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Introduction on the state of play

This is the eighth issue of the biannual European equality law review, produced by the European network of legal experts in gender equality and non-discrimination (EELN). This issue provides an overview of legal and policy developments across Europe, and as far as possible reflects the state of affairs from 1 January to 30 June 2018. The aim of the EELN is to provide the European Commission and the general public with independent information regarding gender equality and non-discrimination law, and more specifically the transposition and implementation of the EU equality and non-discrimination directives.

In this issue

This law review opens with five in-depth analytical articles. In the field of gender equality, Marie Mercat-Bruns from the Conservatoire National des Arts et Métiers, the CNRS and Sciences Po Law School, proposes a discussion of the concept of systemic discrimination and its added value for thinking about gender inequality. Her article offers a comparative examination of the issue of systemic gender discrimination in US, Canadian, French and EU law and case law. In the second article, Katja Nebe from Martin Luther University Halle-Wittenberg and Sonja Mangold from the University of Bremen take a look at how transnational social dialogue and collective agreements can foster equal treatment at work in relation to issues such as work-life balance, precarious and atypical employment, professional diversity, participation rights of workers, and representation of disadvantaged groups in management decisions. This article provides examples of existing initiatives and analyses the remaining regulatory gaps. The third article by Hélène Masse-Dessen and Raphaële Xenidis explores how Member States have used positive action in practice. The authors discuss the potentialities and difficulties of the concept, notably through a detailed analysis of positive action in France. In the field of non-discrimination law, Prof. Stéphanie Hennette-Vauchez from the University Paris Nanterre looks at the legal framework pertaining to religious holidays in employment in Austria, France and Spain. The fifth article has been authored by Dieter Schindlauer, the Austrian non-discrimination expert of the Network. He analyses how the concept of harassment in national anti-discrimination legislation can be used as a tool in fighting hate speech. To do so, he compared legislation in Austria, Bulgaria and Spain. Finally, this law review proposes a section presenting the most recent case law of the Court of Justice of the European Union and of the European Court of Human Rights in the field of gender equality and non-discrimination,[1] and closes with a section detailing the most recent developments in legislation, case law and policy at the national level.[2]

Recent developments at the European level[3]

In February 2018, the European Parliament adopted a resolution on protection and non-discrimination with regard to minorities in the EU Member States.[4] In this resolution, the Parliament took strong position for combating discrimination against autochthonous, national and linguistic minorities at the EU and national level, and protecting minority languages and the rights of LGBTI persons.

1 The sections on non-discrimination were drafted by Edith Chambrier, Isabelle Chopin and Carmine Conte of the Migration Policy Group while the sections on gender equality were drafted by Raphaële Xenidis of Utrecht University.

2 On the basis of information provided by the national experts, Franka van Hoof of Utrecht University drafted the sections regarding gender equality while Edith Chambrier, Isabelle Chopin and Carmine Conte of the Migration Policy Group drafted those regarding anti-discrimination and made the final compilation.

3 This section, as the rest of the Review, covers the period of 1 January to 30 June 2018.

4 European Parliament resolution of 7 February 2018 on protection and non-discrimination with regard to minorities in the EU Member States (2017/2937(RSP)), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0032+0+DOC+XML+V0//EN&language=EN.

On 15 February 2018, the Council adopted a decision approving the conclusion of the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled.[5] The Marrakesh Treaty establishes a set of international rules which ensure that there are limitations or exceptions to copyright rules for the benefit of people who are blind, visually impaired or otherwise print disabled. With EU legislation implementing the Marrakesh Treaty now in force, Member States have a clear deadline of 10 October 2018 by which they must have transposed the EU legislation into their national laws.

On 27 February 2018, ECRI published its General Policy Recommendation No. 2: Equality bodies to combat racism and intolerance at national level adopted on 7 December 2017, including a new set of recommendations to the European governments regarding standards for their equality body, notably efficiency, independence and impact of equality bodies, the establishment of equality bodies, their institutional architecture and their functions, competences, independence, effectiveness and accessibility.

On 1 March 2018, the European Parliament adopted a resolution on the situation of fundamental rights in the EU on 2016.[6] It follows a motion of resolution in the Report on the situation of fundamental rights in the EU in 2016 produced by the Committee on Civil Liberties, Justice and Home Affairs on 13 February 2018.[7] The Resolution assessed how fundamental rights were implemented in the EU in 2016, and what must still be done to reach the standards laid down in the Charter of Fundamental Rights. Half of the report concerns discrimination. The report condemns all forms of discrimination and specially focuses on certain vulnerable groups such as Roma people, Minorities, LGBTI, Transgender, people with disabilities and women. It contains particular strong commitments regarding LGBTI rights, e.g. by promoting the role of education against LGBTI phobia, condemning pathologisation of trans people and conversion. Parliament also called for the adoption of the proposal of the Horizontal Directive, still blocked in the European Council. This Directive is to protect EU citizens against discrimination in all areas of life.

The second annual report on LGBTI List of Actions[8] covering 2017, was presented at the occasion of the High-Level Group on Non-Discrimination, Equality and Diversity on 1 March 2018, which is also the yearly 'Zero Discrimination Day'. It was the Commission's response to a European Parliament Resolution and a joint call from Member States to step up efforts to combat discrimination based on sexual orientation and gender identity. Council conclusions on LGBTI equality in June 2016 required the Commission to report annually on the implementation of the list of actions.

To mark International Women's Day on 8 March 2018, the European Commission released its strategy to improve the participation of women in the digital sector. Drawing on the findings of a study published in March 2018, a series of actions focusing on gender stereotypes, education and women's entrepreneurship has been announced. That same day the Commission also published its 2018 Report on Equality between Men and Women, which noted that women still face several important challenges. While the gender pay gap has been stagnating, women are also under-represented in decision-making positions on the labour market and in politics. The report highlights how persisting and widespread harmful stereotypes related to gender roles prevent women from accessing the labour market.

5 Council Decision 2018/254 of 15 February 2018 on the conclusion on behalf of the European Union of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.048.01.0001.01.ENG&toc=OJ:L:2018:048:TOC.

6 European Parliament resolution of 1 March 2018 on the situation of fundamental rights in the EU in 2016 (2017/2125(INI)), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0056+0+DOC+XML+V0//EN&language=EN.

7 Committee on Civil Liberties, Justice and Home Affairs, Report on the situation of fundamental rights in the EU in 2016 (2017/2125(INI)), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2018-0025+0+DOC+XML+V0//EN.

8 2nd Annual Report on LGBTI List of Actions (1 March 2018): http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=615032.

In the wake of the launch of the European Pillar of Social Rights in April 2017, the European Commission presented a new Social Fairness Package on 13 March 2018, containing two initiatives that could positively impact gender equality and non-discrimination in Europe. First, the Commission released its proposal for a Regulation establishing a European Labour Authority, which would aim to strengthen fairness in the internal market through ensuring the respect of workers' rights and social protection, notably with regard to equal treatment.[9] Second, the Commission adopted a Council recommendation aimed at combating inequalities in the access to social protection of workers and self-employed persons, which might constitute 'indirect discrimination against young people, the foreign-born and women, who are more likely to be hired on non-standard contracts'.[10] In particular, the recommendation foresees the publication of data on access to social protection broken down by 'labour market status […], type of employment […], gender, age and citizenship', which may facilitate the monitoring and the enforcement of the directive and its effect on gender equality and non-discrimination.[11]

On 21 June 2018, the Council agreed on a general approach to the Work-Life Balance Directive,[12] which aims to improve the sharing of care and family-related responsibilities between women and men and thus improving women's participation in the labour market. This directive, if adopted, is to introduce paid paternity leave, parental leave and carers' leave for EU workers and repeal Directive 2010/18/EU.

In the wake of the EU's signing of the Istanbul Convention and in line with the 'Strategic engagement for gender equality 2016-2019', the issue of violence against women has been particularly relevant during the period covered by this law review. Following the momentum of the #Metoo movement, the Committee on Women's Rights and Gender Equality adopted a report on 'Bullying and sexual harassment at the workplace, in public spaces, and in political life in the EU' planned for a plenary discussion in September.[13]

Finally, a number of relevant reports was published by the EU's Fundamental Rights Agency (FRA) during this reporting period, including FRA's Fundamental Rights Report 2018 published in June which reveals mixed progress in the field of gender equality and non-discrimination, highlighting how unequal treatment remains a reality in Europe.[14] The exploitation of migrant women in domestic work in the EU was the subject of a report by the FRA published in June, which highlights how migrant domestic workers can be subject to 'abuse and harassment from employers with many working in fear of maltreatment, of losing their job or of deportation'.[15]

Network publications and activities

With regard to gender equality, the Network has prepared a number of reports that are being finalised. A thematic report authored by Annick Masselot examines the enforcement of the protection against dismissal, discrimination and unfavourable treatment based on pregnancy, maternity, paternity and

9 European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority COM (2018) 131 final, Brussels, 13 March 2018, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0131:FIN.

10 European Commission, Proposal for a Council Recommendation on access to social protection for workers and the self-employed, COM (2018) 132 final, Brussels, 13 March 2018, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0132:FIN.

11 Ibid, Recommendation 18.

12 European Commission, Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM(2017) 253 final, Brussels, 26 April 2017, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1494929657775&uri=CELEX:52017PC0253.

13 Helge Hoel and Maarit Vartia, 'Bullying and sexual harassment at the workplace, in public spaces, and in political life in the EU', European Parliament, Strasbourg, March 2018, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604949/IPOL_STU(2018)604949_EN.pdf.

14 FRA's Fundamental Rights Report 2018, Vienna, June 2018, available at: http://fra.europa.eu/en/publication/2018/fundamental-rights-report-2018.

15 Fundamental Rights Agency, 'Out of sight: migrant women exploited in domestic work', Vienna, June 2018, available at: http://fra.europa.eu/en/publication/2018/exploited-domestic-workers.

parental leaves at the national level across 31 countries. The Network is also finalising a thematic report on the rights of transgender and intersex people, authored by Marjolein van den Brink and Peter Dunne, which analyses the national, EU and international legal developments in relation to discrimination on the grounds of sex, gender identity and gender expression. With regard to non-discrimination, two thematic reports are being finalised for publication. The first one is authored by Niall Crowley, former chief executive of the Equality Body in Ireland and Equality and Human Rights Independent Expert. It establishes a state of play of equality bodies in Europe by building on, updating and further develop the 2007 Network's earlier thematic report by Rikki Holtmaat examining equality bodies,[16] the 2010 study of equality bodies by Ammer et al. commissioned by the European Commission[17] and the 2011 study on equality bodies by Niall Crowley for Equinet (Equality bodies' network).[18] The second thematic report related to disability equality and non-discrimination is authored by Lisa Waddington and Andrea Broderick. It provides a comprehensive analysis of the UN and EU legal provisions addressing disability equality and non-discrimination, with a specific focus on the Employment Equality Directive and the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

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

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16 Holtmaat R., Catalysts for Change? Equality bodies according to Directive 2000/43/EC, European Network of Legal Experts in the Field of Non-Discrimination, European Commission, Brussels, 2007.
17 The study was published by Human European Consultancy and the Ludwig Boltzmann Institute
18 Crowley N., Equality Bodies and National Human Rights Institutions: Making links to maximise impact, Equinet, Brussels, 2011.

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1 While on maternity leave, Catharina Germaine was replaced by Carmine Conte assisted by Edith Chambrier.

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Systemic discrimination: rethinking the tools of gender equality

Marie Mercat-Bruns*

I Introduction

On 26 April 2017, the European Commission published a Recommendation on the European Pillar of Social Rights setting the building of a more inclusive and fairer Union as a key priority. It emphasized the need for gender equality through both equal treatment and equal opportunities in all areas, namely recruitment, conditions of employment and career progression, but also in terms of social protection, education, and access to goods and services.[1] The emphasis placed by the Commission in 2017 on *effective outcomes* across the board for gender equality offers the initial impetus for this paper, in addition to questions raised by the introduction in France of a new class action suit to combat 'collective' discrimination.[2] The article explores two questions: To what extent does EU and French gender equality law already address systemic discrimination? And with what tools could the law tackle this type of discrimination more effectively?

Sex discrimination has been banned in the EU for a long time since the prohibition of wage disparities in the Treaty of Rome. The challenge today for the effective enforcement of antidiscrimination law at EU level is to confront subtler forms of sex discrimination. These subtler forms, of both direct and indirect nature, concern not only individual illegal behaviors by employers, but also biased or discriminatory statutes and agreements which appear neutral on their face but which in fact have a disproportionate discriminatory impact on certain protected groups. This approach requires looking at systemic discrimination, understood as a combination of direct and indirect discrimination, linked to workforce-wide policies and pervasive practices that have the combined effect of systematically disadvantaging women or other protected groups in a broader fashion and over time.[3] The idea is not necessarily to consider the State or employers to be liable for societal forces which often produce entrenched inequalities. It is rather to focus the analysis on the means of enforcement and the interpretation of antidiscrimination law to lift deep-rooted structural barriers to equal opportunity, such as glass ceilings in companies or dynamics of sex segregation in the workforce, that hinder equality between men and women. The notion of systemic discrimination purports to give a better insight into the complex and variegated manifestations of sex discrimination. It goes beyond the legal concepts of direct and indirect discrimination, which are too often seen through the narrow lens of small, repeated instances of individual litigation in EU and Member State case law, thus missing the bigger picture.

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1 https://ec.europa.eu/commission/publications/commission-recommendation-establishing-european-pillar-social-rights_en.

2 Law n° 2016-1547, Nov. 18 2016 on the modernization of Justice XXI Century.

3 Kim, P. (2015), 'Addressing systemic discrimination: public enforcement and the role of the EEOC,' *Boston University Law Review*, Vol. 95, pp. 1133-1154.

II Why discuss systemic discrimination within the EU legal framework today?

The reflection on systemic discrimination is justified by the fact that certain EU Member States have adopted new forms of action to litigate issues of group discrimination, notably France through a new law introducing a class action suit.[4] This national initiative raises questions regarding the meaning of collective discrimination. Is the new class action suit to serve as a more efficient tool by simply grouping different individual claims of discrimination, or could the introduction of a collective action deal with subtle structural discriminatory practices in the workplace and in other spheres?

The issue of systemic discrimination embraces a more holistic perspective on equal opportunity in all contractual relationships.

Moreover, in employment, 'the proliferation of flexible workplace structures can make traditional tools of antidiscrimination law less effective'[5] because antidiscrimination law was constructed with reference to the more rigid organizational structures of the past. Telework, independent work through company outsourcing, the need for more versatile workers and team work blur the lines of work supervision. Antidiscrimination law lacks flexible means to detect discrimination in less linear forms of management decision making, for example in cases where employers prefer co-decision making or the diversification of techniques in job evaluations. 'Workplace structures facilitate conduct – often driven by subtle or unconscious bias – that operates as a drag on the achievements of members of historically excluded groups.'[6] In addition, a rise in 'second generation discrimination'[7] is to be observed, along with subtler forms of direct and indirect exclusion of minorities and women, who are kept out of social networks and therefore not informed of advancement opportunities in certain sectors. Sexual harassment is also still pervasive in certain industries, which increases the risk of a hostile environment at work, in public spaces and in commercial transactions.

In addition, manifestations of systemic sex discrimination are reflected in the persistent exclusion of the most disadvantaged women, who are subjected to multiple discrimination in housing, the consumption of goods and services and employment, for example in France, despite sex discrimination being prohibited in all these spheres.

The reflection on systemic discrimination at European level might play out differently in the individual Member States which do not have a class action suit, even though EU directives and their interpretation by the CJEU promote the coherent application of antidiscrimination law. Hence the issue requires revisiting EU norms and national case law and legislation through the prism of systemic discrimination. In other words, the goal of this research is not necessarily to offer a new concept of systemic discrimination to be

4 Law n° 2016-1547, Nov. 18 2016 gives both trade unions and NGOS (in the sole context of recruitment) the right to take legal action against employment discrimination and to challenge collective discrimination before a civil court judge after a certain period of time subject to possible settlements with the company in question. This class action in discrimination law applies to all areas of law, goods and services, housing, urban planning, health services, public services, etc. The Law (Art. 62) applies: 'when several persons placed in a similar situation have suffered from harm committed by the same person, as a result of a contractual or legal violation of the same nature, upon which they can instigate a class action through one plaintiff' (i.e. the union or NGO concerning recruitment decisions).

5 Bagenstos, S. (2006), 'The structural turn and the limits of antidiscrimination law', *California Law Rev*. Vol. 94, pp.1-49, p. 2.

6 Ibid.

7 Sturm, S. (2001), 'Second Generation Employment Discrimination: a structural approach', *Columbia L. Rev*. Vol. 101, pp. 458-568: "Frequently, sexual harassment and discriminatory exclusion involve issues that depart from the 'first generation' patterns of bias. Unequal treatment may result from cognitive or unconscious bias, rather than deliberate, intentional exclusion. 'Second generation' claims involve social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups. Exclusion is frequently difficult to trace directly to intentional, discrete actions of particular actors, and may sometimes be visible only in the aggregate. Structures of decision making, opportunity, and power fail to surface these patterns of exclusion, and themselves produce differential access and opportunity."

formally included in EU law but rather to examine to what extent EU gender equality law addresses the phenomenon of systemic discrimination.

In order to understand the issue of systemic discrimination, which is not necessarily the systematic, repeated occurrence of discrimination, this article defines the concept of systemic discrimination (1) and its use in countries like France, the United States and Canada (2). It then becomes relevant to revisit European gender equality law through the lens of systemic discrimination. It shows how EU gender equality law, without referring to systemic discrimination, has actually already adopted a structural frame in the production and interpretation of antidiscrimination law (3). The final step is to show how current and future tools can target systemic discrimination and serve strategic compliance or litigation in this direction (4).

III The concept of systemic gender discrimination

What is systematic gender discrimination?

The concept of systemic discrimination does not formally exist in most Member States and in European law. This does not, however, mean that systemic discrimination is not already implicitly targeted by existing norms.[8] After clarifying the concept in Europe and whether it overlaps with the systematic occurrence of discrimination or notions like structural or institutional discrimination, it will be useful to see how it has been defined outside the EU, for example in Canada and the United States.

A common result of multi-level judicial argumentation at the CJEU and in national courts has been the simultaneous invocation of both direct and indirect gender discrimination in the same cases. However, gender discrimination can also be perceived as the result of systematic direct or indirect patterns: recurring practices or policies where discrimination has a wide scope covering an entire industrial sector, a type of job, a multinational company or a region. Apart from individual claims, EU and Member State laws also address gender discrimination as a group phenomenon that can be widespread in certain types of physical or engineering jobs, at certain executive levels, or in particular industries that are not characterized by a critical mass of female workers in strategic positions, for example in the construction work sector. Systematic gender discrimination is therefore typified by multiple violations.

What is the problem that the concept of systemic gender discrimination seeks to address?

By contrast, systemic discrimination results from the combined effect of direct and indirect discrimination. The exact correlation between the two concepts and their exact input in producing systemic discrimination within gender groups are not always fully comprehensible. The glass ceiling or sticky floor that affects women in certain industries is a manifestation of systemic discrimination and is easier to detect when factors like age and sex are used to monitor the career paths of women. However, its exact cause is hard to pin down. Instead of focusing on the cause, the concept of systemic discrimination, like indirect discrimination, addresses the effect of discrimination. It becomes a pedagogical tool to analyze the contours of discrimination when the notion is not included in the letter of the law. In some countries it can help to prove discrimination in cases relating to class actions.

The concept of systemic discrimination is useful to understand how gender discrimination is produced in employment, for example as a combination of a variety of harms. These harms can impact female careers. For instance, women who take maternity leave, then take parental leave for family responsibilities and end up in a part-time job, are exposed to a higher risk of systemic discrimination. Litigation on direct and

8 See Section 3. Revisiting European and national case Law through the lens of systemic discrimination.

indirect discrimination with their respective legal frameworks of evidence is path-dependent. Arguments based on these two concepts lead to specific remedies and their interactions and combinations, which can create a diversity of harms including harassment, are often neglected.

The concept of systemic discrimination is a valuable frame to understand how the harms of discrimination can be addressed by the principal functions of antidiscrimination law.[9]

IV What kinds of harm does it cover?

Eliminating market barriers

The first function of the law serves to eliminate market barriers by proscribing discrimination: it avoids opposing freedom of contract to equality. A systemic understanding of sex discrimination covers a more comprehensive spectrum of existing arbitrary obstacles to the conclusion or continuation of contracts in housing, employment and goods and services.

Expressing social norms and standards

The second function of antidiscrimination law is to 'express social norms such as standards of human dignity'.[10] It provides a proper basis to analyze the systemic dimension of discrimination and goes beyond viewing the personal harms linked to harassment in an isolated manner. As EU case law shows, risks of aggravated stigma towards groups permeate particular professional sectors and geographical areas.

Facilitating social redistribution

The third function that a systemic analysis of discrimination facilitates is social redistribution. When EU and Member States' courts tackle unequal treatment in social rights through comparability-based analyses leading to the extension of certain rights, it produces substantial redistribution effects derived from the contribution of citizens to welfare systems.[11]

Protecting autonomy

Finally, if the last function of antidiscrimination law is to protect the autonomy of individuals and groups, paying attention to the issue of systemic discrimination gives a further insight into how certain groups can be empowered through equal gender representation in certain spheres in and outside the workplace, for instance parity mechanisms in executive boards. Complaint procedures and class actions are procedural tools that foster a more systemic understanding of plaintiffs' agency, the capacity to vindicate group rights through conciliation, and an opportunity for institutions or companies to develop means to prevent risks of discrimination through compliance and settlements.

However, the reflection on systemic discrimination at European level might play out differently in those individual Member States which do not have a class action suit, even though EU directives and their interpretation by the CJEU promote the coherent application of antidiscrimination law.

9 See R. Post's interview, Mercat-Bruns, M. (2016), *Discrimination at work* UC Press, pp. 29-37, available at: http://dx.doi.org/10.1525/luminos.11.

10 Ibid, pp. 29-37.

11 See EUCJ 10 May 2011, *Jürgen Römer* vs. *City of Hamburg* Case C-147/08.

V How is it different from other concepts, such as collective discrimination or institutional and structural discrimination?

Sometimes the term institutional discrimination is used to designate collective discrimination linked to public institutional settings (schools, housing projects, law enforcement).[12] Public institutions also ignore, or contribute to, the collective exclusion or the recurring difference in treatment of protected groups including women. In addition to the first ECtHR cases on indirect discrimination[13] and the recent French case[14] on the education of Roma children, certain Member States, like France, have had numerous recent examples of institutional gender intersectional discrimination. These cases for instance concern low income housing selection processes, where women have not been regarded as the heads of single parent households,[15] or court findings of gender discrimination through the racial profiling of young men by law enforcement officials.[16] The recognition of indirect discrimination provides 'challenges to institutionalized practices which, though likely the result of direct racial or [gender] hostility and/or stereotyping, would be difficult to establish as such.'[17] Most of the time institutional decision-making is perceived as fair, rational and meritocratic.

The adjective 'institutional' is also associated with more positive institutional change[18] in the private and public sector in order to target arbitrary 'institutional' practices.[19] However, these 'disparities that frequently result from cognitive bias, unequal access to opportunity networks, and other structural dynamics, rather than from intentional exclusion'[20] are present in both the private and public realm.

The issue of structural discrimination is often used as a synonym for systemic discrimination including private sector inequalities. 'Hierarchical, bureaucratic structures give way to a more flexible governance where it is harder to identify a blanket discriminatory policy or identifiable decision to exclude (…).' The 'conceptualization of structural discrimination suggests that the regulation of subtle forms of discrimination common in today's workplace for example requires a focus on the operation of discriminatory bias as influenced, enabled, and even encouraged by the structures, practices, and dynamics of the organizations and groups within which individuals work. In other words, it posits the need to conceptualize discrimination in terms of workplace dynamics rather than solely in existing terms of an identifiable actor's isolated state of mind, a victim's perception of his or her work environment, or the job-relatedness of a neutral employment practice with adverse consequences.'[21] Systemic discrimination

12 Feagin, J. (1978), *Discrimination American Style: institutional racism and sexism,* Robert E. Krieger Publishing Company p. 246; Knowles, L., Prewitt, K. (1969), *Institutional racism in America,* Englowood Cliffs.

13 ECtHR 13 Nov. 2007, *D.H. and others v Czech Republic* (Application no. 57325/00): the European Court of Human Rights found a violation of Article 14 of the Convention in relation to a pattern of racial discrimination in a particular sphere of public life, in this case public primary schools. As such, the Court underscored that the Convention addresses not only specific acts of discrimination, but also *systemic* practices that deny racial or ethnic groups the enjoyment of their rights. The Court clarified that racial segregation amounts to discrimination in breach of Article 14 and demonstrates, through the use of indirect discrimination, that equal access to education for Roma is a *persistent* problem throughout Europe.

14 See the Supreme Court of France's recent creative decision interpreting discrimination law in a systemic way as requiring local authorities to register Roma children in schools without adding additional requirements in terms of residency, Cass. Crim. Jan. 23 2018 n°17-81369.

15 In a survey conducted by the French Defender of Rights in 2016 on discrimination in access to rental housing and involving 5 117 persons, 24 % of women with children under 3 years of age felt that they had been subjected to discrimination. Available at: https://www.defenseurdesdroits.fr/fr/communique-de-presse/2017/12/enquete-acces-aux-droits-ndeg5-discriminations-et-acces-au-logement.

16 Cass. 1er civ. 9 novembre 2016 n° 15-25.873.

17 McColgan, A. (2014), *Discrimination, Equality and the law*, Hart p. 10.

18 See http://change-center.squarespace.com/susan-sturm/.

19 Bobbitt-Zeher, D. (2011), 'Connecting Gender Stereotypes, Institutional Policies, and Gender Composition of Workplace', Gender and society, Vol. 25, pp. 764-786.

20 See Sturm, S. (2010), 'Activating systemic change toward full participation: the pivotal role of boundary spanning intermediaries', *Saint Louis Law Rev*. Vol. 54, pp. 1117-1138; see http://change-center.squarespace.com/susan-sturm/.

21 Green, T. (2003), 'Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory', 38 *Harv. C.R.-C.L. L. Rev*. pp. 91-157.

derives from how organizations, as structures, discriminate,[22] moving from, for example, understanding sexual harassment as 'a purely interpersonal problem' to considering it 'part of a broader environment of behavior, including sexually explicit language and touching as well as non-sexual acts of job sabotage and ridicule.'[23] Directive 2006/54/EC in its definition of a hostile environment resulting in harassment as discrimination confirms this wider view of environmental sexism.

In this context, it is difficult to prove causation between one discriminatory decision and exclusion because the 'decision making process is seen as separate constituent elements' especially in cases of indirect discrimination.[24] For instance, if a promotion process is based both on some direct job evaluations following more indirect – apparently neutral – practices which in fact prevent the circulation of information on the availability of jobs, it might be hard to show the combined discriminatory effect of the recruitment practice as a whole. It is not sufficient to identify the harm linked to a particular decision to hire, fire or promote. Moreover, job cultures play an important role. For example, the underrepresentation of women in high-tech companies is due to exclusionary corporate cultures and women feeling isolated due to a lack of role models, networks and mentors.[25] In addition, claiming bias in subjective decision-making requires proving what constitutes objective decision-making in assessing workforce performance. Glass ceilings or a sex-segregated workforce are some concrete effects of systemic gender discrimination as studies show.[26]

VI What is the added value of the concept of systemic discrimination?

The advantage of adopting a framework of analysis that coins discrimination as systemic is to first recognize that, depending on the country, the region, the industry, the sphere of activity (employment, education, housing), systemic discrimination can vary and the solutions to combat it also depend on the country and its internal systems (the job market, the role of the State and the social security system). Systemic discrimination will be easier to conceptualize in a country that has adopted a rule of civil procedure that recognizes class or group actions. This might, for example, help civil jurisdictions like France, which prefer equality as a paradigm over the antidiscrimination principle, which is considered imported from common law systems, to embrace complex notions like indirect discrimination. Countries which favor social rights through collective bargaining, fundamental rights and the collective democratic legitimacy of the legislative process instead of strategic litigation, would also be more familiar with the concept of systemic discrimination, which seeks to redress collective harms with collective solutions in the collective interest of a particular group. In this perspective, the focus of anti-discrimination law would be less on psychological biases and stereotypes and more on crafting an objective theoretical framework to rationalize the collective causes and effects of discrimination as a functional disorder in employment, housing or education.

22 Green, T. (2017), *Discrimination laundering: the rise of organizational innocence and the crisis of equal opportunity law*, Cambridge University Press pp. 116-141.

23 Green, T., 'America is from Venus, France is from Mars: pinups, policing and gender equality', *Employee Rights and Employment Policy Journal,* 2017 (forthcoming).

24 *Stout v Potter,* 276 F.3d 1118, 1124 (9th Cir. 2002): 'We doubt that the overall screening process should be treated as one employment practice for purposes of disparate impact analysis.'

25 *Catalyst, bit by bit: catalyst's guide to advancing women in high tech companies* (2003), *available at* http://www.catalyst.org/knowledge/bit-bit-catalyst-guide-advancing-women-high-tech-companies.

26 Mercat-Bruns, M. (2015), 'L'identification de la discrimination systémique', *Revue de droit du Travail*, pp. 672-681; Mercat-Bruns, M., Boussard-Verrecchia, E. (2015), 'Appartenance syndicale, sexe, âge et inégalités: vers une reconnaissance de la discrimination systémique', *Revue de Droit du Travail*, pp. 660-671.

VII Why do traditional anti-discrimination tools fall short?

The concepts of direct and indirect discrimination are excellent tools to smoke out discrimination. Each of these concepts detects systemic discrimination when differential treatment or the discriminatory impact of an apparently neutral rule have a wide effect on a group. However, direct and indirect discrimination serve as one-shot tools to remedy discrimination in litigation and mediation and do not create an impetus, like the systemic discrimination framework does, to achieve gender equality in the future. The acceptance of the idea of systemic discrimination and its use to evaluate organizations or practices require a second step in the form of compensation or remedies for these deep-rooted inequalities. Direct and indirect discrimination do not necessarily require positive action as a sanction, apart from individual instances of reasonable accommodation, because the goal is to stop the difference of treatment or to stop using apparently neutral but in fact discriminatory criteria, provisions or practices. By contrast, systemic discrimination cannot be stopped by inaction or financial remedies. Confronting systemic discrimination requires structural changes for groups at different levels through positive action both from policy makers and from judges who issue injunctions for positive action in class action suits. No action actually perpetuates systemic discrimination that is inherent in the access, selection and evaluation of persons in employment, education and housing.

VIII Systemic gender discrimination in American, Canadian and French case law

A comparative analysis highlights the assets of a systemic view of discrimination. This article selectively focuses on three countries because of their formal reference to systemic discrimination. Two of them have formally included the term in their law. The United States opted for a quantitative measure of broad systematic discrimination in the guidelines of its equality body and a legal reference to 'systemic' disparate treatment, while Canada preferred a more qualitative view of systemic discrimination, which is explicit in its case law. France just adopted class actions[27] following an in-depth study by the Ministry of Justice on the notion of systemic discrimination. Some of France's case law also embraces a systemic approach to discrimination.

In other words, the comparison highlights different ways in which the concept of systemic discrimination can been used. In the United States the notion of systemic discrimination is understood as a form of group discrimination. It is linked to a particularly high number of claims, litigated jointly and generated by a particular pattern or practice of discrimination. In Canada, it has been explicitly recognized in the case law as a particular form of discrimination (i.e. the result of a combination of direct and indirect discrimination). In France, the legislative history of the new law on class actions reveals that the concept of systemic discrimination is understood as the result of a combination of direct and indirect discrimination, without the law including a specific definition.[28] It is in the French case law that judges seem to be adopting a more systemic approach to discrimination law. This question in the United States, France and Canada is often raised in relation to employment but also concerns the consumption and supply of goods and services and the access to social benefits. The comparative analysis raises the question of whether the concept of systemic discrimination should be formally recognized as a legal mechanism in EU law, as it is used in Canada or the United States, or should merely serve, more like in France, as an analytical framework to better understand the effect of direct and indirect group discrimination.

27 See note 2, Law n° 2016-1547, 18 November 2016 on the modernization of Justice in the XXIst Century.

28 Before the adoption of the French class action suit on discrimination, a French report for the Ministry of Justice referred to the definition of systemic discrimination in relation to the effects of both direct and indirect discrimination, see Pecaut-Rivolier, L. (2013), *Lutter contre les discriminations au travail: un défi collectif*, Rapport au Ministère de la Justice, p. 27.

IX The American quantitative definition linked to the broad impact of systemic discrimination

According to the American administrative equality body, the Equal Employment Opportunity Commission (EEOC), 'systemic discrimination in employment involves a pattern or practice, policy, or class case where the alleged discrimination has a broad impact on an industry, profession, company or geographic area.'[29] This definition does not fully explain the cause of systemic discrimination but rather ascertains the extent of its scope in terms of numbers and its recurring impact.[30]

To understand the reference to systemic discrimination in American law, it is best to describe the first precedents that were followed by a series of cases from the 1980s to this day,[31] which have had indisputable effectiveness in combating gender and racial group discrimination.[32] In the 1977 case of *International Brotherhood of Teamsters v United States,*[33] the Supreme Court ruled that in a 'pattern or practice'[34] discrimination case, once the plaintiff proves that the defendant has systematically discriminated, all the affected class members are presumed to be entitled to relief (such as back pay, jobs) unless the defendant proves that the individuals were not the victims of the pattern or practice of discrimination at stake. 'The Government sustained its burden of proving that the company engaged in a systemwide pattern or practice of employment discrimination against minority members in violation of Title VII by regularly and purposefully treating such members less favorably than white persons. The evidence, showing pervasive statistical disparities in driver positions between employment of the minority members and whites, and bolstered by considerable testimony of specific instances of discrimination, was not adequately rebutted by the company (...).'[35]

The same year, in *Hazelwood School District v United States*,[36] the Supreme Court ruled that a plaintiff can establish a *prima facie* case of class hiring discrimination through the presentation of statistical evidence by comparing the racial composition of an employer's workforce with the racial composition of the relevant labor market. The court explained that, absent discrimination, an employer's workforce should reflect the composition of the pool of applicants.

In addition to class actions, the EEOC has also challenged class-wide sex discrimination in employment. For example, a complaint had alleged discrimination against female employees in General Telephone's facilities in the States of California, Idaho, Montana, and Oregon, in the form of restrictions on maternity

29 https://www.eeoc.gov/eeoc/systemic/.

30 Title VII of the Civil Rights Act of 1964 *(Pub. L. 88-352)* SEC. 2000e-2. *[Section 703] The Civil Rights Act of 1991 (Pub. L. 102-166)* (a) 'It shall be an unlawful employment practice for an employer -(2) (…) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.'

31 See the more recent class actions as systemic complaints which the EEOC has filed: *EEOC v Texas Roadhouse* (2011) https://www.scribd.com/document/289566171/Amended-Texas-Roadhouse-complaint; *EEOC v Discovering Hidden Hawaii Tours* (2017). https://www.scribd.com/document/339446403/Discovering-Hidden-Hawaii-Tours-complaint#from_embed; *EEOC v Global Horizons* (2011) http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1407&context=condec; for an example of a settlement linked to a systemic claim: *EEOC v Global Horizons* (2014) https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1407&context=condec.

32 On the extraordinary impetus of systemic sex discrimination litigation in the United States since the 1970s, see Krieger, L. (2007), 'The Watched Variable Improves: On Eliminating Sex Discrimination in Employment', in *Sex Discrimination' in Employment* (Crosby F. et al. eds), p. 33; see also Mercat-Bruns, M. (2016), *Discrimination at work,* UC Press, pp. 174-180, free e-book: http://dx.doi.org/10.1525/luminos.11.

33 431 U.S. 329 (1977).

34 The law does not refer directly to the term 'systemic discrimination' but rather implicitly covers it with the term 'pattern or practice', see Title VII of the Civil Rights Act of 1964: Section 707 authorizes government action 'against an employer "engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by" the statute.' *Chin v Port Auth*., 685 F.3d 135, 147 (2d Cir. 2012) (citing 42 U.S.C. § 20ooe-6 (2006)); see Tsang, C. (2013), 'Uncovering systemic discrimination: allowing individual challenges to a 'pattern or practice'', *Yale Law and Policy Review*, Vol. 31, n°1, pp. 319-333.

35 431 U.S. 329 (1977), pp. 334-343.

36 433 U.S. 299 (1977).

leave, access to craft jobs, and promotion to managerial positions.[37] It sought injunctive relief and back pay for the women affected by the challenged practices. Unfortunately, for some authors, American cases seem to have failed to grasp the meaning of statistical patterns and practices inherent in systemic discrimination, relying too much on evidence of stereotyping. For example, instead of considering statistical disparities in pay or promotion as sufficient to shift the burden of proof of discrimination to the employer, plaintiffs in the 80s started to add general testimony by social psychologists asserting that subjective decision-making is more prone to the influence of stereotyping, without targeting one specific practice.[38] Even the innovative concept of disparate impact[39] (indirect discrimination in Europe) has lacked a more transformative effect because of its often limited application to written employment tests in the United States[40] or because voluntary compliance of employers to prevent disparate impact discrimination can lead to liability for disparate treatment discrimination (direct discrimination in Europe).[41] The American example is compelling in order to understand the methodological approach to systemic discrimination that has been pursued by the EEOC in litigation to this day,[42] notwithstanding the current general resistance to antidiscrimination law by a conservative American judiciary.

X The Canadian qualitative definition based on the cause and the effect of systemic discrimination

The Supreme Court of Canada has defined systemic discrimination by conceptualizing the cause and the harm produced as a combination of direct and indirect discrimination.[43] In a case concerning women seeking jobs with the National Railroad Company, the Court held: 'systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination.' (…) 'The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural forces", for example that women "just can't do the job."'[44]

This formal legal recognition of systemic discrimination gave the Supreme Court the opportunity to justify employment equity programs, the Canadian form of positive action, to break the 'cycle of systemic exclusion'.[45] A scholar from Quebec has shown that discrimination can result from individual behavior as well as the unintended and often unconscious consequences of a discriminatory system, notably sex segregation in jobs in a company.[46]

Additionally, as Canadian scholars explain, a systemic perspective on discrimination can also acknowledge 'more complex and intersecting identities.'[47] 'In *Alexander v British Columbia*,[48] Isabel Alexander was a First Nations woman who was partially blind and had a motor impairment affecting her gait and her

37 *General Telephone Co. of the Northwest, Inc.* v. EEOC, 446 U.S. 318 (*1980*): The EEOC may seek class-wide relief under 706 (f) (1) without being certified as the class representative under Rule 23 pp. 323-334.
38 See Selmi, M. (2011), 'Theorizing systemic disparate treatment discrimination', 32 *Berkeley J. Emp. & Lab. L.,* Vol. 32, pp. 477-497.
39 With the famous Griggs case that inspired European lawmakers, see Suk J., *Disparate Impact Abroad* March 2014 Faculty Research Paper No. 425.
40 Selmi, M. (2006), 'Was the Disparate Impact Theory a Mistake?', 53 UCLA L. Rev., Vol. 53 pp. 701-782: 'the disparate impact theory has produced no substantial social change' outside of 'written employment tests'.
41 See *Ricci v Destefano,* 557 U.S. 557 (2009); for a comparison with Canada: Seiner, J. (2006), 'Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach', *Yale Law & Policy Review,* Vol. 25 pp. 95-142.
42 See the recent EEOC claims note 37.
43 Indirect discrimination is called 'adverse effect' discrimination in Canada, See *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536.
44 *Canadian National Railway v Canada* (Human Rights Commission), [Action Travail des Femmes] (1987) 1 S.C.R. 1114 at 1139.
45 Ibid at 1143.
46 Chicha-Pontbriand, M-T. (1989), *Discrimination systémique, fondement et méthodologie des programmes d'accès à l'égalité à l'emploi*, Cowansville, Ed. Y. Blais, p. 85.
47 Sheppard, C. (2010), *Inclusive Equality: The relational dimensions of systemic discrimination in Canada*, McGill-Queen's University Press p. 32-33.
48 *Alexander v British Columbia* (1989), 10 Canadian Human Rights Reporter D/5871.

speech. She was refused service in a liquor store because the male store manager thought she was drunk. Alexander alleged discrimination based on race, color, ancestry and/or disability. The tribunal… asserted that the cause of the discrimination was her disability. The allegations of discrimination on the basis of her race, color and ancestry were summarily rejected.'[49]

In short, 'the dynamics of systemic discrimination operate to entrench and perpetuate inequality'[50] and thus thrive on the effects of decision-makers' inaction. The innovation in the Canadian approach lies in its ambition to explicitly define systemic discrimination as a legal concept. The judges have shown how systemic discrimination derives from direct and indirect discrimination and pervades the procedures that organizations adopt or the forms they take. The cases demonstrate that the apparently innocuous absence of positive measures to remove barriers of exclusion also perpetuate systemic discrimination. Lastly, the Canadian reference to the structural and institutional dimensions of systemic gender discrimination might provide an insight into the different settings outside employment in which systemic gender discrimination might be prevalent.

XI Revisiting French case law through the lens of systemic discrimination

In addition to the adoption of a specific class action on collective discrimination, which triggered the first national debate on systemic discrimination, and despite the absence of an explicit legal definition,[51] France offers enriching examples of how courts implicitly flesh out systemic discrimination in cases of direct and indirect discrimination and harassment. The cases concern all types of discrimination, including gender, and are useful examples of how subtle systemic judicial reasoning can take place despite the absence of a formal recognition of systemic discrimination as a concept in the law.

In a case concerning the allocation of affiliation rights to separate pension funds for managers and non-managers, the French *Cour de cassation* (Supreme Court) recognized indirect discrimination based on sex when the decision to affiliate reinforced a sex-segregated company.[52] Social workers, mostly women, were considered to be non-managers, while technicians at the same level, mostly men, were presumed to be managers.[53] The Supreme Court recognized that the simple distinction between the two groups, in addition to financial harm, created a particular disadvantage because it categorized the position of social worker as one deprived of leadership. The Court subsequently admitted the reasoned justification brought by the pension fund that the difference of treatment was necessary to ensure the coherence and permanence of the binary pension scheme (managers' and non-managers' funds). However, and relying on the proportionality test, it rejected the justification for the coherence of the classification itself. The Court investigated and found that systemic discrimination was inherent in the system of categorization which relied on the perception that management skills in different professions are prominently male or female. The pension fund attempted to justify that social workers were presumed to be non-managers by means of a circular reasoning, accepting the fact that other collective bargaining agreements categorized social workers as non-managers in the past. Moreover, the Court directly questioned the standards that determined what it took to be a manager: in practice, social workers accomplished far more leadership tasks than technicians of the same pay grade, investigating delicate guardianship issues and denouncing child abuse. In so doing the Court uncovered the systemic discrimination entrenched both in the apparently neutral distinction between managers and non-managers – which in fact produced indirect discrimination and perpetuated sex segregation in pension funds – and in the individual harm that arose from the biased evaluation of the profession of social worker.

49 Duclos, N. (1993), 'Disappearing Women: racial minority women in human rights cases', *Canadian Journal of Women and the Law* Vol. 6, pp. 25-51.
50 Sheppard, C. (2010), *Inclusive Equality*, p. 22.
51 See note 2.
52 Soc. 6 June 2012 N° 10-21489.
53 Ibid.

Another French case, in which the French Defender of Rights intervened, concerned sexual harassment in certain types of low-level jobs when women, often of foreign origin, cleaning toilets on trains were constantly harassed in the process by their male colleagues with no reaction by subcontractors despite whistleblowing efforts.[54] The *Cour de cassation* in France has also recognized indirect discrimination against undocumented female care providers who were dismissed without cause because their employers knew that they would not seek redress in court.[55] The Court relied on the concept of indirect discrimination and concluded that the 'exploitation' of the apparently neutral status of illegal immigration created a particular disadvantage that only affected domestic workers of foreign nationalities. The Court alluded to systemic discrimination and to the fact that foreign women often work as illegal domestic workers. As the Court acknowledged, their situation was in no way comparable to that of French domestic workers, who are covered by labor law. The case reflects how multiple discrimination gives rise to the risk of systemic discrimination.

Other studies of systemic discrimination include French cases on promotions. An empirical analysis of the litigation allows drawing analogies between the plight of union members exposed to risks of retaliation in cases of resistance to employers, and the situation of older and female workers, all three groups being affected by glass ceilings. When employers rely heavily on constant worktime flexibility, the physical and mental availability of workers is used as a criterion in professional evaluations and built in the construction of pay scales.[56] In turn, these management practices can perpetuate the alienation of women, older workers and union representatives.

The EU and Member States' strong deference to collective bargaining can also foster institutional blindness to systemic discrimination in the negotiation and conclusion of collective bargaining agreements[57] if women are insufficiently represented in the negotiation process. For grounds other than sex, the risk of overt discrimination in the content of collective agreements is never excluded because representatives are susceptible to favor majority interests in the concessions they make during the bargaining process.[58] Additionally, the labor law reform recently adopted under the Macron government reinforces the legitimacy of differences in treatment, which are inherent in collective bargaining, by adopting a presumption of legality for these agreements.[59] Case law shows that the comparability requirement in equal pay cases has in the past trumped appropriate insights into the value of job positions: high-level professions held by women are being considered as less strategic than high-level professions held by men.[60] The majority of French cases in goods and services concern direct discrimination and have been dealt with by the Defender of Rights, the French equality body, in relation to certain sectors (insurance, health, rental cars, cell phone contracts…) and based on other grounds than sex (age, health status, disability and nationality).[61] Litigation on collective discrimination might increase in this field in France since the law on class actions has extended the prohibition on discrimination in the consumption and supply of goods and

54 Before the case was heard, the subcontractor had made a commitment to ensure occupational safety by evaluating all risks in terms of a hostile environment linked to these sexual assaults, see CP de Paris 10 November 2017, see http://www.lemonde.fr/economie/article/2017/11/10/le-conseil-des-prud-hommes-de-paris-reconnait-des-faits-de-harcelement-sexuel-a-la-gare-du-nord_5213437_3234.html; this same type of discriminatory harassment sometimes involves racial discrimination taking the form of racial insults in certain professions (cooking) and leading up to the constructive discharge of workers; the difficulty is to prove this, see Soc**.** 22 September 2015 n°14-11563.

55 Soc. 3 November 2011 n°10-20765.

56 Mercat-Bruns, M., Boussard Verrecchia, E. (2015), 'Appartenance syndicale, sexe, âge et inégalités: vers une reconnaissance de la discrimination systémique', *Rev. Droit Travail*, pp. 660-671**;** Mercat-Bruns, M. (2015), **'**L'identification de la discrimination systémique', *RDT*, pp. 672-681.

57 ECJ 16 Oct. 2007 *Palacios de la Villa v Cortefiel Servicios SA* Case C-411/05.

58 See in France, direct discrimination in disability benefits within a collective bargaining agreement: Cass. Soc. 8 October 2014 n°13-11789.

59 See the new Article L. 2262-13 of the Labor Code.

60 See the systemic evolution of the judicial standard of the *Cour de Cassation* for work of equal value: first justifying the lower pay of a female HR director seen as less strategic than a male financial officer, Cass soc. 26 June 2008 n° 06-46204, and then considering both positions as work of equal value, Cass. soc. 1 July 2009 n°07-42691.

61 See Mercat-Bruns, M. (2017), 'Le droit de la non-discrimination: une nouvelle discipline en droit privé?', *Recueil Dalloz*, pp. 224-239. A recent PhD dissertation demonstrates a narrower view of discrimination in civil contract law, Dreano, M. (2016), *La non-discrimination en droit des contrats*, dir. E. SAVAUX, Poitiers.

services. The burden of proof must shift in relation to all protected grounds of discrimination, thereby enlarging the scope of the law beyond the EU directives, which only protect the grounds of sex and race in the field of goods and services.[62]

In sum, France, the United States and Canada offer three ways to envision the breadth of systemic discrimination. It is either explicitly referred to in strategic litigation in the North American models, or implicitly tackled through a comprehensive analysis that fosters the global coherence of the direct and indirect discrimination legal frameworks.

