

# European Gender Equality Law Review



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Maria do Rosário Palma Ramalho  
*Reconciling Family and Professional Life  
and the Gender Equality Principle  
in Employment*

Nurhan Süral  
*Compatibility of Turkey's Legal Rules  
on Pregnancy and Maternity  
with the EU Acquis*



# **European Gender Equality Law Review**

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

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# Introduction

*Susanne Burri\**

In its 2008 report on equality between women and men, the European Commission describes a steady increase of the average female employment rate in the European Union.<sup>1</sup> This rate was 57.2 % in 2006 on average for the 27 Member States, which means that the aim of the Lisbon strategy (60 % in 2010) is within reach. The female unemployment rate was the lowest in ten years (9 %). This is good news! Moreover, another study has shown that equality between women and men could contribute to an increase of the Gross National Income from 15 % up to 45 %.<sup>2</sup> In addition, the employment gap between women and men is narrowing.<sup>3</sup> This gap was, however, still 14.4 % in 2006 and it is even wider between older women and men (17.8 %). The gap between women and men with dependent children is also high (19 %). Part-time work is still much more common for women than men; three quarters of all part-time workers are women. These data highlight the importance of the issue of the reconciliation of work, private and family life. Problematic is also the fact that the gender pay gap is not diminishing and has remained at 15 % on average in the EU since 2003. The vertical segregation is still strong as well: only one out of three managers in companies is a woman. Moreover, occupational and sectoral segregation in the labour market stays relatively high, in particular in Estonia, Slovakia, Latvia and Finland.<sup>4</sup>

The European Commission and the European social partners have taken initiatives to address at least some of the problems in the employment field related to the reconciliation of work, private and family life, mainly by facilitating longer leave periods. Moreover, measures are for example also necessary in the area of childcare, workers need stronger influence on their individual working hours and facilities at school, like the so-called broad school, which offers all kinds of activities to children. The position of self-employed persons will probably be strengthened.

The proposal aimed at amending Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding is still pending.<sup>5</sup> No decision has been reached yet in the European Parliament. The proposed amendments concern in particular the provisions regarding the length of the maternity

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<sup>1</sup> European Commission, *Report on Equality between Women and Men 2008*, Luxembourg: Office for Official Publications of the European Communities, 2008, p. 8.

<sup>2</sup> Bulletin Quotidien Europe No. 9998, 15 October 2009.

<sup>3</sup> European Commission, *Report on Equality between Women and Men 2008*, Luxembourg: Office for Official Publications of the European Communities, 2008, p. 8.

<sup>4</sup> European Commission's Expert Group on Gender and Employment (EGGE), F. Bettio & A. Verashchagina, *Gender segregation in the labour market. Root causes, implications and policy responses in the EU*, European Commission, Luxembourg: Publication Office of the European Union, 2009, p. 7.

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

leave, the protection against dismissal and the employment rights of pregnant workers and workers who have recently given birth. The duration of the maternity leave (Article 8) would be increased from 14 weeks up to 18 weeks, of which six weeks must be taken after birth. There would no longer be any obligation to take a minimum number of weeks before childbirth. Any period of sick leave, up to four weeks before delivery, in the event of illness or complications arising from the pregnancy or childbirth should not shorten the period of maternity leave. The Directive would explicitly include a prohibition (in Article 10, in accordance with case law of the ECJ)<sup>6</sup> to make any preparations for a possible dismissal not due to exceptional circumstances during the maternity leave. In addition, if a woman is dismissed within a period of six months after the end of the maternity leave, she should be able to require a written motivation specifying the grounds of the dismissal. The payment during maternity leave should be equivalent to the full monthly salary received prior to maternity leave (Article 11(1)(a)). However, Member States could stipulate a ceiling, but not below the sick pay allowance. Finally, during or after maternity leave a worker would have a right to ask her employer to adapt her working patterns and hours to the new family situation and the employer would be obliged to consider such a request. But the employer would have no obligation to accept or follow-up on the request. It is not clear yet to which amendments of the proposal the deliberations in the European Parliament will lead.

The second proposal in the field of gender equality concerns the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, by which (if adopted) Directive 86/613/EEC will be repealed.<sup>7</sup> Many provisions of this proposal correspond to provisions of Directive 86/613/EEC, but have been updated in accordance to the most recent equality directives. This concerns, for example, the definitions of the concept of discrimination and positive action, provisions on compensation and reparation and equality bodies. The provisions apply to self-employed workers and assisting spouses, or life partners of self-employed workers when recognized by national law, not being employees or business partners (Article 2). The main proposed changes concern Article 7, which stipulates that female self-employed workers and assisting spouses should be entitled, at their request, to maternity leave as provided for in Directive 92/85/EEC. Maternity leave should be paid at a rate at least equivalent to the payment received in the event of sickness, subject to any ceiling laid down by national law. In addition, self-employed women should have as far as possible the option of temporary replacement services as an alternative to the financial allowance. This proposal has been adopted with some amendments by the European Parliament in first reading.<sup>8</sup> These amendments concern for example the mandatory registration of assisting spouses in view of their possible affiliation to sickness and invalidity insurances and pension schemes; a few explicit clarifications that rights also apply to life partners; and amendments regarding the social protection against sickness, invalidity and old age of assisting spouses and life partners in order to attribute them individual rights. It is now up to the Council to react to the proposal and to the amendments of the European Parliament.

Both proposals reflect the efforts of the Commission to harmonize EU gender equality legislation. The rights of in particular female workers in relation to pregnancy

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<sup>6</sup> ECJ 11 October 2007, Case C-460/06, *Paquay*.

<sup>7</sup> Proposal for a Directive of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC, COM (2008) 636.

<sup>8</sup> P6\_TA(2009)0364.

and maternity are further strengthened. This is certainly a step forward when full or nearly full pay is realised during the pregnancy and maternity leave. However, Member States still have the possibility to define a ceiling below full pay for certain allowances on the condition that the allowance is adequate and at least equivalent to sick pay. The proposed rights of self-employed women and assisting spouses or life partners in relation to pregnancy and maternity are certainly less far-reaching. In my view it is important to strengthen the position of women – whether employed or self-employed – during their pregnancy and maternity leave, in particular as regards financial aspects. However, long maternity leaves in themselves do not contribute to a more balanced share of family responsibilities between women and men. It is therefore crucial that other forms of leave such as paternity leave and parental leave are also available for parents on such conditions that all parents, also those with lower incomes, can afford taking such leaves if they wish to do so. Striking is the fact that both proposals of the Commission in first instance reinforce rights for women in relation to pregnancy and maternity leave. Less attention is paid to reconciliation issues, those being partly covered by the Directive on Parental Leave (96/34/EC), which implements the Framework Agreement of the European social partners. They therefore have the competence to amend their agreement, as they have done recently.

The European social partners have now reached an agreement on the issue of parental leave that might lead to Directive 96/34/EC<sup>9</sup> being repealed: the Directive which implemented their first Agreement on this issue.<sup>10</sup> The European Commission has published a proposal to implement the revised Framework Agreement of the European social partners.<sup>11</sup> If adopted, the duration of the individual parental leave on the grounds of birth or adoption of a child would increase from three up to four months per parent. The right to parental leave is an individual right and should not be transferable from one parent to the other. At least one of the four months is non-transferable between the parents under any circumstances. This month will be lost if only one parent takes the parental leave. This provision is meant to encourage a more equal use of parental leave by fathers and mothers. The agreement applies to all employees regardless of their type of contract (fixed-term, part-time etc.). Parents returning from parental leave may request changes to their working hours and/or working patterns for a set period of time. The employer shall consider and respond to such requests, taking into account both the employer's and the worker's needs. While a longer, sex-neutral parental leave is certainly an improvement compared to the current situation, a weakness of the Framework Agreement is that it does not require any pay or allowance during the leave. In practice, it is likely that women more than men are prepared to take such a leave.

I will now turn from this brief update on pending legislative proposals in the field of gender equality at EU level to the content of this fourth issue of the European Gender Equality Law Review, which is now available not only in electronic form, but also on paper (in English). The two articles in this issue develop the topic of the reconciliation of work, private and family life. Maria do Rosário Palma Ramalho highlights the link

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<sup>9</sup> See the recent case of the ECJ on the interpretation of Clause 2 of Directive 96/34/EC in relation to dismissal: ECJ 22 October 2009, Case C-116/08 (*Meerts*).

<sup>10</sup> See <http://ec.europa.eu/social/main.jsp?catId=420&langId=en&newsId=526&furtherNews=yes>, accessed 21 June 2009.

<sup>11</sup> Proposal for a Council Directive implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, COM (2009) 410.

between gender equality and reconciliation issues, in particular in her analysis of the difficulties to implement gender equality in a context where discrimination at the workplace often occurs in relation to care responsibilities. She criticizes the current approach to maternity as an exception to the principle of equal treatment between women and men, highlighting the limits of such approach. Instead, she suggests further developing an integrated approach, in which maternity and paternity protection go hand in hand and which recognises that a balanced reconciliation of work and family life forms a material condition for gender equality.

Nurhan Süral offers in her contribution an overview of the main provisions of Turkish law in relation to pregnancy and maternity in the light of the community acquis. In her view, the impact of EU gender equality law on Turkish labour law is indisputable and has resulted in many legislative changes. She also outlines the disadvantages of far-reaching sex-specific protective measures – such as a long (partially paid, mainly unpaid) maternity leave – in particular when employers become more reluctant to hire women. Given the relatively low employment rate of women in Turkey, Süral stresses the necessity of measures to increase their employment rate and to facilitate the reconciliation of work, private and family life, not only in law but also in practice. She considers this no easy task, in particular in the light of the historical background of labour relations in Turkey and the reluctance of social partners to engage in for example flexible work arrangements.

In their individual contributions, the independent experts of the European Network of Legal Experts in the field of Gender Equality highlight interesting developments at national level. They discuss legislative initiatives, recent case law and current policies in the 27 Member States of the European Union and three EEA countries (Iceland, Liechtenstein and Norway). In some countries new legislation has been adopted. For example in Belgium, where the protection of pregnant workers confronted with health risks has been improved. In Italy, measures have been taken to combat violence against women, in particular the introduction of a prohibition of ‘persecutory acts’ (such as stalking). In the Netherlands employers are obliged to protect their employees as much as possible against psychosocial pressures and discrimination is now explicitly listed as a possible cause of such pressure. By contrast, a proposal to amend the Bulgarian Family Code in order to incorporate the recognition of life partners – including same-sex partnerships – gave rise to strong debate in society and was not adopted. A proposal for a Civil Partnership Bill – also including same-sex couples – has been published in Ireland, but has not yet been debated. In France, there is much debate after a recent judgement of the *Cour de Cassation* about advantages for mothers who have raised children in pension schemes. The Court considered such advantages contrary to Article 14 of the European Convention on Human Rights. In the UK, the long-awaited proposal for a new Equality Bill was published, which would incorporate in a single text all existing discrimination law provisions. In the Czech Republic, the Anti-Discrimination Bill was finally adopted, after almost two years of discussion in Parliament. In Greece, the positive action measures adopted in 2008 in order to ensure that at least one third of the total number of candidates presented in the country should be female were applied for the first time during the most recent elections.

The European Network of Legal Experts in the Field of Gender Equality has recently published three new publications available to the general public.<sup>12</sup> In the first place, the official publication *EU Gender Equality Rules. How are they transposed into national law?* offers a brief and thematic overview of the main features of EU gender equality law and its transposition in the 27 Member States of the European Union, as well as in the EEA countries of Iceland, Liechtenstein and Norway, to which most of the EU equality law applies. The transposition of Directive 2004/113/EC on the access to and supply of goods and services at national level is the theme of the second publication. The third publication investigates a rather new concept, multiple discrimination, which refers to any discrimination on more than one ground, for example gender and disability. The publications of the European Network of Legal Experts in the Field of Gender Equality can be found on:

<http://ec.europa.eu/social/main.jsp?catId=641&langId=en>

The members of the editorial board hope that you will enjoy reading this Review. If you would like to receive a printed copy in English free of charge, you can contact [EU-network.law@uu.nl](mailto:EU-network.law@uu.nl). Reactions, comments and suggestions regarding the Review are naturally very welcome and proposals for future articles can also be submitted.

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<sup>12</sup> These publications are available on: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 4 November 2009. The official publications can be requested free of charge on: [http://bookshop.europa.eu/eubookshop/index.action?request\\_locale=EN](http://bookshop.europa.eu/eubookshop/index.action?request_locale=EN), accessed 4 November 2009.

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# Reconciling Family and Professional Life and the Gender Equality Principle in Employment

*Maria do Rosário Palma Ramalho*\*

## 1. Practical difficulties in the implementation of EU gender equality principles in the area of work and employment

The starting point of the reflections suggested by this subject is a well-established assumption: recognition of the practical difficulties in the implementation of EU gender equality principles in the area of work and employment.

Individual rights regarding gender equality were formally recognised by the Treaty of Rome fifty years ago, from the perspective of equal remuneration (Article 119 of the Treaty), and have gained a broader and broader scope since 1975, in the form of Directives that have been transposed in the Member States. Both the rules of the Treaty and those of the various Directives dealing with gender equality issues have been applied and interpreted by the Court of Justice for many years in an intensive and very creative way. As a result of this *acquis* the main principles and the legislation in the area of gender equality have been reinforced and enlarged in the Treaties of Amsterdam and Nice (Article 2, Article 3 Paragraph 2, Article 13, and Article 141 of the TEC). Finally, these rights are maintained in the Lisbon Treaty (Article 3 No. 3 Paragraph 2 of the TEU, and Articles 8, 10, 19, 153 No. 1 i) and 157 of the TFEU), and will indeed be reinforced - provided the ratification of this Treaty will succeed - by the formal recognition of the binding effect of the Charter of Fundamental Rights of the European Union (Article 6 No. 1 of the TEU), where these issues are also contemplated.

Despite these important developments of the gender equality principle in the employment area with respect to issues ranging from equality in access to work (including promotions and training) via equal pay and social security, to maternity rights and, more broadly, to the issue of reconciliation between family responsibilities and working life, the difficulties in the practical implementation and the lack of effectiveness of the principle itself are well known. Moreover, it seems that this practical weakness in the gender equality principle is common to Member States with very different economic development, different working models, and various types of social and cultural background.

In short, the formal recognition of gender equality rules and the traditional methods used to implement them over the years seem to be insufficient to ensure the effectiveness of the gender equality principle. The lack of effectiveness of the gender equality principle in the area of work and employment has inspired many studies on this topic.<sup>1</sup>

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<sup>1</sup> We have been involved in two international studies in this area, both of them in the scope of European countries and supported by the European Commission, and both of them with experts from several Member States, therefore with very different backgrounds in this area. The first project regarded the pay gap between men and women. For the final report on this project, see Maria Do Rosário Palma Ramalho, *Guaranteeing Equal Pay between Women and Men in the European Union*, Lisbon (CITE), 2004 (also available in French and in Portuguese, under the titles *Garantir a Igualdade Remuneratória entre Mulheres e Homens na União Europeia*, and *Garantir l'égalité de*

When looking at the results of these studies, there seems to be a clear link between equal (or unequal) treatment of women and men in access to employment and at work and the topic of reconciliation of family and working life. It is this link that we would like to explore a little further in this paper.

## **2. The link between gender discriminatory practices at work and the reconciliation of family and working life by women and men**

The link between gender discriminatory practices at work and the reconciliation of family and working life between men and women is easily established, if one takes into consideration the main factors that are responsible for the lack of effectiveness of the gender equality principle in itself.

In our view, five reasons can be identified for the lack of effectiveness of the gender equality principle in the area of work and employment: i) the low visibility of the principle itself; ii) the complexity of the notions related to gender discrimination legislation; iii) the difficulties of judicial procedures in the gender equality area; iv) the traditional segregation in the labour market between ‘female’ and ‘male’ professions; and v) the social stigma attached both to professional responsibilities and to family responsibilities.<sup>2</sup>

These reasons can be explained briefly.

- i) The first reason for the lack of effectiveness of the gender equality principle is the low visibility of the principle itself, not only in the law, but also in its practical application by courts, and for the social partners. On the one hand, gender equality issues are not always clear in the law, and seem to be little known by the courts that seldom apply this legislation. On the other hand, gender equality issues are not among the strongest worries of trade unions and are certainly not an important issue for employers. Finally, in many countries these issues do not seem to be a priority to public inspection services.
- ii) The second reason for the lack of effectiveness of the gender equality principle regards the technical concepts supposed by gender equality. In fact, notions like indirect discrimination, equal work and work of equal value are not very clear and their content is difficult to integrate and even harder to explain.
- iii) The third reason for the lack of effectiveness of the gender equality principle regards the difficulties of judicial procedures in the gender equality area. It is well established that very few actions are brought before the courts, and that even fewer are successful since the proof is difficult, because of the need of a concrete comparator. However, even when judicial procedures are successful, the results

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remuneration entre femmes et hommes dans l'Union Européenne). The second project regarded the issue of reconciliation of family and working life. The final report for this project was published under the title *Concilier famille et travail pour les hommes et les femmes: droit et pratiques*, Athènes - Bruxelles (Ant. N. Sakkoulas / Bruylant), 2005.

For a broader perspective on these issues, also see *Legal Approaches to some Aspects of the Reconciliation of Work, Private and Family Life in Thirty European Countries*, by the European Network of Legal Experts in the Field of Gender Equality, <http://ec.europa.eu/social/main.jsp?catId=641&langId=en&moreDocuments=yes>

<sup>2</sup> These conclusions can be found in Rosário Palma Ramalho, *Guaranteeing Equal Pay...cit.*, 42 ss. They are based on a questionnaire addressed to the partners of the project, regarding the diagnosis of discriminatory practices in employment and at work, and it is important to emphasize that these conclusions were common to all Member States involved, despite their different economic situation and social traditions.

- are modest from the perspective of the global development of the gender equality system, since their effect is limited to the claimant.
- iv) The fourth factor responsible for the low effectiveness of the gender equality principle has an economic cause. It regards the traditional segregation of the labour market between professions or areas of economic activity which are dominated by women ('female professions') and those that mostly employ men ('male professions'). The fact is that this social segregation of the labour market often goes with a less favourable evaluation of the so-called female professions (e.g. work in social services, which is considered a mainly female area, is less valued than other mainly male professional areas). This 'natural' segregation of the labour market is directly responsible for systematic discrimination, meaning not the individualised discrimination between two concrete workers (female A *versus* male B), but the discrimination in the labour market as a whole between different categories of workers or different professions. One can easily understand that when the labour market is sex-segregated (which is the common situation in most countries), discrimination in access to employment and in working conditions arises directly from the lower value recognised to certain categories of workers, if these categories are mainly female.
- v) The last reason for the difficulties in the implementation of the gender equality principle is the social stigma attached both to professional responsibilities and to family responsibilities: because society expects women to be more devoted to family and to care<sup>3</sup> than men, this fact has consequences for their professional life that induce discriminatory practises. In short, there is a clear link between gender equality and the social traditions regarding the reconciliation of family and working life.

We would now like to pay specific attention to the last reason described above (the social stigma attached to professional and family responsibilities), to underline its major importance amongst all the factors responsible for the difficulties in the implementation of gender equality legislation, mainly in employment law.

The utmost importance of this factor is proved by a simple assumption: even if we could eradicate all other sources of discrimination, by legal measures and with a joint action of all relevant partners in the process, discriminatory practices in access to employment and at the workplace would persist, since the responsibilities regarding care are still mostly attributed to women.

In fact, it is commonly recognised that a 'non-equitable' division of family responsibilities between men and women is the source of both direct and indirect sex discrimination. For instance, in access to employment, women are often left out, since employers are afraid of their more frequent absences from work, for maternity or family reasons, and also due to the more probable breaks in their careers, on account of maternity leaves or other long-term leaves for reasons related to childcare. Also, women are discriminated against in the course of their employment contracts, in promotions or in access to benefits related to productivity or lack of absences, again for reasons related to maternity and care.

But if a working father wants to participate more actively in family life and to use his paternity rights, he might have to endure discriminatory practices at work or in

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<sup>3</sup> We use the expression 'care' in the wide sense of the word, including the duties related to maternity but also the duties related to one's family, not only to help the children, but also to help other dependents, like elderly people or handicapped or sick relatives.

access to employment. And, when this happens, in some countries he may not be covered by the legal measures which protect women during pregnancy and as mothers, since these measures often apply only to women.

These examples prove the importance of this factor to the practical development of the gender equality principle, mainly in the area of employment. However, it is also easy to conclude that, more than any other, this factor is very difficult to eradicate or even to grasp, at least in legal actions, since it lies beyond the legal system in cultural tradition.

This description confirms the assumption that there is a material link between gender equality law and the rights attached to maternity, paternity and the reconciliation of family and working life. Now, the question is to establish how this link should be dealt with by the legal system, always bearing in mind the goal of the practical implementation of gender equality principles. This will now be discussed.

### **3. The link between legal provisions regarding gender equality and provisions regarding the reconciliation of family and working life: possible approaches**

The link between gender equality provisions and provisions regarding the reconciliation of family and working life can be established in two ways by the legal system.

One possibility is to consider legislation regarding maternity as an *exception* to the gender equality principle. From this perspective, the evident value of maternity rights justifies the different treatment accorded to women in employment for that reason, and therefore the rules that establish such a ‘different’ treatment are not to be considered discriminatory.

The other possible approach to this issue is to consider the right to a balanced share of care responsibilities between men and women who work as *part* of the gender equality principle itself, in fact as a *material condition* for the efficiency of this principle. From this perspective, maternity provisions aiming to protect pregnant women and new mothers would find their place among the rest of the measures regarding the reconciliation of family and working life, and all other measures in this area should be directed at both mothers and fathers.<sup>4</sup>

#### ***3.1. The ‘exception’ approach: maternity provisions as a justified exception to equal treatment between men and women***

European legislation has adopted the first approach to this issue for a long time. In fact, since Directive 76/207, regarding equal treatment between men and women in access to employment, working conditions and professional training, the legal measures concerning the protection of women during pregnancy and after birth were justified as an exception to the equal treatment principle.<sup>5</sup> And it was also under this view that Directive 92/85 regarding the protection of pregnant women and new mothers at work was approved.

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<sup>4</sup> For a more developed view on this approach to the problem of the relation between gender equality and the reconciliation of family and working life, see Maria Do Rosário Palma Ramalho, *Conciliação equilibrada entre a vida profissional e familiar - uma condição para a igualdade entre mulheres e homens na União Europeia*, in *Estudos de Direito do Trabalho I*, Coimbra (Almedina), 2003, pp. 269-277.

<sup>5</sup> This approach results from Article 2, n. 3 of the Directive, and has been developed in the sense of exceptional but justifiable measures to the gender equality principle. This approach was also adopted by the Court of Justice in several judgments.

In our view, despite the protection granted by these rules to women during pregnancy and maternity, this line of approach had negative consequences for the subsequent development of gender equality law, mainly for the development of rules concerning the reconciliation between family responsibilities and working life in a balanced or 'equitable' way. We now wish to emphasise the following negative consequences.

On the one hand, this approach had a narrowing effect on the content of legislation regarding the protection of maternity, which became more limited than it might have been if maternity, paternity and reconciling issues had been considered together. In fact, despite the importance of Directive 92/85, namely to grant maternity leave, to protect women against dismissal during pregnancy and maternity leave and to ensure their rights when returning from maternity leave, the fact is that this Directive is applicable only to women, since pregnancy in itself was the justification for the exceptional protection provided by this ruling.<sup>6</sup> And this being so, men were necessarily left out of the scope of the Directive, when exercising their own paternity rights.

On the other hand, the perspective of maternity rules as an exception to the gender equality principle has led to several judgments of the Court of Justice which show a somewhat prejudiced view on these issues: Cases such as *Larsson* or *Brown-Rentokil*,<sup>7</sup> which discussed questions like 'if an illness is due to pregnancy, is the woman still protected under the European rule that prohibits dismissal during pregnancy?', as well as several cases where the Court agreed with the refusal to grant maternity leave to fathers in case of adoption (for instance *Commission v Italy*<sup>8</sup>) or in the case of long-term maternity leaves (for instance *Hofmann*<sup>9</sup>). These examples illustrate how limited this approach is.<sup>10</sup>

Finally, the fact that Directive 92/85 only applies to women contributed to increase different treatment between men and women in what regards the reconciliation of family and working life. In short, this Directive protected pregnant women but kept untouched the traditional stigma regarding the sharing of professional and family responsibilities between men and women.

### ***3.2. The integrated approach: maternity and paternity protection and balanced reconciliation of work and family life as a material condition for gender equality***

More recent developments show that European law is evolving from this traditional approach to maternity issues towards an approach that also incorporates paternity issues and, more broadly, the matters regarding the reconciliation of family and working life. In this sense, we would like to recall several provisions and Directives:

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<sup>6</sup> It should be noted that the basis of Directive 92/85 was not Article 119 of the Treaty of Rome, regarding equal pay, but Article 118-A, regarding working conditions and the protection of health at work. This way, the Directive naturally followed the biological and medical justification for the protective legislation, which was pregnancy, and therefore its scope was necessarily limited to women.

<sup>7</sup> *Larsson* (Case C-400/95, of 29 May 1997); *Brown-Rentokil* (Case C-394/96, of 30 June 1998).

<sup>8</sup> *Commission v Italy* (Case C-163/82, of 26 October 1983).

<sup>9</sup> *Hofmann* (Case C-184/83, of 12 July 1984)

<sup>10</sup> For a detailed approach of the traditional view of the Court of Justice in issues related to maternity provisions see Annick Masselot, *Les rapports entre l'égalité de traitement et la protection de la maternité au travers de la jurisprudence de la Cour de Justice sur la grossesse et la maternité*, in 'L'Égalité entre femmes et hommes et la vie professionnelle. Le point sur les développements actuels en Europe', Paris (Daloz), 2003, pp. 103-120.

- i) Directive 96/34, of 3 June 1996, establishing the right to parental leave, grants this leave both to the father and the mother of the child, in principle on a non-transferable basis, which means that for the first time European law promotes the role of both parents in the care of their young children. The other interesting point in this Directive is the fact that it was based on a social partners framework agreement and not directly on the Treaty, and this basis shows the increasing importance of this issue at the social partners level.
- ii) Council Resolution No. 9303/00 of 19 June 2000,<sup>11</sup> regarding the promotion of a balanced participation of men and women in professional activity and in family activities: this Resolution is based on a substantive approach of the gender equality principle in Article 2 of the TEC, in the sense that this principle demands not only the elimination of existing discriminatory practices, but that it also demands that adequate conditions are created in order to prevent any new forms of discrimination from arising. In short, the gender equality principle is also to be understood as a proactive goal.  
In this sense, the Resolution establishes that the right to balanced participation of women and men both in professional life and in family life is a material condition to achieve gender equality at work, and therefore encourages the Member States to take the necessary steps to protect fathers who wish to contribute to this more balanced reconciliation.
- iii) The European Charter of Fundamental Rights, in Article 33 No. 2, mentions maternity and paternity rights and the right to the reconciliation of family and working life altogether, which is also an important argument in favour of this integrated approach to the two subjects.<sup>12</sup>
- iv) The new version of Article 2 No. 7 of Directive 76/207, as amended by Directive 2002/73, of 23 September 2002, firmly states that a less favourable treatment of women for reasons related to pregnancy or to maternity is to be considered as gender discrimination.
- v) Finally, in what regards the Recast Directive on gender equality (Directive 2006/54, of 5 July 2006), despite the fact that this Directive decided not to include all the rules from Directive 92/85, an integrated approach to maternity issues and reconciliation issues can also be noted. On the one hand, in its preamble (point 11) the Directive explicitly recognises the reconciliation of family and working life as a task of both men and women. On the other hand, the Directive states that any less favourable treatment of women related to pregnancy or to maternity leave is integrated in the notion of discrimination (Article 2 No. 2 c)) and is to be considered as direct discrimination (point 11 of the preamble). Finally, this Directive reaffirms the right of mothers to return to the same or an equivalent job at the end of maternity leave (Article 15), recognises the right to an equivalent protection of the workers in the Member States that have instated paternity leave and/or adoption leave (Article 16) and, in the field of social dialogue, encourages social partners within the Member States to promote flexible working arrangements with the aim of facilitating the reconciliation of work and private life (Article 21 No. 2).

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<sup>11</sup> OJ C 218 of 31 July 2000.

<sup>12</sup> The importance of this rule will of course increase if it becomes binding and has the same value as the Treaties, under the terms of Article 6 No. 1 of the TEU, in the version of the Lisbon Treaty, if this Treaty comes into force.

When looking at more recent developments in the European Union's policies, we can conclude that the subject of reconciliation of family responsibilities and working life is now firmly set on the agenda.

From this perspective, promoting reconciliation is part of the amended Lisbon Strategy (Guideline 18 of the Employment Guidelines (2005-2008),<sup>13</sup> and the Roadmap for Equality between Men and Women for the period 2006-2010, established by the European Commission, indicates reconciliation as a priority.<sup>14</sup> Also, this subject has been discussed with the European social partners since 2006, in order to review the framework agreement on parental leave. And in October 2008, the European Commission issued a Communication on the issue of reconciliation between professional, private and family life,<sup>15</sup> which established the following goals:

- to improve legal measures serving reconciliation, including legislative proposals concerning the Directives regarding maternity leave and parental leave, with the aim of extending the first leave and promoting the father's access to the second one;
- to promote equal treatment and maternity protection for independent workers and helping spouses, in a new Directive to replace Directive 86/613, the latter of which is considered relatively useless;
- to promote assessment reports on childcare facilities in the Member States, and other actions and studies serving the practical implementation of reconciliation policies.

Following this Communication, a Proposal for the amendment of Directive 92/85 has already been presented to the European Parliament.<sup>16</sup> This proposal contemplates the extension of paid maternity leave to 18 weeks (instead of the present 14 weeks) and reinforces the protection of women against dismissal, during and immediately after the leave.

Finally, following the Revised Framework Agreement on Parental Leave reached by the social partners on 18 June 2009, the Commission formally presented a Proposal to Implement the Revised Framework regarding Directive 96/34/EC, in July 2009.<sup>17</sup> The most significant measure in this Framework Agreement regards the length of parental leave, which has been extended to a minimum period of 4 months, in principle on a non-transferable basis (Clause 2 No. 2 of the Agreement).

