificate at level B2. The applicant had an equivalent certificate. However, from February 2011 the requirement was raised to level C1. L.J. failed to pass the required exam in due time.
>
> L.J. appealed against the decision to release him from service claiming it to be unsubstantiated and discriminatory. The court of first instance found that L.J. did his work very well and that his work was repeatedly praised by his superiors. The decision to release him from service due to the lack of a single document was found to be unlawful. This decision was appealed by the employer.

80 A former prison doctor filed a complaint claiming *inter alia* indirect ethnic discrimination on the ground of language as her level of proficiency affected her remuneration. According to the Tallinn District Court, Directive 2000/43/EC was irrelevant in this case as far as it deals with ethnic and racial discrimination and not language. For public officials, Estonian language proficiency requirements are based on valid legislation and they do not constitute ethnic discrimination. The court argued that 'ethnic origin cannot be altered but a person can develop better language proficiency'. Estonia, Judgment of the Tallinn District Court (*Tallinna Ringkonnakohus*) of 30 November 2009 in administrative case No. 3-08-2604, para 15.

81 The Equal Treatment Act abolished the special anti-discrimination norms of the valid Employment Contracts Act. The latter provided protection from discrimination on more grounds than the Equal Treatment Act. Article 2(3) of the latter was to signal that the level of protection against discrimination has not been reduced.

82 Estonia, Judgment of the Supreme Court (Civil Law Chamber) of 22 March 2017 in case No. 3-2-1-167-16, point 14.

> The district court emphasised[83] that public institutions must follow official legal requirements. Therefore, the release from service due to the lack of the language proficiency certificate was inevitable. The court did not find ethnic and age discrimination in this case: L.J. had not been treated less favourably than all other public officials without C1 proficiency certificates regardless of their ethnic origin or age. This decision became final.

This means that the district court found that the language requirements were non-discriminatory, since they applied to everyone. This 'one-language-for-all' approach is particularly inappropriate when we touch on the issue of indirect discrimination. The study of possible unequal treatment in this case should proceed from the understanding that members of two groups are in unequal conditions – persons who speak a certain language as their first language and persons for whom a certain language is not their mother tongue.[84]

The district court was *a priori* satisfied that the requirements established by the State were justified and proportional. For this judgment, this was certainly not the case, since the complainant coped with his duties quite well. So, what would happen if a court applied a test of proportionality of language requirements? In this context it can apply the classical proportionality test adopted in the case law of both the ECJ and the Supreme Court in Estonia.

The requirement to use the national language in the public sector seems to be *legitimate* by default.[85] The establishment of official language requirements is *suitable/appropriate* insofar as the desired legitimate aim can actually be achieved.

In the next stage it is to be decided whether the measure is *necessary*. In this context, one is to consider whether the task could have been achieved by some other less costly way or by some way that is less inhibitive for rights and freedoms. Most probably, the answer to this question will be to the effect that professional linguistic requirements are necessary in the national context.

Passing to the final stage of the proportionality test (proportionality *sensu stricto*), the Estonian courts decide if the acts or measures 'represent a net gain, when the reduction in enjoyment of rights is weighed against the level of realisation of the aim'.[86] It is important to examine what is the highest public good in the context of a particular case. Without doubt, at this stage Estonian judges will rely on the Estonian constitutional provisions and case law of the Supreme Court presented above.

An approximate line of reasoning on the issue of language requirements in the professional context has been demonstrated by the Chancellor of Justice, a body that occupies a unique place in the Estonian legal system, combining the obligations of the constitutionality guardian, ombudsman and equality body.

> In June 2008 the Chancellor of Justice started a procedure on the basis of the application submitted under Article 15 of the Chancellor of Justice Act, which ensures everyone's right of recourse to the Chancellor to review the conformity of an act or other legislation of general application with the Constitution or the law. The applicant claimed that several legal provisions were in violation of Article 12 of the Constitution (ban of discrimination). The Basic Schools and Upper Secondary Schools Act and the Vocational Educational Institutions Act had been amended to introduce beginners' allowances (*lähtetoetused*), which are to be paid to those who start their teaching career outside the largest Estonian cities of Tallinn or Tartu. One of the established

83 Estonia, Judgment of the Tallinn District Court (*Tallinna Ringkonnakohus*) of 23 January 2014 in administrative case No. 3-13-510.

84 Fernand de Varennes, Language, Minorities and Human Rights, The Hague: Martinus Nijhoff Publishers, pp. 80-81.

85 More questions are raised by such demands in the private sphere. According to the Language Act, in the private sector the use of language can be justified by 'protection of the fundamental rights or in the public interest,' and the latter term means 'public safety, public order, public administration, education, health, consumer protection and occupational safety' (Article 2 (2)). Compare with Article 19(2)-(3) ICCPR cited above.

86 Julian Rivers, Proportionality and Variable Intensity of Review, 65 Cambridge L.J. 174 (2006), p. 181.

requirements for recipients is Estonian language proficiency at the 'highest level' (then one of three officially established proficiency levels in Estonia). However, according to valid legislation most of the teachers in Russian-language schools only needed to possess 'middle level' proficiency certificates (as required by then valid government regulation No. 249 of 16 August 1999).

The Chancellor of Justice came to the conclusion[87] that more advanced requirements for those applying for beginners' allowances as compared with teachers' professional requirements did not breach the constitutional anti-discrimination provisions. The Chancellor emphasised that the ban of discrimination was not absolute but could be limited by other constitutional provisions. Article 6 of the Constitution established Estonian as the only official language of the country. This provision shall be regarded as a constitutional value. Consequently, linguistic requirements for teachers are constitutional as such regardless of concrete requirements for a proficiency level. Beginners' allowances are not deemed to be shared among all teachers. They were introduced in the framework of the State's policies and the official bodies did have a right to establish specific requirements for those applying for such benefits.

The Chancellor of Justice argued that the State may introduce specific requirements for the access to certain work-related benefits as compared with general occupational requirements. But (in some areas?) any linguistic requirements might be justified, and they shall not be deemed as ethnic/linguistic discrimination (and *mutatis mutandis* discrimination on nationality). It seems that the recognition of the possibilities of 'any' requirements for education workers cannot be considered compatible with the principle of proportionality in accordance with the above-mentioned ECJ case law relating to the freedom of movement.

This approach to language cannot be fully considered a product of Estonian legal thought. The well-known German theorist Robert Alexi, who considered the nature of Estonian linguistic naturalization requirements for the numerous Russian-speaking minority in Estonia, came to the conclusion that 'doubtlessly the self-preservation and identity of Estonia are apparent values of the constitution within formulations, history of creation, context and aims of the Estonian Constitution. Furthermore, it is beyond doubt that those constitutional values also include linguistic self-preservation and identity'.[88]

If language-related values of the nation state are assumed to be indisputable, the options to verify the linguistic demands with the help of norms of non-discrimination would be scant. For instance, in Estonia the required proportionality test is under the powerful influence of the dominant understanding of 'legitimate expectations' of a majority of the population and ideological views on the place and role of the national language.[89] Against this background, the linguistic requirements can easily pass the proportionality test even if for the outside observer the contested demands seem excessive.

Conclusions

EU law provides an opportunity to verify the validity of professional language requirements through statutory rules and case law on nationality discrimination and direct or indirect discrimination on the grounds of racial or ethnic origin. In all cases, the key issue is the proportionality of these requirements.

87 Estonia, Chancellor of Justice, Written communication of 14 August 2008 No. 6-1/080952/00805794, available at: http://www.oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_seisukoht_vastuolu_puudumine_opetajate_lahetustoetus.pdf (visited 1 March 2018).

88 Alexy R. Põhiõigused Eesti põhiseaduses (Fundamental Rights in Estonian Constitution), Juridica, 2001 (separate issue), p. 65.

89 'The aim of Estonia has to be timeless, as it is. This aim is clearly described by our constitution – the Republic of Estonia has been founded to protect internal and external peace, and to guarantee the survival of the Estonian nation, language and culture through times. In order to achieve these objectives, the Estonian State has been founded on freedom, justice and law'. The speech of the President of the Republic at the Republic of Estonia Independence Day Celebration at the Estonian National Museum (24 February 2018), at: www.president.ee (visited 1 March 2018).

The test of proportionality as developed in the practice of the European Court of Justice may provide assistance here.

The Estonian case study examined the problems that may arise along this path. Estonia has detailed language legislation and has applied the proportionality test in practice. In spite of this, in court rooms, the verification of language requirements was blocked by the use of the 'one-language-for-all' approach, which states that requirements for each and every person cannot be discriminatory, or that the rules established by the State are justified by default.

Given the role that language plays in modern society, especially in the CEE region, the proportionality test may become an empty formality, since at the last stage, when deciding on the proportionality *sensu stricto*, weighing all the pros and cons, judges might be under the influence of values of an ethnically and culturally biased nation state. The example of Estonia shows that theoretically in some areas any language requirements can be justified in the interests of preserving the national language and national linguistic identity.

We very much believe that Estonia is not unique in this regard. Therefore, ensuring the proportionality of language requirements, especially in the context of provisions on ethnic discrimination, is possible only by working out certain standards at the supranational, i.e. European level.

Throwing the babies out with the bathwater: the CJEU, xenophobia and equality bodies after *Jyske Finans*

Lilla Farkas*

This article seeks to broaden the analysis of the *Jyske Finans* judgment by scrutinising the imbalance in the Court's approach to various forms of racism prevalent in Europe and the chasm it opens between the interpretations of international tribunals with authority to rule on racial discrimination. It also calls attention to the significant role that equality bodies play in the enforcement of EU racial equality norms and the need to recognise them as agents of EU law. This article consists of five parts. Following the introduction, it provides a short summary of the judgment. Part 3 explains the need for equal scrutiny of all forms of racism in the EU. Part 4 looks at equality bodies enforcing EU law at home and before the CJEU, while Part 5 concludes.

I Introduction

Jyske Finans does not belong to the celebrated cases of the Court of Justice of the European Union (CJEU). The reasoning and the result "begs the question of what space there is for race discrimination in the Race Directive aside from discrimination based on ethnic origin."[1] The key shortcoming of *Jyske Finans* is that it fails to recognise widespread xenophobia, which is a key form that racial discrimination takes across the European Union. It follows verdicts in *Achbita* and *Bougnaoui* where the Court's analysis also skates over the social context, i.e. stereotypes at the intersection of religion, gender and race that underlie the Islamic veil bans.[2]

Since the adoption of the Racial Equality Directive,[3] in two highly celebrated cases the CJEU made inroads into clarifying the meaning of discrimination based on racial or ethnic origin. In *Feryn* and *CHEZ*, its approach was broad and contextual, focusing on how racial discrimination is constructed by majority

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1 Atrey, S., Race discrimination in EU law after *Jyske Finans,* Case C-668/15, *Jyske Finans A/S v Ligebehandlingsnævnet*, acting on behalf of Ismar Huskic, Judgment of the Court (First Chamber) of 6 April 2017 EU:C:2017:278, Common Market Law Review, 55, 2018, p. 627.

2 Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, and Case C-188/15, *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole SA. For an intersectional analysis, see,* Loenen, T., 'The headscarf debate: Approaching the intersection of sex, religion, and race under the European Convention on Human Rights and EC equality law', in Schiek, D. and Chege, V., *European Union non-discrimination law: Comparative perspectives on multidimensional equality law*, 2009.

3 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19/7/2000, pp. 0022-0026.

groups over time.[4] The CJEU subjected discrimination against the Roma to a high level of scrutiny, examining the way in which Eastern Europe's largest ethnic group was in fact racialised.[5]

In comparison, in *Jyske Finans* and other referrals under the Racial Equality Directive the social context was not brought to the fore, nor was the purpose of the Directive discussed.[6] Failure to reflect on the prejudices against and discrimination of foreigners is particularly troublesome, given that the Racial Equality Directive was adopted specifically to combat discrimination against immigrants in Western Europe.[7] Moreover, national courts and the European Court of Human Rights tend to establish (in)direct race discrimination when faced with such practices.[8]

The Racial Equality Directive prohibits discrimination on the ground of racial or ethnic origin in a broad range of fields. It mandates the establishment of equality bodies to promote non-discrimination by providing assistance to victims of discrimination, by conducting surveys, by producing reports, and by publishing recommendations.[9] In two-thirds of the Member States however – including Denmark – there are bodies whose competences do not limit them to playing such a promotional role. The tribunal-type bodies can hear, examine and decide on individual instances of discrimination brought before them, while in various other countries, equality bodies can act on behalf or in support of victims or bring representative action when individual victims cannot be identified.[10] The *Jyske Finans* case started before the Danish Board of Equal Treatment, a tribunal-type body that established indirect racial discrimination and eventually became the defendant in the case referred to the CJEU. By standing up for its decision, it came to represent the interests of the applicant Mr Huskic, a Danish national of Bosnian origin.

An important characteristic of EU anti-discrimination law is the lack of a European enforcement agency. In view of this structural weakness, it would be particularly desirable for the Court to be more appreciative of national equality bodies that have gathered considerable expertise in the anti-discrimination field. Half of the preliminary references on racial discrimination broadly construed involve equality bodies. The failure to engage in quasi-judicial dialogue is to the detriment of racial or racialised groups whose interests these bodies represent. Dialogue and mutual learning could increase the level of protection under EU anti-discrimination law, simultaneously elevating the Court's profile in the fundamental rights field.

II The *Jyske Finans* judgment

In Denmark, Jyske Finans A/S offers loans and lease arrangements to individuals and businesses, in cooperation with motor-vehicle dealers. In 2009, Ismar Huskic, the applicant and his partner concluded a

4 Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* and Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*. For comments on the judgments see, Krause, R., 'Case note on Feryn', Common Market Law Review 47: pp. 917-931, 2010. This case note summarises the criticism of the Court's activist interpretation in German legal circles. In CHEZ, the Court went far but not far enough, according to Lahuerta, S. B., 'Ethnic discrimination, discrimination by association and the Roma community: CHEZ', Common Market Law Review 53: pp. 797-818, 2016. See also, Farkas, L., The meaning of racial or ethnic origin under EU law: between identities and stereotypes, European Commission, January 2017, pp. 74-79.

5 McCrudden C., "The New Architecture of EU Equality Law after CHEZ: Did the Court of Justice Reconceptualise Direct and Indirect Discrimination?" *European Equality Law Review, 1/2016.*

6 Case C-571/10 *Servet Kamberaj v Istituto per l`Edilizia sociale della provincial autonoma di Bolzano (IPES) et al*; Case C-394/11 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and others*, Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH*, Case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn* v *Vilniaus miesto savivaldybės administracija*.

7 Mark Bell, Racism and Equality in the European Union (OUP, 2008), pp. 75-78.

8 According to information collected for The meaning of racial or ethnic origin Report, National courts and equality bodies, among other things, grapple with the essential elements of the definition of racial or ethnic origin, descent, as well as 'foreignness' and nationality-based discrimination, pp. 62-64.

9 Article 13 of the Racial Equality Directive mandates the establishment of equality bodies. EU law prohibits discrimination on seven grounds, but it requires Member States to establish equality bodies only in the field of race and gender.

10 Ammer, Margit et al, *Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC*, page 43 and 44, see https://www.humanconsultancy.com/downloads/402-study-on-equality-bodies-set-up-under-directives-2000-43-ec-2004-113-ec-and-2006-54-ec-synthesis-report.

contract with a dealer for the purchase of a used car. The price was partly financed through a loan jointly requested from Jyske Finans by the applicant and his partner. In order to assess his loan application, the company asked the applicant to provide an identification document, given that according to his driving licence he was born in Bosnia and Herzegovina. His partner who was born in Denmark was not asked to submit further proof of identity. Had a situation test been planned, the company's profiling practice could not have been more plainly revealed, given that both being Danish citizens, the only difference between the applicant and his partner was their country of birth.

In 2010, following Mr Huskic's complaint, the Danish Board of Equal Treatment (Ligebehandlingsnævnet) found that Jyske Finans had discriminated indirectly on the ground of race and ordered the company to pay DKK 10 000 (approximately EUR 1 340) in compensation. The Board's long-standing interpretation of discrimination based on nationality or country of origin has been that such conduct constitutes indirect discrimination on the basis of racial or ethnic origin. The company did not comply with the Board's decision, which led the Board to bring proceedings before the District Court, Viborg (Retten i Viborg). In 2013, the District Court upheld the Board's decision and, importantly, expressed the view that the profiling of persons based on their place of birth could amount to direct ethnic discrimination.

On appeal by the company, the Court of Appeal of Western Denmark (Vestre Landsret) referred the case to the CJEU, essentially requesting its interpretation on whether the profiling at issue amounted to direct or indirect racial discrimination. If the requirement that customers furnish additional identification when their driving licences attest a place of birth other than the Nordic countries, an EU Member State, Switzerland or Liechtenstein had amounted to indirect discrimination, the question arose whether the public security considerations served by Directive 2005/60/EC on the Prevention of use of the financial system for the purpose of money laundering and terrorist financing, can reasonably justify unequal treatment between Danish citizens.

Advocate General Wahl opined that Jyske Finans' conduct could not amount to direct race discrimination. In his view, a person's place of birth says "surprisingly little" about him or her, and reference to the place of birth can only "maintain certain ill-begotten stereotypes" about his ethnic origin.[11] According to the Advocate General, racial discrimination cannot be established as long as a specific ethnic group suffering disadvantage is not identified.[12] However, in view of an online document published by Jyske Finans, in which the company itself considered "the risk of money laundering and financing of terrorism [as] generally relatively limited when it comes to this type of transaction", the Advocate General conceded that were the Court to examine indirect race discrimination, the profiling practice cannot be justified. Given that the practice does not sufficiently take into account individual circumstances, it can be deemed to be contrary to the Racial Equality Directive.[13]

The Court (First Chamber) found that racial discrimination had not taken place.[14] It ruled that racial or ethnic origin was simply not at play, and that therefore it was not needed to assess the necessity and proportionality of the profiling practice at hand.[15] The Court argued that in order to establish less favourable treatment, all affected non-Danish ethnic origins must be specified. In other words, rather than treated as a single group (ethnic non-Danes), groups based on countries of origin must be compiled and compared to ethnic Danes. This aspect of the reasoning specifically troubles national equality experts,

11 Paragraphs 2 and 3, Opinion of Advocate General Wahl delivered on 1 December 2016 in case C-668/15, *Jyske Finans AS v Ligebehandlingsnaevnet, acting on behalf of Ismar Huskic.*

12 Ibid., Paragraphs 68-69.

13 Ibid, Paragraph 90. It should perhaps be added that it would seem rather unreasonable to suspect one party to a joint loan request of money laundering, while not suspecting the other – which was exactly what took place in the present case.

14 Paragraph 20 of the judgment of the Court delivered on 6 April 2017 in case C-668/15, *Jyske Finans AS v Ligebehandlingsnaevnet, acting on behalf of Ismar Huskic*: '[…] a person's country of birth cannot, in itself, justify a general presumption that that person is a member of a given ethnic group such as to establish the existence of a direct or inextricable link between those two concepts'.

15 Ibid., Paragraphs 31-35.

because it is the junction where the CJEU's analysis fundamentally differs from that of the European Court of Human Rights and national practice.

At the end of 2017, in light of the CJEU's verdict, the Court of Appeal of Western Denmark quashed the Board's decision and the latter accepted this judgment. The domestic outcome is detrimental to Mr Huskic and in the future may impede protection from racial discrimination before the Danish Board of Equal Treatment, and potentially before civil courts. Its reception elsewhere remains to be seen, particularly because when faced with discrimination based on migrant background, foreignness or other equivalent terms, courts in the overwhelming majority of Member States routinely establish racial discrimination – direct or indirect.[16]

III The need for equal scrutiny of all forms of racism in the EU

There are two important aspects of the *Jyske Finans* judgment that test the effectiveness of protection from racial discrimination under EU law. This section deals with the explicit one, namely the judgment's effect as reinforcing uncertainties concerning the interpretation of xenophobia as a form of racial discrimination. Xenophobia is a practice that racialises individuals on the basis of their place of birth, a term equivalent to migration background or non-European origin. Xenophobia constructs a racial group on the basis of these 'objective criteria' regardless of the identities of the individuals that allegedly comprise this group. Discrimination against Muslims, inasmuch as it largely targets individuals of migration background, is an interrelated phenomenon.

The judgments rendered in relation to discrimination against individuals with a migration background and discrimination against the Roma indicates a lack of consistent interpretation.

The lack of definition is not specific to race,[17] but as the *Jyske Finans* judgment shows, here it may function in a way that denies protection to persons who squarely fall within the personal scope of EU equality law and policy. The interpretation of the protected ground also impacts on the qualification of claims as direct or indirect discrimination, which not only limits or broadens justiciability but is also of significant symbolic value.

Danish anti-discrimination law does not prohibit discrimination based on nationality or place of birth. Still, these criteria come into play by way of the International Convention on the Elimination of All Forms of Racial Discrimination which Denmark, like other Member States, ratified. The ICERD prohibits discrimination based on race, colour, descent or national or ethnic origin.[18] Interestingly, Denmark is the only EU Member State that has been subjected to intense judicial scrutiny by the ICERD Committee.[19] Up to May 2014, 21 individual communications had been filed against the country: nine inadmissible, five resolved with a finding of no violation, while in seven a violation was established.[20] The overwhelming majority of communications were authored by individuals of migrant and Muslim background.

16 The meaning of racial or ethnic origin Report 2017, pp. 62-64.

17 Disability case law focuses almost exclusively on the definitional puzzle and the recent headscarf cases also bring to the fore the definition of religion.

18 According to ICERD Article 1.1. 'In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

19 Activist lawyers and the Documentation and Advisory Centre on Racial Discrimination were key to initiating these legal challenges and thus to framing claims and forum shopping.

20 Among the EU Member States, Slovakia ranked second with a total of four individual communications filed – violation was established in two. In Statistical survey on individual complaints, CERD, May 2014.

The Board of Equal Treatment and Danish courts are regularly petitioned by individuals who suffer discrimination in relation to their migration background (or equivalent terms).[21] At times, even legal provisions employ unlawful distinctions between Danish citizens, depending on their origin in and outside of Denmark. For instance, in *Biao v Denmark*, the leading case on xenophobia, the European Court of Human Rights was called on to examine the unequal treatment of Danish citizens of non-Danish ethnic origin as compared to citizens of Danish ethnic origin in the context of legislation on family reunification.[22]

A heated debate in Chamber led to a judgment in which a slight majority found that discrimination had not taken place in *Biao*. This verdict was reversed by the Grand Chamber, which established indirect ethnic discrimination. The dissent here suggests that several judges considered the political consequences of the finding as troublesome. On the other hand, concurring judge Albequerque demonstrated why a strictly doctrinal analysis should have necessitated a finding of direct ethnic discrimination.[23] Given the lack of publicly available dissenting or concurring opinions in the CJEU, similar insights are not available.

The CJEU encountered xenophobia in a handful of cases referred under the Racial Equality Directive. In *Feryn*, based on Advocate General Maduro's highly praised opinion,[24] the Court found that xenophobic speech acts denying access to employment to immigrants, and more specifically Moroccans, amounted to direct discrimination under the Racial Equality Directive. In *Galina Meister*, in addition to arguments based on gender and age discrimination, racial discrimination based on the applicant's Russian origin and consequently her migration background was at hand. The Court did not specifically address this ground. In *Kamberaj* the Court ruled that the question on racial equality was inadmissible, since the discrimination at hand was based on nationality (a concept synonymous to country of origin), whereas the Racial Equality Directive expressly excluded from its scope differences of treatment based on this ground. The exception in the Directive does indeed relate to questions of immigration. However, the practice at hand in *Kamberaj* that excluded from housing provisions individuals of non-Italian citizenship could theoretically have given rise to a claim of indirect racial discrimination.

In *Feryn, Galina Meister* and *Kamberaj*, the Court did not address the definition of *discrimination on the ground of racial or ethnic origin*. Regrettably, in *Jyske Finans* the Court did not examine the formula contained in the Racial Equality Directive either. Rather, following the Advocate General's Opinion it examined the *definition of race and ethnicity*. The focus on race or ethnicity instead of discrimination based on racial or ethnic origin is key to understanding why the CJEU's conclusions diverge from national equality bodies and courts, as well as international tribunals.[25]

In *Jyske Finans*, the difference between Mr Huskic and his partner was based on their place of birth, given that both were Danish citizens. In this sense, the issue at hand was analogous to that in *Biao,* i.e. distinction between citizens based on a proxy category of racial or ethnic origin. However, while the Strasbourg Court established indirect discrimination by looking at how the ground, ethnicity was

21 According to the 2017 Report on Denmark's compliance with the Racial Equality Directive now pending review in the European network of legal experts in gender equality and non-discrimination, half a dozen such cases have been reported.

22 *Biao v Denmark*, Application No. 38590/10, Grand Chamber judgment of 24 May 2016.

23 It must be noted, however, that the Strasbourg Court's case law is uneven. Recently, in *Garib v the Netherlands* the Grand Chamber's failure to examine racial discrimination concerning the freedom to choose one's residence was seen by a minority of judges, as well as by commentators as *deeply disappointing in terms of both reasoning and outcome*. See *Strasbourg fails to protect the rights of people living in or at risk of poverty: the disappointing Grand Chamber judgment in Garib v the Netherlands*, 16 November 2017 by Valeska David and Sarah Ganty, PhD researchers at Ghent University and Université Libre de Bruxelles, https://strasbourgobservers.com/category/cases/garib-v-the-netherlands/. *Garib v the Netherlands*, Application No. 43494/09), Grand Chamber judgment of 6 November 2017.

24 Opinion of Advocate General Poiares Maduro, Case C-54/07, 1.3., Paragraphs 15-17. He underlined that a 'simple' speech act such as that committed in *Feryn* may have graver consequences, because '[n]obody can reasonably be expected to apply for a position if they know in advance that, because of their racial or ethnic origin, they stand no chance of being hired.' This speech conveys a message of exclusion from the labour market and it 'would lead to awkward results if discrimination of this type were for some reason to be excluded altogether from the scope of the Directive'. Had that been the case, the 'most blatant strategy of employment discrimination might also turn out to be the most "rewarding".'

25 See the case law analysed in The meaning of racial or ethnic origin Report, fn. 9 and 17.

constructed in Danish legislation, the Luxembourg Court followed the Advocate General[26] and examined whether a proxy ('objective criterion') could ever be regarded as an element of ethnic identity. Rightly, it concluded that an ascribed characteristic should not be permitted to override ethnic self-identification. A natural consequence of this finding should have been an examination of whether the profiling practice had in fact imposed such an ascription on ethnic non-Danes, but this is not the route the Court took. It concluded instead that Ismar Huskic had not been subjected to discrimination on the ground of racial or ethnic origin.

The CJEU's reasoning was squarely based in its rejection of racist attitudes that objectify individuals on the basis of proxies such as migration background/place of birth. Regrettably, however, this anti-racism steered the assessment against, rather than in favour of the individual who had actually been subjected to racism. It inspired a false question and consequently a false response. In the end, the Court failed to examine whether the profiling practice discriminated Mr Huskic *on the ground of racial or ethnic origin.* Rather than relying on non-legal sources necessary for a contextual legal analysis, it ventured outside of the law and into the realm of social sciences.

Notwithstanding the above, Mr Huskic's claim ultimately revolved around a doctrinal debate between the European Commission and Advocate General Wahl. As the CJEU notes, it agrees with the Advocate General as concerns the necessity "to carry out, not a general abstract comparison, but a specific concrete comparison" in order to establish indirect race discrimination.[27] A specific concrete comparison in the Court's view would require more than an estimation of non-Danes among those born outside of Denmark. This is the point on which the judicial interpretations in *Biao* and *Jyske Finans,* i.e. between the Strasbourg and Luxembourg Courts, fundamentally differ.

In *Jyske Finans*, the CJEU requires a comparison on the basis of *specific* ethnicities other than the Danish one. In theory, this requirement would partially bring its case law on race discrimination in line with other grounds, such as gender, where (proxies for) men and women are routinely compared. Dissecting non-Danish ethnicity into subgroups would, however, only partially ensure compliance across the grounds, because instead of creating two groups to compare (men v women), it would dissect the group subjected to less favourable treatment (men v subgroups of women). Rather than examining the criterion of the place of birth outside of the EU and EEA, it would artificially create specific subgroups according to place of birth in specific countries. This approach would not only be inadequate in *Jyske Finans*, but more broadly, in the anti-discrimination field. To take a typical example from the sex discrimination field, it would require the group of part-time employees to be divided according to specific working times, for instance among those who work less than four hours, between four and six hours or longer periods. Such fragmentation of the comparable groups could render statistical evidence futile and deny the fact that a protected group – women – are overrepresented among all subgroups.

More importantly, the requirement of furnishing concrete ethnic data cannot be met, because the overwhelming majority of Member States do not collect such data, particularly not on the ground of race – nor do they provide detailed rules on ethnic data collection by private entities.[28] This prompted the ethnic data question in *Galina Meister*, which was not examined in detail however. The Court did not address the feasibility of ethnic data collection in *Jyske Finans* either. In practice, not only national statistical offices, but also Eurostat survey racism by collecting data on the basis of proxies, which in

26 Indeed, the Advocate General sought to distinguish *Jyske Finans* from *Biao* by pointing out that the former distinguished among citizens with reference to place of birth, while the latter referred to the length of citizenship. This is only partially true, however, because the length of citizenship in Biao coincided with the place of birth. See para. 65 of his opinion.

27 Paragraph 32. *Jyske Finans* judgment.

28 Analysis and comparative review of equality data collection practices in the European Union, Specific Report on Equality Data based on Racial and Ethnic Origin, Lilla Farkas, May 2016, p. 15.

the Western European context consist primarily of the place of birth of respondents and their parents.[29] Nonetheless, even without ethnic data it is evident that ethnic non-Danes are vastly overrepresented among those born outside of Denmark. These facts form part of public knowledge and as such need not be proven.

The CJEU held that the country of birth is a race-neutral criterion or that in the least it "cannot generally be presumed [to be] the sole basis of a person's' ethnic origin"[30] This created a Catch 22, an unwarranted focus on self-identification, rather than on assumptions and stereotypes that are at play in racial profiling practices. Paradoxically, while referring to *CHEZ*, the leading case on assumed discrimination, the CJEU reinterpreted discrimination on the ground of racial or ethnic origin as discrimination on the ground of racial or ethnic self-identity.[31] Importantly, in the majority of Member States, individuals of a migration background are racialised, rather than self-identifying as distinct racial groups. Racial bias lumps together diverse ethnic groups, kneading them into a single entity. Because race is constructed from without, the criteria describing ethnic minorities – shared language, culture, etc. – cannot be used to identify racial or racialised groups from within. This is where the judgment deviates from the basic tenets of social sciences, research and analysis by institutions, such as the European Union Agency for Fundamental Rights and ultimately EU anti-discrimination law.[32]

The verdict inadvertently challenges the foundations of European integration policies, inasmuch as they are based on country of birth/origin/migration background or equivalent proxies. It throws into doubt national case law that routinely establishes racial discrimination in relation to country of birth, migration background and similar proxies of race. Although including references to the leading Roma judgment, *Jyske Finans* stands in stark contrast with *CHEZ's* broad reading of racial discrimination that extends protection to a non-Roma treated unfavourably 'together with the Roma'. Indeed, the approach of the Grand Chamber – and specifically the judge rapporteur – in *CHEZ* is an example to follow.

IV Equality bodies enforcing EU law at home and before the CJEU

Implicitly, the CJEU's judgment may level down the protection provided by the Danish Board of Equal Treatment in case of xenophobic practices. The verdict does not address Denmark's intervention that supported the Board's finding of indirect race discrimination, but could equally conceive of the profiling practice as direct discrimination.

Article 13 of the Racial Equality Directive lays down the minimum requirements for equality bodies, constituting them as fundamentally promotional entities with the power to provide independent assistance to victims, issue independent recommendations and conduct independent surveys. These and other 'EU collective actor legislative requirements'[33] facilitate the active engagement of equality bodies in legal disputes over racial equality.

29 Labour Force Survey, the European Health Interview Survey (EHIS) and European Statistics of Income and Living Condition (SILC) collect data on the basis of the place of birth. The European Social Survey asks questions about nationality, racial or ethnic origin and colour. Eurobarometer (EB) seeks information about ethnic origin, while EU-MIDIS asks about immigrant background of respondents and their parents. Ibid, pp. 9-12.

30 Paragraphs 33 and 34. *Jyske Finans* judgment.

31 Paragraph 17. *Jyske Finans* judgment.

32 The FRA's predecessor, the European Union Monitoring Center on Racism and Xenophobia, as its name suggests, specifically addressed racism against foreigners and migrants. The FRA publishes annual reports on racism and xenophobia and collects survey data on racism and xenophobia against migrants. For publications by Legalnet for the Commission, see Links between migration and discrimination, written by Olivier De Schutter July 2016, Directorate-General for Justice and Consumers and Links between migration and discrimination, European Network of Legal Experts in the non-discrimination field Olivier de Schutter, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.2, Manuscript completed in July 2009.

33 A term coined by Claire Kilpatrick and Bruno de Witte in Elise Muir, Claire Kilpatrick and Bruno de Witte (eds.), How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum, EUI Working Paper LAW 2017/17, p. 4.

In several Member States, equality bodies have standing under Article 7 of the Directive to act in support or on behalf of complainants. Some also have the right to initiate representative action, when individual victims cannot be identified. The French, Romanian and Slovakian bodies can intervene to present observations in court. The Belgian, Irish, Finnish, Swedish and Slovakian equality bodies can engage in proceedings on behalf or in support of a victim. The Bulgarian, Hungarian and Belgian bodies can mount representative action. *Amicus curiae* briefs can also be presented by equality bodies – such as the Equality and Human Rights Commission in the United Kingdom.[34]

Anchored in domestic law, procedural innovations also prevail in proceedings before the CJEU. In the field of racial equality, particularly in Member States that provide equality bodies with powers that are wider than the minimum requirements, such bodies play an important role in enforcement. Given their key role at the domestic level, their steady access to resources and pivotal function in assisting victims, they could also become repeat players before the CJEU.[35] Through transnational collaboration, equality bodies can become strategic players at the EU level. Indeed, EQUINET, the European Network of Equality Bodies is preparing a legal strategy on the enforcement of racial equality at the European level, which necessarily includes action before the European Courts in Luxembourg and Strasbourg.[36]

The rules of procedure enable equality bodies to engage as third-party interveners also before the Strasbourg Court, but similar standing is not available before the Luxembourg Court. Even though equality bodies have established an umbrella organisation to represent their interests at EU level, EQUINET – similarly to national bodies – lacks such standing. The only way for equality bodies to influence decision making before the CJEU is to engage in domestic proceedings, which is, however less conducive to a pan-European agenda. Still, several equality bodies can intervene or present observations in national judicial proceedings, for instance in Romania and France. In other countries, equality bodies can act as amicus curiae, submitting friends of court briefs to national courts.

Equality bodies with quasi-judicial competences can be defendants, if their decisions are challenged. This scenario materialised in *CHEZ* that was referred at the initiative of the court reviewing the Bulgarian equality body's decision. The *CHEZ* referral triggered the CJEU's analysis of discriminatory practices concerning access to electricity in Roma districts. *CHEZ* asked questions in order to counterbalance the Bulgarian Supreme Administrative Court's regressive practice – questions raised also by the Bulgarian equality body.

In *Jyske Finans*, the Danish Board of Equal Treatment acted on behalf of the applicant while defending its own decision in domestic courts. The referral was initiated by Jyske Finans and in Luxembourg the Board was represented by a law firm servicing the Danish Ministry of Foreign Affairs. In other words, it was the Member State that actively engaged in litigation. The existence of the Board of Equal Treatment induced the Member State's pro-minority actions. In light of the various complaints against the country for condoning or indeed committing racial discrimination, its approach in *Jyske Finans* seems particularly progressive. An important factor that triggered such a positive response from Denmark is the existence of equality bodies, agents of EU law within the Member State structures.

The Board is an independent, specialised equality tribunal that receives complaints from individuals alleging racial discrimination and renders decisions in each case. The Board provides cheap and swift procedures. Its proceedings seek to balance out inequalities between parties in terms of their financial situation and access to legal expertise. Board decisions are subject to judicial review by ordinary courts. The Board is constituted by judges and civil servants.

34 2017 Comparative Report, pp. 88-97.

35 Marc Galanter, Why the "haves" come out ahead: Speculations on the limits of legal change, Law and society review, Vol. 9 No. 1, 1974, pp. 95-160. More specifically, see Kádár, T., The Standing of National Equality Bodies before the European Union Court of Justice: the Implications of the Belov Judgment, Equal Rights Review No. 11 of 2013, pp. 13-25.

36 See the proceedings of the EQUINET Seminar on fighting discrimination on grounds of race and ethnic origin held in Budapest at the office of the Commissioner for Fundamental Rights on 9-10 November 2016.

Equality bodies that lack quasi-judicial powers but are given the right to launch legal action on behalf or in support of victims can successfully engage in dialogue with the CJEU as the example of the Belgian body, UNIA, shows. They can initiate preliminary referrals as claimants (representatives) or as interveners, but costly and cumbersome civil litigation is often a condition of this type of engagement. UNIA took representative action in *Feryn* with a view to challenging an act of racist speech which was directed at immigrants in general, rather than at an individual under the Racial Equality Directive. In *Achbita*, UNIA intervened before the trial court with a view to securing a favourable judgment on wearing the Islamic veil in private employment.[37]

The interaction between equality bodies and the CJEU has been uneven: promising for the Roma, while puzzling for other racial or racialised groups. Equality bodies assisting challenges of discrimination on the basis of migration background would need the kind of encouragement and support that the CJEU provided in *Feryn* and *CHEZ*. The Bulgarian Roma-related referrals show that good things come to those who wait, but it is a cause for concern if the waiting takes substantially longer for certain racial or racialised communities. The CJEU's lack of attention to the approaches of quasi-judicial bodies has ramifications for judicial dialogue – ramifications the Luxembourg Court is best placed to prevent or correct.

It seems timely now to return to *Feryn*, in order to ensure that the level of protection provided by the CJEU matches that offered by national quasi-judicial and judicial instances. A genuinely mutual judicial dialogue can prevent situations where national high courts and equality bodies reinterpret CJEU judgments – as they did in the Islamic veil cases[38] – to overcome the uncertainty caused by the Luxembourg Court for both employers and employees.[39] Domestic stakeholders fear that the notable discrepancy between the interpretations of the Luxembourg and Strasbourg Courts may create difficulties in Danish judicial and quasi-judicial interpretation as well.