XII Revisiting European case law through the lens of systemic discrimination

The goal of this section is to show that the logic of EU antidiscrimination law itself is actually systemic in nature. It is a framework of rules intended to eradicate the systemic barriers in the market for employment or goods and services, and it is not limited to singling out individual perpetrators to remedy the harm done to victims. The EU model is about collective discrimination in the sense that it can apply to the evaluation of differences of treatment or effects between protected groups in comparable situations linked to all types of contracts (employment contracts for all grounds and also possibly civil contracts for the grounds of sex[63] and racial discrimination).[64] The structural issue of equal work of equal value epitomizes the systemic nature of this collective standard, inscribed from the outset in the Treaty of Rome.[65] The EU concepts of direct and indirect discrimination are based on a no-fault liability framework and a collective view of discrimination. European case law and, likewise, litigation in the Member States themselves face the challenge of claims which are not purely individual because of the influence of collective bargaining, pay scales,[66] welfare systems, and collective redundancy, often without instigating a specific class action, i.e. an action instigated by a collective union representation or equality bodies. Through the lens of indirect discrimination, collective practices related to the causes and effects of group discrimination (age cohorts, gender groups) can be scrutinized.

Furthermore, since the *Defrenne* cases,[67] EU gender equality law, especially after the Amsterdam Treaty and the Gender Recast Directive, offers means to interpret the structural forms of discrimination, emphasizing the particular disadvantages for women.[68] In terms of prohibited grounds, the directives, for example, pinpoint that discrimination can result from a combination of grounds[69] or thwart access to employment opportunities for some subgroups within protected groups like foreign women or ethnic minorities.[70] The Commission, in its Strategy Engagement for Gender Equality (2016-2019), does perceive

62 See Law n° 2016-1547, 18 November 2016 on the modernization of justice in the XXIst century, Art. 86, 3°, amending the Law of 2008.

63 See EUCJ 1 March 2011, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministers,* Case C-236/09.

64 See EUCJ 16 July 2015, *'CHEZ* Razpredelenie Bulgaria' AD *v* Komisia za zashtita ot diskriminatsia, Case C-83/14.

65 Art. 119 EEC.

66 Recommendation on pay transparency rules; see the Report on pay transparency in the EU: https://www.equalitylaw.eu/downloads/4073-pay-transparency-in-the-eu-pdf-693-kb.

67 For example, CJEU 8 April 1976, *Defrenne Case* C-43/75.

68 Directive 2006/54/EC, Art. 2(1) b 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular *disadvantage* compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

69 See EU Report on intersectionality, http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2016/07/Intersectional-discrimination-in-EU-gender-equality-and-non-discrimination-law.pdf.

70 Directive 2000/43/EC (recital 14) and Directive 2000/78/EC (recital 3): 'In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.' See also: Decision No. 771/2006/EC of the European Parliament and of the Council of 17 May 2006 establishing the European Year of Equal Opportunities for All (2007): pt. 10 had already focused on mainstreaming multiple discrimination as a source of a particular difficulty: 'it is essential that actions in relation to racial or ethnic origin, religion or belief, disability, age or sexual orientation take full account of gender differences.'

antidiscrimination law as a possible way to show how multiple forms of subordination can arise from membership in several protected groups: 'particular attention will be paid to the specific needs of groups facing multiple disadvantages, e.g. single parents and older, migrant, Roma and disabled women.'[71] The Commission is also studying the specific issues pertaining to gender discrimination in relation to gender identity and LGBTI equality.[72] The symmetric quality of sex and gender discrimination, which implies that men and women can be arbitrarily mistreated, must not ignore the often greater disadvantage of women within this protected group, as highlighted by the Council of Europe.[73] Our analysis of systemic discrimination merely reflects a prior trend of European institutions to implicitly target the systemic phenomenon, which might be the way EU antidiscrimination law becomes truly inclusive.[74]

Many of the problems that produce workplace inequalities are issues that require a societal perspective because disadvantage can be seen as a continuum from access to education and housing to access to health services at the end of one's life; all these areas are interrelated. Even if it seems difficult to assign blame for systemic discrimination to any particular employer or housing administrator, this wider focus on systemic discrimination is present in EU case law, mostly at work and in the judicial interpretation of these norms in Member States. A renewed conceptual EU framework is crucial because today the tendency in some Member States is to establish a hierarchy between the grounds of discrimination in order to respect the EU architecture of principles of antidiscrimination.[75] The prism of systemic discrimination is a useful reminder that discrimination, in general and regardless of the ground, can be an affront to human dignity even at a collective level.[76]

Some EU case law provides useful examples of a structural view of gender equality. In some ways standards developed in the CJEU case law on gender equality, without formally referring to systemic discrimination, have adhered to its logic and provided tools of interpretation to flesh out group disadvantage. European case law might be better equipped in the future to formulate wider solutions to systemic discrimination through an EU class action similar to the one just proposed by the Commission for consumers.[77] In addition to EU case law, the Court has also validated certain tools that could target systemic discrimination,[78] like flexible positive action[79] or EU policy-making on gender mainstreaming.[80]

Based on an incremental approach, the Court has gradually developed a systemic discrimination analysis.[81]

71 https://ec.europa.eu/anti-trafficking/eu-policy/strategic-engagement-gender-equality-2016-2019_en, p. 9.
72 https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/lesbian-gay-bi-trans-and-intersex-equality/list-actions-advance-lgbti-equality_en.
73 The Council of Europe echoes this trend: Resolution 1887 (2012) of the Council of Europe Assembly on 'Multiple discrimination against Muslim women in Europe: for equal opportunities.
74 'The equality scheme may alter the colour or gender composition of those in power but deep structural inequalities remain – for example, the inequality between middle class white men and black women may diminish, but the gap between poor black women and rich black women may increase', Hepple, B. (2013), 'Transformative equality: the role of democratic participation', in *Facing development: the North-South Challenge to Transnational Labour Law,* LLRN Barcelona, https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_SirBobHepple.pdf/d2fc160a-5b89-456a-9505-bffa977796de; see also Fredman, S. (2011), *Discrimination Law* , 2nd edn Clarendon, p. 232.
75 See the recent French Supreme Court decision on age discrimination which limits damages for discrimination, justifying the its decision with a sweeping affirmation: the principle of age discrimination is not a fundamental freedom', see Cass. Soc. 15 nov. 2017 n° 16-14281 and Mercat-Bruns, M. (2018), 'Le principe de non-discrimination n'est pas une liberté fondamentale', Vol. 2 *Revue Droit du Travail*, p. 31.
76 See the debate in Canada on the need to conceptualize equality through an infringement of dignity: Reaume, D. (2002-03), 'Dignity and Discrimination', *Louisiana L. Rev*. Vol. 63, pp. 645-646; Greschner, D. (2001), 'Does law advance the cause of equality', *Queen's Law Journal* Vol. 27 p. 299, pp. 312-313.
77 http://europa.eu/rapid/press-release_MEMO-18-2821_en.htm.
78 See Section 4 on tools to target systemic discrimination.
79 ECJ *Marshall* Nov. 11 1997, Case C-409/95; ECJ March 28 2000, *Badeck* C-158/97; ECJ 6 July 2000, *Abrahamsson* Case C-407/98.
80 See https://ec.europa.eu/europeaid/sectors/human-rights-and-democratic-governance/gender-equality/gender-mainstreaming_en.
81 CJEU April 8 1976, *Defrenne,* Case C-43/75, Judgment pt. 1.

The systemic frame of mind of judges was clearly formulated at an early stage: 'it is impossible not to recognize that the complete implementation of the aim pursued by Article 119, by means of the elimination of all discrimination, direct and indirect, between men and women workers, not only as regards individual undertakings *but also entire branches of industry* and *even the economic system as a whole*, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and national level.'[82] This method of analyzing the gender pay gap gradually became more elaborate, evolving from measuring the basic difference of pay in relation to a specific job, to understanding how jobs can be different but of comparable worth, to acknowledging a sex segregated workforce by allowing a comparison between different jobs held by women and men with similar qualifications and the same functions. In the *Rummler* case,[83] the Court was asked whether a job classification system based on muscular effort was contrary to Directive 75/117/EEC of 10 February 1975. The Court did not discard the use of characteristics such as muscular effort or the heaviness of the work which seemed more characteristic of men, but it recognized that 'the principle of equal pay requires essentially that the nature of the work to be carried out be considered objectively. Consequently, the same work or work to which equal value is attributed must be remunerated in the same manner whether it is carried out by a man or a woman. Where a *job classification system* is used in determining remuneration, that *system* must be based on criteria which do not differ according to whether the work is carried out by a man or a woman and must not be organized, as a whole, in such a manner that *it has the practical effect* of discriminating *generally* against workers of one sex.'[84] A system which relied on the average performance of one sex to determine the values in the system itself could not be justified.

The structural disparities in wages linked to the nature of the work (part time/full time) were also uncovered by the ECJ in the *Jenkins* case[85] and attest to the disproportionate number of women working part time. This case on indirect discrimination concerned the pay applicable to part-time work contracts, which was set 10% lower than the rate applicable to full-time contracts regardless of the quality and the nature of the job, in order to 'objectively' combat absenteeism and to encourage productivity and the full use of machinery. It was a subtler form of discrimination because there was no apparent intention to harm. However, this difference in treatment linked to working time reflected, as early as 1981, a systemic general practice of the clothing manufacturer and exposed a structural cause and effect of sex discrimination.

In the *Brachner* case,[86] the systemic judicial screening of discriminatory forms of employment extended to the discriminatory management of welfare system schemes. The question was whether a pension reform which separately increased all pensions, except the lowest ones, disproportionately affected women who benefited from lower retirement benefits, thereby constituting indirect sex discrimination. 'Article 4(1) of Directive 79/7/EEC of 1978 must be interpreted as meaning that if (…) a significantly higher percentage of female pensioners than male pensioners may in fact have suffered a disadvantage because of the exclusion of minimum pensions from the exceptional increase provided for by the adjustment scheme at issue (…) that disadvantage cannot be justified by the fact that women who have worked become entitled to a pension at an earlier age or that they receive their pension over a longer period, or because the compensatory supplement standard amount was also subject to an exceptional increase in (…) 2008..'[87] This decision has a very symbolic dimension revealing how systemic sex discrimination in wages spills over to perpetuate systemic sex discrimination in pensions if Member States disregard these persistent sex disparities in pension benefits.

82 Ibid, pt. 19.
83 ECJ 1 July 1986, *Gisela Rummler v Dato-Druck GmbH*, Case C-237/85.
84 Ibid.
85 ECJ 31 March 1981, *Paula Jenkins*, Case C-96/80.
86 EUCJ Oct. 20 2011, *Brachner,* Case C-123/10.
87 Ibid, Judgment, pt. 3.

Three final CJEU examples of cases reflect how the way society views parenting, child bearing and religious clothing can generate systemic gender discrimination. In the *Coleman* case[88] a mother taking care of her child with a disability did not obtain the same worktime adjustments as workers who were parents of children with no disabilities. The Court relied on a new relational concept of discrimination by association and explained that '(...) where an employer treats an employee who is not himself disabled less favorably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favorable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a) of Directive 2000/78.'[89] The ban on direct discrimination in effect grasped the structural and recurring challenges of combining work and parenting in the case of a child with a disability. The Court's referral to "discrimination by association" recognizes what causes the vulnerability of working mothers taking care of children living with disabilities. They are not the direct victims of discrimination based on disability, but the victims of a workplace organizational system that ignores the constraints of primary 'care' providers, especially in relation to disability, and facilitates demeaning treatment through harassment of single mothers. This case also clearly shows the combination of workplace conditions and direct sex stereotypes targeting single mothers. 'On Ms. Coleman's return from maternity leave, her former employer refused to allow her to return to her existing job, in circumstances where the parents of non-disabled children would have been allowed to take up their former posts. Her former employer also refused to allow her the same flexibility as regards her working hours and the same working conditions as those of her colleagues who are parents of non-disabled children. Ms Coleman was described as 'lazy' when she requested time off to care for her child, whereas parents of non-disabled children were allowed time off...'.[90]

Furthermore, as the Court of Justice revealed, systemic sex discrimination may stem from the limited consideration of a particular difference of treatment linked to a return from maternity leave.[91] 'Article 15 of Directive 2006/54/EC which requires equivalent jobs and conditions of employment after maternity precludes national legislation which (...) excludes a woman on maternity leave from a vocational training course (...) which is compulsory in order to be able to be appointed definitively to a post as a civil servant and in order to benefit from an improvement in her employment conditions, while guaranteeing her the right to participate in the next training course organized, the date of which is nevertheless uncertain.'[92] This decision, based on the proportionality test,[93] is fundamental to understand how the introduction of workplace policies, that seem neutral on their face but offer rights based on the particular availability or presence of workers and procedures, produce systemic sex discrimination. The deferral of training because of maternity leave postpones advancement and limits pay. The wage disparity incurred by these civil servants is never subsequently compensated during their career and structurally applies to all women taking maternity leave.

Finally, in terms of multiple discrimination combining sex and religion which can foster systemic discrimination, the Court of Justice has recognized that women wearing veils as part of their religious practice can be at a disadvantage when working for an undertaking that has an internal regulation

88 EUCJ July 17 2008, *Coleman,* Case C-303/06.

89 Ibid, pt. 56.

90 EUCJ *Coleman* C-303/06, pt. 26: '(…) the formal grievance which she lodged against her ill treatment was not dealt with properly and she felt constrained to withdraw it; abusive and insulting comments were made about both her and her child.' (…) Having occasionally arrived late at the office because of problems related to her son's condition, she was told that she would be dismissed if she came to work late again. No such threat was made in the case of other employees with non-disabled children who were late for similar reasons.'

91 EUCJ March 6 2014, *Napoli,* Case C595/12.

92 Ibid, Judgment, pt. 1.

93 EUCJ *Napoli*, pt 36: 'It must be stated that a measure such as that at issue in the main proceedings, which provides for automatic exclusion from a training course and renders it impossible to sit the examination organised at the end of that course, without account being taken, in particular, either of the stage of the course at which the absence for maternity leave takes place or of the training already received, and which merely grants the woman who has taken such leave the right to participate in a training course organised at a later, but uncertain, date, does not appear to comply with the principle of proportionality.'

which prohibits the visible wearing of any political, philosophical or religious sign. This policy does not constitute direct discrimination and is not necessarily indirect discrimination.[94] The Court still implicitly warned national courts to avoid systemic discrimination based on religion. Reasonably accommodating these women in jobs without visual contact with customers might be required by the national courts. It is a way to avoid that internal rules on workplace neutrality increase the systemic exclusion of religious women from employment in certain sectors.

In sum, EU case law reveals the existence of implicit judicial approaches that aim to uncover systemic discrimination. These approaches contribute to the coherence of the EU antidiscrimination law model, despite the absence of an EU tool for class action on discrimination issues. The future lies in the development of more proactive tools to target and thwart systemic gender discrimination practices that have been uncovered by the Court in its case law.

XIII Future tools to target systemic discrimination and to serve strategic compliance or litigation

One of the main differences between attempting to limit systemic discrimination and specifically combating direct or indirect discrimination pertains to the solutions to systemic discrimination. They are by definition systemic in nature because they often require collective solutions benefiting groups and they transcend the remedy allocated to individuals affected by the initial harm of discrimination.

This section will discuss ways to target systemic discrimination through specific measures. Firstly, instruments that are often used are geared towards halting systemic discrimination in the future through injunctive relief following a class action. A second type of measure against systemic discrimination springs precisely from a critique of soft law compliance measures and requires more substantive obligations assigned to companies and institutions to quash further structural exclusion of disadvantaged groups. The plaintiff-friendly evidentiary standard in antidiscrimination law[95] and the use of statistics, albeit optional,[96] have traditionally been considered as the means to uncover collective discrimination.

With the adoption of class actions focused on prohibiting discrimination, judges in France, for example, will now be able to resort to injunctive relief to require a company or a public institution to cease structural discrimination in the future. This will constitute the first concrete device to redress systemic discrimination. The new French law on class actions in discrimination cases provides, in addition to monetary compensation for emotional distress and material compensation for victims of discrimination, 'the possibility to require respondents to stop discriminating in the future with the threat of financial penalties if changes are not made.'[97] This will require a guilty party to create concrete tools or tests to monitor future risks of discrimination, for example blind auto-testing mechanisms to combat biases in recruitment and effective whistleblowing mechanisms to alert authorities on violations of pay transparency rules. Guilty parties will also have to implement measures to develop positive action to avoid glass-ceiling effects, to advance gender mainstreaming subject to verification from independent

94 EUCJ March 14 2017, Cases C-157/15, *Achbita v G4S Secure Solutions*, and C-188/15 *Bougnaoui v Micropole*: 'An internal rule of an undertaking which prohibits the visible wearing of any political, philosophical or religious sign does not constitute direct discrimination… By contrast, such a prohibition may constitute indirect discrimination if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage. However indirect discrimination may be objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, provided that the means of achieving that aim are appropriate and necessary.'

95 Directives 2000/78, Art. 10, and 2000/43, Art. 8; see the presumption made in the case of recruitment, EUCJ 19 April 2012, Case C415/10, *Meister,* or concerning grounds linked to privacy which appear to be discriminatory, EUCJ 25 April 2013, Case C-81/12, *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării*.

96 ECJ 26 June 2001, *Brunnhofer,* Case C-381/99, § 52 and § 53.

97 Law on the modernization of justice, Article 65; the first class action has recently been instigated to combat union discrimination at Safran: https://www.lesechos.fr/economie-france/social/0301292799787-discrimination-syndicale-la-premiere-action-de-groupe-en-passe-darriver-en-justice-2154771.php.

authorities and to monitor annual results. Measures to put in place could include leadership training or mentorship programs for women and workers from minority groups; open web platforms to pool information on opportunities for promotion at work or access to goods and services (housing, education and health) and an increase in continuing education for older workers.

In other words, in addition to monetary sanctions for past systemic discrimination and efforts to target future systemic discrimination through injunctive relief, procedural solutions are often presented as structural ones to foster exchange between the judiciary, workplaces, and non-governmental actors.[98] 'The role of courts is to police employer processes that may facilitate (or inhibit) discrimination, rather than to police particular acts of discrimination themselves.'[99] The idea is to encourage employers to develop problem-solving processes, to gather information about their patterns and practices of selection and to formulate 'rolling standards'.[100] These standards would 'establish a floor of acceptable conduct' that would 'rise as the capacity to address problems increases.' An employer would be 'in compliance' when this conduct is 'continually improving'.[101]

Employers' reaction to systemic discrimination can be to delegate this task to diversity managers who ensure that workplace equality goals are respected. The risk is only that managerial interests mitigate the achievement of these goals.[102] 'Organizational forums tend to recast grievances in ways that downplay legal issues and that focus instead on more typically managerial concerns, such as communication, problem solving, teamwork… Rights violations (e.g., safety hazards, discrimination, environmental degradation) are likely to be handled as interpersonal difficulties, administrative problems, or psychological pathologies.'[103] 'Management consultants press employers to adopt internal dispute resolution procedures, zero tolerance policies, diversity training programs.'[104] The development of these policies also serves intermediaries.[105]

In addition to these managerial efforts to minimize the risk of liability without always confronting the real causes of systemic discrimination, the courts still lack the ability to evaluate structures[106] without referring to these companies' own policies. No substantive workplace equity principles put these procedures into perspective.[107] In order to target workplace harassment, for example, it is useful to know what makes harassment wrongful and what the 'kinds of abusive workplace conduct' are. '(….) What is the "reasonable" balance between the costs of additional internal workplace processes and the harm of continuing discrimination?'[108] The implementation of procedural policies for compliance might even conceal decision-makers' resistance in implementing, for example, flexible quotas to allow a critical mass of women to have access to all types of jobs, services and housing.[109]

XIV Conclusion

This analysis of systemic discrimination in Europe, through exploring examples of countries which have formally recognized the concept in their law, was focused on ways to reframe equality issues and to

98 Sturm, S. (2001), 'Second Generation Employment Discrimination: A Structural Approach', Vol. 101 *Colum. L. Rev*., pp. 458, 460.
99 Ibid.
100 Ibid.
101 Ibid.
102 Albiston, C. (2005), 'Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights', *Law & Soc'v Rev.* Vol. 39, pp. 11, 20.
103 Edelman, L., Suchman, M. (1999), 'When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law', *Law & Soc'v Rev.* Vol. 33 pp. 941, 967.
104 Bagenstos, S. (2006), 'The structural turn and the limits of antidiscrimination law', *California Law Rev*. Vol. 94, pp. 1-49, p. 29.
105 Krawiec, K. (2003), 'Cosmetic Compliance and the Failure of Negotiated Governance', *Wash. U. Law Q.* Vol. 81, p. 487.
106 Bagenstos, S. (2006), 'The structural turn and the limits of antidiscrimination law', *California Law Rev*. Vol. 94, pp. 1-49, p. 33.
107 Ibid, p. 34.
108 Ibid, p. 35.
109 ECJ *Marshall 11* November 1997, Case C-409/95; ECJ 28 March 2000, *Badeck* C-158/97; ECJ 6 July 2000, *Abrahamsson,* Case C-407/98.

gain a comprehensive panorama of the combined effect of direct and indirect discrimination. This article aimed to expand the opportunities to reflect on the tools to further promote substantive equality through systemic solutions to structural inequalities across the board (employment, housing, goods and services). It seems relevant to conclude more specifically on systemic gender discrimination, which ignores the need to see 'the difference 'difference' makes.'[110] Companies' and institutions' accountability concerning this issue often starts at the top with an awareness of gender disparities in leadership opportunities. For instance, if gender differences within a firm are still linked to presumptions that women lack decision-making power because of a lack of commitment, a lack of assurance, or no competitive streak, objectivity and rationality, then the company as a whole lacks a culture of equality, which permeates the whole organization. Prior gender discrimination case law based on class actions abroad reveals that organizational systems that favor subjective, discretionary decision making by, mostly, male managers tend to increase the risk of structural discrimination.[111] However, confronting systemic discrimination is not only about developing a culture of complaint and response which again rests on an individual view of the causes of discrimination.[112] The empowerment of women in employment and access to services generally requires a 'process of awareness and capacity-building, which increases their participation and decision making power as citizens'.[113] This may potentially lead to more opportunities in different structures in an inclusive direction.[114] Thus measures against systemic discrimination also imply access to representation and networks in the political arena to mentor women and foster their autonomy and agency in all spheres of activity, beyond the enforcement of antidiscrimination law.[115]

110 Rhode, D. (2003), *The difference 'difference' makes: women and leadership*, Stanford University Press, p. 6.
111 Green, T. (2017), *Discrimination laundering: the rise of organizational innocence and the crisis of equal opportunity law*, Cambridge University Press, p. 73.
112 Ibid, p. 84.
113 Anderson, J., Siim B. (2004), *Introduction: the politics of inclusion and empowerment: gender, class and citizenship*, NY Palgrave, p. 2.
114 Ibid.
115 Nedelsky, J. (*1989*) 'Reconceiving *Autonomy*: Sources, Thoughts and Possibilities', *Yale Journal* of *Law* & *Feminism*, Vol. 1, p. 7.

Fostering equality and diversity through transnational collective agreements

Katja Nebe and Sonja Mangold*

I Introduction: the growing importance of transnational norm-setting by social partners

The dynamics of globalization and Europeanization have largely influenced the capacity of nation-states and national collective actors to regulate labour relations.[1] At the same time, representatives of employers and employees increasingly take over functions of norm-setting at a cross-border level. In this article we discuss the contribution of transnational social partners to regulation that fosters equal treatment at work.[2]

In Europe, different forms of transnational collective agreements between employers and employees are currently gaining in importance. These inter alia include the outcomes of the European Social Dialogue, which is the work and negotiation structure between management and labour at European cross-sectoral and sectoral level and which was institutionalized for the first time by the Treaty of Maastricht in 1992.[3] Transnational Company Agreements, which can be defined as agreements on work-related issues concluded between multinational companies and employee representatives, are another example of a regulation that has been spreading rapidly in recent years.[4]

A number of EU equal treatment directives[5] explicitly encourage social partners to also negotiate at the cross-border level to improve equality at work. As the literature points out, self-regulatory practices of social partners can help to find problem-specific solutions to combat discrimination and to effectively implement the existing EU equality legal framework.[6] So far, however, a specific legal framework for transnational collective bargaining at company level does not exist.

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1 See further e.g. Blanpain R., Bisom-Rapp S., Jefferson T., Corbett W.R, Josephs H.K., Zimmer M.J., The Global Workplace, Cambridge (2007).

2 'Transnational social partners' and 'social dialogue' refer to different constellations of social partners and negotiation fora for employers' and employees' representatives on work-related issues with a cross-border dimension.

3 See Welz C., The European Social Dialogue Under Articles 138 and 139 of the EC Treaty-Actors, Processes, Outcomes, Alphen a. d. Rijn (2008).

4 See further European Commission (2012), Commission Staff Working Document, Transnational company agreements: realising the potential of social dialogue, SWD (2012) 264 final.

5 Article 11 of Directive 2000/43/EC and Article 13 of Directive 2000/78/EC provide that social partners, without any prejudice to their autonomy, may conclude at the appropriate (transnational included) level, agreements laying down anti-discrimination rules; A similar rule in Article 21 of Directive 2006/54/EC encourages the social partners to conclude, at the appropriate level, agreements relating to gender equality.

6 See Falke J., Der soziale Dialog. Neue Säule des Schutzes vor Diskriminierung?, *Zeitschrift für europäisches Sozial- und Arbeitsrecht* (ZESAR) 2004, pp. 244-256; European Commission (1995), Flexibility in working time and security for workers: First phase of consultation with the Social Partners, SEC (95)1540/3.

In a recent research project at Bremen University, funded by the German Research Foundation,[7] the authors of this article systematically analysed transnational collective agreements in the field of equality and non-discrimination.[8] The authors collected documents related to social dialogue and negotiations between social partners in the databases of the European Commission and the European Trade Union Institute. In addition to providing an overview of what we found in these databases, which is of particular interest for experts in European labour law and EU non-discrimination law, the authors also comprehensively evaluated them to assess how they have contributed to improving equality at work for the last thirty years.[9] In line with the ILO definition of 'collective agreement',[10] our primary research interest lies in legally binding written documents.[11] By analysing the contents of the documents emanating from different actor constellations and legally differently structured forms of regulation, the aim was to identify in a comparative perspective the strengths and weaknesses of emerging transnational norm-setting processes in relation to improving equality in the workplace. Through expert interviews with scientists and practitioners we were able to gain some additional knowledge about factors that foster and hinder appropriate and effective rule-making in this regard.

In the following sections, we give an overview of the outcomes generated by four main types[12] of transnational collective self-regulation. In the first section we take a closer look at European cross-sectoral and sectoral Social Dialogues according to Articles 154/155 TFEU (old Articles 138/139 EC). Cross-sectoral and sectoral agreements concluded by the European umbrella organizations of workers ´ and employers ´ associations have gained considerable importance since the 1990s. Collective agreements under 155 TFEU may be implemented autonomously by the social partners in the Member States (Article 155(2) TFEU, old Article 139(2) EC) or, alternatively, in matters covered by Article 153 TFEU, via a Council Decision in Directives after the social partners make a corresponding joint request to the Commission.[13]

Secondly, we examine the outcome of European Works Council (EWC) founding agreements. As a result of a European directive from 1994,[14] numerous representation structures called EWCs have been established for the purpose of transnational information and consultation of employees. Founding agreements establishing EWCs are concluded between multinational corporations and special negotiating bodies of employee representatives pursuant to the provisions of Directive 2009/38/EC[15] (old Directive 94/ 45 EC).

7 An interdisciplinary research team composed of Katja Nebe and Ulrich Mückenberger (as project directors), Aimee Waldon, Philipp Gies, Sonja Mangold and Tanja Kavur (as research associates) examined between 2012-2015 transnational regulatory activities of social partners in four areas that belong to the core tasks of the social state: health and safety at work, information and consultation of employees, non-discrimination in professional life and work-life balance.

8 The study in the field of equality and non-discrimination was carried out by Sonja Mangold in cooperation with Prof. Katja Nebe. For further information on the project see Mückenberger U., Nebe K., Formwandel von Staatlichkeit durch transnationalen Sozialen Dialog – Ein Forschungsvorhaben, *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* (ZIAS) 2013, pp. 82-104.

9 The databases contain agreements and other transnational texts at sectoral, cross-sectoral and company level concluded by the social partners in the last decades; for more detailed information see: European Commission, Social dialogue texts database, available at: http://ec.europa.eu/social/main.jsp?catId=521&langId=en; European Commission/ILO, Database on transnational company agreements, available at: http://ec.europa.eu/social/main.jsp?catId=978&langId=en; European Trade Union Institute, European Works Councils database, available at http://www.ewcdb.eu/ (accessed 21 September 2018).

10 See ILO Recommendation No. 91 that defines collective agreements as: all agreements in writing regarding working conditions and terms of employment that should bind the signatories on whose behalf the agreements are concluded. For more information, see https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R091 (accessed 7 September 2018).

11 Elements that resulted in our classification of a text as a binding agreement were inter alia specific rules on rights and obligations, choice of law clauses or clauses stipulating jurisdiction.

12 A certain number of SE Works Council agreements also refer to non-discrimination issues, see Wirtz T., *Der SE-Betriebsrat*, Baden-Baden (2013).

13 See further on the implementation mechanisms Welz C., *The European Social Dialogue Under Articles 138 and 139 of the EC Treaty-Actors, Processes, Outcomes*, Alphen a. d. Rijn (2008), pp. 288-324.

14 Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 254/64, 30. 9. 1994.

15 Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), OJ L 122/28, 16.5. 2009.

Thirdly, we discuss the contribution of EWC substantive agreements to equality and non-discrimination. It has been observed that existing EWC bodies do not limit themselves to information and consultation activities foreseen in the EWC Directive but reach agreements with management on substantive issues such as working conditions. The legal framework for these EWC substantive agreements is uncertain however.[16]

Fourthly, we present the impact of Transnational Company Agreements (TCAs) on equality and non-discrimination. TCAs, whose scope covers more than one country, are concluded by representatives of a company or a group of companies on the one hand and national and/or transnational trade union organizations on the other hand.[17] So far, however, there is no specific EU legal basis for such regulation.

As we show in detail, transnational social partners came to some remarkable achievements,[18] but our study also reveals that there are still regulatory gaps which should be filled in the future. The article concludes with some suggestions to EU policy makers on how the capacity of transnational social partner agreements in the area of equality and non-discrimination could be improved.

II Outcomes of cross-sectoral social dialogue

Gender equality and reconciliation of work and family life

The topic of the reconciliation of family life and work has been playing an important role in European Law for a long time.[19] The protection against discrimination on grounds of sex and the duty to ensure equality between men and women were enshrined in EU primary and secondary law at an early stage. The issue of work-family balance made its way into secondary law via agreements reached by the European cross-sectoral social partners (today Art. 155 TFEU).[20]

Social Partner agreements were major steps towards an EU legal framework aimed at reconciling work and family life. Worth mentioning here as products of the EU Social Dialogue are the 1996 Parental Leave Directive[21] that for the first time emphasized the connection between gender equality and work-family reconciliation, the autonomous agreement on telework (2002),[22] the Part-Time Directive (1997) and – a more recent result of social dialogue – the Framework Agreement on inclusive labour markets (2010).[23] This last one pursues a holistic approach to create an inclusive labour market for all persons and groups

16 See further e.g. Ales E., Engblom S., Jaspers T., Laulom S., Sciarra S., Sobczak A., Dal-Ré F.V., Transnational Collective Bargaining: Past, Present and Future, Brussels (2006).

17 For this study we defined a TCA as an agreement which is concluded between multinational companies and transnational and/or national trade union organizations. Additionally, EWCs can be involved on the employee side. For further information on TCAs see also European Commission (2012), Commission Staff Working Document, Transnational Company agreements: realising the potential of social dialogue, SWD (2012) 264 final.

18 A detailed analysis of the contents of transnational social dialogue agreements in the area of equality and non-discrimination can be found in the PhD thesis of Mangold S., *Transnationale Soziale Dialoge und Antidiskriminierung im Erwerbsleben*, Baden-Baden (2018).

19 See Kohte W., Bedeutung des Gemeinschaftsrechts für die Vereinbarkeit von Familie und Beruf, in: Düwell F.-J., Göhle-Sander K., Kohte W. (eds.), *Juris Praxiskommentar Vereinbarkeit von Familie und Beruf*, Saarbrücken (2009).

20 The main actors involved in negotiation processes at cross-industry level are BUSINESSEUROPE (former UNICE), CEEP (the public-sector employers´ association), ETUC (European Trade Union Confederation) and UEAPME (the European Association of Craft, Small and Medium-sized Enterprises).

21 Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave, OJ L 145/4, 19.6.1996. In 2009 the European social partners signed an outcome revising their 1995 Framework Agreement on Parental Leave, which was transformed into Directive 2010/18/EU (OJ L 68/13, 18.3.2010); recently, the Commission published a proposal for a Directive on work-life balance for parents and carers (COM/2017/0253 final–2017/085 (COD)). The proposal – if adopted – is to repeal Parental Leave Directive 2010/18/EU.

22 See cross-industry social partners (ETUC/UNICE/UEAPME/CEEP), Framework agreement on telework (2002), available at: https://ueapme.com/docs/joint_position/Telework%20agreement.pdf (accessed 21 September 2018).

23 See cross-industry social partners (ETUC/BUSINESSEUROPE/CEEP/UEAPME), Framework agreement on inclusive labour markets, available at: http://ec.europa.eu/employment_social/2010againstpoverty/export/sites/default/downloads/Events/event_123_Framework_agreement_ILM_25.03.10.pdf (21 September 2018).

that are exposed to the risk of social exclusion. These include, among others, persons with disabilities and single mothers. According to the negotiated text, appropriate work-life balance policies are a key instrument for professional inclusion. The agreement addresses all relevant public and private actors (state authorities, NGOs, social partners) to develop an inclusive labour market.[24] On closer inspection, the Framework Agreement on inclusive labour markets might therefore prove crucial in relation to the issue of diversity. This may have great impact in the Member States,[25] but that remains to be seen. In EU primary law, reconciliation between family and professional life is now also expressly mentioned in Article 33 of the EU Charter of Fundamental Rights. The development of this set of norms, in which European social partners were involved, proves the central role they play in this field. Social partners are in fact key players in this respect, not only in their own perception but also in the unanimous opinion of those who carry political responsibility in Europe.[26]

The agreements on parental leave of 1995[27] and 2009[28] protect workers against dismissal when they take parental leave. Furthermore, despite not being explicitly foreseen by EU primary law, the agreements guarantee the employees' right to return to the same job at the end of the parental leave.[29] Employees also maintain the rights acquired on the parental leave start date.[30] Hence, significant progress has been achieved through cross-sectoral social dialogue with regard to a non-discriminatory return to professional life. Finally, it can be said that the normative force of social partner agreements has been confirmed by the case law of the Court of Justice of the EU that emphasized the fundamental importance of rights of workers with family responsibilities and part-time employees to equal treatment and equal opportunities.[31]

In summary, European cross-sectoral social dialogue has made an important contribution to gender equality and the reconciliation of work and family life.

Tackling precarious employment

The increasing flexibilization of the labour market has created a demand for protection standards in European labour law to save permanent employment, to regulate atypical forms of employment and to protect workers from discrimination.[32] After the proposals for a new directive[33] failed due to the unanimity requirement in the Council voting procedure, the Commission wanted to regulate atypical employment contracts despite the resistance of United Kingdom via the European social dialogue.

24 For further information on the agreement see e.g. Mangold S., *Transnationale Soziale Dialoge und Antidiskriminierung im Erwerbsleben*, Baden-Baden (2018).

25 For further information on the implementation process see cross-industry social partners (ETUC/BUSINESSEUROPE/CEEP/UEAPME), final implementation report (2014), available at: http://erc-online.eu/wp-content/uploads/2014/10/Final_implementation_report_Inclusive-Labour-Markets-Agreement.pdf (accessed 21 September 2018).

26 See e.g. European Parliament (2004), Resolution on reconciling professional, family and private lives (2003/2129(INI)), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML%20TA%20P5-TA-2004-0152%200%20DOC%20PDF%20V0//EN&language=EN (21 September 2018).

27 See cross-industry social partners (UNICE/CEEP/ETUC), framework agreement on parental leave (1995), available at: https://www.etuc.org/en/framework-agreement-parental-leave-1996 (accessed 21 September 2018).

28 See cross-industry social partners (ETUC/BUSINESSEUROPE/CEEP/UEAPME), Framework agreement on parental leave (revised) (2009), available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=526 (accessed 21 September 2018).

29 For a detailed legal analysis of the concept of the right to return to the same job in the framework agreements, see Kiesow D., *Die Rückkehr an den früheren Arbeitsplatz und Arbeitsarrangements*, Baden-Baden (2018), pp. 120-263.

30 See Clause 5 of the revised framework agreement on parental leave. See for recent case law e.g. Court of Justice of the European Union (CJEU), judgment of 7 September 2017, Case C-174/16, NZA 2017, 1381.

31 See e.g. Court of Justice of the European Union (CJEU), judgment of 22 October 2009, Case C-116/08 (Meerts), ECRI 10063 para 38-42; judgment of 22 April 2010, Case C-486/08 (Tirol), NZA 2010, 557.

32 See Kröger K., *Die Befristung von Arbeitsverträgen in Frankreich, Großbritannien und Deutschland*, Hamburg (2008), p. 89.

33 See Proposal for a Council Directive on Certain Employment Relationships with Regard to Working Conditions COM (90)228 final, OJ C 224/4.

During this process, the European social partners concluded the Framework Agreement on fixed-term work in 1999.[34] It became binding for the EU Member States by Council decision through the adoption of Directive 99/70/EC.[35, 36]

The negotiated content was seen as less of a success on the employees´ side.[37] Without the possibility to take industrial action at EU level to assert the interests of employees, many union demands remained unfulfilled. Nevertheless, the result of the social dialogue can now be regarded as satisfactory from the employees´ perspective. The agreement – in interaction with the subsequent case law of the Court of Justice of the EU – offers appropriate protection standards for fixed-term workers.

The Framework Agreement provides, at its core, a principle of non-discrimination with regard to fixed-term employment (Clause 4). Different treatment of fixed-term and permanent employees must be justified on objective grounds. The European Court of Justice has interpreted the notion of 'objective grounds' narrowly, in accordance with the objective, expressed in EU primary law, to improve in a progressive manner the working conditions of atypical workers.[38] The Court decided that a discriminatory practice cannot be justified by the fact that it is contained in a general and abstract norm such as a law or a collective agreement; on the contrary, the concept of 'objective grounds' requires the unequal treatment at issue to respond to a genuine need, be appropriate for achieving the objective pursued. and be necessary for that purpose.[39]

Further important instruments promoting equal opportunities stipulated in the Framework Agreement are the duties of employers to inform temporary employees about vacant jobs in order to assist them in gaining permanent employment, and the obligation for employers to facilitate the training of fixed-term workers (Clause 6). These rules could effectively turn fixed-term employment into a well-functioning transitional market leading to permanent work instead of precarious career paths.[40]

34 See cross-industry social partners (ETUC/UNICE/CEEP), Framework agreement on fixed-term work (1999), available at: http://ec.europa.eu/social/main.jsp?catId=521&langId=en&agreementId=1125 (accessed 21 September 2018).

35 Council Directive 99/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work concluded by UNICE, CEEP and the ETUC [1999], OJ L 175/43.

36 See further Kröger K., *Die Befristung von Arbeitsverträgen in Frankreich, Großbritannien und Deutschland*, Hamburg (2008), p. 89.

37 Kaufmann I., Die europäische Sozialpartnervereinbarung über befristete Arbeitsverträge, *Arbeit und Recht* (AuR) 1999, pp. 332-334.

38 The Community Charter of the Fundamental Social Rights of Workers (1989) which is incorporated in EU primary law states in Article 7 that the completion of the internal market must lead to an improvement in the living and working conditions of workers (…). This process must result from an approximation of these conditions while the improvement is being maintained, in particular as regards forms of employment such as (…) fixed-term contracts.

39 See e.g. CJEU, judgment of 22 April 2010, Case C-486/08 (Tirol); CJEU, judgment of 15 April 2008, Case C-268/06 (Impact), NZA 2008, 581. See also, more recently, CJEU, judgment of 5 June 2018, Case C-574/16 (Grupo Norte Facility), NZA 2018, 771; CJEU, judgment of 14 September 2016, Case C-596/14 (De Diego Porras), NZA 2016, 1193; see also the comment on the judgment in the case of Diego Porras of Kocher E., Anmerkung zum EuGH-Urt. vom 14.9.2016 - C-596/14 (de Diego Porras), ZESAR 2017, pp. 281-286.

40 On the further contents of the framework agreement see Nebe K., Das befristete Arbeitsverhältnis im deutschen und europäischen Arbeitsrecht – Vom sozialen zum richterlichen Dialog, in: Schmidt I. (ed.), *Jahrbuch des Arbeitsrechts*, Berlin (2011), pp. 89-117.

III Sectoral social dialogue

European sectoral social dialogue also addresses the issue of equality and non-discrimination.

Positive steps

In 1998 the Commission adopted a Decision on the establishment of new sectoral committees as the main forum for sectoral social dialogue.[41] This institutionalisation has led to the creation of numerous new sectoral social dialogue structures. The rules of procedure adopted by these committees include references to anti-discrimination issues. In several texts, the social partners commit themselves to improving the representation of women on the committees and steering groups. An example of this is provided by the rules of procedure of the European sectoral social dialogue committee in the contract-catering sector in 2007.[42] In certain cases, the social partners agree to set up special working groups in areas such as equal opportunities or anti-racism, as the 1997 agreement on the prevention of racial discrimination in the commerce sector shows.[43]

Moreover, some substantive agreements were concluded at sectoral level, which aim to improve professional equality. One example is the 2012 autonomous agreement regarding the minimum requirements for standard player contracts in the professional football sector.[44] This outcome states that the Clubs and the Player shall contractually commit to acting against racism and other discriminatory acts in football.

Untapped potential

It must be noted, however, that no binding substantive agreement focused on equality matters has yet been reached at sectoral level. The results of sectoral Social Dialogue therefore lag behind those reached at the cross-sectoral level. One reason may be that the cross-sectoral Social Dialogue integrates broader interests and perspectives from the employers' and employees' sides compared to the sectoral level.[45] Cross-sectoral collective actors might be more responsive to societal issues such as non-discrimination and therefore more prepared to negotiate binding agreements. That said, even in the absence of binding agreements, the relatively high number of 'soft law' outcomes at the sectoral level at least demonstrates the general willingness of the sectoral social partners to be actively involved in the fight against discrimination. According to the results of our study, more than 100 non-binding texts (joint opinions, joint declarations, frameworks of actions, etc.)[46] relating to equality have been adopted by sectoral committees. This indicates that there is significant untapped potential for regulatory activities of the European sectoral Social Dialogue in this area.

41 Commission Decision 98/500/EC on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the Social Partners at European level (OJ (1998) L 225/27).

42 See social partners in the contract-catering sector (FERCO, European Federation for Contract Catering Organisations/ EFFAT, European Federation of Food, Agriculture and Tourism Trade Unions), Rules of procedures (2007), available at: http://ec.europa.eu/social/main.jsp?catId=521&langId=en (accessed 22 September 2018).

43 See social partners in the commerce sector (EuroCommerce/Euro-FIET, European Regional Organisation of the International Federation of Commercial, Clerical, Professional and Technical Employees), Agreement on the setting-up of a working group on the prevention of racial discrimination (1997), available at: http://ec.europa.eu/social/main.jsp?catId=521&langId=en (accessed 22 September 2018).

44 See social partners in the professional football sector (EPFL, Association of European Professional Football Leagues/ FIFPro, Fédération Internationale des Associations de Footballeurs Professionnels), Agreement regarding the minimum requirements for standard player contracts in the professional football sector in the European Union and in the rest of the UEFA territory (2012), available at: http://ec.europa.eu/social/main.jsp?catId=480&intPageId=1848&langId=en (accessed 22 September 2018).

45 See also in this regard Mückenberger U., Dimensionen des Wandels des deutschen Arbeitsrechtssystems angesichts Postfordismus und Globalisierung, in: Dingeldey I., Holtrup A., Warsewa G. (eds.), *Wandel der Governance der Erwerbsarbeit*, Wiesbaden (2015), pp. 71-98.

46 For a typology of texts of European social dialogue see Pochet Ph., Dufresne A., Degryse C. (eds.), The European Sectoral Social Dialogue, Actors, *Developments and Challenges*, Brussels (2006).

IV EWC founding agreements touching on equality issues

European Works Councils (EWCs) are fora for transnational information and participation of employees in multinational companies. EWC bodies deal with matters and measures affecting more than one country such as employment conditions, transfers of production, mergers or closures of undertakings. Since the adoption of the first EWC Directive in 1994[47] an impressive number of EWCs has been created. Today, more than 1000 active EWC bodies exist.[48] According to our analysis, about twelve percent of the agreements establishing an EWC contains provisions on equality and non-discrimination.[49] Most of these relate to gender equality. Less frequently, other disadvantaged groups such as persons with disabilities or racial minority groups are addressed.

Participation rights

Social partners agreements frequently mention equality issues as topics on which EWCs must be regularly informed and consulted by the central management. Outcomes often stipulate involvement rights of EWCs on 'equal opportunities', 'professional diversity' or 'equality between men and women'. For instance, an agreement signed by the Italian company SELEX Galileo in 2009[50] states that EWC representatives must be informed and consulted – as a priority – on matters such as maternity protection, employment for persons with disabilities and any form of harassment.

The attention paid to the issue of equal opportunities in EWC founding agreements goes beyond the list of the mandatory (subsidiary) requirements foreseen by the EWC Directive.[51] There is also no provision in other EU legislation that requires the involvement of EWCs in equality issues. This means that the negotiating actors go beyond the existing EU legal framework. The inclusion of these topics in the agenda of EWCs can therefore be considered innovative.

A limited number of agreements allow EWCs to engage in substantive negotiations on equality. The Danone EWC agreement (1996),[52] for example, explicitly gives the EWC the right to 'negotiate joint statements and measures' with regard to the social policy of the company including equality-related issues. Moreover, some of the outcomes allow for the establishment of topic-specific EWC working groups and committees, as the 2004 EWC agreement at the Belgian banking group Dexia[53] shows.

Our analysis further revealed that several agreements concluded with companies headquartered in France stipulate far-reaching participation rights. For instance, the 2009 EWC founding agreement at the French energy group ENGIE (former GDF Suez)[54] states that professional equality is a cross-cutting issue on the agenda of the EWC meetings. Moreover, the agreement commits to setting up a permanent working

47 Council Directive of 22 September 1994, 94/45/EC, OJ No. L 254/64, replaced in 2009 by Recast Directive 2009/38/EC, OJ L 122/28.

48 For current data on the number of EWCs, see the European works council database of the European Trade Union Institute: http://www.ewcdb.eu/.

49 The agreements mentioned below originate from the EWC database of the European Trade Union Institute (ETUI). They are not fully accessible to the public. We would like to expressly thank the ETUI for making them available for the purposes of our study.

50 Selex Galileo European Works Council installation agreement (2009), restricted access at: http://www.ewcdb.eu/body/1165 (accessed 22 September 2018).

51 The subsidiary requirements of Directive 2009/38/EC state that the information and consultation activities of the EWC shall relate *inter alia* to the employment situation and probable trend, transfers of production, mergers or collective redundancies. The mandatory subsidiary requirements of the EWC Directive are applied if the negotiations between the social partners fail.