#### **4. Final remarks**

This brief description of recent developments in European law in this area allows us to draw several conclusions.

The first conclusion that we would like to mention is to recognize that the European Union definitely seems to consider the issue of reconciliation between professional, family and private life to be an important issue.

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<sup>13</sup> This Guideline mentioned, as one of the priorities of the employment strategy, the promotion of a lifecycle approach to work, through better reconciliation of work and private life and the provision of childcare facilities and care for other dependents.

<sup>14</sup> To promote reconciliation, the Roadmap establishes targets like introducing flexible working arrangements and increasing childcare services.

<sup>15</sup> Communication of 3 October 2008 - COM (2008) 635 final.

<sup>16</sup> SEC (2008) 2595; SEC (2008) 2596; COM (2008) 637 final - COD 2008/0193\*/.

<sup>17</sup> COM (2009) 410 final of 30 July 2009.

The second conclusion is also to recognize that, despite the option of the Recast Directive on gender equality (Directive 2006/54, of 5 July 2006) to leave maternity leave and parental leave legislation out of its own scope, the link of maternity issues with gender equality is already well established, both due to work of the Court of Justice in judgments like *Thibault* (where different treatment of pregnant women was qualified as direct sex discrimination)<sup>18</sup> and to the various references to this link in other legislation (mainly in Directive 2002/73). Moreover, this link is even more explicitly assumed in the Proposal for the amendment of Directive 92/85, which indicates Article 141 No. 3 of TEC as its primary basis, together with Article 137 No. 2, thus firmly recognizing that maternity provisions involve not only a question of women's health and security, but indeed a problem of gender equality.

After establishing these conclusions, however, we can go a little further in order to reach a third and final point, which relates to the integrated approach of maternity issues and reconciliation issues.

In our opinion, the developments of European law that we have just described is still not enough to increase the effectiveness of the gender equality principle, since there is not yet a clear assumption of the link between maternity provisions and reconciliation provisions. In fact, European law keeps progressing in this area by two apparently independent topics: the maternity topic, contemplated in the Maternity Leave Directive; and reconciliation measures, attempted in the Parental Leave Directive.

Contrary to this perspective, we think that these topics would gain from being considered together, since 'progressive' measures related to one of them can in fact have a negative effect on the other one.<sup>19</sup> Thus, instead of two revised or new Directives respectively on maternity leave and parental leave, it would be interesting to test the possibility of one Directive, regarding reconciliation issues, which would apply to men and women who work but who also play a family role, and where specific provisions to protect women that are pregnant or have recently given birth would find their place.

In our view, this unified approach to both topics would be more useful to promote a more balanced division of family responsibilities between men and women, since it would at least send a strong signal that the European Union considers reconciliation as essentially a task for men and women. And since the issue of reconciliation is the key point for the practical progress of gender equality - as we established at the beginning of this paper - this perspective deserves at least a better look.

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<sup>18</sup> Case C-136/95.

<sup>19</sup> For instance, the rule regarding the extension of maternity leave to a minimum of 18 weeks, included in the Proposal for the revision of Directive 92/85, may have negative effects from the perspective of an 'equitable' reconciliation of professional life and family responsibilities, since it will most probably keep women (and not men) away from their jobs for a longer period.

# Compatibility of Turkey's Legal Rules on Pregnancy and Maternity with the EU *Acquis*

Nurhan Süral\*

## 1. Introduction

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)<sup>1</sup> consolidates different bodies of secondary legislation replacing the prior directives on equal pay, equal treatment, occupational social security, and the burden of proof. Directive 2006/54 leaves unamended the Pregnancy and the Parental Leave Directives. There is a Proposal for a Directive of the European Parliament and of the Council of 3 October 2008 amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.<sup>2</sup>

Turkey has one of the lowest overall employment rates, particularly for women, in the OECD.<sup>3</sup> As stated in '*Female Labor Force Participation in Turkey: Trends, Determinants, and Policy Framework*,' a report prepared jointly by Turkey's State Planning Organization and the World Bank,<sup>4</sup> the share of women holding or looking for jobs in 2008 was below 22 % as compared to an average of 62 % in OECD countries and to an average of 33 % in a group of selected comparison countries with similar levels of economic development. The report reveals that pregnancy and childcare are important constraints to women's employment. Women interviewed in Istanbul stated that they would have to pay between 500 and 600 TL (between approx. 205 and 246 EUR) per month for childcare only if they decided to work, and more for other extra costs of additional household help. These costs would use up most of their additional earnings.

Under the scope of the 'Promoting Gender Equality Project – Strengthening Institutional Capacity Twinning Project', implemented jointly by the General Directorate on the Status of Women<sup>5</sup> and the Directorate of International Affairs of the Ministry of Social Affairs and Employment of the Netherlands, the National Action Plan - Gender Equality 2008-2013 has been prepared with the participation of all parties.<sup>6</sup> The Action Plan cites 'low educational level, low wages for women with low levels of education, migration from rural to urban areas, lack of adequate qualifications, the inadequacy of childcare facilities and/or the need to take care of the elderly and disabled individuals in the family as well as traditional ideas about

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<sup>1</sup> OJ L 204, 26 July 2006, p. 23.

<sup>2</sup> COM(2008) 637 final.

<sup>3</sup> OECD Economic Surveys Turkey, Vol. 2008/14, July 2008, p. 70.

<sup>4</sup> <http://www.worldbank.org.tr>; 15 September 2009.

<sup>5</sup> *Kadının Statüsü Genel Müdürlüğü* established by Law no. 5521 (Official Gazette, 27 October 2004).

<sup>6</sup> National Action Plan – Gender Equality 2008-2013, General Directorate on the Status of Women publication, Ankara 2008.

women's social roles and responsibilities' as reasons for the very low labour force participation of women.<sup>7</sup>

## 2. Legal rules on pregnancy and maternity

### *General*

The rules on pregnancy and childbirth in the Labour Act and the By-law<sup>8</sup> on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries,<sup>9</sup> are almost completely drawn on Directive 92/85/EEC.

### *Ante-natal rights and requirements*

A pregnant worker shall mean a pregnant worker who informs her employer of her condition with a document to be obtained from any health institution; a worker who has recently given birth shall mean a worker who has recently given birth and who informs her employer of her condition; a worker who is breastfeeding shall mean a worker who is breastfeeding her 0-1 year old child (By-Law, Article 4).

Pregnant workers are entitled to time off, without loss of pay, in order to attend ante-natal examinations, if such medical examinations have to take place during working hours (By-Law, Article 12). If the pregnant/recently given birth/breastfeeding worker's physician asks for a position that is less strenuous or hazardous, the employer has to transfer her to another position if there is one or if he can provide one without being unduly burdened, without a reduction in wage. If such a transfer is not possible, then the worker shall be granted a leave without pay upon request for a period necessary for safety and health of the worker (By-Law, Article 8). Also, a pregnant worker, a worker who has recently given birth or a breastfeeding worker cannot perform work beyond 7.5 hours a day (Article 10).

### *Maternity leave*

In Turkey, there is a compulsory maternity leave of 16 weeks (LA, Article 74). The eight-week ante-natal resting period may be reduced to three weeks by request of the worker and the approval of the doctor, and the unused period is added to the eight-week post-natal resting period. If there is multiple pregnancy, two more weeks are to be added to the ante-natal leave. These ante-natal and post-natal resting periods may be increased with a medical report on the basis of the worker's health and the nature of the work to be performed. If there is an early birth as a result of which part of the ante-natal leave is not used, this part cannot be added to the post-natal rest period.

The total period of maternity leave in Turkey is compulsory. An employer who requires a woman to work during this period is guilty of an offence. Maternity leave is considered as worked hours in the calculation of the annual leave (LA, Article 55b). Directive 92/85/EEC envisages a maternity leave of at least 14 weeks allocated before and/or after delivery. The maternity leave has to include compulsory maternity leave of at least two weeks allocated before and/or after delivery. The Proposal for a

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<sup>7</sup> See also: European Stability Initiative, *Islamic Calvinists: Change and Conservatism in Central Anatolia*, September 2005. Another must-read report of the European Stability Initiative is *Sex and Power in Turkey – Feminism, Islam and the Maturing of Turkish Democracy*, Berlin – Istanbul 2 June 2007. Both reports are available online, <http://www.esiweb.org>.

<sup>8</sup> The Prime Ministry, the ministries and public corporate bodies may issue by-laws to ensure application of laws related to their particular fields of operation.

<sup>9</sup> *Gebe veya Emziren Kadınların Çalıştırılma Şartlarıyla Emzirme Odaları ve Çocuk Bakım Yurtlarına Dair Yönetmelik*, Official Gazette, 14 July 2004.

Directive of the European Parliament and of the Council of 3 October 2008 amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding extends the maternity leave from 14 to 18 weeks. This corresponds to 12 non-compulsory weeks that women can choose to take before or after delivery and six compulsory weeks after delivery. If the actual date of delivery differs from the presumed date, the period of leave before the birth can be extended without having an effect on the post-natal period. Moreover, additional leave may be granted in the event of premature childbirth, children hospitalized at birth, the birth of children with disabilities and multiple births. Also, any period of sick leave, up to 4 weeks before delivery, in the event of illness or complications during pregnancy or childbirth shall not shorten the period of maternity leave in the interest of women's health. Where childbirth occurs after the due date, the prenatal portion of the leave shall be extended to the actual date of birth, without any reduction in the post-natal portion of the leave. When the Proposal is given effect, Turkey has to reconsider the duration of maternity leave and its compulsory/non-compulsory nature.

### ***Additional maternity leave***

The worker, if she so requests, has to be granted unpaid leave of up to six months (one year for public officials) following the post-natal period (LA, Article 74). The two periods, compulsory and additional, run consecutively, to give an entitlement to 16 weeks (18 in case of multiple pregnancy) plus 6 months leave. There can be no gap between the two periods.

Maternity leave and additional maternity leave are limited to women. This reflects the traditional division of responsibility prioritizing the relationship between a woman and her child. In *Hofmann*<sup>10</sup> and *Italy*,<sup>11</sup> the ECJ, under the previous Equal Treatment Directive 76/207,<sup>12</sup> ruled that national provisions could legitimately confine additional maternity leave and compulsory adoption leave to mothers.

### ***Other forms of family-related leaves***

The Community Resolution of 29 June 2000 on the balanced participation of women and men in family and working life<sup>13</sup> leaves it to the Member States whether or not to grant paternity leave. According to Directive 96/34/EC,<sup>14</sup> male and female workers must have an individual, non-transferable right to at least three months' parental leave for childcare purposes (as distinct from maternity leave) after the birth or adoption of a child until a given age of up to eight years. On 30 July 2009, the European Commission adopted a proposal<sup>15</sup> to increase the existing right to take parental leave from three to four months per parent and apply it to all employees, regardless of their type of contract. The European Commission's proposal would also allow three of each parent's four months to be transferred to the other.

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<sup>10</sup> Case 184/83 *Hofmann v Barmer Ersatzkasse* [1984] ECR 3047.

<sup>11</sup> Case 163/82 *Commission v Italy* [1983] ECR 3273.

<sup>12</sup> OJ L 39, 14 February 1976, p. 40.

<sup>13</sup> OJ C 218, 31 July 2000, p. 5.

<sup>14</sup> Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ L 145, 19 June 1996, p. 4).

<sup>15</sup> Proposal for a Council Directive implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (COM(2009) 410 final).

In Turkey, there is no parental leave, paternity leave,<sup>16</sup> adoption leave or filial leave for the workers but the social partners may agree upon such family-related leaves through collective labour agreements. So far, no other types of leave have been agreed on apart from paternity leave.

### *Nursing periods*

Breastfeeding workers are allowed 1½ hours a day to breastfeed their children below one year of age. It is up to the woman worker to decide about the time and divisibility of this nursing period that will constitute part of the worked period (LA, Article 74). In practice, nursing periods are used in a way that contradicts its underlying idea: Nursing workers prefer using nursing periods collectively to have one workday off per week.

### *Night work*

Article 9 of the By-Law on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries conforms to Article 7 of the Directive 92/85/EEC. There will be temporary inability of a woman worker to perform night work: A pregnant worker cannot be obliged to perform night work during the period starting from the time that her pregnancy is specified in a medical certificate until delivery. Night work may be performed after maternity leave or for a nursing worker, after a six-month period following delivery leave if she is fit to resume night work. If the worker presents a medical certificate stating that it is necessary for her safety or health, she will not perform night work for the period specified (Article 9). The six-month night work prohibition may be extended to one year upon a medical certificate according to the By-Law on Working Conditions for Women Workers in Night Shifts.<sup>17</sup> A female civil servant cannot perform night work starting from the 26<sup>th</sup> week of her pregnancy until one year after her delivery.<sup>18</sup>

### *Childcare*

Childcare is regulated in Council Recommendation 92/241/EEC of 31 March 1992<sup>19</sup> and the Barcelona European Council conclusions of March 2002.

Under the By-law on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries, workplaces employing between 100 and 150 female workers are to establish nursing rooms while those employing more than 150 female workers have to establish day nurseries consisting of a nursing room and a day nursery (Article 15). The fact that it is not the total number of workers but the number of female workers in the workplace being considered points to the norm that women are mainly responsible for the rearing of children. The children of the working men are to benefit if the mother has died or if parental authority has been given to the father by a court decision (Article 16). The establishment, conduct, and functioning of such facilities are entirely at the expense of the employers. The employers under the legal obligation of establishing day nurseries were also burdened to establish pre-school classes complying with the programmes of the Ministry of Education. These

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<sup>16</sup> A civil servant is entitled to a leave of three days upon request on the occasion of his wife's delivery (Civil Servants Act [*Devlet Memurları Kanunu*, Law no. 657, Official Gazette 23 July 1965], Art. 104).

<sup>17</sup> *Kadın İşçilerin Gece Postalarında Çalıştırılma Koşulları Hakkında Yönetmelik*, Official Gazette 9 August 2004.

<sup>18</sup> Prime Ministry circular 2005/14 (*Başbakanlık Genelgesi 2005/14*), Official Gazette 2 June 2005.

<sup>19</sup> OJ L 123, 8 May 1992, p. 16.

legal burdens were eased by the so-called ‘employment package’, Law no. 5763, aiming at employment promotion.<sup>20</sup> The employers are not obliged to establish pre-school classes any longer and outsourcing became possible for childcare services (Article 6, 37).

### ***Protection against dismissal***

Article 10 of Directive 92/85/EEC prohibits dismissal during the period from the beginning of their pregnancy to the end of the maternity leave except under exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, to which the competent national authority gives consent. If the worker is dismissed during the period from the beginning of their pregnancy to the end of the maternity leave, the employer must cite duly substantiated grounds for her dismissal in writing. Under the new proposal, employers would also have to justify, in writing, the dismissal of a worker within six months of the end of her maternity leave.

In Turkey, the labour contract is deemed to have been suspended during maternity leave. Therefore, dismissal for any reason during the period of maternity leave is legally impermissible. An exception shall be the automatic expiration of the prescribed period coinciding with the leave in case of a fixed-term labour contract.

Between the employer and the worker there may be a fixed-term or an open-ended labour contract. A fixed-term labour contract cannot be terminated before the expiration of a specified period unless there is a justified cause leading to an immediate dismissal. Excessive absenteeism (beyond 8-14 weeks corresponding to employment period) for health reasons is a justified cause for dismissal. If a female worker fails to report to work for reasons of health following her maternity leave, the employer is entitled to terminate the fixed-term or open-ended labour contract for excessive absenteeism (LA, Article 25/1). This conforms to the ECJ’s rulings in *Hertz*,<sup>21</sup> *Larsson*,<sup>22</sup> and *Brown*.<sup>23</sup> In such a case, the worker shall be entitled to severance pay if she has been employed in that particular workplace for at least one year.

Where a worker employed under an open-ended labour contract is dismissed for being pregnant, the degree of protection and the consequences will differ according to whether she has regular or increased job security. Workers with increased job security enjoy greater protection against dismissal on notice. A worker who has been working for more than six months under an open-ended labour contract at a workplace where at least thirty (fifty in agriculture) workers are employed benefits from increased job security. Where the employer owns more than one establishment in the same industry, the total number of workers shall be considered (LA, Article 18). The 30-worker threshold is to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized enterprises.

If the worker dismissed for pregnancy is one with regular job security, this will constitute an ‘abusive dismissal’ entitling the worker to the so-called ‘bad-faith pay,’

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<sup>20</sup> Law Amending the Labour Act and Other Acts (*İş Kanunu ve Bazı Kanunlarda Değişiklik Yapılması Hakkında Kanun*), Official Gazette, 26 May 2008.

<sup>21</sup> Case C-179/88 *Handels- og Kontorfuntionerernes Forbund i Danmark v Dansk Arbejdsgiverforening* [1990] ECR I-3941.

<sup>22</sup> Case C-400/95 *Handels- og Kontorfuntionerernes Forbund i Danmark, acting on behalf of Larsson v Dansk Handel & Services, acting on behalf of Fotex Supermarked A/S* [1997] ECR I-2757.

<sup>23</sup> Case C-394/96 *Brown v Rentokil Ltd.* [1998] ECR I-4185.

equalling to thrice the amount of pay corresponding to the worker's notice period. The employer has to make such a termination in writing without a legal burden of specifying the reason of dismissal. If the worker has increased job security, the employer is under the legal burden of specifying the reason of dismissal clearly and precisely (LA, Article 18). Where no reason is specified or the reason specified is not a valid one in the particular case, the court will rule for reinstatement (LA, Article 20). If the employer does not reinstate the worker, she will be entitled to 'job security pay' corresponding to her four to eight months' basic wages. Severance pay shall also be paid to such a worker with regular or increased job security if she has completed at least one year of service at the workplace concerned.

Article 18 of the Labour Act on increased job security presents, on the basis of the ILO C158,<sup>24</sup> a non-exhaustive list of incidents that do not constitute valid reason for contract termination, inter alia, sex, marital status, family obligations, pregnancy, delivery, and absenteeism due to maternity leave.

Under Article 5 of the Labour Act on prohibition of discrimination at work, in an employment relationship, excluding selection, gender discrimination is a reason to justifiably claim wrongful treatment or termination. If the worker proves *prima facie* that there may be discrimination, it is up to the employer to prove the contrary. Proof of discrimination shall suffice, a consequent loss or suffering shall not be sought. A female worker, be it one with regular or increased job security, who considers herself discriminatorily treated on the basis of sex during the course of employment or dismissal may pursue her claims and demand pay amounting to four months' basic wages. This is the so-called 'discrimination pay.' Introduction of a ceiling to the amount of discrimination pay contradicts the *acquis*: the ECJ has ruled that fixing a prior upper limit may preclude effective compensation. The case law of the ECJ is upheld by Directive 2002/73/EC amending Council Directive 76/207/EEC, recast by Directive 2006/54/EC.

### ***Social security related issues***

In cases of pregnancy and delivery, there are benefits in kind and benefits in cash. Maternity medical benefits cover medical examination, medication, in vitro fertilization, and hospitalization designed to cover care for the insured woman or the uninsured wife of the working man.

Maternity allowance is a short-term incapacity benefit designed to compensate for a worker's loss of earnings through pregnancy and delivery. Directive 92/85/EC provides for a minimum maternity leave period for employees of 14 weeks and for a minimum payment during this leave at the level of sick pay. As regards maternity allowance, Turkey meets the minimum requirement. Unless there is a provision to the contrary in the individual or collective labour contract, there will be no pay by the employer during maternity leave, the worker will be paid maternity allowance equalling sick pay by the social security organization (Law no. 5510,<sup>25</sup> Art. 18). To qualify for maternity allowance, a female worker has to have made at least 90 days' contributions during a period of one year before birth.

In some schemes, the worker can make up for any unpaid leave by way of extra contributions. During a period of unpaid maternity leave, neither the worker nor the employer will be expected to contribute. The worker may, if she chooses, pay contributions for the statutory (compulsory) maternity leave but the employer will not

<sup>24</sup> Convention on the termination of employment relationship at the employer's initiative, 1982.

<sup>25</sup> Social Insurances and General Health Insurance Act (*Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu*), Official Gazette 16 June 2006.

have a duty to contribute. If the worker pays contributions for the statutory maternity leave period, this period counts as pensionable service. Also, where a worker resigns due to pregnancy (birth has to take place within 300 days following resignation) or delivery, she may, if she chooses, pay contributions for at most the two-year period during which she remains unemployed. This period starts with birth and the worker may benefit from this provision for two separate births (Article 41).

The so-called 'milk money' (nursing allowance) is a lump-sum payment made to a breastfeeding worker or to the uninsured breastfeeding wife of the male worker for each newborn child provided that the child is alive (Article 16). To qualify for the nursing allowance, a female worker or the working husband of the woman has to have paid at least 120 days' contributions within a period of one year before delivery.

If a female worker is the mother of a disabled child in need of constant care, she will be entitled to early retirement: 90 extra pensionable days will be added to each year of service (Article 28). It is the Social Security Organization Health Board<sup>26</sup> that determines the child's condition on the basis of the relevant By-Law.<sup>27</sup>

### 3. Conclusions

Turkey, being a country eager to join the EU, is going through a phase of adopting the *acquis*. There is an indisputable impact of EU law on the development of Turkish labour law. The EU dimension of the promotion of gender equality is considered in the preparation of new legislation and amendments. The national starting point is incorporation of the relevant *acquis* and this has to be followed by effective implementation.

The maternity provisions generally either meet, or are more generous than, the minimum requirements of Directive 92/85. Protective measures are essential in pregnancy-related cases but overprotective provisions like long maternity leave, the legal obligation of the employer to grant six months of unpaid additional leave on the worker's request, nursing breaks of 1½ hours a day for one year or childcare facilities solely at the expense of employers can backfire, discouraging employers from hiring female workers. Such 'protective measures' may make female labour a lot more costly for the employers when compared with male labour. A move from 'protection' to 'promotion' is essential. Law no. 5763 of May 2008, the so-called 'employment package', tries to ameliorate the adverse effects of the global crisis on employment and eases some of the undue burdens on the employers, *inter alia*, lifting of the legal obligation of establishing pre-school classes and providing the option of outsourcing childcare. Barriers for businesses hiring women have to be lifted. Law no. 5763 of May 2008 provides incentives such as lifted or lowered premiums for employers to promote employment of youth and women. These incentives, applicable until 30 June 2010, cover males aged between 18-29 and females above 18 without an upper age limit (Article 20). The Government is to subsidize employers' social security contributions for newly hired women during up to five years.

The gap in the unemployment rates of men and women has to be reduced. In the National Action Plan – Gender Equality 2008-2013, objectives and strategies for action are developed for the areas of education, economy, poverty, power and decision making, health, media and the environment. In the economic area, strategies

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<sup>26</sup> *Sosyal Güvenlik Kurumu Sağlık Kurulu*.

<sup>27</sup> Article 15, By-Law on Incapacity for Work and Schemes for Invalidity (*Çalışma Gücü Ve Meslekte Kazanma Gücü Kaybı Oranı Tespit İşlemleri Yönetmeliği*), Official Gazette, 11 October 2008.

to increase women's employment in line with the Ninth Development Plan (2007-2013) include:

1. revising the existing Labour Act in order to incorporate definitions based on gender equality;<sup>28</sup>
2. taking the necessary measures against all kinds of discrimination faced by women with regard to entry into and performance in employment and working life;
3. expanding care services for children and for sick, disabled and elderly people, and enhancing their accessibility;<sup>29</sup>
4. making legal arrangements on parental leave in order to share the childcare responsibilities between mothers and fathers; and
5. providing information to home-based working women about the opportunities to benefit from the social security system.

Family structure has its direct implications on women's entry into the labour market. The pressures of combining paid work and domestic and care responsibilities are evident. Many women leave the labour market because of difficulties in reconciling work and domestic responsibilities. Labour market inequalities make it rational for many women, rather than their male partners, to give up employment to care for children or others. Longer spells of unemployment to reconcile work and maternity can have negative consequences for experience, skills and motivation for re-entry into the labour market. Reintegration after a long pregnancy-related break is quite difficult. Part-time work is not very developed. Shortage of affordable childcare prevents women in low-paid and lower-skilled jobs from working. Development of public pre-school education/programmes may help women to find work.

The assessment of the compatibility of Turkey's legal rules on pregnancy and maternity with the EU *acquis* gives us one important conclusion: Turkey is highly responsive to change and it has shown initiative in the adaptation process by developing new legal rules and innovative policies. However, reality at enterprise level points to a second important conclusion: The participation rate by women is very low, and laws and strategies to increase female employment have to be effectively implemented and social partners' adaptability to change has to be increased. For example, flexible forms of employment and working-time arrangements are provided in the law, but are very difficult to apply in practice due to trade unions' resistance as a result of a long history with the state being the main employer and with a guarantee of life-long employment especially for public sector workers.

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<sup>28</sup> For example, terms like 'direct discrimination', 'indirect discrimination' and 'sexual harassment' need to be defined.

<sup>29</sup> For example, discrimination is prohibited in the course of work and at termination of employment, but not prohibited in access to employment and in access to all types and to all levels of vocational guidance, vocational training and retraining, including practical work experience.

# EU Policy and Legislative Process Update

April 2009 – October 2009

1. On 29 October 2009 the Commission sent a reasoned opinion to Hungary for incorrect implementation of the Parental Leave Directive (96/34/EC).  
<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=627&furtherNews=yes>
2. On 8 October 2009 the Commission sent reasoned opinions to Germany and Portugal to fully implement EU rules prohibiting discrimination in employment and occupation on the grounds of gender (Directive 2002/73/EC). With regard to Germany, the reasoned opinion concerns discrimination on the grounds of sex with regard to dismissals. The reasoned opinion to Portugal includes issues such as the right of associations to engage in judicial procedures, the competences of the equality body and the fact that civil servants are not included in the scope of the legislation. The infringement proceedings against Austria, Finland and Malta, based on the same Directive, have been closed because these Member States have now brought their national legislation in line with the requirements of Directive 2002/73/EC.  
<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=609&furtherNews=yes>
3. On 30 July 2009 the Commission adopted a proposal for a Council Directive implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (text with EEA relevance).  
*COM/2009/0410 final*  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0410:FIN:EN:PDF>
4. On 27 July 2009 the Commission published a report to the Council and the European Parliament on the application of Directive 2002/73/EC. In general the Commission is positive about the process, impact and implementation of the Directive, but the report also draws attention to the fact that the Commission has had to take action against some national governments that have not yet brought their laws and procedures into line with the Directive.  
<http://ec.europa.eu/social/BlobServlet?docId=3306&langId=en>
5. On 25 June 2009 the European Commission referred Estonia to the European Court of Justice for non-transposition of EU rules prohibiting gender discrimination in access to and supply of goods and services (Directive 2004/113/EC). The Commission has since withdrawn the case against Estonia.  
<http://ec.europa.eu/social/main.jsp?catId=418&langId=en&newsId=539&furtherNews=yes>
6. On the same day, on 25 June 2009, the Commission sent a reasoned opinion to Latvia on its implementation of EU rules prohibiting discrimination in employment and occupation on the grounds of sex (2002/73/EC). Issues are the definition of indirect discrimination and the level of protection against discrimination in the areas of self-employment, vocational training and benefits provided for by organisations of workers or employers.  
<http://ec.europa.eu/social/main.jsp?catId=418&langId=en&newsId=538&furtherNews=yes>

7. Also on 25 June 2009 the Commission started a procedure against Italy on Article 228 EC, because of non-compliance of Italian legislation with the judgment of the Court of Justice (C-46/07). In that judgment, the Court of Justice found that the Italian civil service pension scheme was discriminatory.
8. On 14 May 2009 the Commission referred Poland to the Court of Justice for non-transposition of EU rules prohibiting gender discrimination in access to and supply of goods and services (Directive 2004/113/EC). Although the Commission sent a reasoned opinion to Poland in June 2008, Poland has not yet adopted the necessary measures to give effect to the Directive in national law.  
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/785&format=HTML&aged=0&language=EN&guiLanguage=en>

# European Court of Justice Case Law Update

April 2009 – October 2009

## **Case C-63/08, 29 October 2009**

### ***Virginie Pontin v T-Comalux SA***

*Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding*

*Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*

### **Facts**

Ms Pontin worked as secretary for T-COMALUX from November 2005. She had a permanent appointment. In January 2007, Pontin was dismissed without any notification of reasons, when she was on leave for reasons of incapacity for work. In a notice dated several days later, the company based the dismissal of Pontin on non-compliance with the existing procedures regarding disability leave. Several days later, Pontin submitted a medical certificate stating that she was pregnant and argued that the dismissal was invalid. According to the Luxembourg Code du Travail, a woman can prove her pregnancy by submitting a medical certificate within 8 days after a notice of dismissal. Within 15 days, the woman can apply to the Tribunal du Travail with a request to declare the dismissal void because of pregnancy.

The Tribunal asks the Court of Justice if those periods are compatible with Directive 92/85/EEC and Directive 76/207/EEC. Moreover, women who are dismissed during pregnancy are not able to claim compensation, whereas unlawful dismissals on other grounds do have such a right. The referring tribunal asked the Court of Justice whether this legal provision is in compliance with Directive 76/207/EEC.

### **Judgment of the Court of Justice**

1. Articles 10 and 12 of Directive 92/85/EEC must be interpreted as not precluding legislation of a Member State which provides a specific remedy concerning the prohibition of dismissal of pregnant workers or workers who have recently given birth or are breastfeeding laid down in that Article 10, exercised according to procedural rules specific to that remedy, provided however that those rules are no less favourable than those governing similar domestic actions (principle of equivalence) and are not framed in such a way as to render practically impossible the exercise of rights conferred by Community law (principle of effectiveness). A fifteen-day limitation period, such as that laid down in the fourth subparagraph of Article L. 337-1(1) of the Luxembourg Labour Code, does not appear to meet that condition, but that is a matter for the referring court to determine.
2. Article 2, in conjunction with Article 3, of Directive 76/207/EEC must be interpreted as precluding legislation of a Member State, such as that introduced by Article L. 337-1(1) of the Luxembourg Labour Code, which is specific to the protection provided for in Article 10 of Directive 92/85 in the event of the dismissal of a pregnant worker, or of a worker who has recently given birth or is breastfeeding, and which denies a pregnant employee who has been dismissed

during her pregnancy the option to bring an action for damages whereas such an action is available to any other employee who has been dismissed, where such a limitation on remedies constitutes less favourable treatment of a woman related to pregnancy. That would be the case in particular if the procedural rules relating to the only action available in the case of dismissal of such workers do not comply with the principle of effective judicial protection of an individual's rights under Community law, a matter which is for the referring court to determine.