V Conclusions

Concerned about the erosion of an envyingly high level of protection against racial discrimination in the European Union,[40] this paper examined the *Jyske Finans* judgment from two angles. As concerns the more explicit impact of the verdict – the finding of no racial discrimination – it called attention to an apparent imbalance in the Court of Justice's approach to the diverse forms of racism in Europe. The high level of scrutiny deployed in relation to the Roma is commendable, but the Court's examination of

37 Ms Achbita was a trade union member and received legal representation from the union throughout the domestic proceedings. UNIA acted on the authorisation of Ms Achbita, arranging its own legal representation that required the approval of the Administrative Council, which comprises representatives of all Belgian administrative units. UNIA incurred legal costs and expenses totalling EUR 158 440. Proceedings before the CJEU cost UNIA EUR 29 855. UNIA was represented by Christian Beyart, a partner at Allen and Overy, who also represented UNIA in the *Feryn* case. Interview with Imane El Morabet, UNIA, 6 February 2018.

38 In a ruling of 9 October 2017, the Belgian Court of Cassation followed the CJEU's interpretation concerning the absence of direct discrimination in *Achbita*. However, it considered that the right to dismiss could be abused – therefore indirect discrimination could be established – even in the absence of fault and negligent (unknowing) wrongful conduct. Emmanuelle Bribosia and Isabelle Rorive (with the collaboration of Cecilia Rizcallah), Legalnet's 2017 Country Report on Belgium, unpublished, p. 270. In France, on 22 November 2017 in case No. 13-19855 the Court of Cassation concluded that Micropole's decision to dismiss Ms Bougnaoui by reason of her refusal to remove her veil when clients so demand, constituted direct discrimination. Micropole's justification based on the wish of an employer to meet the desire of its client cannot be considered as a genuine and determining occupational requirement. Sophie Latraverse, Legalnet's 2017 Country Report on France, unpublished, p. 187. The headscarf judgments have not inspired the Netherlands Institute for Human Rights to decrease the level of protection. The NIHR stresses that the judgments 'should not be interpreted as giving employers a free hand to ban headscarves from the workplace'. Titia Loenen, Legalnet 2017 Country Report, The Netherlands, p. 49.

39 Joseph H.H. Weiler, Je suis Achbita, The European Journal of International Law Vol. 28 No. 4, 2018, pp. 989-1008.

40 This is the suggestion of literature on the hierarchy of grounds in EU anti-discrimination law. See, for instance, Lisa Waddington and Mark Bell, https://www.kluwerlawonline.com/abstract.php?area=Journals&id=350516, Common Market L. Rev., 2001.

referrals concerning other types of racism could benefit from a teleological interpretation of the Racial Equality Directive and an appreciation of EU policies targeting racialised minorities.

While applauding the reference to *CHEZ* in *Jyske Finans*, this paper finds the latter wanting in terms of a broad and constructivist reading that otherwise characterises the verdict in *CHEZ*. Regrettably, with few exceptions, the CJEU's judgments on racial equality are short of the richness of interpretation that could facilitate the work of national courts and equality bodies and help legitimate these agents of EU law in the eyes of, among others, racialised communities.

Jyske Finans is also a learning opportunity. An important lesson is the necessity to continue exploring the *Feryn-CHEZ* line of case law in full, i.e. to investigate what *discrimination on the ground of racial or ethnic origin* means. In order to best perform this interpretive function, the focus should be on the process of 'race making', rather than self-identification, because the latter triggers less favourable treatment in a negligible portion of cases. As Advocate General Wahl noted, asking certain questions, such as what is race and ethnic origin is not for lawyers – at least to the extent that lawyers alone cannot answer them. Nonetheless, lawyers are not barred from consulting the ample resources that EU institutions, such as the Fundamental Rights Agency, produce on the matter.

Equality bodies assisting challenges of discrimination on the basis of migration background would need the kind of encouragement and support that the CJEU provided in *Feryn* and *CHEZ*. Returning to *Feryn's* teleological interpretation could equalise the level of protection before the CJEU, the ECtHR and national judicial instances. Given the conformity that the very existence of a transnational legal system requires between quasi-judicial and judicial interpretation, more attention needs to be paid to the approaches of specialised equality bodies. Similar to national courts, these specialised bodies play a crucial role in the interpretation and enforcement of EU anti-discrimination law.

A more implicit lesson to be learned from *Jyske Finans* is that equality bodies are endowed with various powers and tools that, if used wisely, can contribute to 'broadening and deepening' the protection from racial discrimination both at the domestic level and before the CJEU.[41] In order to unlock the full potential of equality bodies to enforce the Racial Equality Directive, both the CJEU and the bodies themselves need to do more by way of dialogue and mutual learning. Dialogue may dissipate the risk of dismantling in practice the normative promises inherent in EU anti-discrimination law, a risk rendered frighteningly real in *Jyske Finans*.

41 The term is borrowed from Mark Bell, Bell, M., 'The principle of equal treatment: widening and deepening', Craig, P. and de Búrca, G. (eds.), *The evolution of EU law,* 2011.

EU equality law in the age of Brexit

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I Introduction[1]

In the absence of other arrangements being negotiated, the United Kingdom's exit from the EU ('Brexit') would mean that there would be no requirement in the UK to implement EU anti-discrimination law. If the United Kingdom leaves the European Union in March 2019, the impact on equality law may well be considerable, both in the United Kingdom itself and in the EU-27. In this article, I suggest, however, that all is not yet lost in this regard. The future of equality law after Brexit is currently uncertain and the current negotiations between the UK and the EU-27 are of critical importance in determining the future shape of equality law both in the UK and in the EU-27. More broadly, however, I will suggest that the challenge of Brexit should in any event act as a wake-up call, and urge us to rethink the fundamentals of human rights and equality law through the lens of human dignity.

II The past of EU equality law

It is uncontroversial that the United Kingdom has had a considerable impact on the development of European Union equality law over the past 40 years.[2] (By 'EU equality law', I mean to include Treaty law and Directives addressing issues of equal treatment on grounds of sex, race, age, sexual orientation, religion, disability and age. I do not include the issues surrounding discrimination on grounds of nationality in this discussion, though they too will be significantly impacted on.) That is not to say that this influence was the only factor shaping EU equality law, or even that it was dominant, but it was certainly *a* significant factor. This influence can be seen in the conceptual and institutional architecture of EU law, such as in the development of indirect discrimination, the acceptance of positive action, the shifting of the burden of proof, and the significant role of equality bodies.

So too, UK influence on EU equality law was significant in the development of the case law of the Court of Justice of the European Union, not only because much of the early case law of the Court derived from cases referred by UK courts, but also because of the important role that UK judges and advocates general played. The UK influence (together with Ireland – the other common-law jurisdiction in the EU) appears, more broadly, to have contributed to the development of a fusion of civil-law and common-law approaches to interpretation of the equality directives. The role of UK experts on such bodies as *Equinet* and the various expert networks on equality established by the European Commission was also not insignificant.

It is also uncontroversial that the impact of EU equality law on the UK has also been highly significant.[3] We need only think of the effect of EU law on the development of equal pay in the UK, an influence that began even before the UK joined the (then) EEC in 1972, and then continued with the development of

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1 I am most grateful to Alexandra Timmer, Marcel Zwamborn, and Linda Senden for helpful comments on an earlier draft.

2 Julie C. Suk, *Equality after Brexit: Evaluating British Contributions to EU Antidiscrimination Law*, 40 Fordham International Law Journal 1535 (2017).

3 Bob Hepple, *Equality: The Legal Framework* (2nd ed., 2014, Hart), passim.

equal pay for work of equal value, leading to substantial litigation and extensive changes in collective bargaining practice. So, too, the expansion of the grounds of discrimination in EU law has had a marked influence in the UK, leading to the incorporation into UK law of a considerably broader range of grounds than had originally dominated UK equality law (race and gender).

More recently, the indirect importance of EU law is clear in the development in the UK of enhanced scrutiny of the composition of company boards; corporate self-regulation takes place in the shadow of the threat of EU legislation hanging over the market if it is not effective. In the context of the devolved legislatures and government in Scotland, Wales, and Northern Ireland, the incorporation of EU law into the devolution settlements of these nations within the UK (to be explained in more detail below), meant that EU equality law plays a constitutional role in the UK, constraining devolved institutions from exercising their powers contrary to EU equality law. In no small measure, the influence of EU equality law in the UK has been due to the ready acceptance of the UK courts of EU law more broadly.

III The future of EU equality law?

Brexit's challenge to human rights is difficult to predict with any real precision, because it is not scheduled to come into effect until March 2019, and the exit negotiations continue. From the EU-27's perspective, Brexit presents at least two challenges, and an opportunity. The opportunity that Brexit presents has also been identified: that the EU may no longer be slowed down in the further development of equality by the well-known penchant of the British in recent years to oppose the deepening of equality law.[4] It was not alone in this, of course, but the UK's exit will mean the removal of one significant barrier to progress in this field.

The first challenge is that the EU will be deprived of some of the experience of developing and implementing equality law that the UK brought to EU consideration of equality law in the past. The UK often provided a usefully different perspective which sharpened debate and challenged some continental European approaches, for example over the question of the collection of ethnic data.[5] It is important that this gap be filled, potentially by attempting to retain and nurture the more informal networks of relationships between UK experts and the rest of Europe that have developed over time. The second challenge is how to deal with a powerful economy on the border of the EU which would be free, theoretically at least, to depart significantly from equality norms.[6] That poses both an economic, and a cultural challenge, which I shall return to subsequently.

These challenges are worrying, but the worst-case scenario of the effect of Brexit for human and equality rights in the *UK* is much more disturbing. Removal of free-movement rights will allow the introduction of even more discriminatory immigration policies in the UK. Removal of free-movement rights will threaten the right to remain in the UK of at least some EU nationals. Leaving the Common European Asylum System may put asylum seekers more at risk. Removal of EU data protection requirements will threaten privacy, unless equivalents are in place. Removing the application of the EU Charter of Fundamental Rights to the post-Brexit operation of EU-origin laws will allow human rights violations in the application of those laws. In the longer term, withdrawal from the EU will remove a significant political obligation for UK to continue as a member of the ECHR. Greater pressure on the ECHR system to replace some of the protections hitherto guaranteed under EU law will put the ECHR even more in the firing line in Britain,

4 Guerrina, R., Murphy, H. (2016), *Strategic Silences in the Brexit Debate: Gender, Marginality and Governance*, (2016) 12(4) Journal of Contemporary European Research, 872.

5 Ginger Hervey, When Britain exits the EU, its diversity departs too, *Politico*, 11th December 2017, available at: https://www.politico.eu/article/brexit-diversity-exits-the-eu-brussels.

6 Alex Barker and Jim Brunsden, *EU seeks powers to stop post-Brexit bonfire of regulation*, Financial Times, 1 February 2018.

leading to even more pressure to withdraw. The effects of Brexit on women have been identified as particularly problematic.[7]

IV Withdrawal Treaty negotiations

The future role of EU equality law in the UK is likely to change, but how far and how fast remains to be seen. The starting point of analysis should be the current EU-27/UK negotiations. This is clearly a complicated process and the end point remains unclear, but we can identify three interlocking parts of the negotiations to date. Each of these parts engages with EU equality law, but in different ways.

The first phase of the negotiations concerns the exit agreement, more formally the Withdrawal Treaty, which we now have in the form of a draft text released by the European Commission.[8] It is the position of the EU-27 that 'sufficient progress'[9] must be made on reaching agreement on the Withdrawal Treaty before progress can be made on the other elements in the negotiations: a transition agreement, under which the UK would remain subject to significant parts of the EU acquis for a period after the UK formally leaves the EU and be able to continue to benefit from the Customs Union and the Single Market; and the ultimate future relations treaty, which will deal with the economic and trade relationships between the UK and the EU-27 after transition.

Most attention has so far been devoted to the Withdrawal Treaty and it is this that has raised the most questions over the future role of equality law in the UK. At this point, a little more explanation of the issues dealt with in the Withdrawal Treaty negotiations is necessary. There are three particularly delicate areas: the question of the UK's financial obligations to the EU-27 (the 'budget' issue); the future rights of UK citizens resident in the EU-27 and vice versa after Brexit; and the issue of Ireland/Northern Ireland.

It is the third of these issues (Ireland-Northern Ireland) that most engages issues of EU equality law. Much public attention in Britain and on the continent of Europe has focused attention on the issue of the Border between Ireland and Northern Ireland after Brexit, and that is a critically important issue. There is, however, another central question that has engaged negotiators, namely the preservation of the Belfast-Good Friday Agreement that has preserved an uneasy peace in Northern Ireland and, indeed, on the island of Ireland more broadly, since 1998.[10] The concern is that, unless very carefully handled, Brexit will undermine that peace agreement, with potentially disastrous consequences.

V Implications for equality law in Northern Ireland

Central to the Belfast-Good Friday Agreement is the role of human rights and equality. The Agreement does much more than establish a new system of government; it also aimed at establishing a new system of values and principles that would govern how that system operated. The Belfast-Good Friday Agreement included, as a result, commitments to equality between the two ethno-national communities, and between other groups in Northern Ireland. One of the ways in which the latter commitments were met was through the incorporation of EU equality law into the law of Northern Ireland. We have seen

7 Roberta Guerrina and Annick Masselot, *Walking into the Footprint of EU law: Unpacking the Gendered Consequences of Brexit,* (2018) 17(2) Social Policy and Society 319.

8 Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19th March 2018, available at: https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en.

9 The phrase dates from the European Council (Art. 50) guidelines for Brexit negotiations, 29 April 2017, available at: http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines.

10 Agreement reached in the multi-party negotiations, 10 April 1998, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf.

above that EU law has a constitutional role in limiting the operation of devolved institutions, but EU equality law in Northern Ireland also an important function in structuring relations between citizens.

EU equality law plays a critically important role in underpinning the peace process. As a result, the EU-27 and the UK government agreed, in principle, that the Belfast-Good Friday Agreement should be preserved. This resulted in a political agreement in December 2017 which incorporated this aspiration.[11] Critically, however, the EU-27 have sought to make this political commitment legally binding and have therefore sought to bring the language of the political agreement into the draft Withdrawal Treaty, in the form of a Protocol to the Treaty. Article 1(1) of the Protocol specifically refers to EU equality law. It states:

'The United Kingdom shall ensure that no diminution of rights, safeguards and equality of opportunity as set out in that part of the 1998 [Belfast-Good Friday] Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.'[12]

The precise effect of this is uncertain, but it appears that the intention is to commit the UK Government to safeguarding a legal status quo that currently includes EU equality law. The extent of the preservation of EU equality law is uncertain however. In particular, does it include the provisions of the EU Charter of Fundamental Rights? Critically, Annex 1, listing the covered provisions, has not yet been negotiated. Certain issues have been clarified, however. Article 12(3) provides that where the Protocol 'makes reference to a Union act, and where that act is amended or replaced after the entry into force of the Withdrawal Agreement, the reference to that act shall be read as referring to it as amended or replaced.' Article 12(2) further provides that where the provisions of the Protocol refer to Union law or concepts or provisions, they shall 'in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union.' Some uncertainties aside, the provisions of Article 1, if agreed, would appear to mean that, at least in Northern Ireland, EU equality law would be substantially preserved, at least in its substance.

The Ireland-Northern Ireland Protocol goes beyond this, however, in establishing a set of institutional arrangements that would be of considerable future significance for equality law, if accepted.[13] Article 1(2) of the Protocol continues:

> 'The United Kingdom shall continue to facilitate the related work of the institutions and bodies pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland.'

The effect of this provision is to ensure that, as part of an internationally binding agreement, the UK retains, inter alia, the main equality body in Northern Ireland, the Equality Commission for Northern Ireland.

11 Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, 8 December 2017, available at: https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en.

12 Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19th March 2018, available at: https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en.

13 Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19 March 2018, above, Protocol on Ireland-Northern Ireland.

Beyond that, the provisions of the Protocol also attempt to deal with the problem of enforcement. Clearly, one of the important features of existing EU equality law in the EU Member States is not only the substance of EU law but also the availability of mechanisms of interpretation and adjudication that EU law provides, in particular the role of the CJEU in being able to receive preliminary references from member-state courts, thus ensuring that there would be a consistent European interpretation of the provisions of EU equality law.

The Withdrawal Treaty (Article 158) would establish a Specialised Committee on issues related to the island of Ireland, including the provisions just considered. This would be composed of representatives from the EU and the UK. The Specialised Committee has several roles, including discussing any point of relevance to the Protocol giving rise to a difficulty and raised by the European Union or the United Kingdom, and making recommendations to a new Joint Committee as regards the functioning of this Protocol.[14] That is merely the tip of the enforcement iceberg, however.

According to Article 162 of the Withdrawal Treaty, either the EU or the UK may bring any dispute which concerns the interpretation or application of the Agreement (including the Ireland-Northern Ireland Protocol) before the Joint Committee. The Joint Committee may settle the dispute through a recommendation, or it may, at any point, decide to submit the dispute brought before it to the CJEU for a ruling. The Court's rulings would be binding on the EU and the UK. If a dispute has not been settled within three months after it was brought before the Joint Committee and it has not been submitted to the CJEU by the Joint Committee, the dispute may be submitted to the CJEU for a ruling at the request of either the EU or the UK, in which case the rulings of the Court are again binding on the EU and the UK.

Article 163 provides that where the EU or the UK considers that the other has not taken the necessary measures to comply with the judgment of the Court of Justice of the European Union resulting from these proceedings, either the EU or the UK may bring the case before the CJEU, and again its rulings are binding. If the CJEU finds that the EU or the UK has not complied with obligations, the other party may decide to suspend parts of the Withdrawal Agreement or parts of any other agreement between the UK and the EU. Any suspension must be proportionate to the breach of obligation concerned, taking into account the gravity of the breach and the rights in question. The suspension is subject to judicial review by the CJEU.

The Protocol establishes, however, that a subsequent agreement between the EU and the UK could supplant the provisions just discussed. Article 15 provides that should a subsequent agreement between the EU and the UK 'which allows addressing the unique circumstances on the island of Ireland, avoiding a hard border and protecting the 1998 Agreement in all its dimensions, become applicable after the entry into force of the Withdrawal Agreement, this Protocol shall not apply or shall cease to apply, as the case may be, in whole or in part, from the date of entry into force of such subsequent agreement and in accordance with that agreement.' The Protocol makes clear, however, that in the absence of better arrangements being offered by the UK, the existing provisions would remain in force.

VI Equality law in the rest of the UK post-Brexit: three complications

These provisions relating to Northern Ireland and equality would not apply to the rest of the United Kingdom. This means that, following Brexit, equality policy and law will be largely in the hands of the UK Parliament. There are various complications that arise, however, which will affect how far the UK will depart from the existing EU equality *acquis*.

The first complicating factor arises from the process that the UK has adopted internally to deal with the consequences of Brexit. The UK Government is in the process of bringing forward legislation in the UK

14 Protocol, Article 10.

Parliament to address several different issues. One of these pieces of legislation is the European Union (Withdrawal) Bill.[15] This provides that following exit day, all of the existing EU acquis will become part of UK law, and be treated as such. This will include the whole of the existing equality acquis. This will remain part of UK law unless and until Parliament itself or, under certain circumstances, government Ministers repeal parts of that acquis. In other words, even after Brexit, the equality acquis will continue to operate until Ministers decide to depart from it. It is, so far, unclear whether or when Ministers would do so.

The second complicating factor arises from the constitutional arrangements in place in the UK which govern relations between the four nations that make up the United Kingdom (England, Scotland, Wales and Northern Ireland). From 1998, a significant amount of power and responsibility has been given to these nations to run their own affairs through assemblies (in the case of Northern Ireland and Wales) or a Parliament (in the case of Scotland). This is referred to as 'devolution'. At the moment, certain issues that are delegated to devolved institutions in the UK are as subject to EU law as the institutions in London. So, for example, equality law is a substantially devolved matter in Northern Ireland, but in practice equality law is heavily regulated by EU law. If the UK leaves the EU, those areas currently regulated in Brussels will revert to the UK. However, the question remains open as to how far the UK Parliament and Government will fully delegate these areas back to the devolved administrations.

The reason why this is in doubt is because the UK's announced policy is to retain certain powers in London that are necessary in order to be able to secure the effective operation of the UK 'single market', for example. Thus, it is unclear to what extent the UK central Government will permit regulatory divergence between the different parts of the UK. We have seen that, if the Ireland Protocol is accepted, there is likely to be regulatory divergence between Northern Ireland and the rest of the UK, but will regulatory divergence on issues of equality be permitted by London between Scotland and England? This remains to be seen.

A third complicating factor has to do with the future trade relationship between the UK and the EU, and its impact on equality policy. At the moment, the UK Government's stated policy, as set out in Prime Minister Theresa May's Mansion House Speech in March 2018, is to leave the Single Market and the Customs Union, but to negotiate an as 'deep and comprehensive' economic and trade relationship with the EU-27 as possible, short of remaining in the Single Market or the Customs Union.[16] Whether this is possible from the perspective of the EU-27 remains to be seen. It is also uncertain whether the UK Government can withstand parliamentary pressure to reverse its decision to leave the Customs Union.

There are two main reasons why the future economic relation with the EU-27 is critical for equality law in the UK. The first is that if the UK achieves its goal of substantially replicating the benefits of the Single Market without what the UK Government regards as its costs (such as free movement, the role of the CJEU, and contributions to the EU budget), then this is likely to be achievable only on condition that there is maximum regulatory alignment, and this would be likely to include continuing to adhere to Single Market regulations. The EU-27, in the shape of the Commission's formidable chief negotiator, Michel Barnier, has indicated that the Commission includes environmental and social aspects of the Single Market within this sphere,[17] including presumably in such areas as equality. It cannot be in the interests of the EU-27 to allow a highly deregulated UK access to EU markets.

Retention of market access is, therefore, likely to result in retention of EU equality law in all but name. The opposite is also true, of course. The less the UK seeks or is given access to the EU markets, the less likely it is that the EU would require the UK to adhere to regulatory alignment in such areas as equality.

15 Available at: https://publications.parliament.uk/pa/bills/lbill/2017-2019/0079/18079.pdf.

16 'PM speech on our future economic partnership with the European Union', Mansion House, London, 2 March 2018, available at: https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union.

17 Hans von der Burchard, Brussels will insist on ECJ in Brexit Treaty, says Barnier, *Politico*, 24 April 2018, available at: https://www.politico.eu/article/brussels-will-insist-on-ecj-in-brexit-treaty-says-barnier.

The contrast between the position of Norway and Canada illustrates the point. Norway, as a member of the EEA, gets substantial market access to the EU and conforms to the EU gender equality acquis (not the other areas of EU equality law). Canada, with a substantially lesser degree of access, will not have any equality obligations under its trade treaty arrangements with the EU.

The second reason why the future economic relations treaty is critical for equality policy has to do with membership in the Customs Union, or equivalent. One of the reasons why the UK is so keen to leave the Customs Union is because this would mean that the UK would be free to negotiate its own trade agreements with non-EU States, such as China, the United States, and Australia. At the moment, of course, EU Member States are not free to negotiate such agreements themselves. The closer the UK comes to remaining in the Customs Union, or a customs relationship of a similar type, the less likely it is that the UK would be able to negotiate its own trade treaties.

How far the UK is free to do so will affect the extent to which the UK will be exposed to pressures from non-EU States to reduce tariffs as a condition for achieving such trade agreements – that much is obvious. But it is of more significance for equality law that it will also affect the extent to which the UK is exposed to equivalent pressures to reduce *non-tariff* barriers. A non-tariff barrier would include any regulatory practices which have the effect of reducing the ability of one State to conduct open-access trade with another. So, for example, restricting access to the UK market of chlorinated chickens would constitute a non-tariff barrier which the United States would be anxious to remove.[18]

Following Brexit, and in the absence of a deep and extensive free trade agreement with the EU, the UK will be under significant pressure to attempt to replace its existing access to EU markets with access to other markets, and will therefore be under pressure to succumb to pressure to reduce non-tariff barriers, potentially leading to heavy deregulation. This is where the Trump effect is likely to have its greatest impact on equality policy in the UK. Equality law requirements, to the extent that they differ between States can be regarded as constituting non-tariff barriers and may be targeted by States negotiating a free-trade agreement with the UK. With an economic nationalist controlling the White House, the UK Government will be lucky to escape without significant elements of its current (EU-based) regulatory policies being undermined.

Take just one example: there has been some progress in getting public authorities to adopt particularized equality norms in the context of public procurement by public authorities in the UK. To the extent that these norms differ from (or even conflict with) those which tenderers consider usual in their home States (for example, the United States), the UK will be under pressure in trade negotiations covering public procurement to modify, more likely reduce their equality norms in that context.[19]

VII What is to be done?

This is the worst-case scenario but it will come to pass, unless, of course a second referendum, or a new election, or the EU-27 saves the day. Those concerned with equality law should pay closer attention to these negotiations than, perhaps, equality specialists have done so hitherto and should seek to ensure a negotiated outcome consistent with equality principles. Perhaps, we should also view it as presenting us with an opportunity to rethink our own fundamental commitments. Facing up to a moment that calls into question the deepest meaning of our claims and values may be cathartic, if we handle it properly.

For human rights and equality activists, I suggest, it is now a time for navel-gazing, as well as activism. We need to focus, I think, on addressing the anxious question that haunts human rights and equality policy, one which we seldom dare to formulate in public. Is there any convincing normative justification

18 The Independent (31 July 2017) 'Brexit: Food Standards Agency should be able to say no to chlorinated chicken', available at: https://ind.pn/2CN1PaN.

19 See Christopher McCrudden, *Buying Social Justice* (Oxford University Press, 2007).

for human rights and equality? Is there a persuasive human rights and equality narrative that we can present in response to Brexit in the years ahead? In not developing one, have we contributed to Brexit? It is a stark challenge to us all.

To address it, we need to revisit first principles. How should we begin to re-think the possible normative justification of human rights and equality? It will be useful to introduce some distinctions. First, there is a distinction between legal rights and *moral* rights, and the two have no necessary connection between them, except at the level of basic structure.[20] Second, there is a distinction between rights and obligations, and we need to be conscious of both. As Onora O'Neill has persuasively argued elsewhere, stating rights without also imposing obligations on someone to uphold those rights is worrisome.[21] Third, there is a distinction between utilitarian and *non-utilitarian* justifications for rights: quite often the rights that we are accorded in law, for example, are primarily justified in utility. The right to park my car on the road during particular periods is an obvious example. And finally, there is a distinction between rights, and human rights, which I take to be justified by non-utilitarian justifications. The right to park my car is different from the right not to be tortured, notably that the latter is not commonly justified in utility. From now on, then, I'll be concerned with the *moral* justification of *human* rights, and their accompanying *obligations,* from a *non-utilitarian* perspective.

In my most recent book,[22] I develop a modest proposal. We should distinguish the 'general justifying aim' of the human rights and equality system from the way in which that aim is pursued. The general justifying aim of the human rights system (including equality) is the pursuit of 'human dignity' – the idea that a human person has a moral worth, simply as a human person and for no other reason.[23] The human rights system supplements this basic understanding of human dignity with two further principles: that individuals are in relationship with each other (let's call it 'relationality'), with implications for how we should behave towards each other, and that the States in which we live must be limited States, such that the State exists for the individual, not the individual for the State.

The way the general justifying aim of human dignity is pursued by according 'human rights' to persons, together with the appropriate allocation of obligations. Human rights, including equality rights, become an instrument by which human dignity is protected and upheld. But does resort to human dignity actually help? Don't we disagree about what we mean by 'human dignity', about the implications of relationality, and indeed what the limits of the State should be? Yes, often fundamentally. Is that not a huge problem? No, on the contrary.

One of the important roles that 'human dignity' plays is to provide a language that is centred on the human person through which reasonable disagreements on these matters can be addressed. What I suggest, then, is that the legitimate differences we have concerning the understanding of human dignity require us to embrace a dialogic approach. Through this dialogue we will understand better, over time, what recognition of our common humanity requires. It is a constant work in progress. This lack of resolution is not a failure of the system. Rather, it is an essential *aspect* of the human rights system: contestation and change is built into the system.

The continuing dialogue about what human dignity properly involves should, as a result, be open to all. We should therefore welcome the opportunity that the phenomenon of Brexit offers to engage in as serious a conversation as possible about these deeply contested issues. But engage we must. Does that mean that 'anything goes'; that there are no constraints in this dialogue? No. 'Human dignity' also provides a minimal constraint on who is to be included in the dialogue, and the permissible limits of this

20 Joseph Raz, *Legal Rights*, (1984) 4(1*)* Oxford Journal of Legal Studies, 1.
21 Onora O'Neil, *Justice Across Boundaries: Whose Obligations* (Cambridge University Press, 2016).
22 Christopher McCrudden, *Litigating Religions: An Essay on Human Rights, Courts, and Beliefs* (Oxford University Press, 2018).
23 For this purpose, I'm not concerned with the *word* 'dignity' in this context, but with the *concept* that lies behind it. Other languages have different words for the same idea, whether in German – *Menschenwürde* – or in Irish – *uaisleacht* – but there is an understanding in both of the basic moral worth of the human person.

dialogue. As will be obvious, this carries us into difficult territory and the nature of this article is such that I cannot dwell on that issue here.[24]

Standing our ground on the primary importance of human dignity also allows us to avoid falling into the trap of elevating human rights to become incontestable dogma. We need to recognize their limits as well as their strengths, and understand that they will not necessarily be the best method by which to further human dignity. In important ways, then, human dignity is not only the ground on which human rights are built, but also a basis for critiquing existing arrangements of rights. Human dignity provides the basis for the critique of human rights itself; do the current arrangements for rights and obligations best serve the aim of protecting and furthering human dignity, or do they retard human dignity?

History demonstrates that it is when we treat other persons, and other groups, as less than fully human that the most egregious human rights violations occur. Think of the slave trade, the Famine in Ireland, the Holocaust, segregation in the United States, the Khmer Rouge in Cambodia, and the treatment of women everywhere. One of the most troubling aspects of Brexit, in my view, is the degree to which the particular threats to human rights and equality that derive from it coalesce around this general unwillingness to treat others as fully human, and thus not accord them what their human dignity demands.

This is blatant in the way immigrants and asylum seekers are viewed, but it is true in more subtle ways: in the reckless disregard for the effect of Brexit on the Peace Process in Northern Ireland; in the use of EU citizens in Britain as bargaining chips;[25] in the insouciant disregard for the adverse effects on the most vulnerable, and so on. What should our response be? Here's my suggestion: let's not talk only about the politics and the economics of Brexit, let's talk more about the *morality* of Brexit. Human dignity provides us with the language to do so, and the standard against which it should be measured. Equality rights provide us with the tools to do something about it when they fall short of this standard.

24 See further, *Litigating Religions*, above.

25 Ruvi Ziegler, *Logically flawed, morally indefensible: EU citizens in the UK are bargaining chips*, LSE Brexit Blog, available at: http://blogs.lse.ac.uk/brexit/2017/02/16/logically-flawed-morally-indefensible-eu-citizens-in-the-uk-are-bargaining-chips.

Promoting substantive gender equality through the law on pregnancy discrimination, maternity and parental leave

Dr Jule Mulder*

I Introduction

EU sex discrimination law has long recognised the link between sex and pregnancy discrimination. It considers pregnancy discrimination under the scope of direct sex discrimination and recognises the need for special protection in relation to pregnancy/maternity. Article 33(2) of the Charter of Fundamental Rights of the European Union recognises a general right to reconcile family and professional life. It also envisages protection while on maternity leave, a right to paid maternity leave and to parental leave in addition to the non-discrimination and gender equality provisions in Article 21 and 23. Paternity leave is not mentioned and the Article's focus on maternity leave does not recognise other ways that could enable families and mothers to reconcile family and work life.[1] The Pregnancy Directive provides minimum special protections to pregnant women and women who have recently given birth.[2] Additionally, EU law also provides minimum parental-leave rights available to both parents and the recently proposed Directive on the work-life balance aims to extend these rights and encourage fathers to take longer periods of leave.[3] Member States often go beyond these minimum protections and provide further rights. Nevertheless, pregnancy discrimination continues to be one of the most common and well-reported forms of discrimination within Member States.[4] Women who are pregnant or have recently given birth experience detrimental treatment, loss of opportunities and demotion.

The causes for this are complex and multifaceted. Inter alia, gender expectations and stereotypes may motivate employers to consider pregnant women and women who have recently given birth as less attractive employees, as they are expected to prioritise childcare over work responsibilities and to be less flexible than other employees, once they return from their (often relatively short) maternity leave.

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1 Schiek, D. (2014), 'Article 23: Equality between women and men' in: Peers, S., Hervey, T, Kenner, K. and Ward, A. (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, Hart Publishing, pp. 633, 639.

2 Court of Justice of the European Union (CJEU), 177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen*, 8 November 1990; Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (*Pregnancy Directive*), OJ L 348, 28.11.1992, pp. 1-7 as amended by Directive 2007/30/EC, OJ L 161, 27.06.2007, pp. 21-24.

3 Council Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (*Parental Leave Directive*), OJ L 68, 18.03.2010, pp. 13-20; Proposal for a Directive on work-life balance for parents and carers and repealing council Directive 2010/18/EC, COM(2017) 253 final, 26.4.2017, 2017/085 (COD).

4 See for example Equality and Human Rights Commission (2017), *Pregnancy and maternity discrimination research findings*, available at: https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings, accessed 02 May 2018; College voor de Rechten van de mens (2016), *Is het nu beter bevallen?*, available at: https://www.mensenrechten.nl/publicaties/detail/36883.

Such gender expectations in relation to pregnancy and childcare disadvantage all women, even if they are not or will never be pregnant or give birth because they are either expected to become mothers or have the typical traits of a carer. This article argues that rights that exclusively focus on pregnancy and maternity fail to tackle these gender expectations and stereotypes. They are thus unlikely to prevent pregnancy and maternity discrimination and struggle to advance gender equality. Accordingly, this article analyses how broader rights to parental leave can effectively support substantive gender equality and tackle pregnancy discrimination within the European legal framework. It does so by drawing on recent developments within the CJEU case law and two Member States, the UK and Germany, that signal a shift of paradigm by focusing more directly on fathers' involvement in childcare and paternity leave. These laws potentially take a more holistic approach towards challenging gender expectations and fostering substantive gender equality.

To explore how family-oriented provisions can support substantive gender equality, this article is structured in three parts. Firstly, it will discuss how the concept of substantive gender equality can help theorising pregnancy and maternity discrimination. It will then consider the EU legal framework and the CJEU approach towards sex discrimination in relation to pregnancy and rights associated with maternity leave and parental leave. Finally, it will discuss recent developments in the UK and Germany to illustrate the progressive potential and pitfalls of different leave provisions in the light of substantive gender equality and the EU legal framework. This article will conclude by identifying how the EU legal framework could support Member States' leave provisions that tackle gender expectations in relation to pregnancy and maternity more effectively.

II Substantive gender equality

The CJEU has repeatedly held that EU non-discrimination law aims at fostering substantive rather than formal gender equality.[5] Substantive equality goes beyond procedural equal treatment and focuses on outcomes, equal opportunities, and structural or social inequality that places formally equal people in different situations within society and may hinder them to compete on an equal footing. Accordingly, it focuses on the effects of treatment and suggests a group-sensitive and asymmetrical approach.[6] The multi-dimensional nature of the concept of equality means that its precise scope is difficult to ascertain. Fredman identifies four overlapping dimensions: the redistributive, the transformative, the participative, and the recognition dimension.[7] Most important for the discussion below is that the redistribution dimension targets disadvantages of certain groups, whether material or structural. This may include positive actions but also the general removal of obstacles. The transformative dimension aims at abolishing structural disadvantages and providing accommodation of different needs.[8]

Within the feminist critique, the 'male norm' has often been referred to as a standard that structurally disadvantages women within employment. While male and female workers are often confronted with the same set of expectations in terms of flexibility, availability and commitment, these expectations are not always gender-neutral but rather based on the traditional male gender role as breadwinner with a domestic support system that takes care of children and household. Men are often more able to comply with these expectations if traditional gender roles persist within society. Formal equality ignores that women will only have the right to equal treatment once they behave and organise their life like men,[9] which is something that most women will struggle to do as long as they continue to carry the majority of domestic or childcare responsibilities. There is thus a need to link inequality and difference,

5 See for example, Court of Justice of the European Union (CJEU), C-284/02 *Land Brandenburg v Ursula Sass*, 18 November 2004, paragraph 34; Mulder, J. (2017) *EU Non-Discrimination Law in the Courts*, Oxford, Hart Publishing, Chapter 2.

6 Schiek, D. (2002), 'Elements of a New Framework for the Principle of Equal Treatment of Persons in EC Law' *European Law Journal*, Vol. 8, issue 2, pp. 290-314.

7 Fredman, S. (2011), *Discrimination Law*, Oxford, OUP, 2nd edn, pp. 25-33.

8 Ibid, 11, 30.

9 MacKinnon, C. (1987), *Feminism Unmodified*, London, Harvard University Press, pp. 72-73.

by recognising diversity, dismissing the comparison approach, and highlighting existing social, economic, and biological differences and structural inequality.[10]

Women's reproductive capacities and their medical needs before and after they give birth makes it extremely difficult for women to comply with the male standard as pregnancy will include absences and potential temporary incapacity to work. Women are thus in a different situation while pregnant. EU law has responded to this in several ways. It has banned pregnancy discrimination but also provided special rights to pregnant workers and those who have recently given birth. Finding the right balance has been a challenge, as laws recognising women's biological reproductive difference have arguably turned them into less attractive employees and job applicants. Moreover, pregnancy can trigger socially constructed gender differences in addition to the biological and reproductive ones. After all, pregnancies do not produce disadvantages simply because of the relatively short period of time women will be absent from work, but also because it is often assumed or observed that women are more likely to carry the primary burden of childcare, to reduce their working time and to become less committed employees as they prioritise domestic and childcare responsibilities.[11] Women's common experiences of detrimental treatment once they return from maternity leave and the rather stubborn 'motherhood penalty' demonstrate that disadvantages often are not simply linked to maternity but to motherhood in more general terms.[12] Protective measures can maintain, further, or establish such stereotypes about women and female gender roles that go beyond the medical needs before and after birth, especially if they encourage women to organise their life according to traditional gender roles. Once accepted, such stereotypes disadvantage all women as they all carry the same risk of motherhood and female gender roles, even if they are not and will never be pregnant. To separate the burdens of parenthood from pregnancy thus seems crucial for the fostering of substantive gender equality, as it tackles an influential gender stereotype that disadvantages women at the workplace.[13]

A stereotype is 'a generalized view or preconception of attributes or characteristics possessed by, or the roles that should be performed by, members of a particular group'.[14] It can be negative or positive albeit patronising.[15] While stereotypes often impose certain behaviour upon people by indicating what they should do, how they should look, and what their role should be (prescriptive), stereotypes can also describe facts in a sense that there is often some statistical or empirical truth to them (descriptive).[16] This means that there is a circular link between the different dimensions of the stereotype. The prescriptive nature of stereotypes may mean that there are social, cultural and economic pressures for women to accept most caring responsibilities. However, women also de facto take up more of these responsibilities and choose to do so despite the professional disadvantages associated with that choice. There is thus a descriptive basis for the motherhood stereotype.[17] Leave provisions can affect both aspects. They may encourage women to self-select into a less competitive environment, so they can prioritise childcare

10 MacKinnon, C. (1991), 'Difference and Dominance' in: Bartlett, K. and Kennedy, R. (eds.), *Feminist Legal Theory*, Oxford, Westview, pp. 81-93.