52 Renegotiated agreement on the Danone joint information and consultation committee (1996), restricted access at: http://www.ewcdb.eu/body/717 (accessed 22 September 2018).

53 Dexia European Works Council, rules of procedure (2004), restricted access at: http://www.ewcdb.eu/agreement/1203 (accessed 22 September 2018).

54 ENGIE European Works Council agreement, restricted access at: http://www.ewcdb.eu/body/727 (accessed 22 September 2018).

group on diversity matters, composed of equal numbers of employee representatives and management appointees, which should hold two extra meetings per year beyond the regular EWC meetings. Several substantive agreements on non-discrimination were subsequently reached at the ENGIE Group with the involvement of the EWC.[55]

Better representation of disadvantaged groups

Some EWC founding agreements refer to gender balance among employee representatives. For example, an agreement concluded at Danish company Jysk Nordic in 2010[56] stipulates that 'the allocation of seats in the EWC must take into account the desirability of an equal gender representation'. Some agreements, such as the 2010 EWC agreement at the French banking group BNP Paribas,[57] also formulate rules for a better representation of women in EWC steering committees. Further, an outcome negotiated in 2002 in the US company HP[58] lays down that the EWC should be 'as diverse as possible' and represent 'all segments of the workforce (gender, language, culture, health, etc.).'

It must be said, however, that provisions for the inclusion of underrepresented groups in EWC bodies are still relatively rare. The revised EWC Directive 2009/38/EC emphasizes in Article 6 (2.b) the need to ensure a balanced representation of different categories of employees (by activities or gender) in EWCs. Transnational social partners are therefore required to address the issue of underrepresentation of women and other disadvantaged groups in their negotiating practice.

Positive results with gaps

In summary, the conclusion is that a great number of EWC founding agreements strengthen collective participation in equality issues. The outcomes go beyond the EU legal framework in this respect. In contrast, our study showed, that regulatory efforts to achieve equality of representation in EWC bodies remain insufficient. In this regard, the social partners fall short of the legal requirements.

V EWC substantive agreements: A limited outcome

EWCs are increasingly engaged in negotiating substantive agreements on issues such as health and safety at work, job security or profit-sharing with multinational corporations.[59] Nevertheless, our research showed that the outcome of additional agreements of EWCs in the field of equality is very limited. Less than ten binding instruments have been adopted so far.

An example worth mentioning is the EWC substantial agreement on the use of electronic communication systems which was negotiated at the global technology group GEPEgroup in 2002.[60] The agreement specifically refers to the prohibition of harassment. The actors involved agreed that any communication entailing harassment on the basis on gender, race, age, disability, religion, sexual orientation or national origin is forbidden and subject to disciplinary sanctions.

55 GDF Suez European agreement on professional equality between women and men (2012), available at: http://ec.europa.eu/employment_social/empl_portal/transnational_agreements/GDFSUEZ_equality_EN.pdf (accessed 22 September 2018).
56 Jysk Nordic European Works Council installation agreement (2010), restricted access at: http://www.ewcdb.eu/agreement/1566 (accessed 22 September 2018).
57 BNP Paribas European Works Council, amendment to existing EWC agreement (2010), restricted access at: http://www.ewcdb.eu/agreement/1614 (22 September 2018).
58 HP European Works Council agreement (2002), restricted access at: http://www.ewcdb.eu/agreement/923 (22 September 2018).
59 See e.g. Ales E., Engblom S., Jaspers T., Laulom S., Sciarra S., Sobczak A., Dal-Ré F.V., Transnational Collective Bargaining: *Past, Present and Future*, Brussels (2006).
60 General Electric Plastics, agreement on the use of electronic communication systems (2002), restricted access at: http://www.ewcdb.eu/docs/9870 (accessed 21 September 2018).

Another agreement was adopted at the French multinational company PPR in 2008 concerning the employment of older workers.[61] The social partners laid down a variety of measures to overcome the barriers to employment and to foster job retention for older people. The text inter alia includes concrete provisions on non-discriminatory job advertisements. The social partners committed themselves to addressing stereotyping about the abilities and roles of older workers through awareness-raising activities and staff training. Moreover, the agreement stipulates that action should be taken at the local level to favour a reduction of working hours and workplace adjustments. Workplace adjustments according to the needs of older persons are not foreseen in EU non-discrimination law.[62] The social partner regulation therefore goes beyond the existing EU legal framework. The company must regularly report on the implementation of the agreement at the annual meeting of the EWC. Hence, the EWC at PPR reached a remarkable outcome aiming at the active inclusion of older workers.

In summary, however, it should be pointed out that the results of substantial EWC agreements in the field of equality and non-discrimination are rather disappointing. The norm-setting capacity of this type of regulation is similarly low. The activities of EWCs in this area should therefore be strengthened in the future.

VI Transnational Company Agreements: remarkable results

Transnational Company Agreements (TCAs)[63] that result from negotiation processes between multinational enterprises on the one hand and national and/or transnational trade union organizations on the other hand have impressively increased in the last three decades.[64] According to the results of our study, nearly one hundred agreements were concluded dealing with equality and non-discrimination.[65]

A broad spectrum of provisions

A large number of documents focus on fundamental labour rights and Corporate Social Responsibility (CSR).[66, 67] Most of these agreements explicitly refer to the ILO core labour standards and the fundamental ILO Conventions 100 and 111 on discrimination. Many outcomes include a provision – often rather vaguely formulated – on the protection against discrimination on various grounds.

A notable aspect is that a certain number of agreements enumerate prohibited grounds beyond those expressly mentioned in Article 19 TFEU and Article 21 of the EU Charter of Fundamental Rights. These texts e.g. prohibit discrimination based on health status, name, physical appearance, family status or different backgrounds and experiences. The stipulation of such grounds in agreements exceeds the existing EU non-discrimination framework and can therefore be qualified as innovative.

61 PPR European Works Council, Charter in favour of the employment of seniors (2008), available at: ec.europa.eu/employment_social/empl_portal/transnational_agreements/PPR_CharterSeniors_FR.pdf (accessed 22 September 2018).

62 See also Bribosia E., Rorive I., Reasonable Accommodation beyond Disability in Europe?, Luxemburg (2013), available at: http://www.ergo-work.eu/pdf/Reasonable%20Accommodation%20EN.pdf (accessed 22 September 2018).

63 For our definition of Transnational Company Agreement see footnote 22.

64 See further Schömann I., Wilke P., Towards a sustainable company, the potential contribution of international framework agreements, in: Vitols S., Kluge N. (eds.), *The Sustainable Company: A New Approach to Corporate Governance*, Brussels (2011), pp. 167-183.

65 Some of these texts were signed by both an EWC and an international/European/national trade union organization.

66 The EU Commission has defined the concept of CSR as 'the responsibility of enterprises for their impacts on society'. See further European Commission (2011), *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM/2011/0681final.

67 These agreements can be subdivided into agreements with a global scope that are signed by international trade unions (so-called 'International Framework Agreements') and outcomes with a European context that are signed by European/national trade unions, see European Foundation for the Improvement of Living and Working Conditions (Eurofound), European Industrial Relations Dictionary, International Framework Agreement (published 7 February 2013), available at: https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/international-framework-agreement (accessed 22 September 2018).

In some cases, non-discrimination clauses are integrated in agreements that deal with the prevention and mitigation of the negative consequences of restructuring measures (such as mergers, closures of businesses or mass redundancies) for the employees and aim at an intelligent future-oriented personnel policy. For instance, an 'Agreement on Improving Professional Development through Effective Anticipation' was negotiated by European trade unions with the French company Thales in 2009.[68] The document specifies the employer's duty to provide national employees' representatives with regular and appropriate information on equal treatment between men and women. Explicitly referring to the Gender Recast Directive (2006/54/EC),[69] the company is committed to regularly informing them about the proportion of women in the workforce as well as in management positions, and about the gender distribution in fixed-term contracts and part-time jobs. On this basis, annual action plans for equal opportunities shall be drawn up at national level. The implementation of the agreement is monitored by a 'European Anticipation Commission' composed of the negotiating parties. Furthermore, the EWC shall review a self-evaluation report issued by the company and assessing the implementation of the agreement on a yearly basis.

Another example is by the global agreement concluded in 2013 at the globally active Italian electricity company Enel, setting up a worldwide works council.[70] The negotiated text contains provisions that are usually rarely found in agreements on the establishment of a global multilateral committee on equal opportunities. The task of this committee is to initiate topic-specific projects and studies[71] and to implement a company-wide diversity policy. The creation of social dialogue structures on a global level is not regulated by state actors and can therefore be considered innovative. The agreement could contribute to spreading non-discrimination policies in countries outside Europe that possibly display lower standards, provided that the negotiated contents gain practical effect.[72]

Far-reaching negotiation outcomes in French companies

Our analysis showed that the number of TCAs dealing mainly with equality matters is relatively small. Most of these agreements were signed by companies headquartered in France.

The expert interviews that we conducted with social partner representatives and academics revealed that the legislation in France favours the conclusion of transnational agreements. The French labour law imposes on the social partners at company level a continuous duty to negotiate on professional equality between men and women, on the employment of old-age employees and the employment of persons with disabilities.[73] The resulting national regulatory culture in this field evidently encourages the actors involved to take action at cross-border level.[74]

Some of the explored outcomes, like the Europe-wide agreement on equal opportunities concluded at Total[75] in 2005 or the European framework agreement on equal opportunities for women and persons

68 Thales European agreement on 'Improving Professional Development through Effective Anticipation' (2009), available at: http://ec.europa.eu/social/main.jsp?catId=978&langId=en&agreementId=173 (accessed 22 September 2018).

69 According to Article 21(4) Directive 2006/54/EC employers shall be encouraged to provide employees and/or their representatives with appropriate information on equal treatment for men and women in the undertaking at appropriate regular intervals.

70 Enel Global framework agreement on social dialogue guidelines (2013), available at: http://ec.europa.eu/social/main.jsp?catId=978&langId=en&agreementId=232 (accessed 22 September 2018).

71 However, the agreement does not specify exactly which topics should be the subject of these projects and studies.

72 See below on the question of the effective implementation of transnational agreements.

73 See Section L. 2241-4 and Section L. 2241-5 of the Labour Code. For further information see Despax M., Rojox J., Laborde J.-P., *Labour Law in France*, Alphen aan den Rijn (2011), p. 309.

74 For example, one of our interview partners noted the following: 'The French law is very demanding. We have a habit to obtain agreements on certain topics. I think, that's the reason why so many French companies are able to negotiate and obtain agreements at European level'.

75 Total European agreement on equal opportunity (2005), available at: http://ec.europa.eu/employment_social/empl_portal/transnational_agreements/Total_equalopportunity-EN.pdf (accessed 22 September 2018).

with disabilities signed by Areva in 2006,[76] are well-known. These agreements contain similarly concrete binding provisions aimed at promoting gender equality and a better professional integration of disabled persons. Furthermore, they foresee specific follow-up procedures and monitoring activities that indicate the effectiveness of norms in practice.

TCAs that mainly focus on equality and non-discrimination often go beyond the guarantee of formal equality and make efforts to ensure de facto equality of disadvantaged groups. The social partners are obviously aware of the fact that preferential treatment is necessary to achieve real equality in professional life.[77] In particular, the outcomes cover a wide range of positive action measures in favour of women, older employees and others.[78] These include advertising campaigns in schools to increase the percentage of women in technical professions, awareness-raising activities concerning discrimination on various grounds, and staff training. There are also provisions on minimum quotas for women in managerial positions, rules on career talks for older employees and on the establishment of mentoring programmes for disadvantaged groups. An agreement on gender equality reached by GDF Suez (today ENGIE) in 2012 sets a 30 per cent minimum representation of women in permanent contracts.[79]

In rare cases, the social partners take regulatory measures to adapt workplaces and to create a more inclusive working environment. The 2006 European agreement on equal opportunities at Areva, for example, contains provisions confirming and specifying the employer´s obligation to provide for reasonable accommodation for disabled people.[80] In particular, the agreement reached by social partners laid down that adjustments have to be made to facilitate access to training for disabled employees (e.g. through transport and logistical arrangements). Although the employers´ obligation of reasonable accommodation is already part of EU law the rules at Areva may have a positive impact. They may help to enforce the legal obligation not least in countries such as Germany where the scope of this obligation is controversial. In Germany not all disabled workers are explicitly covered by the right to reasonable accommodation. The German Social Law Code imposes on employers a duty to accommodate severely disabled employees only.[81]

The EU-wide rules at Areva, which apply to all workers, could therefore contribute to harmonizing equality standards upwards in the workplace. To ensure the effectiveness of the outcome, the negotiating parties stipulated that the agreement shall be implemented by means of national collective agreements and local action plans. A monitoring committee composed of representatives of human resource management, the EWC and representatives of the involved European trade union shall evaluate the practical application of the agreement on an annual basis. Moreover, a project was carried out by the negotiating parties with the support of the European Commission in order to increase awareness and foster implementation at

76 Group memorandum of agreement on equal opportunities within the Areva Group in Europe (2006), available at: http://doco.industriall-europe.eu/Doco/AREVA%20-%20Equal%20opportunities%202006%20EN.pdf (accessed 22 September 2018).

77 See further on the concepts of formal and substantial equality e.g. Schiek D. (ed.), Allgemeines Gleichbehandlungsgesetz (AGG). *Ein Kommentar aus europäischer Perspektive*, München (2007).

78 On positive action – in the sense of preferential treatment – as a key concept in EU anti-discrimination law see further Ellis E., Watson P., *EU – Antidiscrimination Law*, Oxford (2012), pp. 176-177.

79 GDF Suez European agreement on professional equality between women and men (2012), available at: http://ec.europa.eu/employment_social/empl_portal/transnational_agreements/GDFSUEZ_equality_EN.pdf (accessed 22 September 2018).

80 Article 5 Directive 2000/78/EC provides that employers are required to take appropriate measures to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.

81 See § 164 SGB IX (old § 81 SGB IX). The predominant opinion in the literature assumes, however, that a legal duty for employers to accommodate all disabled employees arises from a legal interpretation in conformity with the Directive (see e.g. Colneric N., Das Verbot der Diskriminierung wegen einer Behinderung in der Rechtsprechung des EuGH, in: Faber U., Feldhoff K., Nebe K., Schmidt K., Waßer U. (eds.), Gesellschaftliche Bewegungen – Recht unter Beobachtung und in Aktion, *Festschrift für Wolfhard Kohte*, Baden-Baden (2016), pp. 243-259; Kohte W., Kommentierung zu § 82 SGB IX, in: Knickrehm S., Kreikebohm R., Waltermann R., *Kommentar zum Sozialrecht*, München (2017); Rabe-Rosendahl C., *Angemessene Vorkehrungen für behinderte Menschen im Arbeitsrecht*, Baden-Baden (2017); see also BAG, judgment of 19 December 2013, 6 AZR 190/12, NZA 2014, 372, 376).

the local level.[82] The social partners thus made notable efforts to achieve the effective application of their agreement.

A 'Convention on Diversity' concluded by an international trade union with Danone in 2007[83] also provides for concrete provisions for an inclusive workplace. It inter alia calls on national social partners to introduce flexible working-time arrangements to provide solutions to the specific situations of single parents, persons with disabilities and older employees. Furthermore, the text contains a commitment to improving workstation ergonomics and to adjusting workplaces in order to maintain older and disabled workers in employment. There are no provisions in EU legislation about an adjustment of working time and working conditions to specifically meet the needs of single parents or older employees. The Danone text therefore goes beyond the existing EU legal framework and can be considered as innovative.

Some recent TCAs aim at tackling the persistent problem of sexual harassment in the workplace.[84] Among them, a global agreement concluded at UK-Dutch company Unilever in 2016[85] refers to ILO Convention No. 111 and lays down a broad definition of the term 'harassment'.[86] Furthermore, social partners agreed on the company-wide implementation of specific staff training. Local social partners are called on to pursue and develop an active policy against harassment including confidential complaint procedures and appropriate sanctions. It is also worth mentioning that the transnational collective actors show strong awareness of their responsibility to ensure professional equality across the whole supply chain. For example, an agreement on equality and diversity signed by GDF Suez in 2007[87] states that the agreed provisions must be extended to all relationships with suppliers, contract partners and subcontractors.

The ambiguous capacity of TCAs

As shown in the previous sections, TCAs often refer to the existing international and European regulation to combat discrimination and to foster equality at work. Key concepts in the field of non-discrimination law[88] (such as harassment, positive action or reasonable accommodation) are included in negotiation results, and their place on the corporate agenda is confirmed and specified with respect to the particular needs of workplaces and workers in multinational companies in relation to equality-related activities. In some cases, social partners remarkably go beyond the current legal framework. In comparison with the other forms of transnational social dialogue, the norm-setting activities of TCAs in the area of equality and non-discrimination are relatively strong. On closer inspection, however, it becomes apparent that adequate regulatory practices can still be improved. Far-reaching results are concentrated in a limited number of multinational companies mostly headquartered in France. Furthermore, the contents of TCAs sometimes remain rather vague and entail the risk of falling behind existing legal requirements of EU law and national implementing legislation.

82 For further information see Areva, Press Release (15 April 2010), available at: http://www.sa.areva.com/EN/news-8348/equal-opportunities-areva-to-pursue-odeo-initiative-in-the-longterm.html (accessed 22 September 2018).

83 Danone Convention on diversity (2007), available at: http://ec.europa.eu/employment_social/empl_portal/transnational_agreements/Danone_Diversity_EN.pdf (accessed 22 September 2018).

84 See further on current data on harassment at work European Union Agency for Fundamental Rights, Violence against women: an EU-wide survey. Main results report (2014), available at: http://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report (accessed 20 September 2018).

85 Unilever Joint Commitment to preventing sexual harassment (2016), available at: http://ec.europa.eu/social/main.jsp?catId=978&langId=en&agreementId=277 (accessed 22 September 2018).

86 According to the agreement, harassment includes: any insult, inappropriate remark, comment on a person´s physique, dress, age, family situation; a condescending or paternalist attitude with sexual implications undermining dignity; any unwelcome invitation or request, implicit or explicit, whether or not accompanied by threats; any lascivious look or gesture associated with sexuality; any unnecessary physical contact such as touching, caresses, pinching or assault.

87 GDF Suez agreement on commitment to promoting equality and diversity within the Group (2007), available at: http://ec.europa.eu/social/main.jsp?catId=978&langId=en&agreementId=167 (accessed 22 September 2018).

88 See further Ellis E., Watson P., *EU – Antidiscrimination Law*, Oxford (2012), pp. 142-177.

VII The different capacity of the four forms of regulation

Our research indicates that there are two specific centres of growth for transnational norm-setting in the field of non-discrimination and equality: European cross-sectoral Social Dialogue and TCAs.

As we have shown, cross-sectoral social partners achieved some remarkable outcomes in the area of gender equality, the reconciliation of family life and work, and the fight against precarious employment. The outcomes on parental leave and atypical work were put into mandatory EU Directives and have therefore had a significant impact for the whole workforce in the Member States. By contrast, sectoral social partners have not yet reached a substantial binding agreement on equality and non-discrimination. As mentioned above, one reason for this different outcome may be the specific constellation of actors at the sectoral level, which is narrower than the cross-sectoral social partner organizations. The broader nature of the latter constellation seems to favour the inclusion in the agenda of broader societal interests like the fight against discrimination.

EWC founding agreements made some notable efforts to strengthen the collective participation rights of EWCs on equality issues. On the other hand, the practice of social partners falls short of legal requirements to work towards equal representation in EWC bodies. If one takes a closer look at the further results at company level, the productivity of Transnational Company Agreements that are co-signed by trade unions is striking. TCAs seem to have a significant potential for adequate and innovative norm-setting, although, as pointed out, the outcomes of this type of regulation are still frequently unsatisfactory because their content may be rather vague. By contrast, the regulation activities of EWC substantive agreements on non-discrimination issues have remained very weak. This suggests that an involvement of trade unions on the employee side fosters satisfactory outcomes in negotiations with multinational companies. It would be a worthwhile task for future studies to explore in detail the reasons for the strengths and weaknesses of the single types of regulation we identified in our analysis.

VIII Remaining regulatory gaps

The brief overview above of the contents of agreements has demonstrated that transnational social partners take a wide range of regulatory measures to promote equal treatment at work. A broad spectrum of persons and groups affected by discrimination is covered in collective agreements. Provisions on positive action or reasonable accommodation demonstrate clear commitment on the part of social partners not only to ensure formal equality but also full equality in practice.

However, our study also revealed that there is still a room to fill regulatory gaps. For instance, results at company level hardly address the issue of precarious work.[89] In addition, collective actors have paid only little attention to the problem of multiple discrimination[90] in employment. Specific measures in favour of the vulnerable groups that are particularly affected by social exclusion, such as young migrants, older women or women with disabilities, are hardly found in collective agreements. Situations where persons suffer discrimination at work because of specific combinations of protected grounds, called 'intersectional discrimination', are still completely disregarded.[91] Social partners do not seem willing to take action in

89 One of the rare exceptions is a recent global framework agreement concluded at Danone on the topic of sustainable employment. See Danone Agreement on Sustainable Employment and Access to Rights (2016), available at: http://www.iuf.org/w/sites/default/files/9%202016%20IUF-Danone%20Agreement%20on%20Sustainable%20Employment%20and%20Access%20to%20Rights.pdf (accessed 22 September 2018).

90 'Multiple discrimination' consists of a situation where the person complaining of discrimination belongs to two separate protected groups, both of which are affected by anti-discrimination legislation, for example, a disabled woman. On the prohibition of multiple discrimination in EU law see Monaghan K., Multiple and intersectional discrimination in EU law, *European Anti-Discrimination Law Review 13/2011*, pp. 20-32.

91 The concept of 'intersectional discrimination' refers to a discriminatory situation which is based on several grounds interacting with each other at the same time and which results in a form of discrimination that is not covered by any of the individual anti-discrimination regulations. See further Monaghan K., Multiple and intersectional discrimination in EU

an area where the EU anti-discrimination legal framework is currently still fragmented.[92] Furthermore, social partners have so far failed to make adjustments or take measures to eliminate discriminatory situations in the workplace on grounds of religion. Regulatory options[93] such as the establishment of prayer rooms or time off from work to observe religious practices are absent from the agreements studied in the framework of our research project.

IX Perspectives for further development

Despite these gaps, the results of our study clearly indicate that transnational collective agreements have great potential as instruments to combat discrimination and to promote equality. Both employers' and employees' representatives share a common interest in anti-discrimination measures and policies. Especially the growing number of TCAs that are concluded on a voluntary basis demonstrates the will of the social partners to harmonize equality standards across countries. From a business point of view, professional diversity is increasingly associated with higher productivity and improved performance.[94] From a trade union perspective, concerns about precarious workers and disadvantaged groups may help revitalize union organizations that are faced with a decline of their membership throughout Europe.[95] Against this background, transnational social dialogue could develop into a crucial element in the fight against discriminatory practices at work.

Special attention should be paid by future research and political initiatives to the question of the implementation and enforcement of transnational agreements dealing with non-discrimination and equality. This particularly applies to EWC substantive agreements and TCAs whose legal conditions of implementation are unclear. Our study found at least two specific factors hindering effective implementation processes. The first factor – as revealed by our expert interviews – is the underrepresentation of women and other groups affected by discrimination in social partner organizations and decision-making positions. The second factor is the widespread lack of social and cultural acceptance of diversity and equality.[96]

In view of these obstacles revealed by our study, European and national political actors are called on to provide proactive legal and institutional support to ensure effective collective self-regulation. Awareness-raising strategies and initiatives to overcome underrepresentation seem particularly necessary with regard to both norm building and enforcement. In this regard it should be welcomed that the promotion of gender balance in decision making has become a key issue in the current EU gender equality policy.[97]

A systematic involvement of NGOs and interest groups (women´s groups, disabled persons' organizations etc.) may also help to bring forward appropriate regulatory practices.[98] NGOs and relevant interest organizations could empower and strengthen the perspective of those affected by discrimination in

law, *European Anti-Discrimination Law Review 13/2011*, pp. 20-32. Schiek D., Chege V., European Non-Discrimination Law. *Comparative Perspectives on Multidimensional Equality Law*, New York (2009).

92 See Schiek D., Chege V., European Non-Discrimination Law. *Comparative Perspectives on Multidimensional Equality Law*, New York (2009).

93 See further Bribosia E., Rorive I., Reasonable Accommodation beyond Disability in Europe?, Luxemburg (2013), pp. 46-59, available at: http://www.ergo-work.eu/pdf/Reasonable%20Accommodation%20EN.pdf (accessed 22 September 2018).

94 See further e.g. Vedder, G., Die historische Entwicklung von Diversity Management in den USA und in Deutschland, in: Krell, G., Wächter, H. (eds.), *Diversity Management – Impulse aus der Personalforschung*, München und Mering (2006), pp. 1-23.

95 See Hyman R., Klarsfeld A., Ng E., Haq R., Social regulation of diversity and equality, *European Journal of Industrial Relations* (EJIR) (November 2012), pp. 279-292.

96 See further Mangold S., *Transnationale Soziale Dialoge und Antidiskriminierung im Erwerbsleben*, Baden-Baden (2018), pp. 284-288.

97 See European Commission, *Strategic Engagement for Gender Equality 2016-2019*, Luxemburg (2016), available at: https://ec.europa.eu/info/sites/info/files/strategic_engagement_en.pdf (accessed 22 September 2018).

98 See also Rust U., Kommentierung zu Art. 154 AEUV, in: von der Groeben H., Schwarze J., Hatje A. (eds.), Europäisches Unionsrecht: *Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union*, Kommentar, Baden-Baden (2015).

negotiation processes. They could also foster compliance with negotiated agreements by raising public awareness.

A further important supporting instrument would be the creation of an optional EU legal framework for transnational collective bargaining at company level, as the European Parliament called for in a resolution in 2013.[99] An EU legal framework that defines and clarifies the negotiating actors, legal effects and implementation procedures of TCAs could yield effective and satisfying results. Furthermore, such an instrument should expressly encourage the participation of women in the Social Dialogue and call on the social partners to integrate equality issues in negotiation processes, as the European Parliament has recommended.[100]

The recent 'European Pillar of Social Rights'[101] may give new impetus to the debate on the legal and institutional framework for transnational collective agreements. Supporting the capacity of social partners to conclude agreements at the transnational level is in fact one of the declared aims of the Pillar of Social Rights.

99 European Parliament Resolution of 12 September 2013 on cross-border collective bargaining and transnational social dialogue (2012/2292(INI)), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0386+0+DOC+XML+V0//EN (accessed 20 October 2018).

100 See European Parliament Resolution of 12 September 2013 (2012/2292(INI)), para. 15, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0386+0+DOC+XML+V0//EN (accessed 20 October 2018).

101 For more information see European Commission (2018), *The European Pillar of Social Rights in 20 principles*, https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en (accessed 22 September 2018).

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Positive action in practice: some dos and don'ts in the field of EU gender equality law

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Introduction

Thirty years after the Court of Justice of the EU (CJEU)[1] grappled with the first cases, positive action remains a controversial issue of EU law. Numerous theoretical contributions have been written on the topic and the notion is by now well-known, at least from a theoretical perspective. Hence, the aim of the present article is not to propose a conceptual discussion of positive action, but rather to explore the ways in which it has been used and operationalised in practice. Based on recent legal and case law developments at EU level and in Member States, we examine the question of whether, and when, positive action truly promotes substantive equality in practice. By the same token, we look at the application of the notion through a critical lens and ask whether its misuse does not, at times, curb the principle of equality itself. After briefly defining the notion of positive action and offering some terminological clarifications (I), we briefly trace its legal development in EU law from historical landmark cases to more recent developments at the CJEU (II). In a third section, we explore and discuss the potentialities and pitfalls of positive action through examples from its different fields of application in a number of EU Member States (III). Finally, we further investigate the difficulties posed by the notion in practice through a detailed analysis of the French case law (IV). To conclude, we propose some lessons and reflections on the dos and don'ts of positive action (V).

I From formal to substantive equality?

A controversial and polysemous concept

Positive action is by now a well-known concept which has attracted the attention of a considerable amount of institutional and academic research.[2] In contrast to formal equality, which merely focuses on

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1 Throughout this article, we use the term CJEU for the sake of uniformity even though prior to 2009 the Court was in fact Court of Justice of the European Communities (CJEC).

2 See e.g. De Vos, M. (2007), *Beyond formal equality: Positive action under Directives 2000/43/EC and 2000/78/EC*, European Commission, LuxembourgLuxembourg, 2007; Selanec, G. and Senden, L. (2011), *Positive action measures to ensure full equality in practice between men and women, including on company boards*, European Commission, Brussels; Equinet (2014), *Positive action measures. The experience of equality bodies*, Brussels. See also e.g. O'Cinneide, C. (2005), 'Positive duties and gender equality', *International Journal of Discrimination and the Law*, Vol. 8, p. 91; O'Cinneide, C. (2006), 'Positive action and the limits of existing law' *Maastricht Journal of European and Comparative Law*, Vol. 13, p. 351; Fredman, S. (1998), 'After Kalanke and Marschall: Affirming affirmative action' *Cambridge Yearbook of European Legal Studies*, Vol. 1, p. 199; Fredman, S. 'Affirmative action and the European Court of Justice: A Critical Analysis' in Shaw, J. (ed) (2000), *Social law and policy in*

providing every individual or group with the same opportunities and chances, positive action aims at social transformation and *de facto* equality. It covers a broad range of measures, the objective of which is, in the short or long term, directly or indirectly, to tend towards an equality of results. By definition, positive action relates to 'differential treatment designed to ameliorate disadvantage or address specific need'.[3] Positive action measures are by essence redistributive as they seek to alter the unequal distribution of social goods of all kinds (labour, political participation opportunities, education, etc.) among different groups in society, and *in fine* the representation and inclusion of these groups. In the face of persisting inequalities and the limited capacities of an individual adversarial anti-discrimination judicial framework, positive action has been called on to provide a more systematic and upstream equality model.[4] What is more, today, measures encouraging diversity are not only regarded as a matter of equality and fairness, but also increasingly as an efficiency issue (e.g. in terms of managing human resources, producing output, etc.).[5]

To place positive action within a broader conceptual framework, it can be called a form of 'asymmetrical' equality.[6] Rather than treating comparable cases in the same manner, which is the mantra of formal equality, positive and affirmative action evolve on a spectrum ranging from real equal opportunities to substantive and transformative equality. They either seek to truly equalise chances of social participation for disadvantaged groups, or even target an equality of results termed 'substantive'.[7] At the same time, when they seek to remedy past discrimination, challenge established stereotypes and 'modify [...] social and cultural patterns of conduct' to 'eliminat[e] prejudices [...] and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes', they come under the ambit of what is now called 'transformative equality'.[8]

Despite these recognised benefits, positive action remains controversial because of its declared lack of 'neutrality'. It goes beyond the widely accepted formal equality formula of 'treating like cases as like' and speaks to the second, less-known, part of Aristotle's principle of justice by treating unlike cases differently. In lay terms, however, positive action is often assimilated to a kind of unconditional favouritism granted to certain individuals merely because of their membership of socially disadvantaged groups. This erroneous association has contributed to imbuing the notion with a controversial reputation.

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3 McColgan, A. (2014), *Discrimination, equality and the law*, Human Rights Law in Perspective, Vol. 19, Hart Publishing, p. 89. See also Barmes, L. (2009), 'Equality law and experimentation: The positive action challenge', *The Cambridge Law Journal*, Vol. 68, p. 623.

4 Fredman, *Human rights transformed positive rights and positive duties* (Chapter 8).

5 See Council of the European Union, Council recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women (1984) OJ L331/34. See also Craig, P. P. and De Búrca, G. (2015), *EU law: text, cases, and materials*, (Sixth edition), Oxford University Press, pp. 951-955.

6 McColgan, *Discrimination, equality and the law*equality and the law, pp. 70-100 and Fredman, S. (2016), 'Substantive equality revisited', *International Journal of Constitutional Law*, Vol. 14, pp. 712, 728/729.

7 For an interesting discussion of the concept of substantive equality, see for instance the debate between European and US scholars Sandra Fredman and Catharine MacKinnon: Fredman, S. (2016), 'Substantive equality revisited', *International Journal of Constitutional Law*, Vol. 14, p. 712; Fredman, S. (2016), 'Substantive equality revisited: A rejoinder to Catharine MacKinnon', *International Journal of Constitutional Law*, Vol. 14, p. 747; MacKinnon, C. A. (2016), 'Substantive equality revisited: A reply to Sandra Fredman', *International Journal of Constitutional Law*, Vol. 14, p. 739.

8 Article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women, available at http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article5 accessed on 26 September 2018. See also General recommendation No. 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (2004), para. 10 available at http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf accessed on 26 September 2018. On the concept of transformative equality more specifically, see e.g. Fredman, S. (2003), 'Beyond the dichotomy of formal and substantive equality: Towards a new definition of equal rights' in Boerefijn, I. et al (eds), *Temporary special measures: accelerating de facto equality of women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women*, Intersentia; Holtmaat, R. (2012), 'Article 5' in Rudolf, B., Freeman, M. A. and Chinkin, C. M. (eds), *The UN Convention on the Elimination of all Forms of Discrimination against Women: a commentary*,Oxford University Press, pp. 143-144; Cusack, S. and Pusey, L. (2013), 'CEDAW and the rights to non-discrimination and equality', *Melbourne Journal of International Law*, Vol. 14, p. 54, p. 11-12.

A broad spectrum

At the level of terminology, concepts have frequently been mixed up, adding to the existing confusion. Even though often assimilated to 'reverse' or 'positive discrimination', positive action is legally distinguishable. While 'reverse' and 'positive' discrimination refer to direct preferences given to certain groups because of their social membership, positive action is much broader as it covers a wide spectrum of possible measures ranging from monitoring and indirect support to more direct interventions such as quotas. The existing conceptual plurality is reinforced by the different terminology used in other jurisdictions. The European notion of 'positive action' is, for instance, to be distinguished from its US counterpart. While 'affirmative action' is broadly similar, it also carries its own history and socio-legal context and functions along different parameters.[9]

As mentioned above, the term positive action embodies a wide spectrum of meanings and encompasses measures of different levels of intensity.[10] As early as 1986, Christopher McCrudden proposed a five-pronged classification of possible types of positive action: (1) the review of policies and actions in light of the discriminatory impact they can have and the eradication of discrimination – now often referred to as gender mainstreaming; (2) a form of objectively justified indirect discrimination through targeted 'inclusionary' policies aimed at increasing the representation of socially disadvantaged groups but using neutral criteria such as unemployed status or residential area; (3) 'outreach programmes' providing information, support and training to under-represented groups to increase their access to socially valued goods (e.g. jobs, political functions, study programme etc.); (4) 'preferential treatment' granting conditional or unconditional preference[11] to under-represented groups in areas such as employment, education, services, etc.; and finally (5) the redefinition of 'merit' taking into account membership of under-represented categories as an asset.[12]

In the specific context of EU gender equality law, three categories of positive action have been proposed with different purposes.[13] These aim to increase women's access to the labour market; improve work-life balance, achieve a fairer sharing of breadwinning and care responsibilities among women and men, and loosen the yoke of traditional gender roles; and finally remedy past discrimination by enhancing the representation of women in positions of power (e.g. on company boards, in political decision-making, etc.).[14]

The means of positive action are as numerous as the forms it can take. Quotas, action plans setting quantitative targets and timelines, mainstreaming of gender equality in policy- and decision-making, financial support in the form of subsidies, as well as training and non-financial support (e.g. flexible working hours, childcare facilities, etc.) are all different ways positive action can be implemented according to the European Commission.[15]

9 On this point see e.g. McColgan, *Discrimination, equality and the law*equality and the law, pp. 81-88.
10 See e.g. De Vos, *Beyond formal equality: Positive action under directives 2000/43/EC and 2000/78/EC*Marc, p. 12 and Ellis, E. and Watson, P. (2013), *EU anti-discrimination law*, Oxford University Press, p. 505.
11 Conditional preference, in contrast to unconditional access, means that the mere membership in an under-represented group does not grant automatic access to the good in question but that other criteria such as qualifications are taken into account. These concepts are further discussed in section II(1) and II(2).
12 McCrudden, 'Rethinking positive action', pp. 223-225.
13 See Craig and De Búrca, *EU law: text, cases, and materials*, pp. 950-951.
14 Ibid.
15 See European Commission, Communication from the Commission to the European Parliament and the Council on the interpretation of the judgment of the Court of Justice on 17 October 1995 in Case C-450/93, *Kalanke v Freie Hansestadt Bremen* (1996) COM(96)88 final, 9-10.

II Positive action and EU law: a tense relationship

The legal sources of positive action in EU primary and secondary law

Historically, the formal recognition of positive action in EU law started with the former Equal Treatment Directive 76/207/EEC.[16] In its Article 2(4), the directive provided the possibility for Member States to 'take measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities' in the field of employment. Despite the absence of an explicit mention of the notion of 'positive action' and the presence of the term 'equal opportunity', the case law of the Court of Justice progressively carved out today's concept. In 1984, the Commission encouraged Member States 'to adopt a positive action policy' and delineated two main aims: to eliminate 'attitudes, behaviour and structures' based on traditional gender roles and to enhance the participation of women in the labour market and their representation in positions of responsibility.[17]

In 1999, positive action made its way to primary law through an explicit mention in ex-Article 141(4) of the Amsterdam treaty (Article 157(4) TFEU) on equal pay. The terms of the debate changed slightly, with a new provision spelling out that, 'with a view to ensuring full equality in practice between men and women in working life', Member States could 'maintai[n] or adop[t] measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers'.[18]

Interestingly, the mention of equal opportunities disappeared from this new wording and was replaced by the term 'full equality in practice', while the positive and remedial nature of the measures involved was clearly spelled out. This second legal definition shifted the concept away from the ambit of formal equality and closer to the domain of substantive equality. Women are however not specifically mentioned as the recipients of positive action measures but instead the more neutral term 'underrepresented sex' was used. This is also reflected in the wording of Article 23 of the EU Charter of Fundamental Rights on equality between women and men.[19] While apparently making space for a contextual application of the legal provision, this change was criticised.[20]

Article 2(4) of the former Equal Treatment Directive has now been replaced by a dedicated provision in the Gender Recast Directive. In line with the wording of Article 157(4) TFEU, Article 3 lays down a possibility, but no obligation, for Member States to adopt positive action measures in the area of employment. Its interpretation by the Court does not diverge from its earlier interpretation of the Treaty provision. Article 5 of Directive 2010/41/EU foresees the same possibility in the field of self-employment, while Article 6 of Directive 2004/113/EC allows for positive action in the consumption and supply of goods and services. Finally, concerning discrimination on the grounds of race, sexual orientation, age, disability and religion, positive action measures are also allowed by Articles 5 and 7 of the Race Equality Directive and the Framework Directive respectively.[21]

16 Council of the European Union, Council Directive 76/207/ EC 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 (1976) OJ L 39/40 (hereinafter former Equal Treatment Directive).

17 Council recommendation 84/635/EEC.

18 Article 157(4) TFEU.

19 Article 23 of the Charter of Fundamental Rights provides that: 'Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex'.

20 However, the 'Declaration (28) on Article 119(4) of the Treaty establishing the European Community' clarifies that '[w]hen adopting measures referred to in Article 119(4) of the Treaty establishing the European Community [on positive action], Member States should, in the first instance, aim at improving the situation of women in working life'. See section III(3) for a critical discussion.

21 Council of the European Union, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000) OJ L 180/22 and Council of the European Union, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (2000) OJ L 303/16.

Despite an explicit recognition, EU law specifies neither what form these measures can take nor their content. Positive action remains an option for the Member States to decide on and to design. While the inscription of equality as a founding value and an overarching objective of the Union in Articles 2 and 3(3) TEU could justify an obligation for Member States to adopt positive action measures, the principle of subsidiarity is likely to have tilted the balance in favour of more leeway for Member States to choose their equality model. As a consequence, it has been the task of the CJEU to flesh out the boundaries between lawful and unlawful positive action.

The CJEU walking the 'tightrope':[22] a progressive delimitation of the boundaries of positive action between anti-discrimination and anti-stereotyping

As early as 1986 in *Bilka-Kaufhaus*, the CJEU decided that the Treaty article on equal pay (current Article 157 TFEU) did not entail an obligation for employers to take into account and compensate *a priori* the disproportionate disadvantageous effects on women that an occupational pension scheme might have when designing its rules of operation.[23] This ruling clarified that positive action is not an obligation under EU law but rather merely an option for Member States. Two years later, the Court found in Article 2(4) of the former Equal Treatment Directive 76/207/EC a legal basis for positive action, as it 'allow[ed] measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life'.[24]

During the following decade, the CJEU refined the criteria for positive action measures to be compatible with EU law. Following infringement proceedings against France, the Court deemed, for instance, that special rights granted systematically to women by collective agreements[25] were too general to constitute positive action.[26] The Advocate General feared that the measures at stake would be discriminatory against non-beneficiaries (men) and risked perpetuating traditional gender roles, locking women into caretaking and men into breadwinning roles.[27] The French example is particularly interesting in this regard and will therefore be extensively analysed in the fourth section of this article. The take-away message was that positive action measures should be narrowly tailored and clearly and objectively aimed at redressing specific disadvantages. These criteriahave been confirmed in later cases (*Badeck*, *Abrahamsson*, *Griesmar*).[28]

The discussion of the scope of positive action focused on the issue of quotas with the landmark cases *Kalanke* and *Marschall*.[29] In *Kalanke*, a preference was given by a German regional law to female job candidates if their qualifications were equal to those of male candidates. The Court ruled that unconditional or absolute quotas were discriminatory and thus not permissible under EU law. The Commission criticised the Court's ruling and issued a communication reaffirming the need for positive action to challenge

22 Senden, L. A. J. and Visser, M. (2013), 'Balancing a tightrope: The EU Directive on improving the gender balance among non-executive directors of boards of listed companies' *European Gender Equality Law Review*.

23 C-170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] EU:C:1986:204. See also De Vos, *Beyond formal equality: Positive action under directives 2000/43/EC and 2000/78/EC*, p. 14.

24 C-312/86 *Commission of the European Communities v French Republic* [1988] EU:C:1988:485, 15 (hereinafter C-312/86 *Commission v France*; to be distinguished from a second infringement proceeding decided the same year C-318/86 *Commission v France* cited below).

25 C-312/86 *Commission v France* (1988), 8. These special rights are: longer maternity leave, shorter working hours, lower retirement age, days off when children are ill, subsidies in relation to childcare, etc.

26 C-312/86 *Commission v France* (1988), 8. See section (IV) for a detailed analysis.

27 According to A. G. Slynn, 'France's insistence on the traditional role of the mother […] ignores developments in society'. C-312/86 *Commission v France* (1988), Opinion of A. G. Slynn, EU:C:1988:428. See also Rapport d'audience présenté dans l'affaire 312/86, available at https://eur-lex.europa.eu/resource.html?uri=cellar:be18ec45-d47e-4557-9e33-cfb510c6a337.0001.06/DOC_2&format=PDF accessed on 19 September 2018.

28 C-366/99 *Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie and Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation* [2001] EU:C:2001:648, 87.

29 C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] EU:C:1995:322 and C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] EU:C:1997:533.

deeply entrenched inequalities.[30] The Commission also provided an interpretation of *Kalanke*, considering that the Court had only outlawed automatic quotas.[31] This was confirmed by the CJEU itself in *Marschall.* A quota scheme granting priority to equally qualified female candidates applying for a position where women are under-represented is allowed under EU law as long as the priority granted is not absolute but linked to an objective assessment of the individual situation of candidates. This assessment should allow 'reasons specific to an individual male candidate [to] tilt the balance in his favour' and the criteria able to override the priority scheme should not be discriminatory against women.[32] Following the boundaries drawn in these cases, the quotas for training and recruitment in *Badeck* were deemed flexible enough to be compatible with EU law.

In *Abrahamsson* and *Briheche,* the CJEU recognised as a 'clear aim' the achievement of 'substantive, rather than formal, equality by reducing *de facto* inequalities which may arise in society'.[33] However, lessons from these cases suggest that positive action measures should be proportionately tailored to reduce *de facto* inequalities, that is based on legitimate, clear, objective and reviewable criteria and strictly necessary to achieve their target in terms of content and duration. In *Abrahamsson*, the Court warned that granting priority to female candidates who had sufficient but not equal qualifications was going too far and was thus contrary to EU law. In the same way, in *Briheche*, a French rule that waived an age limit to sit a *concours* for entry to public-sector employment for widows who had not remarried was considered by the Court to be discriminatory against widowers who had not remarried. By contrast, following an argument made earlier in *Griesmar* (which we discuss in detail in section IV.2. below), in *Lommers* the rule governing the priority granted to female officials in access to childcare facilities was deemed proportionate if it allowed 'male officials […] who take care of their children by themselves to have access to [the] nursery places scheme on the same conditions as female officials'.[34]

The jurisprudential construction of positive action in the field of gender equality in the EU illustrates two major difficulties. The first difficulty is linked to the fine line between granting advantages to a target group and avoiding these advantages proving discriminatory against other groups. Despite the boundaries drawn by the Court through the proportionality test and the scrutiny criteria developed in the past 30 years, this line is still not always evident when operationalising the notion of positive action through law- and policy-making at national level. This difficulty is illustrated by the recent case of *Leone and Leone*, decided in 2014, which concerns the granting by France of early retirement with service credit and immediate payment of pensions to civil servants who became parents and took career breaks of two months minimum to care for each of their children.[35] Albeit neutral when taken at face value, this measure disadvantages male workers because 'many more women than men [are able to] benefit' from it and therefore indirect, as opposed to direct, sex discrimination was at stake, which could not be justified by what France presented as positive action.[36]

The second difficulty relates to finding the right balance between efforts to redress structural disadvantage by granting women substantive advantages and the risk of reinforcing existing gender stereotypes and

30 COM(96)88 final.

31 Ibid.

32 *Marschall* (1997), 24. The CJEU labelled this a 'saving clause'.

33 C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] EU:C:2000:367, 48 and C-319/03 *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice* [2004] EU:C:2004:574, 25.

34 Griesmar (2001), 56 and C-476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] EU:C:2002:183, 50 and 30 (referring to Griesmar).

35 These career breaks can take the form of maternity leave, paternity leave, adoption leave, parental leave, parental care leave or leave. See C-173/13 *Maurice Leone and Blandine Leone v Garde des Sceaux, ministre de la Justice and Caisse nationale de retraite des agents des collectivités locales* [2014] EU:C:2014:2090, 82.

36 Ibid, 45. The case is particularly interesting as the objective justification test was quite strict. The CJEU rejected France's argument that the measure constituted positive action under Article 141(4) TEC (Article 157(4) TFEU). The Court argued that such a scheme could not 'remedy for the problems which [women] may encounter in the course of their professional career, and does not […] offset the disadvantages to which the[ir] careers are exposed by helping them in their professional life and thereby ensure full equality in practice between men and women in working life'. See also ibid, 101, following the argument previously made in *Griesmar* (2001), 50, 64 and subsequently in C-46/06 *Commission of the European Communities v Italian Republic* [2008] EU:C:2008:618, 57.

perpetuating the segregation of women in caregiving roles outside the labour market.[37] *Roca Alvarez* is a good illustration of this tension between advantaging and stereotyping women.[38] This case concerned a Spanish legal provision which granted female workers who had become mothers breastfeeding leave, while it granted breastfeeding leave to male workers who had become fathers only when their partner was employed (thereby excluding the male partners of self-employed women and women who were not employed). The CJEU found that this rule was discriminatory and thus could not 'be considered [...] a measure eliminating or reducing existing inequalities in society within the meaning of Article 2(4) of Directive 76/207, nor a measure seeking to achieve substantive as opposed to formal equality by reducing the real inequalities that can arise in society and thus, in accordance with Article 157(4) TFEU, to prevent or compensate for disadvantages in the professional careers of the relevant persons'.[39] By contrast, it was 'liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties'.[40]

Recent case law development confirmed the Court's caution towards measures presented as positive action but risking perpetuating gender segregation and stereotypes. In *Maïstrellis* in 2015, the Court considered a measure preventing a male judge from taking paid parental leave if his wife is not employed unless, due to a serious illness or injury, she is unable to take care of the child.[41] The CJEU clarified that such a measure, 'far from ensuring full equality in practice between men and women in working life', reinforced traditional gender roles, overburdening women with caretaking duties.[42]

III A comparative outlook: how and where is positive action implemented at national level?[43]

All 28 EU Member States have enacted legislation on positive action.[44] The ways in which positive action has been integrated into national law however range across a broad spectrum, from binding legal obligations in a minority of EU Member States to simple voluntary measures in a majority of them. National provisions on positive action also vary with regard to their scope of application, ranging, in the majority, from limited public sector requirements to, more rarely, wide-reaching public and private obligations.