**Case C-116/08, 22 October 2009**

***C. Meerts v Proost NV (not available in English)***

*Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC*

**Facts**

In this case the interpretation of Directive 96/34/EC in a framework agreement on parental leave was at issue. Ms Meerts worked for the company Proost NV. She reduced her working time for parental leave from 18 November 2000 until 17 May 2003. Just before the end of the parental leave in May 2003, Meerts was dismissed because of economic considerations. The amount of compensation for her dismissal was calculated based on part-time work, instead of full-time work during the period of parental leave. The question was whether this calculation was in compliance with the framework agreement. The Advocate-General, in her opinion of 14 May 2009, advised the Court of Justice to declare that Article 2(6) of the Directive requires that the calculation of the compensation for dismissal, without urgent reasons and without taking into account a period of notice, is based on the salary as if the employee did not take parental leave.

**Judgment of the Court of Justice**

The Court of Justice applied Clause 2(6) of the framework agreement, which constitutes the right to maintenance of acquired rights on the date on which parental leave starts until the end of parental leave. The Belgian Government claimed that the calculation is justified, since there would be discrimination if two workers employed on a full-time basis, one on part-time parental leave and the other working full-time, were entitled in the event of dismissal to receive equivalent compensation, since two different situations would be treated in the same way. The Court of Justice did not accept this reasoning and declared that where an employer unilaterally terminates a worker's full-time employment contract of indefinite duration, without urgent cause or without observing the statutory period of notice, whilst the worker is on part-time parental leave, Clauses 2(6) and 2(7) of the framework agreement preclude the compensation to be paid to the worker from being determined on the basis of the reduced salary being received when the dismissal takes place.

**Case C-537/07, 16 July 2009**

***Evangelina Gómez-Limón Sánchez-Camacho v Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS) and Alcampo SA***

*Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC*

## Facts

In this case the calculation of invalidity pension of Ms Gómez-Limón was at issue. According to Spanish law a person with legal custody and the care for a child under 6 years old may reduce his or her working days with a proportionate reduction of salary. Ms Gómez-Limón used that possibility and reduced her working days in order to take care of her child. Her pension was calculated on the salary effectively received and the contributions effectively paid during her period of parental leave, rather than the salary and contributions that would have corresponded to full-time employment. She argued before the national court that the calculation applied to her in practice negates the effectiveness of a measure intended to promote equality before the law and to eliminate discrimination on grounds of sex. The Spanish tribunal asked the Court of Justice five questions on the compatibility of this calculation with Community law.<sup>1</sup>

## Judgment of the Court of Justice

The Court of Justice concluded that:

1. Clause 2(6) of the framework agreement on parental leave (...) can be relied on by individuals before a national court.
2. Clauses 2(6) and 2(8) of the framework agreement on parental leave do not preclude the taking into account, in the calculation of an employee's permanent invalidity pension, of the fact that he has taken a period of part-time parental leave during which he made contributions and acquired pension entitlements in proportion to the salary received.
3. Clause 2(8) of the framework agreement on parental leave does not impose obligations on the Member States, apart from that of examining and determining social security questions related to that framework agreement in accordance with national legislation. In particular, it does not require them to ensure that during parental leave employees continue to receive social security benefits. Clause 2(8) thereof cannot be relied on by individuals before a national court against public authorities.
4. The principle of equal treatment for men and women and, in particular, the principle of equal treatment for men and women in matters of social security, within the meaning of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, does not preclude an employee, during part-time parental leave, from acquiring entitlements to a permanent invalidity pension according to the time worked and the salary received and not as if he had worked on a full-time basis.

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<sup>1</sup> The referred questions and the opinion of Advocate-general Sharpston were reported in *European Gender Equality Law Review* 1/2008, p. 40 and in *European Gender Equality Law Review* 1/2009, p. 29.

## OPINIONS OF ADVOCATE-GENERALS

### Case C-194/08

#### **Opinion of Advocate-General P. Maduro of 3 September 2009**

##### *Susanne Gassmayr v Bundesministerin für Wissenschaft und Forschung*

*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*

Susanne Gassmayr is a junior doctor and worked at the anaesthesia clinic of the University of Graz. In the working conditions a so-called on-call duty allowance is paid when employers have to be on duty outside the normal working hours. Gassmayr stopped working for reasons related to her pregnancy. In Austria pregnant workers can take a leave if they have a medical statement declaring that their or the child's health requires such a leave. The University refused to pay her allowances for average on-call duties for the period that she did not work. Since she had not performed such duties, she was not entitled to such allowance according to the Federal Minister for Education, Science and Culture. Gassmayr challenged the Minister's decision before the *Verwaltungsgerichtshof*, which referred the case to the Court of Justice.

The Advocate-General advises the Court of Justice to answer the referring court, the *Verwaltungsgerichtshof*:

- Article 11(1), (2) and (3) of Council Directive 92/85/EEC (...) has direct effect and can be relied upon by individuals in domestic proceedings;
- Article 11(1), (2) and (3) of Directive 92/85 does not preclude a provision of national law according to which an employer may refuse to pay to a pregnant employee a special allowance, such as the on-call duty allowance at issue in the main proceedings, which is directly linked to the performance of specific duties, if the employee concerned has performed no such duties because she was on maternity leave or was prevented from working due to reasons connected to her health or the health of the child. It is for the national court to assess the nature of particular allowances and ascertain that the income of the pregnant employee is at least equivalent to the income that national law guarantees to employees who are away from their work for reasons connected with their state of health.

## PENDING CASES BEFORE THE EUROPEAN COURT OF JUSTICE

### Case C-186/09

#### *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, 26 May 2009*

##### **OJ C 180 of 1 August 2009, p. 33**

*Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services*

#### **Claim of Commission of the European Communities**

- Declare that by failing to adopt the laws, regulations and administrative provisions necessary to comply with Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, or in any event, by

- failing to communicate them to the Commission, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under the Directive;
- Order the United Kingdom of Great Britain and Northern Ireland to pay the costs.

### **Plea in law and main argument**

The period within which the Directive had to be transposed expired on 21 December 2007.

### **Case C-236/09**

**Reference for a preliminary ruling from the Cour constitutionnelle (Belgium) lodged on 29 June 2009, *Association Belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministres*, OJ C 205 of 29 August 2009, p. 28**

*Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services*

### **Questions referred by the Cour constitutionnelle:**

1. Is Article 5(2) of Council Directive 2004/113/EC compatible with Article 6(2) of the Treaty on the European Union, and more specifically with the principle of equality and non-discrimination guaranteed by that provision?
2. If the answer to the first question is negative, is Article 5(2) of the Directive also incompatible with Article 6(2) of the Treaty on the European Union if its application is restricted to life-assurance contracts?

### **Case C-104/09**

**Reference for a preliminary ruling from the Tribunal Superior de Justicia de Galicia (Spain) lodged on 19 March 2009, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*, OJ C 141 of 20 June 2009, p. 22**

*Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*

### **Questions referred by the Tribunal Superior de Justicia de Galicia**

Does a national law (specifically, Article 37.4 of the Workers' Statute) which recognises only employed mothers, but not employed fathers, as holders of the right to paid leave in respect of the feeding of an unweaned child - leave which consists of a half-hour reduction in the working day or an hour taken off from work that may be divided into two parts, which is voluntary, paid for by the employer and may be taken until the child is nine months old - infringe the principle of equal treatment, which prohibits discrimination on grounds of sex, and is recognised in Article 13 of the Treaty, in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, and in Directive 2002/73 amending that Directive?

# European Court of Human Rights Case Law Update

April 2009 – October 2009

## Case of *Opuz v Turkey* of 9 June 2009

The applicant was married to H.O. and they had three children together. Between 1995 and 2001 H.O. used violence against the applicant and her mother several times, which resulted in various serious injuries. In one of the incidents, H.O. stabbed the applicant several times with a knife. Another time he drove his car into the applicant and her mother. After this, H.O. stated before the police that this was just an accident, because he wanted to give them a lift, and the applicant and her mother threw themselves in front of the car. The mother of the applicant suffered life-threatening injuries from this incident. During the period in which these incidents took place, the public prosecutor filed multiple indictments against H.O., but the Magistrate's Court discontinued the assault case, because the applicant and her mother withdrew their complaints. In another incident, the public prosecutor did not initiate criminal proceedings against H.O., because of a lack of evidence. Since October 2001, after H.O. had stabbed her, the applicant lived with her mother. The mother of the applicant presented several petitions to the prosecutor's office claiming that H.O. was threatening to kill her. When the mother went to get the applicant's furniture with a transport company in March 2002, H.O. surprised the driver and shot the mother, who died instantly. H.O. was finally convicted of murder of the mother of the applicant and was sentenced to life-time imprisonment, which was later changed into 15 years and 10 months and a fine, because of his good conduct during the trial and because he had declared that the murder was the result of provocation by the mother and was necessary to defend his honour. In view of the pre-trial detention and the fact that the judgment would be examined on appeal, the Court ordered the release of H.O. After his release H.O. tried to find out the whereabouts of the applicant. She therefore filed a complaint with the prosecutors' office that her life was in danger, and she asked the authorities to take measures to protect her from H.O. She also repeated that request before the Court. In the end, the authorities informed the Court that protective measures had been taken.

The applicant claimed before the European Court of Human Rights that the Turkish Government and the state authorities failed to protect her and her mother from domestic violence. The ECHR found that the Turkish Government had indeed failed to protect the applicant and concluded that Article 2 (right to life) and Article 3 (prohibition of torture and of inhuman and degrading treatment) of the Convention had been violated. Moreover the ECHR concluded that there had been a violation of Article 14 (prohibition of discrimination) read in conjunction with Article 2 (the right to life) and 3 (prohibition of torture and of inhuman and degrading treatment) of the Convention. The Court referred to instruments and principles of international law accepted by the vast majority of States, and stated that the State's failure – even if unintentional – to protect women against domestic violence breached women's right to equal protection by the law. Reports of two NGOs<sup>1</sup> both suggested that domestic violence was tolerated by the authorities and that the remedies indicated by the Government did not function effectively. The Court considered therefore: '(...) the

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<sup>1</sup> Diyarbakır Bar Association and Amnesty International.

violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence'.<sup>2</sup>

The whole judgment can be found on:

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=851046&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

### **Case *K.H. and others v Slovakia*, 28 April 2009**

As reported by Zuzana Magurová in the Slovakian update, the European Court of Human Rights concluded that Slovakia violated the human rights of eight Roma women. The applicants were treated at gynaecological and obstetrics departments in two hospitals in eastern Slovakia during their pregnancies and deliveries. Despite continuous attempts to conceive, none of the applicants succeeded in becoming pregnant since their last stay in hospital, when they delivered via caesarean section. The applicants suspected that the reason for their infertility might be that during their caesarean delivery a sterilisation procedure was performed on them by medical personnel in the hospitals concerned. Several applicants had been asked to sign documents prior to their delivery or on discharge from the hospital but they were not sure of the content of those documents. The legal representatives of the women were not allowed to make photocopies of their medical reports for potential evidence in future civil proceedings for damages, and to ensure that such documents and evidence were not destroyed or lost. According to the Ministry of Health, the Healthcare Act does not permit a patient to authorise another person to consult her or his medical record. The applicants themselves, however, were allowed to consult their own medical files and make handwritten excerpts. The women claimed that the refusal was a violation of Article 8, because it violates the rights of access to information concerning their health and reproductive status. Moreover, the women claimed that the refusal was a violation of Article 6 of the Convention, because the refusal to make photocopies would disadvantage them in proceedings against the State.

The European Court of Human Rights unanimously concluded that there had been violation of Article 8 and with majority concluded that Article 6 of the Convention had been violated. Background information on this case is provided in the Slovakian report on page 89 of this *European Gender Equality Law Review*.

The whole judgment can be found on:

<http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=73160&sessionId=36419052&skin=hudoc-en&attachment=true>

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<sup>2</sup> Paragraph 200 of the judgment.

## News from the Member States and EEA Countries

AUSTRIA – Anna Sporrer

### Policy developments

#### *Campaign on equal pay*

In September 2009, the Minister for Women's Affairs and the Minister for Labour, Social Affairs and Consumer Protection launched a joint campaign on equal pay for women and men called 'EQUAL = FAIR', proposing that employers who employ more than 25 employees shall be obliged to publish anonymous salary lists within the enterprise in order to create more transparency and to combat inequalities in the pay schemes. In their proposal the two ministers referred to best practices in the public services in Austria, to the model of Sweden and to some private (multinational) enterprises. In order to create more publicity for this initiative, the campaign is also supported by famous persons like artists, actors and scientists.

#### *Representation of women in leading positions*

The Minister for Women's Affairs has published a report according to which the representation of women in leading positions in the federal public services has increased from 16 % to 20.6 % in total over the last 2 years. The situations in the various ministries differ remarkably, from 41.2 % in the Ministry of Social Affairs and 25 % in the Federal Chancellery to the Ministry of Defence with 0 % women in leading positions. The Federal Positions Plan (*Stellenplan des Bundes*), which is part of the future budget for the Federal State, will further include new targets in order to increase women's representation in leading positions during this legislative period.

#### *Improvement of childcare allowance system*

The coalition partners have agreed on improving the system for childcare allowances by adding a right for parents to receive an income-related benefit of between EUR 1 000 and EUR 2 000 monthly until the child is 14 months old, in case the parents share the childcare leave. This measure is aimed at allowing women to return to the labour market after childbirth as soon as they want and at motivating fathers to take care of the child for at least 2 months. This new childcare allowance will be granted to all parents of children born after 1 October 2009.

### Legislative developments

#### *Promotion of women on business boards and at universities*

The Code of Businesses (*Unternehmensgesetzbuch*) has been amended and now contains an obligation for all capital companies to describe in their annual reports which kind of measures have been taken in order to promote women on boards of management, supervisory boards and in leading positions of the enterprise.<sup>1</sup>

The Act on the Organisation of Universities and their Studies has been amended.<sup>2</sup> In many respects, the amendments are dedicated to improving promotion of women at universities and to strengthen the structure and powers of the internal equality bodies.

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<sup>1</sup> OJ I 71/2009.

<sup>2</sup> OJ I 81/2009.

### ***Affirmative action plans***

Under the Federal Equal Treatment Act, all federal ministries have to issue affirmative action plans for women, which have to be revised every other year and have to formulate concrete aims and goals for the advancement of women in all fields and at all levels. The action plans have the legal status of a legally binding regulation and are to be regarded as means of enforcement of the Federal Equal Treatment Act, which provides for legally binding provisions on the promotion of women, including the quota of 40 % for the representation of women in all levels and income classes. Thus, all action plans reaffirm de-facto equality between women and men as a major goal and all ministries commit themselves to proactive policies towards this aim. The action plans contain provisions on hiring and career advancement, job advertisements, protection against harassment, promotion of women in vocational training, career planning, adequate representation of women on commissions and other advisory and deciding bodies as well as measures for better reconciliation of work and family life for women and men. Furthermore, most of the action plans provide for binding goals for the percentage of women in areas where women are still under-represented, which have to be reached within the following two years. Several such action plans have recently been amended, in particular for the Ministry of Finance<sup>3</sup> and the Ministry of Health.<sup>4</sup>

### ***Amendment of framework on financial support***

The Regulation on the General Framework for the Granting of Governmental financial Support (*Verordnung über die Allgemeinen Rahmenrichtlinien für die Gewährung von Förderungen aus Bundesmitteln*) has been amended and strengthens the principle that all organisations or institutions applying financial support by the Federal Government are obliged to strictly obey all equality acts.<sup>5</sup>

### **Case law of national courts**

#### ***Supreme Court: preliminary reference regarding protection against dismissal***

The Austrian Supreme Court has referred a certain case to the European Court of Justice for a preliminary ruling on the question whether or not Article 3 Paragraph 1c of Directive 76/207/EEC as amended by Directive 2002/73/EC is in contradiction with a collective agreement provision which states that special protection against dismissal, which goes beyond the general protection against dismissal, is given only until the employee is entitled to old-age pension, given that the pensionable age is different for women and men. Secondly, the Supreme Court asks whether or not the Directive opposes an employer's decision on the dismissal of a female employee a few months after she has reached the pensionable age in order to employ young employees entering the labour market.<sup>6</sup>

#### ***Supreme Court: transgender***

With reference to the European Court of Human Rights, the European Court of Justice (C-423/04 *Richards*), Directives 76/207/EEC and 79/7/EEC, and to the legal situation in Germany, the Austrian Supreme Court has stated that legally the personal status of a transgender person changes by its recognition through the administrative authority

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<sup>3</sup> OJ II 289/2009.

<sup>4</sup> OJ II 303/2009.

<sup>5</sup> OJ II 317/2009.

<sup>6</sup> Supreme Court 4.8.2009, 9ObA163/08y.

after an operation and does not have retroactive effect. Therefore with regard to pension rights the claimant has to be treated as a person of her former male sex.<sup>7</sup>

***Supreme Court: discrimination in application procedure***

The Supreme Court has confirmed the judgment in first instance ascertaining discrimination on grounds of sex of a female apprentice who applied for a job as a carpenter and was told that girls would not qualify for that job, because physically they would not be strong enough. With reference to Article 6 of Directive 76/207/EEC and the jurisdiction of the European Court of Justice (C-180/95 *Draehmpaehl*) the Supreme Court awarded compensation of immaterial damages of EUR 500.<sup>8</sup>

**BELGIUM – Jean Jacqmain**

**Policy developments**

While the disastrous effects of the economic recession, especially on employment, continued unabated, and the various authorities were confronted with prospects of serious budgetary deficits, the federal coalition was nearly paralysed again, this time by the run-up to the regional elections of June in which its component parties were bitter rivals. Forming the new Region and Community governments took one month and by the summer recess there was still absolutely no hint of interest for gender issues to report at any decision level.

**Legislative developments**

Two significant but unrelated improvements in the protection of maternity are to be mentioned.

The first one concerns pregnant employees who must be removed from their usual tasks because of a health risk for themselves or the embryos. Thanks to an amendment introduced by the Economic Reactivation Act of March 2007, as from 1 January 2010, the Maternity Insurance (a branch of the statutory Healthcare and Sickness Insurance Scheme, organised by the Consolidated Act of 14 July 1994) will either compensate for the lower pay if the employer has to transfer the employee to a lesser-paid job (until now, there was no compensation) or give her a benefit equal to 90% of the gross remuneration, i.e. a maximum of EUR 100.84 per day if no transfer is possible (until now, the benefit was 60 %, i.e. a maximum of EUR 71.02 per day, unless the health risk coincides with a risk of occupational disease in which case a 90 % benefit may be supplied based on the statutory Occupational Disease Insurance Scheme).

The second one concerns the computation of postnatal leave. Under the Working Conditions Act of 16 March 1971, the last seven days of pregnancy are compulsory antenatal leave, so that, logically speaking, the postnatal leave begins on the day of delivery. However, it happens that an employee is taken by surprise and, without having used any antenatal leave, gives birth when her leave has only just started, or when she has not even finished her usual work, thus losing one day of her postnatal leave. Thanks to an amendment introduced by the Multi-Purpose Act of 6 May 2009,

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<sup>7</sup> Supreme Court 21.4.2009, 10ObS29/09a.

<sup>8</sup> Supreme Court 23.4.2009, 8ObA11/09i.

as from 1 March 2009 the postnatal leave begins on the day following the delivery in the case mentioned above.<sup>9</sup>

### **Case law of national courts**

The following decisions are noteworthy.

#### ***Constitutional Court, Judgment n°63/2009 of 25 March 2009***

Although female employees are still the main users of parental leave, the gender dimension was not mentioned at any stage of a dispute which gave the Constitutional Court the opportunity to interpret Article 102 of the Recovery Act of 22 January 1985 in the light of the general principle of equality under the law (Articles 10 and 11 of the Constitution). Under Article 102, any employee is entitled to a 3-month full-time parental leave or a 6-month half-time leave (or a 15-month one-fifth leave); no pay is due during the time when no work is performed, but a benefit, or a proportional fraction of it, is provided by the Unemployment Insurance Scheme.

Given that Article 102 mentions ‘the employer’ in the singular form, was it possible that a woman who had full-time employment divided by halves between two different employers and had taken a 3-month parental leave with the first employer, was not entitled to the benefit if she later applied for a similar leave with the second employer? In its judgment n°63/2009 of 25 March 2009,<sup>10</sup> the Constitutional Court relied on plain common sense to rule that Article 102 resulted in unjustified discrimination if (as the Unemployment Office claimed) a 6-month half-time parental leave was only granted if an employee was occupied full-time by a single employer, but not by two.

Meanwhile, the ECJ decided on 22 October 2009 in case C-116/08 *Meerts*, which the Court of Cassation had referred for a preliminary ruling concerning Directive 96/34/EC.

#### ***Constitutional Court, judgment n°103/2009 of 18 June 2009***

The Act of 10 May 2007 ‘aimed at combating discrimination between women and men’ (colloquially ‘the Gender Act’) purports to implement (within the federal Parliament’s jurisdiction) all the relevant EC Directives, including Directive 2004/113. As to the use of gender-related actuarial factors in insurance, Article 10 of the Act originally provided that such an exception as allowed by Article 5.2 of the Directive could be applied, but not later than 21 December 2007. However, due to an intensive and successful lobbying campaign waged by *Assuralia*, the insurance companies’ federation, to have that deadline repealed, the new federal majority which resulted from the general elections of June 2007 adopted an Act amending the Gender Act which was promulgated on 21 December 2007. Consequently, but exclusively in life insurance, the use of gender-related actuarial factors remains permissible; in order to comply with Articles 5.2 and 16.1 of Directive 2004/113, the Control Commission for Bank, Finance and Insurance (an official body) is supposed to collect and publish relevant actuarial data.

*Test-Achats/Aankoop*, the main consumers’ rights organisation, applied for annulment of the Act of 21 December 2007 by the Constitutional Court, claiming that the disputed Act violated the general principle of equality under the law (Articles 10

<sup>9</sup> All Acts mentioned above are accessible on [www.juridat.be](http://www.juridat.be) (in French and Dutch) last accessed 31 August 2009.

<sup>10</sup> [www.constitutionalcourt.be](http://www.constitutionalcourt.be) (in French, Dutch and German); last accessed 31 August 2009.

and 11 of the Constitution), combined with various provisions of European law. However, given that the Act of 21 December 2007 is based on the faculty of exception which Article 5.2 of Directive 2004/113/EC conceded to the Member States, the claimant held that the latter provision was incompatible with the principle of equality and non-discrimination which is guaranteed by Article 6.2 of the EU Treaty through a reference to Article 14 of the European Convention of Human Rights.

Consequently, in its judgment n°103/2009 of 18 June 2009,<sup>11</sup> the Constitutional Court found that under Article 234 EC, it must refer the case to the ECJ for a preliminary ruling concerning the question of compatibility mentioned above; it is now pending (C-236/09, *Test-Achats*).

### ***Conseil d'Etat, two judgments of 17 March 2009, n° 191.532 and 191.533***

So far, the parliaments of different Communities (competent in matters of education) have been unable to legislate on whether or not pupils or students (not to mention teachers) should be allowed to display 'signs of religious adherence' (i.e., mainly, the Islamic headscarf) in public-sponsored schools. Thus, the government of the French-speaking Community left it to the discretion of every school individually.

When two school directors adopted regulations to prohibit the wearing of any 'headgear', the *Mouvement contre le racisme, l'antisémitisme et la xénophobie* (M.R.A.X.) applied before the Conseil d'Etat for annulment of those regulations, relying on the Act of 10 May 2007 aimed at combating discrimination based on race and ethnic origins (colloquially, the 'Race Act'). In its judgments of 17 March 2009,<sup>12</sup> the *Conseil d'Etat* found that according to its charter, M.R.A.X. aims at combating racial discrimination and promoting equality, which is precisely the purpose of the disputed regulations; thus, M.R.A.X. had no *locus standi* and its applications were dismissed.

Those judgments (rendered by the court of last resort in administrative matters) are extremely worrying because they jeopardize the interested associations' right to engage in judicial procedures, which was recognized by the three Acts of 10 May 2007 (on 'Race', 'Gender' and 'Discrimination in general') in order to implement Directives 2000/43, 2000/78, 2004/113 and 2006/54/EC.

## **BULGARIA – Genoveva Tisheva**

### **Policy developments**

The national elections of 5 July 2009 have brought to power a new political force: the political party 'Citizens for European Development of Bulgaria' (member of the EPP group in the European parliament), which has the majority in the 41st National Assembly. By the end of July 2009, the new Government was formed with promises to tackle the economic crisis, to combat corruption, to speed up the judicial reform and to improve the process of absorption and accountability for the EU structural funds.

<sup>11</sup> [www.constitutionalcourt.be](http://www.constitutionalcourt.be) (in French, Dutch and German); last accessed 31 August 2009.

<sup>12</sup> Accessible on [www.consetat-raadvst.be](http://www.consetat-raadvst.be) (in French), last accessed 31 August 2009. See S. Van Drooghenbroeck's critical comments in *Journal des tribunaux*, 2009, p. 252.

In June 2009, it was officially recognized that Bulgaria is in the middle of the economic crisis,<sup>13</sup> unemployment is growing (in August 2009: 6.2 %; compared to 5.6 % in 2008).

In order to avoid a budget deficit by the end of 2009, the Government announced measures for budgetary restrictions but promised not to touch the expenses for education and other expenses in the sensitive social sphere.

In this context, the concern that the Government will not allocate enough funds for gender equality by the end of 2009 is legitimate. The budget which is being planned for 2010 is defined as 'reasonable', which also means forthcoming restrictions.

## **Legislative developments**

Given the political and economic framework described above, currently there is no space for debate on the need for a special gender equality law, as this will imply an additional budget for a new gender equality institution, for financing monitoring, research, analysis, etc.

### ***Adoption of a new Family Code***

In June 2009, a new Family Code (FC) was adopted<sup>14</sup> which will come into force on 1 October 2009. The changes in the regulation of family relations were desperately needed, as the last Family Code dated from 1985 and did not correspond with the new social realities. The draft of the new FC contained two new solutions of importance for gender equality – the recognition and registration of cohabitants (partners) and the new regulation of property relations of spouses and partners. The first issue provoked much discussion in society. Despite the fact that the great majority of women and men in Bulgaria live in partnership relations and many of them have children together, the parliament was rather strongly influenced by the conservative organisations and institutions (the Orthodox Church) and adopted the new FC without the recognition of cohabitation. An additional reason for the rise of the conservative forces was the suggestion of some NGOs, like the gay organization 'Gemini', to also include in the FC the recognition of same-sex partnerships. Thus the debate about recognition or not of cohabitants expanded and the issue turned out to be too sensitive and too innovative for the parliamentarians. Finally, they decided to leave the scope of the FC as it stands now, and as it had been since 1985, by giving recognition just to the family in the classical sense. So the protection by the State and society of marriage and the family remains among the main principles of the new Family Code. The issue of recognizing personal and family rights related to cohabitation, including same-sex partnerships, was postponed into an unclear future.

This rigid understanding on the legislator's part of family relations also influences gender equality and the realization of other social rights of the partners. However, cohabitation is explicitly recognized in other laws – the Law on Protection against Domestic Violence, where both spouses and partners are protected, and the Law on Social Support for the eligibility for social support. It is worth noting that new provisions (since 1 January 2009) in the Labour Code and the Code of Social Insurance envision, after the first 6 months of maternity leave, the possibility for

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<sup>13</sup> According to National Statistics, the GDP for the first three months of 2009 decreased by 3.5 %, and for the first 6 months by 4 %, compared to the same periods of 2008.

<sup>14</sup> SG 47/2009, amended by SG 74/2009.

sharing the remaining paid childcare leave up to 410 days between the mother and the father, if they are married or live together.

Cohabitation is not recognized for survivors' benefits, for the family benefits allocated from the State budget, or for the eligibility criteria applied for ensuring housing, etc.

The recognition of cohabitation by the Family Code will be an important signal for harmonization of the approach and for ensuring equality.

The new Family Code proposes new solutions for the property relations between spouses. The existing regime of marital community was diversified by adding a regime of separate property and a regime based on a marital contract. The property regime can be changed during the marriage and is subject to explicit registration. It would be worthwhile to monitor how these new solutions will impact gender equality in Bulgaria.

### ***Reformation of legislation in the field of domestic violence***

The new Government continued the reform in the field of domestic violence by re-launching the draft amendments to the Law on Protection against Domestic Violence, prepared by the previous government. They provide for more effective protection of the victims of violence and for sustainability of the services for such victims. If adopted by the 41st National Assembly by the end of the year, the changes will have positive influence on gender equality in Bulgaria.

Changes made to the Penal Code in April 2009<sup>15</sup> have the potential to ensure increased protection of women against domestic violence and trafficking, including for sexual exploitation. Violation of protection orders issued under the Law on Protection against Domestic Violence was criminalized (Article 296 Penal Code). Using the services of a minor prostitute (despite the age of sexual consent - 14) was explicitly criminalized too (Article 154(a) PC). The punishments for trafficking were made more stringent. Using the sexual services of a trafficked person was explicitly introduced as a new *corpus delicti* of the crime of trafficking in persons (Article 159(c) PC).

### **Equality body decisions/opinions**

Two pending cases on gender equality which have attracted media attention can be mentioned for the period under consideration.

#### ***Access to positions in the National Guard of Bulgaria***

Two female university students initiated a case before the Supreme Administrative Court against a regulation issued by the Minister of Defence hindering women's access to positions in the National Guard of Bulgaria. Supported by an NGO, they claim that this is a sexist stereotyped attitude towards women who, apparently, are not worthy enough to present honours as part of the units of the National Guard. The Ministry of Defence reacted with the argument that this job might be detrimental to women's health. The case is still pending and in its initial phase.