11 Ridgeway, C. and Correll, S. (2004), 'Unpacking the Gender System' (2004) 18(4) Gender Society, Vol. 18, issue 4, pp. 510, 524-526.

12 Kahn, J., García-Manglano, J. and Bianch, S. (2014), 'The Motherhood Penalty at Midlife: Long-Term Effects of Children on Women's Careers' *Journal of Marriage and Family*, Vol. 76, issue 1, pp. 56-72.

13 Fredman, S. (2014), 'Reversing roles: bringing men into the frame' *International Journal of Law in Context* Vol. 10, issue 4, pp. 442-459.

14 Cook, R. and Cusack, S. (2010), *Gender Stereotypes: Transnational Legal Perspectives*, Philadelphia, University of Pennsylvania Press, p. 9.

15 Brems, E. and Timmer, A. (2016), 'Introduction' in: Brems, E. and Timmer, A (eds.) *Stereotypes and Human Rights Law*, Cambridge, Intersentia, pp. 1, 3.

16 Timmer, A (2011), 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' *Human Rights Law Review*, Vol. 11, issue 2, pp. 707-738; Timmer, A (2015), 'Judging Stereotypes' *The American Journal of Comparative Law* Vol. 63, issue 1, 239-284; Peroni, L and Timmer, A (2016), 'Gender Stereotyping in Domestic Violence Cases' in: Brems, E and Timmer, A (eds.) *Stereotypes and Human Rights Law*, Cambridge, Intersentia, p. 39, 41.

17 Cook, R. and Cusack, S. (2010), *Gender Stereotypes: Transnational Legal Perspectives*, Philadelphia, University of Pennsylvania Press, p. 14.

(supply) and employers may conceive them as less desirable employees (demand).[18] While emancipation seems impossible without autonomy,[19] the choices made need to be understood in this context. Women may choose to take long-term parental leave or to work part-time. However, they make these choices within a specific economic, cultural and social context of structural inequality. Disadvantages connected to these choices thus need to be tackled even if the women choose these circumstances.[20] Similarly, fathers may have more freedom arranging their involvement with the children's upbringing as they wish. However, they may also face additional social and economic pressures to forgo any rights available to them. Compulsory types of leave may counteract these social pressures that limit fathers' and mothers' choices, despite their potential paternalistic nature.[21]

To foster substantive equality, law prohibiting sex discrimination and providing special rights to young parents thus need to be a multi-edged sword. It needs to protect women from discrimination based on pregnancy. It needs to provide accommodation to enable absences due to pregnancy and subsequent leave. It needs to provide further protection from disadvantages that are linked to choices made in the existing circumstances. Finally, it needs to challenge these circumstances and prevent re-enforcement of descriptive stereotypes. The challenge is to simultaneously tackle the prescriptive nature of some motherhood stereotypes, while also recognising the descriptive reality that disadvantages women within the labour market.

III EU legal framework

The CJEU's approach towards pregnancy discrimination often serves as an example to highlight the substantive value of EU non-discrimination law. Since only biological females can become pregnant,[22] the CJEU held in *Dekker* that pregnancy discrimination constitutes direct sex discrimination.[23] Women shall thus not be disadvantaged because of their pregnancy, even if there is no comparator and they are in a different situation than men and women who are not or will never be pregnant. The Court thus recognises the link between pregnancy and the biological female sex, although it has not taken its finding to its logical conclusion, as it has excluded women who suffer pregnancy-related illnesses after maternity leave from the protection although only biological females can have pregnancy-related illnesses prior or post pregnancy.[24] Nevertheless, the Court has generally rejected detrimental treatment that is based on the worker's pregnancy and viewed comparisons with men who were ill with scepticism.[25]

Today, Article 2(2)(c) Recast Directive also prohibits less favourable treatment of women in relation to pregnancy and maternity, and Article 15 Recast Directive protects women's right to return to their job or an equivalent post at the end of their maternity leave.[26] Article 16 provides similar protection to those

18 Gornick, J (2015), 'Leaves policies in challenging times: what have we learned? What lies ahead?' *Community, Work & Family*, Vol. 18, No. 2, p. 242.

19 Benhabib, S. (1992), *Situating the Self*, Cambridge, Political Press, p. 16; Mullally, S. (2006), *Gender, Culture and Human Rights*, Oxford, Hart Publishing, p. 20.

20 Fredman, S. (2011), *Discrimination Law*, Oxford, OUP, 2nd edn, p. 28.

21 Fredman, S. (2014), 'Reversing roles: bringing men into the frame' *International Journal of Law in Context* Vol. 10, issue 4, p. 442, 451; Suk, J. (2012), 'From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe' *American Journal of Comparative Law* Vol. 60, issue 1, pp. 75, 79.

22 In the original ruling the CJEU refers to 'women' rather than 'biological females'. It is possible for transmen to become pregnant if they have changed their legal sex from female to male without prior sterilisation. However, they still need to be biologically female, i.e. they need to have female reproductive organs. Subsequent case law on surrogacies (e.g. C-363/12 *Z. v A Government department*, 18 March 2014) has clarified that the CJEU indeed focuses on the reproductive capacity rather than legal sex or female gender identity in relation to pregnancy discrimination.

23 Court of Justice of the European Union (CJEU), 177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen*, 8 November 1990.

24 Court of Justice of the European Union (CJEU), C-191/03, *North Western Health Board v Margaret McKenna*, 8 September 2005; Mulder, J. (2015), 'Pregnancy Discrimination in the National Courts: Is There a Common EU Framework?' *International Journal of Comparative Labour Law*, Vol. 31, pp. 67-90.

25 Court of Justice of the European Union (CJEU), C-32/93, *Webb v EMO Air Cargo*, 14 July 1994.

26 Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (*Recast Directive*), OJ L 204, 26.7.2006, pp. 23-36.

who are entitled to paternity or adoption leave. Additionally, the Pregnancy Directive provides protections and entitlements for pregnant workers and those that have recently given birth. Most notably, women are entitled to at least 14 weeks of maternity leave, two of which are compulsory (Article 8); women are protected from dismissal during pregnancy leave and maternity leave, save exceptional circumstances (Article 10);[27] and women are entitled to a payment during the leave (Article 11) that is at least comparable to statutory sickness payments.[28] Additionally, the Parental Leave Directive provides minimum rights of leave to fathers and mothers with at least one month of leave being provided on a non-transferable basis. Clause 2(2) explicitly aims to encourage a more equal take-up of the leave by both parents. The Commission's proposal on work-life balance for parents and carers suggests implementing measures that further encourage fathers to take up leave. The proposal inter alia suggests a right to ten days of paternity leave (Article 4), a right to individual non-transferable parental leave of four months that can be taken on a flexible (e.g. part-time) basis (Article 5), and a right to adequate payment for the duration of the leave (Article 8).

EU law thus takes a tri-layered approach. It prohibits pregnancy discrimination, it provides special protection in relation to pregnancy and maternity, and it provides leave for both parents. Unfortunately, it seems that the special rights often overshadow the equal access approach. The CJEU consistently justifies the right to maternity leave with reference to the women's biological condition and their special relationship with the child.[29] While there may be a special relationship linked with women's biological conditions in relation to breastfeeding, such general statement reinforces stereotypes as it prioritises women's caring responsibility and draws a direct distinction between her role as mother and the father's role.[30] Moreover, while the CJEU subsumes pregnancy under sex discrimination, it has often refused to challenge the traditional division of labour.[31] Despite focusing on disadvantages, EU case law on pregnancy thus often comes across as special protection provided to women in a fragile state. Protection that can be withdrawn once she returns to work.[32]

It has been suggested that recent case law, in addition to changed policy aims, is more sensitive to gender stereotypes and rejects the traditional division of labour as a justification for excluding fathers from certain benefits in relation to childcare.[33] *Roca Álvarez* can serve as an example of this development. The CJEU held that the so-called breastfeeding leave was sufficiently separated from the women's biological ability to breastfeed and primarily focused on childcare. Since fathers and mothers are equally able to take care of their children, they had to have equal access to the leave. The scheme was discriminatory because fathers had no independent right to the leave but depended on a maternal transfer. Explicitly, the CJEU recognised that the exclusion of men from the leave may perpetuate traditional gender roles.[34] Just as in the decision in *Griesmar*,[35] the Court drew a distinction between special protections related to the women's biological state (including disadvantages linked to maternity leave) and measures that are

27 Court of Justice of the European Union (CJEU), *Jessica Porras Guisado v Bankia SA and Others*, 22 February 2018.

28 Court of Justice of the European Union (CJEU), C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission*, 27 October 1998.

29 Court of Justice of the European Union (CJEU), 184/83, *Hofmann v Barmer Ersatzkasse*, 12 July 1984, paragraph 25; C-116/06, *Sari Kiiski v Tampereen kaupunki*, 20 September 2007, paragraph 46; C-5/12, *Marc Betriu Montull v Instituto Nacional de la Seguridad Social*, 19 September 2013, paragraph 50.

30 Timmer, A. (2016), 'Gender Stereotypes in the Case Law of the EU Court of Justice' *European Equality Law Review*, issue 1, pp. 37, 40; McGlynn, C., 'Work, Family, and Parenthood' in: Conaghan, J. and Rittich, K. (eds.), *Labour Law, Work, and Family*, Oxford, OUP, pp. 217-236.

31 Court of Justice of the European Union (CJEU), 170/84, *Bilka v Weber von Hartz*, 13 May 1986, paragraph 43.

32 Court of Justice of the European Union (CJEU), C-191/03, *North Western Health Board v Margaret McKenna*, 8 September 2005.

33 Caracciolo di Torella, E. (2014), 'Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union' *European Law* Journal, Vol. 20, issue 1, pp. 88-106.

34 Court of Justice of the European Union (CJEU), C-104/09, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*, 30 September 2010, paragraph 36.

35 Court of Justice of the European Union (CJEU), C-266/99, *Joseph Griesmar v Ministre de l'Économie, des Finances et de l'Industrie*, 29 November 2001, paragraph 44. Masselot, A. (2001), 'Pregnancy, maternity and the organisation of family life: an attempt to classify the case law of the Court of Justice' *European Law Review*, Vol. 26, issue 3, pp. 239, 245.

designed to protect women in their role as parents. Since fathers are parents too, the latter constitutes sex discrimination. The reasoning has been confirmed in subsequent case law.[36]

Equal access to parental leave can challenge gender stereotypes as it encourages fathers to take up equal parental responsibilities and thus separates the risks related to parenthood from the female sex.[37] However, the approach also bears some dangers. Firstly, the anti-stereotyping approach shows limited awareness of the de facto situation of women, as it partly remains within the logic of formal equality. Predominantly, it challenges distinctions between men and women based on stereotypical assumptions regarding their living arrangements. In the same vein, the CJEU has challenged limited access to survivor pensions for men unless their wives were the main breadwinner,[38] looser age requirements to enter the civil service for unmarried widows,[39] and flexible retirement schemes for women whose husbands have become disabled.[40] However, it does not consider the potential descriptive truth within the stereotype and the pressures that create it.[41] Thus, it opens access to these benefits to men who are, at least statistically, likely to be in a much better position than women and thus benefits them further. This may not be too problematic as long as it does not mean a reduction of rights for women. However, in the long run, there is a risk that their entitlements are reduced or means-tested. In that light, it may not be too surprising that some women's groups in the UK rejected legal proposals to allow fathers equal access to shared parental leave.[42] The argument would be that mothers carry out most of the childcare responsibilities, whether fathers have access to leave or not. A reduction of their rights to leave for the benefit of the father thus potentially leaves women worse off, as they lose their hard-won rights and face difficulties to remain employed. The CJEU's assessment of motherhood via surrogacy arrangements demonstrates this conundrum. Formally, the Court is correct to consider the comparability of fathers and mothers who become parents via a surrogacy arrangement. After all, neither give birth to the child.[43] However, the absence of any paid leave entitlements is likely to affect mothers more severely than fathers. Rights to maternity leave can help women to stay in employment and thus advance gender equality. If fathers are less likely to take leave, it is not an accident that the above-discussed cases, in which the fathers seek access to leave, all deal with situations in which, due to the mother's lack of employment, the leave would have been lost without an independent right to leave for the father. It does not necessarily follow that the fathers picked up the role as primary carer for the duration of that leave. Not granting the leave to fathers at all may mean however that they are never able to take up that role, which will also disadvantage their female partners.[44]

Secondly, the distinction between maternity leave and parental leave is not always clear. In *Sass*, the CJEU held that a leave must be categorised based on its purpose, not its length. If it aims at protecting 'the woman's biological condition and the special relationship between the woman and her child', it constitutes maternity leave and cannot result in less favourable treatment.[45] Following these guidelines, the German Federal Labour Court held that the 20 weeks of leave available in the former German Democratic Republic (Eastern Germany) did not constitute maternity leave because it was not granted

36 Court of Justice of the European Union (CJEU), C-222/14, *Konstantinos Maïstrellis v Ypourgos Dikaiosynis*, 16 July 2015.
37 Timmer, A (2016), 'Gender Stereotyping in the Case Law of the EU Court of Justice' *European Equality Law Review*, issue1, pp. 37-46.
38 Court of Justice of the European Union (CJEU), C- 379/99, *Barmer Ersatzkasse v Hans Menauer*, 9 October 2001.
39 Court of Justice of the European Union (CJEU), C-319/03, *Serge Briheche v Ministre de l'Intérieur*, 30 September 2004.
40 Court of Justice of the European Union (CJEU), C-206/00, *Henri Mouflin v Recteur de l'académie de Reims*, 13 December 2001.
41 Court of Justice of the European Union (CJEU), C-220/02, *Österreichischer Gewerkschaftsbund v Wirtschaftskammer Österreich*, 8 June 2004, where the court dismissed comparability of absence due to military service and parental leave and held that the former constituted a civic obligation while the latter was a voluntary act. It therefore did not matter that almost only women took parental leave.
42 Baird, M and O'Brien, M (2015), 'Dynamics of parental leave in Anglophone countries' *Community, Work & Family*, Vol. 18, No. 2, pp. 198, 210-211.
43 Court of Justice of the European Union (CJEU), C-167/12, *C. D. v S. T.*, 18 March 2014.
44 See for example the discussion around C-476/99, *H. Lommers v Minister van Landbouw*, 19 March 2002; Fredman, S. (2014), 'Reversing roles: bringing men into the frame' *International Journal of Law in Context* Vol. 10, issue 4, pp. 442, 452.
45 Court of Justice of the European Union (CJEU), C-284/02 *Land Brandenburg v Ursula Sass*, 18 November 2004, paragraphs 34-39; C-294/04, *Carmen Sarkatzis Herrero v Instituto Madrileño de la Salud*, 16 February 2006.

to all birth mothers, but only if the child lived with the mother. It thus aimed at general childcare.[46] Sass' leave was thus retroactively reclassified as parental leave, which affected her seniority and consequently her pay.[47] However, in *Betriu Montull* the CJEU did consider a leave to fall within the notion of maternity leave because it fell within the 14-week period guaranteed by the Pregnancy Directive.[48] It did not matter that some of the leave was transferable to the father if both parents were employed and thus predominantly focused on childcare rather than the woman's biological condition or special relationship. Such uncertainty within the approach leaves great flexibility to the Member States regarding the available leaves and allows for the continued existence of leave provisions and measures that are based on stereotypical assumptions about mothers, fathers and gender roles.

IV National leave provisions encouraging fathers to care

The national approaches to leave have been the focus of much political and academic debate. Member States' approaches range from welfare systems that are based on the traditional breadwinner/housemaker distinction, to systems that aim at changing gender relations and actively encourage mothers to return to work.[49] This article is not the place to discuss these different approaches in detail. Instead, it will focus on two recent developments in the UK and Germany to illustrate the progressive potential and pitfalls of different leave provisions in the light of substantive gender equality and the EU legal framework.

V The UK Shared Parental Leave

Section 17-18 of the UK Equality Act 2010 explicitly prohibits unfavourable treatment because of pregnancy without requiring a comparator and the maternity leave is generous compared to the EU minimum requirements, after it was extended to 12 months in 2003. Additionally, paternity leave (2 weeks), shared parental leave and parental leave provisions potentially enable fathers to be directly involved in the early upbringing of their children.[50] However, none of these types of leave are compulsory. This means that fathers have great flexibility regarding the way they organise their childcare involvement. The *shared parental leave* provisions introduced in 2015 allow parents to share 50 of the 52 weeks of maternity leave between them, depending on their choice.[51] In principle, it thus enables some flexibility between parents and long and slow-term involvement of fathers.[52] Fathers are therefore able to take up responsibilities related to everyday childcare that is long-term and slow instead of only being able to reserve some free time to ensure quality time with their children (e.g. during the weekend). However, fathers are not equally entitled to the leave. Rather, the *shared parental leave*, as well as its predecessor the 2010 *additional parental leave*, are based on maternal transfer.[53] Fathers' leave therefore depends on the mother's discretion and her formal entitlement.[54] Moreover, statutory pay is very low during the first 39 weeks of leave (£145.18 a week or 90 % of your average weekly earnings). While statutory maternity pay is also low, the first six weeks are paid at a rate of 90 % of whatever is earned. The last 13 weeks are unpaid.[55] Employers may choose to top-up the statutory pay. However, according to the guidelines published by the Department for Business Innovation and Skills (the 'BIS guidelines'), the pay

46 Germany, Federal Labour Court (*Bundesarbeitsgericht*), 6 AZR 108/01-B, 16 June 2005, paragraphs 20-24.
47 Mulder, J. (2017) *EU Non-Discrimination Law in the Courts*, Oxford, Hart Publishing, pp. 183-185.
48 Court of Justice of the European Union (CJEU), C-5/12, *Marc Betriu Montull v Instituto Nacional de la Seguridad Social*, 19 September 2013.
49 Moss, P. and Deven, F. (eds.) (2015) 'Leave policies in challenging times (special issue)' *Community, Work & Family*, Vol. 18, No. 2; Kamerman, S. and Moss, P. (eds.) (2009), *The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market*, Bristol, Policy Press.
50 Part VIII Employment Rights Act 1996.
51 Shared Parental Leave Regulations 2014, 3(1).
52 Mitchell, G. (2015), 'Encouraging Fathers to Care: The Children and Family Act 2014 and Shared Parental Leave' *Industrial Law Journal*, Vol. 44, issue 1, pp. 123, 126-128.
53 Moss, P. and Deven, F. (2006), 'Leave Policies and Research' *Marriage & Family Review*, Vol. 39, issue 3-4, pp. 255-285.
54 The Maternity and Adoption Leave (Curtailment of Statutory Rights of Leave) Regulations 2014, 6(2); Shared Parental Leave Regulations 2014, 8(3)(iii).
55 Statutory Shared Parental Pay Regulations 2014, 10(1).

during shared parental leave 'may or may not be the same as the employer offers mothers on maternity leave'.[56] As opposed to maternity leave, the shared parental leave is also not a day-one right but requires 26 weeks of employment with the same employer by the fifteenth week before the expected day of birth.[57]

Despite the positive recognition of fathers' role in children's upbringing and the need for equal parenting to tackle sex discrimination and the gender pay gap in the legislative process, the estimated uptake was small.[58] De facto, only 1 % of new parents took advantage of the scheme between 2015 and 2017.[59] The scheme therefore has limited impact on the traditional division of labour within families. The reasons for this are easily identifiable. Leaves based on maternal transferal are badly equipped to encourage fathers to take long-term leave, as the primary childcare responsibility remains with the mother.[60] Fathers have great flexibility. Consequently, they often view taking leave as *their choice* rather than their parental obligation.[61] Flexibility can also impose additional external pressures not to take leave as it is not considered the norm.[62] Fathers whose partners are not eligible for maternity leave are altogether excluded from the scheme and the eligibility requirement of 26 weeks of employment distinguishes the leave from the day-one right to maternity leave. The scheme thus risks legitimising discrimination of women of childbearing age.[63] The low statutory pay can serve as a further obstacle. While most of the maternity pay is at the same low rate, the gender pay gap makes it more likely for families to depend on the father's income. This may dissuade fathers.[64] Apart from the 2-week paternity leave, none of the leaves available to fathers are provided on a 'use-it-or-lose-it' basis and the paternity leave is not compulsory. The leave provisions thus fail to incentivise fathers to take long-term leave and do not create any legal expectations.

From a European perspective, the leaves also conflate maternity leave and parental leave. They do not sufficiently distinguish between the mother's biological condition after birth and the fathers' and mothers' role as parents. The UK shared parental leave would be contrary to EU law if it were deemed to constitute parental leave, since fathers and mothers do not have equal access to the leave. To prevent this, it has to fall under the scope of the Pregnancy Directive. While CJEU case law has not been entirely consistent on this point, the classification of the leave depends on the purpose not the name of the leave. It is highly questionable whether a full-year leave can be justified by the mother's biological condition after birth or the special relationship with the child. The transferable nature of the leave further suggests that it is primarily concerned with childcare. While similar arguments were not accepted in *Betriu Montull,* the case was concerned with timeframes that fell within the minimum requirements set out by the Pregnancy Directive while the full-year shared parental leave exceeds that timeframe.

The comparability between maternity leave and shared parental leave has also been the subject of recent case law. The question was whether a difference in pay as accepted by Paragraph 77 of the BIS guidelines constituted direct or indirect sex discrimination. While the Employment Tribunal (ET) confirmed

56 BIS guidance (2014), available online: https://www.gov.uk/government/publications/shared-parental-leave-and-pay-employers-technical-guide, paragraph 77.

57 Shared Parental Leave Regulations 2014, 33(1).

58 HM Government (2012), *Modern Workplaces – Government Response on Flexible Parental Leave* and *Impact Assessment*, available online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/82969/12-1267-modern-workplaces-response-flexible-parental-leave.pdf.

59 Financial Times (2017), *Few families opt for shared parental leave*, available online: https://www.ft.com/content/2c4e539c-9a0d-11e7-a652-cde3f882dd7b.

60 Mitchell, G. (2015), 'Encouraging Fathers to Care: The Children and Family Act 2014 and Shared Parental Leave' *Industrial Law Journal*, Vol. 44, issue 1, pp. 123, 129-131.

61 O'Brien, M. and Twamley, K. (2017), 'Fathers Taking Leave alone in the UK – A Gift Exchange Between Mother and Father?', in: O'Brien, M. and Wall, K. (eds.), *Comparative Perspectives on Work-Life Balance and Gender Equality*, pp. 163-181.

62 Fredman, S. (2014), 'Reversing roles: bringing men into the frame' *International Journal of Law in Context* Vol. 10, issue 4, pp. 442, 451.

63 Mitchell, G. (2015), 'Encouraging Fathers to Care: The Children and Family Act 2014 and Shared Parental Leave' *Industrial Law Journal*, Vol. 44, issue 1, pp. 123, 129.

64 Ibid, 130-131.

this,[65] the Employment Appeal Tribunal (EAT) in *Capita Customer Management v Ali* distinguished between the different purposes of maternity leave and shared parental leave.[66] According to the EAT, the correct comparator of a father on shared parental leave is a mother on shared parental leave, as this leave focuses on childcare alone. It thus upheld a provision that provided 14 weeks of full pay to mothers on maternity leave but only 2 weeks of full pay to fathers on paternity leave. It could do so with reference to *Betriu Montull*, because the pay fell within the 14 weeks of maternity leave provided for by the Pregnancy Directive. The ET has also accepted differences between maternity pay and additional paternity leave pay (the predecessor of shared parental leave pay). While the tribunal identified potential indirect discrimination, it considered it justified, if the employer could show that the policy was aimed at recruiting and retaining women.[67] This means that the introduction of the various types of leave has not led to a different assessment of the maternity leave taken in the weeks after the birth. This seems to be in line with current EU law. However, it is questionable whether the EAT's assessment could be upheld regarding leave later in the period. The longer the leave, the more difficult it seems to argue that its purpose focuses on the woman's biological condition. *Capita Customer Management* also demonstrates that it is not always in the medical interest of young mothers to have long leave periods after their birth. In that case, the mother was encouraged to return to work early to assist her recovery from post-natal depression.

VI The German Parental Leave (*Elternzeit*)

German Law on parental leave changed significantly in 2007. Traditionally, the Western welfare system based its entitlements on the breadwinner model and encouraged mothers to stay at home for three years after the child's birth. However, the new parental-leave provisions aim at reducing the opportunity costs associated with leave and at enabling mothers to return to work within or after the first year of leave.[68] Inter alia, it was hoped that the new scheme aimed at employment and gender equality would increase the birth rate.[69] The current system distinguishes between maternity leave and parental leave. Pregnant women may not be engaged by their employer to do work for six weeks before the due date unless they explicitly consent, and they are on a compulsory leave of 8 weeks after they give birth. During that time, they receive EUR 13 in maternity pay per day from their health insurance and an employer supplement that covers the gap between the maternity pay and the net regular pay.[70] Additionally, both parents have access to parental leave. The parental-leave provisions introduced several innovations regarding pay. Firstly, rather than a low monthly flat-rate benefit with an income ceiling for the first 6 months, parents on leave receive 67 % of their previous income; with an absolute minimum of EUR 300 and a cap at EUR 1,800 per month.[71] Secondly, the pay is available for 12 months minus the received maternity pay. This is a reduction of time compared to the previous 24 months of pay at a flat rate. However, parents can spread the pay over 24 months and will then receive 33.5 % of their pay.[72] Finally, the new provisions provide for two 'father months' that are allocated at a 'take it or lose it' basis. If fathers take at least two months of leave the overall pay period is extended to 14 months.[73] Unpaid leave can be taken subsequently.[74] Parents can also work part-time during their leave. That income will be taken into account in the calculation of the parental-leave pay.

65 *Ali v Capita Customer* Management, 1800990/2016, 2 June 2017; *Hextall v Chief Constable of Leicestershire Police*, 2601223/2015.
66 UKEAT/0161/17/BA, 11 April 2018.
67 *Shuter v Ford Motor* Company, ET/3203504/2013, 30 July 2014.
68 Parliamentary Protocol, BT-Drucks 16/1889, pp. 23-24.
69 Erler, D. (2009) 'Germany: taking a Nordic turn?' in: Kamerman. S. and Moss, P. (eds.), *The Politics of Parental Leave Policies*, Bristol, Policy Press, pp. 119-134.
70 Germany, Maternity Protection Law (*Mutterschutzgesetz*, MuSchG), paragraphs 19-20.
71 Law on Parental Pay and Leave (*Gesetz zum Elterngeld und zur Elternzeit*, BEEG), paragraph 2.
72 Paragraph 4(3) BEEG.
73 Paragraph 4(5) BEEG.
74 Paragraphs 15-16 BEEG.

The number of fathers taking leave has increased every year since the introduction of the new parental-leave provisions. For example, in 2014, 34 % of fathers took some parental leave including part-time leave. However, only 21 % of these fathers took more than the 2 additional 'father months' and mothers continue to dedicate more of their time to childcare.[75] Nevertheless, there is some evidence that fathers reduce their working time after the paid leave.[76] The income-dependent pay during leave is less interesting for those parents whose overall income is low and unequally distributed. Thus, if the father's income is significantly higher than the mother's income but not high enough to be sufficient at a rate of 67%, fathers will be unable to take the leave and have to forgo the two 'father months'. This has been the subject of a Constitutional complaint that challenged the alleged unfavourable treatment of low-income families. While the Federal Constitutional Court acknowledged that the provisions interfere with the free choice of parents to organise their family life (Article 6 German Constitution), it considered this interference justified as it aligned with the State's duty to 'promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages' (Article 3(2) German Constitution) and was also proportionate.[77]

Overall, leave provisions in German law are more in line with the system envisioned by EU law than the UK law on leave. A relatively short maternity leave (8 weeks after birth) reserved for the mother is supplemented with longer parental leave that is available to fathers and mothers. However, only the recent changes regarding pay have encouraged fathers to take up leave and most fathers only take the two months reserved for them. In comparison, the newly introduced UK shared parental leave scheme offers some pay to fathers but at a much lower rate and has not significantly increased the number of fathers who take leave. This suggests that a meaningful reduction of opportunity costs significantly reduces the pressure for fathers to stay in employment because they can afford to go on leave. At the same time, the German law increases the opportunity cost of not taking the two 'father months' because the leave then only includes 12 months, which results in an earlier need for external childcare or unpaid care by the mother. The German law regarding part-time parental leave is more ambiguous. The possibility to take 24 months of leave is clearly contrary to the aim of the legislation as it does not necessarily encourage mothers to return early to the labour market because the part-time leave can be taken without being in part-time employment.[78] This means that it fails to address the costs associated with long-term leave and is not likely to reduce the motherhood penalty. However, the flexibility to take part-time leave as envisaged by Article 5(6) of the Commission's proposal on work-life balance may also have its benefits. Namely, it enables parents to stay connected with their employment and receive part-time pay. It thus reduced the financial sacrifice associated with long-time leave and enables parents to advance their career while on leave. However, research suggests that fathers having flexibility regarding their leave arrangements often choose leaves that allow them to have quality time with their children (e.g. one day of leave per week), rather than opting for 'slow-time leave' that deals with everyday childcare.[79] The part-time leave provides fathers with this opportunity and thus entails the risk that mothers remain the primary carer unless they also work part-time. However, this is much less likely, given that gender roles as well as the full-time maternity leave gears mothers towards providing full-time care.

75 Germany, Ministry for Family, Seniors, Women and Youth (*Bundesministerium für Familie Senioren Frauen und Jugend*) (2016), *Väterreport*, available online: https://www.bmfsfj.de/blob/112720/2d7af062c2bc70c8166f5bca1b2a331e/vaeterreport-2016-data.pdf, pp. 16-18.

76 Ibid, 20-21.

77 Germany, Federal Constitutional Law (Bundesverfassungsgericht), 1 BvL 15/11, 19 August 2011; 1 BvR 2075/11, 26 October 2011; Mulder, J. (2017) *EU Non-Discrimination Law in the Courts*, Oxford, Hart Publishing, p. 89.

78 Erler, D. (2009) 'Germany: taking a Nordic turn?' in: Kamerman. S. and Moss, P. (eds.), *The Politics of Parental Leave Policies*, Bristol, Policy Press, p.128.

79 Brandth, B. and Kvande, E. (2016), 'Fathers and flexible parental leave' *Work, Employment and Society*, Vol. 30, issue 2, pp. 275-290.

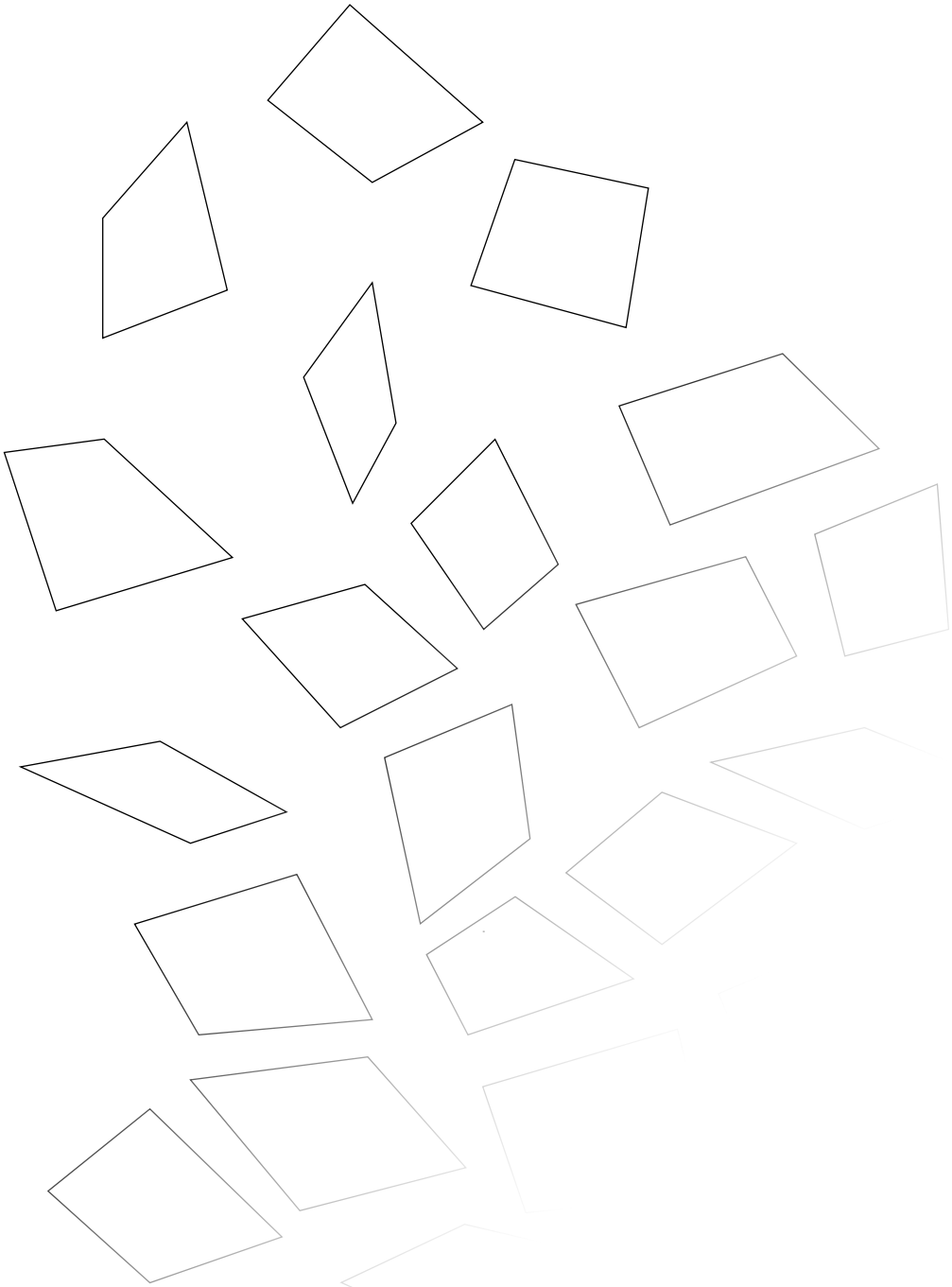
VII Conclusion

This article has evaluated recent developments in the EU legal framework and recent leave provisions introduced in two Member States, the UK and Germany, in the light of substantive gender equality. To ensure substantive gender equality in the context of pregnancy and maternity, women's biological condition related to pregnancy and birth and the parents' childcare responsibilities need to be acknowledged. Currently, both theses aspects burden women in the employment market. Women are more likely to accept these responsibilities beyond maternity and birth and are assumed to take them even if they do not have and will never have children. To challenge these prescriptive stereotypes while simultaneously acknowledging their descriptive reality, EU law needs to distinguish carefully between maternity leave and parental leave and ensure that the latter is de facto equally accessible to fathers and mothers. It is submitted that this means that long-term maternity leave that focuses on childcare should not be accepted. There is therefore a need to develop and apply stringent criteria to identify national leave provisions as either maternity leave or parental leave, irrespectively of their name. Transferability of the leave to the father should be a clear indicator regarding its focus on childcare, even if it falls within the timeframe provided by the Pregnancy Directive. Needs related to the biological condition after birth differ, and protection in the context of long-term pregnancy-related illnesses may be more effectively addressed by a consistent application of the prohibition against pregnancy discrimination within the scope of direct sex discrimination. Pregnancy does not always require long post-natal leave and in some cases may even be harmful to the woman's physical or mental health.

Moreover, rules on parental leave need to do more than pay lip service regarding their equal access. While they may encourage fathers to take the leave that is reserved for them, there is clear evidence that the opportunity costs of taking leave primarily relate to pay, not to the availability of the leave itself. Where fathers' income is higher than the mothers', it can be too costly for the household to take up fathers' leave regardless of its availability. The Commission's proposal to guarantee an adequate income during parental leave (Article 8) takes a step in the right direction. However, given the persistence of the gender-pay gap, parental leave pay will have to make a meaningful contribution to the household income to enable fathers to take leave. In the same vein, a non-transferable leave will only encourage fathers to take it where it is adequately remunerated, so that not taking the fathers' leave represents a larger loss of benefit than the cost for the mother to take unpaid leave for an equivalent period. This is particularly important in households with lower combined incomes, or for households where there is a large difference in the earnings of both parents. The proposed flexible part-time parental leave (Article 5) addresses some of the financial concerns (mainly, a similar difficulty linked to low pay during leave) and also has the benefit that it keeps mothers and fathers connected to their employment. However, in view of the author it may not effectively challenge gender roles because it enables fathers to take short-term part-time leave focused on quality time with their children rather than sharing the burden of everyday childcare. While mothers are enabled to take up part-time leave too, persisting gender roles makes it less likely that they will take up such opportunities.

There are two components that deserve further consideration. The usefulness of compulsory (paternity) leaves for fathers in reducing flexibilities that make it unlikely for fathers to take up long-term leave focus on everyday childcare (either because of lack of interest or social pressures) and on the financial support needed to accommodate such leave. Both would 'level up'[80] the fathers' role as parents and the associated leave. Beyond that, there are many other measures that can enable families and mothers to reconcile paid work and unpaid family obligations without creating the same disadvantages than are associated with long-term leave. This includes measures that effectively regulate working time or provide affordable childcare.