Compulsory vs optional positive action

Greece, Germany and Finland are examples of the few jurisdictions in which 'hard' positive action measures have been adopted. In Greece, positive action is 'well understood and widely applied by the courts in their jurisprudence'.[45] Article 116(2) of the Constitution provides for a general obligation for the State and

37 An interesting contribution on this topic compares the US to the EU approach to maternity leave and retirement. See Suk, J. C. (2012) 'From antidiscrimination to equality: Stereotypes and the life cycle in the United States and Europe', *American Journal of Comparative Law*, Vol. 60, p. 75.

38 C-104/09 *Pedro Manuel Roca Álvarez v Sesa Start España* ETT SA [2010] EU:C:2010:561.

39 Ibid, 38.

40 Ibid, 36 and *Lommers* (2002), 41.

41 C-222/14 *Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton* [2015] EU:C:2015:473, 22.

42 *Maïstrellis* (2015), 50.

43 This section is largely based on information provided by the national experts of the European network of legal experts in gender equality law. For more information, please refer to: https://www.equalitylaw.eu/. The authors of this article would also like to thank Nada Bodiroga-Vukobrat, Jean Jacqmain, Sophia Koukoulis-Spiliotopoulos, Adrijana Martinovic, Kevät Nousiainen, Panagiota Petroglou, Marlies Vegter and Nathalie Wuiame for the ad hoc expertise they provided on the issue of positive action in their respective national contexts.

44 Timmer, A. and Senden, L. (2017), *How are EU rules transposed into national law in 2017? A comparative analysis of gender equality law in Europe*, European Commission, BrusselsBrussels, 2017, p. 13.

45 We thank Sophia Koukoulis-Spiliotopoulos and Panagiota Petroglou for providing us with this information. See Koukoulis-Spiliotopoulos, S. (2003) 'Greece: From Formal to Substantive Gender Equality. The leading role of the jurisprudence and the contribution of women's NGOs' in Manganas, A. (2003) *Essays in Honour of Alice Yotopoulos-Marangopoulos*, Panteion University/Bruylant.

the public sector to adopt positive action measures to promote gender equality.[46] The material scope of this provision is much wider than EU law, as it applies to all relevant areas in which public authorities are involved.[47] In Germany, Article 3(2)(2) of the Federal Constitution establishes an obligation for public entities to further women's equality in practice.[48] This takes the form of plans seeking to increase female representation in employment, including hiring and promotion practices. However, since the effectiveness of these practices has been questioned, some *Länder* have recently adopted gender quotas following the criteria set by the CJEU.[49]

In Finland, the requirement for positive action goes even further as it applies not only to the public but also to the private sector, and notably to employers and educational institutions. Finnish public authorities have a positive duty to promote gender equality in preparatory work and decision-making and Finnish law provides for a quota of 40 % for the representation of women in non-elected decision-making bodies.[50] Sanctions are foreseen if the quota is not respected, notably the annulment of the appointment decision.[51] The same quota and rules apply to the administrative and executive boards of companies where the majority shareholder is a public entity.[52] Positive action is also required of private employers and educational institutions through equality plans.[53] Examples of measures are the monitoring and correction of the gender pay gap for private employers and the prevention of sexual harassment for educational institutions.[54] These positive action requirements are subject to enforcement by the Equality Ombudsman and the Non-Discrimination and Equality Tribunal.[55]

At the other end of the spectrum, in many EU Member States positive action is not considered a priority and therefore remains rather limited.[56] For example, positive action is generally neither required nor permitted by Latvian law save a few exceptions. Examples include *ad hoc* vocational training programmes and supportive measures for unemployed members of disadvantaged groups (e.g. parents returning from care leave, people living with disabilities, young people and older people, etc.)[57] and an obligation to 'tak[e] into account the principle of equal representation of gender' in the election of the chairpersons of the departments of the Latvian Supreme Court and of the Chief Justices of its Chambers.[58] These measures, however, do not take the form of binding provisions but, rather, are of a voluntary nature or merely represent principles to be observed without quantitative targets. No sanctions are foreseen by the law if they are not respected.[59] Apart from the Latvian example, positive action requirements mainly

46 Koukoulis-Spiliotopoulos, S. and Petroglou, P. (2018), *Country report gender equality: Greece. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union.

47 Ibid, quoting Article 19 of Act 3896/2010 transposing Directive 2006/54 and Article 5 of Act 3769/2009 transposing Directive 2004/113.

48 Lembke, U. (2018), *Country report gender equality: Germany. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, p. 14.

49 Ibid, p. 14: e.g. North Rhine-Westphalia, Mecklenburg-West Pomerania and Lower Saxony, requiring that women are *substantially* equally qualified.

50 See Nousiainen, K. (2018) *Country report gender equality: Finland. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, p. 13: the quota applies to 'government committees, advisory boards, working groups and other equivalent preparation, planning and decision-making bodies' as well as to 'municipal and inter-municipal co-operation bodies'. Special reasons can justify a derogation and municipal councils are excluded from the quota system. See Section 4 of the Act on Equality, available at https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/75131/Act_on%20Equality_between_women_and_men_2015_FINAL.pdf?sequence=1.

51 Nousiainen, *Country report gender equality: Finland. How are EU rules transposed into national law?*, p. 13.

52 Ibid, pp. 13-14.

53 This concerns employers with 30 or more employees. Ibid, p. 14.

54 Ibid.

55 Ibid, p. 15.

56 Timmer and Senden, *How are EU rules transposed into national law in 2017? A comparative analysis of gender equality law in Europe*, p. 13.

57 Ibid. Article 3(1) (4) of the Unemployed and Job-seekers Support Law mentions 'occupational training, retraining and raising of qualifications' as possible measures but does not give more details on the kind of positive action measures to be adopted.

58 Ibid, p. 13, quoting the Law on Judicial Power (*Likums 'Par tiesu varu'*), Official Gazette No. 1, 14 January 1993, respective amendments Official Gazette No. 160, 7 October 2005. Article 44(2) of the Law on Judicial Power and Part V (65).

59 Ibid.

take the form of soft law rather than hard law measures in a majority of countries in the EU. When they exist, binding obligations tend to concern the public sector. In general, they represent an exception in the private sector, where positive action measures may nonetheless exist on a voluntary basis. The following paragraphs provide a brief comparative overview of the issues and fields in which positive action has been implemented at the national level.

Fields of application: where and how can positive action contribute to gender equality?

This section first explores examples of positive action measures as expressly allowed under the Gender Recast Directive 2006/54/EC and Directive 2004/113/EC on goods and services. It then turns to the representation of women in positions of economic and political power, which has recently been addressed by various EU legal and policy instruments.[60]

Access to employment, promotion and pay

Several mechanisms aim to improve access for women in employment. The most well-known, but also the most controversial, are the so-called gender quotas, which attribute priority to women in relation to hiring, promotion and other employment-related matters. The categorisation proposed by Linda Senden and Goran Selanec usefully highlights the great variety of forms that quotas can take. 'Absolute' preferences grant automatic priority solely based on membership of a target group; 'strong' preferences grant priority to members of a target group who fulfil some minimum requirements; 'tie-break' preferences grant priority to members of a target group if they are equally qualified for a position or benefit; 'flexible' preferences are similar to tie-break preferences but accept that other overriding social goals modify the distribution of priority; and 'weak' preferences consider membership of a target group as one of several criteria for granting priority.[61] Only the last two forms seem to have been accepted by the CJEU so far.[62]

Several Member States have put in place employment quotas. In Germany, following the early cases of *Kalanke* and *Marschall*, discussions have focused more recently on the issue of objective and individual comparative assessments as required by the CJEU to grant preferences to female job candidates.[63] As 'there are nearly never two persons with equal qualifications, let alone a man and a woman', this quota system had been described by experts as 'ineffective' and difficult to apply.[64] North Rhine-Westphalia therefore planned to change the requirement of 'equal qualifications' to 'substantially equal qualifications' in order to smoothe the difficulties linked to such comparative assessments in relation to the gender quota system in place at regional level for recruitment in the civil service.[65] However, the State

60 Directive 2014/95/EU on disclosure of non-financial and diversity information established reporting obligations for large listed companies in relation to *inter alia* gender equality. Recommendations have been made on these reporting obligations: Communication from the Commission (2017/C215/01), Guidelines on non-financial reporting (methodology for reporting non-financial information), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705(01) accessed on 28 September 2018. Advisory Committee on Equal Opportunities for Women and Men (2017) *Opinion on "Gender balance in decisionmaking in politics"*, available at https://ec.europa.eu/info/sites/info/files/final_version_5_december.pdf accessed on 28 September 2018.

61 See Selanec and Senden, *Positive action measures to ensure full equality in practice between men and women, including on company boards*, pp. 4-5.

62 See section II(2) of this article.

63 *Kalanke* (1995) and *Marschall* (1997).

64 Lembke, *Country report gender equality: Germany. How are EU rules transposed into national law?*, p. 15.

65 Ibid, p. 14: 'female civil servants were to be given preference in promotion under provision of substantially equal qualification, aptitude and professional performance based upon an equivalent overall evaluation in the applicant's latest assessment report, unless specific hardships occurred in the person of a male applicant, and under the further conditions of a lower proportion of female civil servants in the higher position applied for than in the corresponding lower positions and not having reached 50 % yet' and quoting the 2016 Statute on the Modernisation of the Civil Service Law.

Administrative Court of North Rhine-Westphalia rejected that amendment and the new quota system was repealed in 2017.[66]

In the Netherlands, some employers, such as the University of Delft, who were willing to increase the number of female professors, reserved a number of tenure-track positions for female academics.[67] This measure was deemed lawful by the Dutch equality body because it aimed to combat the persevering structural disadvantages suffered by women in the face of the inefficiency of numerous earlier measures taken by the University Board. Despite the Dutch equality body's approval, doubts were raised as regards the measure's permissibility under Article 157(4) TFEU and the CJEU case law following *Kalanke*.[68] Other similar measures taken around the same time, for instance an initiative by the University of Groningen to invite only female applicants for a professorship position, were considered discriminatory against men.[69]

Other examples include Austria, where 40 % female representation needs to be reached at all levels of the federal and provincial civil service.[70] The European Commission itself adopted positive action measures and indicated that it was 'well on track to meet its own target of 40 % female representation in senior and middle management positions by 2019', with a rate of about 35 % in 2017.[71]

Beyond quotas and quantitative targets, numerous other types of measures have been adopted that address the representation of women on the labour market as well as their working conditions, including pay. In Denmark, initiatives such as specific training offered to female staff are allowed for a limited period of time under the condition that the representation of one gender is 25 % or less of the whole workforce.[72] Following the Commission's recent efforts to tackle the gender pay gap,[73] the issue of pay transparency has been on the political agenda of a number of EU Member States. In Poland, positive action measures in the field of pay have translated into the creation of a free IT application which lets users calculate the pay gap in their professional sector.[74]

Positive action in the consumption and supply of goods and services

There are fewer instances of positive action in the field of the consumption and supply of goods and services. An interesting example was provided in 2017 by a textile company that launched a marketing campaign to raise awareness about the gender pay gap in Finland.[75] It reflected the average difference between women's and men's pay by selling its products at 83 % of their usual price to its female customers and announced that the benefits of the campaign would be donated to an organisation protecting women's rights.[76] The campaign was not exclusionary in the sense that all customers would have been entitled to the discount upon request, without being required to demonstrate their gender identity. However, the campaign triggered several complaints of discrimination. The Equality Ombudsman

66 See ibid, p. 15 quoting: Statute on Amendments to the Civil Service Law of North Rhine-Westphalia of 19 September 2017, available at https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument?Id=XMMGVB1729|764|765 and State Administrative Court of North Rhine-Westphalia, judgment of 21 February 2017, 6 B 1109/16. This decision pre-empted a decision of the State Constitutional Court on the topic.

67 Vegter, M. (2018), *Country report gender equality: The Netherlands. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union2018, p. 11.

68 Ibid.

69 Ibid.

70 Thomasberger, M. (2018), *Country report gender equality: Austria. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, p. 12: Paragraph 8 of the Equal Treatment Act (Private Sector) and Paragraphs 11 to 11d of the Federal Equal Treatment Act for Civil Servants.

71 European Commission, *International Women's Day 2017: Gender equality – a European export* (8 March 2017) available at http://europa.eu/rapid/press-release_IP-17-489_en.htm accessed on 20 September 2018.

72 Jørgensen, S. (2018), *Country report gender equality: Denmark. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union2018, p. 12.

73 European Commission, *EU Action Plan 2017-2019 Tackling the gender pay gap COM(2017)678* (2017).

74 See Zielińska, E. (2018), *Country report gender equality: Poland. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union2018, pp. 13-14.

75 See Nousiainen, *Country report gender equality: Finland. How are EU rules transposed into national law?*

76 Ibid.

in fine concluded that it was not discriminatory as long as all customers had clearly been informed that they were *de facto* entitled to the discount.[77] This is an interesting example which could pose new questions in relation to EU law in the future. The initiative of the Finnish company can surely be regarded as a case of overstretching the concept of positive action. At the same time, it can also be considered to be a thought-provoking, symbolic initiative. While this measure can *de facto* do little to improve full equality in practice, it does increase the visibility of, and public awareness about, the problem of the gender pay gap.

On 8 March 2018, the Lithuanian equality body launched a campaign against gender-based pricing called 'Price Has No Gender'.[78] The Lithuanian Ombudsperson deemed the decision of a car-washing company to offer discounts to female customers only in order to demonstrate the user-friendliness of a new service discriminatory.[79] This example demonstrates how 'positive action' risks being misinterpreted, misappropriated and misused as a pretext to implement measures that actually reinforce existing harmful gender stereotypes. Typically, the initiative described above is based on a traditional representation of segregated gender roles, with activities related to cars viewed as 'masculine', which affects collective representations of women's capabilities and can have demeaning effects on gender equality (e.g. the argument that a traditionally masculine service has become 'easy-to-use' so women can now use it).[80]

Positive action measures aimed at improving the gender balance on company boards

The equal representation of women on company boards has been an important topic on the EU agenda for many years now.[81] In 2012, the Commission proposed a directive which aimed to improve the gender balance on non-executive company boards.[82] The initial plan was to set a quantitative objective of 40 % for the proportion of each gender on company boards to be reached by 2020 for the private sector and by 2018 for the public sector. However, while a broad consensus exists on the necessity of improving the representation of women in this area and many Member States have adopted measures to this end, the directive proposal has now been blocked in the Council for years. Member States mainly disagree about the transformation of positive action into a binding EU obligation and remain in favour of more subsidiarity.[83]

At the national level, some Member States, such as Belgium, France, Italy, Germany and more recently Portugal and Austria, have adopted hard legal measures such as mandatory quotas along with sanctions in case of non-respect, in order to improve the gender balance at the level of company management.[84]

77 Ibid, quoting the Equality Ombudsman's opinion of 29.08.2017, Dnro TAS/225/2017.

78 See Davulis, T. (2018) *The Office of the Equal Opportunities' Ombudsperson in Lithuania started campaign against possible discriminatory pricing of services for women and men*, European Network of legal experts in gender equality and non-discrimination; European Union, 24 July 2018, available at https://www.equalitylaw.eu/downloads/4651-lithuania-the-office-of-of-the-equal-opportunities-ombudsperson-in-lithuania-started-campaign-against-possible-discriminatory-pricing-of-services-for-women-and-men-pdf-138-kb accessed on 28 September 2018.

79 Ibid.

80 The subsequent pilot study launched by the Ombudsperson also revealed discriminatory 'gender pricing' based on gender stereotypes in beauty services such as hairdressing, manicuring, etc. While hairdressing is tendentially more expensive for women, a manicure or a pedicure is more expensive for men. See ibid.

81 See e.g. Selanec and Senden, *Positive action measures to ensure full equality in practice between men and women, including on company boards* and Oliveira, Á. and Gondek, M. (2014), 'Women on Company Boards – An Example of Positive Action in Europe' *EUI Working Papers* 2014/34, Robert Schuman Centre for Advanced Studies.

82 European Commission, Proposal of 14 November 2012 for a Directive of the European Parliament and of the Council on improving the gender balance among nonexecutive directors of companies listed on stock exchanges and related measures (2012) COM (2012) 614 final.

83 Council of the European Union, Progress Report of 31 May 2017 on the Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among directors of companies listed on stock exchanges and related measures (2017) 2012/0299 (COD), 2, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9496_2017_INIT&from=EN accessed on 19 September 2018.

84 Senden, L. and Kruisinga, S. (2018), *Gender-balanced company boards in Europe: A comparative analysis of the regulatory, policy and enforcement approaches in the EU and EEA Member States*, European Network of legal experts in gender equality and non-discrimination; European Union, available at https://www.equalitylaw.eu/downloads/4537-gender-balanced-company-boards-in-europe-pdf-1-68-mb accessed on 20 September 2018, p. 52. See also van Hoof, F. (2018), 'Key

These measures generally apply to all state-owned companies and to private companies of a certain size, often those listed on the stock exchange. In Austria for example, legislative developments that entered into force in January 2018 now require companies listed on the stock exchange with 1 000 employees or more to apply a 30 % quota to improve the gender balance on any supervisory board that has six or more members. Breaching this rule is sanctioned by an empty seat policy.[85]

In Estonia, Finland, Greece and Slovenia, binding legislation has been adopted with a view to this but exclusively in relation to state-owned companies.[86] Other Member States have adopted a soft regulatory approach applying either to the private sector or both public and private companies, such as Bulgaria, Denmark, Finland, the Netherlands, Romania and Spain.[87] For instance, the Netherlands has adopted a comply-or-explain mechanism according to which companies must meet a 30 % target for the representation of each gender on company boards. Renewed in 2017, this soft legal mechanism foresees that if the target is not reached, companies have to explain the reasons for failure and the measures put in place in order to remedy the gender imbalance.[88] However, research shows that the efficiency of such a mechanism is minimal in the Dutch context.[89] Spanish law foresees a similar mechanism but without setting any quantitative target.[90]

In contrast, in 2017 Croatia, Cyprus, the Czech Republic, Greece, Hungary, Latvia, Lithuania, Malta and Slovakia had no legal provisions aiming to increase the representation of women on company boards.[91] However, Croatia, the Czech Republic, Malta and Slovakia do have policy measures in place in this regard.[92] Examples of recent policy measures in Malta include a monitoring programme aimed at advancing the careers of women in economic decision-making, along with a directory of professional women 'giving visibility and more opportunities to professional and competent women for appointment on boards and committees'.[93] A diversity charter was adopted in May 2017 in Slovakia, which aims to support diversity and inclusion in the workplace through several channels such as awareness-raising initiatives, training, mainstreaming diversity in human resources, decision-making, etc.[94] In Croatia, these policy measures

developments at national level in legislation, case law and policy', *European Equality Law Review*, Vol. 1, pp. 60 and 107 available at https://www.equalitylaw.eu/downloads/4639-european-equality-law-review-1-2018-pdf-1-086-kb accessed on 28 September 2018; Thomasberger, M. (2017), *Austria enacts legislation for a 30 % quota of women on supervisory company boards*, European Network of legal experts in gender equality law; European Union, 23 November 2017, available at https://www.equalitylaw.eu/downloads/4510-austria-austria-enacts-legislation-for-a-30-quota-of-women-on-supervisory-company-boards-pdf-168-kb accessed on 28 September 2018; Palma Ramalho, M. do R. (2017), *Recent developments in Portuguese employment law regarding women on company boards,* European Network of legal experts in gender equality law; European Union, 23 November 2017, available at https://www.equalitylaw.eu/downloads/4512-portugal-recent-developments-in-portuguese-employment-law-regarding-women-on-company-boards-pdf-120-kb accessed on 28 September 2018.

85 Thomasberger, *Country report gender equality: Austria. How are EU rules transposed into national law?*, p. 13. This rule does not apply to companies whose workforce is composed of less than 20 % of employees of one sex.

86 Senden and Kruisinga, *Gender-balanced company boards in Europe: A comparative analysis of the regulatory, policy and enforcement approaches in the EU and EEA Member States*policy and enforcement approaches in the EU and EEA Member States, p. 47.

87 Ibid.

88 Vegter, *Country report gender equality: The Netherlands. How are EU rules transposed into national law?*, p. 12.

89 Ibid, p. 12, quoting Letter to Parliament, 6 March 2018, ref. 1327715.

90 Ballester Pastor, M. A. (2018), *Country report gender equality: Spain. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, p. 11.

91 Senden and Kruisinga, *Gender-balanced company boards in Europe: A comparative analysis of the regulatory, policy and enforcement approaches in the EU and EEA Member States*policy and enforcement approaches in the EU and EEA Member States, p. 46.

92 Ibid, p. 59.

93 Both initiatives were launched in 2015 with the support of the European Union. See ibid, p. 58 and National Commission for the Promotion of Equality, 'Gender balance in decision-making' (2016), available at https://ncpe.gov.mt/en/Pages/Projects_and_Specific_Initiatives/Gender_Balance_in_Decision_Making.aspx accessed on 28 September 2018.

94 Magurová, Z. (2018), *Country report gender equality: Slovakia. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, p. 15, and Pontis, N. 'Charta Diverzity' (2017), available at https://www.chartadiverzity.sk/charta-diverzity-sr/english-summary/ accessed on 28 September 2018.

took the form of a public campaign including the launch of a special website, awareness-raising through the media and educational seminars promoting gender equality on company boards.[95]

Political representation and elected functions

The representation of women in positions of political power is as important for gender equality as their presence in the economic sector. Some Member States such as Belgium, France and Slovenia have imposed diverse forms of quotas to improve gender equality in political elections. In Belgium, for instance, a quota system ensures the parity of electoral lists at all levels of the State (federal, regional and local) – a measure described as 'highly effective'.[96] In Slovenia, a gender quota of 40 % was introduced in the early 2000s for local elections and elections to the European Parliament, and in 2006 a gender quota of 35 % was introduced for national parliamentary elections. Electoral lists proposed by political parties can be rejected in case of non-respect.[97] In France, the law on departmental elections was reformed in 2013 to introduce a binominal system by which voters no longer choose one candidate but a team composed of a man and a woman.[98]

In Germany, the State Constitutional Court of Mecklenburg-West Pomerania, later imitated by the State Labour Court of Schleswig-Holstein, confirmed the validity of a provision of the regional equal treatment legislation which, in the public sector, reserved the right to run and vote for the position of equal opportunities commissioner to female employees only.[99] Arguing that women are the victims of structural discrimination, the Court explained that the law constituted a positive action measure meant to compensate for the disadvantages generally suffered by women in their working life, e.g. the difficulties of reconciling work and family life, sexual harassment in the workplace, their under-representation in leading positions, etc. Thus it departed from a formal equality approach, stating that special measures are essential to achieve substantive equality.[100]

By contrast, in Sweden, where the representation of women in both the Parliament and the Government amounts to almost 50 %, no gender quotas were used. This relative gender balance was achieved thanks to a voluntary practice among political parties which, motivated by public expectations, appoint a woman as every second candidate for political elections.[101] Finally, other types of positive action measures include training, awareness-raising campaigns, capacity-building, mentoring and networking programmes to encourage women to enter politics. Such policies are in place, for instance, in Slovenia through the project 'Meta Dekleta – Promotion of active citizenship of young women' and Ireland with the platform 'Women for election'.[102]

95 Nacsa, B. (2018), *Country report gender equality: Hungary. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, pp. 13-14.

96 Article 11*bis* of the Constitution quoted in Jacqmain, J. (2018) *Country report gender equality: Belgium. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, p. 14, and European Commission, *2018 report on equality between women and men in the EU*, Publications Office of the European Union, p. 29.

97 European Commission, *2018 report on equality between women and men in the EU*.

98 Ibid.

99 See Lembke, *Country report gender equality: Germany. How are EU rules transposed into national law?*, p. 15, citing State Constitutional Court of Mecklenburg-West Pomerania, judgment of 10 October 2017, LVerfG 7/16 and State Labour Court of Schleswig-Holstein, judgment of 2 November 2017, 2 Sa 262 d/17. The measure applied to all bodies where such an equal opportunities commissioner had to be elected, i.e. in employee councils, councils of judges and public prosecutors' councils in all regional public institutions (state schools, public administration, courts, etc.). The task of the equal opportunities commissioner is to promote gender equality in these bodies.

100 Ibid, p. 15.

101 Julén Votinius, J. (2018), *Country report gender equality: Sweden. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, p. 13.

102 Commission, *2018 report on equality between women and men in the EU*, p. 30. Meta Dekleta – Promotion of Active citizenship of young women, available at https://eeagrants.org/project-portal/project/SI03-0014 accessed on 28 September 2018, and Women for Election, available at http://www.womenforelection.ie/ accessed on 28 September 2018.

Difficulties

Many difficulties exist with regard to the implementation of positive action at the national level. Firstly, it can prove arduous to draw general rules of application from the boundaries established by the CJEU between lawful and unlawful positive action, let alone to transpose these rules into concrete policy-making. In fact, it has been deplored that the complexity and restrictiveness of the rules deployed by the CJEU in its successive case law in effect hinder positive action.[103] In Germany, the difficulties exposed above in relation to the comparative assessment of equal qualifications for male and female job candidates were also signalled as a recurring obstacle to the effectiveness of positive action.[104] In Sweden, experts highlight increasing uncertainties about the scope and meaning of positive action following the CJEU's invalidating decision in the *Abrahamsson* case.[105] Furthermore, the very definition of individual merit, which is used in EU law and beyond as a yardstick to articulate the limits of positive action,[106] is highly indeterminate and therefore makes designing lawful positive action measures challenging.[107]

Secondly, the indeterminacy and vagueness of the set of recommendations and measures often contained in action plans and strategic documents might also hinder the effective implementation of concrete positive action measures.

The question of the beneficiaries of positive action is also challenging. While some national legislation, such as the Dutch law for instance, explicitly refers to women, EU law remains neutral and speaks of the 'under-represented sex'. The use of this neutral formulation was criticised, as men are often not a disadvantaged group even when they are under-represented.[108]

A further challenge is the enforcement of positive action. In fact, the merely declaratory nature of positive action measures, the lack of precise targets and objectives and the absence of dissuasive sanctions and appropriate remedies in case of breaches have repeatedly been signalled as obstacles to their proper implementation.[109] In Finland, for instance, the enforcement of legislation is not monitored effectively and sanctions for non-implementation are often not consistently implemented.[110] In Belgium, the Gender Act in principle allows positive action, which is considered a lawful justification for differential treatment, but is in fact still awaiting implementation through a Royal Decree that has not yet been adopted, leaving positive action in a grey zone.[111] Enforcement should also address the differences in gender representation across the hierarchical spectrum within given sectors. In Croatia for instance, it would not be enough to consider the average representation of women among judges, as it ranges from 72 % in municipal courts to 23 % at the Constitutional Court.[112]

Finally, positive action can prove a double-edged sword, as its positive effects on gender equality risk being offset by the resentment, misunderstandings and controversies it often provokes. In a number of EU Member States, including Germany, Belgium, Croatia and the Netherlands, experts express concerns

103 Vegter, *Country report gender equality: The Netherlands. How are EU rules transposed into national law?*, p. 11 and Timmer and Senden, *How are EU rules transposed into national law in 2017? A comparative analysis of gender equality law in Europe*.
104 Lembke, *Country report gender equality: Germany. How are EU rules transposed into national law?*, p. 14.
105 Julén Votinius, *Country report gender equality: Sweden. How are EU rules transposed into national law?*, p. 12.
106 See section II(2) of this article.
107 See McCrudden, 'Rethinking positive action', p. 225.
108 See, for instance, what Bourdieu calls the 'double standard': 'As is seen in the difference between the chef and the cook, the couturier and the seamstress, a reputedly female task only has to be taken over by a man and performed outside the private sphere in order for it to be thereby ennobled and transfigured'. Bourdieu, P. (2001), *Masculine domination*, Stanford University Press, p. 60.
109 We would like to thank Nada Bodiroga-Vukobrat, Adrijana Martinovic, Kevät Nousiainen and Marlies Vegter for highlighting this.
110 See Nousiainen, *Country report gender equality: Finland. How are EU rules transposed into national law?*, p. 15.
111 Jacqmain, J., *Country report gender equality: Belgium. How are EU rules transposed into national law?,* p. 13.
112 We thank Nada Bodiroga-Vukobrat and Adrijana Martinovic for highlighting this data. See Edina Aranjoš Borovac (2018), *Women and Men in Croatia, 2018*, p. 58, p. 56 available at https://www.dzs.hr/Hrv_Eng/menandwomen/men_and_women_2018.pdf accessed on 11 October 2018.

over 'fundamental misunderstandings', 'under-development','clumsy usages' and 'resistance' in relation to the purpose and content of positive action measures.[113] Positive action is a popular ground for political hijacking by populist and conservative parties in some Member States, such as Germany, where it has also been increasingly contested in courts.[114] Stigmatisation of what are pejoratively called 'quota women' or quota groups is also alarming, as beneficiaries of positive action risk being victimised and their skills and qualifications denigrated, therefore defeating the very purpose of positive action.[115] At the level of political debates, for instance in the Netherlands, the misunderstandings surrounding positive action have led to resistance and frustration from majority groups who see themselves as disadvantaged, but also from minority groups themselves, who do not want to be categorized as the beneficiaries of quotas or preferences.[116]

While this section has given concrete examples of the enforcement of positive action at the level of EU Member States and has analysed some of its legal, social and political consequences, the next section delves in detail into the legal articulation of the concept and the difficulties of its deployment. To this end, the analysis focuses on the French example – France having played a historical role in the development of the concept of positive action through its judicial dialogue with the CJEU.

IV The limitations and difficulties of positive action: the example of the French context

The difficulties and limitations of positive action are well illustrated by the arduous process of its integration into the French legal system.

French constitutional tradition

It is well known that French law is defined by its generality and is fundamentally imbued with the principle of equality, which is different from the principle of non-discrimination.[117] Article 1 of the Declaration of Human and Civic Rights of 1789, which still forms part of positive law in France, states that '[m]en are born and remain free and equal in rights' and that the law 'must be the same for all, whether it protects or punishes'. It further provides that '[a]ll citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.'[118] Article 1 of the Constitution, which remained unchanged until 2008, maintains this principle: 'France shall be an indivisible, secular, democratic and social Republic. It

113 A notable exception to this is the case of Greece, where experts Sophia Koukoulis-Spiliotopoulos and Panagiota Petroglou find positive action to be generally well understood and widely applied. A further exception in relation to Finland is worth mentioning. Kevät Nousiainen finds that positive action is positively regarded by social partners as a less confrontational method to combat discrimination. Regarding Belgium, Jean Jacqmain and Nathalie Wuiame point out an interesting example in the civil service of the Brussels Capital Region, where an assessment for promotion found a male and a female candidate of equal merit and the female candidate was promoted, the Government arguing positive action in favour of women. The male applicant challenged this decision and the Conseil d'Etat (highest administrative court) annulled the decision, arguing that it lacked the formal motivation required by the Act of 29 July 1991, as the Government did not demonstrate that women were under-represented in that particular professional category (*Khassime*, 6 October 2015, n°232.451). See Lembke, *Country report gender equality: Germany. How are EU rules transposed into national law?*, p. 15. We would also like to thank the national experts of the countries mentioned for providing their views on the development of positive action in their national context.

114 Ibid, p. 15.

115 Ibid. We would like to thank Kevät Nousiainen for drawing our attention to the term 'quota women' in relation to the Finnish debate on positive action.

116 We would like to thank the Dutch expert, Marlies Vegter, for drawing our attention to these counter-reactions.

117 Equality means that persons in the same or a similar situation must be treated equally. A comparison is required to establish differential treatment, and the cause of this unequal treatment does not matter. By contrast, non-discrimination means that no decision impacting a person can be taken if motivated by a prohibited criterion. A comparison may be useful to establish discrimination but is not always necessary, and the prohibited criterion must be shown.

118 Déclaration des Droits de l'Homme [Declaration of Human and Civic Rights] (1789), Articles 1 and 6.

shall ensure the equality of all citizens before the law, without distinction of origin, race or religion'.[119] The preamble to the Constitution of 1946, which also forms part of positive law, specifies that, '[t]he law guarantees women equal rights to those of men in all spheres'.

However, not all men, and *a fortiori* not all women, were included in this conception of equality. Women and colonised peoples, who had special status, did not have equal rights. It was not until 1936 that the Conseil d'État (Council of State) granted women access to civil service posts without distinction except for operational reasons.[120] Nevertheless, these 'operational' reasons long continued to be closely linked to stereotypes and prejudices.[121] It was only with the Order of 21 April 1944 that women obtained the right to vote and not until the Law of 13 July 1965 that some equality was recognised in matrimonial regimes, although the preamble to the Constitution of 1946, which is still part of positive law, already specified that '[t]he law guarantees women equal rights to those of men in all spheres'.[122] In short, the much vaunted doctrine of equality was not without major flaws.

Furthermore, it never prevented the introduction of numerous specific measures far beyond the historical purview of maternity protection. These included differences in the minimum age for access to employment and in the retirement age, exclusion from certain roles and from night work, specific rights to rest, jobs restricted to people of one sex or the other, separate schools and qualification systems – without these measures apparently being considered violations of the constitutional principle of equality. Some of the measures were associated with protecting women's reproductive function, but many were related to so-called 'issues of decency' and thus to stereotypes based on women's supposed weakness. Incidentally, these restrictions were sometimes the result of demands made by men's trade unions.[123]

Upholding equal rights: three French cases before the Court of Justice

It is only latterly, in the second half of the 20th century, that the principles of equality and non-discrimination have enabled these measures to be challenged. In the first instance they were judged harshly. Except in cases where belonging to a particular sex is an essential condition for an activity (such as performing artists), they were gradually abolished or declared unlawful. There was no reflection – or very little – on the 'positive' aspect of the measures. The sole aim was formal equality. Gradually, the most obvious barriers disappeared – in law if not in reality – especially in relation to access to occupations. However, it is not easy to repeal protective measures without creating new inequalities. It is also interesting to examine the arguments of those who defended the measures, including some trade unions seeking to protect their beneficiaries from greater vulnerability.

A number of emblematic cases warrant attention. In terms of specific protective measures in collective agreements, the clauses establishing them, which clearly derogate from equality, were regulated but continued to be authorised by the law of 16 July 1983 on the rights and obligations of civil servants:[124] 'Any term reserving the benefit of any measure to employees on grounds of sex included in any collective labour agreement or labour contract shall be void, except where such a clause is intended to implement the provisions of Articles L. 122-25 to L. 122-27, L. 122-32 and L. 224-1 to L. 224-5 of this code' (relating to protection of pregnancy and maternity).

119 The planned consitutional reforms, the discussion of which is currently postponed, removes 'race' and inserts 'sex' into this article.

120 CE, 3 juillet 1936, Dlle Bobard [Council of State, 3 July 1936, Miss Bobard].

121 Roman, D. (2018), 'La promotion des femmes par la jurisprudence administrative in Actes du colloque « la juridiction administrative et les femmes »' ['The promotion of women through administrative case law, in conference proceedings, "Administrative jurisdiction and women"'], *AJFP*, p. 2215.

122 Ordonnance du 21 avril 1944 portant organisation des pouvoirs publics en France après la Libération [Order of 21 April 1944 organising public authorities after the Liberation of France], Art. 17 and Loi portant réforme des régimes matrimoniaux, 13 juillet 1965, n° 65-570 [Law reforming matrimonial systems, 13 July 1965, n° 65-570].

123 Perrot, M. (1998), Les femmes ou les silences de l'Histoire [Women or the silences of history], Paris, Flammarion.

124 Loi dite 'Loi Le Pors' portant droits et obligations des fonctionnaires, 13 juillet 1983, n° 83-634 [Law on the rights and obligations of civil servants, 13 July 1983, n° 83-634].

In 1988, France was referred to the CJEU because of the 'special benefits' accorded to women in collective agreements.[125] For the French Government, the so-called 'special benefits' provision[126] should be *'considered compatible with the principle of equality when those special rights derive from a concern for protection. The French Government consider[ed] that the directive should be interpreted in the same manner, and that such an approach [wa]s supported by the provisions of Article 2 (3) and (4) [on specific protection for women, pregnancy and maternity and on positive action], of the directive. The French Government further consider[ed] that neither the directive nor the principle of equal treatment for men and women [wa]s intended to modify the organization of the family or the responsibilities actually assumed by the marriage partners. It claim[ed] that the special rights for women provided for in collective agreements [we]re designed to take account of the situation existing in the majority of French households. Member States, moreover, have a degree of discretion in that regard when implementing the directive'*.[127]

In other words, according to France, the 'special benefits' at stake were compensation measures to take account of women's *de facto* different social situation. No mention was made of any need to change this situation, the focus was purely on compensating for the consequences. Thus, 'positive action' was not invoked as such, the French reasoning merely defended the existence of a compensation measure deemed admissible because, France argued, the aim of the directive was not to transform gender relations in work and family life. This analysis was firmly rejected by the Court.[128] The Court stated that, generally, there can be no derogations from the principle of equality under the guise of 'removing existing inequalities'. Thereby it already made a distinction between compensation and positive action and, consequently, rejected the French position advocating general compensation measures. France's reaction was not to abolish all special measures, but to restrict the scope by regulating collective negotiation.

It is also interesting to look at another 'French' case from 1988.[129] Traditionally, separate *concours* (recruitment competitions) were held for candidates seeking entry to different sections of the civil service.[130] Thus, among others, there were different competitions for police officers and teachers. The justification given for this is interesting: for some sections (the police and prison officers) the contingencies of the role meant that it had to be restricted to a single sex. With regard to primary school teachers and physical education teachers, the French Government highlighted the need to give children the opportunity to be educated by men as well as women, since the profession was very female-dominated and the joint competitions were not enabling enough men to be recruited. The French Council of State approved this measure,[131] holding that restricting women's access in this way was justified, 'taking into account the mission of the civil service in relation to pre-school and primary education and the potential

125 C-312/86 *Commission v France* (1988).

126 Ibid, 8. The judgment of the CJEU specifies that, 'According to the Commission, which has not been contradicted on this point by the French Government, special rights for women included in collective agreements relate in particular to: the extension of maternity leave; the shortening of working hours, for example for women over 59 years of age; the advancement of the retirement age; the obtaining of leave when a child is ill; the granting of additional days of annual leave in respect of each child; the granting of one day's leave at the beginning of the school year; the granting of time off work on Mother's Day; daily breaks for women working on keyboard equipment or employed as typists or switchboard operators; the granting of extra points for pension rights in respect of the second and subsequent children; and the payment of an allowance to mothers who have to meet the cost of nurseries or childminders'.

127 Ibid, 10-11.

128 Ibid. 'It must be borne in mind that the principle of equal treatment which is to be implemented, under Article 5(2)(b) of the directive, with regard to collective labour agreements means, in the words of Article 2(1) of the directive, that "there shall be no discrimination whatsoever on grounds of sex". Article 2(3) and (4) provides that the directive is to be without prejudice either to provisions concerning the protection of women, particularly as regards pregnancy and maternity, or to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in the directive. It must be concluded, both from the generality of the terms used in the French legislation, which allows any clause providing "special rights for women" to remain in force, and from the examples of such special rights which have been cited in the pleadings, that the contested provisions cannot find justification in Article 2(3). As some of those examples show, some of the special rights preserved relate to the protection of women in their capacity as older workers or parents – categories to which both men and women may equally belong.'

129 C-318/86 *Commission of the European Communities v French Republic* [1988] EU:C:1988:352.

130 Within the civil service there are different sections or 'corps' of employees linked to a particular profession or field. For example: primary teachers or police officers.

131 CE, 16 avril 1986, n° 47337 [Council of State, 16 April 1986, n° 47337].

psychological benefit for children in this age group of having a teaching body composed of men and women'. The Commission did not share this analysis and referred France to the CJEU.[132] During the course of the proceedings, teachers had been withdrawn from the list of civil service corps with separate *concours*, which left the police, prison administration and a very specific teaching corps.[133] Irrespective of the solution adopted by the Court judgment, which relates to the remaining corps, it is notable that the French Government's argument already raised the issue of the beneficiaries of positive action. It was not an audible argument at the time, but we cannot be sure that it would still be the case today, as we shall see.

The third well-known French case is the *Griesmar* case[134] which relates to increases to insurance duration for civil servants' pensions. The legislation on retirement pensions for civil servants, considered similar to a payment under Article 119 of the EC Treaty then applicable, limited *to female civil servants who have had children a service credit for the calculation of their retirement pension. Their pension was credited not because of a loss of entitlements resulting from maternity leave but because they had brought up children. Thus this measure excluded male civil servants from benefiting from this credit even if they had been responsible for their children's upbringing.* Here, again, the French Government defended the measure as a compensation measure, due to the incontestable fact that women's careers entitle them to much lower pensions than men. Once again, the measure was too general to be justified.

The Court noted that '[t]he measure in question [wa]s limited to granting female civil servants who are mothers a service credit at the date of their retirement, without providing a remedy for the problems which they may encounter in the course of their professional career.' Following this judgment, fathers also obtained the service credit but, given the cost of this measure, a reform was deemed necessary. However, this reform, while it removed the increases, significantly penalised women who had, in fact, seen their careers curtailed. In terms of pensions, the issue was not about entitlements which could be exercised immediately but entitlements built up over a long period, meaning that a simple alignment could produce serious inequalities.[135] Law 2004-1485 of 30 December 2004 preserved the automatic nature of the benefit for women, while men would have to provide proof of their involvement in caring for their children.[136] The Leone judgment subsequently rejected this position, noting that '[u]nless it can be justified by objective factors unrelated to any discrimination on grounds of sex, such as a legitimate social policy aim, and is appropriate to achieve that aim and necessary in order to do so, which requires that it genuinely reflect a concern to attain that aim and be pursued in a consistent and systematic manner in the light thereof, a service credit scheme for pension purposes such as the one at issue in the main proceedings gives rise to indirect discrimination in terms of pay as between female workers and male workers'.[137]

Following this, in a judgment by the Assembly of 27 March 2015,[138] the Conseil d'Etat considered that proof of the existence of a legitimate motive had been provided and approved the law reforming the pension system, noting furthermore that it had been amended again to remove the benefit for the future.[139] This marked the end of this long-running dispute.

132 C-318/86 *Commission v France* (1988).
133 Ibid.
134 *Griesmar* (2001).
135 Masse-Dessen, H. « Retraite des femmes: existe-t-il des marges de manœuvre du point de vue du droit communautaire sur la reconnaissance de droits particuliers? Interrogations et espoirs » ['Women in retirement: is there room to maneouvre on the recognition of special rights from the point of view of Community law? Concerns and hopes'], *Revue française des affaires sociales* 2012/4, pp. 207-213, available at https://www.cairn.info/revue-francaise-des-affaires-sociales-2012-4-page-207.htm accessed 20 September 2018.
136 Loi de finances rectificative pour 2004, 30 décembre 2004, n° 2004-1485 [Corrective financial law for 2004, 30 December 2004, n° 2004-1485].
137 Leone and Leone (2014).
138 CE Ass., 27 mars 2015, *M. Quintanel*, n° 372426 [Council of State Assembly, 27 March 2015, no. 372426].
139 Loi portant réforme des retraites, 9 novembre 2010, n° 2010-1330 [Law reforming the pension system, 9 November 2010, n° 2010-1330].

Introducing positive action into French law

This is the landscape in which the debate on positive action is taking place in France. On the domestic level, it is conceived as a derogation and intrinsically suspect. But designed as a compensation measure it is also essentially a social justice measure. Where does the balance lie? Is it possible to answer this question without defining positive action more specifically? We will consider a number of examples.

Firstly, since 1988 and with subsequent laws, the debate on 'special measures' has changed. It is now accepted that strict equality does not lead to justice and that voluntary, and therefore positive, action is required. Thus, the law has progressively established requirements in the private sector regarding the collection and publication of information about the state of equality between women and men, and regarding the negotiation and development of measures promoting professional equality within companies. Accordingly, Article L. 1142-4 of the Labour Code makes explicit provision for positive action in favour of women, although it specifies that such measures must be temporary.[140] They are described as 'measures adopted solely to benefit women with the aim of establishing equal opportunities for women and men, especially by removing existing inequalities which affect women's opportunities', and can take the form of (1) 'regulatory provisions in the areas of recruitment, training, promotion, organisation and working conditions', (2) 'stipulations in extended industry-wide agreements or extended collective agreements', and (3) 'the application of the [so-called] strategy for professional equality for women and men'.[141] The Law of 9 May 2001 promoting professional equality between women and men introduced the requirement to conduct collective negotiations on equality within companies, to produce written reports and to implement appropriate measures.[142] In the different professional sectors, negotiations must now be conducted every three years.

The recent law of 5 September 2018 introduced a requirement for companies with over 50 employees to publish indicators annually on the pay gap between women and men and on the action taken to close the gap.[143] The necessary procedures and a methodology are defined by decree and there is an obligation to conduct negotiations. If the indicators are unsatisfactory, companies must ensure compliance within three years or face penalties. The legal framework thus now allows and even imposes proactive measures. In the public sector, the Law of 12 March 2012 introduced similar measures.[144]

However, no text clearly defines the nature of the measures referred to by the Law of 5 September 2018, Article L. 1142-4 of the Labour Code and the Law of 9 May 2001, which must only respect the general norms and, in particular, those which result from European law.[145] Thus merely intending to establish an advantage for the disadvantaged group is not sufficient. This would be illegal, since it is not a 'measure intended to protect pregnancy or maternity or to promote equal opportunity for men and women by removing existing inequalities which affect women's opportunities', especially in relation to employment.[146]

140 Code du Travail [Labour Code], Art. L 1142-4: The provisions of Articles L. 1142-1 and L. 1142-3 are without prejudice to the introduction of temporary measures adopted solely to benefit women with the aim of establishing equal opportunities for women and men, especially by removing existing inequalities which affect women's opportunities. These measures result from: 1 regulatory provisions established in the areas of recruitment, training, promotion, organisation and working conditions; 2 stipulations in extended industry-wide agreements or extended collective agreements; 3 the application of the strategy for professional equality for women and men.

141 Ibid.

142 Loi relative à l'égalité professionnelle entre les femmes et les hommes, 9 mai 2001, n° 2001-397 [Law on professional equality between women and men, 9 May 2001, n° 2001-397].

143 Loi pour la liberté de choisir son avenir professionnel, 5 septembre 2018, n° 2018-771 [Law on the freedom to choose a professional future, 5 September 2018, n° 2018-771].

144 Loi relative à l'accès à l'emploi titulaire et à l'amélioration des conditions d'emploi des agents contractuels dans la fonction publique, à la lutte contre les discriminations et portant diverses dispositions relatives à la fonction publique, 12 mars 2012, n° 2012-347 [Law on the access to permanent employment and the improvement of the working conditions of contractual agents in the civil service, on combating discrimination and on diverse provisions relating to the civil service, 12 March 2012, n° 2012-347].