#### ***Sexist advertisement***

The case before the Commission for Protection against Discrimination against the producers of the sexist advertisement of anisette 'Peshtera' and the media which

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<sup>15</sup> SG 27/ 2009.

disseminated it, is still pending, more than one year after it was initiated by 13 Bulgarian women. The case has its grounds in the Constitution, in the Anti-Discrimination Law, in CEDAW, etc. One of the main arguments of the claimants is that Bulgaria transposed Directive 113/2004, without explicitly excluding its application in the field of media and advertising. The delay in the consideration of the case by the Commission shows that it is a new and difficult issue for the equality body. In fact, the Commission itself, without a claim from the parties, mandated a consolidated expert opinion on the case: a media and advertising expert, a sexologist and a psychologist are expected to give their opinion and facilitate the decision of the Commission.

In addition to this otherwise plausible reason for delaying the decision, there are signs that the equality body is afraid of creating a precedent, which will provoke a wave of such cases, given the scale of sexist advertising in Bulgaria. Hopefully, the doubts about influence and pressure of corporate interests will dissipate.

## **CYPRUS – Lia Efstratiou-Georgiades**

### **Policy developments**

#### ***The National Action Plan for Gender Equality***

As part of the National Plan for Gender Equality ‘Promoting access of women to the labour market’, under the project ‘Expansion and Improvement of Care Services for Children, the Elderly, the Disabled and other Dependents’, the Ministry of Labour and Social Insurance (Social Welfare Services) has published two research studies: ‘The Role of Local Authorities in Promoting Policies on Care for reconciliation of work and family life’ and ‘The Open Care Services of the Cyprus Social Welfare Model’.

### **Legislative developments**

The following amendment Laws and Regulations transpose into national legislation the provisions of Recast Directive 2006/54/EC which is related to the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation:<sup>16</sup>

a) Law No. 38(I)/2009 (basic Law on Equal Pay between Men and Women for the Same Work or for Work to which Equal Value is Attributed, No. 177(I)/2002) (i) replaces/amends the definitions of ‘direct’ and ‘indirect’ discrimination, of ‘discrimination on the ground of sex’, of ‘pay’ and of ‘group of companies’, (ii) prohibits discrimination in pay between the two sexes, (iii) extends the comparison of pay between workers in companies of the same group if there is no comparable worker in the same company, (iv) encourages the giving of information by the employers to the employees or their representatives regarding salaries and differences in salaries in the various levels of the company, (v) provides independent assistance to victims of discrimination;

b) Law No. 39(I)/2009 (basic Law on Equal Treatment of Men and Women as regards Access to Employment and Vocational Training, No. 205(I)/2002) (i) clarifies the definitions of ‘direct discrimination’, ‘indirect discrimination’ and ‘discrimination on the ground of sex’, (ii) ensures the principle of equal treatment of men and women

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<sup>16</sup> Also see [www.cygazette.com](http://www.cygazette.com)

in the participation in workers' and employers' organizations and in the benefits provided by such organizations, iii) clarifies the provisions relating to judicial and/or administrative protection and the reversal of the burden of proof, (iv) provides that all the above provisions apply even in cases where the employment relation has ended, (v) improves the composition of the Gender Equality Committee in Employment and Vocational Training and makes it more independent so as to enable it to provide independent assistance to victims of discrimination;

c) Law No. 40(I)/2009 (basic Law on Equal Treatment of Men and Women in Occupational Social Insurance Schemes, No. 133(I)/2002) (i) replaces/amends the definitions mentioned in a) above, (ii) replaces the definition of 'Occupational Social Insurance Scheme' by a new definition which describes a scheme which provides for benefits to employees and self-employed persons in the same company or group of companies which supplement or replace the benefits under the Social Insurance System;

d) Regulations 176/2009 for the Provision of Independent Assistance to Victims of Discrimination (under Articles 23(2)(a) and 34 of the Law 205(I)/2002 – 39(I)/2009) has the purpose to establish the nature, the kind, the content and the procedure for the provision of independent assistance to victims of discrimination by the Gender Equality Committee, including advice on matters of discrimination and legal aid and representation of the victims before the Court or administrative body.

### **Case law of national courts**

There is no case law to report with respect to cases before the national courts on the ground of sex for the period April 2009 to August 2009.

### **Equality body decisions/opinions**

#### ***File No. AKI 65/2008 published 24 May 2009: access to training programme***

The Ombudsman, as Equality Authority, examined the complaint of Mr GB against KES College relating to his not being accepted by the College to attend its training programme for massage, because he is a man. The College in its written statement explained that the complainant was interested in following the special course for massage, but not in the training programme for beauty therapist. The College organized a special programme for men in which two other men who were also interested would participate, but the timetable of this programme was not convenient for him, because of his work. During the investigation of the complaint by the Officer of the Equality Authority, the Principal and Vice-Principal of the College stated that according to the policy adopted by the College, male students are not accepted to study this specific training programme because of the Cypriot mentality and because the participation of a male student, especially in the massage lessons, would cause the reaction of not only the female students, but also of their parents because, for the purposes of the lessons, the female students undress and practise massage on each other. The Ombudsman, after examining the complaint, concluded that there is exclusion of male students from registration in the training programme of beauty therapist, which constitutes direct discrimination on the ground of sex in the field of occupational training, which is not allowed under the Equal Treatment between Men and Women in Employment and Occupational Training Laws of 2002-2009. Furthermore, this situation constitutes indirect discrimination on the ground of sex in the field of access to job positions. Because of not being able to graduate from the

college, Mr GB could not comply with the minimum requirements to work in the field of beauty therapy. He could not even take the ITEC of London exams to certify his professional qualification. The Ombudsman intends to discuss the matter with the college as well as with the complainant and she sent them, together with her report on the complaint, an invitation for consultation and to discuss the recommendation she intends to submit so that the discrimination on ground of sex ceases to exist. In the end, Mr GB registered at another college in the field of beauty therapist and in the specialized course of massage, in which male students are also accepted and for purposes of decency some special measures are taken, e.g. Mr GB does the practical massaging exercises on his own model.

***File No. AKI 27/2008 published 16 April 2009: unequal treatment in occupational training***

The Ombudsman examined the complaint of the Equality Observatory of Cyprus against the Cyprus Telecommunications Authority (CYTA), on behalf of a group of 14 women, who work as cleaners at CYTA, stating that they were not granted equal opportunities for occupational training as compared to their male colleagues who were working in the same category of general services (unskilled workers, gardeners, technician cleaner, guard porter), who were granted occupational training. In her investigation the Ombudsman noted, among other things, that not only the cleaners, but also the workers and gardeners were recruited as unskilled labour and were all in the same salary scale. Furthermore, the cleaners as well as the workers and gardeners had only passed primary school. The occupational training programme was at the level of general knowledge and was not a specialized occupational training of employees. The Ombudsman found out that, through the years, in the collective agreements from 1980-2003, access to training was given to existing staff of general services, whereas to cleaners (all women), who belonged to the same category of personnel, such access was not given. Occupational training was one of the prerequisites for salary advancement. The Ombudsman reached the following conclusions:

a) that the exclusion of the cleaners from the occupational training programme constitutes indirect discrimination on ground of sex in the field of access to occupational training, thus violating the Equal Treatment of Men and Women in Employment and Occupational Training Laws of 2002-2007;

b) that the fact that cleaners were denied the possibility to have occupational training made occupational advancement impossible for them and caused inequality in remuneration on ground of sex;

c) that in the collective agreement neither the work of cleaner nor that of the technician cleaner, guard, porter or worker are evaluated. Although on the day of their recruitment they get the same salary, the group of cleaners, which only includes women, later find themselves in an unfavourable position as regards remuneration compared to men who belong to other groups but have the same initial salary, and this situation cannot be justified by objective factors not relating to sex, thus constituting indirect discrimination on ground of sex;

d) that in the collective agreement of 2002, the criteria on which the transfer of workers from one group to another was based constituted indirect discrimination on ground of sex against the female cleaners, because these criteria deprived them of any prospect for occupational development until their retirement; and e) that the dimension of the equality of sexes was persistently absent from the agenda of negotiations for the collective agreements.

The Ombudsman will call the interested parties for consultations in order to discuss the content of the recommendation that she will submit.

## **Miscellaneous**

### ***Activities on gender equality by NGOs***

Several NGOs continue to organize seminars to promote the principle of equality and inform their members regarding the provisions of the laws which transpose European equality legislation.

In May 2009, the Gender Equality and Equal Treatment Department of Trade Union DEOK published the book 'Steps for equal pay' combating the pay gap of 25 % between men and women in Cypriot Society.

## **CZECH REPUBLIC – Kristina Koldinská**

### **Policy developments**

#### ***Abrogation of adoption restrictions for registered partners***

Government Council for Human Rights approved initiative of its Committee for sexual minorities on 18 June 2009 which is directed at abrogation of Section 13, paragraph 2 of Act No. 115/2006 Coll., on Registered Partnership, according to which 'Lasting partnership prevents any of partners to become an adoptive parent'. Suggestion of the Committee for sexual minorities derived from Analysis of Czech legal regulations for adoption of a child by gays, lesbian and bisexual people in the light of the European Union law and European Convention on Human Rights and Fundamental Freedoms.<sup>17</sup> The analysis examined the question of accordance of adoption ban with European Convention on Human Rights and Fundamental Freedoms and the Constitution of the Czech Republic. On the basis of a recent decision of the European Court of Human Rights (*E.B. v France* of January 2008), the above mentioned legal provisions shall be seen as in breach with the Convention and therefore unconstitutional.<sup>18</sup>

### **Legislative developments**

#### ***Antidiscrimination bill adopted***

On 17 June 2009 the antidiscrimination bill has been finally adopted by the Parliament, after almost two years of discussions on it (it was proposed by the Government in July 2007). The Act No. 198/2009 Coll., on equal treatment and legal instruments of protection against discrimination and on amendment of some laws, has been published on 29 June 2009 in the part 58 of the Collection of Laws.

The act is quite short: it has just 19 sections (including those amending some other acts). The act defines the right to equal treatment in areas of employment and access to employment, entrepreneurship and self-employment, membership and activity in trade unions, councils of employees or organisations of employers, membership and activity in professional chambers, social security, social benefits,

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<sup>17</sup> Whole analysis is available at: [http://www.feminismus.cz/download/analyza\\_adopce\\_final.pdf](http://www.feminismus.cz/download/analyza_adopce_final.pdf), accessed 14 September 2009.

<sup>18</sup> A longer information can be read on <http://www.feminismus.cz/fulltext.shtml?x=2193616>, accessed 14 September 2009.

health care, education, and access to goods and services. The act defines direct and indirect discrimination, harassment and sexual harassment, and includes also a negative definition of discrimination (acceptable different treatment).

Quite a large part of the act (two large sections) is dedicated to equal payment for men and women in social security systems of workers. This is because of the fact that the Czech Republic does not have a system of occupational pensions, which does not however exclude the state from implementing the occupational pensions directive. Therefore, situations where the employer must pay attention to the issue of equal treatment are regulated.

The anti-discrimination act provides further the possibility of applying to a court in the case of discrimination, and the competences of the public defender of rights (the ombudsman) have been extended in the sense that the ombudsman shall provide methodical help to victims of discrimination when they apply to a court and commence court proceedings. Furthermore, the ombudsman shall carry out research, publish reports and make recommendations regarding issues related to discrimination, and ensure the exchange of information among competent European subjects and bodies. There is however no competence for the ombudsman to defend victims before courts or provide any further legal assistance.

There are also some obligations for insurance companies, which are an expression of implementation of the Directive 2004/113.

In fact, the whole antidiscrimination law implements the EC equality directives in order to be in accordance with them. Actually, the obligations of the Czech Republic towards EU have been the strongest argument for adoption of the antidiscrimination law.

## **Case law of national courts**

### ***Indirect discrimination against parents caring after their children***

In recent case law, there is an important decision of Supreme Administrative Court<sup>19</sup> regarding the case of indirect discrimination against parents caring after their children. The case started with the decision of a financial office which argued that a married couple could not benefit from so-called ‘common taxation of spouses’, as one of them did not receive the care benefit as provided by the system of state social support. In fact, the Czech law on taxation introduced the common taxation of spouses in order to support families with children through a tax benefit. This benefit, however, is not provided to self-employed persons who do not benefit from the parental benefit provided by the system of state social support. In such a case, where the spouse who was self-employed would also receive the above-mentioned benefit, the common taxation of spouses could have been applied. In the case reported, the spouses initiated a court case, as they thought that such a condition in legislation represents indirect discrimination against people who care for children and work as self-employed persons at the same time. A number of arguments using principles of European law and wording of relevant directives has been presented in the claim, also claiming direct application of these directives in cases where national legislation does not observe (or implement) them. Neither the financial office nor the court discussed the principles of European law, and the issue of indirect discrimination was completely ignored in the reasoning of the court, where it simply stated that there was no such discrimination.

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<sup>19</sup> No. 7 Afs 103/2008-71.

The Supreme Administrative Court found the arguments of the plaintiffs relevant and abolished the previous decisions of lower courts, founding the reasoning of the decision especially on EC equality law and the concepts of indirect discrimination and direct application of directives.

## DENMARK – *Ruth Nielsen*

### Policy developments

#### *New minister*

On 7 April 2009, Inger Støjberg became Minister for Employment and Gender Equality.

#### *LO's equal pay strategy*

On 15 May 2009, the Confederation of Trade Unions (LO) adopted an equal pay strategy. The equal pay strategy is composed of 12 actions, which are divided into two parts. The first part includes legislation and more general efforts and the second part actions that may be included in collective agreements. Three of the proposals (1, 5 and 11) require measures both by legislation and collective agreements.

The first part, i.e. the legislation-oriented part, of the strategy lists the following actions:

1. Greater transparency in wage formation;
2. Insisting on the establishment of an independent gender equality body;
3. Strengthening the efforts to discover Equal Pay Cases;
4. Clarification of the concept 'work of equal value';
5. Increased maternity/paternity/parental rights for men;
6. Clarification of the significance of provisions on extra work (overtime, etc.);
7. Identification of the importance of wage increases being fixed as a percentage;
8. Insisting on making public employers comply with their mainstreaming duties under the Equal Pay Act § 1b.

The second part, i.e. the collective agreement oriented part, of the strategy lists the following actions:

1. Greater transparency in wage formation;
2. Increased maternity/paternity/parental rights for men;
3. Explicit equal pay provisions in the collective agreements;
4. Schemes for salary equalisation;
5. Further development of the existing Maternity Compensation Fund (which spreads the cost of maternity-related payments between employers) into a Fund compensating employers' care-related wage costs more generally;
6. Insisting on making public employers comply with their mainstreaming duties under the Equal Pay Act § 1b;
7. Payment during children's sickness.

## **Legislative developments**

### ***Act on equal treatment of men and women in connection with insurance, pensions and similar financial benefits***

In February 2009, the Danish Parliament adopted an Act amending the Act on equal treatment of men and women in occupational social security schemes which implements Article 5 in Directive 2004/113/EC. The amendments will come into force on 21 December 2009.

The amendments prohibit discrimination on the basis of sex in the calculation of premiums and benefits in connection with private life insurance and non-life insurance against loss or damage. The amendment to the Act changes its title into ‘Act on equal treatment of men and women in connection with insurance, pensions and similar financial benefits’. The current Act on equal treatment of men and women in occupational social security schemes applies to pensions and insurances related to employment and occupation. These provisions remain unchanged. The amendment adds a new chapter to the Act on contracts for life and non-life insurance that are not entered into in connection with employment or occupation.

The main new rule is Section 18 b(1) which provides that using sex as a factor in calculating premiums and benefits related to insurance and related financial services in all new contracts concluded after 21 December 2009 must not lead to differences in individuals’ premiums and benefits, subject to Section 18 (2) and (3). A provider of insurance and related financial services, may, however, under Section 18 b(2), decide to apply proportionate differences in individuals’ premiums and benefits where the use of gender is a determining actuarial factor for risk assessment. Each provider must ensure that the assessment of whether the use of gender is a determining actuarial factor in the risk assessment is based on relevant and accurate actuarial and statistical data. Under Section 18 b(3) providers of insurance and related financial services, using the option in Section 18 b(2) must periodically collect, publish and maintain accurate data relevant to the use of sex as a determining actuarial factor. The Financial Supervisory Authority shall lay down detailed provisions.

## **Case law of national courts**

There have been no important new developments in the case law of the courts.

## **Equality body decisions/opinions**

Denmark has no independent gender equality body as required in the directives underlying Danish gender equality law. By 1 January 2009, a new Equality Complaints Board for all prohibited grounds of discrimination was established. The new general Complaints Board is modelled on the previously existing Complaints Board for Gender Equality. It functions in three chambers: one for gender equality, one for ethnic equality and one for the remaining prohibited discrimination grounds. The chamber on gender equality has ruled in 21 cases in the first 9 months of 2009 (available in Danish at [//www.ast.dk/](http://www.ast.dk/)).

## Policy developments

### *Proposed amendments to Gender Equality Act*

Parliament has been processing for over a year a Draft Act to amend the Gender Equality Act. One aim of the Draft Act is to harmonize Estonian legislation with the requirements of European Gender Equality Directives. Because of political disputes between various parties on local elections, amendments to the Local Government Organization Act and the Local Government Council Election Act were annexed to the initial Draft Act amending the Gender Equality Act. However, the President of the Republic did not proclaim the Act, as he deemed it undemocratic and therefore unconstitutional, and sent the Act back to Parliament for revision. Parliament still has not adopted the Draft Act. One reason for the delay might be that the head of the Constitutional Affairs Commission has described these issues as ‘of lesser importance’.<sup>20</sup> As a result, on 25 June 2009 the European Commission referred Estonia to the European Court of Justice for non-transposition of EU rules prohibiting gender discrimination in the access to and supply of goods and services (Directive 2004/113/EC).

Further, due to the state budget cuts, Parliament has recently adopted several Acts that reduce the level of social protection, including the amount of sickness and care benefits. In February and June 2009, Parliament adopted amendments to the state budget.

## Legislative developments

### *Amendments to Gender Equality Act in new round of proceedings in Parliament*

A Draft Act to amend the Gender Equality Act, the Civil Service Act and the Labour Contracts Act (317 SE) was sent to a new round of proceedings in Parliament. On 11 March 2009, Parliament decided to change the Draft Act (317 UA) and regulate the issues regarding gender equality and the organization of local elections in different Draft Acts. The Draft Act was scheduled for its second reading on 5 May 2009. This second reading, however, was discontinued for purposes of additional analysis.

### *New Labour Contracts Act into effect on 1 July 2009*

The new Act fully revises the earlier Labour Act, including the norms concerning guarantees for parents of small children. The new Act establishes all labour regulations in one single Act. The Acts that were repealed include the Wages Act.

### *Amendments to Health Insurance Act into effect on 1 July 2009<sup>21</sup>*

Due to the reduced state budget resources following the impact of the global economic recession, most of the welfare benefits have been reduced in recent months.

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<sup>20</sup> L. Past, *Saamatut Eestis ähvardab soolise võrdõiguslikkuse ‘suhkrutrahv’*. *Võib-olla*. (Estonia may see imposition of a gender equality fine) – *Eesti Päevaleht*, 30.06.2009, available on <http://www.epl.ee/artikkel/472329>, accessed 14 September 2009.

<sup>21</sup> Article 11 of the Act to amend several laws due to the adoption of the second amendments to the State Budget of 2009, adopted on 18 June 2009, amending Articles 54(1)(1) and 54(1)(11) and repealing Article 54(1)(2) and 54(1)(3) of the HIA. Published in RT I 2009, 35, 232 (the State Gazette). Article 19 of the Act to amend the State Budget of 2009 and other Acts, adopted on 20 February 2009, amending Article 19 of the Health and Safety Act.

As part of the package of cost cuts, the following reductions in the payment of sickness and care benefits were made by amendments to the Health Insurance Act:

1) The sickness fund pays sickness benefits starting on the ninth day of the period of temporary incapacity for work. On the first three days, no benefits are paid, and it is the employer who has to pay benefits on days four to eight of the period of temporary incapacity for work. Under the previous rules, the sickness fund paid sickness benefits starting from the second day of the period of temporary incapacity for work.

2) The amount of sickness benefit for days four to eight (paid by the employer) is now 70 % of the average wage of the employee during the previous six months; as of the ninth day (paid by the sickness fund) it is 70 % of the average wage of the previous calendar year subject to the payment of social taxes. Under the previous rules, the amount of the benefit constituted 80 % of the average wage of the previous calendar year.

3) The amount of the care benefit is 80 % of the average wage of the previous calendar year subject to the payment of social taxes. Before, the amount of the care benefit was 100 %. The care benefit will continue to be paid by the sickness fund.

### **Case law of national courts**

#### ***Constitutional review of the Police Service Act***

The Administrative Chamber of the Supreme Court has initiated constitutional review proceedings regarding Article 49(3) of the Police Service Act. The Chamber found that this provision causes differential treatment of women and men born in 1948 and that it is therefore necessary to review whether this provision is in compliance with Article 12 of the Constitution (the right not to be discriminated on the grounds of sex).<sup>22</sup>

According to the Act, police officers can be accepted for police service, depending on the actual position, until the age of 55 or 60. However, according to Article 49(3), with the permission of the head of the Police Board, a police officer may be employed in the police service until he or she reaches the pensionable age provided for in Article 7 of the State Pension Insurance Act. According to this provision, the general pensionable age is 63. Article 7(2) stipulates that in order to gradually equalise the pensionable age of men and women, the right of women born between years 1944 and 1952 to receive an old-age pension arises prior to reaching the general pensionable age, at the ages envisaged in the Act. For women born in 1948, the respective age is 60 years and 6 months. The claimant in a particular case objected against being released from the police service on the basis of Article 49(3) of the Police Service Act when she reached the age of 60 years and 6 months of age. The pensionable age of male policemen born in 1948 is 63.

The Administrative Chamber has referred the case to the Supreme Court en banc (i.e. the full court) for adjudication.

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<sup>22</sup> Decision of the Administrative Chamber of the Supreme Court of 18 June 2009, No. 3-3-1-41-09.

## Equality body decisions/opinions

### *Opinion of the Gender Equality and Equal Treatment Commissioner concerning equal pay in the public sector*

The Gender Equality and Equal Treatment Commissioner found that the Ministry of Defence had breached the principle of equal pay when paying a lower salary to a female civil servant than to her male colleagues who did the same job.<sup>23</sup>

By way of background, in the Estonian civil service the salary has several components: a basic salary corresponding to the salary scale (the basic salary can be differentiated taking into account qualifications, working conditions, region or other characteristics of the work); an additional fee for more efficient working results or for supplementary obligations; additional fees for the length of service, academic degree, proficiency in foreign languages, processing state secrets or classified media as set forth in the law.<sup>24</sup>

The claimant in this particular case works as an advisor in the Ministry of Defence. There are two male advisors in her department. All three advisors had the same salary scale, but the amount corresponding to the salary scale was differentiated for each advisor. The differentiated salary scale is called a salary rate. The salary rate of the claimant was lower than the salary rate of her male colleagues. However, as the claimant also received an additional fee for the years of service, her total remuneration was higher than the total remuneration of her male colleagues. The Ministry explained that the salary rate was lower for the female advisor because she received an additional fee for the length of service. The Ministry also pointed out that this is quite common and that, for example, the salary rate for another female employee was also lower than the rate for her male colleagues because she received an additional fee for an academic degree.

The Commissioner established that the duties and responsibilities were similar for all advisors. The female employee had a longer term of service and higher education, whereas her male colleagues only had secondary education. The Commissioner found that the difference in the salary rate had no objective justification, given that the claimant had a higher qualification than her male colleagues. Therefore the Commissioner found that discrimination on the grounds of gender had indeed occurred. The Commissioner additionally pointed out that the amount of additional fees, leave benefit and compensation upon release from service depend on the amount of the salary rate, and not the other way around.

The representative of the Ministry of Defence, having received the opinion of the Commissioner, stated that the Ministry is yet to decide whether to change the salary system. The Ministry added that the breach of the principle of equal treatment had not been intentional. Further, the Ministry is currently analysing how to prevent gender discrimination in the future; one possibility under consideration is to appoint a gender equality representative at the Ministry.

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<sup>23</sup> H. Rudi. *Ministeerium tegi palka makstes naisametnikule liiga* (The Ministry violated the rights of a female employee in remuneration). – Postimees 24.08.2009, available at: <http://www.postimees.ee/?id=155601&print=1>, accessed 24 August 2009.

<sup>24</sup> Wages of civil servants are regulated by the Civil Service Act, State Civil Servants Official Titles and Salary Scale Act and Government Regulation No. 182 of 30 December 2008 on Remuneration of State Civil Servants.

## Policy developments

### *Government reports to Parliament on gender equality*

The present Government's programme of April 2004 contains the promise that the Government shall report to Parliament on equality between women and men. The coordinating Ministry for the Report is the Ministry of Social Affairs and Health, but a group of ministers is responsible for the political guidelines. The aim of the Report is to assess Finnish equality politics and equality measures under the four latest Government's Equality Programmes, covering the period since 1997. In October 2008, the ministers' group on Social Policy decided to set up an expert working group to prepare the Report, and an expert group was appointed in March 2009, with the aim to support and further the preparation of the Report to be presented to Parliament in the autumn of 2010. The working group is to direct the preparation of the Report, with the expertise of its members and through expert hearings. The group is chaired by Professor Helena Ranta, a well-known forensic dentist, and its members include representatives of equality bodies and experts. The working group held its first meeting in May. The task of the experts is to direct the preparation of the Report and to provide an independent expert point of view.

The Government Report is to pay special attention to the following issues: education and research, violence against women, decision making, working life and reconciliation of work and family life, equality bodies, gender mainstreaming, men and gender equality, and issues connected to multiculturalism and immigration. The Report is also to contain propositions for guidelines to be followed in future equality programmes, including legislative amendments. Special reports have been ordered on some of these issues, including violence against women, equality bodies, working life, reconciliation and educational politics. The special reports are to be finished in 2009. NGOs and other stakeholders are heard during their preparation; the first hearing was held on 19 May.

The on-going preparation of the Government Report to Parliament on gender equality is one of the reasons why the law reform on equality legislation and equality bodies, which is to cover other prohibited grounds of discrimination, will not include gender. The reform of equality legislation is being prepared by the Equality Committee, appointed by the Ministry of Justice. Because the Government Report to Parliament is to cover a range of equality programmes by several governments and other areas of equality legislation are simultaneously being reformed as well, the Report to Parliament will certainly lead to an assessment of the need for reform of the Act on Equality between Women and Men.

## Legislative developments

### *Amendment of the Act on Equality*

The Act on Equality between Women and Men<sup>25</sup> was amended in May<sup>26</sup> as to the definition of discrimination and as to the provision on compensation. The amendment came into force on 15 July 2009.

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<sup>25</sup> Act 609/1986.

<sup>26</sup> Act 369/2009.

Definitions of sexual harassment and harassment on the basis of sex were added to Section 7 of the Act, which contains the prohibition of discrimination and defines what is meant by discrimination. The definitions of harassment follow those in Directive 2002/73/EC. The European Commission had claimed that Finland had failed to implement Article 2 of the Equality Directive correctly before the amendment. The Directive contains definitions of harassment and sexual harassment, while the Finnish Act on Equality included no such definitions before the amendment. The preparatory works for the previous formulation of the Finnish provisions<sup>27</sup> explained what harassment and sexual harassment are, but this was not considered sufficient, because national legislation has to be exact and sufficiently clear so that authorities may apply it correctly and individuals fully know their rights. The amendment introduced clear definitions of harassment into the law text itself.

Before the amendment, the compensation to victims of discrimination was limited for cases concerning discrimination regarding access to a job. Under Section 11 Subsection 2, the maximum compensation was EUR 16,210 in these cases. This maximum compensation could be exceeded when considered appropriate due to the seriousness of the discrimination and other circumstances in the case, and the victim could also demand damages under the Tort Liability Act<sup>28</sup> and some other acts. Article 18 of Directive 2006/54 requires the Member States to ensure ‘real and effective compensation or reparation’ for the loss and damage suffered by the victim, and setting a prior upper limit to compensation is prohibited, ‘except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination (...) is the refusal to take his/her job application into consideration’, or in other words, when there are several applicants and only one of them was to be chosen, the ones that would not have been appointed even if discrimination had not taken place may be compensated only for the violation as such, not for the loss of employment. By contrast, the Finnish provision in force until June this year allowed the compensation to be limited even for the ‘best’ applicant who would have been appointed but for the discrimination. The Equality Directive does not allow the Member States to set a general upper limit to compensation to all applicants, and the compensation has to be ‘dissuasive and proportionate to the damage suffered’.

Finnish tort law as a rule does not include punitive or dissuasive damages, and immaterial damages are compensated rather sparingly. The compensation may also be adjusted if the liability is deemed unreasonably onerous. Finland believed that the provisions on compensation under various pieces of legislation taken together were sufficient for proper implementation of the Directive. However, as the burden of proof in discrimination cases differs from that under other pieces of legislation, compensations under the Employment Contracts Act and the Tort Liability Act are not of the type required in EU non-discrimination law.

The original Draft Bill prepared by the Ministry of Social Affairs and Health would have removed the upper limit altogether, but the limit was reinserted into the law proposal after stakeholders had been heard. The Employment and Equality Committee of Parliament in its statement<sup>29</sup> noted that it may be difficult to prove beyond doubt which of the applicants had greatest merits in the comparison of merits that the employer is to make post facto in order to clarify which applicant is the one to whom the limit does not apply. The Committee required that the Government monitor how the upper limit is used in legal practice. Thus, Section 11(2) in its amended form

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<sup>27</sup> HE 195/2004.

<sup>28</sup> 412/1974.

<sup>29</sup> 4/2009 vp.

sets an upper limit to the compensation to those applicants concerning whom the employer can prove that they would not have been chosen for the job even if no discrimination had taken place.