80 Fredman, S. (2014), 'Reversing roles: bringing men into the frame' *International Journal of Law in Context* Vol. 10, issue 4, pp. 442-459.



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 July to 31 December 2017.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE-GENERAL OPINIONS

Case C-270/16, *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal*, Opinion of Advocate General Sharpston delivered on 19 October 2017, ECLI:EU:C:2017:788

Disability

The reference for a preliminary ruling was submitted by Social Court No. 1 of Cuenca, Spain, and related to the interpretation of the Employment Equality Directive. The claimant before the referring court had been employed as a cleaner between 1993 and 2015, when he was dismissed by his employer following several periods of sickness absences. Prior to his dismissal, in 2014, the claimant had been recognised by the competent authority as having a disability but had failed to inform his employer of this fact. According to the Spanish Public Health Medical Services, the sicknesses due to which the claimant had been absent from work prior to his dismissal had been caused by his disability. Despite the fact that his employer was not aware of his disability, the claimant alleged that his dismissal amounted to discrimination on grounds of disability and was therefore void.

Both the referring court and the Advocate General highlighted the similarities between the current case and that of *HK Danmark*,[1] as both cases concerned workers with disabilities who had been dismissed on the basis of legal provisions establishing particular rules for dismissal in cases where the worker has been absent from work due to sickness for a certain duration. In this regard, the AG recalled that the Court in *HK Danmark* had observed that a worker with a disability is exposed to an additional risk of illnesses connected with their disability as compared with workers who do not have a disability. As such, provisions that are based on the frequency or length of sickness absence periods may amount to *prima facie* indirect discrimination on grounds of disability.

Having noted that employees or prospective employees with disabilities are under no obligation to disclose their disabilities to their (prospective) employers, the AG further concluded that employers who are 'justifiably in total ignorance' of their employee's disability 'cannot be expected to take steps to provide 'reasonable accommodation'.

To determine whether any prima facie indirect discrimination of the national provision was at hand, the AG noted that the aim pursued by the legislator was to combat absenteeism which, according to the Spanish Government, represents a major cause for concern in that country. Under such circumstances, the AG held that such an aim would be legitimate and went on to note that the referring court would need to examine whether the legislator had taken sufficient account of and adequately balanced the interests of employers on the one hand and those of employees with disabilities on the other when establishing the measure at hand in the present case. As guidance in this regard the AG noted that the measure at hand appears to be less generous for employees than the one examined in the *HK Danmark* case, and that the referring court would need to take all relevant factors into account to determine whether the measure was sufficiently wide as to extend to 'absences that are merely occasional and sporadic', in which case the AG argued that it will clearly not be proportionate, or whether it is appropriate to fulfil the aim of combating absenteeism. The AG then stressed that she did not express any 'concluded view' on this matter.

1 CJEU, Cases C-335/11 and C-337/11, EU:C:2013:222, judgment of 11 April 2013. See also Waddington, L., *HK Danmark (Ring and Skouboe Werge): Interpreting EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities*, in European Anti-Discrimination Law Review, Issue 17 (2013), pp. 13-23.

REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

Case C 190/16, *Werner Fries v Lufthansa CityLine GmbH*, judgment delivered on 5 July 2017, ECLI:EU:C:2017:513

Age

The request for a preliminary ruling to the Court of Justice concerned the validity of provision FCL.065(b) in Annex I to Regulation No. 1178/2011 according to which the holder of a pilot licence who has attained the age of 65 years shall not act as a pilot of an aircraft engaged in commercial air transport. The case before the referring court regarded the payment of the remuneration allegedly owed to the claimant, a pilot of an aircraft, related to the months of November and December 2013. During the month of October 2013, the claimant attained the age of 65 and the airplane company decided to not employ him any longer, on the basis of the fact that he was no longer entitled to work as a pilot of an aircraft engaged in commercial air transport from that date.

The referring court asked whether such regulation was in compliance with the Charter of Fundamental Rights of the European Union ('the Charter') and, specifically, with the prohibition of discrimination on grounds of age under Article 21(1) of the Charter. The Court of Justice was also called to clarify whether the measure at issue must be interpreted as prohibiting the claimant from acting as a pilot in ferry flights, operated by an air carrier carrying no passengers, cargo or mail, and working as an instructor and/or examiner on board an aircraft, without being part of the flight crew.

The Court found that provision FCL.065(b) established a difference in treatment based on age. However, it noted that Article 52(1) of the Charter allows limitations on the exercise of the rights and freedoms recognised by the Charter in case they are provided by law and respect the essence of those rights and freedoms. The Court underlined that, subject to the principle of proportionality, limitations may be introduced only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. The Court held that the objective of guaranteeing air traffic safety constitutes a legitimate objective of general interest.

The Court then assessed whether the prohibition imposed by EU law is appropriate for attaining the objective pursued and does not go beyond what is necessary to achieve that objective. According to the Court, the EU legislature took into consideration the differences between that type of transport and non-commercial air transport, the technical complexity of aircraft used in commercial air transport and the higher number of persons concerned, with such differences justifying different rules being imposed to ensure air traffic safety for the two types of transport. Consequently, the imposition of an age limit in the sole context of commercial air transport was regarded as an appropriate means of maintaining an adequate level of civil aviation safety in Europe.

Furthermore, as regards the issue of whether such a measure goes beyond what is necessary for achieving its objective, the Court found that it does not appear unreasonable for the EU legislature to fix an age limit for acting as a pilot in the commercial air transport sector, in order to maintain an adequate level of civil aviation safety in Europe. In that respect, EU rules defining the requirements applicable to civil aviation aircrew aim to minimise the risk of failures due to human error and ensure that only those persons having the necessary physical capabilities are authorised to pilot aircraft.

To conclude, the EU legislature is not required to provide for an individual examination of the physical and mental capacity of every holder of a pilot's licence over the age of 65, rather than for an age limit. In these circumstances, it must be held that prohibiting holders of a pilot's licence who have attained the age of 65 from acting as pilots of aircraft engaged in commercial air transport is compatible with Article 21(1) of the Charter. However, in relation to activities associated with the training and examination of pilots, the Court noted that the holder of a pilot's licence acting as an instructor and/or examiner does not pilot the aircraft. It must therefore be held that neither ferry flights nor activities associated with the

training and examination of pilots fall within the scope of the measure referred to in point FCL.065(b) in Annex I to Regulation No 1178/2011.

Gender

Age

Case C-354/16, *Ute Kleinsteuber v Mars GmbH*, judgment delivered on 13 July 2017, ECLI:EU:C:2017:539

The Arbeitsgericht Verden (Labour Court, Verden) in Germany submitted a request for a preliminary ruling concerning the calculation of an occupational pension accrued by a part-time worker who left the undertaking before reaching his pensionable age. The referring court wanted to know whether the national provisions applied in the main proceedings resulted in discrimination against part-time employees within the meaning of the Framework Agreement on part-time work annexed to Council Directive 907/81/EC, and discrimination based on age within the meaning of Council Directive 2000/78/EC.

The claimant in this case, Mrs Kleinstueber, had worked in various positions both full time and part time for Mars GmbH ('Mars') between 1 October 1990 and 31 May 2014. At the age of 55, Mrs. Kleinstueber expressed her wish to claim her right to an occupational pension. In the pension plan applied by Mars, the amount of an occupational pension was calculated by firstly determining the amount that would correspond to a salary based on full-time employment, which was then reduced by the actual average rate of activity during the whole employment period. A so-called 'split pension' formula was then applied to determine the final amount of the occupational pension. This meant that a distinction was made between the income earned falling below the ceiling for calculating contributions to the statutory pension scheme, and income exceeding that ceiling. The ceiling for calculating contributions, in German social security law, was the amount up to which the salary of a person benefiting from statutory cover was used for social insurance. Furthermore, Mars' pension scheme laid down a ceiling of 35 years for the years of service which could be taken into account. Mrs. Kleinsteuber challenged before the Labour Court Verden Mars' calculation of the amount of her occupational pension, and considered that she was entitled to a higher pension.

The referring court, Labour Court Verden, firstly asked whether Clauses 4.1 and 4.2 of the Framework Agreement and Article 4 of Directive 2006/54/EC in conjunction with Directive 2000/78/EC are to be interpreted as precluding national statutory provisions or practices which apply the so-called 'split formula' and apply a uniform rate of activity for part-time workers in their calculation of a statutory pension. In addressing this question, the Court of Justice firstly looked at the split formula and held that it was applied to both full-time and part-time workers and was in line with the pro rata temporis principle. The Court held that the objective of Mars's pension scheme was to complement the statutory pension scheme in order to establish a continuation of the standard of living once the pensionable age was reached. The aim of the split formula applied, which is to take into account the different cover needs for remuneration bands below and above the ceiling for the calculation of contributions which was not taken into consideration by the statutory pension scheme, could be considered legitimate and concerned the public interest. Moreover, the Court held that the alternative calculation formula which was suggested by the claimant, namely to calculate the split formula based on the full-time income first and then apply the part-time rate to determine the amount of the occupational pension, would actually result in an overestimation of activity. The Court concluded in regard to this question that it could not be held that the legislation at issue in the main proceedings amounted to discrimination on the ground of the type of work, or to an infringement of the principle of equal opportunities and equal treatment of men and women within the meaning of Directive 2006/54.

The Court held that applying a uniform rate of activity for workers who had been employed both part time and full time was not precluded as long as it did not violate the pro rata temporis principle. It was up to the national court to determine whether this was the case or not.

Finally, the Labour Court Verden asked whether the principle of non-discrimination on grounds of age, enshrined in Article 21 of the Charter of Fundamental Rights of the European Union and given specific expression by Articles 1, 2 and 6(1) of Council Directive 2000/78/EC, was violated by national statutory provisions or practices which applied a maximum limit of reckonable years of service on the basis of which a statutory pension was calculated. The Court held that a side effect of this provision was that employees who gained their years of service at a younger age enjoy a smaller occupational pension than those who completed these years at an older age, despite the total amount of years of service being the same. However, the Court ruled that the objective of the measure could be considered as one of public interest, since it aimed to establish a balance between the interests at issue falling within employment policy and social protection in order to guarantee an occupational pension. In light of this objective, the legislation could be considered appropriate and necessary and was therefore not precluded by Articles 1, 2 and 6 (1) of Council Directive 2000/78/EC.

Case C-143/16, *Abercrombie & Fitch Italia Srl v Antonino Bordonaro*, judgment delivered on 19 July 2017, ECLI:EU:C:2017:566

The reference for a preliminary ruling was submitted by the Supreme Court of Cassation in Italy and concerned the interpretation of the Employment Equality Directive with regard to the prohibition of discrimination on grounds of age. The claimant before the referring court was employed on the basis of an 'on-call' employment contract foreseen for an indefinite duration and generally worked between three and five times per week. When the claimant reached the age of 25, he was informed by the employer that his contract had ended as the age requirement provided by the law regulating on-call employment contracts was no longer fulfilled. Indeed, the relevant national provision limits this type of employment to persons aged below 25 or above 50.[2] The claimant brought an action before the competent courts, claiming that the on-call contract and his dismissal were unlawful due to age discrimination.

The referring court requested guidance from the CJEU regarding the compatibility of the relevant national provision with the principle of non-discrimination on grounds of age as referred in the Directive on the one hand and Article 21(1) of the Charter of Fundamental Rights on the other.

Having established that the claimant may be classified as a 'worker' within the meaning of Article 45 TFEU and that his situation can be found to be objectively comparable to that of workers in other age categories, the Court concluded that the relevant national provision created a difference of treatment on the ground of age. It then went on to examine whether such a difference of treatment can be justified under Article 6(1) of the Directive. In this regard, the Italian Government contended that the general aim of measures such as that at hand was to ensure flexibility on the labour market and thereby to increase employment levels, while the specific aim of the measure at hand was to give young people an initial opportunity to enter the labour market. Recalling its existing case law with regard to what constitutes a legitimate aim of social or employment policy for the purposes of justifying a difference of treatment on grounds of age, the Court concluded that the relevant national provision must be held to pursue a legitimate aim. Finally, the Court held that it must be considered, 'in the light of the broad discretion enjoyed by the Member States' when determining the legitimate aims of their social and employment policies and when adopting measures capable of pursuing those aims, that the national provision at hand was appropriate and necessary to achieve the aim of introducing young persons into the labour market.

2 Despite amendments to the relevant national provisions during the validity of the claimant's employment contract, the general age limit of 25 was maintained.

Gender

Case C-409/16 *Ypourgos Esoterikon and Ypourgos Ethnikis paideias kai Thriskevmaton v Maria-Eleni Kalliri*, judgment delivered on 18 October 2017, ECLI:EU:C:2017:767

This case concerns the request for a preliminary ruling on the compatibility of height requirements for admission to a police academy with Directive 76/207/EEC. The applicant in the main proceedings, Ms Kalliri, had applied as part of a selection procedure for enrolment in a Greek police school. The local police station had refused her entry on the ground that she was 1.68m in height, which meant that she fell two centimetres short of the minimum height of 1.70m as required by Presidential Decree 4/1995, amended by Presidential Decree 90/2003. Ms Kalliri had disputed her rejection before the Administrative Court of Appeal in Athens, which had upheld her claim, finding that the Presidential Decree was contrary to the principle of equality. The Interior Minister and the Minister for Education and Religious Affairs appealed that decision before the referring court, the Greek Council of State. The Council of State referred the question whether Directives 76/207 and 2006/54 preclude a law like the Presidential Decree to the Court.

After determining that, based on ratione temporis et materiae, the situation of Ms Kalliri fell within the scope of Directive 76/2006, the Court found that, because the height requirement applies to both women and men, the Greek law does not constitute direct discrimination. However, the referring court found that a much larger number of women than men were affected by the height requirement. Women were therefore placed in a disadvantaged position compared to men, meaning that the law at hand constituted indirect discrimination.

The Court then considered whether the law was objectively justified by a legitimate aim. The Greek Government submitted that the aim of the law was to enable effective police work, and that possession of certain particular physical attributes, such as height, was a necessary and appropriate condition for achieving that aim. Referring to previous rulings, the Court recalled that the concern to ensure the operational capacity and proper functioning of the police services indeed constituted a legitimate objective.

The Court continued by investigating whether the height requirement was appropriate and necessary to achieve this objective. The Court acknowledged that police work may require a particular physical aptitude. However, certain police work, such as traffic control, did not require such an aptitude. Furthermore, it did not appear that such a competence was necessarily connected with being of a certain height and that shorter persons naturally lacked that competence. In addition, until 2003 the Greek law required a minimum height for women of 1.65m, while the Greek armed forces, port police and coast guard required a minimum height of only 1.60m. Lastly, the aim pursued by the law could be achieved by measures that were less disadvantageous to women, such as a preselection allowing their physical ability to be assessed. Therefore, the Court concluded that Directive 76/207 precludes national law like Presidential Decree 4/1995, as amended by Presidential Decree 90/2003.

European Court of Human Rights

Belcacemi and Oussar v Belgium, application No. 37798/13, Judgment of 11 July 2017

Religion or belief

This case concerned legislation prohibiting the wearing of the full veil in public spaces. The applicants were of Muslim religion and personally chose to wear the niqab according to their religious beliefs. They also pointed out that they were fully willing to remove it whenever necessary (identity control, in front of Courts or tribunals, in the post office, etc.). On 1 June 2011, legislation was enacted which prohibits the wearing of clothing which covers one's face in public spaces. The applicants held that this provision violated their rights in breach of Articles 3, 8, 9, 10 and 11 of the ECHR, separately or in conjunction with the non-discrimination provision of Article 14. The Belgian Government considered the limitation to be justified on the basis of public security, equality between men and women and respect for minimum rules of living together in society.

In view of the similarity with previous Court case *S.A.S. v France* of 2014,[3] the Court adopted the same legal reasoning. It held that the prohibition of wearing the full veil in public spaces constitutes a limitation both of the applicants' right to respect for their private and family life (Article 8) and in particular of their freedom of thought, conscience and religion (Article 9). Yet, the Court considered that the restriction was provided by law, pursued the legitimate aim of respect for minimum rules of living together in society and was necessary in a democratic society since it was proportionate to the legitimate aim. The prohibition was therefore not in breach of the Convention.

Alexandru Enache v Romania, application No. 16986/12, Chamber Judgment of 3 October 2017

Gender

This case concerns a Romanian national, Mr. Enache, who had been serving a seven-year prison sentence for embezzlement since 2011. On the basis of Article 453 of the Romanian Criminal Code, he had requested a stay of execution of his sentence because he had a child of a few months old. The article in question permits mothers serving a prison sentence to apply for a stay of execution of sentence until their child reaches the age of one. Mr Enache's request had been denied by the national court on the grounds that the provision in question had to be interpreted restrictively, and applied to mothers only.

Mr. Enache complained before the Court that he had been discriminated against on the ground of sex, relying on Article 14, combined with Article 8 and Article 1 of Protocol No. 12 to the Convention.

The Court determined that the complaint should only be assessed under Article 14 in conjunction with Article 8 of the Convention. When assessing the claim, the Court referred to its case law regarding labour law, where it had been held that the situation of a father of a young child is sufficiently comparable to that of a mother of a young child and in which it has been established that fathers and mothers should enjoy the same rights regarding parental leave and parental-leave allowance. However, this case is fundamentally different from labour law cases because of its criminal nature, and the margin of appreciation enjoyed by States in implementing their criminal-law policies. The Court determined that the aim of a stay of execution is to serve the best interests of a child by providing the appropriate care and attention during its first year, and that this care could be provided both by a mother and a father. Therefore, Mr Enache could claim to be in a position similar to a female prisoner. However, the Court found the aim of the provision, namely to provide for particular personal situations, such as the unique

3 ECtHR, *S.A.S v France*, Application No. 43835/11, Grand Chamber Judgment of 1 July 2014. See also *European equality law review*, Issue 2015/1, pp. 65-66.

bond between mother and child during pregnancy and the first year of the baby's life in the best interest of the child, legitimate within the meaning of Article 14. The Court also found the means employed proportionate, because female prisoners did not automatically receive the stay of execution.

The Court found that the considerations above formed an adequate justification for the difference in treatment suffered by the applicant. The Court held, by five votes to two, that there had been no violation of Article 14 read in conjunction with Article 8 and Article 1 of Protocol No. 12 to the Convention.

Carvalho Pinto v Portugal, application No. 17484/15, Judgment of 25 October 2017

Age

Gender

This case concerned the Administrative Supreme Court's decision to reduce the compensation initially awarded to a 50-year-old woman who suffered from a number of physical impairments – including the incapacity to have sexual relations – following a failed medical operation.

She therefore started a procedure before the Lisbon Administrative Court to claim compensation. The first-instance court established that the surgeon had acted recklessly by not fulfilling his objective duty of care. It found that there was a causal link between the surgeon's conduct and the injury to the applicant's pudendal nerve. As a result, the Lisbon Administrative Court considered that she should be awarded EUR 80,000 in compensation for non-pecuniary damage. In addition, for pecuniary damage, the Court granted EUR 92,000, of which EUR 16,000 was for the services of a maid the applicant had had to hire to help her with household tasks. However, on 9 October 2014, the Supreme Administrative Court upheld the first-instance judgment on the merits but reduced, inter alia, the amount that had been allocated for the services of the maid from EUR 16,000 to EUR 6,000 and the compensation for non-pecuniary damage from EUR 80,000 to EUR 50,000.

The applicant claimed to have been discriminated against on the grounds of sex and age, in breach of Article 14 in conjunction with Article 8 of the Convention. In particular, the applicant complained with regard to the reasons given by the Supreme Administrative Court for reducing the amount awarded to her. The Portuguese Court had disregarded the importance of a sex life for her as a woman by referring to her age (the applicant was aged 50 at the time), arguing that she had reached 'an age when sex is not as important as in younger years, its significance diminishing with age.' Moreover, the national Court considered that she was not likely to have needed a full-time maid, because given the age of the applicant's children, she 'probably only needed to take care of her husband'.

Against this background, the European Court of Human Rights noted that the advancement of gender equality today is a major goal for the Member States of the Council of Europe and very weighty reasons would have to be put forward before difference of treatment based on gender could be regarded as compatible with the Convention. In this regard, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justifications for a difference in treatment on the grounds of sex.

The Court acknowledged that the question at issue was the assumption that sexuality is not as important for a 50-year-old woman and mother of two children as for someone of a younger age. This assumption reflects the traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people. The Court underlined that the applicant's age and sex had been considered as decisive factors in the final decision of the Portuguese Court to lower the compensation, introducing a difference of treatment based on those grounds.

In view of the foregoing considerations, the Court concluded that there had therefore been a violation of Article 14 of the Convention in conjunction with Article 8.

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 July to 31 December 2017.

AT Austria

LEGISLATIVE DEVELOPMENT

Gender

New legislation concerning gender equality on supervisory boards

During the period after the falling apart of the governing coalition and the new elections in October 2017, the process for the adoption of new legislation was more flexible. Usually, the Government drafts legislative proposals accompanied by explanatory notes which are assessed by stakeholders before starting deliberations in Parliament. During the transition period before the elections, parties took the opportunity to draft legislation without this preliminary process. In June 2017 the Social Democrats and Conservatives presented a joint proposal for Equality of Men and Women on Supervisory Boards which was passed with the support of the Green Party in one of the last legislative sessions before the elections and published on 27 July 2017[1]. Due to the more informal legislative process there are no explanatory notes or stakeholder evaluations of the legislation available. This resulted in some ambiguities in the understanding of the new provisions.

From 1 January 2018, appointments and postings to supervisory boards of listed stock companies, and of companies with more than 1000 employees whose boards consist of at least six seats, must consist of a minimum of 30 % of the underrepresented sex. Only 'single gender' companies (defined as companies that have a workforce with less than 20 % employees of one sex) are exempt from the new regulations. The 30 % quota is sanctioned by an 'empty seat' policy meaning that appointment votes and postings that fail to meet the required minimum are void and board members holding such seats are barred from voting. The new regulations take effect on 1 January 2018 and are applicable to all board elections from that date onward. Current seat holders on company boards will not be affected.

Internet sources:
https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2017_I_104/BGBLA_2017_I_104.pdf
http://www.wienerzeitung.at/themen_channel/recht/recht/929531_Das-Gesetz-scheint-das-Verfehlen-der-Quote-zu-akzeptieren.html
https://www.ots.at/presseaussendung/OTS_20180301_OTS0083/ak-frauenmanagementreport-die-loesung-heisst-quote

New provisions in two collective agreements concerning parental-leave periods

Gender

Two important collective agreements have been amended to include parental-leave periods in determining pay increases based on seniority. In Austria 98% of workers work under contracts covered by a collective agreement. Under Austrian labour law, collective agreements must contain pay schemes which stipulate minimum wages according to individual qualification and years of work experience. For employment contracts that fall under a collective agreement, annual wage increases depend on the outcome of social partner negotiations. Many collective agreements contain provisions that guarantee regular payment increases depending on seniority. By law, periods of unpaid parental leave do not have to be considered in full when payment increases based on seniority are considered. This results in a permanent pay disadvantage for women, which considerably contributes to sectoral gender wage gaps.

In October and November 2017, the social partners of collective agreements for the trade and commerce sector and for the metal-working industry amended their pay schemes, which now contain new provisions

1 Law on Equal Treatment of Men and Women on Company Boards (*Gleichstellungsgesetz von Männern und Frauen im Aufsichtsrat, GMFA-G*), BGBl I 104/2017, https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2017_I_104/BGBLA_2017_I_104.pdfsig, accessed 26 March 2018.

requiring employers to recognise parental-leave periods of up to 22 months for all pay increases related to seniority.

Economic evaluations of the persisting gender wage gap show that a considerable proportion of wage inequalities between men and women results from unpaid leave periods that are not taken into account for the calculation of regular pay increases. Social partners have recognised this as an important issue and are taking steps accordingly.

Internet source:
https://www.arbeiterkammer.at/interessenvertretung/familie/Kollektivvertraege_bringen_Vorteile_fuer_Familien.html

CASE LAW

Supreme Court explains rules on calculation of maternity-leave benefits

Gender

On 14 November 2017, the Supreme Court clarified the rules for the calculation of statutory maternity benefits for employees.

According to Art. 11 n° 2 (b) and Art. 8 of Directive 92/85, Member States have to ensure that pregnant workers receive either a continuation of their pay or an entitlement to an adequate allowance during the statutory maternity-leave period. Austria has implemented these obligations of the Directive in Paragraphs 3 and 5 of the Maternity Protection Act (*Mutterschutzgesetz, MSchG*)[2] and in the regulations about statutory health insurance (Paragraphs 120 n° 3 and 162 General Social Security Act [*Allgemeines Sozialversicherungsgesetz, ASVG]*).[3] The calculation rules for the statutory maternity-leave benefit ('*Wochengeld*') ensure that workers receive an average of their net earnings of the last thirteen weeks before the start of the maternity leave.

Paragraph 8 of the Maternity Protection Act stipulates that pregnant workers are precluded from working overtime under any circumstances, even in cases of employment contracts which contain clauses with all-in overtime compensation.[4] Paragraph 14 of the Maternity Protection Act[5] as well as established case law state that employers do not have to compensate pregnant workers for the loss of regularly occurring overtime pay or of all-in overtime compensation. As a result maternity-leave benefits are usually calculated without taking overtime wage elements into account.

In the case at hand, the Supreme Court had to decide whether a claimant, who was no longer able to work overtime from the moment she notified her employer of her pregnancy, was entitled to a maternity-leave benefit including pay for overtime which she had been receiving in the months preceding her pregnancy.[6]

The Supreme Court issued a verdict in favour of the claimant. The judges on the panel stated that Paragraph 8 of the Maternity Protection Act, which precludes overtime work during pregnancy, has to be considered as a subset of the employment prohibitions for pregnant workers. Calculation rules for the statutory maternity benefit have to take into account the effects of these maternity protection rules

2 https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40196032/NOR40196032.pdf, https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40057689/NOR40057689.pdf, accessed 20 February 2018.
3 https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40196105/NOR40196105.pdf, https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40196109/NOR40196109.pdf, accessed 20 February 2018.
4 https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR12099214/NOR12099214.pdf, accessed 20 February 2018.
5 https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40178135/NOR40178135.pdf, accessed 20 February 2018.
6 OGH vom 14.11.2017, 10 ObS 115/17k, https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20171114_OGH0002_010OBS00115_17K0000_000/JJT_20171114_OGH0002_010OBS00115_17K0000_000.pdf, accessed 20 February 2018.

on the employee's wage. The aim of the provisions is to grant a compensation that reflects the average earnings before the pregnancy.

Prior to this verdict, the common administrative practice was to calculate the statutory maternity benefit in accordance with the general rule, which states that the benefit has to equal the average wages during the last thirteen weeks before maternity leave. The statutory health insurance authorities, which are in charge of the administration of maternity benefits, will now have to adapt their determination and calculation rules according to the new case law.

Internet source:
OGH vom 14.11.2017, 10 ObS 115/17k:
https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20171114_OGH0002_010OBS00115_17K0000_000/JJT_20171114_OGH0002_010OBS00115_17K0000_000.pdf

POLICY DEVELOPMENT

Gender

The newly elected Government and gender equality; structural changes and legislative agenda for 2017-2022

In the parliamentary elections of 16 October 2017, the conservative People's Party (Österreichische Volkpartei, ÖVP) emerged as the strongest political party. The chairman, Sebastian Kurz, who had withdrawn from the former coalition with the Social Democratic Party (Sozialdemokratische Partei Österreichs, SPÖ) in May 2017, entered into coalition negotiations with the third populist right-wing Freedom Party (Freiheitliche Partei Östereichs, FPÖ). After extended talks, the two new coalition partners presented their government programme and the new Ministers on Monday 18 December 2017.

Under the new government programme, the Ministry for Health and Women's issues is discontinued and its competences are transferred to the Federal Ministry for Social and Labour Affairs and Consumer Protection.

The Government consists of fourteen Ministers, five of which are women. The new female Federal Ministers are instated for federal administration in the areas of Science, Research and Economy (Margarete Schramböck, ÖVP), Agriculture and Environment (Elisabeth Köstinger, ÖVP), Foreign Affairs, Europe and Integration (Karin Kneissl, independent), Health, Women's Issues, Social and Labour Affairs, and Consumer Protection (Beate Hartinger, FPÖ), Family and Youth Affairs (Juliane Bogner-Strauß, ÖVP). Additionally, a female undersecretary has been appointed to the Federal Ministry of Interior (Karoline Edtstadler, ÖVP).

The new coalition partners also presented their working programme for the coming legislative period. Under the heading 'Fairness and Justice', family and women policies are presented in the same chapter which also covers generational equality, social security in general, and pensions. The analysis shows that family-oriented policies take a much more central and important role than women's issues. Some of the family-oriented policies show a tendency to reinforce the populist messages that contributed to the election success of the populist right, providing a variety of financial benefits for families with children.

The new Government also plans to evaluate Austrian parental-leave legislation with the goal to extend protection against dismissal until the third birthday of the child, the period during which parents are entitled to a 'small children's benefit' (*Kinderbetreuungsgeld*).

The programme strongly emphasises the reconciliation of work and family life, e.g. by promising improvement and extension of childcare institutions and an extension of care facilities during school holidays. Economic evaluations of the persisting gender wage gap consistently show that a large

proportion of wage inequalities between men and women in Austria is mainly caused by the number of women working part time. This also contributes to the large and persisting gender pension gap. One of the main reasons for women to work part time in Austria, is the structure of school holidays. The school holidays require parents, mostly women, to structure their working hours accordingly. It is to be expected that the plans for the extension of admissible working hours and the introduction of additional school holidays will contribute to more women seeking part-time work.

One of the most controversial and most discussed plans of the new Government was the announcement to extend the possibilities for longer working hours (up to 12 hours per day and up to 60 hours per week with shortened break and rest periods). This could have a negative impact on career development opportunities for people with care duties for children, which still mainly fall upon women.

Under the sub-heading 'Women' (p. 105), the first bullet point is 'same wage for work of same value'. In order to achieve this, the Government intends to evaluate collective agreements in coordination with the social partners to find and eliminate indirect discriminations, and especially the consideration of unpaid parental leave for regular advancements in pay schemes. Additionally, the Government intends to re-structure the existing federal requirements for gender-related income reporting.

The new government programme shows little progressive planning concerning gender-related issues. Some of the items in the sub-chapter concerning women's issues seem to have been adopted from former government planning without much evaluation as to the actual situation.

Internet source:
https://www.bundeskanzleramt.gv.at/documents/131008/569203/Regierungsprogramm_2017%e2%80%932022.pdf/b2fe3f65-5a04-47b6-913d-2fe512ff4ce6

Belgium

BE

LEGISLATIVE DEVELOPMENT

Use of gender-neutral actuarial factors in the calculation of pension annuity

Gender

A Royal Decree of 15 March 2017, applicable as of 1 April 2017, amended the R.D. of 15 September 1965, ancillary to the Act of 17 July 1963 concerning the Overseas Social Security Scheme. This optional scheme provides basic coverage for expatriates who are employed outside the European Economic Area. The insurance may be subscribed to by the employer, or by the worker individually. The scheme provides a pension annuity concerning old age, the amount of which was calculated through the application of gender-based actuarial factors (GBAF), as regulated by the R.D. of 15 September 1965.

In compliance with the CJEU's decision in Case C-318/13 *X.*, and in answer to the 2015 letter of the European Commission requesting all Member States to scan their respective statutory social security legislation for any uses of GBAF, the amended R.D. of 15 September 1965 now provides that gender-neutral actuarial factors must be used for the calculation of the pension annuity.

After the statutory Accidents at Work scheme, this is the second amendment of Belgian legislation concerning GBAF.

Internet source:
All relevant legal texts are available in Dutch and French on www.juridat.be

Brussels Parliament adopts ordinance setting up new anti-discrimination tools in the job market

All grounds

On 16 November 2017, the Brussels Parliament adopted a new ordinance (statutory law) allowing labour inspectors of the Brussels Region to use 'discrimination tests' to fight discrimination in employment. The ordinance mentions two kinds of tests: situation testing and mystery calls. Situation testing in accordance with the ordinance is based on the sending of pairs of equivalent CVs with a variable criterion measuring discrimination (ethnic origin, age, disability, gender, etc.). Mystery calls on the other hand allow labour inspectors to use a false identity when calling an employment intermediary to verify whether they comply with discriminatory demands of a potential client. These mystery calls mainly concern publicly subsidised companies that establish contact between individuals looking for domestic help and housekeepers (*entreprises de titres-service*).

Valid discrimination tests must meet several conditions: (1) they cannot amount to provocation and should be in line with fairness of proof standards; (2) they cannot be purely proactive or used randomly but must follow several complaints or reports, for instance to either of the two national equality bodies (UNIA – the Inter-federal Centre for Equal Opportunities and the Institute for Equality of Women and Men) and must be based on serious indications of practices likely to be qualified as direct or indirect discrimination within a particular place or a sector of activity.

The ordinance aims at reducing inequalities of participation in the labour market which were strongly confirmed by the socio-economic monitoring carried out in 2015 by UNIA and the FPS Employment, Labour and Social Dialogue. A similar text is in preparation at the federal level, which has wider competence in the employment field than the Regions (Brussels, Flanders and Wallonia).

Internet source:
http://www.ejustice.just.fgov.be/eli/ordonnance/2017/11/16/2017014113/moniteur

CASE LAW

Age discrimination before the Belgian Council of State

Age

Proceedings for annulment were initiated against a refusal to appoint a candidate for a position at the Brussels Regional Agency for Public Cleanliness because of his age. A regulation provides that 35 is the maximum age to apply for this position. This condition does not apply to workers hired by the Regional Agency for Cleanliness before they were 35. The claimant, who is older, asserted that fixing the maximum age of 35 for candidates applying for a position of worker for public cleanliness cannot constitute a genuine occupational requirement and, therefore, constitutes direct discrimination based on age, prohibited by the Federal Act of 10 May 2007 pertaining to the fight against certain forms of discrimination that transposes Directive 2000/78.

According to the Council of State, this condition is necessary to guarantee that the position can be fulfilled for a certain amount of time by newly appointed workers. Indeed, the Council considered that, since the position requires excellent physical condition, it is no longer possible for people of a certain age to fulfil the essential requirements of the work at stake. The Council of State also underlined that, in this matter, its control is only a marginal one (standard of abuse of authority) and that it is for the claimant to prove that the requirement is not essential for the position. The application for annulment was rejected.[7]

Internet source:
http://www.raadvst-consetat.be/?lang=fr

7 Belgium, Ruling of the Council of State No. 239.217 issued on 26 September 2017.

Entitlement to integration allowances and maternity protection

Gender

Under the Royal Decree of 25 November 1991 concerning the Unemployment Insurance Scheme, young persons under 25 (with possible postponement) who completed their education are entitled to 'integration allowances' after a 310-day waiting period. During this waiting period, they are expected to actively seek employment. Their willingness to seek employment is assessed by the Employment Agency, and is a condition to entitlement. However, in case of pregnancy, a woman is excused from assessment during the compulsory part of maternity leave (i.e. 10 weeks) as provided by the Working Conditions Act of 16 March 1971.

A woman was assessed negatively because during a brief period of 2 months following the end of her maternity leave, she had not taken any steps to seek employment. She challenged the Employment Agency's decision concerning the negative assessment because she claimed to have suffered from a postpartum depression as a consequence of giving birth prematurely.

On 9 August 2017, the Labour Court of Appeal in Brussels[8] held that under Article 37 (5) of the R.D. of 25 November 1991, personal circumstances must be taken into account in the assessment. The Court referred to the CJEU's decision in Case 184/83 *Hofmann* [1984-3047] on the importance of letting mother and child develop their relationship during the first months of the latter's life. The Court also stated that, given that such circumstances cannot affect a man, Article 37 (5) had to be applied in compliance with the prohibition of direct gender discrimination imposed by Directive 79/7/EEC. Consequently, the Labour Court of Appeal cancelled the Employment Agency's decision.

In 2004, an opinion[9] of the Council of Equal Opportunities for Men and Women, a consultative body with the federal Government, prompted the adoption of an amendment to the R.D. of 25 November 1991 so that maternity leave ceased to lengthen the 310-day waiting period. However circumstantial, the Labour Court of Appeal's judgment goes one step further toward the reconciliation of job seeking and protection of maternity.

Internet source:
Case unreported. Opinions of the Council of Equal Opportunities for Men and Women, available in French and Dutch at www.conseildelegalite.be or http://www.raadvandegelijkekansen.be

Ruling of the Belgian Supreme Court in the *Achbita* case

Religion or belief

On 9 October 2017, the Belgian Supreme Court rendered its judgment in the *Achbita* case, following the preliminary ruling issued by the Court of Justice on 14 March 2017. The claimant worked as a permanent contract receptionist at G4S Security Services and, three years after her being hired, decided to wear the Islamic headscarf during working hours. Although she had not been under any duty to wear a specific uniform until then, she was informed that the headscarf would not be tolerated because it was contrary to the neutrality policy of the company. At the same time, the work regulations of the company were amended in order to forbid workers from wearing any visible symbols expressing political, philosophical or religious beliefs. Having refused to remove her headscarf at the premises of the company, the employee was dismissed. In 2011, the Labour Court of Antwerp considered that the employer could prohibit the wearing of any religious signs by all employees in order to preserve the neutral image of the company. The applicant brought the case before the Court of Cassation which submitted a preliminary ruling to the Court of Justice.[10] The CJEU held that a general ban of wearing religious symbols did not amount to direct discrimination since it was applicable to all employees regardless of their religion. It nevertheless

8 *Rôle général* n°2016/AB/191, unreported.
9 Opinion n°71 of 10 April 2003 concerning the impact of maternity leave on the waiting period in Unemployment Scheme Regulations.
10 Belgium, Court of Cassation, decision of 9 March 2015, S.12.0062.N, available at: www.UNIA.be/en.

stressed that it could constitute indirect discrimination if it were demonstrated that a particular religion was more strongly disadvantaged by this measure. Such a measure may be lawful however, if it pursues a legitimate aim and if it is proportionate. The CJEU underlined that a general ban of the wearing of religious symbols could be justified by the aim of a company to maintain its neutrality as it relates to its freedom to conduct a business as protected by Article 16 of the Charter. Moreover, the CJEU considered that it could be proportionate if it only applied to employees in contact with clients and provided that the employer tried to offer the employee another position, where she/he would not be in contact with clients.