145 Ibid.

146 See Cass. Soc., 8 octobre 1996, n° 92-42.291 [Social Chamber of the Court of Cassation, 8 October 1996, n° 92-42.291].

Secondly, the legality of compensation measures is still being debated in relation to pensions. Following the *Griesmar* judgments, the new law approving the use of the increases described above was validated by the French Constitutional Council.[147] After the *Leone* judgment, the Conseil d'Etat approved the French provision *in relation to the past*, supporting its decision with a quantitative analysis of inequalities that penalise women's careers. It did so through a very detailed statement which highlighted the differences between the incomes of women and men and the potential impact the removal of service credits would have for careers which were already completed.[148] Specifically, while noting the divergence from the case law of the European Court, the Conseil d'Etat, according to its Vice President, sought to 'establish the social facts from which the conclusions were to be drawn'.[149]

Thirdly, the debate on access to various branches of the civil service and on quotas has changed completely. As we have seen, on the basis of the Constitution any form of quota was initially prohibited. In 1982, the Constitutional Council declared the law proposing the introduction of quotas for women in municipal elections[150] to be contrary to the Constitution, and this was followed in 2006 by a similar declaration on the law providing for specific proportions of men and women on the boards of directors and supervisory boards of private companies and public sector organisations, on works councils, among employee representatives, on lists of candidates for industrial tribunals and similar civil service bodies.[151] It took two constitutional revisions to clear the blockage. Since the constitutional laws of 8 July 1999 and 23 July 2008, Article 1 of the Constitution no longer states only that France, 'shall ensure the equality of all citizens before the law, without distinction of origin, race or religion' and that '[i]t shall respect all beliefs', but also that the law 'shall promote equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility'. On this basis, it was possible to introduce rules of parity and quotas, both for some political elections (European, regional, departmental and municipal, as well as for some of the seats in the Senate) and for recruitment panels and boards of companies and other bodies.

Nevertheless, resistance remains strong and, as Professor Diane Roman puts it,[152] 'although parity appears to have become a matrix for public policy, in administrative case law it still has the status of an exception which must be established by a legislative text and is strictly interpreted. This approach is readily explained by the administrative court's unfailing adherence to the principle of formal equality which sees parity as a derogation from equality'. The Conseil d'Etat has thus repeatedly condemned measures introduced by lower authorities such as administrative or private regulations, which in contrast to the law voted for in Parliament, cannot derogate from the principle of equality. It has also condemned measures it considers to be too automatic which do not always allow selection panels to exercise freedom of choice or freely undertake an assessment of skills.

The fact that the provision in the Labour Code does not envisage parity, but a measure known as 'proportional diversity, which requires electoral lists for professional elections to reflect the composition of the electoral college, has been the subject of very strong opposition, including in some unions.[153] Recently, it even led to circumvention schemes requiring the intervention of a judge. Thus, to avoid this, some lists just present a single candidate of the under-represented sex.[154]

147 Cons. Constit., 14 août 2003, n° 2003-483 DC, considérant 34 [Constitutional Council, 14 August 2003, no. 2003-483 DC recital 34].
148 CE Ass., 27 mars 2015, *M. Quintanel*, n° 372426 [Council of State Assembly, 27 March 2015, no. 372426].
149 Sauvé, J. M. (2018), 'Allocution introductive du Colloque « la jurisprudence administrative et les femmes »' ['Introductory address at the conference "Administrative jurisprudence and women"], *AJFP*, p. 2212.
150 Cons. Constit., 18 novembre 1982, n° 82-146 DC [Constitutional Council, 18 November 1982, n° 82-146].
151 Cons. Constit., 16 mars 2006, n° 2006-533 DC [Constitutional Council, 16 March 2006, n° 2006-533 DC].
152 Roman, 'The promotion of women through administrative case law'.
153 Code du Travail [Labour Code], Art. L. 2314-30 (former. L. 2314-24-1): *'For each electoral college, the lists mentioned in Article L. 2314-29 which comprise several candidates are composed of a number of women and men corresponding to the proportion of women and men on the electoral roll. The lists are made up by alternating candidates of each sex until there are no more candidates of one of the sexes.'*
154 Cass. Soc., 9 mai 2018, n° 17-14088 [Social Chamber of the Court of Cassation, 9 May 2018, n° 17-14088].

On balance, it can be said at this point that, although the principle of parity has been accepted, it has not been greeted with widespread enthusiasm. Thus it can be concluded that the tradition of formal equality has had to be combined with the need for rules on positive action, but that the struggle is far from over.

Current debates

Without making any claims to be exhaustive, it could be useful to look at some current debates. Regarding the question of whether there is any need for positive action, the principle is still disputed.[155] More specifically, the Vice President of the Conseil d'Etat, Jean Marc Sauvé, summarised the position of the administrative court as follows:[156] 'The promotion of real equality between women and men, particularly through the introduction of measures such as quotas or positive discrimination, is, as we well know, liable to have paradoxical consequences, which must lead us to think about imposing not a limit but a point of equilibrium for any policy of this kind. We must pursue two goals simultaneously: on the one hand, we must seek effective equality and the prohibition of discrimination, and, on the other, we must aim to preserve other principles which are part of the foundations of our social pact, such as equal entry into public employment by ability and without distinction except that of virtues and talents, and also respect for personal and religious freedom'.[157] The issue must therefore be to define the content of this social pact and to establish to what extent, in the name of reality, we hold on to stereotypes. When statistics reveal a situation of inequality, how can we make the distinction between the stereotype which must be challenged and the social reality with which we are dealing?

Furthermore, is it a question of ensuring equality for the individual beneficiaries or for the status of women in general and their image in society? Here we return to the debate which began in 1988 about diversity in teaching bodies. In terms of the suitability of the measure and specifically the avoidance of stereotypes, how should 'positive' be defined? It is not enough, we know, to assert that the action is positive, it must be shown that it leads to equality. This is an eminently political issue.

A recent judgment from the Court of Cassation provides an example of this ambiguity.[158] A collective agreement gave a half-day holiday to female employees to mark International Women's Day on 8 March. This was clearly discrimination on the ground of sex. When a male employee asked to be entitled to the same benefit, the Court of Cassation adjudicated. Despite clearly contrary advice from its advocate general, it considered that this measure could be approved as positive discrimination. For the Court, 'by applying Articles L. 1142-4, L. 1143-1 and L. 1143-2 of the Labour Code,[159] interpreted in the light of Article 157, paragraph 4, of the Treaty on the Functioning of the European Union, a collective agreement may include a half-day holiday only for female employees on the occasion of International Women's Day, since this measure aims to establish equal opportunities for men and women by removing existing inequalities which affect opportunities for women'. The commentary on the judgment on the Court's website explains that, '[e]vents of any kind on 8 March provide an opportunity for reflection on the particular situation of women at work and ways in which it may be improved. The Social Chamber considers that there is therefore a link between this day and working conditions which legitimises this measure established by a collective agreement to promote equal opportunities.'[160]

155 On 11 September 2011, during a radio broadcast, the Minister for European Affairs said that positive discrimination is 'completely contrary to the interests of women. *If you are a woman who is appointed because you're a woman, that will follow you throughout your life, throughout your career. That's not how I want things to be'*. Slate.fr, 'Pour la ministre Nathalie Loiseau, imposer une femme à l'Assemblée est 'contraire aux intérêts des femmes" 11 September 2018, available at http://www.slate.fr/story/167093/pour-la-ministre-nathalie-loiseau-la-discrimination-positive-est-contraire-aux-interets accessed on 20 September 2018.

156 Sauvé, 'Allocution introductive du Colloque "La jurisprudence administrative et les femmes"', p. 2212.

157 Ibid.

158 Cass. Soc., 12 juillet 2017, n° 15-26 262 [Social Chamber of the Court of Cassation, 12 July 2017, n° 15-26 262].

159 Articles on positive action and the possibility of implementing them through collective negotiation.

160 Cour de Cassation, 'Explanatory note on Cass. Soc., 12 juillet 2017, n° 15-26 262' available at https://www.courdecassation.fr/jurisprudence_2/notes_explicatives_7002/droits_femmes_37306.html accessed on 20 September 2018.

This analysis has been strongly criticised. As noted by Professor Jérôme Porta, '[t]he judgment of 12 July 2017 undeniably marks a significant change. The benefit in question – the half-day holiday to which only female employees are entitled – has no link to protection of pregnancy or maternity or to the promotion of female employees in the company (where there was no suggestion that they were under-represented) or to a disadvantage specifically identified as one from which women within the company suffered. The solution is therefore technically questionable and it is no less dubious in terms of its symbolic value. Taking women away from the workplace, even by granting them a holiday, brings to mind a certain differentialist philosophy which long had the effect of excluding women from work, in the name of protecting them'.[161] Would it be acceptable for positive action to encourage the campaign for women's rights to be restricted to women? Whether this decision is in compliance with the legal principles of the Union is more than debatable.

V Conclusion

Are further conclusions necessary? The example given above shows that by not clarifying the concepts it is possible, under the guise of positive action, for the very purpose of and thereby our progress towards equality, to be called into question. An overstretched definition of positive action risks diluting its effects and leading to its purpose – equality – being forgotten. At the same time, a too restrictive definition risks leading to the inefficiency of positive action and the perpetuation of existing inequalities.

For the concept of positive action to be useful, it is essential to have a definition of the positive which does not perpetuate stereotypes. This would prevent the recurrence of those special advantages which only serve to uphold differences for which there is no objective basis. Ultimately, positive action is not compensation but a measure aimed at the future. The question is how to ensure that measures are 'devised' in order to start building equality instead of being compensatory. Shouldn't positive action be restricted to this strategy and achieved by envisaging the establishment of rights which are consistent with this approach? On this point, clarifications are necessary, even essential, if positive action is not to lose its positive role. The resistance found in some countries to the concept, for a variety of reasons, would surely be reduced if a clearer definition were to be given, establishing that it is not about static compensation or underpinning stereotypes, but about favouring a real level-playing field in order to make significant progress towards equality. Positive action is, after all, action and can therefore only be forward-looking. If equality had been achieved, it would be unnecessary. But it has not and so we need imagination… and diligence. We shall continue our work on this task – equality is an ongoing project. Despite alternating between setbacks and advances, we shall remain resolutely optimistic.

161 Porta, J. (2018) 'Droit et genre, RÉGINE', *Recueil Dalloz*, no. 17/7774, p. 919.

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Religious holidays in employment – Austria, France & Spain

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I Introduction

While issues of religious freedom and religious discrimination have predominantly arisen in European debates pertaining to multiculturalism, integration, migration or, more recently, national security and terrorism, they have also become central in the field of employment.[1] There are many ways in which one's religion and employment may intersect. Particular undertakings may or may not have a specific ethos and claim to be based on religious beliefs – or, conversely, on commitments to neutrality. Specific job posts may entail activities that collide with religious rules – from the handling of forbidden or 'impure' foods or beverages to the performing of acts that are condemned by certain religions. Rules that are internal to work organizations (such as dress codes) may entail restrictions on workers' religious freedom and choice of dress (diverse forms of head coverings, Jewish Tsitsits…). In fact, questions relating to the wearing of religious clothing and dress at work have occupied centre stage in several countries;[2] and recently, the Court of Justice of the European Union has delivered two Grand Chamber rulings on the extent to which employment decisions affecting veiled female workers amounted to (or did not amount to) religious discrimination.[3]

This contribution looks at a narrower and trickier question – one that does not necessarily pertain to the *visibility* of religion in public spheres (including the workplace) but focuses on the legal status of religious holidays in employment in European law. Does religious freedom include, in some form or another, a right to be absent from work for religious rituals and celebrations, or as a result of religious prescriptions? Is an employer's refusal to grant such requests to be read as a form of religious discrimination? In trying to answer these questions and others, this paper looks at the rules that delineate *the organization of* working *time* by examining the legal status of *religious holidays in the workplace*.

In the first place, emphasis is put on how deeply socially and culturally embedded the social organization of time is, and how reluctant European legal orders remain to consider that indirect forms of discrimination may stem from choices such as a predominant rule of Sunday rest or official annual calendars. This socio-cultural embeddedness of the organization of social time tends to be further consolidated by economic rights. For instance, employers' right to conduct a business or freedom of contract tend to trump considerations stemming either from the identity or dignity claims of individual workers to obtain the accommodation of their religious beliefs in the workplace or from the principle of non-discrimination based on religion. Antidiscrimination law certainly provides workers with some levels of protection, as the overarching recognition of a right not to be discriminated against on the grounds of religion in

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1 Alidadi, K. (2017), *Religion, Equality and Employment in Europe: the Case for Reasonable Accommodation*, Bloomsberg.

2 Howard, E. (2017), *Religious clothing and symbols in employment. A legal analyses of the situation in the EU Member States*, European Network of Legal Experts in gender equality and non-discrimination.

3 Hennette Vauchez, S. (2017), 'Equality and the Market: the Unhappy Fate of religious discrimination in Europe', *European Constitutional Law Review,* vol. 13, p. 744.

employment protects workers from adverse decisions based on their religion. To that extent, it is true as a matter of principle that employers are not allowed to deny requests for religious holidays *on the sole grounds* that such requests are religiously motivated. In fact, nothing prevents employers from accommodating such requests and implemented religious-friendly policies in that respect. However, it remains the case that workers do not have a right to be granted religious holidays, as such decisions remain essentially in the purview of employers' appreciation of the needs of their undertakings.

After first underlying the ways in which the organization of time in any given society may convey unwanted forms of oppression and domination that weigh disproportionality on members of religious minorities (1), the paper seeks to take stock of the main legal points of reference on this particular issue – at the level of the Council of Europe (2), of the European Union (3), as well as at the national level – with a focus on Austria, France and Spain (4). Overall, the paper seeks to unearth the ambivalent status of religious holidays in employment, by arguing that, for the most part, secular re-readings of 'tradition', on the one hand, and the legal protection awarded to employers' rights and legitimacy to assess the necessary organization of working time in their undertakings, on the other hand, have marginalized any notion of a (worker's) right to religious holidays. Workers may be strongly (at least formally) protected against religious discrimination; but this is not paramount to saying that they enjoy a right to religious holidays. This, of course, does not mean that employers are barred from accommodating their employees' religions in various ways -including by adapting working time to religious holidays; but when they do, it is a matter of choice and policy for them – not a legal requirement.

II Holidays, culture and secularism

Both the etymology and the contemporary lay meaning of the English word 'holiday(s)' encapsulate the background tension against which the question of religious holidays in employment needs to be read. In fact, the very word 'holiday' retains much of its religious etymology: it stems from *holy* days and refers to moments reserved for sacred celebrations and rituals. In contemporary lay parlance, however, 'holiday' has become an almost secular synonym for a vacation and days off of work, regardless of any notion of holiness. Although this possibly dual meaning of 'holi/holy days' might be very specific to the English language, this ambivalence reflects the particular organization of social time that most societies are based on: the choice of weekly days of rest as well as, more generally, the dominant annual calendar on which schools, public administrations and many businesses operate often have religious origins. Weekly, it seems that nearly all societies operate with a predominantly identified day off; and in Europe, the default day of rest is overwhelmingly Sunday. Annually, many societies operate on the basis of a calendar that foresees a number of holidays, many of which have religious origins. It is common in Europe that such calendars are officially recognized in legal texts – legislative or administrative acts. Because it reflects the organization of time of a majoritarian predominant group(s), this social organization of time is bound to have detrimental or at least inegalitarian effects on other groups who are the minority. Because they often have religious origins, they may additionally be read as indirect forms of religious discrimination.

Weekly rest

As far as a weekly rest is concerned, the question of whether the default choice of Sundays should be read as a form of religious discrimination or even oppression (of Christian traditions) has arisen in several legal orders – and famously in an important 1985 Canadian Supreme Court decision which reached the conclusion that the choice of Sundays as the default rest day was problematic and potentially discriminatory.[4] While it is undoubtable that having Sunday as a common day of rest allows most Christians to attend worship services while forcing members of other and smaller religious groups to

4 The Supreme Court of Canada held that the Lord Day's Act (a Sunday closing law) violated the Canadian Charter's Article 2 on the enjoyment of the freedom of conscience and religion because it bound 'all to a sectarian Christian ideal' in a coercive manner, thus creating 'a climate hostile' to non-Christian Canadians and consequently appearing as

either adapt their holy day celebrations to the dominant organization of social time or claim (and obtain) religious holidays, this decision sparked a brisk debate on the power of the courts, the unavoidability of values and traditions and on secularization processes.

The question of whether an official weekly day of rest may amount to religious discrimination is all the more important when the Sunday rest rule has historically been interpreted strictly. A famous French case for instance ruled at the beginning of the 20th century that the Sunday rule was imperative and it was therefore illegal for employers to impose any other day of rest. In that case, a Jewish employer could not impose Saturday as a day of rest for the normal operation of the undertaking he was in charge of.[5]

The European Union fell short of a similar debate at the time when the first Working Directive[6] was being challenged before the Luxembourg Court of Justice. In a 1996 ruling, the Court did annul the former Article 5 of the Working Directive that elevated Sundays as the default rest day. Yet, it did so on a technical basis: it was because the 'Council has failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week' that the 'the second sentence of Article 5, which is severable from the other provisions of the directive, must be annulled.'[7] It is however interesting to note that the Court retained 'the diversity of cultural, ethnic and religious factors' among those factors that are to be taken into account in the assessment of which weekly day should be designated as a rest day. At any rate, the current version of the directive now prescribes that all Member States must ensure that all workers enjoy at least 24 hours of rest every week – but it remains silent on which day during the week this ought to be.[8] Further interventions by the European Commission confirm that the EU prefers to leave this sensitive matter to the Member States.[9]

This ruling is interesting in that it illustrates how deeply entangled cultural and social considerations may be. It is indeed hardly disputable that the fact that Sundays are the default day off in European (and beyond) societies has religious origins; and it has been well established in much of the literature on religious freedom that 'secular' norms – especially secularized norms – need to be critically put into question in order to unearth unwanted patterns of oppression and domination.[10] On the other hand, it is equally difficult to dismantle some of the pillars of social organization and to do away with all common/majoritarian/dominant social standards. In fact, this is the line of reasoning that underpins International Labour Organization Conventions, for instance: ILO Convention no. 14 of 1921 insists that the rest period of at least 24 consecutive hours that is to be granted to workers every period of 7 days shall 'wherever possible, be fixed so as to coincide with the days already established by the traditions or customs of the country or district.'. In other words, the ILO invites States to take customs and traditions into account when organizing weekly rest rules, and remains silent on the underlying role of religion in this respect. The European Social Charter defines a very similar standard.[11]

discrimination against them: Excerpts of the opinion of Chief Justice Dickson, SC of Canada, *R. v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 1985 CanLII 69 (SCC); online at: https://www.canlii.org/en/ca/scc/doc/1985/1985canlii69/1985canlii69.html.

5 CE, 30 November 1906, Sirey, 1907, III, p. 23.

6 Directive 93/104/EC of 23 November 1993 was replaced by Directive 2003/88/EC of 4 November 2003.

7 Judgment of the Court of 12 November 1996, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* – Council Directive 93/104/EC concerning certain aspects of the organization of working time – Action for annulment – Case C-84/94.

8 Article 5 of Directive 2003/88/EC: 'Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3.'

9 See for instance Communication from the Commission, Reviewing the Working Time Directive, 21 Dec. 2010, COM(2010) 801 final, 11: 'the question of whether weekly rest should normally be taken on a Sunday, rather than on another day of the week, is very complex, raising issues about the effect on health and safety and work-life balance, as well as issues of a social, religious and educational nature. However, it does not necessarily follow that this is an appropriate matter for legislation at EU level: in view of the other issues which arise, the principle of proportionality appears applicable.'

10 See for instance: Amiraux, V., Koussens, D. (2014), *Trajectoires de la neutralité*, Presses de l'Université de Montréal ; Laborde, C. (2016), 'Liberal Neutrality, Religion and the Good', in Cohen J., Laborde, C., eds., *Religion, Secularism and Constitutional Democracy*, Columbia University Press, p. 249.

11 Article 2 of the ESC states that Member States should agree 'to ensure a weekly rest period which shall, as far as possible, coincide with the day recognized by tradition or custom in the country or region concerned as day of rest.'

Nationally, many courts seem to have also adopted such lines of reasoning on this particular subject. The Spanish Constitutional Court ruled in 1985 that the rule of Sunday rest should not be read as a religious tradition, regardless of its actual historical roots. In fact, the Court firmly affirmed that 'the rule of Sunday rest in the Workers' Statute is beyond doubt *a secular and work-related institution.*'[12] In France, the Conseil constitutionnel has not referred to a secular dimension of Sundays as it ruled that, pursuant to 'paragraph 11 of the Preamble to the Constitution of 1946 [according to which] the Nation "shall guarantee to all.... protection of their health, material security, rest and leisure'", 'the principle of Sunday rest is one of the guarantees of the right to rest vested in employees.'[13] It only noted that by declaring Sunday as the default rest day, Parliament rightfully sought to 'reconcile freedom of enterprise, which derives from Article 4 of the Declaration of the Rights of Man and the Citizen of 1789 and paragraph 10 of the Preamble of 1946 which provides: "The Nation shall provide the individual and the family with the conditions necessary for their development.'"[14] The choice of Sunday was however upheld and cut off from its religious origins; albeit implicitly, it appears as a secular choice. This is also the path that has been followed by the Austrian Constitutional Court, which upheld the principle of weekend rest and affirmed the lawmaker's public interest in contributing to the observation and preservation of the rule through business legislation[15] – but it said nothing about its religious roots and dimension. On the contrary, the court affirmed that 'changes of values within the society during the last two decades have changed nothing regarding the public interest in [the far-reaching] sychronisation of [business hours] with the principle of weekend rest.'[16]

What critical readings of secular norms seem to have a hard time dismantling, however, might well be more successfully shaken by the impact of neoliberalism on commerce, the retail sector and beyond. Contemporary legal developments have indeed come to question and challenge the rule of Sunday rest in many countries, as they have sought to accompany the evolutions of working time in a number of economic sectors encapsulated by the move towards a '24/7' society. Many countries that have long rested on an unquestioned elevation of Sundays as the default rest days are currently experiencing derogations from the rule (if not its outright abandonment) in the name of economic necessities. In countries such as the Netherlands, the United Kingdom or France, derogations from the rule of idle Sundays are multiplying – and not only in tourist shopping places. In France, for instance, the Macron law of 6 August 2015[17] introduced flexible arrangements for Sunday work by giving local authorities the right to designate 12 Sundays annually on which local shops may remain open for business; and in tourist areas, shops are allowed to open every Sunday. Within that framework, it is for the social partners to negotiate collective agreements on Sunday work – including corresponding salary premiums (sometimes above 100 %) and support for increased childcare needs. Similar reforms have taken place in Spain.[18] It is still too early to say what impact such reforms may have on the possibilities for workers to exercise their religious freedom – and, especially, to be able not to work on religious holidays. It could be argued that the more flexible days of operation in any undertaking, the greater the freedom for employees. The possibility of working on Sundays does indeed mechanically open up the option for non-Christian workers to relocate their weekly day of rest and thus enjoy easier conciliation with the Jewish Shabbath, the Muslim Friday or the 7th day Adventist Saturday celebrations. However, as long as employers do not

12 My translation from: "es inequivoco en el Estatuto de los Trabajadores (…) que el descanso seminal es una institucion secular y laboral" [emphasis added].

13 Other examples of comparable rulings include the Hungarian Constitutional Court of 27 February 1993 (number 1993/10, see summary online: http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1993-1-004?fn=document-frameset.htm$f=templates$3.0, last visited 27 August 2018).

14 Decision no. 2009-588 – August 6th 2009 Act reaffirming the principle of Sunday rest and designed to provide for exceptions to this principle for employees volunteering to work on Sundays in touristic and thermal Communes and areas and certain conurbations.

15 Austrian Constitutional Court, Decision No. G66/11, 14 June 2012.

16 Austrian onstitutional Court, Decision No. G66/11, 14 June 2012.

17 Loi no. 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques

18 Law 1/2004, of December 21, on business hours (modified in 2012) establishes that the minimum number of Sundays and holidays in which businesses may remain open to the public will be 16 (although they may be extended by the Autonomous Communities). In tourist areas, shops can open every Sunday.

have a duty to accommodate requests[19] such as weekly or annual days of rest when they are religiously motivated, these reforms that challenge Sunday rest do nothing more than potentially increase options. They do not bring about enhanced rights for workers.

Annual calendars

In the three countries that this paper focuses upon (and indeed in most countries), there exists an official calendar of holidays. All of them include some religious holidays and are the result of historical development. With respect to the overall predominance of Christianity in Europe, these official calendars unsurprisingly include Christian holidays as religious holidays.

In the Austrian Federal Act on Rest Periods (*Arbeitsuhegesetz*), 13 specified calendar days are identified as holidays – at least 10 of which appear to be rooted in Catholic traditions (including: Easter Monday, Assumption Day, All Saints Day, Mary Conception…). In France, Article L. 3133-1 of the Labour Code sets an official legal calendar. The Labour Code makes it mandatory that Labour Day (May 1st) be a remunerated day of rest. The legal calendar further specifies that companies may declare a total of 9 other holidays to be chosen in a list that includes 3 secular holidays (Bastille Day on July 14 and the celebration of the end of both of the World Wars, May 8 and November 11) and six days that, directly or indirectly,[20] express the Christian tradition (Ascension, Assumption, All Saints, Christmas, Easter, Pentecost). The number of religious (and indeed Christian) holidays included in the legal calendar is even higher in some specific regions such as Alsace Moselle, where Saint Steven (Dec. 26) as well as Good Friday are also holidays.[21] In Spain, the general framework is provided by the Statute of Workers (*Estatuto de los Trabajadores*) combined with Royal Decree 2001/1983. Together, these texts establish that a maximum of 14 days annually are to be considered holidays, among which some are to be of a civic nature (e.g., December 6, day of the Constitution), others in direct relation to workers' rights (e.g., May 1st). But the remainder and the greater number of named holidays are presented as stemming from agreements with the Holy See: 7 of the listed days echo the Catholic tradition, from the day of Immaculate Conception to that of Epiphany of the Lord.

Such official legal calendars have a number of consequences. If a given company or branch[22] decides to define some or all of the days listed in the legal calendar as holidays, then rest is imposed on all employees – regardless of their religion.[23] This of course does not preclude employees of faiths other than Christian (or Christians wishing to attend religious celebrations other than the ones listed) from

19 Not to mention the fact that even when they do, such as in the USA pursuant to the Civil Rights Act of 1964, it remains the case that accommodating weekly days of rest is only an obligation as long as undue hardhip for the employer does not ensue. For a case in which a TWA Jewish employee transferred to a post in which his lack of seniority made this accommodation impossible because it exceeded reasonable accommodation: see *Trans World Airlines, Inc. v Hardison*, 432 U.S. 63 (1977).

20 Several sources indicate that despite their religious correspondance, Easter and Pentecost were elevated as national holidays not by religious forces and pressure, but rather for the interests of banks and chambers of commerce; see Lalouette, J. (2010), *Jours de fête*, Taillandier.

21 See Art. L. 3134-1 of the Labour Code. It must also be noted that in Mayotte, the one French overseas department in which the majority of the population is Muslim, a particular rule is also in place: the Labour Code explicitly states that the legal calendar may not infringe upon either collective or individual work agreements nor local traditions that consider days of Miradji, Idi El Fitri, Idi El Kabir or Maoulid as holidays. French Guiana is another territory in which the Law of 9 Dec. 1905 on the separation between Churches and the State does not apply, thus leaving intact a situation resulting from an ordinance of 27 August 1828 giving only the Catholic religion the status of a recognized cult.

22 In France, collective agreements that tackle the issue of religion in general and religious holidays in particular remain the exception. Some do exist (see for instance an old 1984 collective Convention for the audiovisual sector that acknowledged the possibility for workers of the Jewish and Muslim faith to request a leave of absence for religious reasons). See Jourdan, D. (2013), 'Religion dans l'entreprise, égalité de traitement et discrimination', *Semaine Sociale Lamy*, Special Issue 1611, pp. 13-16.

23 Art. L. 3133-3-1 of the Labour Code: '"Un accord d'entreprise ou d'établissement ou, à défaut, une convention ou un accord de branche, définit les jours fériés chômés.' Art. L. 3133-3-2: 'A défaut d'accord, l'employeur fixe les jours fériés chômés.'

requesting a day off; but they do not have a right to be granted such a leave of absence. And an unauthorized absence will potentially lead to disciplinary measures and possibly dismissal.[24]

Another way in which legal calendars may give rise to forms of discrimination has led to a case that is currently pending before the CJEU; it relates to configurations in which some days or entitlements are reserved for believers of particular faiths. In Austria, the legal calendar allows Protestants to take a day off on Good Friday; Protestant workers who nonetheless do work on that day receive extra pay. Consequently, a non-Protestant plaintiff has argued in court that this entitlement to extra money was a form of discrimination on the basis of religion. After the first instance court rejected his claim, the plaintiff won on appeal. The Austrian Supreme Court subsequently referred several questions to the CJEU, including a question pertaining to the compatibility of the Austrian rule with both Art. 21 of the EU Charter of fundamental freedoms and Directive 2000/78. In particular, the Austrian court invited the CJEU, in the event that it finds the Austrian law to be discriminatory, to clarify whether private employers should be required to grant the rights and entitlements currently reserved for Protestant workers who work on Good Friday to all employees, irrespective of their religious affiliation, or whether the national provisions should be anulled in their entirety and no longer granted to anybody.[25]

Rules that reserve days or entitlements for believers of particular faiths, as well as, more generally, employers' decisions to grant requests for religious holidays, may also raise issues of proof. Would it be legal for an employer to subject the enjoyment of a particular holiday to proof that a particular worker is of a particular faith? Alternatively, would it be legal for an employer to request a certificate or proof of attendance at a given religious ceremony?

This echoing of the Christian tradition in the legal calendars that govern the social organization of time in France, Spain and Austria (as well as many other European countries) may however be undergoing some important changes. In Spain and France in particular (but possibly not so much in Austria), efforts have been undertaken to mitigate the unfavourable effects of this historical pattern of historical development. Although the official calendars remain rooted in a tradition of Catholicism, amendments and complements thereto are multiplying; and they generally express a widening of the holy days to be taken into consideration. As such, there are many gestures towards believers belonging to, historically, more minority groups.

Such efforts are particularly visible in Spain, where two specific Acts of Parliament were adopted in 1992 with representatives of both the Jewish and Muslim faiths in order to complement the general official calendar. Resulting from these two acts,[26] workers of the Jewish and Muslim faiths who wish to do so may substitute the holidays listed in Royal Decree 2001 of 1983 from agreements with the Holy See with Jewish or Muslim holidays such as Rosh Hashanah, Yom Kippour, Succoth or Idu Al-Fitr, Idu Al-Adha and Al Hiyra.

In France, it is particularly in the public sector that efforts and gestures towards religious faiths other than Catholic are visible. In the public sector, it has been established since a 1967 ministerial circular that managers may authorize absences[27] for civil servants and public agents who request them in order

24 Cass. Soc. 16 Dec. 1981, no. 79-41.300: a Muslim employee had stayed away from work for l'Aïd el Kebir (a Muslim holiday). She was dismissed for unilaterally breaching her work contract ('rupture abusive du contrat de travail'). In this case, she had improperly informed her superiors in advance that she planned to be absent from work; additionally, the judges found that her absence on that particular day had resulted in her company being unable to honour an important delivery that was scheduled for that day. The courts upheld her dismissal.

25 Request for a preliminary ruling from the Oberster Gerichtshof, lodged on 13 April 2017 – *Cresco Investigation GmbH v Markus Achatzi*, C-193/17.

26 Law 25/1992 (Cooperation Agreement with the Federation of Israelite Communities of Spain) and Law 26/1992 (State Cooperation Agreement with the Islamic Commission of Spain). There also exists Law 24/1992 (Cooperation Agreement with the Protestants) but it does not include holidays other than the ones already enshrined in the general framework.

27 While holidays are limited in their duration by law (in France, the default rule is that, annually, workers are entitled to 5 weeks of holidays), authorizations for absences may be granted in addition to holidays, for motives that are generally exceptional (weddings, funerals, caring for relatives at the end of their lives…).

to participate in religious ceremonies, subject to the condition that such absences are compatible with the regular operation of the service to which the worker belongs. After 1967, an annual list of legal holidays in the public sector was thus published – a list that, as a matter of fact, coincided with the official legal calendar of holidays in the private sector.[28] A new circular was issued in 2012 that made the calendar permanent.[29] It also renewed the calendar, with a view to include holidays other than Catholic and Protestant ones, among which, for instance, are Orthodox holidays (Teophany), Armenian (24 April), Muslim (Aïd El Adha, Al Mawlid Ennabi, Aïd El Fitr), Jewish (Chavaout, Roch Hachana, Yom Kippour) and Buddhist (Vesak). Additionally, the extended list is presented as being merely indicative – in the sense that nothing forbids the heads of these services from granting requests for a leave of absence with a view to celebrating holidays beyond the list.[30] The question of whether to amend the legal calendar of holidays in general has, however, so far remained unheeded. It was addressed in 2003, for instance, as President Jacques Chirac appointed the experts' commission on the application of the constitutional principle of *laïcité* presided over by Bernard Stasi[31] and explicitly asked the commission to address that issue. In its final recommendations, the Stasi Commission did indeed suggest that the legal calendar be amended so as to include Kippour, l'Aïd el Kebir and possibly the Orthodox Christmas day; but the proposal went unheeded. Accommodations to the general legal calendar can also be local. Both in Spain and in France, local realities may result in amendments and accommodation in the applicable legal calendars of holidays. In the autonomous Spanish cities of Ceuta and Melilla that are enclaves in the North of Africa and where approximately 50 % of the population profess to be Muslim, a Muslim celebration was recently included in the regional holidays for the year 2018 (Idu Al Adha, 22 August).

In Austria, a new regulation was adopted in 2015 regarding the recognition of the Islamic faith by the State.[32] Paragraph 13 of the regulation refers to a number of Islamic holidays (Ramadan, Pilgrim & Sacrifice festival, Ashura) and protects the right of Muslims to the full enjoyment of the festivities by affirming that on these days as well as during Friday prayers generally, all avoidable actions causing noise or that might otherwise disturb the festivities are prohibited in the vicinity of places of worship. This new regulation does not elevate these Islamic holidays to the status of public holidays, nor does it endow Muslim workers with a right to obtain holidays on the specified days. It is however an important step in the recognition of Islam and affords the possibility of including these Islamic holidays in collective work agreements, for instance. Such collective work agreements could indeed special rules on holidays as long as they do not contradict binding law – which means in this context, that the agreements can include more holidays than defined by the Federal Act on Rest Periods. This may include religious holidays or the duty to prefer the wishes of granting particular days off, if they are religious holidays.

III ECHR standards: freedom of contract trumps a right to the accommodation of work time for religious purposes

Article 9 of the ECHR protects religious freedom. Several important rulings by the ECtHR have confirmed the importance of this right in the overall European human rights system, among which is the 1993 case of *Kokinakkis v Greece* that is of particular importance as it stated that 'freedom of thought, conscience

28 Article L. 3133-1 of the Labour Code.

29 Circulaire du 10 février 2012 relative aux autorisations d'absence pouvant être accordées à l'occasion des principals fêtes religieuses des différentes confessions.

30 See, for an illustration: CE, 12 February 1997, Mlle *Henny*, no. 125893, concerning a Christian public agent who requested to be absent on three Christian holidays beyond the ones listed ; and CAA Paris, 22 March 2001, *Crouzat*, no. 99PA02621 concerning a denial emanating from an adept of the Raelian movement that was truck down ; and CE, 16 February 2004, *Ahmed B.*, no. 264314: although the denial of the applicant's request to benefit from a leave of absence every Friday in order to attend prayers at the mosque was an infringment upon his freedom of religion, it was justified by the internal rules of the service.

31 This commission is famous for recommending that the wearing of ostentatious religious signs be banned in public schools – an idea that was effectively translated into legislation by the Act of 15 March 2004.

32 In Austria, there is a principle of separation between churches and the State that rests on a system of recognition. A list of the 17 recognized churches and faith communities may be found at: http://bmukk.gv.at/ministerium/Gesetzlich_anerkannte_Ki5433.xml.

and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.'[33] The scope of Article 9 is a wide one indeed, that envisages religious freedom as exercised 'either alone or in community with others and in public or private' and covers the right 'to manifest [one's] religion or belief, in worship, teaching, practice and observance.'

On the specific topic of religious rights at work, however, the case law appears to be rather cautious. With respect to the topic of religious holidays in employment in particular, it is strikingly dominated by a mode of reasoning that positions the employment contract as a screen preventing Article 9's recognition of religious freedom to deploy its full potential.

Free will and employment contracts

Emblematic in that respect is one of the first cases in which the European Commission on Human Rights dealt with the issue in 1981. The *X v the UK* case involved a public school teacher in London who, as a devout Muslim, requested a leave of absence in the form of extended lunch breaks on Fridays in order to attend prayers at a nearby mosque. Although he had benefited from some forms of accommodation in some of the schools he had previously been assigned to, he ultimately entered into a conflict with the Inner London Education Authority (ILEA) and resigned. The European Commission chose to consider that the applicant had accepted teaching obligations under his contract '"of his own free will and that it was 'a result of this contract that he found himself unable to work with the ILEA and attend Friday prayers.'[34] By contrast, the Commission did not delve in depth into an analysis of the applicant's claim that 'his case could have been better solved by a re-arrangement of the school timetable permitting his absence for about 45 minutes.' Rather, the Commission adopted a deferent stance, insisting on the relative novelty of the issue of religious diversity in the UK, the complexity of the public school system and the necessity of respecting the national authorities' assessment of 'what might be the best policy in this field.'[35] This line of reasoning according to which decisions by which employers who refuse requests of accommodation for religious holidays or days of rest do not subsequently raise Aticle 9 issues became a pattern of ECHR jurisprudence. In several cases, the Commission invariably argued that dismissals[36] or disciplinary measures[37] subsequent to requests for religious holidays and/or rest periods were the result of the employment contracts – and breaches thereof – and were not based on the applicants' religions. One of the cases concerned a woman who was employed in a travel agency and was required to work Sundays on a rota basis. After some time, she, as a Christian, informed her employer that she was no longer ready to do so; but her employer's response was to amend her employment contract so as to include Sunday as a normal working day on a rota basis with no enhanced rate of pay (employees who worked on a Sunday would receive one day off in lieu during the week and would work a total of five days a week). Again the Commission noted that 'the applicant was dismissed for failing to agree to work certain hours rather than her religious belief.'[38]

Freedom to resign

Moreover, these cases have led the Commission to insist on the fact that all these applicants retained the freedom to resign. In the case of *X. v the UK* in 1981, the Commission had ruled that the applicant was

33 ECtHR, 25 May 1993, *Kokinakkis v Greece*, no. 14307/88, §31.
34 EComHR, *X v the UK*, 12 March 1981, no. 8160/78, §9.
35 *Ibid.*, §19.
36 EComHR, 9 April 1997, *Stedman v UK,* no. 29107/95.
37 EComHR, 3 December 1996, *Konttinen v Finland*, no. 24949/94.
38 EComHR, 9 April 1997, *Stedman v UK,* §1.

'free to resign if and when he found that his teaching obligations conflicted with his religious duties.'[39] In fact, the Commission even ruled that this possibility to relinquish a given post was to be regarded as 'the ultimate guarantee of the freedom of religion.'[40] It is unclear whether this line of reasoning has been subverted by later jurisprudential developments. Some authors have read the *Eweida* bundle of cases as long-awaited rebuttals of the 'freedom to leave your job' hermeneutics of religious freedom.[41] It is true that the Court in this prominent line of cases has provided employers with a sophisticated pattern of balancing employers' rights and the interests of the undertakings they are in charge of with the workers' rights to express their religious freedom in the workplace. As is well known, this has resulted in a ruling, for instance, that solely marketing or image-related considerations were not serious enough for justifying a ban on the wearing of small crosses over an airline company uniform, whereas health and safety considerations could validly justify the prohibition on wearing religious necklaces.[42] Overall, these cases were widely read as indicators of the Court's new approach to religious freedom and employment. Previously, religious freedom was deemed to be sufficiently protected by the right to resign (and, therefore, work-related restrictions on religious practices such as being required to work on the Sabbath generally did not amount to interference with religious freedom). Since *Eweida* and the other rulings on the same day, the Court's approach requires a casuisitic balancing of rights whereby the possibility for the applicant to change jobs is weighed against the proportionality of arrangements and accommodations conceded by the employer.

Regardless of this significant evolution in the case law, however, ECHR law can hardly be read as protecting employees' religious freedom on this particular issue of working times and holidays. In fact, the Court makes this explicit point in the 2006 *Kosteski* case: 'there is no right as such under article 9 to have leave from work for particular religious holidays.'[43] Generally speaking, the Court defers to the employers' assessments of what the workplace actually requires.

IV EU law standards: limited traction, no legal obligation to accommodate working time and holiday requests for religious purposes

One of the first and still relevant cases that has dealt with issues of religious holidays in employment under EU law is the CJEU's 1976 ruling in the *Vivien Prais v Council* case. It concerned a British national who had applied for a *concours* that was being organized for the recruitment of linguistic experts for the European Union. When she was notified of the date of one of the tests, she informed the Council that it was problematic for her, as it coincided with that of a major Jewish holiday (Shavuot). She asked for an alternative date to be set (at least for herself) but was denied that possibility. She took her case to the European Court of Justice, arguing that both EU Staff Regulations prohibiting discrimination based on sex, race or creed and Articles 9 & 14 of the ECHR had been violated. In a very interesting ruling, the Court dismissed her application, arguing that although 'it is desirable that an appointing authority informs itself in a general way of dates which might be unsuitable for religious reasons, and seeks to avoid fixing such dates for tests, nevertheless (...) neither the Staff Regulations nor the fundamental rights already referred to can be considered as imposing on the appointing authority a duty to avoid a conflict with a religious requirement of which the authority has not been informed.'[44] In this particular case, as all potential candidates had already been informed of the test date by the time Prais informed the Council of the conflict, the Court found that the Council had the discretion not to organize alternative dates. Although the ruling is now more than forty years old, its fundamental logic seems to have not

39 EComHR, 9 April 1997, *Steadman v UK*, §15.
40 EComHR, 3 December 1996, *Konttinen v Finland*, no. 24949/94, §1.
41 McCrea, R. (2014), 'Religion in the workplace: Eweida and Others v United Kingdom', *Modern Law Review,* vol. 77, no. 2, pp. 277-307.
42 ECtHR, 15 Jan. 2013, *Eweida and others v UK*, no. 4820/10, 59842/10.
43 ECtHR, 13 July 2006, *Kosteski v the former Yugoslav Republic of Macedonia*, no. 55170/00, §45.
44 CJEU, 27 Oct. 1976, *Vivien Prais v Council*, C-130/75, §18.

altered: employers may have the possibility of trying to accommodate and may indeed be invited to do so but, ultimately, organizational logics can prevail. In other words, whereas good practices may be identified and rest on the notion that accommodation for religious holidays is desirable, there is no legal obligation to achieve such results.

EU non-discrimination law: no obligation to accommodate religious claims

Meanwhile, Directive 2000/78 has explicitly elevated religion as one of the forbidden grounds of discrimination in the field of employment. It protects workers against both direct and indirect discrimination. The directive insists that differential treatment based on a protected ground does not amount to discrimination when it is justified by 'a genuine and determining occupational requirement'[45] and it explicitely acknowledges that such requirements can be of particular importance in faith-based organizations.[46] Additionally, the directive establishes that there is no indirect discrimination when taking religion (or other criteria) into account pursues a legitimate aim and is both consistent and proportionate.[47]

Within that framework, discussions over whether the directive may be interpreted as encapsulating a duty for employers to seek to provide workers with reasonable accommodation of their religious practices has been ongoing. Many authors have argued that this was the case;[48] Lucy Vickers, for instance, has written that 'it is arguable that the directive creates an indirect duty to make reasonable accommodation, and that 'if the justification standard is interpreted in the same way as it is in sex equality cases, this will mean that any requirement must have a legitimate aim, the means chosen for achieving that objective must correspond to a real need on the part of the undertaking, must be appropriate with a view to achieving the objective in question and must be necessary to that end.'[49] However, not only does the directive only explicitly mention a duty to accommodate with respect to disability,[50] the recent 2017 judicial interpretations of religious discrimination by the CJEU seem to indicate that the justification standards for indirect discrimination are significantly lower with respect to religion than with respect to sex. In the *Achbita* case, in particular, the Court based its reasoning on the right to conduct a business in order to justify the right of employers to adopt internal policies of religious, philosophical and political neutrality as legitimate self-definitions of their undertakings' images.[51] Any proximate development to the notion that employers may have a duty to accommodate their workers' religion is thus unlikely. And the single paragraph in which the CJEU refers to possible accommodations that might have been due to the fired employee conveys a rather weak notion therof. In §43 of the ruling, the Court insists that it falls upon the referring court to ascertain whether "taking into account the inherent constraints to which the undertaking is subject, and without G4S being required to take on an additional burden", it would

45 Article 4§1.

46 Article 4§2: 'in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.'

47 Art. 2b): '(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.'

48 Again, see Alidadi, K. (2012), 'Reasonable Accommodations for Religion and Belief: Adding Value to Article 9 ECHR and the European Union's Anti-Discrimination Approach to Employment?', *European Law Review*, vol. 6, no. 37, p. 693; see also: Bribosia, E., Ringelheim, J. (2009), 'Aménager la diversité: le droit de l'égalitéface à la pluralité religieuse', *Revue trimestrielle de droit européen*, no. 78, p. 319.

49 Vickers, L. (2006), *Religion and Belief Discrimination in Employment – the EU law*, European Commission, p. 22.

50 In addition to which the Court seems to have adopted a strict interpretive stance on this issue, expressing a reluctance to apply reasonable accommodation beyond disability: CJEU, *Coleman v Attridge*, C-303/06.

51 CJEU, Grand Chamber, 14 March 2017, *Samira Achbita & Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, C-157/15.

have been possible for the employing company to offer her a job that did not involve any visual contact with the customers. Clearly, the standard of obligation that weighs on the employer is rather low here, for it is one that ought not to impose any additional burden and would arguably be satisfied with the containment of employees wishing to express their religious beliefs at work in back office positions.

EU and workers' rights: minimal standards

Besides the non-discrimination framework, EU regulations on workers' rights could also be an interesting venue for thinking about religious holidays and rest periods in employment. Employment law in general is indeed certainly relevant to the topic of religious holidays, if only because it constitutes the overall framework in which working time is determined and, be it the case, accommodated. It must be noted, however, that as far as working hours are concerned, Member States remain free to determine their own rules as a matter of legitimate public interest. This was established by the CJEU in the 1980s[52] and has not been overturned by the adoption of the Working Time Directive, as its legal justification is exclusively related to workers' health and safety considerations. In other words, the directive offers a framework in which religion has only very limited traction. As mentioned above, the original wording of the directive's Article 5 affirmed Sundays as the default rest day throughout the Union. Had this version not been annulled by the European Court of Justice, EU legislation could have been said to endorse a religious organization of time and thus to hinder religious freedom and diversity. Since it was annulled by the CJEU, however, implicit and explicit references to the religious dimension of working time have disappeared; the only obligations that stem from the directive pertain to the benchmark of a maximum of weekly working hours, the periodicity of 24 consecutive hours of rest etc. It seems that only very specific dimensions of religious freedom could give rise to considerations of health and safety and therefore trigger the relevance of the Working Time legislation. The needs of employees who fast for religious reasons is a case in point; and this is a topic that indeed seems to be growing in a number of countries.[53] It has not given rise to specific interventions at the EU level, however.