## FRANCE – Sylvaine Laulom

### Policy developments

#### ***Report proposing measures to improve gender equality at work***

A preparatory report<sup>30</sup> for a national collective negotiation that is to take place in the autumn of 2009 proposes to strengthen the obligation to negotiate on gender equality. According to a 2006 Act, social partners at sectoral and enterprise level must negotiate on the gender pay gap in order for the gap to disappear by the end of 2010. To improve the content of the collective agreements to be newly concluded, the report proposes to define ten new measures that those collective agreements must contain. The report also proposes to adopt financial sanctions to be imposed on companies which have not complied with the obligation to draw up the report on the comparative situation between men and women and to negotiate on equality. The report recommends the adoption of measures to improve the quality of part-time jobs. Finally, the report recommends the adoption of quota in company boards (aiming at 40 % women in 6 years) and for candidates running in professional elections.

#### ***Debates on the specific pension rights of mothers***

Article L.351-4 of the Social Security Code still provides a difference between men and women in social security schemes by granting advantages to mothers who have raised children. A recent case of the *Cour de cassation* (*Cass. 2ème civ. 19 février 2009, n°07-20668*), applying Article 14 of the European Convention of Human Rights, held that such difference of treatment between men and women is contrary to the Convention. Furthermore, there are still some differences between men and women in the pension rights for civil servants and on 25 June 2009 the European Commission sent a reasoned opinion to France. The Ministry of Labour is preparing a text. This issue has raised strong debates, as many fear that amending the law could give the legislator the opportunity to weaken women's rights while their pensions are still lower than men's pensions mainly because of their parental duties. For the moment, one of the solutions proposed is to maintain a specific right for women linked to maternity: an increase of their insurance coverage of a maximum of one year for women who have given birth to one or more children. For the second year, it will be for the parents to decide who will benefit from it. However, two of the main trade unions are against this reform and the solutions proposed are still under debate.

### Equality body decisions/opinions

#### ***Towards better representation of women in boards?***

In its deliberation of 29 June 2009,<sup>31</sup> the Halde asks for the adoption of an Act allowing better representation of women in councils and boards of private and public

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<sup>30</sup> B. Gresy, *Rapport préparatoire à la concertation avec les partenaires sociaux sur l'égalité professionnelle entre les femmes et les hommes*, 8 juillet 2009, <http://www.ladocumentationfrancaise.fr/rapports-publics/094000313/>; accessed 24 July 2009.

<sup>31</sup> Délibération n°2009-237 du 29 juin 2009.

companies, in the access to elective professional functions (like the position of judge in Labour Courts, or the positions of workers' representatives), and in the structures of the trade unions.

## Miscellaneous

### *Annual report on collective bargaining analyses agreements on gender equality*

The most recent annual report on collective bargaining analyses the number and the content of the agreements concluded on gender equality.<sup>32</sup> The report confirms a slow increase in the number of collective agreements dedicated or referring to equality, but the subject of equality is still relatively marginal compared to the traditional topics of collective bargaining. At branch level, 19 specific agreements on equality were concluded in 2008 (against 9 in 2007 and 1 in 2006) and 34 agreements refer to equality (on a total of around 1117 agreements concluded in 2008). At enterprise level, 1235 agreements referring to equality were concluded, against 1076 agreements in 2007, on a total of 27,100 agreements. Concerning the content of the agreements, the report distinguishes between 3 categories of agreements. The first one (representing 1/3 of the specific agreements, and 2/3 of the general agreements) is simply formal: they recall the principle of non-discrimination and declare their willingness to respect the law without any concrete measures. The second category of agreements (half of the specific agreements and 1/3 of the general agreements) recalls the principles of non-discrimination and proposes at least one concrete measure which is, most of the time, the 'neutralisation of maternity leave' on wage (which is in fact a legal obligation). Some agreements specify some objectives in terms of career development and recruitment. The third category (23 specific agreements and no general agreement) tries to take into account the structural causes of gender discrimination and adopts various measures on recruitment, promotion, access to training, access to part-time work, parental measures, etc.

### *Annual report of the Cour de cassation on Equality and Discriminations*

Every year, the *Cour de Cassation* publishes an annual report presenting the principal developments of case law and also suggesting legislative amendments. The report also presents an analysis of a specific topic chosen for its particular interest. This year the report is on the case law of the *Cour de Cassation* on discrimination. It presents a very complete analysis of the most important cases on discrimination and a study on the concepts of discrimination, equality and equal treatment. It stresses the need not to confuse these various concepts. The report illustrates the interest of the *Cour de Cassation* in the anti-discrimination legislation and the willingness of the Court to clarify its case law and to define guidelines for the judges.<sup>33</sup>

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<sup>32</sup> Ministère du travail, *La négociation collective en 2008*, Bilans et rapport, Juin 2009.

<sup>33</sup> *Rapport annuel de la Cour de Cassation 2008, Les discriminations dans la jurisprudence de la Cour*, La documentation française, 2009. [http://www.courdecassation.fr/publications\\_cour\\_26/rapport\\_annuel\\_36/rapport\\_2008\\_2903/](http://www.courdecassation.fr/publications_cour_26/rapport_annuel_36/rapport_2008_2903/); accessed 11 September 2009.

## Policy developments

The elections for the Federal Parliament, which took place on 27 September 2009, dominated the past months and prevented any notable policy developments. Questions of gender equality neither figured prominently on the electoral agenda of the major parties nor were they raised by the media despite continued calls by women's organizations for ending the gender pay gap and for increasing women's representation on company boards. To the extent that the financial crisis was the object of political debate at all, its impact on women was not considered with particular interest.

After the federal elections, a coalition government was formed between the Christian Democrats (CDU/CSU) and the Liberals (F.D.P.). The coalition agreement contains the measures to be taken during the next four years. It is striking that the chapter on equality does not contain plans for new legislation. Thus, the new government intends to convince employers of using the Logib-D procedure<sup>34</sup> for identifying gender-based pay discrimination, but it does not intend to introduce a bill on combating the gender pay gap. An increase of women in decision-making positions in the public sector is to be achieved and the relevant laws are to be evaluated. In the private sector, the number of women on boards is to be increased through better reporting procedures and transparent voluntary commitments. Moreover, a separate boys' and men's policy is to be developed and it shall include opening their perspectives to professions in care and education. The chapter on integration and migration includes, as the last point, the aim of improving migrant girls' and women's participation in public and societal life. Measures will be taken in the areas of education and vocational training, but are not specified.

## Legislative developments

The elections also overshadowed legislative activities and hence no significant legislative developments took place.

## Case law of national courts

### *Federal Labour Court (Bundesarbeitsgericht), judgment 9 AZR 391/08 of 21 April 2009*

The case concerned a woman who gave birth to a child during her parental leave. In accordance with the law, she was entitled to prematurely end the ongoing parental leave and to postpone the rest (up to twelve months) of the parental leave not yet used to be taken after the end of the parental leave for the new child. Both for the premature ending of a parental leave and for taking parental leave for the new child, the employer's consent is necessary (Section 16(3)(1) of the Federal Law on Parental Leave and Parental Allowances (*Bundeselterngehalt- und Elternzeitgesetz*, BEEG, formerly Law of Parental Allowance, *Bundeserziehungsgeldgesetz*, BErzGG)). Consent for the premature end of the parental leave may be withheld only for 'urgent reasons connected to running the enterprise' (*'dringende betriebliche Gründe'*,

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<sup>34</sup> 'Logib-D' stands for '*Lohnungleichheit im Betrieb – Deutschland*'. It is a tool (originally developed in Switzerland) for companies to quickly and anonymously analyse their salary structure to identify *gender pay gaps*.

Section 16(3)(2)) and only within four weeks, whereas the law does not set up any conditions for withholding consent with respect to the postponement (Section 15(2)(4)). In the present case before the Federal Labour Court (*Bundesarbeitsgericht*), the employer refused consenting to the postponement without giving any reasons. The Court decided that, despite the silence of the law on this issue, the employer was not free to give or withhold consent. Instead, it considered that an employer was bound by considerations of equity when deciding on whether to consent or not (*'billiges Ermessen'*). In the opinion of the Court, the employer can refuse consent only by showing disadvantages that the enterprise would suffer because of the postponement of parental leave. Since the employer had not given any reasons at all in the case at hand, the Federal Labour Court decided in favour of the employee.

The decision is convincing because it balances the employer's and employee's interests in the question of postponement of parental leave. By conditioning the employer's refusal of consent on the existence of disadvantages for the enterprise, the Court recognises both the employer's interest in the return of the employee and the employee's interest in taking parental leave to the greatest extent possible.

***Federal Labour Court (Bundesarbeitsgericht), judgment 8 AZR 536/08 of 28 May 2009***

Another case decided by the Federal Labour Court concerned the rejection of a man who had applied for the post of an educator at a state-run boarding school for girls. The school refused to hire him explaining that men could not fill this position as it included night shifts. The Court rejected his action brought for damages because of sex discrimination. It reasoned that in light of these particular duties, the requirement that the educator be a woman was a genuine and determining occupational requirement in the sense of Section 8(1) of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*). This provision transposes, among others, Article 14(2) of Directive 2006/54/EC.

The Court rightly took a restrictive approach to finding a genuine and determining occupational requirement. It looked at the specific duties in light of the circumstances of the case. Evidently, reasons of decency are strongly in favour of having a female teacher for night shifts in a boarding school for teenage girls. This conclusion does not generally exclude male staff from the boarding school, but only if a relevant part of the duties require the employee to be a woman. The case also did not indicate that the employer had structured the duties in a particular way so as to discriminate against men.

***Federal Labour Court (Bundesarbeitsgericht), judgment 2 AZR 499/08 of 20 August 2009***

In yet another case concerning the 'Islamic headscarf,' the Federal Labour Court had to decide on the case of a woman who worked as a social pedagogue at a state-run comprehensive school (*Gesamtschule*). She wore a knitted cap for religious reasons. According to the relevant state law on schools, religiously motivated declarations (*äußere Bekundungen*) are prohibited if they are apt to endanger the state's neutrality or religious peace at school. The Federal Labour Court upheld the decisions of the lower courts which had declared legal the letter of warning sent by the headmaster. The Court held that a cap could be considered to be a prohibited religiously motivated declaration if it serves as a replacement for a headscarf. In the case at hand, the woman had changed to wearing the cap after she had received a letter of warning for her wearing a headscarf.

The judgment is in line with earlier decisions of the Federal Administrative Court on the issue of the Islamic headscarf. Again, this case concerns the question of how to interpret the leading judgment of the Federal Constitutional Court (*Bundesverfassungsgericht*) of 2003 on this issue. That judgment did not conclusively determine the question of whether the ‘abstract danger’ to school peace is a sufficient reason or whether the principle of proportionality requires a case-by-case approach. For this reason, it can safely be assumed that the applicant will bring a constitutional complaint.

***Federal Administrative Court (Bundesverwaltungsgericht), judgment 5 C 32.08 of 30 September 2009***

The Federal Administrative Court (*Bundesverwaltungsgericht*) decided that the competent authority was obliged to consent to a female employee’s dismissal during her parental leave if the employer had closed down the business and had declared bankruptcy. The Court had to determine the limits of the authority’s discretion as to whether to consent to a dismissal during a parental leave (pursuant to Section 18 of the Law on Parental Allowance and Parental Leave (*Bundeselterngehalt- und Elternzeitgesetz*, BEEG)). In the case before it, the authority withheld its consent so as to keep the woman insured under the statutory health insurance system. The Federal Administrative Court reversed the judgments of the lower courts that had upheld this decision. In the view of the Court, the purpose of the prohibition to dismiss an employee during his/her parental leave is to secure them the return to their employment, but not to keep them insured. For this reason, it held that the authority had misused its discretion.

**GREECE – *Sophia Koukoulis-Spiliotopoulos***

**Policy developments**

***First positive measure aiming to increase female participation in Parliament***

As parliamentary elections were (suddenly and prematurely) announced in Greece for 4 October 2009, the subject of female participation in political decision-making is quite topical. In *European Gender Equality Law Review* 2/2008 we already reported that, following a campaign launched by the Greek League for Women’s Rights and supported by the largest Greek women’s NGOs, a positive action measure regarding parliamentary elections was adopted. This measure was provided by Article 3 of Act 3636/2008,<sup>35</sup> by virtue of which a provision was added to Act 3231/2004 governing the election of Members of Parliament. This provision requires that every party present a number of candidates of each sex which corresponds to one third of the total number of its candidates in the country. The candidates appear on a ballot paper on which the voter chooses his/her preferred candidate by placing a cross beside his/her name. However, the Constitution (Article 54(3)) allows that part of Parliament, comprising not more than the one twentieth of the total number of its members (which are currently three hundred (300)) be elected throughout the country in proportion to the total electoral strength of each party. Thus, each party also presents a ‘state ballot’ containing a list of names of candidates for the office of ‘State Deputy’; the order of the candidates on this list determines their chances of being elected.

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<sup>35</sup> OJ A 11, 1.2.2008.

According to the explanatory memorandum to the relevant Bill, this provision aims to implement Article 116(2) of the Greek Constitution and Article 4(1) of the CEDAW. The explanatory memorandum also recalled that, according to Article 116(2) of the Constitution<sup>36</sup> and Article 4(1) of the CEDAW, positive measures do not constitute discrimination. Moreover, as we also reported in *European Gender Equality Law Review* 2/2008, the Council of State (Supreme Administrative Court), when interpreting Article 116(2) of the Constitution in the light of the CEDAW and the Covenant on Civil and Political Rights, constantly holds that taking positive measures in favour of women is a ‘must’ for the legislature and all other state authorities.

The new measure will be applied for the first time in the October 2009 elections. In principle, by virtue of Article 54 of the Greek Constitution, new electoral law provisions do not apply to parliamentary elections that follow the legislature during which they were adopted; they apply to the elections that come after that. By way of exception, according to the same constitutional provision, an electoral provision may apply to the elections that follow the legislature during which it was adopted, provided that a specific provision to this effect is included in the Act that contains it; this specific provision must obtain the votes of the two thirds (2/3) of the total number of Members of Parliament. This was the case for Article 3 of Act 3636/2008 that introduced the aforementioned positive measure. As the Government then in office did not represent this majority, the positive action provision was voted in by other parties as well. Thus, this provision will apply to the elections of 4 October 2009.

The above positive measure may be qualified as an ‘indirect positive measure’ in favour of women. In fact, although it is worded in a gender-neutral way, it is aimed at increasing the currently low participation of women in the Greek Parliament (forty eight women out of three hundred MPs, i.e. 16 %, in the last legislature). At the time of writing (14 September 2009) the composition of the ballots for the coming elections is still unknown. Therefore, we cannot estimate to what extent the new provision will be complied with.

## Legislative developments

### *Services Directive finally transposed*

On 1 July 2009, Act 3769/2009 aimed at transposing Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services<sup>37</sup> was published in the Official Journal.<sup>38</sup> Without proceeding to a detailed analysis of the transposition, we will point out some interesting features of this Act. The Act mainly copies the Directive’s provisions. Thus, in accordance with the Directive, it prohibits, *inter alia*, the use of sex as a factor in the calculation of premiums and benefits in insurance contracts concluded after 21 December 2007.

The Act transposing the Directive allows exceptions not allowed by the Directive. Article 5(2) of the Directive allows Member States to permit proportionate differences in individuals’ premiums and benefits, where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data.

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<sup>36</sup> Article 116(2) of the Constitution: ‘Positive measures aiming at promoting equality between men and women do not constitute discrimination on grounds of sex. The State shall take measures to eliminate inequalities existing in practice, in particular those detrimental to women’.

<sup>37</sup> OJ L 373, 21.12.2004, p. 37.

<sup>38</sup> OJ A 105, 01.07.2009.

This is a transitory provision, since Member States are required to review their relevant decision. Member States can use this option only until 21 December 2007, which was the deadline for the transposition of the Directive. The transposition of the Directive by virtue of Act 3769/2009 took place about 18 months after this deadline (see above). Thus, Greece missed the opportunity to use the above option. In spite of that, Act 3769/2009 allows these differences.

***The transposition of the procedural provisions of the Directive: adequacies and inadequacies***

In certain respects, the transposition of the procedural provisions of Directive 2004/113 is better than the transposition of Directive 2002/73/EC.<sup>39</sup> More particularly, Act 3488/2006<sup>40</sup> transposing Directive 2002/73 allows trade unions and other organisations to have recourse to and intervene before administrative authorities in support of a victim of gender discrimination. However, it only allows them to intervene in favour of a victim before a court after the victim him/herself has brought his/her case to this court; it does not allow recourse to a court by the union or organisation itself. This omission is not repeated in Act 3769/2009. The latter allows unions and other organisations to intervene in favour of victims before administrative authorities and courts, as well as to take the initiative in bringing cases of victims to both administrative authorities and courts. It should be noted that, under Greek law, ‘administrative authorities’ include, *inter alia*, the Ombudsman and the Labour Inspectorate.

Furthermore, both Directives require the victim’s ‘approval’. However, both Act 3769/2009 and Act 3488/2006 require the victim’s ‘consent’. Under Greek law, an ‘approval’ may be given even after the recourse to a court or administrative authority, while a ‘consent’ must be given beforehand; thus the recourse to or intervention before a court or administrative authority may be time-barred before the union or organisation can obtain the victim’s consent.

A serious weakness of Act 3488/2006 transposing Directive 2002/73 is repeated in Act 3769/2009 transposing Directive 2004/113: the rule on the shifting of the burden of proof in favour of the complainant, as well as the aforementioned requirements regarding the *locus standi* of unions and other organisations are not inserted in the Codes of Civil and Administrative Procedure. Thus, the legal certainty required by the ECJ<sup>41</sup> is not created. These rules risk remaining unknown, just like the corresponding rules included in Act 3488/2006.<sup>42</sup>

**HUNGARY – Csilla Kollonay Lehoczky**

**Policy developments**

Hungary is going through a deep economic and political crisis. The minority Government is trying to take steps to stabilise the financial situation of the country, introducing belt-tightening measures, while coping with the deep distrust in the Government and the political establishment of the country. Gender equality remains a

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<sup>39</sup> OJ L 269, 5.10.2002, p. 15.

<sup>40</sup> OJ A 191, 11.9.2006.

<sup>41</sup> See e.g. ECJ Case C-187/98 *Commission v Greece* [1999] ECR I-7713.

<sup>42</sup> On the problems created by Act 3488/2006 in this respect, see Greece, in *European Gender Equality Law Review* 1/2008.

subject second in place behind the vast and serious problem of discrimination against the Roma, and to some extent the issue of the disabled. Considering that due to the economic recession the pervasive discrimination of the Roma is growing, no change may be expected in the priorities of the Government.

The deterioration of public healthcare, the cuts in the funding of social care institutions parallel with growing work-time flexibility make the reconciliation of work and family duties more difficult. Apart from some measures – not always combined with proper financial support – to improve the spread and quality of childcare facilities, efforts to bring women back to work from childcare are not linked to effective steps to help the reconciliation of private and workplace rights, or to change deeply rooted gender role stereotypes.

## **Legislative developments**

### *Acts of Parliament*

#### *Amendment of the Equality Act – curtailing the power of the ETA*

The Equality Act<sup>43</sup> was amended in June 2009<sup>44</sup> in part extending its scope of application, in part limiting the former publicity of the decisions of the Equal Treatment Authority (ETA). The extension of its scope is a positive development, since it is a correction of an original fault: now the principle of equal treatment applies to the exercise of membership rights and participation in employees' and employers' representative organizations as well as public interest bodies. The limitation of the publicity is, at the same time, a serious deprivation of the power of the ETA: it is no longer entitled to publish on its homepage the details of the cases where discrimination was found and a sanction was given. Before, the details could be published for five years after the date of the final decision. The ETA may still keep record of the cases, but only for two years instead of five after the final decision. The amendment deprives the ETA decisions from its effect that could, indeed, discourage offenders and potential offenders.

#### *Civil Code*

On 21 September, Parliament adopted the new Civil Code bringing significant changes in family law relating to marriage. The President of the country, however, did not sign it, and instead sent it back to Parliament to reconsider several drafting deficiencies.

#### *Restrictions on childcare leaves*

Childcare leave has been reduced from three to two years, and the period of paying a higher social security benefit for this period was decreased from two to one year. The minimum preliminary insurance period for entitlement of social security payment during maternity leave and childcare leave has increased from 180 to 365 days within the preceding two years. The changes were promulgated on 8 July 2009, but will be applied only in case of children born after 30 April 2010.

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<sup>43</sup> Act CXXV of 2003 on equal treatment and equal opportunities.

<sup>44</sup> Act LVI of 2009, in force from 1 October 2009.

### *New Act on Registered Partnership*

After the invalidation of the Act on registered partnership by the Constitutional Court,<sup>45</sup> a new Act, XXIX of 2009 has been adopted. From 1 July 2009 registered partnership is available for same-sex couples, in a procedure similar to marriage (before the notary public, in the presence of two witnesses). Minors (below 18) cannot establish such a partnership. The effects of registered partnership are almost the same as those of marriage, with some exceptions: registered partners cannot use each other's name, they cannot adopt children and human reproductive procedures are not available for them). Partnership between heterosexual couples may have some effects in property, family and social security law, but is still not similar to marriage.

### **Constitutional Court decisions**

#### *Protection of pregnant temporary agency workers*

The Constitutional Court (CC) invalidated the provision of the Labour Code that exempted temporary labour agencies from the prohibition to terminate the employment of pregnant employees.<sup>46</sup>

#### *Act on restraining orders*

The Constitutional Court has invalidated the Act adopted by Parliament in December 2008 on 'Restraining orders applicable in cases of violence among relatives'.<sup>47</sup> The President of the Republic of Hungary, instead of signing the Act, sent it to the Constitutional Court for a constitutionality check. The Constitutional Court, in line with the submission, has found the Act unconstitutional, because the definition of 'violence' and of 'relative' is too broad and obscure.

### **Case law of national courts**

There were no published gender cases in the reporting period.

### **Equality body decisions/opinions**

The Equal Treatment Authority (ETA) in the majority of cases assesses the facts and the violation of the law correctly. The sanctions, however, are weak and inefficient, in part because the ETA has no really strong instruments, in part because it is rather cautious in using its powers.

#### ***Harassment at the workplace***

In a certain case, simple in its facts, the ETA established that the claimant was exposed to a degrading, humiliating environment particularly from the boss, whose attitude was rude and intrusive, using obscene language and asking questions intruding into the private – especially sexual – life of subordinates. The employee took sick leave and then terminated her employment. Strangely, after establishing all this as facts, the ETA found it sufficient to oblige the employer to avoid similar conduct in the future.<sup>48</sup>

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<sup>45</sup> See *European Gender Equality Law Review* 1/2009, p. 64.

<sup>46</sup> Resolution no. 67/2009. (VI. 19.) AB.

<sup>47</sup> Resolution no. 53/2009. (V. 6.) AB.

<sup>48</sup> Decision 26/2009, 23 March 2009.

### ***Equal pay***<sup>49</sup>

Upon a claim by a claimant that her wage was about 50 % lower than that of her colleagues, the employer asserted that the employee performed different tasks and that her technical education, knowledge of foreign languages and period of experience was less than those of her colleagues. The ETA did not accept this defence, because it was proven that the tasks were almost identical, the language knowledge of some male colleagues was not much higher and the performance of the claimant was better than average. During the proceedings the employer dismissed the claimant with reference to reorganization and lay-offs, which according to the claimant happened in retaliation. The ETA prohibited such discrimination for the future, ordered that the decision be published during six months and awarded a fine of about EUR 2 000. It accepted that the dismissal occurred for reasonable organizational grounds and did not sanction it.

### ***Pregnancy***

Discrimination was found in the case of an executive who was removed from her position and offered a lower position as a result of being on childcare leave.<sup>50</sup>

In another case, the interview for a certain job was found to be discriminatory, since questions were asked about family background, possible carer in case of need etc. and the applicant was not hired for having problems with a child.<sup>51</sup>

## **ICELAND – *Herdís Thorgeirsdóttir***

### **Policy developments**

#### ***Law on gender quotas***

A law on gender quotas for municipal authorities is being contemplated. About 36 % of local authorities employees are women. During the recent convention of the equality committees of local authorities, ways to increase the role of women in local authorities were discussed. A committee under the auspices of the Ministry of Communication, appointed last winter, will shortly deliver the results of its work on how best to achieve the goal of equal representation in local authorities. Municipal elections will be held in the spring of 2010. The chairman of the Committee has declared that she does not consider adopting a law on gender quotas to be the ideal solution. The committee has discussed ways such as establishing a network of women and men.

#### ***Ministerial committee on gender equality matter***

In the wake of the meeting of cabinet ministers of Iceland's Government on 15 September, the Prime Minister introduced the appointment of a Ministerial Committee on matters of gender equality. The Prime Minister, Minister of Social Affairs and the Minister of Finance have a seat on this Committee and the Minister of Justice and Human Rights will offer assistance on matters regarding trafficking and domestic violence. The Government that came to power in the spring of 2009 stated as its objective to place increased emphasis on the fight for human rights and women's liberation and to grant the issue of gender equality increased weight within

<sup>49</sup> Decision 106/2007, September 2009.

<sup>50</sup> 694/2009; decided in May 2009, being appealed before court.

<sup>51</sup> 43/2009; not yet final, being appealed before court.

the political system; appointing this Ministerial Committee is a step in this direction. The appointment is furthermore in accordance with the policy of co-operation granting the Prime Minister's Office an enhanced role in directing and coordinating matters by instituting ministerial joint advisory committees.

The policy of government co-operation of 8 May 2009 states that the influence of women in the reconstruction of Icelandic society in the wake of the financial crisis will be guaranteed, that the Government will work towards gender mainstreaming in all spheres of society, and that it will have the gender approach as a guiding light in measures regarding job creation and in organising a coherent job policy for Iceland, in fiscal decision-making and in budgeting measures for the next four years. It furthermore states that the Government will take measures to eliminate the gender-based pay gap, that they will finish the gender equality barometers during the election period, that they will enhance the job of the equal rights representatives within the ministries, that they will follow up on their strategy against trafficking and consider preventive steps and alarm responses to address the increased domestic violence resulting from people's worsening financial situation.

### **Legislative developments**

There have been no particular legislative developments. See the policy developments above for legislative intentions.

### **Case law of national courts**

The last few months have seen no new cases.

### **Equality body decisions/opinions and miscellaneous**

#### ***Dismissal of male flight attendant***

The Gender Equality Complaints Committee delivers rulings that are binding on the parties to the case. The Committee dismissed the complaint of a male flight attendant on 26 August 2009 (Case no. 4/2009) as the time limit described in the previous Gender Equality Act had expired when the situation regarded as infringement took place.

The new Gender Equality Act No. 10/2008 became effective on 18 March 2008. The flight attendant was released from his duties on 5 March 2008 and received a formal letter of dismissal from Icelandair on 28 March. In the meantime his case was discussed in a meeting with his employer on 17 March. The complainant held that his dismissal violated the GEA. He claimed direct discrimination, having received a less favourable treatment than another employee of the opposite sex in comparable circumstances. He complained of reiterated gender-based and sexual harassment in his work. Icelandair rejected the complaint maintaining that the dismissal was based on the flight attendant's performance and difficult relations with his employer.

## Policy developments

### *Commission on Taxation*

The government-appointed Commission on Taxation presented their report in September 2009.<sup>52</sup> This was the first major report in 25 years on the taxation system in Ireland. Some parts of the Report are controversial, since it includes, for example, the recommended taxation of children's allowances. Various women's groups say that this will affect women as the mother is the person entitled to collect this allowance. Children's allowances have been significant over the last number of years: e.g. a parent with three children of school-going age would be entitled to approximately EUR 6 420 tax free per annum.<sup>53</sup> Such payment is regardless of the income of the parent(s). Such a decision would be politically unpopular and if it were introduced in the 2010 Budget, the income threshold before such allowance is taxed is likely to be high. By contrast, the Commission did not recommend any change in the tax-free status of maternity benefit, adoptive benefit and health and safety benefit. There are specific recommendations that there should be no taxation of the family-income supplements, for example. However, the Commission recommended the abolition of capital allowances for childcare facilities, the income tax exemption for childcare service providers and the exemption of employer-provided childcare from the benefit in kind charge. The withdrawal of such allowances will inevitably result in a reduction of already strained childcare facilities. The lack of childcare facilities is important when we take into account the recent report on the gender pay gap as set out below.

### *The gender wage gap in Ireland: evidence from the National Employment Survey 2003*

This Report,<sup>54</sup> published on 11 September 2009, is the fifth in a series of reports from the Economic and Social Research Institute<sup>55</sup> arising from the Research Programme on Equality and Discrimination commissioned by the Equality Authority. Based on data from the 2003 National Employment Survey, it draws on data taken at the height of the economic boom. It found that the 'raw' gap between men's and women's wages was about 22 % for all employees. About two-thirds of this gap was due to 'observable' differences between male and female workers. These included levels of education and labour market experience. Women tended to have higher levels of education, but men had more labour market experience, due to the fact that they tended not to take time off for 'care' duties. When account was taken of such factors, the remaining adjusted wage gap was close to 8 %. One of the authors said that the taking of time off of her career influenced a woman's earning potential in two ways: namely her skills get 'degraded' whilst she is off the labour market and when she re-enters after a number of years she tends not to go back at the same level at which she left. This also had an implication on pensions, as these were linked to life-time

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<sup>52</sup> <http://www.taxcommission.ie/downloads/Commission%20on%20Taxation%20Report%202009.pdf>, accessed 7 December 2009.

<sup>53</sup> <http://www.welfare.ie/EN/Schemes/BirthChildrenAndFamilies/ChildRelatedPayments/Pages/cb.aspx>, accessed 14 September 2009.

<sup>54</sup> [http://www.esri.ie/publications/latest\\_publications/view/index.xml?id=2796](http://www.esri.ie/publications/latest_publications/view/index.xml?id=2796), accessed 14 September 2009.

<sup>55</sup> [www.esri.ie](http://www.esri.ie), accessed 14 September 2009.

earnings. The pay gap for part-time employees was 6 % but when other observable factors were taken into account the gap widened to 10 %. Female part-time workers were generally more highly educated than their male counterparts. Higher education amongst women helped to reduce the gender wage gap but this factor alone was not sufficient to compensate for the effects of the labour market experience.