Following the preliminary ruling, the Court of Cassation rendered its judgment on 9 October 2017.[11] It overturned the decision of the Labour Court of Antwerp and dismissed the claim arguing the existence of direct discrimination. Nevertheless, the Court accepted the second argument according to which there could be an abuse of the right to dismiss (and indirect discrimination) even in the absence of a fault and even if the wrongful conduct has been committed unknowingly. On the basis of CJEU case law, it thus quashed the decision of the Labour Court to the extent that it had considered that the employer could not be held liable for the breach of the anti-discrimination rules since s/he could not reasonably foresee that the dismissal was unlawful because of the uncertainty of the case law on this issue and because the employee had not provided sufficient evidence of the existence of a fault in his chief. To conclude, the Court overturned the judgment of the Labour Court except with regard to the consideration that there had been no direct discrimination in the case at hand. The case has been referred to the Labour Court of Ghent.

Court decision on sexual harassment in public spaces

Gender

In June 2016, a car driver was stopped by two police officers after jumping a traffic light. During the ensuing conversation, the driver disrespected and threatened the officers, advising the female officer to look for a job better suited to a woman, and finally insulting her based on her sex.

In its judgment of 8 November 2017, the Criminal Court in Brussels sentenced the offender to a fine of EUR 3,000, i.e. half the maximum amount provided by the Act of 22 May 2014.

Under the Act of 22 May 2014, 'sexism' in a public space is a penal offence, defined as follows: in public or in the presence of several persons or in a public writing, 'any gesture or behaviour which is obviously aimed at expressing contempt of a person in consideration of her or his sex, or regarding that person, for the same motive, as inferior or reduced to her or his sexual dimension, and which grievously affects that person's dignity'. The reported case represents the first-known case of application of this provision.

Just before Women's Rights Day of 8 March 2018, the judgment belatedly raised much interest in the media. However, the facts of the case appear outrageous as the offender could not have chosen his victim more injudiciously. Even in the present context of '#Me Too' revelations, criticisms against the effectiveness of the Act of 22 May 2014 remain unabated, concerning both the difficulty of proof and the willingness of public prosecutors to initiate proceedings, two obstacles which were conspicuously absent from the reported case.

Internet source:
http://igvm-iefh.belgium.be/fr/actualite/premiere_condamnation_pour_sexisme_dans_lespace_public

11 Judgment of the Court of cassation of 9 October 2017. The full text of the decision is available in Dutch at the following address: https://www.unia.be/fr/articles/laffaire-achbita-devra-etre-rejugee.

POLICY DEVELOPMENT

Expert Commission for the assessment of the Anti-Discrimination Acts delivers its first report to the Federal Parliament

All grounds

The Expert Commission for the assessment of the 2007 Anti-discrimination Federal Acts delivered its first annual report to the Federal Secretary of State in charge of Equal Opportunities and to the Federal Parliament in February 2017.[12] This commission was set up in 2016 and is composed of twelve members: two representatives of the judiciary, two lawyers, four members proposed by the National Labour Council and four members proposed by the Ministry for Equal Opportunities. Its president is Françoise Tulkens, the former vice-president of the European Court of Human Rights and the vice-president is Marc Bossuyt, the former president of the Belgian Constitutional Court. The Commission carried out its work during the second part of 2016 and heard 10 experts in the field of non-discrimination, including the directors of the two national equality bodies and the Belgian experts of the European network of legal experts in gender equality and non-discrimination.

The high-quality report was submitted to the Federal Parliament and includes, among others, the following recommendations:

- take into account multiple discrimination in the legal framework and provide for appropriate sanctions;
- expressly mention discrimination by association in statutory law;
- adopt regulation to better define situations of genuine and determining occupational requirement;
- put in place a unique portal (one-stop shop) for victims of discrimination;
- give labour inspectors the competence to carry out situation-testing, including 'mystery calls';[13]
- provide more training in anti-discrimination law to the judiciary, the police, and the labour inspectorate, as well as some training to employers;
- reinforce the protection against victimisation;
- develop positive action measures by adopting regulation;
- transpose Article 15 of Directive 2006/54/EC as to the rights of an employee after maternity leave.

Internet source:
http://unia.be/files/Documenten/Aanbevelingen-advies/Commission_dévaluation_de_la_législation_fédérale_relative_à_la_lutte_contre_les_discriminations.pdf

Bulgaria

BG

CASE LAW

Supreme Court ruling after referral to the Court of Justice of the EU in disability case

Disability

In July 2015, the Supreme Administrative Court (SAC) referred to the Court of Justice of the EU (CJEU) a set of questions concerning advance protection on disability grounds against dismissal of civil servants. The claimant in this case has a mental disability and was a civil servant at a government agency (the Agency) until February 2014 when she was made redundant. She appealed against the redundancy order, claiming that under the Labour Code, Article 333 (1.3), the Agency had a duty to ask the Labour Inspectorate for prior permission to make her redundant because she was a person with disability. The

12 The full report is available (in French) at the following address: https://www.unia.be/files/Documenten/Aanbevelingen-advies/Commission_dévaluation_de_la_législation_fédérale_relative_à_la_lutte_contre_les_discriminations.pdf.
13 For further information, see above, p. 64.

Sofia City Administrative Court (SCAC) held that such advance protection under the Labour Code did not apply to her as she was a civil servant. The Civil Servant Act which applied to the claimant does not provide for similar protection, nor does it refer to the Labour Code in this respect. The redundancy order was confirmed, and the claimant brought an appeal before the SAC.

Considering that civil servants and employees with the same disability were thus treated differently under the legislation in terms of advance protection against dismissal, SAC asked the CJEU 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 such a difference.[14]

On 9 March 2017, the CJEU ruled in this case (Case C406/15), finding that 'the distinction made by such legislation between employees with a particular disability and civil servants with the same disability does not appear to be sufficient in the light of the aim pursued by that legislation, all the more so since both those categories of people with disabilities may be employed by the same administration.' CJEU held that the national court was to establish whether this amounted to an infringement of the principle of equal treatment, taking into account all the relevant rules of national law. In case it did, the court was to re-establish equal treatment which involved granting civil servants with disabilities the same benefits as those enjoyed by employees with disabilities, favoured by this system.

On 15 May 2017, the SAC ruled that national case law preventing civil servants from benefiting from advance disability protection under the Labour Code was to be set aside, and repealed the redundancy order.[15] The SAC found that there was no legitimate reason not to apply the same advance labour protection to persons with the same disability and who have the same responsibilities and qualifications. The court took into account the fact that the claimant's position involved no exercise of public power. Its case has been remanded to the lower court which is expected to rule on the claim for compensation.

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

HR

Croatia

LEGISLATIVE DEVELOPMENT

Amendments to the Act on Maternity and Parental Benefits

Gender

The Act on Amendments to the Act on Maternity and Parental Benefits (Official Gazette *Narodne novine* No. 59/17) entered into force on 1 July 2017.

The main objective of the amendments was to increase the maximum amount of salary compensation during parental leave for employed and self-employed parents from 80 % to 120 % of the budget calculation base. The budget calculation base is a basic budget on which various benefits and forms of assistance are calculated. The amount of this budget is set each year by the Act regulating implementation of the state budget. In 2018, the budget calculation base was HRK 3 326.00 (EUR 448). For parents receiving income from other sources than employment or self-employment, the maximum amount of compensation received during parental exemption from work was increased from 50 % to 70 % of the

14 Bulgaria, Supreme Administrative Court, decision No. 8771 of 16 July 2015 in administrative case No. 12369/2014, *Petya Milkova v the Privatisation and Post-Privatisation Agency.*
15 Bulgaria, Supreme Administrative Court, decision No. 6014 of 15 May 2017 in case No. 1236/2014.

budget calculation base per month. Other compensations pursuant to the Act on Maternity and Parental Benefits, such as compensation during part-time leave for taking care of a child in need of increased care, or during part-time leave instead of parental leave, or during leave for taking care of a child with severe developmental disabilities, etc. were also adapted (average increase of the calculation base of 20 %).

Internet source:
Zakon o izmjenama i dopuni Zakona o rodiljnim i roditeljskim potporama (Official Gazette *Narodne novine* 59/17):
https://narodne-novine.nn.hr/clanci/sluzbeni/2017_06_59_1295.html

New Act on the Protection against Domestic Violence

Gender

The new Act on the Protection against Domestic Violence was adopted in the Croatian Parliament on 4 July 2017 and entered into force on 1 January 2018 (Official Gazette *Narodne novine* no 70/17). It replaces the previous Act on the Protection against Domestic Violence (Official Gazette *Narodne novine* nos. 137/09, 14/10 and 60/10).

The new Act was adopted to bring the regulatory framework on domestic violence in line with the Criminal Code, which entered into force in 2013 (Official Gazette *Narodne novine* nos. 125/11, 144/12, 56/15, 61/15 and 101/17), especially concerning the categorisation of domestic violence offences. The Act implements Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, as well as some of the rights and standards guaranteed under the Istanbul Convention, whose ratification is still pending.

The Act prescribes rights of victims of domestic violence, defines protected persons and forms of domestic violence, sets sanctions for misdemeanours, procedures for data gathering and sets out the rules for the operation of a special committee for follow-up and improvement of the work of bodies involved in criminal or misdemeanour prosecution of domestic violence offences. Special protection is guaranteed for persons with disabilities and the elderly.

Internet source:
Zakon o zaštiti od nasilja u obitelji (Official Gazette *Narodne novine* no. 70/17):
https://narodne-novine.nn.hr/clanci/sluzbeni/2017_07_70_1660.html

POLICY DEVELOPMENT

National Strategy for the Protection against Domestic Violence in the period 2017-2022

Gender

On 22 September 2017, the Croatian Government adopted the National strategy for the protection against domestic violence in the period 2017-2022, which is celebrated as the National Day of combating violence against women.

This is the fourth national strategy for the protection against domestic violence. It includes 33 measures and 7 fields of action: prevention of domestic violence, regulatory framework in the field of domestic violence, support for the victims of domestic violence, psychosocial treatment of offenders, intersectional cooperation, education of experts in the field of domestic violence and raising public awareness on domestic violence. The bodies in charge of implementing key actions are state administrative bodies, units of local and regional self-government and civil society organisations. Each measure is based on a specific article of the Istanbul Convention (whose ratification was expected before the end of 2017, but is still pending).

Internet source:
National Strategy for the Protection against Domestic Violence in the period 2017-2022:
http://www.mspm.hr/UserDocsImages//Vijesti2017//Nacionalna%20strategija%20zastite%20od%20nasilja%20u%20obitelji%20za%20razdoblje%20do%202017.%20do%202022.%20godine.pdf

CY Cyprus

LEGISLATIVE DEVELOPMENT

New Law enacted for paternity leave

Gender

On 1 August 2017, the Protection of Paternity Law No. 117(I)/2017 entered into force.

Article 3(1) of the Law provides that an employee, whose wife has given birth or had a child through surrogacy, or adopted a child up to the age of twelve, has a right to paternity leave for two consecutive weeks. The paternity leave must be taken within the first sixteen weeks after the birth or adoption of the child.

During the paternity leave the employee receives paternity allowance under Social Insurance Law No. 59(I)/2010. The allowance is calculated on the basic insurable earnings (for 2018 this is fixed at EUR 174.38 per week).

Article 5(1) of Law No. 117(I)/2017 explicitly forbids an employer to terminate the employment of an employee or to give notice of termination of his employment from the date that the employee notifies the employer in writing of his intention to exercise his right to paternity leave until the end of the paternity leave. Furthermore the paternity leave must not adversely affect the employee's seniority or his right to promotion or return to the same or a similar job with the same salary and benefits as before taking the leave (Article 6 of Law No. 117(I)/2017).

An employer who violates his obligations under the above-mentioned Articles 3, 5 and 6 of the Law is guilty of an offence and in case of conviction is subject to a penalty of up to EUR 7.000.

Internet source:
http://www.cylaw.org/nomoi/arith/2017_1_117.pdf

CASE LAW

Ombudsman report on the policy of excluding non-Cypriot dependents of Cypriots from welfare entitlement

Racial or ethnic origin

Three different complaints were submitted to the Ombudsman in 2014 regarding the refusals of the Social Welfare Services (SWS) to include foreign spouses as 'dependents' of Cypriot nationals in the family's public benefit entitlement. The SWS relied on Article 3 of the Public Benefits and Services Law which restricts entitlement to public benefit to those Union nationals who have worked as employees or as self-employed persons or who initially acquired the right to residence due to sufficient means, and to third-country nationals who were either granted international protection, were identified as victims of trafficking, or who had a long-term residence visa.

The report of the Ombudsman found that the SWS's interpretation of the relevant provision was unlawful and stated that the SWS must revise its policy to bring it in line with the law.[16] With regard to the three claimants, their applications for eligibility must be accepted and the amounts due must be paid accordingly. However, the report did not examine the complaint from the perspective of discrimination and the report makes no mention of the principles governing the equality acquis.

Internet source:
http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/D75227C6B87C3C35C2258167003A48DE/$file/771.2014_04072017.doc?OpenElement

Child Commissioner report regarding the 'prior residence' requirement in welfare legislation

Racial or ethnic origin

The Commissioner for the rights of the Child delivered a report in response to a number of complaints regarding the rejection of welfare applications submitted by families with young children on the ground that they did not fulfil a requirement of prior residence of a certain duration in the Republic-controlled south of Cyprus. The complaints were directed against three different welfare schemes: the minimum guaranteed income and the single-parent benefit, which both require five years of residence, and the child benefit which currently requires three years of prior residence to be extended to five years as of 2018.

The Commissioner had previously raised concerns about the compatibility of the prior residence requirement with the Racial Equality Directive and other human rights instruments, notably in the context of the discussion leading to the amendment of the child benefit law.[17]

The investigation examined six complaints regarding families living in extreme poverty, who were excluded from welfare because of the prior residence requirement. These included a family of Cypriot Roma who had, in the previous years, been moving back and forth between the (Turkish-controlled) north and the (Greek-Cypriot controlled) south of Cyprus in order to access healthcare in the north where they spoke the language. As a result of not being eligible for welfare support, the Roma family finally settled in the north and their two older children who had been regularly attending school in the south, stopped attending school. As regards this family, the authorities relied on 'credible information' from unnamed sources stating that the family had only lived in the Republic-controlled areas for one year before applying for welfare, and that they were forced to re-settle in the north of Cyprus as a result of being excluded from the welfare system.

The Commissioner concluded that the prior residence requirement is an apparently neutral provision leading to discrimination against vulnerable children on the ground of their nationality or racial/ethnic origin, in violation of the Racial Equality Directive. The report cites additional legal instruments prohibiting discrimination including Article 2 of the UN Convention on the Rights of the Child, as well as a number of other provisions of the Convention. Relying on the position of the UN, the report noted that at times of economic crisis, social expenditure benefiting children must be protected and their interests must be seen as primary rather than subordinate to state finances or 'public interest'.[18]

16 Report of the Commissioner for Administration and Human Rights on the actions of the Social Welfare Services regarding the non-inclusion of foreign spouses of Cypriot citizens as dependent persons for the purposes of public benefit entitlement. Ref. A/P 771/2014, A/P 2419/2014, A/P 1954/2016, 4 July 2017.

17 Memorandum of the Commissioner for the rights of the Child to the Parliamentary Committee on Labour, Welfare and Social Insurance, 20 June 2017, available at www.childcom.org.cy/ccr/ccr.nsf/All/2776829A1B31B66EC2258145003E2FA3/$file/%CE%A5%CF%80%CF%8C%CE%BC%CE%BD%CE%B7%CE%BC%CE%B1%20%CE%95%CE%A0%CE%94%CE%A0%20%CE%95%CF%80%CE%AF%CE%B4%CE%BF%CE%BC%CE%B1%20%CE%A4%CE%AD%CE%BA%CE%BD%CE%BF%CF%85%20%CE%9A%CE%BF%CE%B9%CE%BD.%CE%95%CF%80%CE%B9%CF%84%CF%81%CE%BF%CF%80%CE%AE%20%CE%95%CF%81%CE%B3%CE%B1%CF%83%CE%AF%CE%B1%CF%82%2020.6.2017.docx.

18 United Nations, Report of the Ad Hoc Committee of the Whole of the twenty-seventh special session of the General Assembly, 2002, A/S-27/19/Rev.1, para. 52.

The report referred to the ECtHR's ruling in *Niedzwiecki v Germany*, where the court found that eligibility requirements involving long prior residence for the granting of child benefits to Union citizens amount to discrimination prohibited by ECHR Articles 8 and 14. The report further found that the EU Charter must be seen as applicable in this case since it concerns social assistance to Union citizens and third-country nationals whose legal status is regulated by the EU acquis.

Internet source:
http://www.childcom.org.cy/ccr/ccr.nsf/DMLindex_gr/DMLindex_gr?OpenDocument

Ruling of the Supreme Court on compatibility with the Constitution of the amendment to the law concerning women on company boards

Gender

On 5 July 2017 the Supreme Court delivered a judgment on the legality of the amendment to the law on women on company boards. The President of the Republic with application No. 2/2016 had asked for the Supreme Court's adjudication on whether the addition of Article 3.1 to the basic law No. 149/ 1988 on the appointment of Boards of Directors, which states that 'the Board of Directors of any of the certain legal persons governed by public law is composed by members of which at least one third belongs to either sex', is inconsistent and contrary to Articles 28 and 35 of the Constitution of the Republic and contrary to the Principle of Discrimination on the separation of powers.

The President of the Republic argued that the amended Law institutionalises the introduction of positive discrimination in favour of the underrepresented sex, which is inconsistent with Article 28 of the Constitution in spite of Article 23 of the Charter of Fundamental Rights of the European Union, and Article 157(4) of the Treaty of the European Union.

However, the House of Representatives argued that the provision does not violate the principle of equality as safeguarded by Article 28 of the Constitution since it does not create discrimination between similar persons, and it therefore constitutes reasonable discrimination and is not arbitrary which not only serves public interest, but it is also compatible with the principle of proportionality.

On 5 July 2017, the Supreme Court decided that case law clearly shows that provisions as introduced by this Law violate the principle of equality as enshrined in Article 28 of the Constitution and binds all according to Article 35 of the Constitution (Kittis and Others v Republic (2006) 3 JSC 734; Republic v Constantinou [2002] 3 JSC 534. In this case, favourable treatment of persons provided by the law discriminates against a larger group (the candidates belonging to the other sex), and violates Article 28 of the Constitution. Article 28 of the Constitution provides for substantial equality between two sexes, and does not allow positive measures.

It is noteworthy that the Supreme Court stated that both Article 157 (4) of the Treaty of the European Union and Article 23 of the Charter of Fundamental Rights are not applicable in this case since they do not provide any measures which aim to provide special advantages for the less-represented sex.

Internet source:
http://www.cylaw.org/apofaseis/aad/

Supreme Court ruling on age discrimination in retirement

Age

The claimant had worked as a public servant from 1966 until 2007 when he retired at the age of 61. He received a retirement lump sum calculated on the basis of a formula which resulted in a higher lump sum for those retiring at the age of 63 or above. The claimant applied to the court claiming that the relevant legislative provision was unconstitutional and contrary to Directive 2000/78 because it caused discrimination on the ground of age. The first-instance court rejected his claim stating that the

scope of Directive 2000/78 did not extend to social insurance or social provision systems and did not apply to national provisions determining the age of retirement; and that in order to satisfy his claim the court would have to 'add' a new text in the law which it was not entitled to do, as that would infringe the principle of separation of powers. The first-instance court further found that the lump sum did not form part of the employee's insured remuneration because it related only to the period of service and to the remuneration of the employee upon retirement but did not depend on contributions during service. Finally, the unconstitutionality claim was rejected because accepting the claim would not deliver a positive result for the claimant as it was this very law which had created the right to the lump sum in the first place. The claimant appealed the first-instance court decision.

The Supreme Court rejected the claimant's argument, confirming the finding of the first-instance court regarding an 'amendment' by the Court of the legislative provision amounting to an infringement of the principle of separation of powers.[19] The Court explained the rationale behind the relevant provision, referring to a state policy from 2005 based on the (then) low levels of unemployment. The Court also confirmed the first-instance court's interpretation as regards the applicability of Directive 2000/78, referring to its Recitals 13 and 14. Finally, the Court concluded that even if the claimant's case was found to fall within the scope of the Directive, it would fall within the exception of Article 6(1) as being objectively and reasonably justified by a legitimate aim, without specifying which aim this would have been.

Internet source:
http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2017/3-201710-3-123.htm&qstring=%EC%E9%F7%E1%EB%E1%EA%2A%20and%20%F1%E1%F6%F4%EF%F0%EF%F5%EB%EF%2A

Czech Republic

CZ

POLICY DEVELOPMENT

Extension of powers of the Czech Ombudsman as of 2018

Disability

The Convention on the Rights of Persons with Disabilities was ratified by the Czech Republic on 28 September 2009 and the following year the process to set up a monitoring mechanism for the implementation of the Convention was initiated. This process lasted until 2017 when an amendment to the Act on the Public Defender of Rights was finally adopted, giving this body the additional mandate to monitor the implementation of the Convention. This solution had also been recommended by the Final Recommendations of the UN Committee on the Rights of Persons with Disabilities of 10 April 2015.[20]

As of 1 January 2018,[21] the Defender will monitor the implementation of the Convention, particularly the issue of the rights of persons with disabilities and will do the following:

- support the exercise of rights of people with disabilities and propose measures to protect them;
- carry out research and surveys;
- publish reports and issue recommendations related to the implementation of rights of persons with disabilities; and
- arrange an exchange of experience and information with similar monitoring institutions abroad.

19 Supreme Court of Cyprus, Appeal Jurisdiction, *Michael Raftopoulos v Republic of Cyprus*, Appeal no. 3/2012, 10 October 2017.
20 Committee on the Rights of Persons with Disabilities. Concluding observations on the initial report of the Czech Republic (2015), available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/098/68/PDF/G1509868.pdf?OpenElement.
21 Act No. 198/2017 Sb.

To carry out these tasks, the Defender will establish a council whose members will represent persons with disabilities and protect their rights and interests. The council is expected to consist of 15 members and will meet four times a year. According to a state-of-affairs report, the Office of the Public Defender will increase the number of employees by 10 in the coming few years, to deal with the new responsibilities of the Defender.

In addition, as of 1 January 2018, another amendment to the Act on the Public Defender of Rights became effective,[22] inserting a reference to Regulation (EU) No. 492/2011. In situations relating to the free movement of workers where the said regulation applies, EU citizenship shall also be deemed to be a ground of discrimination, and the Defender shall be competent to review cases relating to this.

Internet sources:
http://www.psp.cz/sqw/historie.sqw?o=7&t=1015
http://www.psp.cz/sqw/historie.sqw?o=7&t=688

DK Denmark

CASE LAW

Supreme Court ruling on medical diagnosis and disability

Disability

The claimant experienced dizziness and visual disorders after a knee surgery for which she had had an epidural. The specific causes of her symptoms were unknown but they caused her to be absent from work. After six months of partial sickness absence, she was dismissed. The employer argued that she had behaved inappropriately during a meeting dealing with her sickness absence. In the meeting in question, colleagues, representatives from the local municipality and her employer had participated. The claimant argued that she had experienced discrimination because of her disability.

In 2016, the High Court concluded that even though the claimant's symptoms had been mentioned in several medical records, it had not been proven that her condition had been caused by a medically diagnosed illness. Thus, it had not been documented that she had a disability at the time of dismissal. On that basis, the High Court acquitted the employer.

In its argument, the Supreme Court referred to case law from the Court of Justice of the European Union (CJEU)[23] to reject the finding that the impairment must be caused by a medically diagnosed illness. Instead, a comprehensive assessment of all the circumstances of the case must be made to determine whether an employee had a disability in the meaning of the Directive at the relevant time.[24] Regarding the issue of duration or permanence, the Supreme Court also referred to the case law of the CJEU and held that all objective elements of evidence must be taken into account to determine whether the impairment was 'long-term', in particular documents based on medical and scientific information.

Furthermore, the Supreme Court stated that in general, it is the employee who bears the burden of proving that, at the time of the alleged discrimination, he or she had a disability, including that the impairment was of a long-term nature.

22 Act No. 365/2017 Sb.
23 The Supreme Court notably cited the decisions in joined cases C-335/11 and C-337/11 (*Ring and Werge*).
24 Denmark, Supreme Court, Ruling No. 300/2016 delivered on 22 November 2017.

Finally, however, the Supreme Court found that in the case at hand the employer had only received sparse information about the cause of the employee's absence and had in any case tried to meet the employee's special needs when she returned to work. The Supreme Court therefore concluded that the dismissal was not related to the employee's illness or her sickness absence but rather to her behaviour. For this reason, without concluding whether the employee's impairment had constituted a disability or not, the Supreme Court held that the dismissal did not amount to discrimination.

Internet source:
http://domstol.fe1.tangora.com/Domsoversigt-(Højesteretten).31478.aspx?recordid31478=1486

Supreme Court ruling on reduced work hours as reasonable accommodation

Disability

The claimant had undergone serious brain surgery following which she experienced abnormal fatigue and was on sick leave for about two months followed by partial sick leave for another eight months. She wanted to go back to her full-time position, but the extreme fatigue prevented her from working more than 12-18 hours per week. The hospital had recommended a 'flexible job' with reduced working hours (for people with a reduced ability to work) but the employer rejected this. Following another three-week sick leave period, the claimant was dismissed.

The claimant argued that her tiredness constituted a disability and that her dismissal was discriminatory. The employer argued that due to the substantial sickness absence since the surgery, the employee could not be expected to perform the job she was appointed to do and thus had to be dismissed.

The Supreme Court noted that based on the medical records of the claimant there were no prospects for her getting back to a full-time position and thus concluded that the impairment at the time of the dismissal constituted a disability encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc. and that the employer had been aware of the disability.[25] The Court also stated that by refusing a 'flexible job' without examining the options more closely, the employer had failed to fulfil its obligation to establish reasonable accommodation.

In conclusion, the dismissal constituted discrimination based on disability and the claimant was awarded a compensation of EUR 67.550covering 12 months of salary (DKK 503.000). Determining the amount of compensation, the Supreme Court referred to the reasoning of the High Court and to the long employment of the claimant (18 years with the same employer) as well as the seriousness of the discrimination.

Internet source:
http://domstol.fe1.tangora.com/Domsoversigt-(Højesteretten).31478.aspx?recordid31478=1487

Board of Equal Treatment ruling on alleged discrimination on grounds of psychosocial disability by association

Disability

The claimant was hired in April 2016 but was then absent from work on a number of occasions to care for her 16-year-old daughter who experienced seizures, and of whom she was the sole caretaker. The claimant was dismissed in December 2016. In the previous summer of 2015, the daughter had been diagnosed with social phobia, anxiety, obsessive-compulsive disorder and a long-term depressive reaction. There had also been incidents of self-harm and suicidal thoughts. During the summer of 2016, the daughter's medication was effective, and she was generally doing much better. In September 2016, the daughter started having anxiety attacks and seizures in school and in October and November her condition deteriorated further. She was hospitalized a number of times, and it was established that her psyche was causing the seizures.

25 Denmark, The Supreme Court, ruling in Case No. 305/2016 delivered on 22 November 2017.

The claimant argued that she was dismissed in December 2016 because of her daughter's disability, and that the dismissal therefore amounted to discrimination on the ground of disability by association.

The Board of Equal Treatment noted that if the daughter was found to have a disability, the dismissal of the claimant could indeed amount to discrimination by association. The Board therefore examined whether the daughter at the time of dismissal had an impairment resulting in a long-term limitation of her functional capacities.[26]

The Board found that the daughter had experienced 'psychological discomfort' but that medical treatment had improved her state during the summer of 2016 and that, at the time of her mother's dismissal, there was no prognosis for her illness. On that basis, the Board concluded that the claimant's daughter at the time of dismissal did not have long-term impairments that amounted to a disability. The Board decided in favour of the employer.

Internet source:
https://www.retsinformation.dk/Forms/R0710.aspx?id=195189

EE Estonia

LEGISLATIVE DEVELOPMENT

Ratification of the Istanbul Convention

Gender

On 20 September 2017, the Estonian Parliament adopted the draft law on the ratification of the Istanbul Convention. The law was proclaimed by the President on 25 September 2017 and entered into force on 6 October 2017.

The Istanbul Convention was signed by Estonia in 2014. In 2017, several amendments to the Penal Code and to the Victim Support Act were adopted. The Ministry of Justice adopted amendments to the Penal Code (PC) concerning stalking, FGM, forced marriages and the prohibition of buying sexual services from victims of trafficking. With these amendments the minimum requirements of the Istanbul Convention were taken into account. Sexual harassment is now defined as an offence against equality under the Penal Code, but it is seen as a misdemeanour and extra-judicial proceedings should be conducted by the Police and Border Guard Board. The coordinating body for the implementation of the Istanbul Convention is the Ministry of Justice.

Internet sources:
Penal Code, RT I, 30.12.2017, 29:
https://www.riigiteataja.ee/en/eli/509012018005/consolide.
President of the Republic proclaimed the ratification of the Istanbul Convention:
https://www.president.ee/en/media/press-releases/13591-president-of-the-republic-proclaimed-the-ratification-of-the-istanbul-convention/index.html.
Shorthand reports:
http://stenogrammid.riigikogu.ee/et/201706131000#PKP-21201;
http://stenogrammid.riigikogu.ee/et/201709201400#PKP-21422;
State Gazette, RT II, 26.09.2017, 1:
https://www.riigiteataja.ee/akt/226092017001.

26 Denmark, Board of Equal Treatment, decision No. 10193 of 12 October 2017.

POLICY DEVELOPMENT

Formation of the Equal Opportunity Advisory Committee

All grounds

On 7 September 2017, the Equal Opportunity Advisory Committee (EOAC) was established by the Minister of Health and Labour. The Committee is made up of seven members from different research institutions and two external members from the Ministry of Social Affairs. One of the members of the Committee is the Chairman of the Gender Equality Council, an advisory body to the Ministry of Social Affairs.[27]

The purpose of the EOAC is to study and monitor social inequalities and dynamics. The aim of the Committee is to raise awareness amongst the public and policymakers on social inequality, and to make proposals with regard to various policy changes which have an impact on social inequality. As members of the EOAC have expertise from various areas of society, more evidence-based and informed policy-making is expected. The tasks of the Committee are:

- to assess draft legislation and political initiatives from a social inequality perspective;
- to proactively develop recommendations to policy makers based on the expertise of the members of the Committee;
- to compile an annual report, which makes a systematic assessment of the situation of social inequality;
- to communicate with the wider public and presentation of results and recommendations for the reduction of social inequality.

Internet source:
More information about the Directive (available in Estonian):
http://adr.rik.ee/som/dokument/5226319

France

FR

LEGISLATIVE DEVELOPMENT

Reform of labour relations and rules relating to compensation of dismissal

All grounds

In September 2017, a reform was introduced with the aim of increasing flexibility and security in labour relations, on the one hand, and simplifying negotiation and dismissal procedures, on the other hand.

Following the adoption by Parliament of a law empowering the Government to adopt executive orders for the reinforcement of social dialogue,[28] five such executive orders were adopted on 22 September 2017.[29] One of these executive orders intends to facilitate hiring and dismissal and to standardise the procedure and cost of dismissal awards. As such, it imposes scales and ceilings regarding damages awarded in relation with all causes of action related to dismissal of an employee. However, this otherwise mandatory scale is not applicable when the dismissal is found to be null and void because it results from the violation of a

27 The Gender Equality Council was established in 2013.

28 France, Law No. 2017-1340 of 15 September 2017 empowering the Government to adopt executive orders for the reinforcement of social dialogue, available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000035568022&fastPos=1&fastReqId=1129812819&categorieLien=cid&oldAction=rechTexte.

29 Executive Order n° 2017-1385 relating to reinforcement of collective bargaining; Executive Order n° 2017-1386 regarding the new organisation of social and economic dialogue in the business favouring the recognition of union activities; Executive Order n° 2017-1387 relating to predictability and securing labour relations; Executive Order n° 2017-1388 regarding several measures relating to collective bargaining; and Executive Order n° 2017-1389 relating to the prevention and the impact of exposition to specific professional risks.

fundamental right, harassment or discrimination prohibited by law. In such circumstances, the employee may request reintegration and claim damages and all wages owed for the duration of the time elapsed since the dismissal until integral compensation, without financial ceiling or time limit.

Internet source:
https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000035607388&fastPos=4&fastReqId=1725531780&categorieLien=cid&oldAction=rechTexte

CASE LAW

Court decision on positive action

Gender

A transport company's collective agreement provides for half a day's leave for women on Women's Day. One of their male employees initiated proceedings against the company claiming that reserving this advantage to women constitutes unequal treatment between men and women.

On 12 July 2017, the *Cour de Cassation*, applying the French Labour Code (Articles L 1142-4, L. 1143-1 and L. 1143-4) in the 'light of Article 157 Paragraph 4 of the TFEU', decided that a collective agreement may provide for half a day's leave only for women if this measure seeks to address equal opportunities in remedying de-facto inequalities that generally affect women.

This is an important decision of the *Cour de cassation*, as demonstrated by the publication of the case on the website of the Court. There have been very few cases on positive action, and this case admits the legality of this specific advantage in giving a broad interpretation of the concept of positive action.

The Labour Code recognises the possibility to take positive action through temporary measures laid down by decree or by collective agreements at sectoral levels or by the employer when establishing a plan for equality between men and women. Positive actions are defined as temporary measures which only benefit women with the aim of establishing equal opportunities between men and women in particular in remedying existing inequalities in opportunities between men and women (Article L 1142-4 of the Labour Code). According to Article L 1142-4 of the Labour Code, positive actions can be defined through a decree, a collective agreement at sectoral level or through a unilateral decision by the employer when establishing a plan for equality between men and women. Article L1142-4 does not specifically mention collective agreements at company level. However, interpreting this Article in the light of Article 157 § 4 of the TFEU, allows the *Cour de cassation* to also admit that a collective agreement concluded at plant level can provide for positive action.

The decision is very short, and it does not clearly explain how half a day's leave can contribute to compensating inequalities. In an explanatory memorandum published with the case on the website of the Court, the Court explains that with this important case, the *Cour de cassation* takes into account the development of European law and of the case law of the ECJ regarding positive action. For the Court, the manifestations of any kind during Women's Day contributes to raising awareness and reflection on the specific situation of women at work and how to improve their situation. Therefore there is a link between this day and working conditions, and a collective agreement can reserve this advantage to women.

The *Cour de Cassation* very clearly intends to apply the European principles on positive action and the Court adopts a broad interpretation of the concept of positive action which is not conceived as an exception to the principle of equal treatment. An important element is also that the advantage has been negotiated and there is therefore a presumption that it respects the principle of equal treatment.

Internet source:
https://www.courdecassation.fr/jurisprudence_2/notes_explicatives_7002/droits_femmes_37306.html

Criminal liability of social housing corporations' collegial commissions of attribution

Racial or ethnic origin

The claimant had applied for social housing but had seen his application rejected on the basis that the high number of tenants of African or Caribbean origin already occupying the building prevented the social housing corporation from accepting another black tenant, as this would go against the legal requirement to 'promote social mix'. The body which took this decision was the corporation's collegial commission of social housing attribution, which is composed of a number of individual persons. Such commissions until now have consistently been considered unable to engage the criminal liability of the social housing corporations to which they belong.

In the present case however, the Criminal Chamber of the Supreme Court (Court of Cassation) found that the social housing corporation was legally responsible for the conditions in which the commission of attribution proceeded in the selection of tenants.[30] In addition, the Court further found, for the first time, that taking into consideration racial or ethnic origin of an applicant in order to determine whether the social mix requirement was met, constituted discrimination in access to goods and services, as prohibited by the Criminal Code. The Court of Appeal will therefore rule on the case again to determine the fine imposed as well as the damages awarded.

The case was initiated by SOS Racisme, an NGO which for many years has pursued the criminal liability of social housing corporations referring to the social mix requirement to implement ethnic quotas.

Internet source:
https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000035192594&fastReqId=1856731927&fastPos=1

Scope of indemnification in case of dismissal based on age discrimination

Age

The claimant had been dismissed on the ground of his age and consequently the Appeal Court had found the dismissal to be null and void in accordance with Article L1132-4 of the Labour Code providing for integral indemnification. However, the Court deducted from the damages awarded the sums received by the claimant on account of unemployment insurance and salary received in another employment. The claimant appealed against this part of the decision, alleging that it infringed the principle according to which an employer cannot benefit from violations of fundamental rights covered by the Constitution, the European Convention of Human Rights and Directive 2000/78. The claimant thus argued that in circumstances where the Court concluded to discrimination, it must conclude to the nullity of the dismissal and payment of all unpaid salaries and advantages, regardless of other sums received by the claimant.

The Supreme Court decided that, considering that discrimination on the ground of age is not protected by the Constitution, the principle of compensatory damages applies and requires that all sums received by the claimant be deducted from the damages awarded.[31] Thus, the Court has narrowed down the impact of its previous case law regarding the compensation of discrimination based on trade union activities,[32] therefore introducing a distinction as regards the compensation of rights and freedoms covered by the French Constitution and rights covered by European law.

Internet source:
https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036053048&fastReqId=387503508&fastPos=1

30 France, Court of Cassation, Criminal Chamber, 11 July 2017, No. 16-82426.
31 France, Court of Cassation, Social Chamber, 15 November 2017, No. 16-15281.
32 France, Court of Cassation, Social Chamber, 2 June 2010, No. 08-43.277.

Supreme Court decision following the CJEU ruling in *Bougnaoui*

The claimant was employed by an IT engineering firm intervening on clients' premises. She had been informed since she first contacted the employer, that wearing the Islamic veil when working on the premises of certain clients might be problematic. Two years after she had been hired, a client on whose premises she was working refused to allow her back on the premises unless she removed her veil. When refusing to comply with the employer's subsequent request to remove her veil when intervening with clients, she was dismissed.