V National laws: accommodation as an option for employers – but not as a right for workers

Against this context of European law (both ECHR and EU), it is thus unsurprising that national laws in France, Spain and Austria converge around the notion that although the accommodation of religious holidays remains a possibility for employers who wish to do so as a matter of human resources policy, it cannot be said to capture a right for workers. In fact, subject to respect for anti-discrimination law rules (which include a prohibition of discrimination based on religion), employers seem to retain a wide margin of appreciation as they process requests for holidays and weigh them against the necessities of the good operation of their undertaking.

Employers' discretion in dealing with holiday requests

In France, what national legal rules (the Labour Code) basically boil down to is the notion that an employer is to treat any request for a vacation/holiday from workers equally –regardless of whether or not they are motivated by religious or other considerations. Within that framework, employers are free to honour or deny requests on the sole basis of the firm's interests: workload, internal organizational purposes etc. In other words, there is no specificity of religiously-motivated requests for holidays. In the private sector, where no legal rule explicitly foresees for such holidays and leave motivated by religious purposes, the

52 See for instance: CJEU, 23 November 1989, *Torfaen Borough Council v B & Q plc*, Case C-145/88.

53 For example, recently a Danish government official's stance on the safety hazards caused by fasting workers triggered a brisk debate; see for instance: https://www.theguardian.com/world/2018/may/21/danish-politician-inger-stjberg-muslims-ramadan.

Labour Code only insists that restrictions on fundamental freedoms (including religious freedom) must be justified by the specific nature of any given work.[54] An employee who absents herself from work for the celebrations of l'Aïd el Kebir without authorization may thus be dismissed – especially in a case in which she had not clearly informed her hierarchy of her intention to do so and her absence prevented an important delivery scheduled for that day from effectively take place.[55]

The rule is slightly tilted in the public sector, as ministerial circulars positively recall that all heads of services in public administrations may grant their employees' requests for a leave of absence for religious purposes under the form of a (paid) leave of absence and underline that requirements pertaining to the normal operation of the service ('le fonctionnement normal du service') are the only valid ground for denying such requests.[56] Yet, the heads of these services remain the sole and sovereign interpreters of such requirements – subject to judicial review.[57] In other words, civil servants and public agents do not enjoy a fully-fledged right to be released from work for religious reasons, as this possibility always depends on their hierarchical superior's appreciation of the necessities of the normal and satisfactory operation of the service. Such authorizations for absences are thus to be understood as benevolent measures.[58] For instance, it is reasonable and therefore legal for a public housing janitor to be denied a leave of absence on Fridays from 2:00 pm to 3:00 pm in order to attend prayers at the mosque. The infringement of a fundamental freedom is justified by this notion of the regular operation of the service.[59]

In Spain, the applicable rules do not distinguish between private and public sector employment on this matter. Subsequent to the aforementioned Laws 25 and 26 of 1992, and although, gererally speaking, there is no right for Muslim or Jewish workers to enjoy the Jewish or Muslim festivities, they do have the possibility to request religious holidays and employers should abide by these requests subject to the condition that they do not disrupt the functioning of the company or result in discrimination against other workers. In other words, employers need to rely on objective and reasonable justifications if they wish to deny such requests. An important ruling by the Constitutional Tribunal in 1985 also makes it clear that, in the case of an employed worker who wishes to change his/her working hours in the name of his her religious beliefs, a further obstacle relates to the notion that even claims articulated on respect for fundamental rights cannot be successfully invoked to impose changes in the labour contractual relationship as far as the other party is concerned. The dismissal of an employee for repeatedly absenting herself from work in the name of her 7th Day Adventist Church's prescription that rest from sunset on Fridays to Saturday was mandatory was indeed valid for religious freedom as such cannot compel the employer to redefine the work contract that had previously been agreed upon.[60] The same holds true in Austria, where similar rules apply, in principle for the public and the private sector. While employers are to treat requests for holidays equally regardless of whether they are religiously motivated or not,

54 Article L1321-3 of the Code du travail: 'Le règlement intérieur ne peut contenir: (…) 2° Des dispositions apportant aux droits des personnes et aux libertés individuelles et collectives des restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché.' However, since an Act of 8 August 2016, Art. L1321-2-1 now states that: 'Le règlement intérieur peut contenir des dispositions inscrivant le principe de neutralité et restreignant la manifestation des convictions des salariés si ces restrictions sont justifiées par l'exercice d'autres libertés et droits fondamentaux ou par les nécessités du bon fonctionnement de l'entreprise et si elles sont proportionnées au but recherché.'

55 Cass. Soc., 16 Dec. 1981, no. 79-41.300.

56 Circular of 10 February 2012, NOR:MFPF1202144C (online: https://www.fonction-publique.gouv.fr/files/files/textes_de_reference/2012/C_20120210_0002.pdf, last visited 27 August 2018); and before that, see Circular FP 901 of 23 September 1967 (online: https://www.fonction-publique.gouv.fr/archives/home20020121/lesrapportsetlespublications/circulaires/230967.htm, last visited 27 August 2018).

57 Koubi, G. (1987), 'Autorisation d'absence et liberté de conscience des fonctionnaires', *La Revue Administrative*, no. 236, p. 133.

58 See the Question écrite asked by the Member of Parliament Marie-Jo Zimmerman and the governmental answer, Journal Officiel, 12 July 1999, p. 4245: 's'agissant de la nature de ces autorisations spéciales d'absnece, il s'agit de simples mesures de bienveillance que le chef de service a la possibilité d'accorder, en étant seul juge, eu égard aux nécessités de service, de l'opportunité de leur attribution.'

59 CE, 19 Nov. 2004, no. 265064.

60 Constitutional Tribunal, 19/1985, 13 February 1985.

they remain free to honour or deny such requests on the sole basis of the firm's interests – in terms of workload, internal organizational purposes etc.

One technical question is that of the extent to which agreements on holidays and rest time need to be mutually agreed upon by employers and employees, or whether they are susceptible to being affected by unilateral decisions of the employer or rules that are exterior and superior to the undertaking. In Spain, as it has insisted on the contractual nature of the employment relationship, the Constitution Tribunal has clarified that all arrangements pertaining to working days and days of rest (and possibly holidays) are to be agreed upon by both parties to the employment contract especially if and when the worker seeks to obtain an accommodation from the general framework provided by the Workers' statute.[61] For example, while Friday evening and all of Saturday can be provided for Jewish workers and Seventh Day Adventists as alternatives to the general rule of Saturday afternoon or Monday morning and all of Sunday rest, this has to be with the agreement of all the parties, and the case law has interpreted this as only being possible if this is requested by the employee before the signing of the contract. Members of the Islamic communities belonging to the Islamic Commission can request to stop work every Friday from 13.30 to 16.30 and one hour before sundown during Ramadan, subject to an agreement with the employer, and with the hours not worked being made up.[62]

All in all, it thus appears that the bottom-line rule is that there is generally no right for workers to obtain permission not to work on specific days because of their religion.

However, if their request is denied, such a denial must be non-discriminatory; in other words, the sole fact that a request has been made for religious purposes is not a valid ground for denying it. The only valid reasons an employer may invoke need to be related to the necessities of the job. In particular, the denial of a requested holiday on the grounds that that particular day is not mentioned in the official and legal holidays may be deemed discriminatory. As a result, good practice guides and recommendations may include the option for an undertaking to only consider civil holidays as holidays, and to leave it up to employees to request a leave of absence on other (religious) days.[63] Similarly, it is recommended that management teams are made aware of the calendars of several religions' main holidays and to take them into account when/if organizing important firm events or seminars, in order to lessen the risk of placing workers in a situation of having to choose between either their professional or their religious commitments.

Religious holidays in faith-based organizations

Only in faith-based organizations may these rules be significantly altered. In France, although there is no general framework that is applicable to such organizations, their existence has been acknowledged by a number of judicial rulings. Most of them have sought to limit the extent to which out-of-work behaviour that does not to repect the beliefs and values of religious undertakings can be taken into account for the termination of employment contracts. Ultimately, the Cour de cassation has insisted that it is only legal to dismiss someone for a lack of loyalty to the faith on which the organization claims to be based if the behaviour at stake objectively causes a disruption for the organization. This is not the case, notably, for a Catholic church sexton whose sexual orientation may not be deemed to cause such disruption.[64] As far as religious holidays in faith-based organizations are concerned, it seems that greater consistency is requested from employers, in that they cannot claim to be alternatively exempted and protected by the generally applicable laws of employment. A Jewish restaurant committed to serving kosher food was thus

61 Ruling 19/1985 of the Constitutional Tribunal.
62 Country Report Spain: European Network of Legal Experts in the non-discrimination field (human european consultancy, Migration Policy Group (MPG), 2006. Constitutional Tribunal, 106/1996, 12 June 1996.
63 In France, see for instance Les entreprises pour la cité, *Gérer la diversité religieuse en entreprise. Guide pratique*.
64 Cass. Soc., 17 April 1991, no. 90-42636.

found to have illegaly dismissed its ritual verificator[65] as the decision to dismiss him rested on the sole ground that he had been absent from work for 25 days (a duration that was longer than that foreseen by the provisions of the Labour Code) in compliance with religious prescriptions imposed for the religious burial of his son in Israel. The Court noted that the employee had warned his employer in advance (and had in fact been replaced), and ruled that the overall situation was one in which the disputed extended leave was in line with the faith that both the employer and the employee were committed to, the sudden claim of the former to the application of Labour law rules pertaining to holidays and a leave of absence (and the subsequent rejection of a leave of absence for religious regions) thus being inadmissible.[66] In Spain, the situation is slightly different in that the Organic Law on Religious Freedom of 5 July 1980 explicitly allows 'registered churches, faiths and religious communities shall be fully independent and may law down their own organizational rules, internal and staff bylaws.' Consequently, hiring practices in such organizations tolerate that questions regarding employees' religious faith can be asked during interviews to the extent that the job to be performed is linked to the particular faith that the organization claims to be based on. In Austria, there does not seem to be any relevant case law on employment in faith-based organizations.

VI Conclusion

When the CJEU's Grand Chamber addressed the issue of employment decisions based on employees' wearing of headscarves and ruled in the *Achbita* and *Bougnaoui* cases in March 2017,[67] expectations were high: these rulings were to be the first pronouncements of the Court on religious discrimination – seventeen years after the adoption of Directive 2000/78. Overall, however, the rulings triggered disappointment and indeed criticism from legal scholars and practitioners.[68] One of the important criticisms that was addressed to the Court related to its failure to even mention how important religious practices (and, indeed, religious clothing such as the choice to cover one's head) may be to a person's identity and dignity. The absence of this dimension of religious freedom in the Court's decisions is all the more striking in that, conversely, economic freedoms such as the right to conduct a business and the right to define an image for one's undertaking play an instrumental role in its reasoning and, indeed, the end result. The examination of the rules pertaining to religious holidays in employment, although there is no leading judicial ruling on this matter, leads to a converging conclusion: employees' rights remain relatively absent from legal argumentations that give much greater reach and traction to the choices, the assessment of economic necessities and the policy orientations of employers. If it were to take seriously its own stance on a robust protection of religious freedom -one that, as expressed in both the *Achbita* & *Bougnaoui* rulings, encompasses both the *forum internum* and the *forum externum*-, the CJEU should probably give more explicit weight to the the importance of religious beliefs for one's identity. Other

65 In restaurants and undertakings committed to serving kosher food, ritual verificators can be designated by rabbinic courts.

66 CA Paris, 25 May 1990, *Brahim c. Arbib,* no. XP2250590X.

67 CJEU, Grand Chamber, 14 March 2017, *Asma Bougnaoui & ADDH v Micropole SA*, C-188/15; and CJEU, Grand Chamber, 14 March 2017, *Samira Achbita & Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, C-157/15.

68 Monique Steijns, *De Zaak Achbita,* blog Nederlands Juristenblad (*Netherlands Law Journal)*, NJB 19 April 2017. Available at: https://www.njb.nl/blog/de-zaak-achbita.22997.lynkx; Monique Steijns, *Achbita and Bounaoui : raising more questions than answers,* Eutopia law 18 March 2017. Available at: https://eutopialaw.com/2017/03/18/achbita-and-bougnaoui-raising-more-questions-than-answers/; Schona Jolly QC, *Achbita and Bougnaoui: a strange kind of equality*, 15 March 2017. Available at: https://www.cloisters.com/blogs/achbita-bougnaoui-a-strange-kind-of-equality; Gareth Davies, *Achbita v G4S : Religious equality squeezed between profit and prejudice,* 6 April 2017. Available at: https://europeanlawblog.eu/2017/04/06/achbita-v-g4s-religious-equality-squeezed-between-profit-and-prejudice/; José Rafael Marin Ais, *Freedom of Religion in the Workplace v Freedom to Conduct a Business, the Islamic Veil Before the Court of Justice: Ms. Samira Achbita Case,* European Papers (2018). Available at: http://europeanpapers.eu/fr/europeanforum/freedom-of-religion-in-workplace-v-freedom-to-conduct-business-achbita-case; Gwénaële Calvès, *Politiques de neutralité au sein des entreprises privées: un feu vert de la CJUE ?* (2017) 1762 Semaine sociale Lamy; Marl Bell, *Leaving Religion at the Door? The European Court of Justice and Religious symbols in the Workplace* (2017) Human Rights Law Review; Jessica Giles, *Neutrality in the Business Spehere – An Encroachment on Rights Protection and State Sovereignty* (2018) Oxford Journal of Law and Religion, Yannick Pagnerre, *[Liberté de] Religion v s [Liberté d'] Entreprise* (2017) Droit social; Sophie Robin-Olivier, *Au sujet des arrêts G4S Secure Solutions et Bougnaoui* (2017) RTDeur.

legal systems (and international legal regimes such as that of the ICCPR in particular) have articulated broad understandings of religious freedom,[69] thereby making explicit connections between religious claims (including when they require that the generally applicable norm be accommodated to a singular situation).[70] As it lists the observance of religious holidays in the full range of the choices that ought to be protected by law, the Human rights committee has also moved to being more demanding in terms of the corresponding obligations that fall upon States -including positive obligations- wheras both the national and supranational legal regimes in Europe seem to remain satisfied with much lower requirements. Maybe the above-mentioned pending preliminary refrence emanating from the Austrian Supreme Court relating to the potentially discriminatory nature of the rule according to which Protestans who work on Good Friday and receive extra money for not taking a holiday that they are entitled to, in that believers of other faiths are not compensated for working on that same day, will be a further occasion for the Court to move forward.

69 HRC, General Comment no. 22 on Article 18, §4.

70 See for instance: *Bikramjit Singh v France* (1852/2008) Views, 4 February 2013, CCPR/C/106/D/1852/2008 (2013).

Using the concept of harassment in national anti-discrimination legislation as a tool in combating hate speech?

Dieter Schindlauer*

I Introduction

When asked 'Can you define hate speech?' during his hearing before the US Congress on 10 April 2018, Mark Zuckerberg, CEO of the giant internet platform Facebook, answered: 'I think this is really a hard question.' If one tries to find a more or less universally applicable definition of what is widely labelled hate speech one has to agree in principle with this brief assessment – not only in a US or global context but also in a European setting. At least for our European framework, we have hints in addition to some international treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR) embodied in some recommendations by the Council of Europe and by the European Commission.

When it comes to counteracting hate speech, the proposals and approaches are even more diverse. What is clearly shared across all differences is the strong concern that hate speech is becoming an increasingly worrisome issue and is increasing in quantity. Hate is also a major digital phenomenon especially on the internet where it is concentrated in online social media platforms and forums.

Hateful comments and degrading or humiliating behaviour are also significant characteristics of another legal concept: discriminatory harassment. This article tries to explore the possibilities of using this legal concept in the fight against hate speech.

If hate speech is hard to define, must not discriminatory harassment be easier to grasp? At least we possess legal definitions of harassment enshrined in European directives that are binding throughout the European Union. A closer look at different national practices demonstrates, however, that even when the minimum standards are defined within the EU acquis communautaire, actual application and approaches in practice can differ widely.

For the purposes of this article, we will take a closer look at the national practices in Austria, Bulgaria and Spain.[1] Already those three different member states – marking points from the east to the west of the Union – show remarkable variations in the understanding of hate speech and in the protection against harassment. These differences also very strongly affect the guiding question of this article, namely whether the protection against (discriminatory) harassment can be used against emanations of hate speech. Without spoiling the further interest of the reader in the remainder of this article it can be

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1 A big thank you at this point to my colleagues, the experts Margarita Ilieva and Lorenzo Cachón, who provided me with such useful information about the legal and practical situations in their countries. Should there be any errors in this regard, they are all mine.

summarized that this idea seems to be very obvious and widely used in Bulgaria, possible but rarely used in Austria, and rather difficult to make use of in Spain.

From a conceptual point of view, it seems that the two concepts – hate speech and harassment – are rather closely connected as their appearance in practice might seem so similar, while their political and legal history differ widely, and their paths have hardly ever crossed throughout their international development. Furthermore, for many jurisdictions the two concepts are tackled in two different strands of law: Hate speech is usually addressed by criminal law while harassment is often redressed by civil law (as well). Both strands have quite different purposes and ways to pursue those purposes. The objective of civil law is to redress wrongs by compelling compensation or restitution. The person who has suffered is the centre of attention and is in charge of the procedure, he/she shall be protected and at least he/she avoids incurring a loss. On the other hand, for criminal law the main objective of the law is to punish the wrongdoer. It is usually up to the state to give him/her and others a strong negative incentive not to repeat similar crimes, to make him/her see and understand and regret the wrongdoing and to achieve some satisfaction for the public sense by retribution. Furthermore, the two concepts seem to be bound to serve two different legal objectives: While harassment is usually seen as protecting an individual's dignity in contractual relationships and his/her equal treatment, protection against hate speech is often seen as being more group-oriented and directed against the development of a public uprising or the disturbance of the public peace in a wider picture.

II What is hate speech? What is illegal hate speech?

In contrast to the quote by Mark Zuckerberg above, the renowned linguist George Lakoff finds that hate speech '…is not exactly hard to detect.'[2] His general, non-legal definition of the phenomenon also seems to be quite compact and adequate: 'Hate speech defames, belittles, or dehumanizes a class of people on the basis of certain inherent properties — typically race, ethnicity, gender, or religion. Hate speech attributes to that class of people certain highly negative qualities taken to be inherent in members of the class. Typical examples are immorality, intellectual inferiority, criminality, lack of patriotism, laziness, untrustworthiness, greed, and attempts or threats to dominate their "natural superiors."'[3]

So, from the point of view of a linguist this is certainly a very suitable definition that can in principle be understood by the majority of people. It is easy to get a grasp of it. For legal specialists, it is much more difficult to find a definition. On various levels – from grassroots NGOs to European Commission working groups or the United Nations, attempts to find a concise and comprehensive definition have been numerous and usually slightly unsatisfactory.

The origin of hate speech as a legally addressed issue lies with the ICERD,[4] more precisely with its Art. 4 which demands that all member states '…declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.' We see that already here the decision was made to use criminal law (argumentum: 'punishable') in counteracting hate speech. The other international basis is the ICCPR[5] which in its Art. 19 protects the right to freedom of expression as a human right which 'carries with it special duties and responsibilities' and in its Art. 20(2) which demands that 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

2 See https://georgelakoff.com/2017/09/14/what-is-hate-speech/ (10.06.2018).
3 See https://georgelakoff.com/2017/09/14/what-is-hate-speech/ (10.06.2018).
4 International Convention on the Elimination of All Forms of Racial Discrimination, in force since 1969.
5 International Covenant on Civil and Political Rights, in force since 1976.

Only in the rather recent Rabat Plan of Action[6] have the experts involved concluded and conceded that the problem of hate speech is generally larger than what can be tackled by means of criminal law alone. In Point 20 of their recommendations they state: 'In terms of general principles, a clear distinction should be made between three types of expression: expression that constitutes a criminal offence; expression that is not criminally punishable but may justify a civil suit or administrative sanctions; expression that does not give rise to criminal, civil or administrative sanctions, but still raises concern in terms of tolerance, civility and respect for the rights of others.'[7]

Art. 10(2) of the European Convention on Human Rights constructs the use of the right to freedom of expression as an act of responsibility. This means that, while its protection is wide, the use of free speech comes with a strong responsibility for those who use it and it may not be misused for purposes that are contrary to the spirit of the whole Convention. The European Court of Human Rights has recently issued a very useful updated factsheet on hate speech[8] that summarizes the Court's case law on the delicate weighing of arguments in cases concerning hate speech and – inevitably – issues of freedom of speech.

In order to later contrast it with the legal definition of discriminatory harassment, it seems necessary to reiterate the main legal considerations of this case law (using the mentioned factsheet): 'Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.' (ECHR, *Handyside v the United Kingdom,* judgment of 7 December 1976, § 49).

> '... tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance ..., provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued.' (ECHR, *Erbakan v Turkey,* judgment of 6 July 2006, § 56).

When dealing with cases concerning incitement to hatred and freedom of expression, the European Court of Human Rights uses two approaches which are provided for by the European Convention on Human Rights:

First: The approach of exclusion from the protection of the Convention, provided for by its Article 17 (the prohibition of the abuse of rights), where the comments in question amount to hate speech and negate the fundamental values of the Convention. 'Eventually, the court recalls that there is no doubt that any remark directed against the Convention's underlying values would be removed from the protection of Article 10 by Article 17 (...)'[9] (*Seurot v France*, decision on admissibility of 18 May 2004).

6 Office of the High Commissioner on Human Rights, A/HRC/22/17/Add.4, Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, adopted 5 October 2012.

7 Office of the High Commissioner on Human Rights, A/HRC/22/17/Add.4, Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, adopted 5 October 2012, p. 9.

8 European Court of Human Rights, Press Unit, Factsheet, Hate speech, available at: https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf.

9 French original: 'Enfin, la Cour rappelle qu'il ne fait aucun doute que tout propos dirigé contre les valeurs qui sous-tendent la Convention se verrait soustrait par l'article 17 à la protection de l'article 10 (...)'.

Second: The approach of setting restrictions on protection, provided for by Article 10, paragraph 2, of the ECHR. This approach is adopted where the speech in question, although it is hate speech, is not likely to destroy the fundamental values of the Convention. This is where the Court applies the test for a legitimate interference with a human right according to the limitations stated in the Convention itself (prescribed by law, necessary in a democratic society, national security, territorial integrity or public safety, etc.).

At the level of the European Union, the respective legislative actions are guided by Council Framework Decision 2008/913/JHA[10] on combating certain forms and expressions of racism and xenophobia by means of criminal law. In its preamble, it sets out the necessity '… to define a common criminal-law approach in the European Union to this phenomenon in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties are provided for natural and legal persons having committed or being liable for such offences.' The Framework Decision then obliges the member states to punish (i.a.) intentional public incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin and the commission of such an act by the public dissemination or distribution of tracts, pictures or other material. The Decision further allows (in Art. 1(2)) for member states to choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.

All these legal definitions of hate speech clearly point to very severe, objectively dangerous, publicly noticeable expressions that are even likely to disturb public order. These form the part of hate speech that has to be tackled by the use of criminal law. Criminal law, of course, does not provide any room for subjective elements in the definition, nor for any sharing of the burden of proof, and neither does it typically place much attention on the victim of the criminal activity. It is the state which acts against it and there might even be no need to identify individual victims or groups thereof.

In the understanding of this particular approach it is interesting to see that the main concept of hate speech focuses on its function of incitement to further adverse action. So, this approach usually does not see the main harm that has already been done by a particular expression but concentrates on the harm that could evolve if the expression was allowed to spread and influence others or the public at large. It is an understanding of incitement to hatred as an inchoate crime[11] that puts the telos of much of the legislation on the protection of public goods like public peace or public order or on the reputation of certain groups rather than on the protection of the dignity of individual victims of such behaviour.

It is very enlightening in this regard that one of the most recent of all European international papers on hate speech, the ECRI's[12] General Policy recommendation No. 15 on hate speech (from December 2015), clearly moves beyond a definition of hate speech that is bound by the limitations enshrined in an approach merely inspired by criminal law. Still, in its point 8 the recommendation refers to the main function of hate speech as '(…) hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those who are targeted by it (…).' Under the same point, the recommendation asks to 'clarify the scope and applicability of responsibility under civil and administrative law for the use of hate speech (…)' and thereby clearly demands that the scope of protection be widened beyond the use of criminal law. This approach is also expressed in the preamble, stating bluntly '(…) that criminal prohibitions are not in themselves sufficient to eradicate the use of hate speech and are not always appropriate (…)' Interestingly for the purposes of this article, in these recommendations *harassment* appears as an integral part of the definition of hate speech (in the preamble): '(…) hate speech is to be understood (…) as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment,

10 Council Framework Decision 2008/913/JHA of 28 November 2008, L 328/55, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32008F0913 (20.06.2018).
11 See the Rabat Plan of Action, recommendation Point 29/f.
12 European Commission against Racism and Intolerance, Council of Europe Framework.

insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status.'

III What is discriminatory harassment?

Quite contrary to the legal history of hate speech, the concept of discriminatory harassment is one that is strongly rooted in civil law or even more precisely: in labour law. Its European version is also a concept that has been developed for a large part by European institutions – the most prominent being the Court of Justice of the European Union together with the Commission and the Council.

Although harassment seems to be a familiar everyday term, its recognition as a legal concept is comparatively new and very dynamic. The initial idea and the coining of the term emanate from the USA in the mid-1970s and they clearly come from sexual harassment and from racial discrimination in employment. Rather early, – in the late 1980s – the concept was also starting to be discussed in the European Union's system regarding protection against discrimination in the workplace on the ground of sex. It took a rather long time to be tackled by binding law, though.

For discriminatory harassment in the European Union we now possess legal definitions that are binding as a minimum standard of protection. The concept is embedded in the protection of the right to equal treatment and is treated as one specific form of discrimination. Point 6 of the preamble to the Gender Recast Directive[13] clearly reveals this: 'Harassment and sexual harassment are contrary to the principle of equal treatment (…) and constitute discrimination (…)' Three different Directives[14] contain these definitions which are more or less congruent: According to these definitions, harassment (based on a discriminatory ground or protected characteristic) is unwanted conduct related to a protected characteristic that takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. So, from this definition we see that the main focus of the protection against harassment is on the direct and individual victim of such conduct. The victim is so important in this concept that there is a strong subjective part in this definition: the conduct must be 'unwanted' by the person affected. This clearly indicates that a particular conduct that is tolerable or acceptable for one person might be unwanted for another and so constitutes no harassment in the former case while it is deemed to be harassment in the latter, – if the additional bits of the definition are fulfilled as well. Harassment does not have to be intentional as 'having the effect of (…)' will be enough to constitute it. Furthermore, the main telos of anti-harassment legislation in Europe is clearly the protection of a person's dignity. Objectively, the harassing conduct must be suitable to change 'the environment' – i.e. to poison the (workplace) relationships and make it an intimidating, hostile, degrading, humiliating or offensive experience to be in a certain environment. This focus on the 'environment' clearly started off as a reference to the workplace context from which the concept emanates. It is worth noticing, though, that with Art. 2(3) of Directive 2000/43/EC (the 'Racial Equality Directive'), the applicability of the prohibition of harassment stretches beyond employment contracts and the workplace.

Harassment therefore acknowledges that discriminatory speech or expressions can have a directly negative effect on the person(s) affected by it. It is not seen as an inchoate crime with a large potential for harm in the future but an assault on a person's dignity that is already complete. This makes it a concept that potentially focuses much more on the persons affected and the concepts of dignity and individual protection than on public peace and order.

13 Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal treatment of men and women in matters of employment and occupation (recast).

14 The Gender Recast Directive 2006/54/EC, the Racial Equality Directive 2000/43/EC and the Employment Equality Directive 2000/78/EC.

IV The practice in Bulgaria[15] – harassment as an established concept in the fight against hate speech

In Bulgaria, harassment is prohibited and defined in the Protection Against Discrimination Act (PADA, in force since January 2004), Additional Provisions, § 1 (1) as 'any unwanted conduct related to [protected][16] grounds (...) and manifested physically, verbally or in any other manner, having the purpose or effect of violating the dignity of a person and of creating a hostile, degrading, humiliating, offensive, or intimidating environment.' It is deemed to be a form of discrimination.[17] Although this mirrors the definition in the relevant EU Directives, what is so special about Bulgaria is that the personal scope of the PADA is universal: any person may be a victim and every person is bound by the prohibition. Furthermore, the material scope of the PADA is universal as well: the ban applies to all rights and legitimate interests. In many cases, both the PADC and the courts have qualified public hate speech or negative stereotyping of groups as harassment.[18] Each individual who commits an act of discrimination, including harassment, can be held liable. In addition, employers can be held liable to pay compensation for damages ensuing from the actions of anybody carrying out work for them. Further, anybody can be held liable and sanctioned by a fine if they have knowingly aided an act of discrimination, including harassment, by a third party.[19] If an employee suffers harassment by a third party at the workplace, and complains about it to the employer, the employer has a duty to take action to stop the harassment.[20]

In a practical understanding of the case law in Bulgaria, the above stressed idea that the individual victim is the centre of attention in anti-harassment legislation seems not to be applicable as there are many cases where this is not the focus. In numerous cases of hate speech targeting whole communities or parts thereof, the national equality body, the PADC (Protection Against Discrimination Commission), and the courts have found harassment while at the same time the actual application of existing criminal provisions against incitement to hatred/discrimination/violence appears to be used rather reluctantly and infrequently. The criminal law regulations against hate speech on racial/ethnic grounds (Article 162 of the Bulgarian Criminal Code) and on religious grounds (Article 164 Bulgarian Criminal Code) prohibit incitement and in this they mirror 'classical' anti-hate speech provisions in other countries with a reference to CERD. Human rights activists[21] criticise the fact that the public prosecution service is acting as a bottleneck that is too narrow here.

Another speciality of the Bulgarian legal situation is the special role and the possibilities of the equality body, the PADC. The PADC is a body consisting of nine members who serve a five-year term.[22] The PADC establishes equality law violations; it issues injunctions to prevent or terminate breaches, and to restore the status quo ante; it sanctions perpetrators; it brings judicial review actions; it is competent to file claims with the civil courts or to join court proceedings in an amicus curiae capacity (both of which are not done in practice); it makes recommendations to public bodies; it gives opinions on draft legislation; it assists victims of discrimination in filing complaints; it is competent to carry out independent research

15 This chapter fundamentally relies on the work of Margarita Ilieva, the Bulgarian legal expert, lawyer and activist. She had a say in the development of the Bulgarian anti-discrimination legislation, has been litigating many important cases and publishes extensively on anti-discrimination issues. For this article, I have mainly used her reports for the European equality law network (see: https://www.equalitylaw.eu/country/bulgaria), a draft recent country report and valuable information submitted in private correspondence.

16 In Bulgaria, the following grounds are protected against discrimination: sex, race, national origin, ethnicity, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or social status, disability, age, sexual orientation, family status, property status, or any other ground provided for by law or by an international treaty that Bulgaria is a party to.

17 See Art. 5 PADA.

18 For instance: Supreme Administrative Court, Decision No. 16554 of 11 December 2013 in case No. 27/2013; Protection against Discrimination Commission, Decision No. 397 of 29 October 2014 in case No. 39/2012.

19 PADA, Article 8.

20 PADA, Article 17.

21 Like, e.g., the Bulgarian Helsinki Committee, Amnesty International, and ILGA Europe.

22 Article 41 (2) PADA.

and to publish independent reports[23] (again, it does not do so in practice). It also informs the public on equality law provisions and carries out other activities as stipulated under its own regulations.[24]

It is interesting to see that under the PADA a victim of harassment or hate speech has two choices: If the main aim of the lawsuit is to establish harassment or incitement to hatred/violence and to claim financial compensation, judicial proceedings should be commenced before the general courts,[25] which can additionally order respondents to take remedial action, or to abstain from or terminate particular action or inaction found to be in breach of the law.

On the other hand, a procedure before the equality body PADC, the independent equality body, will ideally end[26] with a finding of harassment (and/or incitement to discrimination), an order for preventive or remedial action and a fine.[27] So, while the body can impose financial fines, it cannot award compensation. Both proceedings are free from procedural costs.[28] After a finding of harassment by the PADC, the claimant can additionally sue for damages before the general courts (administrative or civil, depending on the public/private nature of the respondent).

In the following I have chosen three rather recent judgments by the Bulgarian courts to showcase the different constellations that are legally subsumed under harassment in Bulgaria, because this approach seems to be quite special in Europe:

The most prominent case of recent times is the case against the Deputy Prime Minister for Economic and Demographic Policy, Mr Valery Simeonov, who also served as the Chair of the National Council for Cooperation on Ethnic and Integration Issues, and who stated in the National Assembly in 2014 (shortened version):

> '*It is an undeniable fact that a large part of the gypsy ethnicity lives outside of any laws, rules and general human norms of behaviour. The laws do not apply to them, taxes and charges are incomprehensible terms, electricity, water, social and health insurance bills have been replaced by the belief that they have only rights, but no obligations and responsibilities. For them, theft and robbery have become a livelihood, violation of the law – a norm of conduct, childbirth – a profitable business at the expense of the state, and the care for their offspring – are teaching minors how to practise begging, prostitution, theft and the sale of drugs. (…) Bulgaria stands on the brink of an ethnic crisis. Two opposing and mutually exclusive worlds are standing opposite each other in our tortured homeland: the world of the poor yet bill-paying pensioners, who are hanging themselves due to disease and poverty, and the world of the bloodthirsty thieves and abusers, getting drunk off of monthly child and social benefits. The question remains, what are the reasons for a part of the gypsy ethnicity becoming a destroyer of statehood and laws? (…)*'

In this case, the Burgas District Court[29] decided on this matter brought by two Roma journalists, and found that it was a case of harassment within the meaning of the Bulgarian PADA. The court ordered Simeonov to abstain from any further such speech while it found that the impugned speech did not amount to incitement to discrimination. Interestingly, the court was very clear in stating that these words 'lead to the violation of the dignity of the person and the creation of a hostile, degrading, humiliating and offensive environment, and could injure anyone of Roma ethnicity, without it being necessary that a

23 Article 47 PADA.
24 Article 47 PADA.
25 PADA, Article 71.
26 With the possibility of two instances of judicial review by the administrative courts.
27 With sanctions ranging from EUR 1 000 to a maximum of EUR 20 000.
28 This is at least true for fees due to the state. In practice, the courts still order the losing party to pay the costs of the winning party.
29 Bulgaria, Burgas District, *K. B. and O. I.* vs *Valery Simeonov,* Decision No. 1151, case No. 7094/2016, 31 July 2016. The decision is currently subject to an appeal before a regional court.

statement refers to the entire Roma community in order for it to be perceived as infringing the dignity of an individual self-identifying as its representative.'

The decision is interesting as the statements of the politician would probably be qualified as hate speech in other European countries as well, while in many other countries it would be hard for a civil claim for harassment to be successful. The European definitions of harassment seem to be focussing so much on the element of an individual's dignity being infringed that this judgment stands out. When the Bulgarian courts refer to dignity in case law like this, the dignity of an individual as a member of a particular group is protected and there seems to be a comparatively wide definition of the 'environment' that the harasser affects with his/her harassment. It is also remarkable that the claimants did not request financial compensation in this case – as it would have been interesting to see whether the court would be willing to award such compensation and how it would assess the damage done by the hate speech to two individuals from a larger ethnic group when they had not in any way been singled out as individual targets of harassment. On the level of political statements and awareness raising, it is additionally important to note that the courts in Bulgaria have the mandate to decide on a matter of principle – i.e. to determine that the particular conduct actually fulfils the elements of harassment – while not being bound to award compensation or sanctions at their discretion, such as ordering the harasser to stop the harassment and to refrain from further similar conduct. A judgment like this would not be possible in Austria or Spain. In Austria and in Spain, the claimants would fail with a harassment claim, as the scope of protection in both countries would clearly not cover this situation as it is beyond a direct connection with their workplace or a contractual agreement regarding goods and services.

The two other Bulgarian cases concerned online hate speech that was not moderated or removed in time – which was also found to be harassment:

In one case[30] decided by the Supreme Administrative Court in 2017 an online news company was found liable for consciously aiding and abetting harassment in the form of anti-Turkish hate speech comments published by users on its website under a news item. The Court found it important that the respondent company had failed to remove the hateful comments from its website for the duration of one month. The Court reinstated a fine of BGN 500 (EUR 250) imposed on the company by the PADC and issued an injunction demanding that it must better control hateful comments posted by users on its site.

The other (earlier) court decision by the Supreme Administrative Court[31] was again based on similar facts, as it was a case against a national TV broadcasting company which was liable for discrimination for having failed to moderate anti-Roma hate comments by anonymous users on its website. The PADC held that by omitting to moderate anti-Roma comments under a news report on its website, the respondent company was guilty of discrimination. The next level court of appeal upheld this decision and ruled that the comments constituted harassment under the PADA, as the broadcaster was responsible for the respective content because it acquired rights over it as soon as it was published on its website. Moreover, the company's own general terms provided for a duty for the company to erase or edit user comments which contain ethnic discrimination or insults against minorities. In addition, as a last instance, the Supreme Administrative Court found that the impugned comments contained incitement to violence against the Roma community, creating a hostile, degrading and offensive environment. The case had been brought by a Roma organisation using the possibility to bring action popularis claims to court under the PADA. In this case the original injunction by the equality body, forcing the company to publish the body's ruling against it on its TV site, was revoked by the Court. The Court also repealed any financial sanction although it found the broadcaster guilty of discrimination (harassment). The judgment echoed the legislation, stating that a harassing intent was not a necessary part of the offence when the result

30 Bulgaria, Supreme Administrative Court, *N.A.* vs *Mediapool Ltd.*; Dec No. 2171 in case No. 12401/2015, 21 February 2017.
31 Bulgaria, Supreme Administrative Court, *NN (a TV broadcasting company)* vs *NN (a Roma NGO),* Decision No. 13542 in case No. 10756/2015, 12 December 2016.

was harassment. The court was guided by the ECtHR case of *Delphi AS* vs *Estonia*[32] that found the media in question liable for their platforms and forums if users misuse them to insult and incite hatred.

In Bulgaria, and in accordance with the European anti-discrimination directives, national law requires a shift of the burden of proof from the complainant to the respondent in discrimination cases. The respective provision[33] was amended in 2015 aiming to be fully in line with the relevant European requirements. Nevertheless, it seems that this procedural element does not play a visible role in practice – especially not in hate speech cases. There is only one judgment[34] regarding sex discrimination where the shifting of the burden of proof has been decisive. In this case the Supreme Administrative Court found that sex was indeed the reason for the less favourable treatment as the respondent had failed to establish a different and legitimate reason.

It can be concluded that in Bulgaria the concept of harassment is applied so universally that it entails most if not all incidents that would be labelled hate speech elsewhere. A functioning and active equality body is contrasted by the rather reluctant enforcement of criminal law which in conjunction lead to a main practical emphasis on the anti-discrimination legislation for the fight against hate speech.

V The practice in Spain[35] – heavy reliance on penalties and criminal law

Although Spain has introduced some new legislation to implement the EU anti-discrimination directives, it is probably safe to say that these are not very strong and do not yet play a major role in practice. Especially the application of anti-discrimination provisions in all fields beyond the field of employment is practically non-existent, as the law lacks sanctions. A notable exception to this is the protected ground of disability which does extend beyond employment and foresees sanctions for harassment.

In addition to this and in sharp contrast to the situation in Bulgaria, the designated national equality body in Spain, the Council for the Elimination of Racial or Ethnic Discrimination, is neither perceived as independent nor as effective. This situation has recently been exacerbated, as after its former chair resigned in September 2015, no replacement has been nominated and hence there has been no meeting of the Council's members during 2016 and 2017.

Law 62/2003 (Article 28.1.d) defines harassment as 'all unwanted conduct related to racial or ethnic origin, religion or faith, disability, age or sexual orientation that takes place with the purpose or effect of violating the dignity of a person and creating an intimidating, humiliating or offensive environment.' Harassment is considered to be a form of discrimination. This law is applicable to all persons, in both the public and the private sector. For the ground of racial or ethnic origin it covers education, health, social services and other services, housing and access to any goods and services in addition to employment. Alas, no sanction is provided to give some practical teeth to that provision outside the sphere of the workplace.

There are some penal sanctions that are foreseen in the context of employment in Spain.

The Law on Offences and Penalties in Social Matters (RLD 5/2000, of 4 August 2000) establishes financial sanctions for offences concerning employment and social matters by natural or legal persons or by private and public-sector employers in the context of employment relations and employment. The law distinguishes between three types of gravity of an offence: 'minor', 'serious' or 'very serious'.

32 ECtHR, *DELFI AS v Estonia*, Grand Chamber Judgment of 16 June 2015, Application No. 64569/09.
33 Art. 9 Protection Against Discrimination Act.
34 Bulgaria, Supreme Administrative Court, Decision No. 274, 9 January 2012 in case No. 1319/2011.
35 This chapter fundamentally relies on the work of Lorenzo Cachón Rodriguez, the Spanish legal expert and academic. For this article, I have mainly used his reports in the European equality law network (see: https://www.equalitylaw.eu/country/spain), his draft recent country report and valuable clarifications submitted in private correspondence.

The amounts of the sanctions range from a minimum of EUR 60 to a maximum of EUR 187 515. To establish the amount of the fine, the courts take into consideration factors such as negligence or the intention of the offender, fraud or collusion, the failure to abide by previous warnings and requests by the inspectorate, business turnover, the number of workers or other persons concerned, and they assess the harm caused. Additionally, some very serious sanctions are made public (the naming and shaming approach).

The same piece of legislation also lays down sanctions for harassment as a very serious infringement in the context of employment relations: 'harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation when it takes place within the scope of management authority, whoever the agent may be, provided that, when the employer is aware of it, the latter does not undertake the necessary measures to prevent such infractions.'

The Law on Social Jurisdiction (Law 36/2011) lays down a special procedure for violations of the fundamental rights and civil liberties that are enshrined in the Spanish Constitution. This procedure covers acts of harassment. If the court judgment rules in favour of the claimant in respect of an act of discrimination or discriminatory harassment, the court will declare that act void, will require the previous state of affairs to be restored and will provide for 'reparation of the consequences of the act, including any appropriate compensation (Article 183). Again, this covers employment issues.

The Criminal Code also serves to safeguard that situations are being addressed and changed if they are found to be in breach of the principle of equality. Article 314 Criminal Code provides for 'imprisonment from six months to two years for those employers "who do not restore a situation of equality in accordance with the law when required to do so or following an administrative penalty, making good any corresponding financial loss" when having been convicted of "serious discrimination in a public or private workplace"'.

So, discriminatory harassment can only be tackled successfully in Spain when it occurs in the sphere of employment. Although it is theoretically possible that a certain act that qualifies as hate speech and fits within the definition of harassment is performed in the area of employment, this specific pattern is not of practical importance in Spain.

Hate speech as such is also dealt with by the Criminal Code under the heading of 'offences against fundamental rights and civil liberties.' In implementing Council Framework Decision 2008/913/JHA Spain has amended its Criminal Code, in particular Articles 510, 511 and 512, which provide for imprisonment for racist crimes and xenophobia. The regulation defines two different groups of conduct:

- Actions of incitement to hatred or violence against certain groups or individuals because of their membership of a group on racist, anti-Semitic or other grounds related to ideology, religion or belief, family status, membership of an ethnic group, race or nation, national origin, sex, sexual orientation or gender identity, gender, illness or disability; this also includes the development or production of writings that incite racism or discrimination; and acts of the denial or glorification of crimes of genocide.
- Acts of humiliation or contempt against such groups or individuals and the glorification or justification of crimes committed against them or their members with a discriminatory motivation.

Article 510 of the Criminal Code foresees prison sentences of one to four years and a fine for any person who publicly encourages, promotes or incites, directly or indirectly, hatred, hostility, discrimination or violence against a group or a part thereof, or against any person on grounds of their membership of that group, for reasons of racism, anti-Semitism or other such ideology, religion or beliefs, family situation, membership of an ethnic group or race, national origin, sex, sexual orientation, sexual identity or gender, illness or disability, or for any person 'disseminating defamatory information' about groups with these same characteristics.

Any person who infringes the dignity of people through actions involving the humiliation of, contempt for or the discrediting of any such groups will be punished with imprisonment from six months to two years and a fine.

These are rather harsh fines and Spain has taken additional measures to make sure that its effort against hate speech is being noticed – especially after the legal amendments of the Criminal Code in 2015. In contrast to both Bulgaria and Austria, Spain has actively invested in hate speech and hate crime investigation and law enforcement by establishing a country-wide network of prosecutors specialising in combating hate crime, including hate speech. The ECRI concedes in its latest report on Spain[36] that it was the engagement of such specialized prosecutors that led to legislative improvement. Moreover, the Spanish National Police have designated 200 police officers specialising in hate crime including hate speech.

When taking a look at the recent public discourse on the issue of hate speech in Spain, it is quite astonishing for a non-Spanish observer to see that the new legislation and the stricter enforcement of anti-hate speech law have received a great deal of criticism and have even caused some outrage.[37] In the Spanish context, the government's interest in anti-hate speech legislation and enforcement was primarily seen by a considerable part of the public as a tool for repressing the right to freedom of speech. The criticism does not come from the anti-immigrant, right-wing fraction that one would expect in Austria or Germany, but from leftists and human rights-oriented groups and NGOs. The reform of the Spanish Penal Code by the conservative government in 2011 was widely labelled as a 'gag law' and the recently elected socialist government promised to reverse this.

By way of a conclusion it seems that for the Spanish legal situation it does not make too much sense to use anti-harassment regulations to combat clear hate speech as the mechanisms do not differ much with regard to their outcome and procedure and, therefore, this approach would not produce any advantages. Additionally, it seems that a vigilant prosecution service and the law enforcement apparatus provide a comparatively well-functioning penal law-based tool against hate speech whereas anti-harassment provisions are clearly only focussing on the employment sphere.

VI The practice in Austria – very little overlap between anti-hate speech and anti-harassment regulations

Hate speech is in principle tackled by criminal law in Austria and the most relevant provision is § 283 (1) Criminal Code which reads:

Whoever,

1. in a manner to reach out to (or accessible to) many people, incites violence against a church or religious community or another group, defined by existing or non-existing criteria of race, skin colour, language, religion or belief, citizenship, breed or national or ethnic origin, gender, physical or mental disability, age or sexual orientation or against a member of such group expressly for the membership in the group or who incites hatred against those,
2. with the purpose of infringing the human dignity of others, insults one of the groups mentioned in 1., in a way that is suitable to diminish or defame the group in the public opinion (...)

36 ECRI Report on Spain, CRI(2018)2, fifth monitoring cycle, adopted 5 December 2017, published 27 February 2018.

37 See, for example: The Spain Report, Editorial, On Freedom Of Speech In Spain, 23 Feb. 2018, https://www.thespainreport.com/articles/1392-180223182833-on-freedom-of-speech-in-spain; Ifex, State of free expression deteriorated in Spain in 2017, 1 Feb. 2018, https://www.ifex.org/spain/2018/01/31/free-expression-deterioration/; Above the Law, Spanish Government Uses Hate Speech Law to Arrest Critic of the Spanish Government, 20 Jan. 2018, https://abovethelaw.com/2018/01/spanish-government-uses-hate-speech-law-to-arrest-critic-of-the-spanish-government/?rf=1; El Pais, Flemming Rose, The problem with hate speech laws in Europe, 30 Jan. 2017, https://elpais.com/elpais/2017/01/30/inenglish/1485772786_432779.html; El Pais, Vera Gutiérrez Calvo, Free speech in the Twitter era: No laughing matter in Spain, https://elpais.com/elpais/2017/04/27/inenglish/1493287498_564542.html; (all links visited 1 July 2018).

Additionally, the provision prohibits the approval or denial of, grossly minimising, or justifying genocide, war crimes and crimes against humanity.