## **Legislative developments**

### ***Civil Partnership Bill 2009***

The Civil Partnership Bill 2009<sup>56</sup> was published in June 2009. The Bill has not yet been debated in Parliament and will probably not be seen as urgent legislation given the more important financial legislation pending. In short it establishes a statutory civil partnership registration scheme for same-sex couples, together with a range of rights, obligations and protections consequent on registration and it sets out the manner in which civil partnerships may be dissolved and under what conditions (it effectively mirrors the laws on judicial separation and divorce). The Bill also establishes a redress scheme for opposite-sex and same-sex cohabiting couples who are not married or registered in a civil partnership, as the case may be. When a relationship ends, the financially dependent cohabitant has to apply to court for certain remedies, including maintenance, property or pension adjustment order or provisions from the estate of a deceased co-habitant.

The proposed legislation will also amend the Employment Equality Acts 1998-2008 by substituting the term ‘civil status’ for ‘marital status’ throughout, so that the statutory obligation not to discriminate against a person in employment matters on the ground that the person is single, married, separated, divorced or widowed is extended to prohibit discrimination based on the person being in a registered civil partnership, or formerly in a registered civil partnership which has been dissolved. There are similar provisions for the Equal Status Acts 2000-2008. This will effectively be an extension of the provisions of the legislation and of the sexual orientation ground of discrimination. However, there is no provision, for example, for adoption rights by same-sex couples, although single people have adoption rights.

## **Case law of national courts**

### ***Judicial review***

There was a challenge by several applicants to the Garda Síochána (police force) (Admissions and Appointments) Amendment Regulations 2004, which limited admission to the force to persons between the ages of 18 and 35. The Regulations are included in a statutory instrument. The applicants brought a claim to the Equality Tribunal, and the Minister for Justice, Equality and Law Reform challenged the jurisdiction of the Tribunal to investigate the complaint. Following the Tribunal’s refusal to decide the issue of jurisdiction as a preliminary point, the Minister applied for judicial review to the High Court.<sup>57</sup> The Tribunal decided that it would have a

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<sup>56</sup> <http://www.oireachtas.ie/documents/bills28/bills/2009/4409/b4409d.pdf>, accessed 14 September 2009.

<sup>57</sup> *Minister for Justice, Equality and Law Reform and Commissioner of An Garda Síochána v Director of the Equality Tribunal and others* [2009] ELR. 116, <http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/56ed2dfbacf3aba28025757600581c87?OpenDocument>, accessed 7 December 2009

hearing in which it would deal with the arguments on jurisdiction as well as the substantive issue of age discrimination. The Equality Act came into force on 18 July 2004 in order to implement Directive 2000/78/EC. Thereafter, S.I. No. 749 of 2004, fixing the age limit for trainee Gardai was passed on 23 November 2004. Charlton, J. considered that the Tribunal had an obligation to accept the Regulations as a matter of law and should not have proceeded to investigate the claim, as there was a clear provision in the statutory instrument that pre-determined the result. The Tribunal could not issue a ruling in breach of a statutory instrument. The legal effect of this judgment is that the Equality Tribunal does not have the jurisdiction to make a declaration that national law is inconsistent with EU law. Under the Irish Constitution only the High Court can make such a declaration. This important judgment is on appeal before the Supreme Court.

### ***Dress code***

A school's code of behaviour which imposes different requirements with regard to hair length on male students as compared with female students unfairly impinges on the right of males to determine their own appearance and places a disproportionate burden on male students. Further, where a hair-length requirement is imposed on a male student and not on a female student it has a much greater impact on him after school than on female students. In the case of a female student, as soon as she leaves the school grounds, she is free to transform her appearance and wear her hair in whichever modern conventional style she chooses.<sup>58</sup> The claimant was awarded EUR 500 for serious upset, disruption and inconvenience in his Leaving Certificate year. He was also awarded EUR 3 000 in respect of victimisation, as he had to leave the school during his final year, an important point in his educational development.

### ***Discriminatory dismissal on grounds of pregnancy***

The claimant became ill with a pregnancy-related illness and was hospitalised. The claimant's husband advised her manager of the pregnancy. Subsequently her contract was not renewed and the reason stated in the letter was that an officer on a career break at the time would be returning to her duties. The claimant stated that a temporary replacement was employed until that person took up duty again. The letter also went on to state the amount of sick days taken. The claimant contended that the non-renewal of her fixed-term contract constitutes discriminatory dismissal on the ground of gender and was due to her pregnancy. The respondent, the Legal Aid Board, stated that they were not advised in relation to the claimant's illness nor the nature of the illness. The Equality Tribunal relied on the case of *Melgar*<sup>59</sup> where the ECJ stated 'where non-renewal of a fixed-term contract is motivated by the worker's state of pregnancy, it constitutes direct discrimination on grounds of sex'. It was noted that the claimant's sick leave was a decisive factor in the decision not to renew her contract, even though it had been apprised that most of the sick leave was pregnancy-related. There was also the gap of 6 weeks between the permanent staff member coming back and the dismissal, and further the respondent's medical officer was not involved at the time of making the decision. It was held that the claimant had raised a *prima facie* case that the non-renewal of her fixed-term contract of employment was directly related to her pregnancy and that the employer failed to rebut the

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<sup>58</sup> *Mary Knott (on behalf of her son David Knott) v Dunmore Community School* [2009] E.L.R. 90; <http://www.equalitytribunal.ie/index.asp?locID=165&docID=1977>, accessed 14 September 2009.

<sup>59</sup> *Maria Luisa Jiminz Melgar v Ayuntamiento de Los Barrios* C- 438/99.

presumption. The claimant was awarded EUR 15 000, taking into account that the respondent is a statutory body which specialises in legal representation and advice.<sup>60</sup>

## Miscellaneous

The Equality Tribunal, which is the adjudicating body charged with hearing discrimination claims, published its Annual Report,<sup>61</sup> Legal Report and Mediation Report on 25 August 2009. The most useful reports are the separate Legal Report and the Mediation reports, which provide detailed summaries of all cases and settlements. There were 79 cases on the gender ground, an increase of 1 % on 2007 under the Employment Equality Acts 1998-2008; there were only 4 claims under the Equal Status Acts 2000-2008. More interestingly, in the first 6 months of 2009, there was a significant increase in employment-related gender claims as compared with the first 6 months of 2008; there is a similar increase in equal status claims.

## ITALY – *Simonetta Renga*

### Policy developments

#### *Promises on the Recast Directive*

In recent months, no particular changes have occurred in the attitude of the Government as regards gender items. Attention is fully concentrated on the economic crisis. This particularly critical situation is never discussed in terms of mainstreaming, and therefore any measures which have been enacted to face the financial difficulties of persons and families are gender blind.

Nevertheless, in this period a positive step has been taken as regards the progress in the implementation of the Recast Directive 2006/54, which has not been fully accomplished yet in Italy. On 31 July, the Government approved a Bill to fill in the gaps of our system.<sup>62</sup> Unfortunately, the draft of the decree is not available and only generic and rather vague news has been published on its content. The decree is said to contain: extension of the notion of discrimination, protection against sexual harassment as well as the prohibition of victimisation and the strengthening of the legitimisation of unions and other associations to stand in trial. The only more clearly described change is the increase in penal sanctions for the violation of the ban on discrimination, which will rise from EUR 206 to EUR 50 000 in addition to detention of up to one year.

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<sup>60</sup> *McGloin v The Legal Aid Board* DEC – E2009 – 042. <http://www.equalitytribunal.ie/index.asp?locID=164&docID=2062>, accessed 14 September 2009.

<sup>61</sup> <http://www.equalitytribunal.ie/index.asp?locID=20&docID=-1>, accessed 14 September 2009.

<sup>62</sup> [http://www.pariopportunita.gov.it/index.php?option=com\\_content&view=article&id=1192:carfagna-lstop-alle-discriminazioni-sul-luogo-di-lavoro&catid=45:comunicati-stampa&Itemid=226](http://www.pariopportunita.gov.it/index.php?option=com_content&view=article&id=1192:carfagna-lstop-alle-discriminazioni-sul-luogo-di-lavoro&catid=45:comunicati-stampa&Itemid=226), accessed 11 September 2009.

## Legislative developments

### *The crime of stalking*

A remarkable step forward in the protection of women against violence has been taken by Act no. 38 of 23 April 2009,<sup>63</sup> which introduced the new crime of ‘persecutory acts’. As all other legislators of the EC, the Italian legislator chose not to use the term ‘stalking’, and preferred the definition ‘persecutory acts’. This notion does not include a classification of stalking behaviour in one list of prohibited acts; it is quite wide and mainly refers to the effects caused by harassing behaviour, such as persistent fear, anxiety or distress. The penalty is high and the criminal proceedings are compulsory when the victim is a minor or a disabled person or if the fact is linked to another crime for which criminal proceedings start *ex officio*. Strict provisions on warning, protection and restraining orders have been introduced and seem to satisfy the need and usefulness of precautionary measures, which are characteristic of this specific crime. On this aspect, the law does not allocate any funds to sustain prevention activities, except for EUR 1 million for the functioning of the ‘green telephone number’. However, funds will be provided for an anti-violence centre for women and to sustain a monitoring agency on this item, from the budgets of the Minister for Equal Opportunities, who has earmarked EUR 29 million for 2009 for this subject.

## Case law of national courts

### *Case law on gender equality*

A survey of case law on gender equality has recently been published in a labour law review. This greatly contributes to the focus on such items, which do not seem to have received great attention in recent years, although the survey sadly reveals that maternity takes the lion’s share in case law.

Two cases, in particular, are of special interest.

### *Indirect sex discrimination during personnel selection*

On 12 December 2007, the Tribunal of Firenze<sup>64</sup> convicted the manager of a private employment agency who infringed Article 10 of Decree no. 276/2003<sup>65</sup> during a personnel selection for the post of computer programmer, a decision of which unfortunately only a summary has now been published. The rules forbid employment agencies to enquire, collect and process data, and/or to pre-select personnel on the ground of a series of factors, including sex, unless they are essential requirements for the job. A female candidate and the Regional Equality Adviser brought the case to court: the court found indirect sex discrimination by the forbidden use of data on gender and ordered the manager of the Agency to pay a penalty and moral damages for mental distress caused by the refusal to consider a female candidate purely because of her sex. Only the manager was convicted, as no proof was presented for complicity of the employer who requested the agency to find a good candidate. Here, the Tribunal of Firenze seems to confirm the concern of certain scholars on the possible effects of the abolition of the State’s monopoly on recruitment procedures on

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<sup>63</sup> Published in OJ no. n. 95 of 24 April 2009, <http://www.parlamento.it/parlam/leggi/090381.htm>, accessed 11 September 2009.

<sup>64</sup> Published in *Rivista Giuridica del Lavoro*, 2008, II, 810.

<sup>65</sup> Article 10 of Decree no. 276/2003, on the Reform of the Labour Market, published in OJ no. 235 of 9 October 2003, in <http://www.dplmodena.it/dlvo276.htm>, accessed 11 September 2009.

the level of implementation of the ban on discrimination. The judgment shows that, at present, the risk of discrimination in the selection phase is definitely higher. In this case gender discrimination proved to be a frequent practice of the agency involved, and the judgment clearly shows the employers' power to influence the choices and the behaviour of the agencies, who receive and accept specific requests (also unlawful ones) from the client as they are worried about losing business.

#### *Justification of indirect discrimination of police regulation on part-time work*

Another interesting case concerns the justification of indirect discrimination. On 29 November 2007, the TAR<sup>66</sup> of Sardegna in judgment no. 2181<sup>67</sup> deemed as discriminatory the provision of the Regulation of the Local Police that rules out part-time work for policemen on the basis of the characteristics of the job. In particular, the Tribunal suspended the recruitment procedure of six policemen. The TAR based this judgment on the proof given by the claimant that part-time work is mainly performed by female employees; the Regulation provision, therefore, puts persons of one sex at a particular disadvantage compared with persons of the other sex. The TAR also took into consideration the lack of proof, as given by the Public Administration, of full-time work being an essential requirement for the job of policeman. The mere reference to organizational problems linked to shift work on Saturdays, Sundays, Public Holidays and night work, which can be tackled without excluding part-time work, was deemed insufficient to justify the particular disadvantage affecting mainly female employees or candidates. This judgment is more traditional, but reveals an increased sensitivity of the courts regarding these items. In the first place, the decision perfectly applies the rule of the partial reversal of the burden of proof and carefully examines the employer's justification, which cannot include general organizational problems, as 'the means must be appropriate and necessary'. In the second place, the judgment coherently enforces the notion of indirect discrimination of Article 25 of Decree no. 198/2006, as it simply refers to the *particular* disadvantage suffered by the persons of one sex, compared with the persons of the other sex, without any reference to the *proportionally* higher disadvantage (which was provided by the notion previously in force).

### **Equality body decisions/opinions**

#### ***The independence of equality bodies denied by a TAR decision***

By decree of 30 October 2008, the Labour Minister, in agreement with the Minister for Equal Opportunities, removed from office the National Equality Advisor, appointed by the previous Government.<sup>68</sup> The National Equality Advisor is appointed by the Minister of Labour, after previous consultation with the Minister for Equal Opportunities, from among candidates who have certified experience and competence of many years in gender equality law and the labour market. The removal took place as a consequence of a spoil system procedure, carried out under Article 6 of Act no. 145/2002, which provides that the appointment of the top management of both the Public Administration and state-controlled institutions which took place in the six months preceding the end of the legislature can be confirmed, annulled, modified or renewed within six months from the vote of confidence to the Government.

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<sup>66</sup> This is the administrative court, which is competent for a limited part of employment relationships with the Public Administration.

<sup>67</sup> Published in *Rivista Giuridica del Lavoro* 2008, II, 830.

<sup>68</sup> Decree of 30 October 2008.

The Equality Advisor appealed against this decision to the Administrative Court (TAR). The TAR, in a decision dated 19 June 2009, stated that the National Advisor is not an independent body, despite her/his wide autonomy of organization. According to the Court, the Advisor can, therefore, be removed if it is not 'tuned' with the Government's policies, under the spoil system provided by Article 6 of Act no. 145/2002. The Court confirmed that the Advisor's appointment is made *intuitu personae*, which means that it has a fiduciary and discretionary character and not a merely technical one. The Advisor, according to the Court, is provided with autonomous powers of action, but is part of the ministerial organization and is bound by government policies. The Court also confirms that the Italian legislation is absolutely compatible with Directive 76/207 (as modified), which provides for general rules and does not include any provisions on the appointment and removal procedures of Equality Advisors, leaving all matters related to public administration to the discretionary power of the national legislator. The Court is convinced that Italian legislation complies with the EU directives, since what is required is the operative autonomy of the Advisors, which, however, is limited by the Government's political guidelines.

This decision must be regarded as a major step back on the route to gender equality. The functions of the equality bodies are to promote equal opportunities between male and female workers and to counteract discrimination: these functions are intended to protect individual and collective interests recognised in the Constitutional Chart. In order to fulfil these assignments, the equality bodies need to be free from political conditioning and their status has to be that of a technical body with guaranteed functions. Until now, the Ministry of Labour in its notes had always recognised the autonomy and functional independence of the National Equality Advisor. These ministerial notes were confirmed by a consultative opinion of the *Corte di Cassazione*.<sup>69</sup>

Until now, the ambiguous wording of Article 20 of Directive 2006/54 (Article 8a of Directive 76/207) has been widely interpreted as granting independency to the Equality Advisors from government policies. Thus, if that is so, the hope is that the European Commission will use the infringement procedure against the Italian legislation as interpreted by the TAR: until now, the Government has received from the European Commission a motivated opinion on the basis of infringement procedure no. 2006/2535, which concerns Directive 2002/73/EC on the issue of the possibility for equality advisors to provide independent assistance for the victims of discriminations to carry out judiciary procedures, and a request for explanation on the specific point of the equality advisors' independence in relation to the removal from office of the National Equality Advisor.

## LATVIA – *Kristīne Dupate*

### Policy developments

Due to the economic crisis, by August 2009 12.3 % of the working population was officially registered as jobseeker. The unemployment rate among men is still higher than that among women. However, it is slowly balancing out, because more and more

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<sup>69</sup> Notes of the legislative office of the Labour Ministry of 13 October 2004 and of 8 June 2005; Note of the General Secretary of the Labour Ministry of 24 January 2008.

dismissals are taking place in the public sector where more female workers are employed. It is suspected that such a high rate of unemployment will reinforce unequal opportunities in the labour market, because employers have a wide range of options with regard to candidates. Stereotypes are such that candidates fitting the 'male norm' are preferred.

Politicians do not observe the principle of gender equality in their decisions. Most of the decisions concern cuts in the social security field, such as social allowances, special benefits for children, elderly, disabled and poor persons, and healthcare. This first of all negatively affects those who fall outside the 'male norm', e.g. persons with a limited capacity for work, persons with a low income and families with dependants. Politicians avoid taking into account statistics and social reality, which has made society more and more frustrated. Society is especially dissatisfied with the unequal effects of the decisions taken on those who have a higher income and those who have a lower income.

### **Legislative developments**

#### ***Adoption of law on the prohibition of discrimination of self-employed persons***

On 21 May 2009 Parliament adopted the Law on prohibition of discrimination of natural persons performing economic activities (self-employed persons).<sup>70</sup> This law implements the requirements of Directive 2004/113 with regard to self-employed persons. It prohibits discrimination on the grounds of sex in relation to the access to and supply of goods and services necessary for the performance of their self-employed activities.

#### ***Cuts in social security allowances***

Due to the economic crisis and lack of financial resources in social security budgets, in June 2009 Parliament adopted a number of amendments envisaging cuts in the social security allowances. One amendment is particularly discriminatory. It concerns the right to the child-care leave allowance. Amendments to the Law on Maternity and Sickness Insurance envisage that starting from 2 May 2010, the right to child-care allowance will be provided to those parents who are on full-time child-care leave. Taking into account the fact that the right to childcare leave is predominantly used by women, such a provision will lead to greater exclusion from the labour market of mothers. The current regulation stipulates that parents in employment are entitled to child-care allowance in an amount of 50 %. Only one of the parents has the right to child-care allowance. Due to this there is no possibility to share the care responsibilities.

A similar legal regulation on a total ban on working during entitlement to child-care allowance was recognized as anti-constitutional by the Constitutional Court in 2005. Most likely, this new legal regulation will also be contested before the Constitutional Court, although the outcome is unpredictable due to considerations concerning the lack of budgetary resources in the social security budget.

#### ***Improper implementation of Directive 2002/73***

In June 2009, Latvia received formal notification on the initiation of an infringement procedure regarding improper implementation of Directive 2002/73. The Commission considers that Latvia has improperly implemented the definition of indirect

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<sup>70</sup> OG No. 89, 9 June 2009.

discrimination, has not implemented the principle of non-discrimination with regard to the access to self-employment, vocational and professional training and membership of and involvement in organisations of employers or employees.

In response to this infringement procedure, the Ministry of Welfare has announced that in order to fulfil its obligations under EU law, it will start drafting amendments to the Education law, the Law on support of jobseekers and the unemployed and the Law on prohibition of discrimination of natural persons performing economic activities (self-employed persons).

### **Case law of national courts**

#### ***Latvian Supreme Court refers case to ECJ for preliminary ruling***

In May 2009 the Supreme Court decided to refer a case to the ECJ for preliminary ruling. This is its first reference concerning gender equality law. The case concerned the protection against dismissal of pregnant board members of enterprises. The most complicated issue in this case is the uncertain employment status of board members in Latvia. Board members can be employed in the capacity of employee as well as in a self-employed capacity. This has raised a number of questions with regard to the protection of self-employed persons in employment as well as regarding the personal scope of Directive 92/85. In order to clarify the provisions of EU law, the Supreme Court referred the case to the ECJ with the following questions: (1) whether board members of an enterprise are to be considered as employees within the meaning of EU law; (2) whether board members of an enterprise are protected against dismissal by EU law during pregnancy; and (3) whether board members employed in a self-employed capacity are protected against dismissal by EU law during pregnancy.

#### ***Unlawful dismissal after child-care leave***

On 3 June 2009 the Supreme Court issued a decision in a case concerning unlawful dismissal after child-care leave and the right to compensation for work stoppage. This judgment highlights the incomplete implementation of the equal pay principle in Latvian law. Compensation for work stoppage is to be calculated on the grounds of average pay. However, the Labour law provides that if a person has not received any salary during the previous 12 months, the average salary must be calculated not on the basis of salary provided by an employment agreement but on the basis of the statutory minimum wage. The Supreme Court did not take into account the aspect of indirect discrimination against women in connection with child-care leave.

### **Equality body decisions/opinions**

#### ***Gender discrimination in system of state-compensated medicines***

In July 2009, the Latvian Equality Body – Ombudsman’s Office initiated an enquiry into the compliance of the system of state-compensated medicines with the requirements of Directive 2004/113. The case was opened on the grounds of several individual complaints identifying situations where state-compensated medicines are provided for one sex only, for a disease that is typical for one sex, while not taking into account that there are several persons of the opposite sex suffering from this disease too. In addition, the Ombudsman’s Office recognized the necessity to review the system of state-compensated medicines in general, in order to analyse whether proportionate financial resources are allocated for typical ‘male’ and ‘female’

diseases. However, it may require huge human resources, which are no longer available at the Ombudsman's Office due to considerable budget cuts.

## LIECHTENSTEIN – *Nicole Mathé*

### Policy developments

#### *Commission impossible? – Women in commissions*<sup>71</sup>

By invitation from the Equal Opportunities Office and the Commission for gender equality, Members of Parliament joined the fifth discussion round on the topic of ideas for staffing various commissions.

In 1997, the Government made the principled decision that at least one third of public commission members have to be women. Various measures have been taken to implement this decision. However, these measures – e.g. a database called '*Frauenpool*' created in 1999 – have not produced the envisaged results up to now. For registration in the database, politically interested women can present themselves at the Equal Opportunities Office and introduce their profile including their areas of interest. The registered data are made available to parties and associations for nomination of members of commissions.

At this discussion round, it was concluded that the '*Frauenpool*' database was rarely used and that women having been registered for years have never been asked to participate in commissions. It was suggested that this could be related to the fact that women tend to present themselves as impartial. This could be interpreted as openness to becoming member of a party in the future or putting thematic work before party membership. The result of the discussion round was that women should announce their interest for active work in a commission or working group directly at the community, parties or associations.

#### *Domestic violence*<sup>72</sup>

A follow-up of the S.I.G.N.A.L. project is an interregional project called 'S.I.G.N.A.L. II' which is organised by the Government of Vorarlberg, Austria, and the Equal Opportunities Office in Liechtenstein in cooperation with the Women's Refuge Liechtenstein. It is to promote the early detection of domestic violence. The target audience are doctors and nursing staff whose awareness and sensitivity should be raised to recognise cases of domestic violence at a very early stage and to offer the victims the necessary help and treatment.

The S.I.G.N.A.L. project is now entering its second stage, which will last from March 2009 to August 2010. 'S.I.G.N.A.L. II' is meant to strengthen the support network for victims of violence and to make the general public aware by an exposition entitled '*Hinter der Fassade*' ('Behind the façade'). Additional target groups are students at nursery schools, family nurses and medical assistant nurses.

The objective of various events in the framework of S.I.G.N.A.L. II is to reach the various professional categories, to sensitize, inform, strengthen and support them. Using key words such as 'recognise – respond – treat – conciliate' awareness is raised regarding the specific needs of patients affected by violence. The main point is to give the participants in the events specific information and knowledge in order for them to

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<sup>71</sup> Press release of the Information Office Liechtenstein, dated 15 May 2009.

<sup>72</sup> Press release of the Information Office Liechtenstein, dated 30 March 2009.

recognise domestic violence as a cause of traumas and problems, to achieve the necessary clarity in communication with concerned patients and, last but not least, to be able to create valuable documentation for courts regarding victims' traumas and health consequences.

### *Services online*<sup>73</sup>

Since the spring of 2009, the Equality Office also offers its services on its website, e.g. online documents to register for projects in order to facilitate the work of all stakeholders implementing gender equality in Liechtenstein.

## **Miscellaneous**

### *Gender Equality Conference*<sup>74</sup>

On 18 June 2009, the 20th Gender Equality Conference of the Eastern Swiss cantons and Liechtenstein took place in Vaduz. Representatives of Equality Offices of the Public Administration, Equality Commissions, universities and women's organisations participated in this conference to exchange experiences and information. Furthermore, topics like the interregional project 'Gender health', the exhibition 'Reconciling family and professional life' as well as 'Women in decision-making positions' were on the agenda.

### *Prevention for victims of trafficking in human beings*<sup>75</sup>

Since May 2009, a newly created information event for dancers and disc jockeys (DJs) has taken place four times. The event addresses persons from outside the European Union who work in nightclubs. As many as 103 persons have already attended the information event.

These information events are based on government decisions from 2007 and 2008 aimed at reducing the possibilities to exploit dancers and DJs and at detecting cases of trafficking in human beings.

The participants were exclusively women, from Russia, the Ukraine, Belarus, Moldova, the Dominican Republic and Brazil. They often work in Liechtenstein for only two or three months on a short-term residence permit.

At the event, dancers and DJs receive information about their rights and obligations during their stay in Liechtenstein. They obtain relevant information concerning the legal situation with regard to foreigners, labour, taxes, social insurance and aid for victims. Moreover, the contact details of possible points and persons of contact are presented, to address specific questions. The events are exclusively organised by female employees of the relevant departments of the Administration and are translated into Russian and Spanish. Documentation is also available in other languages. At the end of such an information event and after verification of their identity, the participants receive the necessary documents, such as a residence permit. These permits are to be requested beforehand by their employers, for whom the event is obligatory. If employers fail to attend the event without indicating any sufficient reason, they do not receive any residence permits for their employees in order to prohibit any further activity.

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<sup>73</sup> <http://www.llv.li/amtsstellen/llv-scg-home.htm>, accessed 9 September 2009.

<sup>74</sup> Press release of the Information Office Liechtenstein, dated 19 June 2009.

<sup>75</sup> Press release of the Information Office Liechtenstein, dated 26 August 2009.

## Policy developments

### *Draft national covenant on family issues*

The Ministry of Social Security and Labour of the Republic of Lithuania submitted to public debate the draft of the national covenant on family issues. The three-page document consolidates the State's priority to create a family-friendly environment and sets mid-term and long-term objectives:

1. to ensure families' prosperity and substantial security;
2. to promote services for families;
3. to improve conditions for families' procreative function;
4. to form society's positive attitude towards the family.

The draft covenant intends to set guidelines for future actions and legislative initiatives in all fields of family life including reconciliation of work and family life. The existing experience with this kind of 'political' or 'public' covenants demonstrates that these instruments are of a purely declaratory nature. The vague provisions of the covenant as well as the provisions of the State Family Policy are taken into account on an occasional or selective basis.

## Legislative developments

### *Return after maternity leave*

For a long time, neither the Labour Code<sup>76</sup> of the Republic of Lithuania nor the Equal Opportunities Act of Women and Men<sup>77</sup> addressed the right of female employees to return to the same post after maternity leave without any detriment in the terms and conditions of work (Article 15 Directive 2006/54/EC, Article 2(7) Directive 2002/73/EC). To fill the most obvious gaps in the transposition of EC legislation, the appropriate legal provisions were included in the Labour Code by its amendments of 23 July 2009.<sup>78</sup> Pursuant to the new Section 179(4), employers shall be obliged to ensure the right of the employee to return to the same or an equivalent post or position after maternity leave. Employers are also obliged to guarantee working conditions that are no less favourable than those before the maternity leave and provide the benefits from any improvement to which she would have been entitled during her absence.

The wording of the initial proposal of the Government was slightly different from the wording of the corresponding provision of Directive 2006/54/EC. The Government previously intended to offer those working conditions to which female workers 'would have been entitled as if they had been working'. The Human Rights Committee and the Legal Department of Seimas raised the question whether the direct translation of the Directive should be followed or not. In order to avoid possible discrepancies in the interpretation of national law, the legislator decided to stick to the wording of the translated Directive. Other points raised, such as the necessity to include remuneration in addition to working conditions or to address the issue of paternity and adoption leave, received no support. The legislation of the Republic of

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<sup>76</sup> State Gazette, 2002, no. 64-2624.

<sup>77</sup> State Gazette, 1998, no. 112-3100.

<sup>78</sup> State Gazette, 2009, no. 93-3993.

Lithuania has included the right to paternity leave since 1 July 2006, but no national provisions to transpose Article 16 of Directive 2006/54/EC have been included so far.

It is important to note that the new Law of 23 July 2009 supplements the Annex to the Labour Code which includes the list of EC directives transposed into the Lithuanian legal system via the Labour Code. After these proposed amendments, the Annex list will include Directives 2002/73/EC and 2006/54/EC. Thus the status of the Labour Code as an instrument for implementation of EC gender equality legislation will be confirmed.

### ***Right of the Equal Opportunities Ombudsperson to conduct independent research and to make recommendations***

Parliament has been considering comments made by the European Commission on the lack of certain expertise competences of the national equality body. The Law on Amendments of the Equal Opportunities for Men and Women Act introduces the right for the Office of the Ombudsperson of Equal Opportunities to conduct independent research on discrimination, to conduct independent surveys concerning discriminatory situations, to publish independent reports and to make recommendations on any issue relating to such discrimination (Article 12 of the Act). The amendment aims to improve legal certainty and to improve the implementation of the provisions of Directives 2006/54/EC and 2002/73/EC. This legislative novelty will probably have no impact at all, since the competences were already quite extensively defined by the Equal Opportunities for Women and Men Act and the Office did not experience any lack of authority to fulfil the tasks of equality body under Article 20 of the Directive 2006/54/EC.

### ***Endless disputes over maternity leave allowances***

Since December 2008, the most generous Lithuanian system of maternity and childcare benefits has become the subject of heated public debate. In the course of the economic growth during the last five years, the State implemented a very active family-friendly social policy based on a steady increase of direct contributions to families. These social benefits paid by the State Social Insurance Fund concern:

1. the maternity leave (70 calendar days before and 56 calendar days after the baby is born, and 70 calendar days after the birth in the event of complications or multiple birth–). The social allowance amounts to 100 % of remuneration;
2. the paternity leave that is granted to men straight after the baby is born until the child reaches the age of one month. The social allowance amounts to 100 % of remuneration;
3. the parental leave that applies until the child has reached the age of three. During parental leave from the end of maternity leave until the child has reached the age of one, the employee is entitled to an allowance of 100 % of the previous remuneration, and 85 % until the child reaches the age of two.