The claimant alleged that her dismissal amounted to unlawful discrimination, and the French Supreme Court referred the case to the CJEU for a preliminary ruling, asking whether the request of a client that an employee remove her Islamic veil can be held to constitute a genuine and determining occupational requirement. In March 2017, the CJEU rendered its decision[33] and on 22 November 2017 the Social Chamber of the French Supreme Court delivered its long-awaited ruling in the case.[34]

The Court explicitly referred to the reasoning of the Court of Justice as regards the scope of the protection against discrimination on the ground of religion, concluding that both religion per se as well as the requirements of religious practice as subjectively defined by the beholder are protected.

Secondly, the Court concluded that the employer's decision to dismiss the claimant by reason of her refusal to remove her veil when clients so demanded, constitutes direct discrimination. Therefore, the only possible justification would be an exception provided by Article 4(1) of Directive 2000/78 regarding genuine and determining occupational requirements, such requirements being justified by the nature of the task to be executed.

In evaluating whether the employer's justifications met this requirement, the Court again referred to the decision of the Court of Justice stating that the will of an employer to meet the desire of its client cannot be considered as a genuine and determining occupational requirement. Finding that the dismissal amounted to unjustifiable direct discrimination, the Court thus quashed the decision of the Court of Appeal and sent back the case before another chamber of the same Court. A decision will thus be delivered on the amount of damages awarded.

Finally, the Court took the opportunity to add an *obiter dictum* by referring to the decision of the Court of Justice in the *Achbita* case. It stated that in-house regulations forbidding any philosophical, political or religious signs in the workplace do not amount to direct discrimination on the ground of religion, but that they may give rise to indirect discrimination, if they have an adverse impact on persons of a particular religion. The Court further noted that in such a case, the indirect discrimination will only be justified if it pursues the legitimate objective of a policy of neutral political, philosophical and religious identity towards its clients and the means to implement this objective are appropriate and necessary. This will be the case for instance where another position without contact with clients is proposed to the employee. It concluded by stating that in the *Bougnaoui* case there was no neutrality rule justifying disciplinary action, but an ad-hoc rule targeting a specific religious sign, therefore amounting to direct rather than indirect discrimination.

By thus going beyond the facts of the case, it would seem that the Court of Cassation aimed at anticipating any upcoming scenarios and debates on this issue. Relevant to note in this context is that many employers have adopted in-house regulations imposing neutrality in the workplace following the adoption in August 2016 of a law which explicitly legalised the adoption of such regulations.[35]

33 CJEU, case C-188/15, Grand Chamber judgment of 14 March 2017, ECLI:EU:C:2017:204. For further information, please see *European equality law review*, Issue 2017/2, p. 59.

34 France, Court of Cassation, 22 November 2017, n° 13-19855, *Asma Bougnaoui, ADDH v Micropole SA*.

35 France, Law No. 2016-1088 of 8 August 2016 relating to employment, modernisation of social dialogue and securing professional life.

Internet source:
Court of Cassation 22 November 2017:
https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/2484_22_38073.html

POLICY DEVELOPMENT

Experimental testing on discrimination in access to private housing for young people

Age

Racial or ethnic origin

In April 2017, a study was published presenting the results of extensive situation testing examining the extent of discrimination in access to private housing. The methodology consisted of identifying a total of 455 advertisements for small apartments to rent in and around 19 big cities in France, and presenting four comparable candidates with the following distinguishing characteristics:

- 40 years old with French-sounding name and 'neutral' background
- 20 years old with French-sounding name and 'neutral' background
- 20 years old with North African-sounding name
- 20 years old from underprivileged suburbs

The results of the testing did not show any risk of discrimination exclusively related to young age, whether the tests presented female or male candidates. However, the results related to candidates of perceived North-African origin clearly indicate a risk of discrimination, whether they are young or middle aged, or coming from an underprivileged suburb or not. In addition, the results indicate a risk of discrimination of persons from underprivileged suburbs, although candidates from such suburbs are preferred to those with North African-sounding names.

Internet source:
http://www.experimentation.jeunes.gouv.fr/spip.php?page=article&id_article=1271

Germany

DE

CASE LAW

Equal opportunity commissioners; women only!

Gender

In the civil services at federal and state level, equal opportunity commissioners are elected who work, amongst others, on placing more women in leading positions; on a better work-life balance; and on combating sex discrimination and sexual harassment. Under the respective state laws, the equal opportunity commissioner is elected by all female employees working in the department and only female employees can run for this office. Some male employees considered this to be unjustified discrimination against men, and therefore filed a complaint.

On 10 October 2017, the State Constitutional Court of Mecklenburg-Western Pomerania decided that to reserve voting and candidate rights to female employees is appropriate and necessary in the current situation and therefore in full compliance with the Constitution. The Court held that Article 3(2) of the German Basic Law explicitly allows to compensate for disadvantages generally suffered by women, especially in working life. In the opinion of the Court, the lack of reconciliation of working and family life, the problem of sexual harassment at the workplace, the small number of women in leading positions are all signs of structural discrimination of women. As long as this structural discrimination is not effectively

tackled, the legislator is authorized by the Constitution to use any means appropriate and necessary to end this discrimination.

Using the example of equal opportunity commissioners, the State Constitutional Court explained the idea of structural discrimination and the suitable means to tackle this kind of discrimination. The Court showed that to reach gender equality as a goal, you cannot always use formal gender equality as means. The Court argued that the use of affirmative action or special measures is an essential tool to achieve substantial equality.

Internet source:
Decision of the State Constitutional Court of Mecklenburg-Western Pomerania of 10 October 2017:
http://www.landesverfassungsgericht-mv.de/presse/aktuelle/download/7%20-%2016%20Urteil%20anonym%2010.10.2017.pdf

Federal Constitutional Court decision on third option for gender identity at birth

Gender

The civil status law[36] requires that the gender of a new-born is registered immediately after birth. For many years, the documented gender could only be 'male' or 'female'. In November 2013 the civil status law was amended and states that if the child can be assigned neither the female nor the male gender, this child's civil status shall be documented in the birth register without indicating the child's gender. Adults born before 2013 could ask for the correction of their registered birth gender when they belonged neither to the male or female gender identity. The claimant of the case applied for the correction of his/her gender registration but did not want to be registered as 'nothing' but claimed for a positive gender registration with a third sex/gender option.

The Federal Constitutional Court decided on 10 October 2017 that the constitutional right of personality protects, among others, the gender identity of a person, covering the gender identity of those who cannot be assigned either the gender male or female permanently. Moreover, the constitutional prohibition of sex/gender discrimination also protects persons who do not permanently identify as male or female. The constitutional right of personality, which protects gender identity, and the constitutional prohibition of sex/gender discrimination are both violated if the civil status law requires that the gender be registered but does not allow for a further positive entry other than male or female.

The Court obligated the legislator to offer such a statutory third gender option by no later than 31 December 2018. On various occasions, the Court emphasized that the addition of a third option would not impair the rights of persons identifying themselves as male or female in any way or change anything for them and that, due to the differentiated wording of Article 3 of the German Constitution especially, this would not mean that gender quota or other special measures would become pointless.

Internet source:
Decision of the Federal Constitutional Court of 10 October 2017 (English):
http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html

36 Civil Status Law (Personenstandsgesetz) of 19 February 2007, https://www.gesetze-im-internet.de/pstg/BJNR012210007.html.

POLICY DEVELOPMENT

Withdrawal of innovative quota regulation for the civil service

In 2016, the Statute on the Modernization of the Civil Service Law of North Rhine-Westphalia entered into force. Section 19(6) concerning promotion stipulates that female civil servants are to be given preference under the provision of *substantial* equal qualification, aptitude and professional performance, unless there are specific obstacles in the person of a male applicant. The preferential promotion of women applied to all higher positions with a proportion of female civil servants lower than the corresponding lower positions as long as the proportion of women in the higher position applied for had not reached 50 %. The Statute established a substantially equal qualification, aptitude and professional performance in case of an equivalent *overall evaluation* in the applicant's latest assessment report.

On 21 February 2017, the State Administrative Court of North Rhine-Westphalia decided that Section 19(6) of the Statute on the Modernization of the Civil Service Law of North Rhine-Westphalia was incompatible with the Constitution. The Court accepted the regulation that female civil servants are to be given preference for promotion under the provision of substantial equal qualification, aptitude and professional performance, unless there are specific obstacles in the person of a male applicant. However, the Court rejected the idea that a substantially equal qualification could be established by an equivalent overall evaluation. Although it seems that gender quota regulations have very little effect, the innovative gender quota regulation of North Rhine-Westphalia became a vividly debated topic. Conservative parties as well as right-wing populists relied on the 'unjustified preferential treatment of unqualified women' as a successful topic in the state election campaign. The court decision was frequently incorrectly reported as a decision on the incompatibility of any gender quota with the Constitution. The immediate withdrawal of the new quota regulation became one of the most important electoral promises.

After the election of the new parliament and government of North Rhine-Westphalia, they fulfilled their promise; on 19 September 2017, the parliament of North Rhine-Westphalia withdrew the innovative gender quota regulation. It did not abolish any quota regulation but fell back on the well-known quota regulation stating that female civil servants are to be given preference for a promotion under provision of equal qualification, aptitude and professional performance, unless there are specific obstacle in the person of a male applicant.

In the civil services, women are still underrepresented in higher positions, higher wage groups, technical occupations and leading positions. For more than 30 years, quota regulations have proved to be quite ineffective. An innovative new approach by the former parliament of North Rhine-Westphalia was immediately withdrawn by the newly elected state parliament. An issue that has raised more concern is that positions against gender equality and the promotion of women have been proved to be successful topics of electoral campaigning.

Internet sources:
Statute on Amendments to the Civil Service Law of North Rhine-Westphalia of 19 September 2017:
https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument?Id=XMMGVB1729|764|765
Press release on the decision of the State Administrative Court of North Rhine-Westfalia of 21 February 2017:
http://www.ovg.nrw.de/behoerde/presse/pressemitteilungen/01_archiv/2017/11_170221/index.php
2014 legal expertise study by law professor Hans-Jürgen Papier and Martin Heidebach, *Rechtsgutachten zur Frage der Zulässigkeit von Zielquoten für Frauen in Führungspositionen im öffentlichen Dienst sowie zur Verankerung von Sanktionen bei Nichteinhaltung* (Legal expertise on the legitimacy of fixed target women quotas for leading positions in the civil service and the implementation of sanctions in the case of non-compliance):
https://www.mhkbg.nrw/mediapool/pdf/presse/pressemitteilungen/Gutachten_Zielquoten.pdf

EL Greece

LEGISLATIVE DEVELOPMENT

Adoption of Law regarding the rights of persons with disabilities

Disability

On 13 September 2017, Law 4488/2017[37] was adopted, including a series of provisions designed to promote the equal treatment of persons with disabilities in all aspects of life. The Law also specifies, clarifies and assists the implementation of the UN CRPD in Greece.

Any natural person or public organisation in the wider public or private sector is therefore required to facilitate the equal exercise of the rights of persons with disabilities in their respective fields of competence or activity by taking all appropriate measures and refraining from any action which may affect the exercise of their rights. In particular, they are required:

a) to remove any existing barriers;
b) to observe the principles of universal design in all areas of competence or activity in order to ensure that persons with disabilities have access to infrastructure, services or goods they offer;
c) to provide, where necessary in a specific case, reasonable adjustments in the form of tailor-made and appropriate modifications, arrangements and appropriate measures, without imposing disproportionate or unjustified burden;
d) to abstain from practices, habits and behaviours which discriminate against persons with disabilities; and
e) to promote, through positive measures, the equal participation and exercise of the rights of persons with disabilities in the area of their competence or activity.

The law does not foresee any specific sanctions in case of violations against these duties, but general obligations such as 'breach of duty' regarding public authorities could be applied.

For instance, administrative bodies and authorities should ensure equal access for people with disabilities to digital communications and services, including the media and internet services, as well as access to general communications for instance through sign language or Greek Braille. The law places particular emphasis on mass-media companies, whether public or private, imposing on them not only an obligation to promote non-discrimination as a principle in their programmes but also to provide services that are accessible to persons with disabilities.

Finally, the law provides some relevant definitions ('disabled people', 'adjustments', etc.) and guidelines for the equal exercise of the rights of people with disabilities and the mainstreaming of disability in all public policies. The Minister for Territorial Coordination is appointed as Coordinating Mechanism for monitoring all issues related to the rights of persons with disabilities.

Internet source:
https://www.e-nomothesia.gr/kat-ergasia-koinonike-asphalise/nomos-4488-2017-fek-137a-13-9-2017.html

37 Law 4488/2017 on insurance issues, on improvement of protection of employees and on rights of persons with disabilities – adopted on 13 September 2017 and published in the Government Gazette on the same day.

CASE LAW

Protected family members of third-country nationals who are primary insurance beneficiaries

Racial or ethnic origin

Two non-profit organisations applied to the Greek Ombudsman (the national equality body) concerning the limitation of insurance rights of third-country nationals and their family members. Only the children (until the age of 18) of third-country nationals are considered as protected family members and are therefore offered health services by the relevant insurance bodies. On the other hand, for Greek and EU citizens, the categories of family members covered by a person's insurance extend much wider, as long as they fulfil the legal criteria.

According to the Ombudsman's non-binding Opinion[38], the insurance legislation arbitrarily distinguishes between dependent family members of primary insurance beneficiaries who are Greek or EU citizens on the one hand and third-country nationals on the other hand. As such, this legislation creates a difference in treatment of insurance beneficiaries based on both their ethnicity and ethnic origin, in violation of the (in principle) equal reciprocal character of insurance contributions paid by all primary insurance beneficiaries. Therefore, the Ombudsman concluded that the relevant provisions amount to a violation of the anti-discrimination framework.

Internet source:
http://www.solidaritynow.org/wp-content/uploads/2017/08/ΠΑΡΕΜΒΑΣΗ-ΣΥΝΗΓΟΡΟΥ-για-ΑΣΦΑΛΙΣΗ-ΜΕΤΑΝΑΣΤΩΝ.pdf

Hungary

HU

CASE LAW

Lack of accessible online cash registers violates the requirement of equal treatment and the CPRD

In Hungary, providers of services and goods may choose between providing their clients with either simplified receipts or full receipts. As of 1 January 2017 however, certain providers of services (including masseurs), are not allowed to provide simplified receipts unless they use so-called online cash registers. If they do not own and/or use online cash registers, they must provide their clients with a full receipt.

Disability

A blind masseur filed a complaint with the Commissioner for Fundamental Rights (the Ombudsman), claiming that since there are no online cash registers that are accessible for blind or visually impaired persons, he is unable to fulfil his statutory obligation to provide a receipt, and therefore he may need to suspend his activities as a masseur.

The Ombudsman launched an investigation, approaching the Ministry of National Economy which pointed out that the claimant has the option of issuing a full receipt. Relying on a number of legal provisions, including Article 9 of the CRPD (according to which 'States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to [...]information and communications, including information and communications technologies and systems'), the Ombudsman concluded that the situation in which 'certain taxpayers may only fulfil their obligation

38 Greek Ombudsman 's Opinion 224709/2017 on protected family members of third-country nationals who are primary insurance beneficiaries.

to provide a receipt through an online cash register, however, the required equipment is not equally accessible for them, causes a violation with regard to legal certainty, [...] equal dignity, the requirement of equal treatment and the state's obligation to provide increased protection to persons with disabilities, and is not in line with [Hungary's] international obligations under Article 4 of the CRPD'.

The Ombudsman requested the Ministry to consult the concerned civil society organisations and to consider amending the decree regulating online cash registers in order to make sure that it prescribes equal accessibility of such registers for blind and visually impaired persons. Furthermore, the Ombudsman rightly pointed out that the CRPD places a positive obligation on the States to take appropriate measures to ensure access on an equal basis and that this obligation was violated when the legislator paid no attention to prescribe accessibility of the cash registers.[39]

Internet source:
https://www.ajbh.hu/documents/10180/2602747/Jelent%C3%A9s+172_2017/da7ba55c-6980-293c-a76b-1f0a4d07e28f?version=1.0

Case of indirect discrimination

In a judgment of 7 August 2017, the Equal Treatment Authority (ETA) illustrated how women are affected by indirect wage discrimination in Hungary.

Gender

Female workers claimed that they were victims of indirect discrimination when they did not receive a 13th-month payment for taking days off to take care of their children. The collective work agreements state that only employees who have not been away from work more than 25 days per year are eligible for receiving the 13th-month payment. The days that workers were away from work due to annual paid holiday, work-related illness, or illness which needed inpatient hospital care are not included in the days of absence.

The mothers of young children claimed that even though the conditions seemed to be impartial, they were proportionally detrimental and discriminatory to mothers who have children under the age of 12, which is the age limit for eligibility for sickness payment based on the child's rights under social security.

The Equal Treatment Authority (ETA) conducted a detailed statistical investigation, comparing the number of workers who were and were not eligible for the 13th-month payment, and the number of female workers who had children under the age of 12. The statistical investigation showed that the regulation in the collective agreement was disproportionately disadvantageous to female workers with young children compared to those male or female workers who had no children.

The ETA noted in its decision that the disadvantages of being a woman and having a young child accumulated in this case, and resulted in an example of multiple and intersectional discrimination.

The ETA obliged the employer to reconsider the preconditions of eligibility of the 13th-month payment, eliminating the existing indirect discrimination, and prohibited the employer from further similar discrimination. The ETA obliged the employer to send a written report about the measures it took to eliminate the discrimination within 60 days. ETA did not impose a fine in this case.

This case is a very important stepping-stone in Hungarian anti-discrimination case law because it sets a good example of how to investigate indirect wage discrimination cases and how to collect, examine and evaluate statistical evidence.

39 Hungary, Commissioner for Fundamental Rights, Report no. AJB-172/2017, of 30 June 2017.

Internet source:
http://www.egyenlobanasmod.hu/article/view/ebh-130-2017

Curia upholds decision establishing segregation in education and ordering the closing down of segregated school

Racial or ethnic origin

In November 2010, the Supreme Court (predecessor of the Curia) established that the Pécsi street school in Kaposvár was ethnically segregated, and that its maintainer, the Municipal Council of Kaposvár had violated the requirement of equal treatment by failing to act against the spontaneously developed segregation e.g. through re-determining the catchment areas of the local schools.[40] Despite the court decision, the Municipal Council did not take any measures to end the segregation. Consequently, the Chance for Children Foundation (CFCF) initiated another lawsuit in late 2013. In the meantime, the school maintenance was transferred to a centralised state organisation – the Klebelsberg Center for Maintaining Educational Institutions (KLIK) – which operated under the Ministry of Human Resources (EMMI). For this reason, the CFCF extended the lawsuit to these bodies as well, requesting the court not only to establish the violation, but also to order desegregation through the closing of the school. In its first-instance decision delivered in November 2015, the Kaposvár Regional Court established the violation, and the responsibility of the defendants, but took the stance that it was not in a position to order the implementation of the complex desegregation plan devised by CFCF. The Court stated that a desegregation process is so complex and depends on so many factors (such as political will) that it would not be possible to order its implementation with the clarity and unambiguity that is required from a judicial decision in order for it to be enforceable.

In October 2016, the Appeals Court agreed with the first-instance court that the respondents were responsible for the segregation, but also ordered that the segregated school must be gradually closed.[41] The Court further ordered the respondents to adopt a detailed desegregation plan on the admission and placement of those first-grade pupils who belong to the school's catchment area, and to publish it on their respective websites by 31 March 2017. The respondents complied with the decision, but some of them requested a review of the judgment by the Curia, arguing for instance that it violated the parents' right to the choice of school and that it was not enforceable.

In its final judgment of 4 October 2017, the Curia upheld the decision of the Appeals Court, including the sanctions imposed.[42] It found that the right to the choice of school is not absolute, and can be limited for instance by the aim of terminating segregation as quickly as possible. As a principle, the Curia held that courts can go beyond concluding that a violation has taken place and ordering the respondent to end the violation, and that they may also order that specific measures be taken in order to enforce the requirement of equal treatment. The Curia also noted that the respondent's reference to non-enforceability was obviously erroneous, as they had in fact enforced the obligations imposed by the second-instance court (closing down the school, finding alternative places for the children who would otherwise have been enrolled there, redrawing the school district boundaries and adopting a desegregation plan).

Internet source:
http://kuria-birosag.hu/hu/sajto/tajekoztato-kuria-pfv-iv-200852017-szamu-kaposvari-szegregacios-ugyben-hozott-iteleterol

40 Hungary, Supreme Court, judgment No. Pfv.IV.21.568/2010/5, of 24 November 2010.
41 Hungary, Pécs Appeals Court, judgement No. Pf.III.20.004/2016/4, of 14 October 2016.
42 Hungary, Curia (Supreme Court), judgement No. Pfv.IV.20085/2017, of 4 October 2017.

Checking only a Roma passenger's train ticket on the railroad platform amounts to discrimination

Racial or ethnic origin

The claimant is of Roma ethnicity and argued that he had been discriminated against when travelling by train, as he was the only one –of a large number of passengers – whose ticket was checked by the ticket inspector already on the platform. The railway company argued that ticket inspectors are authorised to check the tickets on the platform, adding that all other passengers on the platform were waiting for another train. Based on the claimant's statement and the ticket-sales data, the Equal Treatment Authority found that numerous other passengers had been waiting for the same train as the claimant, and that those passengers were in a comparable situation with him. The Authority noted that when ticket inspectors apply the rules regarding ticket controls, they must respect and meet the requirement of equal treatment. Therefore, it concluded that the railway company had discriminated against the claimant on the basis of his Roma ethnicity. It banned the company from future violations, ordered that its decision be published for 30 days and imposed a fine of approximately EUR 325 (HUF 100,000) on the company.[43] The railway company requested a judicial review of the decision.

In December 2017, the Metropolitan Administrative and Labour Court upheld the equality body's decision and found that the claimant had suffered a disadvantage when he was the only person whose ticket had been checked on the platform and that a clear causal link existed between his Roma ethnicity and the act of the ticket inspector.

Internet source:
http://www.egyenlobanasmod.hu/article/view/m%C3%A1r-a-peronon-elk%C3%A9rt%C3%A9k-a-jegy%C3%A9t/mid:7

IS Iceland

CASE LAW

Hate-speech against homosexual people

Sexual orientation

In April 2015, Samtökin'78, the leading LGBTQIA rights organisation in Iceland, filed complaints against ten people because of hateful remarks made on a radio show and on-line after the council of Hafnarfjörður Municipality decided to provide LGBTQIA education in its schools with the assistance of Samtökin'78.

In November 2016, the State Prosecutor brought eight cases concerning violations of the hate speech provision of the General Penal Code No. 19/1940 to the District Courts. The District Courts acquitted one of the accused as the statute of limitations had passed. Five others were acquitted as intent was not proven and their comments were considered to fall within the remit of free speech protected by the Constitution and the ECHR. In December 2017, the Supreme Court ruled upon three cases on appeal. In two cases, the Court disagreed with the very narrow interpretation of the hate speech provision and overturned the acquittals, underlining that the accused did not need to use such grave, grossly injurious and prejudiced comments to express their opinions in accordance with their freedom of expression. Each of the accused was convicted and ordered to pay a fine of ISK 100 000 (approximately EUR 820).[44] In a third case, the accused was found to have publicly insulted homosexual people and expressed prejudice, but the comments were not sufficiently injurious to amount to hate speech.[45]

43 Equal Treatment Authority, decision No. EBH/29/2017 of 7 February 2017.
44 Supreme Court of Iceland, decision of 14 December 2017 in case No. 577/2017 and decision of 14 December 2017 in case No. 415/2017.
45 Supreme Court of Iceland, decision of 14 December 2017 in case No. 354/2017.

Ireland

IE

LEGISLATIVE DEVELOPMENT

Diversity and company boards

All grounds

European Union (Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups) Regulations 2017 S.I. No. 360 of 2017 and Directive 2014/495/EU came into operation on 21 August 2017 and apply to financial years commencing after 1 August 2017. The Regulations apply to large companies with an average number of employees exceeding 500 or a holding company which qualifies as a large company and is the holding company of a group where the aggregate number of employees exceeds 500.

The Regulations provide that there shall be a non-financial statement in a specific section of the director's report (or a separate document and published on the company website) which shall contain information in relation to environmental matters, social and employee matters, respect for human rights, bribery and corruption.

The directors of a large listed company (i.e. company which trades its shares) shall include a description of the diversity policy in relation to the company's board of directors with regard to aspects such as age, gender or educational and professional backgrounds, the objective of the diversity policy, how the diversity policy has been implemented and the results of the diversity policy in the relevant financial year. If there is no such policy, then the directors shall include in the company's corporate governance statement an explanation as to why it has no such policy. The company's statutory auditors will have to report as to whether this information is contained in the corporate governance statement.

If a person fails to comply with these Regulations they may be subject to a fine on summary conviction or to imprisonment for a term not exceeding six months or both. The Director of Corporate Enforcement may investigate instances of suspected offences under these Regulations, enforce the Regulations and undertake all acts or measures necessary for the performance of their functions under the Regulations.

The number of women on the boards of Irish listed companies is approximately 12.5 %. There are many women who are chartered accountants or lawyers with significant commercial experience. There may be a smaller number of women who have held senior executive appointments and have experience of corporate strategy, for example. The statutory requirement for a diversity statement is important. A number of Irish companies listed on the Irish Stock Exchange – the Bank of Ireland, Allied Irish Bank, CRH plc ((Cement Roadstone Holdings) which has the highest number of women on its board)) and Glanbia – publish statements concerning details of the company directors. There is a considerable difference between the 40 % quota which is applied for state boards which may be commercial or non-commercial semi-state companies (i.e. transport, utilities etc.). In some of the state boards, there is a legislative requirement for diversity on the board, i.e. male/female numbers.

Internet source:
https://www.djei.ie/en/Legislation/SI-No-360-of-2017.html

Changes to maternity legislation

Gender

The Social Welfare Act 2017 was signed into law on 23 December 2017. The Act amends the Maternity Protection Act 1994 (as amended) in order to provide for additional maternity leave and benefit to mothers whose baby is born prematurely and are effective from births on or after 1 October 2017. In addition to the current maternity leave period of 26 weeks, there will be an additional period of maternity

leave if the baby is born prematurely. The additional period to be added will be the number of weeks from the baby's actual date of birth up to two weeks before the expected date of confinement which would have been the 37th week of confinement at which point the entitlement to 26 weeks leave and benefit would normally begin. Maternity benefit was set at EUR 235 gross per week, and will be EUR 240 gross per week from 26 March 2018.

Internet source:
http://www.irishstatutebook.ie/eli/2017/act/38/enacted/en/html

IT Italy

LEGISLATIVE DEVELOPMENT

Gender

Promotion of measures for a better work-life balance

The Minister of Labour and Social Policies, together with the Minister of Economics and Finance, issued a Decree on 12 September 2017 to implement Art. 25 of Decree No. 80/2015 on the allocation of resources for experimental measures facilitating a better work-life balance in the private sector. The Decree stipulates the criteria which entitle employers who facilitate a better work-life balance through a collective agreement, to apply for a cut in contributions to the INPS (National Institute for Social Security). The measures taken by companies must involve the following elements:

- measures supporting parenthood (extension of paternity leave and/or integration of the respective allowance, facilitation in childcare centres, e-learning, support for employees coming back to work after maternity leave, vouchers for baby-sitting services) and/or;
- organizational facilitation to combine work and private life (smart working, flexible working hours, facilitate part-time working and transferability of holidays) and/or;
- measures regarding enterprise welfare (providing aid to employees in outsourcing tasks allowing to reach a better work-life balance, providing aid/ vouchers for care services).

Funds have been allocated to support the experimental measures in the period covering 2016-2018 (EUR 55.200.000 for 2017 and EUR 54.600.000 for 2018). 20% of these funds will be shared equally among all employers, while 80 % will be shared proportionally among the working force employed the year before the application. Employers can participate only once, considering the fact that the measures are experimental.

Signing a collective agreement at enterprise level is a requirement to receive the financial support, which on the one hand may stimulate the introduction of more suitable solutions for workers, but on the other hand could discourage employers who are worried to let unions 'enter' the enterprise. A selection of representatives of various Ministers will monitor the effectiveness of the trial. Some negative observations have already been made on the fact that under Decree No. 80/2015 no union representation is ensured in this monitoring function.

Internet sources:
Decree of the Minister of Labour and Social Policies together with the Minister of Economics and Finance of 12 September 2017, 12 September 2017, available at:
http://www.lavoro.gov.it/documenti-e-norme/normative/Documents/2017/Decreto-Misure-di-Conciliazione.pdf
Decree No. 80 of 15 June 2015, modifying Decree No. 151 of 26 March 2001 on the Protection of Motherhood and Fatherhood (*Misure per la conciliazione delle esigenze di cura, di vita e di lavoro, in*

attuazione dell'articolo 1, commi 8 e 9, della legge 10 dicembre 2014, n. 183), 15 June 2015, available at:
http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2015-06-24&atto.codiceRedazionale=15G00094&elenco30giorni=true
Decree No. 193 of 22 October 2016 (*Disposizioni urgenti in materia fiscale e per il finanziamento di esigenze indifferibili)*, 22 October 2016, available at:
http://www.gazzettaufficiale.it/eli/id/2016/10/24/16G00209/sg

Budget Act for 2018

The Budget Act for 2018, passed on 27 December 2017, consists of one article and 1181 paragraphs. The Act contains several provisions which directly or indirectly affect working women.

Paragraph 217 of the Act extended the period of leave awarded to female victims of gender-based violence who are under a protection programme certified by local social services (Art. 24 of Decree No. 80/2015) for domestic workers. Paragraph 220 also provided for a cut in welfare contribution for up to 36 months for social cooperatives hiring female victims of gender-based violence up to 31 December 2018.

Paragraph 218 of the Budget Act partially amended Art. 26 Paragraph 3 of Act No. 198/2006 on Equal Opportunities. It states that any acts, pacts or provisions regarding working conditions offered to women subjected to less favourable treatment after they have become victims of harassment on the ground of sex or sexual harassment are null and void. The same paragraph also specifies that all less favourable treatment, including dismissal, transfer and change of job or any organizational measure which has a direct or indirect negative effect on the working conditions of the worker who brings a case to court for harassment or sexual harassment are null and void. This protection is not enforceable in cases where the claimant's criminal liability for libel or slander has been ascertained.

Paragraph 254 allocated EURO 20 million per year for the period 2018-2020 to support legislative interventions aimed at recognizing the social and economic value of family caregivers (which are mainly women). Following Paragraph 255, the latter are persons who take care of seriously disabled partners or relatives who need a permanent, overall and continuous assistance.

Paragraph 465 and 466 provide for amendments to the civil and criminal procedural law. The former paragraph states that, in cases where the defendant certifies her pregnancy or an adoption/fostering procedure, the judge must reject the continuation of the trial taking into consideration the period of two months before and three months after the birth/adoption/fostering. The amendment also states that this provision must not be seriously detrimental for the parties where an urgent treatment is necessary. Paragraph 466 provides that in the period mentioned above the defendant is allowed not to appear before the court.

Under Paragraph 635 the termination of fixed-term contracts of university researchers who are pregnant is postponed by 5 months, which corresponds to the length of the compulsory maternity leave.

The provisions of the Budget Act mentioned above are highly heterogeneous. Some changes are aimed at improving the protection of motherhood (such as those regarding lawyers and university researchers- Paragraphs 465, 466, and 635) by detailing provisions linked to the specific demands of the sector. Some others actually extend the personal scope of the ruling for the victims of gender-based violence (such as Paragraph 217 for domestic workers), while the strengthening of the protection against harassment and sexual harassment (Paragraph 218) can probably be considered already provided by the Code of Equal Opportunities although by means of interpretation.

No debate or comments at all are to be recorded yet regarding the provisions mentioned above.

However, the allocation of a Fund to support legislative interventions aimed at recognizing the family caregiver's activity has already raised some critical remarks especially from the point of view of female workers. In fact, the Fund is quite scant and seems to express the tendency of the legislator to burden families, and consequently mainly women, with assistance, encouraging them to stay at home rather than investing in social and health structures which would also create jobs. Nevertheless, the evaluation of this intervention must be postponed until the enforcement of the legislative interventions it is aimed to support, as they have not been fixed yet.

Internet sources:
Act N. 205 of 27 December 2017, Budget Act for 2018, published in OJ N. 302 of 29 December 2017, o.s. N. 62:
http://www.gazzettaufficiale.it/eli/id/2017/12/29/17G00222/sg
Caregivers e bonus bébé, non ci siamo:
http://www.ingenere.it/news/caregiver-bonus-bebe-non-ci-siamo

CASE LAW

Victimisation by politicians against non-discrimination law defenders

All grounds

Four individuals and one NGO brought a claim against the Municipality of Varallo for the dissemination of racist posters around the city (against foreign hawkers without license and women wearing the Burqa). The Court of Appeal of Turin rejected the action as the municipality had removed the posters before the judgment, also finding that the claimants who were Italian citizens had no legal standing, because they were not victims and did not live in Varallo. New posters were later disseminated, mentioning the names of the claimants and ridiculing them for diverting economic resources (for legal costs) away from the community. The four individual claimants argued that these new posters amounted to victimisation and brought their cases to Court.[46] In the first case, the Tribunal of Vercelli convicted the Major and the Municipality[47] but the Court of Appeal of Turin quashed the judgment in February 2016.[48] The claimants appealed the decision to the Supreme Court, where it is still pending. By contrast, in the second case, the Tribunal of Milan[49] rejected the claim but in February 2017, the Court of Appeal of Milan quashed the judgment.

The Court found that there was a case of victimisation although the claimants were not themselves victims of discrimination, noting that the protection against victimisation extends to anyone who suffered a disadvantage connected to any activity performed to promote equal treatment. The Court underlined that the actions of those who act against discrimination even if they are not victims, should be enhanced and protected. Consequently, the Municipality was convicted to pay EUR 5,000 to each claimant and to the publication of the judgment in a local newspaper, on the Municipality's website and on the Facebook page of the Vice-Mayor.[50]

Internet source:
https://www.asgi.it/banca-dati/corte-dappello-milano-sentenza-del-23-febbraio-2017/

46 Due to the different places of residence of the claimants, two different cases were initiated before the two courts that were competent.
47 For further information, see *European equality law review*, Issue 2015/2, pp. 108-109.
48 Court of Appeal of Turin, decision of 23 February 2016, available at: https://www.asgi.it/wp-content/uploads/2017/02/ASGI-COMUNE-VARALLO-CORTE-APPELLO-TORINO-SENTENZA-295-DEL-23-02-2016-RG-998-DEL-2014.pdf.
49 Tribunal of Milan, decision of 23 September 2014, available at: https://www.asgi.it/wp-content/uploads/2017/02/MUSATI-e-CORTE-c-COMUNE-DI-VARALLO-2-ord-rigetto-30-09-2014-rg-26800-del-2014-2.pdf.
50 Tribunal of Milan, judgment of 23 February 2017 no. 787, available at: https://www.asgi.it/wp-content/uploads/2017/02/corte-appello-milano-mussati.pdf.

Racist offences towards European MP Cécile Kyenge

Racial or ethnic origin

Cécile Kyenge, currently a Member of the European Parliament, is an Italian citizen of Congolese origin who was the first black person ever appointed as Minister of any Italian Government. Since the very first days of her mandate, several right-wing politicians made strongly racist public statements against or about her, including one MEP representing the Lega Nord party who made particularly racist statements during a popular broadcast in April 2013. The public prosecutor initiated an investigation for defamation aggravated by racial discrimination and in October 2016, the European Parliament decided not to defend the immunity and privileges of the respondent MEP.

The Tribunal of Milan found that the respondent had offended Kyenge on grounds of her origin and of the colour of her skin, and convicted him for racist offences but not for having advocated ideas founded on alleged racial superiority or racial and ethnic hatred (although the Tribunal noted that the statements showed that the respondent did believe in the superiority of the 'white race' over the 'black and African ones'). Moreover, the Tribunal found that the exclusion of liability for opinions expressed as a politician did not apply, since the racist attack did not concern Kyenge's political convictions but, on the contrary, regarded her physical characteristics and her national origin. The respondent was convicted to pay a fine of EUR 1000 and EUR 50,000 in damages in favour of Kyenge.[51]

Internet sources:
https://www.asgi.it/discriminazioni/la-condanna-borghezio-diffamazione-frasi-razziste-nei-confronti-cecile-kyenge/
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2016-0312+0+DOC+XML+V0//EN

Latvia

LV

CASE LAW

Company found guilty of discrimination by dismissing employee with disability

Disability

The case concerned an employee with a disability who had been employed for several years, first as a client-service specialist and later in a manager position. When reorganising the workplace, the employer terminated the employee's position (as well as those of two other managers) and a few months later issued a decision stating that there were no suitable vacancies that could be offered to the employee, therefore terminating her work. During the same period, the employee submitted several complaints concerning her treatment by the employer, including offensive remarks and the deliberate deterioration of her working conditions in relation to her physical disability. Subsequently, the employer sent a request for explanations from the employee regarding her complaints, and then adopted disciplinary measures against her when she did not respond to the request.

Finally, the employer lodged an application before the competent civil court, asking to terminate the labour relationship with the employee.[52] The employee filed a counterclaim asking the court to impose an obligation on the employer to propose suitable alternative positions to her, in accordance with her qualifications and capabilities; to admit the breach of the principle of prohibition of discrimination and victimisation on grounds of disability; and to grant compensation for non-pecuniary damage. The

51 Italy, Tribunal of Milan of 18 May 2017, published 29 September 2017.
52 The Latvian Labour Law (Article 109.2) prohibits the dismissal by an employer of an employee with a disability except for specific cases determined by the law.

employee claimed in this regard that the employer's request for explanations regarding her complaints amounted to victimisation.

In December 2016, the Riga Regional Court rejected the employer's claim and partly satisfied the employee's counterclaim, finding a violation of the prohibition of discrimination and victimisation. The Court ordered the company to provide the employee with work according to her capabilities and qualifications, and awarded EUR 1,000 in non-pecuniary damages.[53] Upon the employer's appeal, the Supreme Court dismissed the complaint on 30 June 2017.[54] The employer then submitted a petition before requesting the suspension of the enforcement of the part of the judgment which ordered the company to provide the employee with work. In its decision of 17 August 2017, the Riga Regional Court rejected this final claim of the company.[55]

The Court noted that the employer had terminated the labour relations based on a reduction in the number of employees and on an exceptional basis with good cause. The Court noted however that the employee had a disability of which the employer was aware, and the invoked justifications for termination of the employment are not mentioned in Article 109.2 of the Labour Law, which provides an exhaustive list of the legal grounds for the termination of labour relations with persons with disabilities. Regarding the alleged discrimination, the Court noted that the burden of proof had shifted to the employer, and that the latter had not submitted any evidence against the employee's claims in this regard. The Court further established that the employer's request for explanations about the employee's complaints, which ultimately led to her dismissal, amounted to victimisation.