Another, still very important law in practice is the National Socialism Prohibition Act (Verbotsgesetz)[38] which criminalises all activities that could lead to a resurfacing of the NSDAP (the National Socialist German Workers' Party), and this includes the use of Nazi symbols and the denial of the holocaust. Still, in 2017, there were 798 official notifications of breaches of this law in Austria[39] (and 123 criminal convictions) while 'only' 259 notifications concerned the above cited § 283 (108 criminal convictions in 2017). The 'Internet Reporting Service on National Socialist Resurgence' of the Ministry of the Interior received 3 523 reports and tips about potential infringements committed online. The massive use of the internet by online haters has recently led to a steep rise in convictions for hate speech.

The main telos of the provision against hate speech – the overall legal good to be protected by the law – is 'public peace' as the norm is listed in the Criminal Code in the section on 'Crimes against public peace'. This is the main reason for the provision to put so much emphasis on the act of spreading the inciting idea 'in a manner to reach out to *many people*' – which has been defined by the case law as being a minimum of 30 persons. It is an aggravating factor, that is taken into account in § 283/2 Criminal Code, if the incitement is accessible to (or reaches out to) a *broad public* (breite Öffentlichkeit) which is defined as a minimum of around 150 persons.

This requirement of publicity is one of the major differences between the prohibition of incitement and the anti-harassment regulations which can be found in civil law – most importantly in §§ 21/1, 21/2, 35/1 Equal Treatment Act.[40]

§ 21 (2) of the Equal Treatment Act provides the following definition:

> 'Harassment is unwanted conduct related to one of the grounds (…) with the purpose or effect of infringing a person's dignity, is unacceptable, undesirable and offensive (indecent) to the person affected and with the purpose or effect of creating an intimidating, hostile or humiliating environment for the person affected.'

This harassment is deemed to be a form of discrimination and therefore its prohibition aims at protecting the principle of equality and the dignity of the persons affected.

Claims against harassment are civil claims only and the only remedy available is the financial compensation of damages, including immaterial damages (to balance the personal grievance suffered, § 26/11 Equal Treatment Act). The compensation does not have a punitive aspect to it as this is generally unknown in the Austrian legal order. The Austrian legal system has not elaborated a legal tradition regarding immaterial damages. Basically, the idea of using compensation for damages in a directive, punitive and thereby dissuasive way is very unfamiliar if not bizarre to judges in Austria. Thus, the legislator has repeatedly seen the need to substantially raise the minimum amount of compensation for harassment (from originally EUR 400 to EUR 1 000 since 2004).

The scope of the protection against harassment does not only include employment but extends to other areas as well – most importantly to 'access to and the supply of goods and services which are available to the public, including housing.' While the majority of cases are brought to court within the scope

38 Austria, National Socialism Prohibition Act 1947, StGBl No. 13/1949 as last amended by BGBl No. 148/1992, English translation available at: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1945_13/ERV_1945_13.html.

39 See, Federal Minister of the Interior, Federal Bureau for the Protection of the Constitution and Counteracting Terrorism, Verfassungsschutzberich 2017 (Report on the Protection of the Constitution), p. 25; available (in German) at: http://www.bvt.gv.at/401/files/Verfassungsschutzbericht2017.pdf.

40 Austria, Equal Treatment Act (Gleichbehandlungsgesetz), BGBl I No. 66/2004, as last amended by BGBl I No. 40/2017; there are other pieces of legislation which also prohibit harassment, they all use the same definition.

of a labour relationship, there are cases beyond that scope.[41] All cases so far have been brought by individuals who had personal contact with the harasser – either in an employment relationship (vertical and horizontal) or in a (pre-)contractual relationship when the case concerns access to goods and services.

The most important question when assessing the possibilities and limits of anti-harassment provisions against emanations of hate speech is the legal definition of '*the environment*' that has to be negatively affected by the harassing incident – as this definition limits the scope of the provision. The understanding of the environment defines the closeness and the status of the relationship between the harasser and the affected person or group. Here, the Austrian interpretation differs greatly from the universal Bulgarian approach.

Two important judgments have brought some clarification concerning the understanding of this concept of the environment for the purposes of anti-harassment legislation:

A recent judgment from Innsbruck[42] clarified that a single incident can have the effect of creating an intimidating, hostile or humiliating environment for the person affected, when it decided in the case of a waiter who had been harassed by his direct supervisor with the words 'I am going to throw the scrambled eggs in your face, you ugly negro (*neger*)!' The court thereby overruled the court of first instance that had found that one single incident was not sufficient to create a hostile environment within the meaning of the law. The court of appeal clearly held that one incident, if severe enough, can actually make the (working) environment change into a hostile or humiliating place and, therefore, harassment does not necessarily need long-lasting or repeated action(s) to occur.

Another judgment by the Supreme Court[43] in a case where an ex-employee had received an insulting letter that used diminishing language about her ethnic origin determined that this conduct was clearly unwanted and indecent and that it did indeed infringe the victim's dignity, but it was not sufficient to create an environment which constituted harassment. The Court stated that the conduct – even possibly a single incident – must be able to create a somewhat durable situation (gewisser Dauerzustand). In the case cited, the employment contract had already been terminated and there was no further contact (apart from the letter) between the alleged harasser and her former employee.

Summarizing these two judgments, it becomes clear that the Austrian courts demand a particular relationship between a harasser and the harassed that is closer and more personal than what we usually see in cases of hate speech. The judgments also imply that, to a certain extent, the harasser and the harassed have to share the environment that is changed by the harassment.

Another issue that becomes apparent when dealing with the Austrian case law on hate speech, on the one hand, and harassment, on the other, is that both legal definitions contain the expression of 'dignity' but they use different standards to judge the threshold of when it is infringed.

Maybe the crucial difference is that § 283/1/2 Criminal Code refers to 'human dignity' (Menschenwürde) while the definition of harassment speaks of 'a person's dignity' (Würde).

The case law on the definition of 'human dignity' in hate speech matters in Austria has determined the following: 'Human dignity is infringed if the conduct bluntly denies the members of the affected group the right to live as equal citizens or describes them as inferior or valueless parts of the population or subjects them to humiliating or degrading treatment. It is decisive if it is aimed at the central and most

41 Austria, Viennese Provincial Court for Civil Matters (Landesgericht für Zivilrechtssachen, Wien), *Hayet B.* vs. *Ferdinand S.,* Decision No. 35R68/07w; 35R104/07i, 30 March 2007.

42 See: Austria, High Provincial Court of Innsbruck (Oberlandesgericht Innsbruck), Decision No. 15Ra 13/17z of 1 March 2017. Available (in German) at: https://www.klagsverband.at/dev/wp-content/uploads/2017/04/OLG-Innsbruck-15Ra13_17z-anonymisiert.pdf (accessed 20.03.2018).

43 Austria, Supreme Court, *S. B.* vs *E.K.,* Decision No. 9ObA21/12x, 27 Feb. 2012.

important part of the personality of the members of the affected group.'[44] This means that a rather high level of aggression and interference is needed to constitute an infringement of human dignity.

In the case law concerning harassment, the requirement to 'infringe a person's dignity' has so far never been given much attention as the necessary level seems to be much lower here than in criminal matters. In the case quoted above,[45] the Supreme Court even stated: 'The infringement of dignity requires the harassing act to have a certain minimum level of intensity, but it is sufficient if an infringement was intended and, therefore, subjectively felt by the affected person.' This is a considerably lower threshold for dignity than for human dignity.

So, in summarising the Austrian situation it can be said that, to date, no case has been brought to court that would qualify as tackling hate speech by means of anti-harassment legislation. Such cases are not impossible, however. Cases could emerge – for example – regarding certain restricted circles in social media, where spreading hate speech could qualify as harassment if – again hypothetically – co-workers or employees have access to the forum. Defamatory, racist or discriminatory images, posters or stickers or the like in rooms (including restrooms) where employees, clients or customers have access to, could be qualified as harassment as well. Tackling incidents like these as harassment will have the advantage that the publicity requirement in § 283 Criminal Code does not apply. Similarly, hate speech emanations in a housing context (in hallways, on staircases, etc.) could trigger a duty for the landlord to remove them or be held liable for harassment. The problem in practice is that the provisions against harassment are rarely used as they require the individuals who are affected to be fully committed and prepared to assume substantial risks. As there is no possibility for an actio popularis in such cases, they will remain rare.

VII Conclusion

From a wider, international perspective, and in general, harassment and hate speech in most countries are not the same, although a binding understanding of what constitutes hate speech does not exist. The fight against hate speech is first and foremost a fight against it spreading and inciting others to join the awful and dangerous chorus of hate and attempted dehumanisation of groups of people. It is alert to the dangers of public discourses tilting and in this it revokes images of mass rallies, pogroms and lynching. Anti-harassment, on the other hand, mainly tries to redress what happens to individuals who should not be made vulnerable and victimised for belonging to a certain group that is exposed to negative stereotyping and discrimination.

Although the legal concepts differ, in real life it can often be the exact same words or images that are used for both. What is hate speech in public can be harassment in another context. Therefore, it is worth taking a closer look at the different situations that need different actions or counteractions. When comparing the practical situations in the three countries within the European Union that I chose for this article, we see that the question reveals some general strengths and weaknesses of the respective legal systems and – even more so – of their practical applicability and enforcement. Thereby, the rather inefficient enforcement of criminal law in Bulgaria and the universal scope of anti-discrimination legislation leave room for a creative and extensive use of the anti-discrimination legislation in the fight against discriminatory hatred. The concept of harassment is applied so universally in Bulgaria that it entails most incidents that would be labelled as hate speech elsewhere. The Bulgarian legislation, furthermore, does not compel the litigant to reduce the claim to only one option: it is possible to litigate a case, claiming that some conduct constitutes an incitement to hatred and/or violence and harassment. An equality body that has the power to issue legally binding decisions and a very active CSO involvement in the

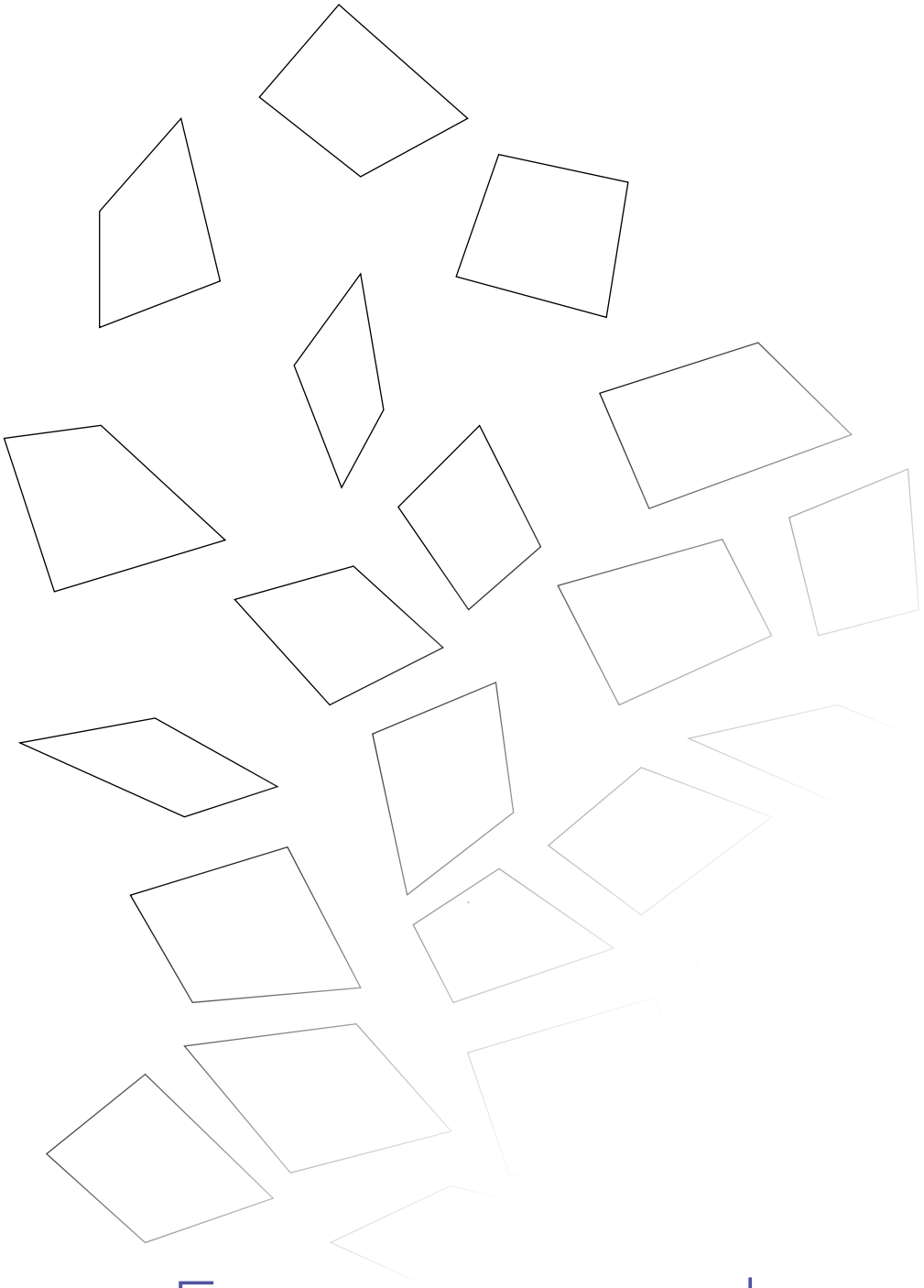
44 See, for example: Austria, Supreme Court, Decision No. 11Os7/18s, 10 April 2018.

45 See, Federal Bureau for the Protection of the Constitution and Counteracting Terrorism, Verfassungsschutzberich 2017 (Report on the Protection of the Constitution) p. 25, available (in German) at: http://www.bvt.gv.at/401/files/Verfassungsschutzberich2017.pdf.

fight against hate speech allows for more variation in the case law and a situation where harassment is definitely and regularly used against emanations of hate speech. It is remarkable that in Bulgaria the case law proves that members of a certain affected group can claim harassment without having any direct (contractual) relationship with the harasser.

In Spain a substantial investment in upgrading and specialising law enforcement agencies resulted in a quite functional system (even partly perceived as being excessive) under the Criminal Code against hate speech that does not provide much creativity for testing the frontiers of anti-harassment legislation. Protection against harassment is generally limited to the employment sphere and does not even provide sanctions beyond that scope. Quite contrary to the situation in Bulgaria, in Spain the legal concept of harassment does not play a role in counteracting issues that are commonly described as hate speech.

In Austria, harassment is strictly a civil law matter which entails no real sanction but the possibility to claim compensation for (immaterial as well as material) damages. Some see a punitive element in the statutory minimum amounts enshrined in the legislation (a minimum of EUR 1 000) but that clearly does not make it a penal matter. Incitement to hatred and discriminatory libel as well as infringements of the National Socialism Prohibition Act are – on the contrary – clearly criminal matters. The two concepts are usually not used in similar contexts. Using the anti-discrimination (anti-harassment) legislation in the fight against hate speech would need quite some creativity as it could deal with conduct that clearly cannot be redressed by means of criminal law. Creativity could lead to new and exciting case law in Austria in this respect as the legislation itself allows for an adequate reaction to the different forms that hate can take, if the affected persons or the lawmaker find ways to overcome the major issue of the ineffectiveness of the anti-discrimination legislation that is responsible for the low numbers of cases reaching the courts. The most promising approach in this respect will be to question the so far rather narrow understanding of the 'environment' in the definition of harassment. Here everyone could learn from the wide Bulgarian understanding. The Spanish case shows that criminal law can function well against hate speech, but it needs investment in the law enforcement structures and resources.



European case law update

This section provides an overview of the main latest developments in gender equality and non-discrimination cases pending or decided by the Court of Justice of the EU and the European Court of Human Rights, from 1 January to 30 June 2018.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE GENERAL OPINIONS

Case C-41/17, *Isabel González Castro v Mutua Umivale ProsegurEspaña SL Instituto Nacional de la Seguridad Social (INSS)*, Opinion of AG Sharpston delivered on 26 April 2018, EU:C:2018:289

Gender

This AG opinion follows a request for a preliminary ruling by the *Tribunal Superior de Justicia de Galicia* (High Court of Justice of Galicia) in Spain, which enquired about the interpretation of 'night work' in the context of the protection of pregnant workers. The question concerned both the measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding laid down in Directive 92/85/EEC and the rules on the burden of proof in cases of sex discrimination set by Directive 2006/54/EC.

In this case, Ms González Castro was employed as a security guard with a Spanish company and worked following a variable rotating pattern of eight-hour shifts during which she was sometimes alone and which were in part done at night. After the birth of her son, she requested paid leave to breastfeed her child. She claimed to be at risk during breastfeeding because of (1) the danger and stress related to her work as a security guard; (2) her work in shifts, sometimes at night and alone; (3) the impossibility to leave her work to breastfeed and the absence of a suitable space to do so. The employer denied the leave arguing that Ms González Castro was not at risk.

AG Sharpston clarified that a worker whose work shifts are partly done at night potentially falls under the protection provided by Article 7 of Directive 92/85/EC, which provides that pregnant and breastfeeding women as well as women who have recently given birth should not be obliged to do night work if this presents a risk to their safety and health. The AG interpreted Directive 92/85/EEC as requiring an individual evaluation of the circumstances of the worker concerned by the employer to determine whether such a risk in fact exists. Thus, the applicant would be protected under EU law if she can show that it is necessary to take measures to avoid a risk to her health and safety. A refusal by the employer to assess such a risk might therefore, in the eyes of AG Sharpston, be contrary to the Directive, which would be for the national court to verify based on the facts of the case.

Further, AG Sharpston clarified that the applicant would also fall under the protection offered by Article 4 of Directive 92/85, which requires the employer to conduct individual risk assessments for pregnant and breastfeeding women or women who have recently given birth, independently of whether they work at night or not. If a risk can be demonstrated, the Directive would require the employer to temporarily adjust the working conditions and working hours of the workers concerned. If this cannot be done, these workers would have to be moved to another position that does not present a risk to their health and safety. Only if this is also impossible would these workers be entitled to a period of leave.

The next question that the AG answered is whether a failure by the employer to conduct an individual risk assessment can be considered a prima facie case of sex discrimination pursuant to Directive 2006/54/EC and whether the rules on the burden of proof laid down in Article 19 apply in this case. AG Sharpston's opinion clarified that if the applicant can show a failure by the employer to assess her individual risk in relation to her breastfeeding her child, it might constitute direct sex discrimination. Once the presumption is established, the burden of proof would lie with the employer. Finally, if the national court examines the employer's refusal to provide paid leave to the employee, the burden of proof would remain with the employer.

REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

Case C-270/16, *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal*, judgment delivered on 18 January 2018, ECLI:EU:C:2018:17

Disability

This request for a preliminary ruling to the Court of Justice concerned the conformity of Article 52(d) of the Spanish Worker's Statute, which allows the termination of an employment contract on the basis of intermittent albeit justified absences, with Directive 2000/78/EC.

The claimant, in the case at hand, had been dismissed on the basis of Article 52(d) of the Spanish Worker's Statute because of his justified intermittent absences from work which were the consequence of illnesses attributed to his disability. The claimant therefore challenged the dismissal decision before Spanish courts for discrimination on the grounds of disability.

The CJEU found that Article 52(d) of the Spanish Worker's Statute risks placing disabled workers at a disadvantage and so bringing about a difference of treatment indirectly based on disability as compared with other workers, since persons with disabilities face the additional risk of being absent by reason of an illness connected with their disability.

Therefore, the Court decided that Article 2(2)(b)(i) of Directive 2000/78 must be interpreted as precluding national legislation under which an employer may dismiss a worker on the grounds of his intermittent absences from work, even if justified, in a situation where those absences are the consequence of sickness attributable to a disability. The CJEU held that it is for the referring court to assess whether the difference in treatment is objectively justified by the legitimate aim of combating absenteeism and whether the measures implemented to achieve that aim are appropriate and do not go beyond what is necessary to achieve it.

Joined Cases C-142/17 and C-143/17, *Manuela Maturi and Others v Fondazione Teatro dell'Opera di Roma*, *Fondazione Teatro dell'Opera di Roma v Manuela Maturi and Others* and *Catia Passeri v Fondazione Teatro dell'Opera di Roma*, judgment delivered on 7 February 2018, EU:C:2018:68

Gender

This reference for a preliminary ruling was submitted by the Italian *Corte suprema di cassazione*. The CJEU, considering that the answer to the preliminary question could be clearly deduced from existing case law (C-356/09 *Kleist* EU:C:2010:703), rendered its decision by way of a reasoned order. The case concerns the principle of equal treatment of men and women in employment laid down by Directive 2006/54/EC and Article 157 TFEU and the principle of non-discrimination enshrined in Article 21 of the Charter.

The dispute was brought by several opera dancers employed in the *Fondazione Teatro dell'Opera di Roma* who were dismissed on the ground that they had reached the working age limit. Their dismissal followed the entry into force in 2010 of a new law in Italy, which lowered the retirement age to 45 for men and women, while it was previously 47 for women and 52 for men. However, under certain conditions workers of 45 or older at the time of the entry into force of the new law were permitted to apply for a continuation of their employment for two years until the former working age limit was reached (47 for women and 52 for men). In practice, this meant that female workers of 47 or older could not apply for a continuation of their employment contract for the two-year period, while male workers of the same age and until the age of 50 could.

The applicants thus challenged their dismissal in court, which prompted a preliminary reference questioning the compatibility of the new piece of Italian legislation with the prohibition of sex discrimination under

Directive 2006/54/EC. Despite the applicants being both men and women, the Court focused on the female applicants (Paragraph 10) and on the question of their differential treatment compared to male workers in relation to the working age limit, as this was the topic of the preliminary reference.

The Court concluded that by preventing female workers from working as long as male workers, the new provision allowed differences in treatment in relation to employment and dismissal, which are directly based on the sex characteristics of the applicants. This amounted to direct sex discrimination, so the differential treatment could not be justified by the objective presented by the Italian legislator of avoiding that workers were exposed to sudden changes in their work contract. The CJEU therefore concluded that the legal provision was contrary to Directive 2006/54/EC.

C-103/16, *Jessica Porras Guisado v Bankia SA and Others*, judgment delivered on 22 February 2018, EU:C:2018:68

Gender

This case followed a request for a preliminary ruling from the Spanish *Tribunal Superior de Justicia de Cataluña* and pertains to the protection of pregnant workers through the measures, laid down by Directive 92/85/EEC, to encourage improvement in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

The dispute concerns a collective redundancy scheme by a Spanish employer, Bankia, after consultation with relevant trade unions. In the framework of the collective redundancy, Ms Porras Guisado, who was pregnant at the time of the facts and employed by Bankia, was dismissed despite having informed her employer of her pregnancy. She challenged her dismissal by invoking the protection of pregnant workers under Directive 92/85/EEC.

In substance, the national court asked the CJEU about the legality of Ms Porras Guisado's dismissal while she was pregnant, in the context of the collective redundancy scheme. The CJEU had to determine whether the Spanish legislation constituted a correct transposition of Article 10 of Directive 92/85 which prohibits the dismissal of pregnant workers, except in exceptional cases.

The CJEU first confirmed that national legislation which permits the dismissal of a pregnant worker because of a collective redundancy is compatible with EU law. The Court clarified that it suffices for an employer to inform the dismissed employee of the grounds justifying the collective redundancy, including the objective criteria used to choose which employees to dismiss (Paragraph 53). No specific justification was therefore needed in relation to the dismissal of the applicant in the framework of the collective redundancy scheme.

However, the CJEU highlighted that the Directive offers a double protection: a protection against dismissal itself as a preventive measure, and a protection from the consequences of dismissal by way of compensation. The aim is to prevent the occurrence of 'harmful effects on the physical and mental state of pregnant workers and workers who have recently given birth or who are breastfeeding', including 'the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy' (Paragraph 62, citing *Webb, C-32/93* and *Danosa, C-232/09*). For this reason, in order to comply with EU law national legislation should offer both protections – prevention and compensation – and compensation alone is not sufficient.

Finally, the collective redundancy agreement granted some categories of workers such as workers with dependents, older workers or workers with disabilities priority status in relation to either being retained or redeployed. However, that provision did not apply to pregnant workers and workers who had recently given birth or who are breastfeeding. The CJEU, contrary to the recommendations of AG Sharpston, ruled that this was lawful under EU law because the pregnancy directive does not require Member States' legislation to grant pregnant workers and workers who have recently given birth or who are

breastfeeding priority status for redeployment or retention, prior to their dismissal (although it does not prevent Member States from providing higher protection, paragraph 73).

Case C-46/17, *Hubertus John v Freie Hansestadt Bremen*, judgment delivered on 28 February 2018, ECLI:EU:C:2018:131

This request for a preliminary ruling to the Court of Justice concerned the conformity of German legislation, which provides for the possibility to postpone the date of termination of a fixed-term contract of the employee having reached the normal age for retirement, with the prohibition on discrimination based on the grounds of age under Directive 2000/78 and with the Framework Agreement on fixed-term work.

Age

The claimant was a teacher employed by the City of Bremen who was approaching the normal retirement age. He therefore asked for permission to continue working beyond that date. The City of Bremen extended his contract for the next school year. At the end of that year, the claimant requested to extend his contract again, but the City refused this request. The claimant filed a complaint considering that the fixed term of the extension granted to him is contrary to the Framework Agreement of fixed-term work and is discriminatory on grounds of age since he was treated differently from people who have not already reached the retirement age.

The Court found that the prohibition of discrimination on grounds of age under Article 2(2) of Directive 2000/78/EC does not preclude a national provision such as that at issue in the main proceedings. However, the national provision should make the postponement of the date of termination of the employment of workers who have reached the legal qualifying age for a retirement pension subject to the employer's consent which is given for a fixed term.

In addition, the Court concluded that the Framework agreement on fixed-term work must be interpreted as meaning that it does not preclude a national provision that permits the parties to a contract of employment to postpone the date of termination of the contract simply because that worker is entitled to a retirement pension, by reaching the normal retirement age.

Case C-482/16, *Georg Stollwitzer v ÖBB Personenverkehr AG*, judgment delivered on 14 March 2018, ECLI:EU:C:2018:180

This request for a preliminary ruling to the Court of Justice concerned the lawfulness of the occupational remuneration scheme established by Austrian legislation in order to eradicate discrimination on grounds of age.

Age

In this case, the claimant worked at the Austrian Railway Company. In 2015, the Austrian legislature adopted a new law that retroactively reformed the rules under which earlier periods of activity are taken into account. This reform was adopted to eliminate discrimination on grounds of age, as the Court had found the previous legislation to be discriminatory (*ÖBB Personenverkehr* C-417/13, EU:C:2015:38). Following the adoption of the 2015 Law, the claimant requested the sum corresponding to the difference in salary which he would have received if the periods required for advancement had been calculated on the basis of the legal situation that existed before the entry into force of the law.

The referring court asked the CJEU whether Article 45 TFEU and Articles 2, 6 and 16 of Directive 2000/78 are to be interpreted as precluding national legislation which retroactively abolishes an age limit and only allows experience acquired at other undertakings operating in the same economic sector to be taken into account.

The Court found that the elimination of discrimination does not mean that the person discriminated against under the previous legal scheme will automatically enjoy the right to receive, with retroactive effect, that difference in salary or future increases in salary. Furthermore, it noted that the new national legislation is applicable without distinction to all employees and thus to both those who were discriminated against under the old scheme and those treated favourably by that scheme, and it transferred all those workers to the new remuneration scheme which it introduced.

Secondly, the Court considered that rewarding experience acquired in a particular field, which enables the worker to perform his duties better, constitutes a legitimate objective of pay policy. The employer is therefore, in principle, free to take into account only such previously completed periods of activity when determining remuneration.

Finally, the Court considered that national legislation had due regard for the balance to be struck between the elimination of discrimination on grounds of age on the one hand and the preservation of rights acquired under the former legal system on the other. Therefore, EU law does not preclude national legislation, such as that at issue in the main proceedings.

Case C-414/16, *Vera Egenberger v Evangelisssches Werk für Diakonie und Entwichlung eV*, judgment delivered on 17 April 2018, ECLI:EU:C:2018:257

This request for a preliminary ruling to the Court of Justice concerned the interpretation of Article 4(2) of Council Directive 2000/78/EC on the exception afforded to employers with an ethos based on religion or belief.

Religion or belief

The claimant in this case applied for a fixed-term post advertised by the Evangelisches Werk für Diakonie und Entwicklung, a body associated with a German Protestant church. The work consisted of representing the diaconate of Germany vis-à-vis the political world and the general public and coordinating the opinion-forming process internally. The claimant had the relevant experience and knowledge for the post, but she was not of a religious faith, which was explicitly required in the post advertisement. She was therefore not invited for an interview. She took the case to the German courts alleging discrimination on grounds of religion or belief.

The referring court observed that the case law of the Bundesverfassungsgericht (Federal Constitutional Court) on churches' privilege of self-determination shows that the judicial review should be limited to a review of plausibility on the basis of the church's self-perception. The referring court therefore asked the CJEU whether that limited judicial review was compatible with the Directive. In that regard, the CJEU found that the right of autonomy of churches must be balanced with the right of workers not to be discriminated against on the grounds of religion or belief. Accordingly, in the event of a dispute, that balancing exercise should be subject of an effective judicial review by an independent authority, and ultimately by a national court.

Secondly, the referring court asked the CJEU for clarifications on the interpretation of the concept of 'genuine, legitimate and justified occupational requirement'. The Court concluded that, in principle, it is not for the national courts to rule on the ethos as such on which the purported occupational requirement is based, but they must nevertheless decide on a case-by-case basis, whether the three criteria concerning a 'genuine, legitimate and justified' requirement are satisfied from the point of view of that ethos. In doing so, national courts must ascertain whether the requirement put forward is necessary and objectively dictated, having regard to the ethos of the church (or organisation) concerned, by the nature of the occupational activity in question or the circumstances in which it is carried out. In addition, the requirement must comply with the principle of proportionality.

Finally, the referring court asked the CJEU whether a national court was required, in a dispute between individuals, to disapply a provision of national law which cannot be interpreted in conformity with Article 4(2). The Court recalled that it is for the national courts to interpret the national law transposing the Directive, as far as possible, in line with the Directive. According to the CJEU, where it is not possible to interpret the applicable national law in compliance with Article 4(2) of Directive 2000/78, national courts must disapply any contrary provision of national law. Since the Charter of Fundamental Rights of the European Union is applicable, the national court must ensure the judicial protection deriving for individuals from the prohibition of all discrimination on grounds of religion or belief (Article 21 of the Charter) and the right to effective judicial protection (Article 47 of the Charter).

C-451/16, *MB v Secretary of State for Work and Pensions*, judgment delivered on 26 June 2018, EU:C:2018:492

This Grand Chamber decision was prompted by a request for a preliminary ruling from the Supreme Court of the United Kingdom and concerned the principle of equal treatment of men and women in matters of social security pursuant to Directive 79/7/EEC in the context of a change of gender.

The applicant, MB, is a male-to-female transgender person who underwent sex reassignment surgery. At the time of the facts, UK law did not recognise same-sex marriages and therefore required transgender persons to annul any marriage into which they had entered before their change of gender, as a precondition for the issuance of a gender recognition certificate. Since the applicant wished to remain married to her wife, she could not obtain the said certificate. Upon reaching the age of 60, the legal retirement age for female workers at the time of the facts, the applicant applied for a pension based on her participation in the state-pension scheme. However, her application was rejected because in the absence of a full gender-recognition certificate, she could not be regarded as a woman for the purpose of determining her pensionable age. The applicant subsequently challenged the legal requirement of marriage annulment before UK courts, which prompted a referral to the CJEU.

The UK Supreme Court asked the CJEU whether a national law that requires a transgender person, who otherwise fulfils all legal criteria for a change of gender, to additionally be unmarried is contrary to the principle of equal treatment laid down by Directive 79/7/EEC in relation to social security.

In its answer, the CJEU first recalled that, according to *Richards* (C-423/04, EU:C:2006:256), gender reassignment falls under the scope of the prohibition of sex discrimination under EU law. Still following *Richards*, 'persons who have lived for a significant period as persons of a gender other than their birth gender and who have undergone a gender reassignment operation must be considered to have changed gender' for the purpose of applying Directive 79/7/EEC.

However, because of the requirement for transgender persons to annul any previously concluded marriage in order to obtain a gender recognition certificate and thus access their pension rights under the statutory social security scheme, UK law treated transgender persons who have changed their gender after marrying and married cis-gender persons differently.[1] The CJEU regarded such difference in treatment as based on sex and therefore as possibly constituting direct sex discrimination under Directive 79/7/EC. Assessing the situations of persons who changed gender after marrying and of married persons who kept their birth gender, the Court concluded that these situations are comparable. Hence, the legal provision at stake amounted to direct discrimination on grounds of sex. In addition, such direct sex discrimination could not be justified by the purpose of avoiding *de facto* marriages between persons of the same sex while same-sex marriage was not legally recognised because such justification fell outside the scope of the derogations provided by Article 4(1) of Directive 79/7/EC.

1 The term cis-gender refers to persons who identify with the gender that was assigned to them at birth.

European Court of Human Rights

Enver Şahin v Turkey, Application No. 23065/12, Judgment of 30 January 2018

This case concerned the impossibility for a paraplegic person to gain access to the university buildings for the purpose of his studies owing to the lack of suitable facilities.

Disability

After an accident that left the applicant's lower limbs paralysed, he requested the faculty to adapt the university premises so that he could resume his studies. The University argued that the adjustments he sought could not be carried out in the short term for lack of financial resources and time constraints. The University instead offered to appoint someone to assist the applicant on the premises. The applicant refused, arguing, among other things, that it would interfere with his privacy.

The applicant complained before the Court that he had been discriminated against on the grounds of disability, relying on Article 14 and on Article 2 of Protocol No. 1 to the Convention (right to education) as well as on Article 8 (right to respect for private and family life) read in conjunction with Article 14.

Firstly, regarding the attitude taken by the university authorities, the Court noted that the University had not refused the applicant's request but had offered him the assistance of an accompanying person. However, the purpose and exact nature of the assistance were not clarified by the Turkish Government before the Court, which highlighted that the possibility for persons with a disability to live independently and fully develop their sense of dignity and self-worth was of paramount importance. The very essence of the Convention was respect for human dignity and human freedom, including the freedom to make one's own choices. The Court therefore concluded that the measure proposed by the University, without an individual assessment of the applicant's situation, could not be regarded as reasonable for the purposes of Article 8, since it disregarded the applicant's need to live an as independent and autonomous life as possible.

Secondly, regarding the response by the national courts, the ECHR found that in accordance with the principle of subsidiarity, it is primarily for the national courts to give effect to the rights at stake. In particular, they should ascertain whether the applicant's educational needs and the limited capacity of the authorities to meet them had been weighed in the proper manner. The Court found that national courts had simply exempted the University from making adjustments on the grounds that the building was constructed in 1988, before the entry into force of the technical guidelines aimed at assisting disabled persons. Moreover, proceeding on the assumption that 'architectural measures would be implemented as funds allowed', the national court had considered it sufficient to reiterate that a person would be appointed to assist the applicant, without demonstrating in what way such a solution might prove satisfactory. The national court had also omitted to look for possible solutions that would have enabled the applicant to resume his studies under conditions as close as possible to those provided to students with no disability, without imposing an undue or disproportionate burden on the administration.

Consequently, the Court found that the Government had failed to demonstrate that the national authorities, and in particular the University and judicial authorities, had reacted with the requisite diligence in order to ensure that the applicant could continue to enjoy his right to education on an equal footing with other students. The fair balance to be struck between the competing interests at stake had therefore not been achieved, and the Court found a violation of Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1 to the Convention.

X v Russia, Application No. 3150/15, Judgment of 20 February 2018

This case concerns, inter alia, the use by medical staff and by a Russian court of elements pertaining to the gender identity and sexual orientation of an applicant as evidence of his posing a threat to himself and others and justifying psychiatric hospitalisation against his will. It is not per se a discrimination case, but the reasoning of the Court is interesting because it addresses the problematic nature of discriminatory assumptions and gender-based stereotyping in medical decision-making. Indirectly, this case is related to the problematic medicalisation of personal choices in relation to gender identity and sexual orientation.

Gender

The applicant, a young Russian national, was arrested by the police after allegedly harassing a teenager in the street. The applicant was being treated for 'schizotypal personality disorder' at the time of the facts and was transported to a psychiatric hospital after his arrest. Upon medical examination, the medical staff decided to hospitalise the applicant against his will. Among the reasons invoked to justify that the applicant presented 'a danger to himself and others', the medical staff noted, in addition to the allegation of sexual harassment, that the applicant wanted to 'spend time with boys' and 'to be caressed', that 'he dyed his hair to attract attention', that he was interested in women's clothing, used make-up and wore 'women's jewellery', and wanted to 'look like a girl' (Paragraph 11). The medical report also noted that the applicant had 'started contemplating the possibility of gender reassignment' (Paragraph 11). The applicant was ultimately forcibly confined at the psychiatric hospital for two weeks after being released. He complained that his right to liberty and security and his right to have the lawfulness of his detention decided speedily by a court, both laid down in Article 5 ECHR, had been violated.

The ECtHR examined the alleged need for involuntary hospitalisation and noted, first, that the allegation of sexual harassment had not been substantiated and that the police reports did not mention any offence committed by the applicant. Second, the Court examined the medical reports and the 'detailed attention and decisive importance' (Paragraph 42) attached by the medical staff to elements pertaining to the applicant's gender identity. Based on these findings, the ECtHR found that these elements did not constitute proof that the applicant posed a danger to himself or others and did not indicate a possible worsening of his mental condition. Although the Court refrained from giving an opinion on the medical staff's remarks concerning the applicant's gender identity, it found that these elements could not justify psychiatric confinement. The Court accordingly found a violation of the applicant's right to liberty and security under Article 5 Paragraph 1 and granted him EUR 7 500 in non-pecuniary damages.

Hülya Ebru Demirel v Turkey, Application No. 30733/08, Judgment of 19 June 2018

The applicant, a Turkish woman, successfully passed the examination to become a civil servant and was subsequently informed that she had been appointed security officer at the local branch of a public electricity company. However, the appointment was cancelled later because the applicant did not meet the necessary criteria of 'being a man' and 'having completed military service'. The applicant filed proceedings before the administrative court, which found discrimination based on sex since (1) 'being a male' was not a requirement for the position to which the applicant had been appointed, and (2) the requirement to have completed military service should only apply to men. The applicant therefore started to work as a security officer for the public electricity company. Nevertheless, the administrative court's finding of sex discrimination was subsequently quashed by the Supreme Administrative Court and the applicant's work contract was accordingly terminated. The Government supported the company by explaining how 'using firearms' and 'working at night' were duties that required the position to be filled by a man. The applicant's appeal, which argued that the decision 'ran counter to the principle of equality and the State's positive obligation to ensure non-discrimination between men and women' as laid out in the CEDAW and EU Law, was dismissed.

Gender

Four years later, the same court reached a different result in a similar case involving a female civil servant applicant who had been denied the same position with the same public company, finding sex discrimination. In light of this decision, the applicant asked for a rectification of the court's earlier decision as regards her own case, which was refused. She therefore brought a case to the ECtHR arguing that she had been discriminated against on account of her sex (Article 14 read in conjunction with Article 8 ECHR), and unfairly treated in the court's proceedings (Article 6 Paragraph 1 ECHR).

On the question of sex-based discrimination, the Court based its reasoning on a very similar case decided in 2014, *Emel Boyraz v Turkey*, which concerned the dismissal of a female employee by the same Turkish public company for the same reason.[2] In *Emel Boyraz*, the Court had found a difference of treatment based on sex because the company's consideration that women were unable to 'work at nights in rural areas' and 'use firearms and physical force in case of an attack' was not substantiated and therefore did not constitute a legitimate aim. The court applied the same reasoning to the present case and consequently found discrimination based on sex. The company's refusal to hire the applicant and her subsequent dismissal therefore constituted a violation of Article 14 taken in conjunction with Article 8.

In addition, the ECtHR considered that the Turkish court had 'failed to fulfil its obligation to provide adequate reasoning for dismissing the applicant's rectification request' and that this constituted a violation of her right to a fair trial (Article 6 Paragraph 1 ECHR). The ECtHR therefore ordered Turkey to pay the applicant EUR 11 000 in pecuniary and non-pecuniary damages for a violation of Article 14 in conjunction with Article 8 and a violation of Article 6 Paragraph 1.

2 *Emel Boyraz v Turkey*, Application No. 61960/08, Judgment of 2 December 2014.

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

This section provides an overview of the main latest developments in gender equality and non-discrimination law (including case law) and policy at the national level in the 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey, from 1 January to 30 June 2018.

AT Austria

CASE LAW

Austria's Constitutional Court has recognised the right to register oneself as 'intersex' in the civic registry

Gender

This case concerns the constitutionality of a passage in the Act on the Registration of Civic Status. The Act requires personal data entered in the civic registry to identify the relevant person as either belonging to the male or to the female sex.[1] The proceedings in this case had been commenced by a person with an intersex condition whose current registration status was male. He/she applied to the competent local authority to have his/her civic status registration changed to 'inter'. The local authority and the administrative review court denied this request stating that the relevant rules do not contain the right for persons to change their civic registration to a status that is neither male nor female. The administrative review court also stated that the relevant regulations, while appearing neutral, could not be interpreted as containing the possibility of intersex registrations. They argued that civic registration is fundamental to the application of a large area of the law, most importantly family law. An additional civic status could result in extensive legal uncertainty for the person in question and persons in a legal relationship with him/her. The administrative review court also rejected the fact that the current case should be subject to the applicability of ECtHR jurisdiction concerning the right of transgender persons to live in accordance with their gender identity, arguing that there is no indication of the ECtHR verdicts going beyond binary gender identities and their possible reassignment. The claimant entered a constitutional appeal against the decision of the administrative review court. The appeal was not based on arguments of legal errors in the decision, but objections against the underlying law on the grounds of constitutionality, which the Constitutional Court decided to take into consideration.

Following a preliminary decision on 14 March 2018, the Constitutional Court issued a verdict on 15 June 2018 that clarifies the lawfulness of adding the option 'intersex' to civic registry entries. Persons who do not have a gender that is distinctly male or female are now free to apply for a corresponding civic registration change. In its final verdict the Constitutional Court saw no unconstitutionality in the relevant passage in the Civic Registry Act[2] and consequently no necessity to overturn it. Instead, the Court argued for a mandatory interpretative understanding of the regulation according to constitutional requirements.

Under the scope of Article 8 of the European Convention on Human Rights (ECHR), which is also implemented as constitutional law in Austria, every person 'with a variant of gender development vis-à-vis male or female has the constitutionally guaranteed right that gender-related regulations respect their variation of gender development as an autonomous gender identity.' Art. 8 ECHR consequently 'especially protects persons with alternative gender identities against heteronomous ("fremdbestimmt") allocations of gender identities.' The law requires certain data for civic registration, among them 'Geschlecht'. It is to be noted that 'Geschlecht' covers both the meaning of sex and of gender, and the Court has found that is not restricted to a strictly binary meaning as a legal term. The Court has further suggested that registration authorities use descriptive terms such as 'diverse', 'inter' or *'offen'* (open), which were recommended by the Austrian Commission on Questions of Bioethics (*Bioethikkommission des Bundeskanzlers)*.[3]

According to its legal mandate, the Constitutional Court has limited its verdict to the question at hand, namely the constitutionality of the legal rule for mandatory entries in the civic registry. Due to the

1 Verdict of 29 June 2018, G 77/2018: http://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_20180615_18G00077_01/JFR_20180615_18G00077_01.pdf.
2 Paragraph 2 section 2 n° 3, http://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40189607/NOR40189607.pdf.
3 Bioethikkommission des Bundeskanzleramts, Intersexualität und Transidentität, 28.11.2017, https://www.bundeskanzleramt.gv.at/documents/131008/549639/Intersexualitaet+und+Transidentitaet_BF/ba132a48-b3ad-4513-82e7-f4125aa6b837.

interpretation guideline contained in the verdict, authorities are from now on required to issue birth certificates and other civic documents with gender-related data with which the applicant most identifies.

Internet source:
Press release by the Constitutional Court: https://www.vfgh.gv.at/downloads/VfGH_Presseinfo_G_77-2018_unbestimmtes_Geschlecht.pdf.
Verdict of 29 June 2018, G 77/2018: http://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_20180615_18G00077_01/JFR_20180615_18G00077_01.pdf.

Belgium

BE

LEGISLATIVE DEVELOPMENT

Enforcement of the federal anti-discrimination legislation

All grounds

Three identical Royal Decrees of 24 October 2008, ancillary to the three federal Anti-Discrimination Acts of 10 May 2007 ('Race', 'Gender' and 'Discrimination in General'), have appointed the Labour Inspectorate of the Federal Public Service, the 'Employment, Labour and Social Dialogue' to monitor compliance with these Acts in the field of employment. However, proving the existence of discriminatory practices, especially in recruitment, had promptly revealed itself as a stumbling block.

Consequently, Chapter 9 of the Act of 15 January 2018 inserted new provisions into the Social Penal Code in order to enable labour inspectors to use mystery calls for the purpose of collecting evidence of penal offences as defined by the three Acts of 10 May 2007. According to the Statement of Purposes in the bill which was tabled in the House of Representatives (the Federal Parliament), the use of mystery calls (i.e. a labour inspector passes himself/herself off as a client or a job seeker) is only permissible if the principles of fairness and respect for the rights of defence are maintained. Hence, provocation and 'fishing expeditions' are prohibited; there must be a strong presumption that discrimination is perpetrated, based on professionally conducted data mining and data matching. Moreover, in every case the use of mystery calls must have been previously sanctioned by the public prosecutor or the *auditeur du travail/arbeidsauditeur* (a specialist public prosecutor in matters of social law).

Both the 'Race' and the 'Gender' Acts of 10 May 2007 (which implement Directive 2000/43/EC and all the Gender directives, respectively) provide that in employment matters, failing to comply with their provisions is not only a breach of labour law, but also a penal offence. In contrast, the 'Discrimination in General' Act only designates a limited number of breaches as penal offences (e.g. provocation or an instruction to discriminate). Consequently, the use of mystery calls will be severely restricted as to the types of discrimination covered by Directive 2000/78/EC.

Internet source:
All legal instruments mentioned are available in French and Dutch at http://www.juridat.be.
Statement of the Purposes of the Act of 15 January 2018 (*Documents parlementaires/Parlementaire Stukken*, no. 54-2768), available in French and Dutch at http://www.lachambre.be or http://www.dekamer.be.

CASE LAW

Court decision on the rejection of a male candidate in a job selection procedure

Gender

This case concerned direct discrimination during a recruitment procedure. The applicant in this case was a man who had applied for the position of a stock manager at a clothing store. He had received the candid answer that it was a woman whom the store wished to employ. The man and the Institute for the Equality of Women and Men (the gender equality body under Directive 2006/54/EC) took legal action.

In its judgment of 4 January 2018, the Labour Court in Leuven found that there had been direct discrimination under the Gender Act of 10 May 2007 and allowed fixed damages to be awarded to the victim.

The key point of interest concerns the fixed damages which may be allowed as compensation for discrimination. Article 23 (2) of the Gender Act is inspired by the CJEU's reasoning in Case C-180/95 *Draehmpaehl* [1997-I-2195] and states that when discrimination has been perpetrated in a context of employment, fixed damages are equal to 6 months' remuneration unless the employer can demonstrate that, even if there had been no gender discrimination, the difference in treatment would still have happened, in which case fixed damages are equal to 3 months' remuneration only. Thus, the Labour Court had to examine the store's various arguments aimed at demonstrating that the male candidate would not have been hired even if he had been a woman. This required a comparison with the woman who had been hired in preference, and the Labour Court found none of those arguments convincing as both candidates had rather similar professional profiles. Consequently, the higher amount of fixed damages was allowed.