On 18 December 2008, the new center-right coalition already revised the calculation rules for the determination of the level of social allowances. The reimbursed remuneration on the basis whereof the amount of allowances are determined shall be calculated according to the insured income of an insured person, which she/he has had in the course of nine calendar months (and not three months, as was stipulated before), and, from 1 July 2009, in the course of twelve calendar months, preceding the month of the beginning of the maternity leave, paternity leave or childcare leave.

These amendments introduced quite substantial differences regarding the entitlement to maternity allowance compared with sickness benefits – a longer record of social insurance is required for the maternity allowance, whereas a three-month insurance period during the last twelve months is required for entitlement to sickness benefits. However, the level of sickness benefit was lower (80-100 % of the average salary for the first two days and 85 % of the ‘compensatory salary’) than that of the maternity allowance (100 % of ‘compensatory salary’). Against the background of Article 11(3) of Directive 92/85/EC, the slight increase<sup>79</sup> of differences between the level of sickness benefits and maternity allowance still cannot justify the more restrictive conditions for entitlement to maternity allowance compared with sickness benefits.

These measures were not sufficient to balance the public finances as the Government proposed and on 23 July 2009 the Parliament adopted new amendments aimed to diminish by 10 % all allowances for employees on parental leave, to 90 % of remuneration until the child reaches the age of one and 75 % until the child reaches the age of two. However, the new law was vetoed by the newly elected President D. Grybauskaitė with the argument that such a restriction of already awarded allowances would violate the legitimate expectations of parents on parental leave. On 22 September, the Parliament agreed to postpone the date set for the new law to come into force to 1 July 2010. The question of parental leave allowances still remains open, as on the next day the Government announced new plans to reduce all social benefits (pensions, state pensions, ‘child money’ etc.) by at least 10 %.

## **LUXEMBOURG – *Anik Raskin***

### **Policy developments**

On 7 June 2009, Luxembourg held European and national elections

#### ***European elections***

One out of six Luxembourg members of the European Parliament is a woman. This is a step back compared to the previous period, during which Luxembourg was equally represented regarding gender in the European parliament. Gender equality policies were not a subject during the European pre-election campaign.

#### ***National elections***

The National Parliament is composed of 60 members. 15 women were directly elected. Thus, the share of the directly elected women is 25 %, which constitutes a clear improvement compared to the previous elections (20 %).

However, there is only one new woman who was directly elected. All the other elected women are outgoing deputies or ministers.

After formation of the new Government, there are now 12 women in Parliament. The Government has 4 women among its 15 ministers.

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<sup>79</sup> The Law of 28 April 2009 on Amendments to the Law on Sickness and Maternity Social Insurance slightly decreased the level of sickness benefits: the first two days will be paid by the employer (not less than 80 % of the average salary of the employee) and the rest by the State Social Insurance Fund (40 % (instead of 80 %) of ‘compensatory salary’ for the next 5 days and 80 % for the rest of the period of sickness).

### ***Gender equality in the government programme***

Measures in the field of gender equality are primarily included in the chapter on the Ministry for Equal Opportunities. The focus is on the renewal of the National Action Plan on equality between women and men. The Government also confirms that the policy of gender mainstreaming in each ministerial department will be continued. According to the ‘twelve critical fields’ of the platform of action of Beijing, the Ministry announces measures in the following fields:

- poverty and social exclusion;
- education, training and research;
- health;
- violence, trafficking, prostitution;
- cooperation;
- the economic field;
- decision making;
- institutional mechanisms;
- fundamental rights;
- the media;
- the environment;
- discrimination towards girls.

### **Legislative developments**

There have been no relevant new legislative developments regarding gender equality since *European Gender Equality Law Review* 1/2009.

### **Equality body decisions/opinions**

The *Centre pour l’Egalité de Traitement* or CET (Centre for Equal Treatment) is concerned with discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. There have been no new actions or publications on gender equality from the CET since *European Gender Equality Law Review* 1/2009.

**MALTA – Peter Xuereb**

### **Policy developments**

The last few months, in the slow summer period in Malta, have served occasionally for the reinforcement of the message from the Government, on those public occasions that have arisen, that it is committed to push forward family-friendly measures. The aim is to increase the participation of women in the labour market, as a means of remaining economically competitive as well as fulfilling women’s own aspirations. All eyes will soon be on the annual budget currently being formulated, and being discussed in the tripartite Malta Council for Social and Economic Development. For example, the Government has announced its intention to open yet more childcare facilities.

## Legislative developments

It had been a cause for concern for some time that although legislation has been adopted in Malta with a view to transposing the relevant EC Directives on gender equality, this had been done in a sometimes opaque manner. In particular, the definition sections of the two main legislative measures, namely the Employment and Industrial Relations Act of 2002 (Chapter 452 of the Laws of Malta, henceforth EIRA) and the Equality for Men and Women Act of 2003 (Chapter 456 of the Laws of Malta, henceforth EMWA), either omitted or did not faithfully reproduce the definitions in the relevant Directives of key concepts – including those of ‘discrimination’, ‘direct discrimination’, ‘indirect discrimination’, or ‘harassment’, all key concepts. Subsequent regulations – adopted under powers vested in the Minister by the above-mentioned Acts – had sought to remedy the situation, but did not do so fully. Moreover, the technique of leaving key definitions to be set out in subsidiary legislation, rather than in the main primary legislation, did not lend itself to legal certainty or to better knowledge by the citizen of his or her rights. In this perspective, the House of Representatives passed two new laws in April 2009 in order to bring the EIRA and the EMWA themselves fully into line with EC law. These are Act No. IV of 2009, which amended the EMWA, and Act No. V of 2009, which amended the EIRA.

Therefore, new Community-Law consistent definitions have now been brought into the above-mentioned primary legislation. The EMWA now provides that statistical evidence is only one form of evidence of indirect discrimination. The new definitions of the key concepts now more fully reflect EC law. It is also worthy of note that the EMWA as now amended makes it absolutely clear that the equality body set up by that Act, namely the National Commission for the Promotion of Equality (the NCPE) is intended to act, and must act, independently when exercising its functions and powers under the Act. In its turn, the EIRA now makes it clear that protection is afforded also in case of dismissal. It is also now clearly provided that compensation by way of damages must, and not only may, be awarded by the Courts in cases of discrimination. Otherwise, Maltese law still does not go beyond EC law in the protection provided. In particular, no collective action is possible and remedies remain as they have always been, and of doubtful real efficacy in deterring certain types of discriminatory behaviour. However, it can at last be said that some glaring gaps in protection relating to key definitions have been addressed by these legislative amendments.<sup>80</sup>

## Case law of national courts

While there have been no major judgments in the reporting period, also due at least in part to the fact that it coincides with the summer recess of the Courts, a recent case is arousing real interest and concern. The case concerns the personal tragedy of a young mother whose baby was born prematurely and died shortly after delivery. The mother worked in a factory where she was exposed to melamine. She had disclosed the fact that she was pregnant to the company’s health and safety officer and had asked to be moved out of harm’s way but, she alleges, she was not moved for three months or more. She is suing her employer, a leading microelectronics company, for damages, alleging that the (multiple) causes of death of the baby were directly linked to the

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<sup>80</sup> For the Laws of Malta, see [www.justice.gov.mt/services/legal.html](http://www.justice.gov.mt/services/legal.html), accessed 11 September 2009.

mother's exposure to melamine at work. If contested and not settled out of court, this case would be a high profile case that could have a very major impact on employee and employer awareness as to the respective rights and obligations of pregnant employees and their employers.<sup>81</sup>

There has been no new information as to cases being dealt with by the equality body, the NCPE. The last publication to provide such information was the Fifth Annual Report, presented by the NCPE in March of this year.<sup>82</sup>

## Miscellaneous

A major national agency, APPOGG (Maltese for 'support'), as well as the National Council of Women Malta, and others, have expressed dismay once again at the apparent inability of the Maltese 'system' to protect women at risk from domestic violence. Their dismay was expressed in July following the separate murders of two women, allegedly by their respective former male partners. APPOGG noted that the local press had barely reported on the two murders, almost as if they were part of a national culture of silence about such 'cases', apparently colluding in a view that 'partner' killings are a 'purely' domestic matter and of 'private' concern only. The two organisations called upon the Government and society as whole to change this mentality for the sake of the many women at risk and of their children. The National Council of Women (NCW) also pleaded for a review of the legislation (the Domestic Violence Act) as necessary. According to the NCW, there is an urgent need for a 'multidisciplinary prevention plan' to deal with the threat of domestic violence. In a statement, the NCW said that while initiatives were taken to assist victims (assuming that they are not beyond help!) there was still much to be done in order to prevent domestic violence. The NCW repeated its call for a 'national detection policy' to 'identify signs of domestic violence' in the early stages. It also called for a national information campaign aimed at the general public and therefore at potential victims as well as aggressors and pro-actively inviting them to seek professional assistance from their respective perspectives.<sup>83</sup>

The debate on the question of the possible introduction or not of divorce legislation is ongoing, and has intensified somewhat over the summer with frequent contributions in the press from well-known activists, church dignitaries, some academics and other professionals, as well as the general public. The matter has as yet not been placed on the official political agenda.

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<sup>81</sup> *The Times*, Friday, 11 September 2009, on [www.timesofmalta.com](http://www.timesofmalta.com), accessed 11 September 2009; *The Malta Independent*, Friday, 11 September 2009 on [www.independent.com.mt](http://www.independent.com.mt) accessed 11 September 2009.

<sup>82</sup> It is available on [www.equality.gov.mt](http://www.equality.gov.mt), accessed 10 September 2009.

<sup>83</sup> *The Times*, Monday, 20 July 2009 on [www.timesofmalta.com](http://www.timesofmalta.com), accessed 20 July 2009; *Maltatoday*, 22 July 2009 at [www.maltatoday.com.mt](http://www.maltatoday.com.mt), accessed 23 July 2009; National Council of Women, Malta, website, on [www.ncwmalta.com](http://www.ncwmalta.com), accessed 10 September 2009.

## Legislative developments

### *Employers obliged to prevent discrimination*

On 30 June 2009, an amendment to the *Arbowet* (Health and Safety at Work Act) was enacted.<sup>84</sup> Under this new law, employers are obliged to prevent and take action against discrimination in their organization. ‘Discrimination’ has now been added to the list of possible causes of ‘*psychosocial pressures*’ at work. Employers are obliged to protect their employees as much as possible against such *psychosocial pressures*. The *Arbowet* obliges employers to make a ‘risk assessment’ with regard to the existence of risks of psychosocial pressures, such as mobbing and sexual harassment, and the risk of ‘discrimination’ has now been added to this. Employers have to adopt a plan of action with regard to the identified risks.

The *Arbeidsinspectie* (Dutch Labour Inspectorate) is responsible for enforcing this obligation, and is competent to impose fines on employers who fail to comply with this obligation. At worst, in cases of persisting neglect of duty by the employer, a business may be shut down by the *Arbeidsinspectie*.

This amendment lays down the employers’ responsibility to prevent and tackle discrimination within their organisation. Enforcing the prevention of discrimination in a proactive way seems to be a valuable supplement to the existing ‘complaints-led’ framework of the non-discrimination provisions, which proved to be limited in effectiveness. In the past, with regard to sexual harassment and mobbing, the *Arbeidsinspectie* never used its powers to impose fines. However, the inclusion to prevent such unwanted behaviour at the work place in the *Arbowet* has proven to be an important tool (e.g. for the Works Councils or the Trade Unions) to stimulate employers to apply risk assessments, to adopt action plans and to set up complaints procedures within the organization. Also, the legal norm that employers have to prevent sexual harassment and mobbing has proven to have the effect that – in case the employer fails to do so – judges in civil-law cases are more inclined to accept liability of the employer in case the victim suffers from such conduct. The same effects may be expected from the inclusion of discrimination into the *Arbowet*.

### *Parliament discusses extension of paternity leave*

At the moment, the Dutch parliament is considering extending the duration of (fully paid) paternity leave from two days to five. The initiator of the bill, opposition party *GroenLinks*, initially proposed an extension to two weeks, but this plan met strong opposition of employers’ organizations, as the employers had to pay for it. One of the underlying motives of the Bill is to enable young fathers to get (equally) involved with the upbringing of their children right from the beginning. This could subsequently enable women to participate more equally in the labour market.

### **Equality body decisions/opinions<sup>85</sup>**

#### *University discriminates against pregnant student*

A Dutch law student who became pregnant and gave birth to a child during the third year of her studies missed two exams of a certain course. She appealed against the

<sup>84</sup> *Kamerstukken Tweede Kamer 2008-2009*, 31 811 no. A.

<sup>85</sup> To be found at the website of the Equal Treatment Commission: <http://www.cgb.nl>

decision of her university for not giving her the possibility of doing an extra re-examination. The student was not able to do the regular examination (in the fifth month of her pregnancy) due to some medical complications related to her pregnancy. She refused to use the official re-sit, as the date set (8 April 2009) was just before her baby was expected (she gave birth to her son on 11 April 2009). The university refused to give her an extra opportunity for a re-sit and suggested that she could attend the course again in the next year. According to the university, the student would not necessarily suffer any study delay, as she was permitted, by way of exception, to move on to a Master's programme in spite of the fact that she had not yet graduated as a Bachelor (first three years of study). According to the internal education and examination regulation of the university, extra provisions for re-examination could only be granted in case of 'substantial' imminent delays. Weighty reasons, such as sickness or pregnancy, could count as such, but the pregnancy of this student was not considered as having caused substantial and imminent delay of her study.

The Dutch Equal Treatment Commission (ETC) did not follow the university's arguments.<sup>86</sup> According to the ETC, the decisive factor is whether this student would be at a disadvantage because of her pregnancy, and 'disadvantage' had to be interpreted in a broad way. Following this reasoning, the ETC declared that the student was at a disadvantage: her study would become heavier, as she had to follow the unfinished course simultaneously to her Master courses. In addition, as time passes on, the student would have to start all over again with regard to the subject matter of the course. The ETC therefore found that the university's treatment of the pregnant student was in breach of equal treatment law.

Cases of sex discrimination due to pregnancy are (unfortunately) still quite common in the field of employment, but so far not in education. The broad interpretation of 'disadvantage' of the ETC is decisive here. According to this ETC Opinion, the university's restrictive policies with regard to re-examination might be justified in general, but not if this causes any disadvantages to students due to pregnancy.

## NORWAY – *Helga Aune*

### Policy developments

Due to the parliamentary elections ending on 14 September 2009, not many gender equality issues have been receiving attention. The politicians touched upon issues such as equal pay to various degrees, but since the present Government chose to shelve the Equal Pay Commissions recommendations they do not have a lot of credibility on this issue.

### Legislative developments

*White Paper 2009:14: A new common Anti-discrimination Act for all discrimination grounds*<sup>87</sup>

The Government appointed a Committee to present a proposal for a new common Anti-discrimination Act for all the various protected grounds on 1 June 2007. The

<sup>86</sup> ETC Opinion of 29 July 2009, No. 2009-71, available at <http://www.cgb.nl/node/14912/volledig>

<sup>87</sup> <http://www.regjeringen.no/nb/dep/bld/dok/nouer/2009/nou-2009-14.html?id=566624>, accessed 13 September 2009.

Committee presented its White Paper on 19 June 2009. The Head of Committee was Professor Hans Petter Graver. The Government has sent in the White Paper for broad consultation. The deadline for submitting comments to the White Paper is 30 December 2009.

The proposal presents an Act consisting of eight chapters: 1. Prohibition of discrimination; 2. Proactive measures; 3. Universal design and accessibility as well as individual adjustments; 4. Employment; 5. Burden of proof and compensation; 6. Administrative rules regarding the Ombud and the Tribunal; 7. Sanctions; 8. In force as of the date that the Act is enacted. The proposal for this new common Anti-discrimination Act contains no dramatic changes compared to the present legislation as such, but collects the various grounds. The basic legal tools are still the prohibition against direct and indirect discrimination.

At present, the Constitution does not include an article stating the non-discrimination principle. The Committee proposes to amend Section 110d of the Constitution to state that: ‘No persons must be subjected to discrimination from the authorities of the State for reasons such as sex, ethnicity, reduced capacity (handicap), sexual orientation, religion, philosophical beliefs, political views, age or other similar important matters concerning a person.’ There is no current clause in the Constitution specifically on discrimination. The majority of the Committee does not recommend that Norway ratify Protocol 12 to ECHR.

In one area the Committee recommends further elaboration: the question of anti-discrimination and insurances. The Committee recommends that a new Committee is appointed and states that special knowledge on anti-discrimination, as well as economy and insurance is needed for this topic.

### ***Fathers’ quota***

The fathers’ quota has been increased from previously six weeks to ten weeks now, by an amendment to the National Insurance Act (*Folketrygdløven*) of 1997, which entered into force on 1 July 2009.<sup>88</sup>

### **Case law of national courts**

There are no court cases to report regarding gender equality from the Civil Courts nor from the Labour Court in the period May - August 2009.

### **Equality body decisions/opinions**

#### ***The Gender Equality and Anti-Discrimination Tribunal***

*Proactive measures – municipalities’ duty to report on the status of gender equality in the annual reports*<sup>89</sup>

In 2007, the Ombud performed a series of checks on municipalities’ annual reports for 2006, following the municipalities’ reporting duty on equality measures in accordance with the Gender Equality Act (GEA) Section 1a, third paragraph. Some of the municipalities which the Ombud found not to have fulfilled their obligations were

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<sup>88</sup> <http://www.regjeringen.no/nb/dep/bld/pressesenter/pressemeldinger/2009/nytt-fra-bld-pr-1-juli.html?id=570519#>, accessed 14 September 2009.

<sup>89</sup> Gender Equality and Anti-Discrimination Tribunal, cases No. 8/2009, 9/2009, 10/2009, 11/2009, 12/2009 and 17/2009. See: <http://www.diskrimineringsnemnda.no/wips/2094117726/>, accessed 14 September 2009.

brought before the Tribunal. The Tribunal provides in all cases a thorough description of the requirement as to the level of details in statistics as regards for example pay, number of male and female employees in the various sectors, planned measures as well as the impact of measures enforced. The requirement of detailed information may vary between large and small municipalities, in general, however the municipalities do keep detailed files of their activities and thus the expectations are harder on the municipalities than perhaps on some private companies. In four of the cases before the Tribunal, the municipalities had made progress in subsequent annual reports and fulfilled the requirements in the GEA Section 1a for the annual reports of 2008, so although the reports for 2007 were not in line with the legal requirements of Section 1a the Tribunal saw no reason to pass an administrative order to issue a new report for 2007. In two of the cases, the Tribunal did pass an administrative order for the municipalities to present a new report for 2008 by 15 September 2009 fulfilling the requirements of Section 1a.

*Police district discriminates against a female applicant*<sup>90</sup>

A woman applied for a position as a senior police officer. A man already employed at the station was ranked as number 1 and the woman as number 2 by the internal employment board (*tilsettingsråd*). The employment board was divided in its decision. The case was brought before the Ombud and finally the Tribunal. In both instances, the woman was found to have been unlawfully discriminated against in contravention of the GEA Section 3 and 4. Decisive weight was placed on the statement of the employment board, which had declared that hiring another woman would constitute undesired strong representation of female leaders in the police district.

**POLAND – Eleonora Zielińska**

**Policy developments**

In Poland, as a consequence of the economic crisis, a new wave of collective redundancies<sup>91</sup> and a race to find economic cost cuts has started. The first group to experience negative developments in such situations are generally women. This time, it is no different. The Government plans, firstly, to cut down on those budgetary expenses that mainly benefit women, e.g. the regulation instituting, in a selective way, the obligation of the state budget to transfer into individual insurance accounts the remaining contributions.<sup>92</sup> Another example is the recent proposal<sup>93</sup> to deprive non-employed widows of the social security benefits from the insurance paid by their late spouse.<sup>94</sup> In order to cut down on budgetary expenses, a reduction of staff of the

<sup>90</sup> <http://www.diskrimineringsnemnda.no/wips/2094117726/module/articles/smId/800151855/smTemplate/Fullvisning/>, accessed 14 September 2009.

<sup>91</sup> *Gazeta Wyborcza* 18-19 April 2009; <http://www.gazeta.pl>, accessed 8 September 2009.

<sup>92</sup> See more below under legislative developments.

<sup>93</sup> *Gazeta Wyborcza* 20 August 2009 and the answer of the organisation of employers ‘Lewiatan’ to the protest letter of women’s organisations; [www.pkpplewiatan.pl](http://www.pkpplewiatan.pl), accessed 8 September 2009.

<sup>94</sup> It is worth to stress that this amendment has been presented to the public as an effort to include older people into the labour market. However, it should rather be perceived as a sign of hypocrisy, since during the last 10 years the Government in order to make space for the youth, showed hyperactivity in pushing out older people (mainly women) into early retirement. It resulted in the highest rate of unemployed people at age 55+ within EU countries (after Malta). Only in 2008 the

Department of Women, Family and Counteracting Discrimination at the Ministry of Labour and Social Policy has been suggested. A part of the Department's duties will be probably transferred to the Plenipotentiary for Equal Treatment, which, due to lack of competence, seems to be liable for the 'pat situation' with respect to implementing the Service Directive.<sup>95</sup> At the same time, the Prime Minister disclosed the governmental plan to transfer the equality body's duties to the Commissioner of Civil Rights Protection, while the person who presently holds this office has on many occasions demonstrated a lack of sufficient gender awareness. As to the draft law on gender parity, prepared as a result of the commitment to the 2009 Congress of Women,<sup>96</sup> the Government shows strong reluctance.<sup>97</sup> All these examples show that promotion of gender equality continues to experience a negative political climate in Poland.

## Legislative developments

### *Amendment aimed at enabling employed persons to continue self-employment while on maternity leave*

On 24 April 2009, the Polish Parliament passed a law<sup>98</sup> enabling employed persons to continue self-employment while on maternity leave (or maternity-like leave), without the risk of losing social insurances related to maternity benefits deriving from an employment contract. Before the above amendments entered into force, if a woman on maternity leave remained e.g. self-employed (or occasionally performed work), the payment of insurance contributions from the state budget had to be terminated, even though her earnings at that time may have been insignificant. The new regulation changed this situation with respect to all persons on maternity leave, not only for the future, but also retrospectively, as of the date on which the law on the system of social security came into force. At the same time, however, the present regulations remained unchanged in relation to persons on parental leave. As a result, all persons entitled to parental leave, who, starting from 1 January 1999, did not pay insurance contributions

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programme 'Solidarity of generations' was started, including activities to increase professional activity of persons of 50+ in order to stop this trend. See: [www.mpips.gov.pl](http://www.mpips.gov.pl)

<sup>95</sup> In a radio interview on 3 August 2009, the Plenipotentiary of Equal Treatment informed the public that there is no need for such a law, and there is no risk of community sanctions since Poland has already transposed most of the equality provisions into the Labour Code and with respect to discrimination in other areas, it will be enough to directly apply the general equality clauses of the Polish Constitution. For more information, see the publication by K. Smiszek, *Rzeczpospolita*, on [http://www.rp.pl.artykyl/4.351.787.Unijne\\_przepisy\\_czekaja\\_na\\_wdrozenie.htm](http://www.rp.pl.artykyl/4.351.787.Unijne_przepisy_czekaja_na_wdrozenie.htm) *Unijne*; accessed 8 September 2009.

<sup>96</sup> The draft law which shall be presented to Parliament as a citizens' draft (which requires 100 000 signatures) guarantees that women receive at least as many places on all electoral lists as men [www.kongreskobiet.pl](http://www.kongreskobiet.pl), accessed 15 September 2009.

<sup>97</sup> The Plenipotentiary for Equal Treatment has expressed strong opposition to the proposed legislative change. The Prime Minister expressed the opinion that if proactive measures such as quotas are to be applied at all, they should take the form of soft law (internal party regulations) rather than that of statutory provisions. See the press information on the website of the Chancellery of the President of Council of Ministers ([www.premier.gov.pl](http://www.premier.gov.pl), accessed 20 August 2009). The President declared that he would use his veto unless the draft on equality is accepted by Parliament. (*Gazeta Wyborcza*, 7 August 2009; <http://www.gazeta.pl>).

<sup>98</sup> Law of 24 April 2009 on the Amendments of the Law on the System of Social Security of 13 October 1998 and Some Other Laws, *Dz.U.* 2009 No.71 item 609; [http://orka.sejm.gov.pl/proc.6.nsf/ustawy/630\\_u.htm](http://orka.sejm.gov.pl/proc.6.nsf/ustawy/630_u.htm), accessed 8 September 2009. See also the article written by D. Wielowiejska, 'Matka Polka, praworzadna idiotka' (*Mother Pole - Law-abiding idiot*), *Gazeta wyborcza*, 12 May 2009; <http://www.gazeta.pl>, accessed 8 September 2009.

connected with e.g. self-employment, are obliged to do so, but without any punitive interests. This difference is officially explained by the differences in legal regimes governing both leaves (in reality mainly influenced by reasons of economy), should be criticized, in particular taking into account the unfair situation thus created: self-employed women on parental leave who in the past refused to pay insurance contributions, *explicitly* required by some local agencies of ZUS (Social Insurance Office) are no longer obliged to do so. However, if self-employed persons on parental leave complied with this request and paid the contributions, they will be not be reimbursed.

## Case law of national courts

### *Discrimination in employment on the ground of maternity*

There is an important Supreme Court decision regarding the interpretation of the principle of reversed burden of proof and how to determine the compensation.<sup>99</sup> A female plaintiff (being herself a judge) claimed that she had been discriminated against in the workplace by her employer, who refused to pay her a bonus connected with performing the function of president of one of the court's departments for the time that she was on maternity leave and on sickness leave, taken during pregnancy. She also claimed to have been deprived of additional monthly pay (the so-called 13th remuneration) in connection with her maternity. She also requested compensation for not being reappointed in the function of president of the department.<sup>100</sup> The court of first instance recognised gender discrimination in all indicated cases and on the basis of Article 183d of the Labour Code, and awarded her a compensation in the amount of double the minimum remuneration for every month of refusal to pay the bonus. With respect to the refusal of the promotion, the court awarded a compensation equal to 12 monthly minimal remunerations. The total compensation agreed by the district court was PLN 17 629 (circa EUR 4 000), instead of the PLN 32 472 (circa EUR 7 500) requested by the claimant. Both parties appealed this verdict before the appellate court, which lowered the total compensation to PLN 7 441 (circa EUR 1 700), because it did not recognise, that the allegation regarding the refusal of promotion constituted infringement of the principle of equal treatment. The claimant filed a cassation claim before the Supreme Court, arguing among other things that the verdict violated Article 17 of the Work Directive (2000/78/EC). The Supreme Court dismissed the claimant's cassation claim for the part in which she requested higher compensation. However, as to the promotion, the Supreme Court repealed the decision of the appellate court, sending the case back for reconsideration (repeated examination). In its reasoning, the Supreme Court indicated that it is the claimant's duty to indicate the facts constituting the alleged discrimination, as well as to prove the amount of material damage that resulted from the discriminatory conduct. In the examined case, the claimant, in particular, did not indicate the grounds of the alleged discrimination (it is worth to note that instead of the claimant another women was promoted). The arguments presented by the claimant (longest employment, rich experience in performing the duty of president of the department and efficiency in the

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<sup>99</sup> Judgment of the Supreme Court of 7 January 2009, Ref. III PK 43/08; [www.sn.pl/orzecznictwo/Index.html](http://www.sn.pl/orzecznictwo/Index.html), accessed 15 March 2009.

<sup>100</sup> It should be added that in the referred case, the courts only decided on the claimant's request for additional compensation for moral damages resulting from the violation of the principle of equal treatment between women and men (since as to the *meritum* of the first two allegations, another court in separate proceedings allowed the claimant's claim).

earlier appointment, recommendation given in her favour by the person who previously performed this function) by their nature were not sufficient to recognize on what ground the discrimination occurred. Valuable considerations of the Supreme Court were also devoted to the interpretation of the Directive's requirement that compensation must be effective, proportional and dissuasive (on this occasion it also mentioned Article 25 of Directive 2006/54/EC<sup>101</sup>), and to the basis for establishment of material and moral damages, which might be covered by a special compensation related to discrimination cases and its relationship to the compensation on the general principles of civil law.

## **PORTUGAL – *Maria do Rosário Palma Ramalho***

### **Legislative developments**

#### ***Complementary legislation to the new Labour Code. Partial transposition of Directive 92/85 of 19 October concerning the protection of pregnant women***

Following the publication of the new Labour Code (Law No. 7/2009, of 12 February 2009), several new legislative provisions, complementary to the LC, were published during the period covered by this Report.

We underline the following Acts:

- new Act on Accidents at the Workplace and Professional Diseases (Law No. 98/2009, of 4 September);
- new Act on working from home (Law No. 101/2009, of 10 September);
- new Act on Security and Health at the Workplace (Law No. 102/2009, of 10 September);
- new Act complementing several aspects of the Labour Code (Law No. 105/2009, of 14 September).

We underline the importance of the new Act on Security and Health at the Workplace, since this Act complements the Labour Code provision regarding health protection for pregnant women and new mothers (Article 62 No. 6 of the LC), thus transposing Directive 92/85 of 19 October in this respect. In this area, the Act establishes a certain number of activities that are forbidden or only admitted under specific conditions to these women and creates heavy penalties to employers that violate these rules. Also, this legislation identifies as a labour risk, requiring regular supervision of the employer, substances and manipulations that may endanger fertility, pregnancy or reproductive function.<sup>102</sup>

#### ***New legislation on social security***

New general legislation on social security has been published: the new Social Security Code, approved by Law No. 110/2009, of 16 September.

This legislation is of major importance since for the first time in this area it combines all relevant legislation regarding social security contribution systems. Until now, the different social security contribution systems (for instance the system applicable to independent workers, the system applicable to workers with a labour

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<sup>101</sup> This was significant, since neither the claimant nor the courts (of first instance and appellate) that examined the case made any reference to gender equality directives.

<sup>102</sup> See especially Articles 50, 57 and 41 of this Act.

contract, and other specific systems) were dealt with in different pieces of legislation, some of them quite ancient and subjected to several revisions, thus making the whole legal system in this area hard to access, to understand and to apply. This new Code is the result of an impressive legislative ‘puzzle’, producing one coherent piece of legislation.