MK The former Yugoslav Republic of Macedonia

LEGISLATIVE DEVELOPMENT

Ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)

Gender

The Macedonian Parliament ratified the Council of Europe Convention on Preventing and Combating Violence against Woman and Domestic Violence (CoE Istanbul Convention) on 22 December 2017.[56] Despite the fact that Macedonia was amongst the first to sign this Convention on 8 July 2011,[57] the previous Government failed to start the procedures for its ratification. The current Government (constituted on 1 June 2017), as promised in the electoral campaign, treated this Convention as a priority and the Governmental Cabinet's procedure for its ratification was concluded on 5 December 2017.[58]

The President of the country gave a New Year's speech on 26 December 2017, during which he made some very critical comments on the ratification of the Istanbul Convention.

The ratification of the Istanbul Convention is of paramount importance since it highlighted the issue of the amendments of a rather long list of legal acts where the issue of gender discrimination / equality

53 Latvia, Riga Regional Court Civil Cases Court Collegium (*Rīgas apgabaltiesas Civillietu tiesas kolēģija),* Judgment of 22 December 2016, Case No. C33533415.
54 Supreme Court, Assignments Sitting Decision of the Civil Case Department, Judgment of 30 June 2017, Case No. SKC – 1097/2017.
55 Latvia, Riga Regional Court Civil Cases Court Collegium (*Rīgas apgabaltiesas Civillietu tiesas kolēģija*), Decision of 17 August 2017, Case No. C33533415, CA-3489-16.
56 Proposal for ratification and voting results available at: https://www.sobranie.mk/materialdetails.nspx?materialId=53d249d3-50bb-44ae-b643-a86295d10b1f, accessed 2 January 2018.
57 https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/210/signatures?p_auth=prfMuyFl, accessed 2 January 2018.
58 Meeting of the Government – http://vlada.mk/sednica/41, accessed 2 January 2018.

is not adequately addressed. This list encompasses not only family law, laws on social protection and equality and antidiscrimination laws, but also laws on the police and penal system. Furthermore, it also has an effect on education and laws on health protection, as well as the media and laws on working relations, including the administration. Therefore, it was thought to be necessary, at least for the time being, to place reservations on Articles 30/2, 44/3, 55/1 and 59 of the Convention.

In addition to the fact that the above-mentioned list of legal acts to be amended is quite long, the main problem might be the fact that the ratification Act indicates the Ministry of Labour and Social Policy as the competent body for its implementation. Bearing in mind that, on one hand, legal changes are necessary in very different legal areas, and on the other the administrative practice of the Macedonian Ministries, it is hard to imagine that the Ministry of Labour and Social Policy could coordinate such a task, let alone implement it. Only the Governmental Cabinet has the authority to do this.

Internet source:
Proposal for ratification and voting results:
https://www.sobranie.mk/materialdetails.nspx?materialId=53d249d3-50bb-44ae-b643-a86295d10b1f
Annual Address by the President Ivanov in the Assembly of the Republic of Macedonia:
http://pretsedatel.mk/mk/2011-06-17-09-55-07/2011-07-19-10-40-39/4677.html

POLICY DEVELOPMENT

Female representation in elections for local self-government 2017

The local elections which took place on 15 October 2017 (first leg) and 29 October 2017 (second leg), were a grand victory for the Social Democrats (SDSM). Out of the 260 candidates for local mayors, 15 were female (5.7 % of the total applicants), of which 6 were elected as mayor (7.4 % of the 81 municipalities).

The female representation in the lists of candidates for council persons showed different figures. Of the 327 lists of candidates, 52 were headed by female candidates (15.9%).

Noteworthy in this context is the case of a rejected list submitted by the left political party 'Levica' in a municipality (Gjorche Petrov). The list was rejected due to a lack of male candidates. 'Levica' responded within the timeframe given by the State Electoral Commission (SEC) by substituting a female candidate with a male candidate.

Comparing the number of female mayors in 2017 to 2013 (4.7 %) there is a rise of about 2.7 %. However, criticism was raised by NGOs and the expert community during the campaigning period which led to a statement of the president of the SDSM (and Prime Minister) that a gender quota system should be introduced for mayors.

A rather visible and hard to dispute discrepancy was created between those categories of (political) positions that are legally regulated (Members of Parliament and councilpersons in the local self-government) and those categories that depend on the political actors' will (mayors, political ministers, heads of different state bodies etc.). However, there are visible changes in the political initiative in raising awareness regarding gender inequality. The best illustration of this is the presence of these issues in the programme of the latest Governmental Cabinet, where gender equality is regarded as an important topic.

Internet sources:
Final list of women in Parliament:
http://www.sobranie.mk/sostav-ns_article-lista-na-zeni-pratenici-2016-2020.nspx
Program of the Government:
http://vlada.mk/sites/default/files/programa/2017-2020/Programa_Vlada_2017-2020_MKD.pdf

MT Malta

POLICY DEVELOPMENT

Political party launches project to increase participation of women in politics between September 2017 and September 2027

Gender

In July 2017, Miriam Dalli, a member of the European Parliament and representative of the Labour Party in Malta, launched a project called LEAD aiming to increase the representation of women in the Labour Party. The Programme is divided into four phases with the aim of ensuring that by 2027 half of the candidates running in the general elections on behalf of the Labour Party will be women.

In order to reach the targets of the plan, the Labour Party will choose around 48 women over a four-year period and implement the Programme called LEAD through six main methods. The female participants will be mentored; they will apply what they learn to gain practical experience; a development plan will be set out; and they will be given opportunities in the media. A national campaign and networking activities will also be launched.

The first call for participants was launched in September 2017 and participants will be asked to commit themselves to standing as candidates for the general elections with the Labour Party. Childcare facilities will be offered throughout the programme, during election campaigns as well as during activities of a political nature.

The candidates fielded by political parties in Malta are pre-dominantly men. It is important to nurture possible candidates at an early stage and not at the eve of elections.

Internet source:
http://www.one.com.mt/news/2017/07/16/il-mara-bi-pjan-ghal-iktar-nisa/ (accessed 24 July 2017)

Women's rights Council launched by Minister for European Affairs and Equality

Gender

The Council for women's rights, which was launched by the Minister for European Affairs and Equality on 27 November 2017, aims to set up a think-tank composed of representatives of registered organisations working on women's rights. The Council currently consists of 23 different organisations but is open to further membership.

The lack of women in Parliament is one of the areas that need to be addressed by the Council. The Government is committed to strengthening equal rights in all areas including public life, employment and politics as well as in the private sphere with regard to family responsibilities.

Malta does not fare well in many areas with regard to gender equality. The deficit is seen mostly in politics but there are other gaps that need to be addressed in order to ensure gender parity.

Internet source:
https://www.timesofmalta.com/articles/view/20171127/local/womens-rights-council-brings-23-ngos-to-the-table.664255

The Netherlands

NL

LEGISLATIVE DEVELOPMENT

Ministerial Decree regarding the general duty to realize accessibility for persons with disabilities as provided in the Disability Discrimination Act (DDA)

Disability

As of 1 January 2017, the Disability Discrimination Act imposes a more general duty on all those bound by it to improve accessibility for people with disabilities in addition to the duty to provide reasonable accommodation in individual cases (Article 2a (1)).[59] As the Act covers not only employment but also access to goods and services including housing and education, the scope of this provision is wide. The duty is of a proactive, general nature and imposes the realisation – at least gradually – of accessibility for persons with disabilities, unless it creates a disproportionate burden. The further implementation of this provision is now ensured by a Ministerial Decree.[60]

The Decree stipulates that the duty of gradual realisation of accessibility entails at least the duty to immediately provide for facilities that are 'easy to achieve' in terms of effort and cost, and to then gradually provide for general accessibility. As regards the latter it will be crucial how much leeway the 'disproportionate burden' criterion will leave for justifying exceptions to the general duty to realise accessibility.

In addition, the Decree requires the Minister of Security and Justice to promote the development of action plans to realise general accessibility in all the sectors covered by the Act in cooperation with representative organisations of persons with disabilities, to monitor the implementation of the Decree and to report annually to Parliament.

Internet source:
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:
http://wetten.overheid.nl/BWBR0039653/2017-06-21

CASE LAW

Administrative High Court rules that self-employed women who did not receive a maternity benefit between 2004 and 2008 are entitled to compensation

Gender

On 27 July 2017, the Administrative High Court, the highest court in cases on social security, ruled that the State had breached the UN Convention on Women's Rights by abolishing the right to a maternity benefit for self-employed women in 2004 and re-introducing the same right in 2008 without creating an arrangement for the women who had given birth between 2004 and 2008. The Court ruled that the social security authorities have to compensate the self-employed women who did not receive a maternity benefit between 2004 and 2008. As such the Court upheld the decision by the Administrative Court of the Mid-Netherlands of 9 October 2016, and overturned two decisions by the Administrative Courts Amsterdam of 18 July 2016.

59 This amendment of the DDA was already 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.

60 Netherlands, Decree General accessibility for persons with a disability or chronic illness of 7 June 2017, Staatsblad 2017, 256 of 20 June 2017.

The claimants, three self-employed women, had been involved in litigation about their right to a maternity benefit since 2005, with the support of trade union 'FNV self-employed', the Association for women and law and the Clara Wichmann fund for test cases. A procedure in the Netherlands, up to the Dutch Supreme Court, yielded nothing. In the procedure before the CEDAW Committee, the Committee ruled in plain language that the women were entitled to a maternity benefit and that the State had breached the Convention on Women's Rights by not creating an arrangement for them. Even this ruling did not induce the State to set things right. The women then started yet another procedure, in which they asked the social security authorities to grant them the benefit. On 18 July 2016, the Amsterdam Administrative Court dismissed the claim of two of the claimants. The Administrative Court of the Mid-Netherlands allowed the claim of one of the other women. The latter decision has now been ratified by the Administrative High Court.

The Administrative High Court ruled in the first place that the opinion by CEDAW must be seen as 'authoritative' and as an opinion which is especially significant in the present procedure. The Court therefore follows CEDAW's point of view that Article 11(2)(b) of the UN Treaty concerns self-employed women as well. Subsequently the Court ruled that this article can be invoked directly. This may not have been the case at the time that the Dutch Supreme Court rendered its earlier judgment (in 2011), but the Supreme Court changed its case law on this subject in a judgment of 2014.

It follows from Article 11(2)(b) that pregnant self-employed women were entitled to some form of compensation in the period between 2004 and 2008 during which time no maternity benefit existed for this group. By not granting them this compensation the State breached its obligations under the UN Women's Treaty.

The foregoing does not mean that the women involved are, without a doubt, as yet entitled to a maternity benefit. It means that the social security authorities must take a decision on how to comply with Article 11(2)(b). If no (accurate) decision is taken within 16 weeks, the women will, however, be entitled to a maternity benefit on the basis of the law that applied until 1 August 2004 or the law that entered into force on 4 June 2008.

The judgment is relevant because 1) the authority of CEDAW is explicitly recognized, 2) it is confirmed that Article 11(2)(b) also relates to self-employed women, 3) the Court ruled that Article 11(2)(b) can be invoked directly, and 4) most important of all, self-employed women who gave birth between 1 August 2004 and 4 June 2008 and did not receive a maternity benefit are now entitled to compensation. This does not only apply to the three women involved in the proceedings, but also to approximately 17 000 other women. The social security authorities promised at an earlier stage that all women who are in the same situation as the claimants, will be treated in the same manner. It is expected that the social security authorities will consult the Minister of Social Affairs and Employment on how to comply with the judgment.

Internet source:
http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CRVB:2017:2461 (court decision)

Reasonable accommodation in access to goods and services for people with disabilities

Disability

The claimant is blind and wished to shop at a chemist's, therefore asking personnel to take her by the arm and guide her through the shop. Finding that this would be too cumbersome, the shop attendant instead offered to collect the items on her shopping list and bring them to her. As this arrangement would not enable the claimant to browse and select the items herself, she suggested that she could come to the shop at a calmer time to then be guided through the store as she wished, but this was also refused.

The claimant brought the case before the National Institute of Human Rights (NIHR), which concluded that the shop had violated its duty to provide reasonable accommodation under the Disability Discrimination Act.[61] It held that the accommodation offered by the shop was not sufficient, in particular because it had not really investigated whether providing the accommodation as suggested by the claimant herself would indeed impose a disproportionate burden. In this respect the NIHR emphasised that the purpose of the obligation to provide reasonable accommodation is to realise the autonomy of disabled persons to the greatest extent possible.[62]

Internet source:
https://www.mensenrechten.nl/publicaties/oordelen/2017-104/detail

Limitations on the wearing of religious dress in public functions

Religion or belief

The claimant is a Muslim woman working with the police, who wears a headscarf for religious reasons. The dress code of the police is based on so-called 'life style neutrality', with the aim of achieving a neutral and uniform appearance to enhance the authority and safety of police officers. As a consequence, all sorts of expressions of personal identity, including not just headscarves and other symbols of personal conviction but also conspicuous tattoos, haircuts and piercings are prohibited.

The claimant is employed as an 'intake and service assistant' with two main tasks: to answer the service number of the police and to take the reports of citizens through a video connection (in the latter situation, she has visible contact with citizens). Police personnel in visual contact with citizens through a video connection are usually in uniform, but due to the fact that the claimant is not allowed to wear her headscarf with the uniform, she has instead been allowed to accomplish this task while wearing her headscarf and civilian clothes. The claimant is not satisfied with this accommodation as it sets her apart and she considers that the prohibition to wear a headscarf with a uniform will limit her career opportunities within the police.

The NIHR found that not allowing the woman to wear her headscarf with a uniform constitutes indirect discrimination on grounds of religion.[63] Although the NIHR accepted the legitimacy of the goals pursued by the dress policy, it considered that in the specific circumstances of the case it was not necessary to apply this policy which was therefore not objectively justified. Indeed, the argument related to the safety of the police is not applicable as the work is done through a video connection, while the argument related to neutrality is found by the NIHR to be of limited importance considering the administrative nature of the work. The NIHR therefore recognises the importance of maintaining state neutrality in public functions but limits its consequences to situations where it can be regarded as strictly necessary.

Internet source:
https://www.mensenrechten.nl/publicaties/oordelen/2017-135/detail

Judgment by the Administrative High Court on less favourable treatment of an employee because of parental leave

Gender

On 23 November 2017 the Administrative High Court, the highest court in cases on social security, ruled that the police, in its capacity as employer, had breached the law by terminating the temporary assignment of a police officer because he had taken parental leave.

61 Netherlands, NIHR, Opinion No. 2017-104 of 7 September 2017.
62 The NIHR is a quasi-judicial body which issues non-binding Opinions. In the majority of cases, its opinions are followed by the conventional courts.
63 NIHR 20 November 2017, Opinion No. 2017-167. https://www.mensenrechten.nl/publicaties/oordelen/2017-135/detail.

The police officer in this case had been temporarily placed in a higher position for the duration of one year. One month before the start of his new position, he was granted parental leave for two days a week. Three months after the start of the new job, the police terminated the employee's assignment because they argued that his parental leave caused problems for the work process. The police officer contested this point of view in court, but his claim was dismissed by the court of first instance. The court ruled that the termination did not constitute 'less favourable treatment' within the meaning of the law, because the formal terms of employment did not change; only the temporary position ended.

On appeal, the Administrative High Court ruled that the termination of the temporary assignment did constitute less favourable treatment. The Court came to this decision because in the first place the termination harmed the career of the police officer by limiting the period during which he could gain experience in a higher position. Secondly, he suffered financial damage because his temporary allowance also stopped, and thirdly his file now stated that his attitude had not been constructive. The Administrative High Court referred to the fact that, following the implementation of Directive 2010/18/EU, a prohibition on less favourable treatment because of the use of parental leave had been introduced into the Employment and Care Act. This prohibition does not only refer to less favourable treatment in a formal sense, but also to disadvantages in a more material sense. The court furthermore pointed out that granting parental leave may be refused for business/organizational reasons, but that the court cannot justify less favourable treatment if the leave has already been granted. In this case the police organisation had granted the leave before the start of the temporary position, and therefore should have found a solution other than terminating the employee's contract in order to tackle problems in the work process.

The judgment is relevant because it clarifies that 'less favourable treatment' within the meaning of the law does not only include negative changes in the formal contractual position of the employee, but also changes that might have a negative effect on the career of an employee and changes of a temporary nature. The notion of 'less favourable treatment' must therefore be interpreted in a broad way. Also relevant is the fact that the Administrative High Court made it clear that business reasons may justify the refusal of parental leave, but cannot justify a less favourable treatment because of leave that has previously been granted. Both points are relevant for the rights of employees who take parental leave.

Internet source:
http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CRVB:2017:4067 (court decision)

NO Norway

CASE LAW

Tribunal of the Equality Body on the request for change of name in publications after gender change

Gender

The Tribunal of the Equality Body published a decision on 24 November 2017 regarding a request to the National Library to change a name in previous publications after the author had undergone a sex and subsequent name change. The National Library argued that this was an impossible request considering the design of the data catalogue system. They argued that changing the name would ruin the search function of the system.

The complainant argued that she had been placed in a less advantageous position than people who had not undergone a sex change, because it affected her career development since she could not rely on her previous work published under her old name.

The Tribunal found that the National Library Catalogue system was not in violation of the Gender Equality Act Section 5 on indirect discrimination. The Tribunal argued that the library's search system was not discriminatory, but was a system developed to enable people to search publications not based on a person's sex. The Tribunal emphasized that the same rules applied to all people, regardless of the reason why they may have changed their name.

The Tribunal further evaluated the question whether the library system was indirectly discriminatory or not. The Tribunal referred to the Ombud's evaluation of the case regarding the requirement of necessity. The Ombud took into consideration that the library system was developed to ensure the search options at a local, national as well as international level. The national library had explained that a specific rule for Norway on this matter would harm the international co-operation on this search engine. The Ombud addressed in its evaluation whether the strict rule by the library on name changes was proportionate in light of the consequences for the applicant having undergone a sex and name change. The Ombud acknowledged that the applicant had lost job options since she did not want to present previous work under her former name. Both the Ombud and the Tribunal acknowledged that this had serious consequences for the applicant. However, because the purposes of the library system are to provide a search engine both at national and international level, the Ombud and the Tribunal found that the personal interests had to give way. They concluded that no indirect discrimination had taken place.

Internet source:
http://www.diskrimineringsnemnda.no/media/2112/uttalelse-i-sak-30-2017-1.pdf

Poland

PL

CASE LAW

Court finds discrimination on the ground of sexual orientation by association

Sexual orientation

Shortly after the claimant, who is a well-known media personality, openly supported a petition on Facebook for legalising civil partnerships (of both different-sex and same-sex couples), he was informed by the Catholic priest who was organising a radio concert which the claimant was supposed to host, that his services were no longer required. The priest allegedly informed the claimant that his support for gay people was the reason for this change (allegedly using insulting terms).

The claimant brought a case of direct discrimination and harassment on the ground of sexual orientation by association against the relevant local diocese of the Roman Catholic Church.

The court of first instance dismissed the lawsuit, stating that there was no binding contract between the parties (in writing).[64] Furthermore, the court did not accept the shift of the burden of proof arguing that the claimant should have provided more evidence himself. Finally, the court also argued that the organiser of the concert being part of the Catholic Church structure has a right to refuse collaboration with persons who support ideas the Catholic Church does not agree with. In this regard, the court also relied on Article 5.7 of the Equal Treatment Act (ETA), which transposes into Polish law the exception for employers with an ethos based on religion or belief. The claimant appealed the ruling.

The court of second instance found that the oral agreement between the parties was binding, based on their past collaboration which had generally based been on oral contracts, the preparation of the parties already realised, and the fact that the name of the claimant was included in the leaflet informing the

64 Poland, X. District Court, *YZ and PTPA on behalf of YZ v Catholic Diocese of H.,* decision of 16 December 2016, No. I C 1326/15.

public about the concert.[65] The court thus applied the ETA to the contract, and found that the claimant had provided sufficient evidence on the probability of indirect discrimination on the ground of belief to shift the burden of proof to the respondent. The latter failed to prove that he terminated the oral contract for other than discriminatory reasons, and the court therefore found that discrimination had taken place. The court therefore rejected the claimant's claim of direct discrimination on grounds of sexual orientation (by association) but found indirect discrimination on grounds of religion instead.

The court further stated that Article 5.7 of the ETA did not apply, considering that the position was to lead a concert with non-religious songs. Therefore, the claimant's beliefs did not constitute a genuine and determining occupational requirement proportionate to the pursuit of a legitimate aim.

The claimant was awarded approximately EUR 240 (PLN 1000) in compensation (corresponding to the remuneration that he would have received for leading the two concerts planned). The same amount was also awarded to the Polish Society for Anti-Discrimination Law, which represented the claimant.

Printing house employee found guilty of refusal to provide services to LGBT initiative

Sexual orientation

A small printing company refused to print a roll-up for the Civil Society Organisation LGBT Business Forum, with the justification stated in an email that the company does not 'contribute to the promotion of [the] LGBT movement in [their] work'. The Ombud (national equality body) sent a motion to the police suggesting an investigation in relation to discrimination in access to services based on the Petty Crimes Code. The police agreed and filed a motion to the court to fine the company, under Article 138 of the Code of Petty Crimes which prohibits the refusal to provide services without just cause.

The District Court fined the printing company EUR 45 (PLN 200) in a simplified procedure without a hearing, based only on the motion of the police.[66] The court verdict was appealed.[67]

At this time, the case attracted quite some attention from the media as well as from the Minister of Justice/Prosecutor General and the (highly conservative) thinktank Ordo Iuris. For instance, on the website of the Ministry the Minister of Justice published a statement which was strongly criticised as a threat to the independence of the judiciary. The statement held that the verdict was 'unconstitutional' as it 'stifles the freedom of thought, beliefs and views, as well as the economic freedom and freedom of transactions.' It further referred to the right of the printing company's employee (who had sent the refusal email) 'not to support homosexual content' and to the duty of the courts to 'guard the constitutional freedom of conscience' and the freedom to pursue a business. It concluded that no 'ideological reasons' justify violating these fundamental principles.[68]

Furthermore, the thinktank Ordo Iuris prepared a petition to amend the Code of Petty Crimes by deleting the relevant provisions as these were being 'used by promoters of radical ideologies to limit the freedom of thought and economic activity. The petition was signed by more than 16,000 people.[69]

In March 2017, the first-instance court found that the printing company was guilty of committing the misdemeanour of refusing to provide services without good cause, as prohibited by Article 138 of the

65 Poland, S. Regional Court, *YZ and PTPA on behalf of YZ v Catholic Diocese of H.*, decision of 22 March 2017, No. 75/17.
66 Poland, Lódź-Widzew District Court, decision of July 2016, *Police v Printing house*.
67 When a decision adopted in a simplified procedure is challenged, the case starts from the beginning before a first-instance court.
68 Statement by the Minister of Justice, previously available at: https://ms.gov.pl/. The Statement has however subsequently been removed. All translations provided by the non-discrimination expert for Poland of the European network of legal experts in gender equality and non-discrimination.
69 http://www.maszwplyw.pl/zlikwidujmy-komunistyczne-relikty-w-kodeksie-wykroczen-ml2,60,k.html.

Code of Petty Crimes. The court indicated in this regard that the printer's convictions did not justify refusing to perform the service. However, the court waived the punishment.[70] The verdict was appealed.

The court of second instance rejected the appeal and upheld the ruling of the court of first instance. The court underlined in the oral justification that the sentence had no ideological tinge. 'The court does not speak for or against the orientation of LGBT groups or the accused. It is an expression of the principle of equality before the law'. The court stated that whether the case concerns a refusal to print roll-ups for LGBT organisations or promotional posters for pro-life movements, it should be assessed in exactly the same way – in terms of the misconception of understanding the freedom of conscience.[71]

Shortly after the second instance court decision, the Minister of Justice announced that he would challenge the decision as soon as the written reasoning of the decision is made public. The Minister filed a cassation complaint to the Supreme Court (in September 2017),[72] to which Ordo Iuris joined an Amicus Curiae brief.[73] At the time of writing the case is still pending.[74] In addition, the Minister challenged the relevant provisions of the Code of Petty Crimes before the Constitutional Tribunal. This case is also sill pending.[75]

Ombudsman withdraws complaint before the Constitutional Tribunal regarding constitutionality of the Equal Treatment Act

In March 2016, the Ombudsman (national equality body) submitted a complaint to the Constitutional Tribunal, challenging the constitutionality of the provisions of the Equal Treatment Act (ETA) due to the closed list of protected grounds (as opposed to the Constitution which prohibits discrimination on any ground).[76] The Ombudsman argued that the difference in scope between the constitutional anti-discrimination provisions and the ETA causes an unjustifiable difference of treatment with regard to the procedural rights of persons experiencing discrimination on grounds other than those listed in the ETA.

All grounds

In April 2017, the Ombudsman quite unexpectedly withdrew the complaint and asked for discontinuation (redemption) of the case. No justification was provided, but it may be considered that the Ombudsman withdrew the complaint out of fear that the Tribunal may use the opportunity of the case to narrow down rather than further broaden the scope of protection against discrimination. The CT took a resolution on discontinuation in October 2017, therefore the case was formally dropped.[77]

Internet source:
http://trybunal.gov.pl/s/k-1716/

70 Poland, Lódź-Widzew District Court, decision of 31 March 2017.
71 Poland, Łódź Regional Court, decision of 26 May 2017.
72 See at: http://www.sn.pl/sprawy/SitePages/e-Sprawa.aspx?ItemSID=7729-ce0d61b0-fe80-4050-bec5-582cc7606e5a&ListName=esprawa2017&Search=II%20KK%20333/17.
73 See at: http://www.ordoiuris.pl/wolnosc-gospodarcza/stanowisko-ordo-iuris-dla-sadu-najwyzszego-w-sprawie-drukarza-z-lodzi.
74 As of March 2018.
75 See at: http://trybunal.gov.pl/sprawy-w-trybunale/art/10008-kodeks-wykroczen-odmowa-swiadczenia-uslugi-klauzula-sumienia/.
76 See at: https://www.rpo.gov.pl/pl/content/wniosek-do-trybunalu-konstytucyjnego-ws-zakresu-stosowania-ustawy-o-rownym-traktowaniu.
77 For full information on the case, see the website of the Constitutional Tribunal at: http://trybunal.gov.pl/postepowanie-i-orzeczenia/postanowienia/art/9882-ustawa-o-wdrozeniu-niektorych-przepisow-unii-europejskiej-w-zakresie-rownego-traktowania/.

Discrimination of a breastfeeding mother at a restaurant

Gender

The young mother in this case claimed that she felt discriminated against when, at the request of another customer, the waiter of a restaurant asked her to move to the toilet to breastfeed her baby. According to the claimant, the waiter indicated the toilet as a more appropriate place to breastfeed. The restaurant on the other hand claimed that she was directed to a chair near the toilet. The owner argued that it was solely a matter of comfort for the mother and the other restaurant guests.

The case in this matter was lodged on behalf of the claimant by the Polish Anti-Discrimination Law Society (PTPA), with a claim for apologies and 10.000 PLN (EUR 1250) in damages. The PTPA claimed that forwarding a request from another customer in a restaurant to be more discrete while breastfeeding constituted discrimination on the basis of sex and was a violation of the mother's personal rights.

In the first instance the woman lost the case. In mid-December 2016, the Regional Court in Gdańsk dismissed her claim, deciding that no discrimination had taken place.[78] An appeal was lodged on behalf of the mother by PTPA.[79] The proceedings were also joined by the Commissioner for Human Rights. On 14 December 2017, the Court of Appeals changed the ruling of the court of first instance and ordered the restaurant owner to pay an amount of PLZ 2 000 in damages plus interest. Additionally, the restaurant owner was ordered to issue a public statement, apologizing to the woman for unlawfully preventing her to breastfeed her child at the restaurant table, which 'constituted discrimination with regard to sex'. The statement shall be published on a web portal, which published an article about the whole situation, generating very offensive comments addressed at the woman. The ruling is final.[80]

Internet source:
http://www.dziennikbaltycki.pl/wiadomosci/gdansk/a/prawomocny-wyrok-ws-karmienia-piersia-w-sopockiej-restauracji-przeprosiny-i-2-tys-zl-dla-kobiety-zdjecia,12768777/

POLICY DEVELOPMENT

The Ministry of Family, Work and Social Policy (MRPiPS) published a free app to measure the gender pay gap

Gender

Women in Poland earn approximately 7-17 % less than men, depending on the methodology used for collecting and processing data. This translates approximately to PLZ 700 (EUR 175) less wage per month. The higher the position, the greater the pay gap becomes, reaching up to thousands of PLZ. A report prepared by the Institute for Structural Research[81] indicates that the average hourly rate in Poland was approximately 10 % lower for women than for men. The pay gap increases even further, when considering that woman in Poland more often are better educated and work in branches with relatively higher salaries. After considering those and other factors, the average (adjusted) pay gap between men and women amounts to approximately 20 %. This difference in pay between women and men, which is not justified by the characteristics of the workers, is relatively high in Poland, compared to other European Countries. With respect to public companies the gender pay gap is relatively low. However, the

78 Ruling of the District Court in Gdańsk, of 12 December 2016, case No. IC 206/15 described in PL General Report 2017, Section 9.8.

79 The text of the appeal has been made available by PTPA; http://www.gazetaprawna.pl/artykuly/1088769,gdansk-14-grudnia-wyrok-ws-o-swobode-karmienia-piersia-w-restauracji.html.

80 The reasoning of this ruling is not available yet. The ruling has been referred, on the basis of the oral reasoning, as presented by the court during trial and press releases. http://www.dziennikbaltycki.pl/wiadomosci/gdansk/a/prawomocny-wyrok-ws-karmienia-piersia-w-sopockiej-restauracji-przeprosiny-i-2-tys-zl-dla-kobiety-zdjecia,12768777/ (accessed 29 January 2018).

81 The report was prepared by: I. Magda, J. Tyrowicz. L. van der Velde), Warsaw 2015. A link to this report is available on the same web page of the Ministry as the link to the gender pay gap tool, https://www.mpips.gov.pl/gfx/mpips/userfiles/_public/1_NOWA%20STRONA/Aktualnosci/2017/NierownoscPlacowa_raport.pdf (accessed 20 January 2018).

pay gap in private companies who employ the largest group, is relatively high, also in comparison with other countries in our region. It is also significantly above the EU average pay gap. The pay gap is also visible in flexible wage components. Woman tend to receive premiums and bonuses more frequently than men, yet the amounts are significantly lower. The adjusted pay gap amongst persons employed in companies employing 9 or more workers is even higher, amounting to as much as 30 %. Research has shown that in Poland the phenomenon of the so-called glass ceiling or sticky floor is quite present. In the conclusion of this report the authors say that: 'a relatively high and stable scale of (adjusted) pay inequalities, especially in the private sector, seems to indicate, that actions by state policy are required'.

The introduction of a pay-gap comparison tool by the MRPiPS[82] is an attempt to address this problem. The Ministry emphasizes that the gender pay gap is a complex phenomenon, because it is the result of many factors combined, influencing the situation of women and men on the labour market. There are objective differences, such as different levels of education, professional experience or exercised profession. There are also factors on which workers have less influence, such as segregation of the labour market, or length of service resulting from different social roles of men and women. Therefore, on the Ministry's website, where the link to the tool has been made available, employers are encouraged to use it, in order to provide equal pay for equal jobs or jobs of equal value, not only because it is an obligation of the employers, but also because it brings many advantages. It is promoted as: 'a way of creating more attractive work places, which will appeal to the most talented persons and motivate current employees. This on the other hand translates into higher competitiveness of a particular employer, which is very important, given the current situation on the 'employee market''. The MRIPS also emphasizes that many companies monitor the average pay with respect to different groups of employees. Point of reference is usually the average for the whole entity or a particular section. Without rejecting this approach, the MRPiPS proposes to attempt to estimate the so-called 'corrected pay gap', where the employee's wages are compared, under consideration of such features as: sex, age, education, occupied position, working time or length of service. Employees are also encouraged to 'use the option of sending to the MRPiPS the corrected gender pay gap, together with information indicated by the user of the application, which will be used only for statistical purposes'. The Ministry guarantees full anonymity of the users.

The fact that the Ministry of Family, Labour and Social Policy developed this tool for employers, to measure the differences in pay and decided to make it available free of charge to all employers, should be assessed positively. It seems however that the mere encouragement to use this tool, included in the introductory letter to employees, is not enough to efficiently combat the gender pay gap phenomenon, given the legal (constitutional and statutory) obligation to guarantee women and men equal pay.

Internet sources:
https://www.mpips.gov.pl/narzedzie-do-mierzenia-luki-placowej
https://www.mpips.gov.pl/gfx/mpips/userfiles/_public/1_NOWA%20STRONA/Aktualnosci/2017/NierownoscPlacowa_raport.pdf
https://www.mpips.gov.pl/aktualnosci-wszystkie/art,5543,9609,luka-placowa-w-polsce.html
http://infostrow.pl/biznes/kobiety-w-polsce-zarabiaja-sporo-mniej-niz-mezczyzni/cid,80064,a

82 The website of the Ministry, which developed the tool https://www.mpips.gov.pl/narzedzie-do-mierzenia-luki-placowej, does not provide any information on when it was launched. On 3 August 2017 the Ombud criticized the lack of publicity given to the tool in the intervention addressed to Minister of Family Labour and Social Policy Ms Rafalska.

PT Portugal

LEGISLATIVE DEVELOPMENT

New legal regime of prevention, prohibition and fight against discrimination on the ground of race/ethnic origin, nationality, ancestry and territory of origin

Racial or ethnic origin

On the basis of a Bill introduced by the Government in February 2017, Parliament passed a law on 7 July 2017, establishing the legal regime of prevention, prohibition and fight against discrimination on the ground of race/ethnic origin, nationality, ancestry and territory of origin.[83] This Law repealed the former legal regime of non-discrimination on the ground of race and ethnic origin which had transposed the Racial Equality Directive, seeking a more transversal and comprehensive normative approach.

The new law is innovative in the following respects:

a) It extends the list of protected grounds, to also include ancestry and territory of origin (Article 1);
b) It introduces the explicit prohibition of discrimination by association and of multiple discrimination (Article 3);[84]
c) It modifies the composition (Article 7) and the powers of the Commission for Equality and Against Racial Discrimination (Article 8);
d) It modifies the legal regime of administrative sanctions (Article 16-26);
e) It introduces the option of a mediation process at the request of the parties or driven by the Commission (Article 11).

The revised composition of the Commission for Equality and against Racial Discrimination has increased the number of representatives of anti-discrimination associations and Members of Parliament, thereby decreasing the (previously predominant) weight of the government representatives within the Commission. The body has also been provided with additional powers, including the following:

- to publish the cases of violation of the new law (either court cases or cases brought to the attention of the Commission);
- to propose revocation of statutes, regulations and administrative acts that contravene the principle of equality and non-discrimination;
- to provide victims with the relevant information for the defence of their rights;
- to decide on cases within administrative processes, including applying penalties such as fines.

With regard to the legal regime of administrative penalties, the law stipulates that all discriminatory practices shall be subjected to administrative sanctions as foreseen by law. The competence for initiating the proceedings rests with the President of the Commission, who is the High Commissioner for Migration and is empowered to initiate proceedings and investigate the case. The fines paid will benefit the budget of the Commission directly, thereby providing some limited financial independence from Government.

Internet source:
https://dre.pt/web/guest/home/-/dre/108038372/details/maximized

83 Portugal, Law No. 93/2017, published in the Portuguese official journal of 23 August 2017 and entered into force on 1 September 2017.
84 However, the Law foresees no explicit and direct consequences of multiple as opposed to single-ground discrimination, with regard to sanctions etc.

Women on Company Boards; new legislation

Gender

On 1 August 2017, the National Parliament approved Law No. 62/2017 concerning women on company boards. The new law applies to public companies and public institutions (at central, regional or local level), and to listed private companies. It establishes a minimum representation of women on executive company boards and surveillance boards. For public companies, the required minimum of female board members will be 33.3% as of 1 January 2018. For private listed companies, the minimum is 20 % from 1 January 2018, but increasing to 33.3% from 1 January 2020.

For the first time in Portugal, a mandatory minimum quota for women on decision-making boards for private listed companies has been set (Article 1). Prior to this legislation only public companies were subject to such a rule and private companies were merely recommended to facilitate the access of women to board positions.

The notion of 'boards' for the purposes of this law is wide, in the sense that it includes executive boards, administrative boards and surveillance boards. And since the minimum quota of women is imposed on each of these boards (Article 1 (1), Article 3 and Article 4), the influence of women at all levels of decision-making in companies will be effective.

The sanctions imposed for a breach of the minimum representation of women on company boards are severe, including the invalidity of the company's decision appointment of the irregular boards and, if the irregularity persists, the application of administrative fines (Article 6). These sanctions may be key to ensure the practical implementation of this piece of legislation.

The law also imposes the duty to elaborate their annual equality plans on companies. The aim of these plans is to achieve equal opportunities and equal treatment of women and men, and to promote the reconciliation of professional and family life at the company. These plans must follow the guidelines indicated by the Public Equality Agency in Employment Area (CITE) (Article 7). This is also a very important provision because until now, these plans were not mandatory.

The timetable for the adjustment of the companies to the minimum quota of 33.3% is relatively short (Article 4 and 5), so the measure will be in place in the coming years.

Internet source:
https://dre.pt/

New legislation concerning harassment

Gender

The Labour Code (LC) and the General Law for Civil Servants and other public employees (*Lei Geral do Trabalho em Funções Públicas* (LGTFP)), were amended by Law No. 73/2017 of 16 August 2017, in the field of harassment practises. The changes introduced are related not only to discriminatory and sexual harassment but to all forms of harassment. The changes are intended to reinforce the protection of victims of harassment in employment by reinforcing the duties of the employer in this area; the damage compensation rights and the protection of the victims and of the witnesses against victimisation and dismissal.