On a more substantive point, this Code introduces several measures aiming to promote stable labour contracts instead of fixed-term contracts (by imposing a more severe contribution to employers that choose to apply fixed-term contracts instead of common labour contracts) and aiming to promote the employment of specific social categories (for instance, persons with a handicap).<sup>103</sup>

## ROMANIA – *Roxana Tesiu*

### Policy developments

Since January 2009, general gender equality measures have received very little attention from state bodies and relevant implementation bodies. Due to presidential elections in November and increased tensions at the trade unions level as a result of the economic crisis, all political focus and discourse have moved onto policies and social measures aimed to achieve political capital and/or address crisis context, especially in budget-related areas. Only marginally such measures imply gender equality aspects. Voices trying to direct attention to the fact that financial measures designed to reduce state budget costs especially affect industries or activity sectors predominantly occupied by women (such as education or the medical system) were very few and proved unable to create space for a public agenda in this regard. By contrast, it is to be noted that one of the most effervescent measures currently proposed by the Romanian Government (draft of the Single Wage Law) positively affects industries traditionally employing men and negatively affects industries predominantly employing women.<sup>104</sup> Such voices claim that passing the present draft of the Single Wage Law will turn direct women’s discrimination into state policy in Romania.

### *Equalizing the retirement age for women and men*

The prime minister’s advisor on social problems has stated that the Government is currently working out a new legal initiative on the public pensions system, designed to gradually increase the retirement age for women and men by 2013. This legal proposal will include provisions currently stipulated in the agreement with the International Monetary Fund<sup>105</sup> and the European Commission on increasing the retirement age. According to the draft, the retirement age for women and men will gradually increase to 60 for women and 65 for men by 2013. The new revised act on the public pensions system will enter into force in 2010.

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<sup>103</sup> This legislation can be found in the official law journal (*Diário da República*), on the following website: [www.dre.pt](http://www.dre.pt).

<sup>104</sup> *Proiectul legii salarizarii unice instituie discriminarea femeilor*, <http://www.revista22.ro/proiectul-legii-salarizarii-unice-instituie-discriminarea-femeilor--6461.html>, last accessed 5 September 2009.

<sup>105</sup> Public statement released by Mediafax, top press agency in Romania, <http://www.mediafax.ro/social/legea-pensiilor-va-prelua-prevederile-acordului-cu-fmi-privind-egalizarea-varstei-de-pensionare-4688416>, last accessed 10 September 2009.

Nevertheless, key social actors in Romania oppose the initiative to equalise the retirement age for women and men. The Conservative Party submitted to the Senate a legal initiative aimed at counteracting the gradual increase of the retirement age by 2013 as proposed by the Government. The main counterargument highlights that equal opportunities for women and men in Romania cannot be achieved by starting with social measures targeting the retirement system, before taking all other measures necessary to achieve equal opportunities for the active population.

## **Legislative developments**

### ***Completion of the legal framework supporting families raising children***

Since June 2009, when the legal framework to support families that are raising children was modified and completed, various actors from civil society requested governmental measures designed to facilitate its implementation. In the absence of such measures, families with children were unable to benefit from the allowances provided for by the law. Thus, Law No. 239 of 2009 filled the vacuum that resulted from the absence of legal provisions for granting parental leave allowance for all children (also twins or triplets).<sup>106</sup> Law No. 240 of 2009 extends the scope of the law to grant parental leave allowance to young women who have a child while being enrolled in studies (high school or university studies) and have therefore not earned any wages in the 12 months before delivery.

On 16 September 2009, the Government adopted the methodological norms concerning the application of the Emergency Ordinance No. 148 of 2005<sup>107</sup> on the support of families raising children, as amended by Laws No. 239 of 2009<sup>108</sup> and 240 of 2009.<sup>109</sup> The methodological norms aim to offer the implementation framework that is necessary to apply the legal provisions on the support of families raising children.

### ***Parental leave will be considered length of service***

A significant debate on the draft of the Single Wage Law is currently engaging all key actors in Romanian society. This legal initiative is designed to offer a concentrated set of measures in the field of wages, primarily aimed to address the critical status of Romanian society as a result of the global economic crisis. Although initially the draft did not include the duration of parental leave when calculating the length of the allowance, after pressure from the trade unions, the Government has recently announced the amendments proposed by the trade unions. Consequently, the parental leave of up to 2 years (or up to 7 years for children with disabilities) will be considered part of the length of service. Although according to the legal provisions of the Labour Code, the individual labour contract is suspended during parental leave, its entire duration will be considered part of the length of service and, upon returning

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<sup>106</sup> According to data of the National Agency for Social Contributions, 1726 families were registered in Romania with twins and 20 with triplets.

<sup>107</sup> Governmental Emergency Ordinance No. 148 of 3 November 2005 concerning the support of families raising children, published in the Official Gazette No. 1008 of 14 November 2005.

<sup>108</sup> Law No. 239 of 2009 amending Article 2 of the Governmental Emergency Ordinance No. 148 of 3 November 2005 concerning the support of families raising children, published in the Official Gazette No. 403 of 15 June 2009.

<sup>109</sup> Law No. 240 of 2009 to complete Article 1(2) of Governmental Emergency Ordinance No. 148 of 3 November 2005 concerning the support of families raising children, published in the Official Gazette No. 403 of 15 June 2009.

from parental leave, employees will benefit from the gross monthly salary granted before starting the period of leave.

## **SLOVAKIA – Zuzana Magurová**

### **Policy developments**

#### ***Institutional framework of gender equality still insufficient***

Although the Slovak National Centre for Human Rights is regarded by the Government as the gender equality body and its scope of competences was extended last year, it does not have a special division on gender equality with sufficient funding and gender equality experts. The same applies to the Government Council for Gender Equality.

#### ***Positive development: three female candidates in presidential elections***

In March, the first round of presidential elections was held, with the historically highest number of female candidates. In the previous elections, only one woman ran for president. This year there were three women running for the office of President of the Slovak Republic and one of them was the most serious rival for the president re-elected during the second round of elections in April.

#### ***National Action Plan for the Prevention and Elimination of Violence against Women for the years 2009 to 2012***

On 17 June, the Government approved the draft of a National Action Plan for the Prevention and Elimination of Violence against Women for the years 2009 to 2012 (NAP). According to the NAP, Slovakia needs to consider a new law dealing with all forms of violence on women, or domestic violence, with which other European countries have experience. Also, prompt and effective help to all women who are victims of violence has to be secured. Therefore, a Methodological Coordination Centre for prevention and elimination of violence against women should be established, and all Slovak counties should have at least one crisis intervention centre as well as a minimum of one temporary home for women and one consulting centre.

In March, twelve NGOs, operating in the area of women's human rights, submitted joint public comments on the proposed NAP, drafted by the Ministry of Labour, Social Affairs and Family. These organizations consider the NAP as an inadequate framework for the effective elimination and prevention of violence against women and they submitted more than 40 comments making proposals for its improvement. Although these NGOs submitted their comments based on the international standards for protection of women's rights and the general principles of human rights to the Ministry at earlier stages of preparation of the NAP, the Ministry hardly took them into account.

### **Legislative developments**

In Slovakia a specific law on gender equality, has still not been adopted.

## Case law of national courts

### *Lack of cases*

The Antidiscrimination Act is still not sufficiently applied in practice. There are no new cases concerning gender discrimination.

### Equality body decisions/opinions

#### *The Report on the observance of human rights including the principle of equal treatment in the Slovak Republic for the year 2008*

Under the Antidiscrimination Act, the Slovak National Centre for Human Rights ('the Centre') acts as the sole institution safeguarding equality, by assessing the observance of the right to equal treatment according to the Antidiscrimination Act. The Centre annually elaborates and publishes the Report on the Observance of Human Rights including the cognizance of the equal treatment principle in the Slovak Republic for the previous calendar year.<sup>110</sup> The general part of the Report 'The fundamental human rights' contains very short chapters concerning the trafficking in human beings (not a separate part concerning trafficking in women), violence against women, participation of women in public governance and coercive sterilisations of Roma women. The issue of coercive sterilisation is part of the chapter concerning the right to the protection of health and possible aspects of discrimination are not mentioned in the report.

The separate part of the report 'The principle of equal treatment and prohibition against discrimination' is highly general and not very critical. It involves the main amendments of the Antidiscrimination Act adopted during the year 2008. The Centre is not critical of the fact that Parliament refused to include the adoption of temporary special measures on the grounds of sex and ethnic or racial origin, nationality or ethnic group and replaced these grounds by social and economic disadvantage. The Centre only criticizes that temporary affirmative action could be adopted only by state administration authorities, and not by other subjects such as employers or self-government authorities.

The chapter concerning discrimination on the ground of sex is short and too general. The Centre states that the situation of women in employment relations has not improved and that inequality in the remuneration of men and women is still a persisting problem. In 2008, the Centre dealt with several cases due to pregnancy and maternity in the area of employment relations. These cases are not described in the report.

### Miscellaneous

#### *ECHR case law: judgment in K.H. and Others v Slovakia (28 April 2009)*

In its decision in this case, the European Court of Human Rights finds that Slovakia violated the human rights of eight Roma women who believe they were victims of sterilization without their informed consent and who were subsequently denied information about their reproductive health. The Court holds that the refusal to provide photocopies of medical records violated the women's right to private and family life. The Court also recognized that information about their reproductive health

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<sup>110</sup> This report is available in English on [http://www.snslp.sk/rs/snslp\\_rs.nsf/0/41BA067E83AA2659C125762C00487FA1?OpenDocument](http://www.snslp.sk/rs/snslp_rs.nsf/0/41BA067E83AA2659C125762C00487FA1?OpenDocument)

status was essential to the women's moral and physical integrity, as well as to their ability to effectively seek redress before the courts. Each of the claimants is entitled to compensation in the amount of EUR 3 500, the Court ruled. Slovakia, represented by its Agent before ECHR, Marica Pirošíková has filed an appeal to the 17-member panel of the Grand Chamber of the Court.

The case dates back to 2002, when lawyers for the Roma women made attempts to review the medical records of the eight women, who were patients in two hospitals in eastern Slovakia during their pregnancies and caesarean deliveries. When the women were later unable to become pregnant again they sought to discover the reason for their infertility. At first, the hospitals made it possible to review the medical records and to make photocopies, but as soon as they realised that the women were trying to find out whether the reason for their infertility could be sterilisation, they denied them further access to the documents. The women's lawyers asked the Slovak courts to order the hospitals to release the medical records. In June 2003, the courts ordered the hospitals to permit the applicants and their authorised representatives to review the medical records and to take handwritten notes from the documents but dismissed the request to photocopy the documents to prevent their abuse.

### **SLOVENIA – Tanja Koderman Sever**

#### **Policy developments**

##### ***Before and after elections for the European Parliament***

Political representation of women is always an important issue before and after elections. In addition to activities to achieve a more balanced representation of women in decision-making as described in the last *European Gender Equality Law Review*<sup>111</sup> I should mention the Conference on Measures to Promote Greater Representation of Women in Politics organized by the Commission for Petitions, Human Rights and Equal Opportunities and the Office for Equal Opportunities (hereinafter the Office) in May 2009. At this conference, the speakers discussed measures aimed at achieving a more balanced representation of women in political decision-making. At the end of the conference they presented joint conclusions on the basis of the contributions and proposals.

Being aware of the very strong role of the media in society, the Office called on the media for more balanced media coverage of both male and female candidates before the upcoming elections to the European Parliament. On the basis of many studies the Office in its press release stated that female candidates for elections are usually less covered by the media than male candidates unless the parties themselves place them at the top of the candidate lists.

There has been much debate in recent years on whether women quotas are an appropriate measure to achieve a more balanced representation of women in decision-making. After the elections to the European Parliament in June 2009 it became more evident that quotas alone will not lead to a more balanced representation of women and men in politics. In the European Parliament two female members were elected out of seven candidates for the members of the Parliament. Therefore, the share of female representatives in the European Parliament decreased in comparison with previous elections in 2004, from 43 % to 29 %.

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<sup>111</sup> *European Gender Equality Law Review* 1/2009, pp. 100-101.

In addition to the election results there were some critics of the campaign for the European elections as well. According to the assessment of the Women's Lobby the majority of political parties have not specifically identified the gender equality issue. The Women's Lobby is also critical of all political parties because they did not place any female candidates at the top of the candidate lists.

### ***Activities of the Office for Equal Opportunities***

Of the activities of the Office for Equal Opportunities, one that is worth mentioning is the publication of the Annual Report on the work of the Advocate of the Principle of Equality for 2008 and its presentation to the Government in April 2009. According to the report, the number of gender discrimination cases decreased from 40 % in 2007 to 20 % in 2008. This means that the Advocate dealt with 47 cases of alleged discrimination on various grounds, out of which only 9 cases were gender discrimination cases.

### ***Government activities***

The Government is considering to merge some government offices (the Office for National Minorities, the Office for Equal Opportunities and the Government Office for the Protection of Classified Information). To this end, the Government is planning to establish a government office for implementation of equality which would take over the work of these offices.

Another item worth mentioning is the discussion and adoption of the Annual Report of the Labour Inspectorate for 2008 at its session at the end of May 2009 and its presentation to the National Assembly. According to the report the prohibition of discrimination was violated in 8 cases in access to employment and in 5 cases during the employment relationship.

### ***Ombudsman activities***

The Ombudsman presented its Annual Report for 2008 to the National Assembly. The Ombudsman decided in only one case of gender discrimination and did not find discrimination.

## **Legislative developments**

### ***Regulation on Measures to Protect the Dignity of Employees in Public Administration Bodies ('the Regulation')***

In May 2009, a new Regulation entered into force in order to protect dignity at work in public administration bodies. On this basis, training courses were launched in July 2009 in order to raise awareness in the field of protection against sexual and other harassment for ministries and government services.

## **Equality body decisions/opinions**

### ***Gender discrimination found in a case regarding access to and supply of goods and services***

In July 2009, the Advocate of the Principle of Equality decided in a case of alleged unequal treatment based on gender regarding access to and supply of goods and services. A male initiator complained of discrimination because the entrance fee to a certain club was charged only to men. The Advocate found entry fees charged only to men directly discriminatory towards men in a written opinion No. 0920-13/2009-2.

## Miscellaneous

### *Various activities to promote gender equality*

In order to promote equal opportunities for men and women two projects should be mentioned. The first one is the 'Diversity Management in Employment' project which has been implemented in the scope of the Progress Programme. This is a joint project, which includes the non-governmental Association for Human Rights ŠKUC-LL, the Association of Free Trade Unions of Slovenia and Association of Employers of Slovenia in order to encourage social partners to adapt and implement diversity management in the employment policies. The emphasis is on measures to increase the employability of older and young people, disabled, racial and ethnic minorities and protection against discrimination based on religion, gender and sexual orientation. The second one is the project on multiple discrimination which is run by the Information Centre Legebitra and its partners. The main purpose of this project is to gather information on multiple discrimination, to bring the issue of multiple discrimination to the attention of the general public and to find solutions regarding how to deal with this issue together with the experts. As part of this project, a poster campaign, training courses for experts dealing with potentially discriminated individuals, and a qualitative study have been carried out.

## SPAIN – Berta Valdés

### Policy developments

The Government's basic policy is focused on taking measures against the financial and economic crisis that is having a particularly negative effect on Spain's unemployment rate. In July 2009 the social dialogue with trade unions and employers associations was broken off; this implies conflicting positions and suggests that autumn will bring social confrontations. In this context, however, the Government has stated that any measures adopted shall not affect citizens' social rights. For the time being, equal rights policies are still being developed, both through new regulations and measures to promote women in economy and employment. Moreover, the Ministry of Gender Equality intends to complete the regulatory framework for anti-discrimination legislation in Spain and has begun to develop a new law on equal treatment that will address all forms of discrimination.

#### *Policy developments in Aragón: creation of the Women's Health Advisory Council*

The creation of the Women's Health Advisory Council (by Decree 115/2009, published in the Official Bulletin of Aragón of July 3, 2009) aims to change the situation of gender inequality that prejudices women for social reasons and due to the way health services are structured. This Advisory Council is a consultative and advisory body that addresses women's health policy issues. Among its functions is to propose criteria and performance strategies to promote mainstreaming in women's health policies, advise on lines of research and propose health intervention programmes for women.

#### *Policy developments in Cantabria: coordination of activities towards mainstreaming*

The Government of Cantabria has created the Gender Equality Commission (by Decree 26/2009, Official Bulletin of Cantabria 3 April 2009). Its objective is to

integrate the principle of gender equality in the activities of the Government of Cantabria. One of its functions is to coordinate the activities for effective application of the Strategy of Mainstreaming. The Commission has been created to comply with Law 3/2007 for Equality and the Strategy of Gender Mainstreaming of the Government of Cantabria 2007-2015.

## **Legislative developments**

### ***Comprehensive regulation in the field of social security: maternity, paternity, risks during pregnancy and risks during the breastfeeding period***

Royal Decree 295/2009 of 6 March 2009 regulates the economic benefits of the social security system for maternity, paternity, risks during pregnancy and risks during the breastfeeding period. This law has two main purposes. The first is to develop in detail the changes introduced in these areas by Act 3/2007 for the effective equality of women and men. For example, on the one hand Act 3/2007 extends the protective action of social security in cases of maternity and risks during pregnancy. On the other hand, it creates new benefits related to paternity and risks during breastfeeding. The second purpose is to combine all existing regulations enabling a comprehensive regulatory approach in the field of social security.

### ***Maternity protection for women in the army***

The Ministry of Defence has introduced some measures in order to protect the situation of women during maternity in the scope of education in the army (Royal Decree 293/2009, *Boletín Oficial del Estado* 14 April 2009). The measures are for women following training courses and for professional military women, when they are pregnant or have just given birth. The regulation gives women new opportunities to attend refresher courses and advanced studies of national defence, when training courses within the scope of the Armed Forces cannot be followed in equal conditions due to situations of pregnancy, childbirth and postpartum.

### ***Draft legislation: sexual and reproductive health and voluntary interruption of pregnancy***

On 14 May 2009 the Bill on sexual and reproductive health and the voluntary interruption of pregnancy was approved by the Council of Ministers. This law introduces social, health and educational measures to guarantee the rights to sexual and reproductive health and prevent unwanted pregnancies. It also schedules the establishment within the next five years of a National Strategy on Sexual and Reproductive Health, involving the academic and educational communities. This draft legislation replaces the current system, which involves penalisation of voluntary termination of pregnancy with three exceptions, with a system that sets a maximum statutory period. The new Bill allows women to freely decide during the first fourteen weeks of pregnancy. The term for pregnancy termination may be extended to week twenty-two when the pregnant woman's life or health is at serious risk or when serious anomalies are detected in the foetus. Both situations require a medical report issued prior to the operation from two specialists other than the one performing the operation. All young women older than sixteen should be able to freely decide about abortion, which will be a free health service under the public health system. Abortion is decriminalised, meaning that women who decide to terminate their pregnancy shall not be punished with imprisonment. The amendment of the law that regulates abortion

is the subject of strong social debate and it will not be easy to pass it as it needs a strong majority in Parliament.

## **Miscellaneous**

### ***Report on the implementation of Act 3/2007 for the effective equality of women and men***

This report makes an initial assessment of the steps taken by the various ministries and government authorities, while providing details of the current situation of women after two years of law enforcement. The initial assessment is positive but the expectation is that changing the basic structure to achieve a more egalitarian society will require more time and further measures. On some specific aspects, progress towards equality has been substantial, e.g. regarding political participation and access to senior positions where the law sets mandatory quotas. The report, made by the Ministry of Gender Equality, accurately reflects all the measures taken and shows that the degree of implementation and enforcement of the Equality Act is currently satisfactory. It also highlights that the former gap between the male and female unemployment rates has been reduced to levels never before achieved. However, the real reason is that the structural components of the economic crisis is affecting, to a greater extent, male-dominated sectors.

## **SWEDEN – Ann Numhauser-Henning**

### **Policy developments**

The Government has taken the initiative for two more important actions in the field of gender equality of a policy character in 2009. These are:

- a national steering programme for female board members in private and public enterprises: ‘Steering Power’; and
- a new strategy for ‘An Equal Labour Market’ (skr. 2008/09:198).

‘Steering Power’ has as its purpose to identify and recognise competent women with the talent to become board members in public and private enterprises. Currently, in public enterprises 48 % of board members are women, whereas only 3.1 % (!) of the board members in large private enterprises are women. Parallel with this action programme, the Government has prolonged the programme to strengthen female entrepreneurs 2007-2009 for a year, adding another SEK 100 million (approx. EUR 10 million).

The new Equality Labour-Market Strategy presents the Government’s views and strategies regarding equal opportunities for women and men for the coming years. There is a focus on combating labour-market segregation, equal opportunities for men and women entrepreneurs, equal labour-market participation and equal working conditions. An assessment report is to be presented to Parliament in 2011.

## Legislative developments

### *Merger of ombudsmen and anti-discrimination acts*

As could be expected, legislative activities in the field of Discrimination Law and Gender Equality Law have been scarce this year. The new Discrimination Act,<sup>112</sup> merging seven former acts on discrimination into a Single Non-discrimination Act and implementing the European equality directives, entered into force on 1 January 2009. As of the same date, four former ombudsmen were merged into a Single Body supervising the new Act, the Equality Ombudsman, DO (*Diskrimineringsombudsmannen*, DO).<sup>113</sup>

### *Transfer of parental benefits*

The only legal initiative of interest so far this year is the Government's Bill 2008/09:194 on (among other things) extended rights to transfer parental benefits. A parent with single custody who is him-/herself too sick to care for the child is suggested to have the right to transfer his or her right to parental benefits to another person – e.g. a relative or a friend. Such rights can only be transferred to a person who abstains from remunerated work and will only apply to the care of children under the age of three.

## Case law of national courts

In early 2009, the Swedish (Supreme) Labour Court decided two cases concerning gender discrimination: Labour Court Case 2009 Nos. 13 and 15.<sup>114</sup> Now another case can be added.

### *Labour Court Case 2009 No. 45 on parental leave*

Labour Court Case 2009 No. 45 concerns Section 15 in the former Equal Opportunities Act (EOA, 1991:433) and Section 16 of the Swedish (1995:584) Parental Leave Act. A pregnant employee had applied for study leave for a one-week course planned to take place in the week preceding her maternity leave. Her employer denied this leave arguing that it would be difficult to consolidate the competence improvement due to the planned pregnancy/maternity leave.

The Court found detrimental treatment on the grounds of parental leave according to Section 16 of the 1995 Parental Leave Act and indemnification was set at SEK 25 000 (approx. EUR 2 500). The judgment also contains, however, an interesting discussion on whether discrimination on the grounds of sex according to the Equal Opportunities Act (EOA) had taken place. The Court presents and discusses into some detail the ECJ's case law in *Dekker*, *Webb* and *Hertz* on pregnancy/maternity leave discrimination as direct discrimination not requiring a comparator. Then it poses the question whether this was a case of pregnancy discrimination (not requiring a comparator or where the relevant comparator was the same employee but not pregnant) or if the relevant comparator was a man who was denied study leave on the grounds of a longer upcoming period of leave from work, which was actually parental leave. According to the Court, there are strong reasons 'to suggest that the woman concerned was in a similar situation as the man who planned a longer parental leave

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<sup>112</sup> Act 2008:567.

<sup>113</sup> See [www.do.se](http://www.do.se), last accessed 7 December 2009.

<sup>114</sup> See EGLR 2009-1. Internet source and additional information: <http://www.arbetsdomstolen.se>, last accessed 7 December 2009.

and was denied competence development on this ground'. However, the Court did not take a stand on this, nor on possible discrimination according to the (old) EOA, since the employer's decision was in breach of the Parental Leave Act.

## **Equality body decisions/opinions**

### ***Complaints to Equality Ombudsman on sex discrimination***

There have been no decisions of a more principled interest from the Equality Body since its start in January 2009. However, a number of complaints on the grounds of sex have been presented to the Equality Ombudsman in 2009. Some of them have been settled out of Court.

One case (HO 1384/2008) concerned a woman who was in her employment probation period, which was ended once the employer learned that she (i) had diabetes and moreover (ii) was pregnant. The settlement implied that the employer paid an indemnification of SEK 65 000 (approx. EUR 6 500).

Another case (JämO 622/2008) concerned a woman working with books. The demands on physical strength that applied to working with one of the big machines were to the detriment of women according to the Equality Ombudsman and amounted to indirect discrimination. Indemnification was set at SEK 35 000 (approx. EUR 3 500).

Yet another case concerned a female nurse who was offered a lower wage increase on the grounds that she had had too much time off for the care of small children. This amounted to illegal detrimental treatment according to the Parental Leave Act. Indemnification was set at SEK 20 000 (approx. EUR 2 000).

Finally, there was a case concerning a woman who was denied employment in a shop on the grounds of pregnancy. Indemnification was set at SEK 50 000 (approx. EUR 5 000).

## **UNITED KINGDOM – *Aileen McColgan***

### **Policy developments**

#### ***The Equality Bill: an introduction***

The 'only show in town' from an equality perspective at present is the long awaited Equality Bill which was finally published on 24 April 2009. The Bill seeks to incorporate all existing discrimination law provisions into a single piece of legislation which would regulate discrimination on grounds of sex, race (including nationality, national origins, ethnicity and colour), disability, religion or belief, sexual orientation, age, pregnancy and gender reassignment). The Bill also suggests the imposition of an obligation on public authorities to consider socio-economic disadvantage when planning and monitoring service provision.

#### ***Sex discrimination/equal pay***

As far as the single Equality Bill applies to sex and pregnancy and gender reassignment, it suggests relatively few substantive changes to the present law. As anticipated in the last EGELR, any early hopes that it might include provisions requiring employers to carry out pay reviews were disappointed.<sup>115</sup> Equal pay would

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<sup>115</sup> *European Gender Equality Law Review* 2/2008, p. 101.

continue to be subject to particular regulation along the lines of the current Equal Pay Act 1970 (as amended), though these provisions would form part of the proposed single Equality Bill. The Bill does propose that employers be prohibited from penalising staff for discussing pay between themselves, but will not require the disclosure by employers of any pay-related information at least until 2013 (the nature of such disclosures being as yet unclear). It also provides some limited scope for hypothetical comparators in the case of alleged direct discrimination in pay.

### ***Definitions of discrimination***

The Bill defines direct discrimination as occurring where (Clause 13) ‘because of a protected characteristic [including sex, pregnancy, gender reassignment], A treats B less favourably than A treats or would treat others’. It is expected that this terminology will extend to cover discrimination on the basis of association (as in Coleman but not limited to the ground of disability) and also discrimination on grounds of perceived status (including but not limited to sex, pregnancy etc). The Bill proposes some changes to the existing law relating to positive action which would permit an employer faced with two equally qualified candidates for a single post to select the one who is from an under-represented or disadvantaged group.

The Bill was amended during parliamentary progress to include a provision on multiple discrimination which would cover direct discrimination on up to two combined grounds, e.g. disability and gender, or disability and race, the Government considering it too complicated and burdensome to allow claims on three or more different discrimination grounds. In addition, the provision on multiple discrimination would apply only to *direct* and not to *indirect* discrimination. Given that the single Equality Bill proposes recognition of multiple discrimination (albeit only on two grounds), the proposed prohibition (with exceptions and subject to a justification defence) of age discrimination in relation to goods and services, including healthcare, may have significant importance for women.

### ***Positive duties***

Of potential concern is the proposed replacement of the current public sector duties regarding race, sex and disability equality with a single public sector equality duty which would also extend to age, sexual orientation and religion or belief. The new duty would require public authorities to ‘have due regard’ to the need to ‘eliminate unlawful discrimination’, ‘advance equality of opportunity’ and ‘foster good relations’ in relation to all of the protected grounds when exercising their functions. The proposed application of the duty to the ground(s) of religion/belief has generated anxiety among many gender equality activists as to the potential for the involvement of (generally male and often self-appointed) ‘spokespersons’ or ‘representatives’ of religious ‘communities’ in public sector decision making about (for example) the provision of reproductive healthcare (including abortions). Concern has also been expressed at the suggestion that, by contrast with the current position under which public authorities must comply with the general duties in relation to everything that they do, it has been suggested that under the new single duty authorities would be given more scope to choose their equality targets. If authorities are permitted greater discretion as regards the pursuit of equality, the fear is that they will choose easy targets which may often exclude gender.

Also of concern as regards the public sector duty/ies is the proposed replacement of the existing specific duties with a more flexible approach which would permit authorities more discretion to decide how they would comply with the general duty

subject to compliance with four key principles concerning consultation and involvement, the use of evidence, transparency, and capability. The reason this has generated concern is that the existing case law has shown that non-compliance with the specific equality duties (and the equality plans drawn up by authorities under those duties) has permitted challenge to the resulting decisions made by those authorities, and their quashing as incompatible with the general equality duties. The Equality and Human Rights Commission has expressed its opposition to allowing public authorities to adopt their own 'equality principles' and to decide for themselves how to meet the equality duty in respect of their various functions on the basis that this may transfer equality from the core business of public authorities to the margins.

### ***Procurement***

Equality activists have for many years been lobbying for the Government to make use of its enormous purchasing power to lever change in the private sector. Domestic as well as EC law has, however, made contract compliance measures very difficult to operate. The explanatory notes to the single Equality Bill state that the proposed new law will create a more explicit connection between procurement and the new single equality duty, the Bill's impact assessment providing that the decision to do this was based on evidence showing that government intervention was necessary to 'encourage' and 'enable' public authorities to use their procurement activities to further equality objectives. Schedule 26 of the Bill would amend the Local Government Act 1988 which at present severely restricts the extent to which local authorities may take into account 'non-commercial' matters in procurement decisions. The 1988 Act, as amended, would permit authorities to take into account such matters during the procurement process when they consider it is 'necessary' or 'expedient' to do so in order to comply with the single equality duty. The Bill also proposes that Ministers be given power to make regulations imposing specific duties in relation to public procurement functions. The explanatory notes suggest that, for example, a minister could impose a specific duty requiring certain public authorities to take into account national priorities set out in a public service agreement (PSA) when setting their equality objectives.



## **European Gender Equality Law Review**



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