The introduced measures reinforce the protection already granted by the LC and by the LGTFP to harassment victims in employment, mainly in four areas: by reinforcing the employers' duties in this area (the employer is now compelled to adopt Codes of Conduct in this area if the company has 7 or more employees and must conduct a disciplinary enquiry when an alleged situation of harassment in the company is reported – Article 127 (1) (k and l) of the LC, introduced by Law No. 73/2017); by reinforcing the protection of harassment victims in relation to damage compensation rights (including in the case

of professional disease caused by those practises – Article 283 of the LC), and as regards victimisation and unfair dismissal (Article 29 (6), Article 331(2)(b) and Article 394 (2) (f) of the LC, introduced by Law No. 73/2017); by protecting the witnesses of harassment practices against victimisation and unfair dismissal (Article 29 (6) of the LC, introduced by Law No. 73/2017); and by reinforcing the sanction system attached to harassment practises (Article 29(5) and Article 127(7) of the LC, introduced by Law No. 73/2017).

Internet source:
www.dre.pt

RO Romania

LEGISLATIVE DEVELOPMENT

Privately-run protected units for persons with disabilities are closed by the Government as part of major legislative reshuffle of relevant legislation

Disability

On 4 August 2017, the Government adopted Emergency Ordinance 60/2017 which introduces and modifies several clauses regarding access to employment of persons with disabilities and introduces a new way of calculating the monthly social benefits granted to persons with disabilities by linking them to the development of the social reference indicator.[85]

The most controversial and criticised amendment is the rewording of Article 81 of Law 448/2006 on 'protected units', i.e. workshops or small factories developed to secure employment for persons with disabilities, usually run by NGOs but also by private for-profit actors. The revised Article 81 limits the possibility to establish protected units to public entities, without providing for any accreditation mechanism to prevent the dissolution of existing (privately run) protected units. Of the more than 700 existing protected units, only one operates within a public institution, while the rest are privately run, 206 of which are established by NGOs supporting persons with disabilities. The explanatory note of the emergency ordinance suggests, without providing actual data, that some of the protected units abuse their legal regime as persons with disabilities employed are too few or only have a part-time contract. The amended provisions do not foresee any alternative mechanisms for the inclusion of persons with disabilities in the labour market. Some NGOs have called upon the Ombudsman to address the Constitutional Court, claiming that the revision of Article 81 is unconstitutional. In addition, directly affected privately-run protected units can challenge the emergency ordinance in court.

Furthermore, Article 78 of the same Act is also amended, regarding the sanction imposed on entities with more than 50 employees which fail to respect the quota of employing persons with disabilities for at least 0.4% of the total workforce. The fine imposed for each position filled by a person without any disability in breach of the quota, was therefore increased from 50% to 100% of the minimum salary, to be paid on a monthly basis to the state budget. The amendments introduce an obligation to organise selection competitions to hire only persons with disabilities, although no sanction is foreseen.

The Emergency Ordinance was adopted despite the protests of NGOs supporting persons with disabilities and of negative advisory opinions issued by the Economic and Social Council.

85 Emergency Ordinance 60 of 4 August 2017 on modifying Law 448 from 2006 on the protection and promotion of the rights of persons with a handicap.

Internet source:
Emergency Ordinance 60/2017:
http://www.cdep.ro/pls/legis/legis_pck.frame

CASE LAW

Multiple discrimination against Romani women in public discourse

Gender

Racial or ethnic origin

On 6 February 2017, journalist Victor Ciutacu commented on anti-corruption and anti-government protesters in Victoriei Square (Piața Victoriei) in a political talk show. Amongst the protesters was an opposition party leader who brought his six-month-old child to the protest. Mr Ciutacu implied that such parents are irresponsible. To illustrate his remark, Mr Ciutacu compared the protester's behaviour with what he called typical Romani women behaviour. Allegedly, Romani women involve their babies in situations with the police to prevent them from enforcing the law in Roma communities. Mr Ciutacu said 'what if a crazy person came, took their baby and threw it to the ground? (...) the same way gypsy women wearing (traditional) skirts throw their new-borns when the gendarmes arrive to cut their illegal electricity connection'.

The National Council for Combating Discrimination *(Consiliul Național pentru Combaterea Discriminării)* addressed the case in Decision No.484 of 6 September 2017. The case was brought to the Council by E-Romnja, a Romani women's organization. The national equality body decided that Mr Ciutacu's statement was discriminatory on the grounds of sex and ethnic origin. The Council imposed a written warning, the lowest possible sanction. The Council justified this low sanction by stating that limitations of the freedom of expression should not be disproportionate. Furthermore, Mr Ciutacu was a first-time offender. The respondent was also ordered to publish the decision in a national newspaper.

This is the first case where the national equality body finds multiple discrimination against Romani women. According to the National Council for Combating Discrimination, in addition to ethnic origin, the gender dimension is clear in the case due to the reference to Romani women's traditional skirts. The decision raises issues regarding how multiple discrimination is sanctioned. Article 2(6) of the Anti-Discrimination Law stipulates that multiple discrimination is an aggravating circumstance. At the same time, the long-standing jurisprudence of the national equality body is that sanctions for discriminatory public statements rarely involve more than a written warning. The national equality body did not explain how they balanced these two opposing approaches to sanctioning to ensure effective, proportionate and dissuasive sanctioning.

National equality body assessing situation-testing case

Racial or ethnic origin

On 31 August 2017, an anonymous 'vlogger posted on social media (YouTube) a video in which he tries to buy food from the grill stand of a supermarket in the Szekely region (the region of Transylvania which has a Hungarian-speaking majority). The shop assistant attempts to make the transaction but eventually gives his money back, seemingly because he was speaking Romanian. The recording rapidly went viral, leading to nationalistic discourse and claims of discrimination of the Romanian population living in the Szekely region.

The National Council for Combating Discrimination (NCCD) started an ex-officio investigation looking into the supermarket's alleged refusal of access to services on grounds of belonging to a national minority (given that he was Romanian in a region where the majority is Hungarian) and on grounds of language. In its decision, the NCCD noted that the recording of the incident constituted situation testing and explained the specificity of this tool in proving discrimination. In its reasoning, the NCCD defined testing as 'a role play, in which a person is in the position of perpetrating a discrimination without knowing that

he/she is under observation, monitoring. Testing entails the presence of a person who has a certain characteristic which can lead the person being monitored to have a certain discriminatory behaviour, compared to another person who does not have the same characteristic. The purpose of the surveillance is in observing the behaviour of the person under monitoring in relation to the person having a certain characteristic, in comparison with the person lacking the same characteristic.' The decision mentions that the admissibility of the evidence resulting from testing depends on 'the methodological rigor of the procedure, the elements of ethics regarding the accuracy of the proof and the existence or not of a certain degree of incitement during the testing.'

The NCCD found that the recording of the testing did not observe the ethical rules regarding the accuracy of the evidence as the recording was not provided in its entirety, having been cut and pasted, without providing the full information and without including the dialogue of the vlogger with the manager of the supermarket who explained to him that the grill stand was not yet open. The decision also found that the vlogger incited the response through his own behaviour.[86] The NCCD concluded that the case did not amount to direct discrimination as no clients, regardless of their ethnic origin, were served before 10 a.m. In addition, the NCCD condemned any conduct of inciting hatred on the grounds of ethnic origin through disseminating incomplete or false information, 'exploiting existing biases in the Romanian society, with the purpose or effect of creating tension in the interethnic relations.'

Internet source:
Decision of the National Council for Combating Discrimination available in Romanian at:
http://api.components.ro/uploads/1d3a0bf8b95391b825aa56853282d5da/2017/09/4A_Kaufland_etnie_limba_neconstatare__1_.pdf

RS Serbia

CASE LAW

Free IT course for women

Gender

This case concerns a complaint concerning the Junior FrontEnd (Web) developer course offered by NGO 'Z', which was offered free of charge only to female candidates. The Ministry of Trade, Tourism and Telecommunications financed this initiative. The applicant claimed that this practise discriminated against male candidates interested in taking part in the course.

The Ministry announced a Public Invitation for allocation of funds for programmes in the field of information society development in the Republic of Serbia in 2017, with the aim to promote Information and Communication Technologies (ICT) among women, as well as to increase their number in ICT occupations. Current analysis shows that only 3 % of the women interested in training have sufficient financial resources to independently finance it. Therefore, the course was designed with the aim to qualify for a position of Junior FrontEnd (Web) Developer and was open to all adult citizens who have completed at least secondary education and wanted qualification in the field of ICT. Female citizens of the Republic of Serbia who have at least secondary education and do not have formal education in the field of ICT could participate free of charge.

On 5 November 2017, the Commissioner for the Protection of Equality assessed the relevant anti-discrimination legal framework. It concluded that the Constitution (Article 21, Par. 4),[87] the Law on

86 Romania, National Council for Combating Discrimination, Decision No. 486 of 6 September 2017.
87 The Constitution of the Republic of Serbia, *The Official Gazette of the Republic of Serbia*, No. 98/2006.

the Prohibition of discrimination (Article 14)[88] and the Law on Gender Equality (Article 7)[89] allow the introduction of special measures in order to eliminate and prevent unequal position of women and men, and those measures are not considered as discrimination. The Commissioner further considered that the National Strategy for Gender Equality (2016-2020)[90] sets the following goals; the improvement of the economic position of women in the labour market; encouragement and support of the participation of girls and women in engineering and new technologies; an increase of the engagement of women in areas such as science, technology, engineering and mathematics, the removal of discrimination against women in these areas and provision of measures for the advancement of women in science. In addition, the National Action Plan for Employment for 2017,[91] adopted by the Government of the Republic of Serbia, states that women are harder to employ and it is foreseen that they should be included in programmes and measures of active employment policy.

The Commissioner found that women make up only 20 % of the employees in the field of ICT, and that supporting programmes for their training and qualification in this area represents an affirmative measure to improve their position in the field of ICT. Therefore, the Commissioner was of the opinion that by providing free training for women in ICT, the Ministry of Trade, Tourism and Telecommunications, as well as the Association of Citizens 'Z', which conducted the training, did not violate the provisions of the Law on the Prohibition of Discrimination.

Internet source:
http://ravnopravnost.gov.rs/rs/prituzba-a-c-potiv-ug-z-i-ministarstva-ttt-zbog-diskriminacije-po-osnovu-pola-u-oblasti-rada-i-zaposljavanja/

POLICY DEVELOPMENT

Access to services for blind and visually impaired people

Disability

The Commissioner for the Protection of Equality (CPE) has issued a general measure[92] to the Ministry of Justice and the Chamber of Public Notaries in order to revise discriminatory tariffs for persons with disabilities in the provision of services. The CPE received a complaint from an individual referring to the numerous problems that blind and visually impaired people face in exercising their rights, in particular their obligation to pay increased tariffs to notaries for certain services, when they need to ensure the presence of a witness or an interpreter.

In its general measure, the CPE emphasized that despite a very solid legal anti-discrimination framework in Serbia, persons with disabilities are still exposed to widespread discrimination, despite the adoption of amendments to the Law on the Prevention of Discrimination against Persons with Disabilities in 2016.[93] The amended provisions stipulate that public authorities are obliged to allow persons with disabilities – in particular those who are blind or visually impaired – to use personal facsimile stamps in order to sign legal documents. Therefore, acting under Article 33, paras 7 and 9 of the Law on the Prohibition of Discrimination,[94] the CPE issued a general measure to the Ministry of Justice and the Chamber of Public

88 The Law on the Prohibition of Discrimination, *The Official Gazette of the Republic of Serbia,* No. 22/2009.
89 The Law on Gender Equality, *The Official Gazette of the Republic of Serbia,* No. 104/2009.
90 The National Strategy for Gender Equality, *The Official Gazette of the Republic of Serbia,* No. 04/2016.
91 The National Action Plan for Employment for 2017, *The Official Gazette of the Republic of Serbia,* No. 92/2016.
92 'General measures' are issued by the CPE, acting under Article 33, par. 7, which prescribes that the CPE, among others, monitors the implementation of laws and other regulations, and under Article 33, par. 9, which prescribes that the CPE recommends measures to public authorities, aimed at ensuring equality. In its general measures, the CPE issues general recommendations to particular public institutions which usually imply changes of policy or legislation.
93 Serbia, The Law on the Amendments to the Law on Prevention of Discrimination against Persons with Disabilities, *Official Gazette of the Republic of Serbia*, No. 13/16, 19 February 2016.
94 Serbia, The Law on the Prohibition of Discrimination, *Official Gazette of the Republic of Serbia*, No. 22/09, 26 March 2009.

Notaries to take action under their competences to amend the Notary Tariff[95] and to ensure that it is not discriminatory to persons with disabilities, as required by Serbian anti-discrimination legislation and ratified international treaties.

The measure was issued on 22 May and published on 19 June 2017.[96] Subsequently, the Ministry of Justice and the Public Procurement Chamber amended the Notary Tariff to ensure that visually impaired people as well as people who are deaf or unable to speak do not pay increased tariffs compared to other citizens.[97]

Internet source:
http://ravnopravnost.gov.rs/preporuka-mera-za-ostvarivanje-ravnopravnosti-osoba-sa-invaliditetom-u-postupku-koriscenja-usluga-javnih-beleznika/

SK

Slovakia

CASE LAW

Racial or ethnic origin

Supreme court recognises the positive obligation of government institutions to prevent residential segregation of Roma minority

The claimants in this case were of a Roma ethnic minority and brought an action against the Town of Sabinov for illegally moving them out of rental apartments owned by the town in a central area and into new rental apartments of a lower standard, far from town infrastructure. As only tenants of Roma ethnic origin had been moved, this led to their segregation. They simultaneously sued the Ministry of Transport and Construction for subsidising this town-building project despite its discriminatory nature and for not preventing segregation of Roma tenants.

The claimants filed the lawsuits in the District Court in Prešov in 2007, which ruled that the defendants had breached the principle of equal treatment and the duty to adopt measures to prevent discrimination. The District Court emphasised the application of the outdated concept of formal equality and the need for a strict scrutiny test for a 'suspicious criterion' consisting of ethnicity. The court awarded to each claimant financial compensation of EUR 1 000 (dismissing the rest of their claims).[98] However, following an appeal by the defendants, the claimants' case was fully dismissed by the Regional Court in Prešov in May 2010.[99] The legal representative of the Roma claimants referred the case to the Supreme Court of the Slovak Republic, which (in February 2012) overturned the decision of the Regional Court and referred the case back to the court of first instance for further proceedings.[100] When issuing their decisions, both the first-instance and the second-instance courts confirmed their initial decisions, thus bringing the case back to the Supreme Court for a ruling.[101]

In April 2017, the Supreme Court accentuated the importance to consider this case in the broader context of the situation of the Roma minority in Slovak society and its vulnerable position referring to the

95 Serbia, Notary Tariff, *Official Gazette of the Republic of Serbia*, No. 91/14, 103/14, 12/16, 17/17, 29 August 2017. The Notary Tariff, pursuant to Article 135 of the Law on Public Notary, was established by the Ministry of Justice.
96 General measure, No. 07-00-111/2017-02, 22 May 2017.
97 The Commissioner for the Protection of Equality, Annual report for 2017, Belgrade, 15 March 2018, p. 99.
98 Slovakia, Prešov District Court Decision No. 25C197/2007 – 585 of 15 June 2009. For further information, please see *European Anti-Discrimination Law Review*, Issue 12 (July 2011), pp. 70-71.
99 Slovakia, Prešov Regional Court Decision No13 Co 44/2009 of 13 May 2010.
100 Slovakia, Supreme Court Decision No 5 Cdo 257/2010 of 22 February 2012.
101 Slovakia, Prešov Regional Court Decision 13 Co 21/2012 of 19 April 2012; Prešov District Court Decision No. 251/2012-33 of 22 October 2012; Prešov Regional Court Decision No. 2 Co11/2013 of 11 March 2014.

relevant decisions of the ECtHR.[102] Since only Roma tenants were moved to the apartments of lower standard outside the town, the Supreme Court found it reasonable to conclude that they were treated differently from the other inhabitants. It stated that the claimants had been entitled to claim their rights as protected by the antidiscrimination laws, even though they did not claim that the termination of their rental agreements by the town was illegal. According to the Supreme Court, it was premature for the Regional Court to legally assess the fact that the claimants had agreed to move to new rental apartments and voluntarily signed the new rental agreements before having determined whether discrimination was proven. However, in this regard it added that even if the claimants had agreed with their discrimination, such consent would be relevant only if it had been informed. The Court further stated that even though the town had fulfilled all conditions for receiving the subsidy for building the apartment buildings from the Ministry of Transport, the principles of equal treatment stemming from the Constitution and international treaties had to be prioritized and respected.

Regarding the responsibility of the Ministry of Transport, the Supreme Court stressed that even though the relevant directive of the Ministry on providing subsidies for building projects can appear to be legally neutral, the Ministry is obliged to consider compliance of this provision with the principle of equal treatment when applying it in concrete cases. The Ministry is also obliged to take positive measures if it finds that the application of the given provision may imply possible discrimination. In this regard, when the request of the town for the subsidy contained facts implying possible discrimination, the Ministry of Transport was obliged to examine the circumstances under which the subsidy was supposed to be used. If the use of the subsidy eventually led to the segregation of a minority population, the legal conditions for providing the subsidy would not be fulfilled due to the contradiction with constitutional principles and international obligations of Slovakia.

The Supreme court again overturned the Regional Court's decision and returned the case to the same Regional Court for further proceedings.

Internet source:
The decision has not yet been published and will be available on:
https://obcan.justice.sk/infosud/-/infosud/zoznam/rozhodnutie

Supreme Court rejects alleged obligation to consider impact of a building on racial segregation when providing a building permit

Racial or ethnic origin

Due to insufficient capacity, the city of Stara Lubovna and the Ministry of Education decided to expand the capacity of a local primary school by adding a low-cost annex to the school made up of metal containers. The school had been attended for a long time solely by Roma children from a nearby socially disadvantaged Roma community. During the building permit proceedings, local residents who owned land property adjacent to the land where the new school building was supposed to be built raised objections against the planned building while pointing at the segregation of Roma children that it would cause, contrary to public interest. The competent building office dismissed their objections and in August 2014 a construction permit was issued for the new school building.[103] Acting as an appeal administrative body, the Department of building and apartment policy of the District Office in Prešov dismissed the claimants' appeal and upheld this decision in October 2014.[104]

As a result, the claimants challenged the dismissal of their claim before the Regional Court in Presov which upheld the building permission.[105] The claimants then turned to the Supreme Court, arguing that the

102 Slovakia, Supreme Court decision No. 5 Cdo 18/2015 – 202 of 16 April 2017, *B.C. and others v Town of Sabinov and the Ministry of Transport and Construction of the Slovak republic* (delivered on 10 July 2017).
103 Slovakia, Decision of the village Nová Ľubovňa No 2014/00418-523 SÚ/Fa of 19 August 2014.
104 Slovakia, Prešov District Office decision No. OU-PO-OVBP2-2014/34204/91382/ŠSS-ZPM of 21 October 2014.
105 Slovakia, Prešov Regional Court decision No. 5 S 73/2014 of 16 December 2015.

legal obligation to consider the public interest when processing a building permit application necessarily also includes considering the impact of a potential building on segregation of racial minorities. Notably, they argued that omitting to consider the potential discriminatory impact of a new building is contrary to the domestic and international antidiscrimination legislation embracing a positive obligation to prevent discrimination.

The Supreme Court upheld the decision of the Regional Court and fully confirmed its reasoning.[106] It stated that a building office is not eligible to consider in administrative proceedings the potential discriminatory impact of the construction of a building, specifically the issues concerning segregation of the Roma minority. In this regard, it found the interpretation of the definition of 'public interest', provided by the claimants in the context of the Building Act, to be unreasonably broad. Further, it stated that the claimants were not entitled to submit such an administrative claim to the court as their individual rights were not violated, as they were not parents of Roma children who attended the segregated school. The Supreme Court also disregarded the request of the claimants to interrupt the court proceedings and refer the case to the CJEU for preliminary ruling as it found it groundless in respect to the legal issues in the given proceedings.

Internet source:
The decision is available at:
https://obcan.justice.sk/infosud/-/infosud/i-detail/rozhodnutie/6fa2ca6a-f186-4283-88d8-8dfbddfc1188%3Aa0068537-3f57-4d6b-9468-6a764c13d829

Regional Court upholds dismissive decision of first-instance court on *actio popularis* challenging a legal provision with alleged discriminatory impact on Roma women

Racial or ethnic origin

Gender

The relevant legislation providing the conditions under which birth allowances are granted stipulates that eligible persons are not entitled to receive these allowances if they leave the hospital after childbirth without a prior approval of their attending doctor. The NGO Center for Civil and Human Rights (the claimant), filed an *actio popularis* lawsuit under the domestic Antidiscrimination Act arguing that this legislation has disparate impact on Roma women and children from socially disadvantaged environments by limiting their ability to obtain the given social allowance, and thereby constitutes indirect discrimination. Providing statistical data to support its arguments, the claimant organisation argued that the legislation negatively impacts almost solely Roma women, who tend to leave hospitals after childbirth without the approval of the doctor. The claimant further argued that the relevant provision of the Law cannot be objectively justified by the legitimate aim pursued (to motivate women to stay in the hospital until they are medically fit to leave) and that the means of achieving this aim are not appropriate and necessary. The provision does not address or mitigate the documented reasons why some Roma women may choose to leave the hospital earlier than recommended after childbirth, which include widespread degrading and abusive treatment in hospitals. In addition to claiming racial discrimination, the claimant also argued discrimination on the ground of sex/gender as the discrimination occurs solely in a situation of giving birth. Also, the Slovak equality body has concluded that the relevant provision constituted indirect discrimination.[107]

On appeal of the first-instance court decision which had dismissed the lawsuit,[108] in September 2017 the Regional Court in Bratislava fully confirmed the decision and reasoning of the first-instance court.[109] This means that the Regional Court confirmed that civil courts in Slovakia are competent to adjudicate

106 Slovakia, Supreme Court decision No. 10Sžo/53/2016 of 20 June 2017, *M.P and M.S. against the Municipality Office Prešov, department of the construction and housing policy* (delivered on 18 August 2017).
107 Expert's opinion of the Slovak National Center for Human Rights from 15 August 2007.
108 Slovakia, Decision of the District Court Bratislava I, file No. 12C 231/2010 – 132 from 16 May 2014.
109 Slovakia, Regional Court in Bratislava, decision No. 14Co/552/2014 – 180 of 26 September 2017, *Poradňa pre občianske a ľudské práva (Center for Civil and Human Rights) against the Slovak republic represented by the National Council of the Slovak republic*.

on the conformity of legal provisions of equal legal force, but considered, with respect to the merits, that the *actio popularis* lawsuit was based on hypothetical assumptions and unspecified cases of alleged discrimination of Roma mothers. In this regard, the Court stated that the alleged indirect discrimination could be claimed before court only by directly affected individuals. Furthermore, it did not consider the legal provision to be discriminatory as the State is eligible to set conditions for providing social benefits with regard to the fact that parents of new-born children not only have rights to receive the benefits, but also duties of care. In this respect, it referred to the opinion of the Defender of Public Rights from 2007[110] stating that there are medical and psychological reasons why the mother should not leave the hospital after childbirth without approval of the doctor, which the challenged legal provision reflects. It could therefore not be considered discriminatory.

From the procedural point of view, the Regional Court confirmed that the eligible subjects (national equality body and eligible NGOs) can challenge the conformity of general legal provisions with the antidiscrimination legislation by *actio popularis* lawsuits. With respect to the merits of the case however, the Court did not recognise the concept of indirect discrimination at all and only examined whether the challenged legal provision fulfilled a legitimate aim, without considering its adequateness and necessity with regard to the documented negative impact on Roma women from socially disadvantaged environments and their children. The Court also rejected the possibility to claim indirect discrimination by *actio popularis* when concluding in principle that it can assess discrimination only when the case is brought by directly affected individual claimants.

Internet source:
The decision is available at:
https://www.poradna-prava.sk/sk/dokumenty/rozsudok-krajskeho-sudu-v-pripade-verejnej-zaloby-poradne-tykajucej-sa-pravneho-ustanovenia-s-diskriminacnym-dopadom-na-zeny/

Slovenia

SI

POLICY DEVELOPMENT

Council of Europe Human Rights Commissioner's Report

Racial or ethnic origin

Age

On 11 July 2017, the Commissioner for Human Rights of the Council of Europe released a report following his visit to Slovenia in March 2017, including several recommendations related to (non)discrimination. The Commissioner noted that the equality body (the Advocate of the Principle of Equality) had been strengthened following the adoption of the Protection against Discrimination Act in 2016. Taking into account the modest resources currently available to the Advocate, the Commissioner encouraged the Slovenian authorities to provide the Advocate with additional resources so that he can carry out his mandate effectively. He also encouraged the Advocate to rapidly outline his priorities and work plan, as well as to raise public awareness about his mandate.[111]

The Commissioner noted that the Roma people continue to be victims of prejudice and to face poor living conditions in some parts of the country, and urged the Slovenian authorities to formulate a clear strategy for the improvement of the situation of Roma.[112] He encouraged the authorities to monitor the

110 Slovakia, Opinion of the Defender of Public Rights of 06 June 2017.
111 Report by Nils Muižnieks, Commissioner For Human Rights of the Council of Europe Following His Visit to Slovenia from 20 to 23 March 2017, 11 July 2017, available at: https://rm.coe.int/report-on-the-visit-to-slovenia-from-20-to-23-march-2017-by-nils-muizn/1680730405, Para. 8.
112 Ibid., para. 86.

occurrence of *de facto* segregation of Roma children in pre-schools and schools,[113] and to ensure that all Roma families enjoy access to water, electricity and sanitation on the land where they live.[114] One of the challenges found by the Commissioner is the lack of data, caused by the Slovenian authorities' interpretation of data protection legislation which allegedly prevents them from collecting specific information on the situation of ethnic groups, including Roma. The Commissioner recalled in this regard that it is possible to collect data in an anonymous manner that does not jeopardise the protection of confidentiality and privacy, thereby facilitating targeted policy-making.[115]

Although measures have been taken to restore the status of many of the 'erased' people, the Commissioner recommended that those still without remedy should be given a possibility to integrate into Slovenian society with a regularised status. The Commissioner also advocated educational material regarding the 'erased' to be included in the national core curriculum of Slovenian schools.[116]

With regard to poverty, older people were identified as one of the most financially jeopardized groups. The Commissioner's recommendation urges the State to refrain from enacting reforms, including in the labour market, which could be detrimental to the welfare of older persons.[117]

Finally, the Commissioner's comments pertaining to political commitment to combating the population's hostility through outreach at the national and local level are timely and crucial to consider.

Internet source:
https://rm.coe.int/report-on-the-visit-to-slovenia-from-20-to-23-march-2017-by-nils-muizn/1680730405

ES Spain

LEGISLATIVE DEVELOPMENT

New social security benefits for self-employed workers with family responsibilities

Gender

A new law was passed on 24 October 2017 (Law 6/2017, 24 October 2017 on urgent reform of self-employed workers), establishing important changes in regulations applicable to self-employed workers. The law introduces reductions to social security contributions made by self-employed workers, in order to facilitate caring for family and dependents.

The new law established some changes in the existing social security benefits applicable to self-employed workers with family responsibilities. It is particularly interesting that Act 6/2017 creates a new social security benefit that applies to women returning to work as a self-employed person after maternity leave, or leave for adoption or caring for a child younger than six years.

In general, Act 6/2017 improves the current benefits in social security applied to self-employed workers with family responsibilities. However, the new Act has a negative impact regarding maternity/paternity leave or when the self-employed person cannot work because her working conditions form a risk for pregnancy or breastfeeding. In these cases the reduction in social security contribution will apply only if the leave period is longer than one month. Furthermore, Act 6/2017 has not changed the fact that two of

113 Ibid., para. 95.
114 Ibid., para. 90.
115 Ibid., para. 61.
116 Ibid., para. 106.
117 Ibid., para. 150.

the benefits will be applicable only if the self-employed person hires a substitute worker, in which case the self-employed person will have to pay the worker´s salary and social security contribution (which will probably be higher than the self-employed person's monthly contribution reduced by the new benefit).

Internet source:
The Act is available at:
https://www.boe.es/diario_boe/txt.php?id=BOE-A-2017-12207

Women on non-executive company boards

On 24 November 2017, the Government approved a Royal Decree transposing Directive 2013/36 and Directive 2014/95 on the disclosure of non-financial information specifically referring to measures taken by listed companies to increase the percentage of women in non-executive company boards. The Royal Decree 18/2017 was approved through an urgent legislative procedure, given that the deadline for the transposition of these Directives had already passed.

Royal Decree 18/2017 affects three other laws; the Code of Commerce (Royal Decree 22 August 1885), the Law of Corporations (Royal Legislative Decree 1/2010, of 2 July 2010) and the Law of Auditing (Law 22/2015, 20 July 2015). Referring specifically to the obligation of the disclosure of information for listed companies, the new Article 540.4.6 of the Law of Corporations states that a description of the diversity policy applied in the composition of the non-executive board of listed companies must be made public. The aspects to be taken into account include age, gender, and educational and professional backgrounds. The new Article 540.6.6 of the Law of Corporations states specifically that companies must refer to the measures they have taken to include women and reach a gender balance in their non-executive board (*Consejo de Administración*). If no such policy is applied, the statement must explain why this is the case. This Article almost literally reproduces what Article 20(1)(g) Directive 2013/34/EU, after being modified by Directive 2014/95/EU says, but adds a very interesting reference about the gender composition of non-executive boards. Article 540.4.6 of the old Law of Corporations stated that companies were obliged to publicize any measures taken in order to obtain a gender-balanced non-executive board. However, the current Royal Decree states that, if no such policy is applied, the statement shall contain an explanation as to why this is the case. This addition reinforces the objective set in Article 75 of the Law on Effective Equality. This article states that the companies that are obliged to submit a non-abbreviated profit and loss account 'will try' to include in their company's non-executive boards a number of women in order to reach a balanced presence of women and men over a period of eight years from the date of entry into force of the Law (the deadline was 24 March 2015). The objective refers to very large companies which cannot submit abbreviated profit and loss accounts, employ more than 250 workers and have a turnover exceeding EURO 22 million a year.

The concept of a balanced presence of women and men is contained in the Additional Provision 1 of the Law on Effective Equality. According to this provision, the presence of women and men is well-balanced when the number of people belonging to one sex on non-executive boards does not exceed 60 %. This means that the aimed percentage of the underrepresented sex is 40. This is a soft target, since companies only have the obligation to 'try' to reach this balance. Moreover, the obligation to aim for gender-balanced non-executive boards only applies to the large companies included in Article 75 of the Law on Effective Equality, and only these companies would have to offer explanations if no such policy is applied.

Internet sources:
Royal Decree 18/2017, of 24 November 2017 about non-financial statement and diversity:
http://noticias.juridicas.com/base_datos/Fiscal/608813-rdl-18-2017-de-24-nov-modifica-codigo-de-comercio-texto-refundido-de-la.html
Law on Effective Equality between women and men, Law 3/2007 of 22 March 2007:
https://www.boe.es/diario_boe/txt.php?id=BOE-A-2007-6115

POLICY DEVELOPMENT

Government to invest EUR 200 million in the first quarter of 2018 to combat gender-based violence

Gender

On 28 September 2017, the Spanish Parliament adopted a document which reflected the agreement of the majority of the political parties represented in Parliament to work together in the fight against gender-based violence. The document contained 200 concrete measures to be implemented mostly by the Government, the Autonomous Communities and local authorities over the next five years.

On 26 December 2017, the Government reported that EUR 200 million which were budgeted in the Agreement for 2018 would be allocated during the first quarter of the year in order to implement the 26 measures planned for 2018.

Internet sources:
Organic Law 1/2004, of 28 December 2004, of Integral Protection Measures against Gender Violence (*Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género*):
https://www.boe.es/diario_boe/txt.php?id=BOE-A-2004-21760
Summary of the Parliamentary Agreement against gender-based violence of 2017:
http://www.elderecho.com/actualidad/Congreso-aprueba-Pacto-Estado-Violencia-Genero_0_1140375145.html
Summary of the 26 measures of the Parliamentary Agreement against gender-based violence that have to be applied in 2018:
http://www.20minutos.es/noticia/3222480/0/26-medidas-pacto-estado-violencia-genero-2018/

SE Sweden

CASE LAW

Discrimination of Muslim dentist wanting to cover her underarms

Religion or belief

This case must be read together with the case of *Karolinska Institutet*[118] from November 2016, which concerned a Muslim student on the dental programme who was placed as an intern in a dental clinic. Workplace regulations required her to work with bare underarms in accordance with guidelines from the National Health and Welfare Board, but due to her religious convictions she asked to wear special disposable underarm protection instead. As the claimant in that case was a student, the respondent was the education provider and the case was therefore brought before the civil courts, although the facts of the case had appeared in an employment setting during the claimant's clinical work. The parties to that case agreed that the requirement of having bare underarms was more burdensome for some Muslim women compared to other groups, and the focus was therefore on the proportionality test. The Equality Ombudsman called a British expert, describing the reasons why British authorities believe that there is no hygienic problem with disposable underarm protection. The respondent however called a Swedish expert stating that such underarm protection caused genuine hygienic concerns. The Municipal Court decided that both experts' statements seemed scientific and credible and it was not possible to believe one more than the other. However, the Municipal Court noted that it was the education provider (alleged discriminator) who bore the burden of proof with regard to the objective justification of possible indirect

118 Stockholm Municipal Court, case No. T 3905-15, *Equality Ombudsman v The Swedish state through Karolinska Institutet*, judgment of 16 November 2016.

discrimination. Therefore, the remaining uncertainty should fall on the education provider who lost the case. The woman was awarded EUR 500 (SEK 5000 SEK) in discrimination damages.

In December 2017, a very similar case was brought before the Labour Court, which reached a very different conclusion.[119]

The People's Dentists of Stockholm County (*Folktandvården*) is a very important dental care provider owned by the Region of Stockholm. It required all dentists to work with bare underarms regardless of the outcome in the Municipal Court in the *Karolinska Institutet* case. A Muslim dentist was therefore disfavoured, and the Equality Ombudsman brought the case before the Labour Court.

The reasoning of the Labour Court is very similar to that of the Municipal Court up to the point when the employer presented the objective justification. Like the Municipal Court in the previous case, the Labour Court concluded that the experts on both sides were credible. The employer showed reasons why it was genuinely (albeit theoretically) possible that there could be a hygienic problem. The expert for the Equality Ombudsman showed that it was not possible to detect increased infections in Britain connected to permitting disposable underarm protection in that country. The case was therefore decided on the rules on burden of proof, although the Labour Court came to a very different conclusion than the Municipal Court.

The Labour Court stated that when the employer had presented the genuinely objective theoretical hygienic reasons, the burden of proof shifted back to the claimant. Since the Equality Ombudsman failed to disprove the employer's expert, the Equality Ombudsman lost the case. The main argument for this outcome was that when patient security is at risk the employer must be allowed a wide security margin when setting rules of hygiene (*försiktighetsprincipen* – the duty-of-care principle) and therefore any remaining doubt must fall on the claimant.

Internet source:
http://www.arbetsdomstolen.se/upload/pdf/2017/65-17.pdf

United Kingdom

UK

CASE LAW

Supreme Court ruling on tribunal fees challenge

The case involved a challenge brought by Unison (a trade union) against the tribunal fees that were imposed in 2013. Unison sought to challenge a Fees Order made pursuant to the Tribunals, Courts and Enforcement Act 2007, Sections 42(1) and 43(3), which required fees to be paid in respect of claims and appeals brought to the employment tribunals and the Employment Appeal Tribunal.[120] The fee level depends on whether the claim is type A (short and simple claims) or type B, including equal pay and discrimination claims, in which case the fee is EUR 1340 (GBP 1200). Relevant court statistics show that the imposition of fees had reduced the number of discrimination cases by around 70-80%.[121]

All grounds

119 Sweden, Labour Court, decision No. 65 of 2017, *Equality Ombudsman, The People's Dentists of Stockholm County*, of 20 December 2017.
120 See also *European equality law review*, Issue 2015/1, pp. 155-156.
121 *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51 at para 58, referring to the Review of the introduction of fees in the Employment Tribunals: Consultation on proposals for reform (Cm 9373) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/587649/Review-of-introduction-of-fees-in-employment-tribunals.pdf.

Unison argued that the introduction of the Fees Order was not a lawful exercise of the Lord Chancellor's statutory powers, because the prescribed fees unjustifiably interfere with the right of access to justice, and unlawfully discriminate against women and other protected groups. The Court of Appeal rejected the claim on the basis that the imposition of fees did not breach the principle of effectiveness and did not amount to unlawful discrimination.[122]

In July 2017, the Supreme Court overruled the Court of Appeal, finding that the Fees Order was unlawful under both domestic and EU law because it had the effect of preventing access to justice.[123] The Fees Order was also unlawful because it contravenes the EU-law guarantee of an effective remedy before a tribunal and imposes disproportionate limitations on the enforcement of EU employment rights. It was also found to be indirectly discriminatory under the Equality Act 2010 because the higher fees charged for more complex type B claims put women at a particular disadvantage, because a higher proportion of women bring type B than bring type A claims, and the differential fees could not be justified as a proportionate means of achieving a legitimate aim.

The Supreme Court held that the fees bear no direct relation to the value of the claims made, and can therefore act as a deterrent to claims for modest amounts or non-monetary remedies. The question of whether fees effectively prevent access to justice must be decided according to the likely impact of the fees on behaviour in the real world. Where low to middle income households can only afford fees by forgoing an acceptable standard of living, the fees cannot be regarded as affordable.

The charging of higher fees was not a proportionate means of achieving the stated aims of the Fees Order, i.e. to transfer the cost of the tribunal service from taxpayers to users and to encourage cases to be settled. The higher fee for type B cases was not an effective means of transferring costs from the tax payer. Moreover, both meritorious and unmeritorious claims could be deterred by the higher price, and there was no correlation between the higher fee and the merits of the case or incentives to settle. As a result, the charging of higher fees in type B cases could not be justified, and the Fees Order was indirectly discriminatory.

Internet source:
https://www.supremecourt.uk/cases/docs/uksc-2015-0233-judgment.pdf

122 United Kingdom, Court of Appeal decision No. [2015] EWCA Civ 935 of 26 August 2015, available at: http://www.bailii.org/ew/cases/EWCA/Civ/2015/935.html.

123 United Kingdom, Supreme Court decision No. [2017] UKSC 51, *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)*, of 26 July 2017.

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