Internet source:
Judgment available in Dutch at https://igvm-iefh.belgium.be/sites/default/files/downloads/cp180823_jugement_0.pdf. Press release on the case by the Gender Institute in French and Dutch available at https://igvm-iefh.belgium.be/fr/actualite/refuser_une_candidature_en_raison_du_sexe_est_de_la_discrimination.

The consequences of cancer recognised as constituting a disability and therefore requiring reasonable accommodation

Disability

After long-term sickness leave for cancer, the claimant returned to work and asked to be reinstated in her position. As she was still impaired by the consequences of her disease, she claimed that she should have benefited from an adapted schedule, but her employer refused this request and dismissed her.

On 20 February 2018, the Labour Court of Brussels (3rd Chamber) delivered a judgment on appeal concerning her dismissal. In its judgment, the Labour Court considered that this dismissal was in breach of the Federal Anti-Discrimination Act.[4]

It underlined that the consequences of the cancer had to be considered as a disability in the case at hand. The Labour Court relied upon the case law of the Court of Justice to reach this conclusion and, notably, on *HK Denmark* (C-335/11 and C-337/11). In this regard, the Court held that the consequences of the cancer entailed a long-term incapacity for the employee. The dismissal therefore constituted discrimination based on disability in breach of the Federal Anti-discrimination Act.

4 Labour Court of Brussels, Judgement of 20 February 2018 No. 2016/AB/959. Available at: https://www.unia.be/files/arrest_kanker_redelijke_aanpassingen.pdf (in Dutch).

The Labour Court furthermore stressed that since the employee had to be recognised as a disabled person, she was entitled to ask for a reasonable accommodation from her employer, such as an adjustment of her working schedule. The Court concluded that the claimant provided sufficient evidence of discrimination on grounds of disability and therefore ordered the employer to pay damages of EUR 12 443 to the claimant.

This case is the first judgment recognising that the consequences of cancer could be considered as a disability in Belgium. The Labour Court conscientiously applied the case law of the Court of Justice defining the notion of disability. Since the incapacity of the employee had to be recognised as a disability, she was entitled to receive reasonable accommodation from her employer based on the Anti-Discrimination Act of 2007.

Internet source:
https://www.unia.be/files/arrest_kanker_redelijke_aanpassingen.pdf (in Dutch).

Refusal of an occupational insurance scheme to cover costs related to gender reassignment

The claimant in this case, originally a man, was diagnosed with gender dysphoria and underwent gender reassignment surgery after which the sex conversion was duly registered. More than 15 years after the surgery, she found employment with a firm where an occupational hospital care insurance scheme was available to employees. However, the individual policy which the insurance company offered the claimant included a clause under which the employee had to waive any claim for the reimbursement of hospital costs related to her gender dysphoria which was regarded as a chronic disease diagnosed prior to the conclusion of the contract. Access to the insurance would be denied if the employee refused to accept the insertion of this clause in the terms and conditions.

The employee objected, and argued that the reassignment operation had cured her of the condition, which consequently was not chronic, although it could still entail hospital costs, e.g. for the replacement of a mammary prosthesis. Moreover, under Article 4 (2) of the Act of 10 May 2007 aimed at combating discrimination between women and men (the 'Gender Act'), any adverse treatment grounded on gender reassignment is regarded as discrimination based on sex, while discrimination in an occupational social security scheme is prohibited under Articles 6 (1) (4) and 12 (1) of this Act. Relying on Article 25 of the Gender Act, the employee applied to the Labour Court for an order to put an end to the illegal treatment; the Institute for the Equality of Women and Men (the 'gender agency' as envisaged by Article 20 of Directive 2006/54/EC) also applied for such an order.

In succession, the Labour Court in Brussels and the Labour Court of Appeal in Brussels in its judgement[5] of 16 March 2018, found that there was discrimination based on gender reassignment and ordered the insurance company to give the employee access to the insurance scheme, subject to a penalty of EUR 2 000. Under Article 23 (2) of the Gender Act, fixed damages of EUR 1 300 were also granted in compensation for the moral prejudice to the employee who, however, reserved her right to take further action should she suffer material prejudice.

The Institute failed in its claim that the order should also be made applicable to any other unknown victim because the Labour Court of Appeal considered that, in contrast to the facts of the case which had led to the CJEU's decision in Case C-54/07 *Feryn* [2008-I-5187], the Institute could not produce any convincing indication that the insurance company had adopted a systematic policy concerning similar situations.

5 Labour Court of Appeal in Brussels, judgment of 16 March 2018, *Algemene Rol* No. 2016/AB/1090.

Internet source:
Decision of the Labour Court of Appeal (in Dutch) accessible at www.juridat.be.

A racist joke cannot be punished without evidence of the moral element consisting of an intention to incite racial hatred

Racial or ethnic origin

The Police Commissioner of Mechelen published a racist message on social media, where he wrote, under a photograph of one of his colleagues: 'Why should I shake your hand? I don't like your colour.'

The Mayor of the city asked for a disciplinary investigation into this matter. The Police Commissioner defended himself underlying that it was 'simply' a joke. A criminal file was opened by the public prosecutor on the ground of incitement to racial hatred (Article 20 of the Federal Act of 10 May 2007 amending the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia).

The judgment of the criminal tribunal of Mechelen of 14 May 2018[6] acquitted the defendant. According to the judgment, the message had a racist character, but it had not been sufficiently proven by the prosecution that the Commissioner had the intent to incite racial hatred. The judge recalled that such a racist act could not, as such, be punished without evidence of the moral element consisting of an intention to incite racial hatred.

Internet source:
https://www.rtbf.be/info/article/detail_le-commissaire-n-est-pas-raciste-mais?id=9918024.

POLICY DEVELOPMENT

Publication of the Diversity Barometer on Education by UNIA

Racial or ethnic origin
Sexual orientation
Disability
Other ground

On 6 February 2018, UNIA published its Diversity Barometer on Education. The study focuses on compulsory education (from 6-18 years) and identifies the risks of discrimination against pupils on the ground of their social or ethnic origin, disability or sexual orientation at school. It points out important systemic deficiencies in the Belgian educational system resulting in discrimination against some groups of pupils mainly on the ground of their social or ethnic origin (e.g. Roma and Travelers, first-generation immigrant pupils) but also on the ground of disability or sexual orientation. According to the study, the specific organisation of the educational system often results in a distribution of pupils among different schools on the basis of their socio-economic background. Another factor that causes inequalities at school is the existence of different educational programmes, some of which are more valued than others.

The 2017 Barometer concerns the Belgian educational system and demonstrates the existence of an important degree of discrimination in this domain. To overcome the main problems in the Belgian educational system, UNIA recommends the introduction of a registration procedure which better contributes to social diversity by having an impact on the distribution of children to given schools, the adoption of general measures for ensuring more accessibility at school and specific reasonable accommodation measures for fostering the participation of students with a disability on an equal basis with others.

Internet source:
https://www.unia.be/fr/publications-et-statistiques/publications/barometre-de-la-diversite-enseignement.

6 Criminal tribunal of Mechelen, Judgment of 14 May 2018, available at: https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-correctionnel-malines-14-mai-2018.

Bulgaria BG

LEGISLATIVE DEVELOPMENT

Amendments to the Labour Code have introduced new leave provisions for adoptive parents

Gender

Adoptive mothers are granted special protection and rights under Article 163 paragraph 1 of the Labour Code. Recently, new leave provisions have been introduced for adoptive parents with the adoption of Article 164b LC in the Labour Code which came into force on 1 of July 2018. These legislative amendments have enhanced the compliance of Bulgarian legislation with EU directives concerning parental leave and the work-life balance proposal.

The new law provides that an adoptive mother of a child is entitled to 365 days of leave from the adoption date onwards. The leave has to be used in full before the child reaches the age of five. If the adoptive parents are married and the mother works for an employee, she can transfer part of this leave to the adoptive father after the first six months which are reserved solely for the adoptive mother. If one of the parents is deceased during the first five years of the adopted child's life, the leave can be taken by either parent of the mother or father.

In case the mother is the sole adoptive parent of a child and works for an employer, the leave mentioned above can be partially transferred to either of her parents. In case the father is the sole adoptive parent, he enjoys the same rights as the sole adoptive mother. The adoptive parents, or other relatives who have been legally granted parental leave, have the right to additional leave for caring for a child up to the age of two which is compensated by a social security payment according to the Law on Social security. When the adoptive mother and father are married or if they cohabit, and in the case of a full adoption, the adoptive father of a child under five years of age has the right to 15 days of paternal leave from the day of the adoption until the child has reached the age of five.

Internet source:
Labour Code of Bulgaria https://lex.bg/bg/laws/ldoc/1594373121.

Croatia HR

LEGISLATIVE DEVELOPMENT

Ratification of the Istanbul Convention

Gender

Five years after the Croatian Government signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), the process of its ratification was finally completed on 13 April 2018. The Act on the Ratification of the Istanbul Convention entered into force on 24 May 2018. Following the deposition of the instruments of ratification in Strasbourg on 12 June 2018, the Convention enters into force in Croatia on 1 October 2018 (Article 76(2) of the Convention). Croatia was the 31st State to ratify the Convention. This ratification represents an important step forward in enforcing the legal framework to protect women against violence and domestic violence.

The Convention was ratified in the Croatian Parliament with 110 votes in favour, 30 against and 2 abstentions.[7] The major concern of the forces against ratification is that the Convention introduces 'gender ideology' into the Croatian legal and educational system. The Government has therefore decided to attach the following 'interpretative statement' to the ratification instrument:

'The Republic of Croatia considers that the aim of the Convention is to protect women against any form of violence and to prevent, prosecute and eliminate any form of violence against women and domestic violence.

The Republic of Croatia considers that the provisions of the Convention do not contain the obligation to introduce gender ideology into the Croatian legal and educational system, nor the obligation to change the constitutional definition of marriage.

The Republic of Croatia considers that the Convention is in line with the provisions of the Constitution of the Republic of Croatia, especially with the provisions on the protection of human rights and fundamental freedoms, and that the Convention shall be applied in accordance with the said provisions, principles and values of the constitutional order of the Republic of Croatia.'

In accordance with Article 78(2) of the Convention, Croatia has also reserved the right to apply Article 30(3) of the Convention solely in relation to victims who are claiming compensation in accordance with the national legislation regulating the issue of compensation for victims of criminal offences.

The ratification was fiercely opposed by clerical and conservative right-wing circles, formally presenting themselves as the citizens' initiative 'The truth about the Istanbul Convention', who combined forces to organise an initiative for a referendum against the Convention. They collected signatures to initiate a referendum to denounce the Convention in the period from 13 to 27 May 2018. The Croatian Parliament calls a referendum when so requested by 10 % of the total electorate in the Republic of Croatia (374 740 valid signatures are needed). Claiming to have successfully collected the required number of signatures, the initiative submitted them to the Croatian Parliament, that requested the Croatian Government (Ministry of Administration) to count and verify them. This will probably take several months. Even if the number of signatures is sufficient, the Parliament or the Government may request the Croatian Constitutional Court to rule whether the referendum question complies with the Croatian Constitution.

Internet source:
Act on Ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, Official Gazette *Narodne Novine – Međunarodni ugovori*, No. 3/18., https://narodne-novine.nn.hr/clanci/medunarodni/2018_05_3_27.html.

POLICY DEVELOPMENT

The Croatian Parliament adopted the 2017 Annual Report of the Ombudsperson for Gender Equality ('OGE').

Gender

Pursuant to Article 22(1) of the Gender Equality Act, the OGE is required to report to the Croatian Parliament at least once a year. Annual work reports are to be submitted to the Croatian Parliament by 31 March for the preceding year. The Government, the Parliamentary Committee on Gender Equality, and occasionally other parliamentary committees (such as the Committee on Human Rights and Rights of Minorities) provide their opinions on the contents of the report prior to the discussions at the parliamentary session. At the vote in Parliament on 14 June 2018, an overwhelming majority supported the Report (114

7 The vote took place on 13 April 2018. See http://www.sabor.hr/prijedlog-zakona-o-potvrdivanju-konvencije-vij0001, accessed 6 July 2018.

votes in favour of adopting the Report, 2 against and 1 abstention). It should be mentioned that the non-approval of OGE's annual report automatically leads to the termination of office of the OGE and his/her deputy (Article 21(1)(5) of the Gender Equality Act).

During the reporting period, the OGE worked on 2 685 cases, of which 1 076 cases involved individual complaints regarding the protection against discrimination and 1 609 cases were initiated mostly on the OGE's own initiative concerning the monitoring of implementation of the Gender Equality Act. The number of individual complaints is on a constant rise (in comparison with 2011, the number of individual complaints has more than tripled). Of 1 076 cases concerning individual complaints, only 426 cases provided enough ground for the OGE's action. During the reporting year, the OGE issued 302 written recommendations, 229 warnings/admonitions and 214 suggestions. The OGE's recommendations, warnings/admonitions and suggestions are complied with in 90.9 % of the cases. Gender-segregated data concerning individual complaints show that women are victims of discrimination in the majority of cases (66.7 %). The majority of complaints concern discrimination based on sex (86.2 %). The combined fields of social security and work and working conditions are the most common fields in which sex discrimination occurs (more than half of individual complaints (52.4 %) concern these two broad fields). One fourth of individual complaints (25.4 %) relates to physical, psychological and other forms of domestic violence and/or partnership violence, and violence in the public domain.

Internet source:
Croatian Parliament, Adopted acts at the 8th Session, http://www.sabor.hr/izvjesce-o-radu-pravobraniteljice-za-ravnoprav0004.
Ombudsperson for Gender Equality, 2017 Annual Report, http://www.prs.hr/attachments/article/2404/IZVJE%C5%A0%C4%86E_O_RADU_ZA_2017.pdf.

Cyprus

CY

LEGISLATIVE DEVELOPMENT

Preventing a mother from breastfeeding in public is considered to be a criminal offence.

On 30 March 2018, the criminal law was amended by Law 24(I) 2018 so as to include 'Preventing a mother from breastfeeding in public ' as an offence. In particular, Article 99B provides that 'Any person who in public and in a manner that is of a threatening, abusive or offensive nature, speaks out or makes a gesture or places any object or distributes written or illustrated texts or behaves inappropriately or carries out any other actions that prevent a mother from breastfeeding, is guilty of an offence and if convicted, is subjected to a fine not exceeding EUR 3 000.'

Gender

At the same time a complaint concerning breastfeeding in public was filed with the Commissioner for the Administration and Protection of Human Rights (the Ombudsman).[8] The complaint was submitted by a woman who had visited the Social Insurance Office, where an employee of the Ministry of Labour refused to attend to her because she was breastfeeding in her presence. The applicant was subsequently seen by another employee who defended her colleague's attitude.

The Ombudsman requested the Head of the Social Insurance Services to investigate the incident under Article 81 (2) of the Civil Service Law of 1/1990 as amended.

8 File Number A.Δ 3/2018.

Subsequently, on 21 May 2018, the Ombudsman requested all the pertinent ministries, including the Ministry of Health, the Ministry of Justice and Public Order, the Ministry of Labour/Welfare and Social Insurance, to cooperate in order to take all necessary measures to consolidate and promote respect for the right to breastfeed as reinforced by the recent legislative changes.

Internet source:
http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/4340B2B512D8003FC22582960028F673/$file/Τοπoθ_3-18_21052018.pdf?OpenElement.

CASE LAW

Court case on sexual harassment by an employer. Appl. No. 556/11, the Industrial Tribunal of Limassol.

Gender

On 20 December 2017, the Industrial Tribunal of Limassol ruled on a sexual harassment case.[9] The Applicant worked as a secretary at the Community Council of Souni-Zanadjia which consists of the President (Defendant No. 1) and six Councillors (Defendants No. 2), all elected by the community of Souni-Zanadjia of Limassol District. The applicant claimed that she had been sexually harassed since February 2010 by Defendant No. 1 who made comments and propositions of a sexual nature, asked impertinent questions about her personal life, pressured her into having sexual relations with him and exposed her to webpages with pornographic content. She stated that she showed him her embarrassment at his actions and that she attempted to stop him. Once Defendant No. 1 understood that the Applicant was not interested in his sexual advances, he stopped sexually harassing her but created a hostile and intimidating working environment.

On 27 September 2010, the Applicant submitted a complaint about sexual harassment to the Inspectors of the Equality Committee of the Ministry of Labour, and asked them to assess a possible violation of the provisions of the Equal Treatment of Men and Women in Employment and Vocational Training Law No. 205 (I)/ 2002. In November 2010, the six Councillors submitted a claim to the District Officer of Limassol and to the Ministry of the Interior requesting them to dismiss the President of the Community or to request him to step down from his position. The claim was rejected because the President of the Community is an elected government official, and cannot be dismissed unless there is a criminal case against him. Subsequently five of the six Councillors resigned.

On 26 September 2011, the Applicant filed Application No. 556/2011 at the Industrial Tribunal of Limassol against the President of the Community (Defendant No. 1) and the Community Council (Defendant No. 2). Defendant No. 2 maintained that when they were informed in July 2010 about the insulting behaviour of the President of the Community, they took measures to protect the Applicant, but they had no authority under the Law to take more effective measures because no complaint had been made to the police and there was no criminal case before the Court against the President.

The Court placed the burden of proof on the defendants, but found that the applicant had failed to provide the court with a complete overview of the material facts of the case and therefore found that her testimony was not sufficient to enable the Court to have a complete picture.

After evaluating all the evidence put before it, the Court decided that the only act of Defendant 1 which constituted sexual harassment was his request at the office of the Community Council to open a webpage which contained pornographic content. On the basis of this conclusion, the Court found that Defendants No. 2 were also responsible for the sexual harassment that the Applicant suffered because

9 The parties to the case were; Nektaria Veresie (the applicant), Michalis Michael (defendant No. 1) and the Community Council of Souni-Zanadjia (defendant No. 2).

the evidence they put before the Court was not sufficient and trustworthy to prove that it was impossible to take measures to protect the Applicant.

The Court decided that the Applicant had a right to damages for the moral injury she had suffered as a result of the sexual harassment caused by exposure to pornographic content at her office, especially considering the employer-employee relationship between her and Defendant No. 1. The Court decided that she was entitled to fair and reasonable damages which it fixed at EUR 1 000, plus interest from July 2010 and the reimbursement of legal costs.

Internet source:
https://drive.google.com/file/d/0B0o8MhVUuiLUTzRKcThKazQtOGh2N2MyOXNmZ2FyeExLYWRr/view.

POLICY DEVELOPMENT

Access to the right to vote for persons with a disability in the 2018 Presidential elections

Disability

Three months ahead of the Presidential Elections of 2018, the confederation of disability organisations KYSOA met with the Minister of the Interior to express their concerns about persons with a disability having access to the voting procedure. During the meeting, KYSOA pointed out that the UN Committee on the implementation of the CRPD had urged the government to introduce legislative measures safeguarding the right of persons with disability to vote and to be elected, and to collect reliable analytical data regarding the exercise of this right.[10] KYSOA asked the Interior Minister to ensure that persons with a disability will be supplied with specific and accessible information about all stages of the voting procedure and that all voting centres will be accessible to persons with all kinds of kinetic, visual, hearing, mental or other disability.[11]

A week ahead of the elections, the Ministry of the Interior posted a note on its website stating that voters who are blind or physically 'incapacitated' may vote alone if they declare to the chairperson of the voting centre that they can do so without assistance. Additional options that were available to them would be to ask the chairperson of the voting centre for assistance or to be escorted into the booth by a person of their choice.[12]

The law on presidential elections, however, does not safeguard the right of persons with disabilities to vote when they are assisted by a person of their choice. Instead, it only provides that persons who cannot vote by themselves may ask for the assistance of the person presiding over the voting centre. It is worth noting that this provision has been in place since 1959 without any amendments[13] and it is not in line with the right to a secret ballot as protected by Article 29(a)(ii) of the CRPD.

On 28 January 2018, the day of the first round of the elections, KYSOA received complaints that blind persons were not being allowed to enter the booth with the person of their choice. On one occasion, a person with a visual impairment reported that the chairperson of the voting centre who was assisting her with voting in fact voted on her behalf for a candidate other than the one she had selected.

10 UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Cyprus, 12 April 2017, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCYP%2fCO%2f1&Lang=en.

11 KYSOA Press release (2017), Persons with disabilities and their organisations demand the safeguarding of their right to participate in political and public life, 9 October 2017, available at www.kysoa.org.cy/kysoa/modules/banners/bannersAddHits.php?bid=57.

12 Ministry of the Interior, Presidential Elections 2018: Exercise of the voting rights of blind or other persons with a physical disability, 22 January 2018, available at http://www.moi.gov.cy/.

13 Law on Elections (President and Vice President of the Republic) of 1959 N. 37/1959, Article 29(6), available at www.cylaw.org/nomoi/enop/non-ind/1959_1_37/index.html.

Similarly, on 4 February 2018, during the second round of elections, KYSOA received reports regarding blind people who had not turned up because of the problems they encountered when exercising their voting rights during the first round. Other blind persons who tried to vote with an escort of their choice were turned away. KYSOA pointed out that a huge number of persons with disabilities did not vote due to accessibility problems.

Despite the concerns expressed by the disability movement well ahead of the elections, it transpired that policy makers were unprepared. The failure to provide ballot papers in braille may potentially be considered as a violation of Article 5(3) of the CRPD (printing ballot papers in braille is a fairly easy and low-cost measure).

In 2016 the Ombudsman's office, in its capacity as the monitoring mechanism for the CRPD, launched a campaign about the rights of persons with a disability to vote in accessible voting centres, with a secret ballot, assisted by persons of their choice if needed, and relying on information available to them in an accessible format and manner regarding both the electoral procedure as well as the various candidates and programmes.[14]

However, during the 2018 elections, the recommendations of both the UN Committee and the Ombudsman have been ignored by the competent political authorities.

CZ Czech Republic

LEGISLATIVE DEVELOPMENT

Provision of long-term care benefit

Gender

On 1 June 2018, Act No. 310/2017 Coll., amending Act No. 187/2006 Coll., on healthcare insurance entered into force. The Act introduces a new benefit: the long-term care benefit. The purpose of the amendment is to provide persons with healthcare insurance with adequate compensation for the loss of income due to long-term care for a relative. The Act further stipulates that employers shall excuse their employees for their absence during the period of long-term care for a relative (a maximum of 90 days) and are obliged to ensure the provision of the same job upon their return.

The long-term care benefit has been contested especially by employers who will face further insecurity due to understaffing which may be caused by employees taking up this type of leave. This benefit has however been necessary to further enable the harmonisation of personal and working life for people with caring responsibilities, who in the majority of cases are women.

Internet source:
Act No. 310/2017 Coll. – https://zakonyprolidi.cz/cs/2017-310.

14 Independent Authority for the rights of persons with disability (2017), 'Voting rights for all: I vote without obstacles', November 2016, available at http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/A7CA1733AED3521BC2258065003AD17F.

CASE LAW

Czech Supreme Court: damages for discrimination can be claimed by the relatives of the victims

All grounds

In a case decided by the Czech courts, the parents of a deceased patient (a child) instigated a discrimination claim against the hospital in which the patient had died. Allegedly, the hospital had refused, for economic reasons, to provide treatment to the patient which could have saved her life, claiming that due to her state of health, even if the imminent risk of death could have been avoided, a sufficient quality of her life would never be restored. According to the claimants, this represented discrimination on the basis of the patient's disability. As a result, the claimants instigated a claim for monetary compensation for the discrimination.

The claim was refused both by the first instance court[15] and the appeal court[16] as both courts interpreted the relevant law (Section 10 of the Anti-Discrimination Act) in such a way that a claim for compensation for discrimination can only be filed by the victim of the discrimination (and not by any third persons).

Following an extraordinary appeal by the claimants, the Czech Supreme Court reviewed the case.[17] In this extraordinary appeal, the claimants argued that the approach adopted by the local courts was contrary to CJEU case law (in particular the *Firma Feryn* case C-54/07). They claimed that the failure of the Czech courts to recognise the right of third persons to instigate discrimination claims would mean that there would be no redress available against discriminatory treatment which leads to the death of the victim of discrimination.

The Supreme Court annulled both the first instance court and the appeal court decisions and instructed them to reconsider their conclusions. The Supreme Court held that a discrimination claim can be instigated by persons other than the victim of discrimination (such as their relatives) when they can prove that the damage to the victim of the discrimination can be deemed to be their damage as well.

However, the Supreme Court remained rather vague about the conditions that must be fulfilled for such a claim to be successful. It appears that the right to redress would only be available to individuals who are close relatives or are closely emotionally attached to the victims of discrimination (not e.g. to NGOs defending the rights of victims of discrimination). The options to file a discrimination claim will need to be evaluated on a case-by-case basis.

Internet source:
http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/97BBF6819C18E0CFC12582550041967C?openDocument&Highlight=0,null,diskriminace.

POLICY DEVELOPMENTS

The Ombudsman establishes an advisory council for monitoring the CRPD

Disability

On 22 May 2018, the Ombudsman established an advisory council on the rights of persons with disabilities as it became the responsible body for monitoring the implementation of the CRPD in the Czech Republic as of 1 January 2018.

15 Decision of the District Court of Prague 5 file No. 28 C 17/2014-106, dated 5 October 2015.
16 Decision of the Municipal Court of Prague file No. 39 Co 74/2016-135, dated 18 May 2016.
17 Decision of the Czech Supreme Court file No. 30 Cdo 2260/2017 (orally announced on 13 Dec 2017, full version with reasoning made publicly available in the second half of March 2018).

The council consists of 11 members, most of whom come from the NGO sector. It will analyse the current legal and political framework and propose measures and strategies for improving the rights of persons with disabilities in the Czech Republic. The activities of the council will mainly focus on Articles 9 (accessibility), 12 (equality), 13 (justice), 19 (an independent way of life), 23 (family and housing), 24 (education), 25 (health), 27 (employment), 28 (social protection) and 30 (participation in cultural and political life) of the CRPD.

The advisory council does not have any decision-making powers, but it has the capacity to monitor the implementation of the rights of persons with disabilities in order to propose legislative and other measures.

Internet source:
https://www.ochrance.cz/monitorovani-prav-lidi-se-zdravotnim-postizenim/.

Plans of the newly elected government to introduce a new 'family package'

Gender

In June 2018, a new government was established by the President and the new Minister for Labour and Social Affairs presented his plans including the introduction of a so-called 'family package'. In this package, the parental allowance will increase from EUR 8 540 (CZK 220 000) to EUR 11 650 (CZK 300 000), the financing of day-care for children is to be increased, and a bill on support for crèches should soon be presented.

The planned changes could be an improvement for families with children. These measures would facilitate a better harmonisation of work and family life, and better conditions for carers, who are still almost exclusively women.

Internet source:
https://www.mpsv.cz/files/clanky/33776/TZ_MPSV_-_Ministr_prace_a_socialnich_veci_predstavuje_sve_priority.pdf.

DK Denmark

LEGISLATIVE DEVELOPMENTS

Adoption of a Burqa Ban in public places

Racial or ethnic origin

The Danish Parliament has amended the Penal Code on 31 May 2018 and made it a criminal offence to wear face covering in public. Bill No. 219 on the Act amending the Penal Code (the prohibition of face covering) entered into force on 1 August 2018.

Religion or belief

The preparatory work describes that the following garments will be illegal in the public sphere if they cover the face: hats, hoods, scarves including the burqa and the niqab, masks, helmets, and artificial beards. According to the preparatory work, the aim of the prohibition is to show that face covering is incompatible with Danish values and social cohesion in Danish society.

The fine for a first violation of the prohibition is DKK 1 000 (EUR 135). The fine will increase in the case of repeated violations.

Internet source:
http://www.ft.dk/samling/20171/lovforslag/L219/index.htm.

A new act prohibiting discrimination on the ground of disability in all spheres of society

The Danish Parliament has adopted a new act prohibiting direct and indirect discrimination on the ground of disability in all spheres of Danish society. The act entered into force on 1 July 2018.

Disability

The act extends the protection against discrimination on the ground of disability to all public and private activities in all areas of society, and beyond the labour market. The aim of the act is to align the protection against discrimination for people with disabilities with the law which covers the grounds of race, ethnic origin and gender.

The prohibition of discrimination in the act is defined in accordance with EU law. The act lacks a definition of disability, but this concept is to be interpreted in accordance with the EU case law. The act does not include an obligation to provide reasonable accommodation and accessibility.

Individuals who experience discrimination because of a disability may file a complaint with the Board of Equal Treatment.[18] The Board can issue financial compensation to victims of discrimination because of their disability.

Internet source:
http://www.ft.dk/samling/20171/lovforslag/L221/index.htm.

CASE LAW

Harassment due to ethnic origin

Racial or ethnic origin

The claimant was a childcare worker of Turkish origin who had worked in the same nursery school for nearly five years. A child with a hearing impairment was assigned to the classroom where the childcare worker worked. The parents complained to the nursery school manager claiming that the childcare worker did not speak Danish in a correct manner and therefore could not fulfil their son's need for role models when it comes to language.

The nursery school manager put in place several accommodations to deal with the criticisms of the parents. The manager informed the parents of the childcare worker's working hours in order to avoid the situation where the claimant was the only childcare worker in the classroom with the child. Moreover, when the claimant went on sick leave, the manager decided to move her to another classroom to limit her daily confrontations with the parents. The childcare worker did not agree with the move and was dismissed because of her absence due to sickness. She therefore filed a complaint with the Board of Equal Treatment and she claimed that she had been harassed because of her ethnic origin. She argued that the constant criticism from the parents and the lack of support from her manager had resulted in insecurity, stress, and depression.

The Board explained that harassment within the labour market is deemed to be discriminatory when the conduct related to ethnic origin (such as complaining about the lack of fluency in Danish) takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile,

18 The Board of Equal Treatment is an independent complaints board established by Consolidated Act No. 1230 of 2 October 2016 on the Act on the Board of Equal Treatment. It is a quasi-judicial institution that is limited to adjudicating individual complaints about discrimination. The Board is not officially designated as an Equality Body.

degrading, humiliating or offensive environment for the person concerned.[19] The Board also underlined that the employer or manager is obliged to protect employees against harassment, including harassment committed by other employees or customers.

The Board stated that the claimant's sickness leading to her dismissal was a result of the conflict with the parents and the lack of support by her manager. Based on the circumstances of the case, including the fact that the manager did not inform the claimant of the parents' concerns and the accommodations adopted, the Board concluded that the manager had not provided the childcare worker with a sufficiently harassment-free working environment. Thus, the complainant received compensation of DKK 250 000 corresponding to nine months of salary due to discrimination because of her ethnic origin.

There is limited case law on harassment within employment in Denmark. This decision by the Board of Equal Treatment emphasises the obligation of employers to secure a working environment free of harassment related to ethnic origin.

Internet source:
https://www.retsinformation.dk/Forms/R0710.aspx?id=198666.

POLICY DEVELOPMENT

Discrimination against homeless unregistered migrants

Racial or ethnic origin

On 22 June 2018, the Danish Institute for Human Rights published a report which highlights various developments that occurred in 2017 and 2018 in Denmark. In particular, the report focuses on the situation of unregistered migrants residing in Denmark and the criminalisation of homeless migrants.[20]

In 2017 and 2018, in response to an intense public debate regarding homeless foreign nationals being present in public places, a wide range of legislative initiatives have been adopted.

A ban has been introduced on establishment or residence in camps which disrupts public order.[21] According to the new law, homeless persons, who have established or resided in a camp that disrupts public order, may be sentenced to fines or imprisonment for up to 18 months and may be banned from residing in a given area for up to two years. Furthermore, individuals may be sentenced to up to 14 days' imprisonment for begging on pedestrian streets, in front of railway stations, in front of or inside supermarkets or on public transport.

It is apparent from the public debate and the debates in Parliament that the measures adopted indirectly target homeless foreign nationals. However, all the measures are neutrally formulated and apply to any person who contravenes any of the various prohibitions.

The Danish Institute for Human Rights recommends that the various measures must not result in a discriminatory investigative and prosecution process. However, the statistics from the Danish Ministry of Justice show that the new laws mainly affect foreign nationals.

19 Board of Equal Treatment, Decision No. 9077 of 11 January 2018.

20 Emil Kiørboe, Uregistrerede Migranter – Status 2018, Institut for Menneskerettigheder (2018). https://menneskeret.dk/udgivelser/uregisterede-migranter-status-2018.

21 Bekendtgørelse nr. 305 af 31. marts 2017 om ændring af bekendtgørelse om politiets sikring af den offentlige orden og beskyttelse af enkeltpersoners og den offentlige sikkerhed mv., samt politiets adgang til at iværksætte midlertidige foranstaltninger. Lov nr. 131 af 27. februar 2018 om ændring af lov om politiets virksomhed (Udvidet bemyndigelse til at fastsætte regler om zoneforbud). Bekendtgørelse nr. 427 af 7. maj 2018 om ændring af bekendtgørelse om politiets sikring af den offentlige orden og beskyttelse af enkeltpersoners og den offentlige sikkerhed mv., samt politiets adgang til at iværksætte midlertidige foranstaltninger.

Internet source:
https://menneskeret.dk/udgivelser/uregisterede-migranter-status-2018.

France

FR

LEGISLATIVE DEVELOPMENT

The French Government proclaims gender equality as 'the great cause of the quinquennium'

Gender

After a consultation that ended on 9 May 2018, Muriel Penicaud, the Minister of Labour, and Marlene Schiappa, the Secretary of State for Equality between Women and Men, presented a global action plan for equality between women and men. The plan formulates 15 points of action including, amongst others, action points to end unequal pay and to strengthen the fight against gender-based and sexual violence. Some of these action points require legislative reforms, for which several proposals are currently being debated in Parliament.

Legislative changes have been proposed aiming to strengthen the fight against 'sexual and sexist violence',[22] and including an Act which provides that sexual assault or harassment against minors is to be considered a more serious crime. The question of the consent of the minor is no longer considered. Moreover, the prosecution of crimes of a sexual or violent nature committed against minors may be brought to the courts up to thirty years after the victim has reached the age of 18.

According to the current legislation, harassment cannot be penalized if a single act has been committed by an offender as this requires several acts. The legislative proposal also considers harassment to be acts carried out in a concerted manner by a group of people against a single victim. It introduces a new infraction called 'sexual outrage' punishing such acts even if they are isolated incidents and are not repeated. One of the possible sanctions foreseen by this new legislation is for a convicted person to attend a training session, at his own expense, on sexual behaviour and gender equality.[23]

A draft bill called 'Equal pay for women and men, and the fight against sexual and gender-based violence at work' has been formulated as part of the project entitled 'freedom to choose one's professional future.'[24] The bill provides that in companies with at least 50 employees, respect for the principle of equal treatment, and more specifically equality between women and men, will be measured using a numerical indicator. This indicator will be developed according to a defined calculation model by decree, and will establish the possible differences in remuneration. As part of the overall plan of action, the Government added that if inequalities are obvious, the company should set aside a wage catch-up envelope for women, the amount of which will be determined by a collective agreement within the next three years. The indicator should be operational as of 1 January 2020 in companies with 50 to 250 employees, and as of 1 January 2019 for companies with more than 250 employees.

The proposed bill also provides that companies must include their actions to promote professional equality between women and men in their annual report. The assessment should include ''classifications, the

22 Position of the High Council for Equality http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/note_de_positionnement_projet_de_loi_violences_sexuelles_et_sexistes_v1804.pdf. Project adopted by the National Assembly (first discussion) http://www.assemblee-nationale.fr/15/pdf/ta/ta0115.pdf. Project submitted to a vote of the Senate http://www.senat.fr/leg/pjl17-590.html.

23 See the whole legislative process at http://www.assemblee-nationale.fr/dyn/15/dossiers/alt/lutte_violences_sexuelles_sexistes. After the information cut-off date of this Law Review, on 3 August 2018, the legislative proposal was accepted and entered into law; Act n° 2018-703, 3 August 2018, '*renforçant la lutte contre les violences sexuelles et sexistes*'

24 Project adopted by the National Assembly (first discussion) http://www.assemblee-nationale.fr/15/pdf/ta/ta0128.pdf.

promotion of gender diversity and certificates of professional qualification aimed to promote women's career paths.' It also stipulates that employers must inform their employees about civil and criminal remedies for harassment as well as the contact details of the competent organizations dealing with complaints such as trade unions, NGOs and administrations.

Internet source:
http://www.assemblee-nationale.fr/dyn/15/dossiers/alt/lutte_violences_sexuelles_sexistes.
http://www.assemblee-nationale.fr/dyn/15/dossiers/alt/choix_avenir_professionnel.

CASE LAW

The wearing of a beard interpreted as a religious symbol in the public service

Religion or belief

The claimant was an Egyptian medical student who was admitted as a trainee for one year at the digestive surgery department of a public hospital in the Paris suburbs, pursuant to a convention between the hospital and his university in Egypt. Article 6 of the convention stated that the trainee will be bound to respect the rules of discipline provided by the Code of Public Health, which, among other requirements, lays down a rule of religious neutrality.

Four months after he had commenced as a trainee, the hospital annulled the convention and put an end to the petitioner's training on the ground that he wore an Islamic beard. The supervising practitioner was consulted and issued a favourable recommendation because 'of the disturbance created by this situation' within the work environment.

The court held that a beard, even a long beard, does not in itself constitute a religious symbol, in the absence of other factors confirming that it is a religious symbol. However, it found that the request of the hospital authorities to shorten the petitioner's beard was justified by the necessity to enforce the principle of neutrality on the premises, particularly in a multicultural environment.[25]

The court concluded that the claimant had breached the duty to respect the principle of neutrality, even if the beard was not combined with any religious proselyte behaviour, or did not create a disturbance to the public and patients, because he failed to prove that his beard was not a religious symbol.

Internet source:
https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000036252625&fastReqId=110506859&fastPos=1.

Criminal liability of a Mayor for a refusal to register Roma children in elementary school

Racial or ethnic origin

A Mayor has been prosecuted before the penal court for discrimination on the ground of ethnic origin and place of residence for having refused to register five Roma children in an elementary school. The Mayor's refusal was based on the fact that the parents did not provide the necessary formal documents and proof of domicile. They were living in a camp that was subject to an evacuation order that had been issued by the Mayor a few weeks previously on safety and sanitary grounds.

Both the Criminal Court and the Criminal Court of Appeal dismissed the case because of the lack of evidence of a discriminatory intent. The civil parties to the penal case therefore brought the case before the Criminal Chamber of the Court of Cassation.

25 Decision of the Administrative Court of Appeal of Versailles, 19 December 2017, N° 15VE03582.

On 23 January 2018, the Criminal Chamber of the Court of Cassation quashed the decision of the Court of Appeal.[26] The Court held that evidence showed that the communal services knew who the five children were and where they lived in the town.

The Court concluded that the Mayor's refusal to register the children in school, when those children are in fact living in a precarious camp and are members of the Roma community, constitutes the offence of a refusal of the benefit of a right as defined by Article 432-7 of the Penal Code. The Court further concluded that this offence and the failure to comply with her duties as a Mayor also constituted a civil wrong for which the Mayor was liable towards the civil parties and it referred the case back to the Court of Appeal for a further decision.

This is one of the first decisions that requires the trial judge to specifically enquire into the intentional component of the offence and to verify hidden intentions by all means.

Internet source:
https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036584795.

Statutory discrimination on the ground of nationality throughout the claimants' career

In the 1970s, the SNCF (the French public railway service) hired 2 000 Moroccan employees by means of a twelve-month specific recruiting process to fill low-skilled jobs. However, they were not hired according to the same conditions as the French employees, the regulatory status of the SNCF imposing a requirement of having French nationality in order to be hired as a permanent employee.

Therefore, the Moroccan employees were hired as contractual agents with the specific status of 'PS25', which was used for temporary employees and for persons holding a list of jobs that were not covered by the statutory regime. Their specific employment conditions were less favourable than those that were applicable to French permanent employees. The claimants filed a suit after retiring, claiming damages for their career and retirement conditions.

Racial or ethnic origin

The SNCF argued that the various legal instruments, such as the ECHR, prohibiting discrimination on the ground of one's origin were not in force in France at the time of the formation of the contract and during the period covering part of its execution. Furthermore, it argued that the claimants were not in a comparable situation with employees hired under a permanent employee status, because they did not carry out the same jobs. SNCF also argued that, as the railroad is a public service, the requirement of French nationality was also authorised by rules that were applicable to requirements related to the exercise of national sovereignty, and that therefore it could not give rise to the liability of the SNCF.

In September 2015, the Labour Court found that the claimants had been victims of discrimination since the early 1970s on the ground of Article 14 ECHR, and the ILO Convention No. 111. In addition, the Labour Court found that the employment contract provided for an equal treatment clause (stating that the employees would be entitled to remuneration that was equal to that received by French employees) and that that had also been breached by the SNCF. SNCF appealed against the decision.

On 31 January 2018, the Paris Court of Appeal delivered its judgment. The Court confirmed the decision of the Labour Court and concluded that there had been discrimination in the career and retirements rights of the employees on the ground of nationality.[27]

Given the mass of evidence relating to the career and functions of the Moroccan employees, the judge held that the shift in the burden of proof that is applicable in matters of discrimination imposes on the

26 Court of Cassation, Criminal Chamber, 23 January 2018, No. 17-81369.
27 Paris Court of Appeal, Social Chamber, 31 January 2018, No. 15/11389 in the case of the 848 Moroccan Railroad workers.

employer an obligation to justify that the difference in treatment is justified by objective elements that are foreign to discrimination based on nationality.

The Court of Appeal did not agree with the argument of the employer according to which the regulation reserving the permanent employee status to French nationals was justified because the railroad was considered to be part of the French public service. The Court concluded that the condition of nationality contravenes the bilateral conventions between France (and the EU) and Morocco, and that this condition of nationality constitutes a violation of Article 14 ECHR and Protocol No. 1 to the ECHR. The Court awarded EUR 173 000 in compensation to each of the claimants for the loss of their career as well as EUR 60 555 for the loss of pension benefits, EUR 3 000 for the loss of training and EUR 5 000 for moral damages. These decisions are immediately enforceable. Given that there are 848 claimants, the overall liability of the SNCF as a result of the decisions of the Court of Appeal is estimated at EUR 180 million.

Internet source:
https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=24074.

Legality of 'solutions of equivalent effect' implemented in derogation of the obligation to ensure the accessibility of newly built housing to persons with a disability

Disability

NGOs have challenged the legality of the provisions of Decree No. 2015-1770 which allows alternative solutions to regulated technical requirements in newly built private housing to meet accessibility standards.

In a decision of 3 February 2016 (no. 386951), the Conseil d'État (Council of State, the Supreme Administrative Court) had previously decided that, with regard to existing buildings receiving members of the public, provisions allowing that accessibility requirements are met by implementing 'solutions of equivalent effect' were legal.

In February 2018, the Council of State ruled that 'solutions of equivalent effect' were legal with regard to newly built buildings that amount to private housing.[28] The Court held that the provisions relating to 'solutions of equivalent effect' in newly built private housing do not *per se* put into question the principle of accessibility. In this regard, they are meant to allow the implementation of technological innovations with the objective of attaining comparable results as technical norms stated in the regulations relating to accessible design.

NGOs are pressuring the Government to ensure the effective implementation of accessibility requirements which have systematically been postponed since the 1970s. They feel that operators seek all possibilities to alleviate the burden of implementing accessibility requirements, that 'solutions of equivalent effect' are a means to multiply derogation requests that will not be seriously scrutinized, and that the rule of the implicit validation of derogation requests has had a major impact on the effective implementation of accessibility requirements.

In this decision, the Supreme Administrative Court appears to close the door to any challenge to the provisions opening the possibility to derogate from accessibility requirements by requesting the implementation of 'solutions of equivalent effect'. However, although the Court validates the applicability of the principle of implicit acceptation in the absence of an explicit refusal, it does so by expressly referring to the purview of this decree, limited to private housing as opposed to buildings receiving the public at large. Thus, it opens the door to challenges that would raise the risks related to the applicability of the principle of implicit acceptation to derogation requests related to newly built buildings receiving the public.

28 Conseil d'Etat, 22 February 2018, No. 397360.

Internet source:
https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000036637082&fastReqId=929507833&fastPos=20.

POLICY DEVELOPMENT

Report of the Defender of Rights regarding experiences of discrimination in the profession of a lawyer

Over the years, the Halde[29] (the former equality body) and the Defender of Rights (the current equality body) have received many complaints from lawyers relating to difficulties in accessing apprenticeships on the ground of origin or relating to dismissals of women lawyers upon their return from maternity leave.

All grounds

Most young lawyers have the status of being employed in a 'liberal profession'. The cases investigated by the Defender of Rights and the ensuing court decisions revealed that there were gaps in the protection of pregnancy and protection against discrimination in the liberal profession. After having recommended that the Government should modify the status of a liberal profession in order to improve the protection against discrimination and to guarantee that lawyers have access to legal redress during pregnancy, Law no. 2014-873 of 4 August 2014 was adopted ensuring the full implementation of the EU Anti-discrimination Directives.

In that particular context, the National Union of Young Lawyers Federations (FNUJA) proposed to jointly engage with the French Equality Body (the Defender of Rights) in order to carry out a survey measuring discrimination within the lawyers' profession in support of change.[30]

The survey was elaborated and undertaken within the French Equality Body in collaboration with the FNUJA and sent to all members of the lawyers' profession in France.

It was answered by 7 138 lawyers, a very significant sample of the social groups that are statistically represented among the members of the profession.

The survey presents questions on the form, means and frequency of situations and practices of discrimination. The results have been given to the Bar organisations for their further benefit, but the main findings have been analysed and presented in a synthesis report prepared by the French Equality Body.

The results of the survey were announced in a joint press conference on 2 May 2018, in the presence of all representatives of the lawyers' profession, i.e. the National Bar Council, the National Conference of Bar Presidents and the President of the Bar of Paris. At this press conference, the Bar associations jointly announced a wide scale of measures to ensure the professional training of lawyers in discrimination law and the protection of lawyers against victimisation and discrimination. They announced that they intended to act drastically to improve sanctions imposed in cases of discrimination. These measures include putting an end to the practice consisting of favouring mediation over prosecution by systematically imposing sanctions in cases of discrimination, ensuring enhanced protection by the Bar against the victimisation of complainants, and reviewing the code of ethics.

29 Haute Autorité de lutte contre les discriminations et pour l'égalité (in English: High Authority to Combat Discrimination and Promote Equality).
30 Défenseur des droits and FNUJA 'Conditions de travail et expériences des discriminations dans la profession d'avocat·e en France' of May 2018.

Highlights: 72 % of women and 47 % of men who responded to the survey report having been a witness to discrimination against colleagues in the last five years.

38 % of the respondents (53 % of whom are women and 21 % are men) report having experienced discrimination themselves in the last five years. The main grounds of discrimination reported are sex (22.4 %), pregnancy (19.7 %) and age (17.3 %).

Even if 53 % of lawyers are women, the profession is characterized by significant inequalities between women and men. When questioned on their experiences of discrimination in the last five years, some social groups are more exposed to discrimination than others. The main findings of the report highlight the following figures:

- 25 % of men aged 30-49 years who have a child;
- 48 % of women aged 40-49 years perceived as white;
- 66 % of men aged 30-49 years perceived as black or Arab;
- 69 % of women aged 30-39 years who have a child;
- 74 % of women aged 30-49 years of the Muslim religion.

According to the report, discrimination is most likely to occur between colleagues during professional relationships and in the specific context of negotiating their earnings.

Less than 5 % of women and men who have been a victim of discrimination have initiated some form of formal recourse to obtain redress. The (perceived) uselessness of any recourse (29 %), the insufficiency of evidence (23 %), the fear of victimisation (21 %) are the main reasons invoked to justify the absence of recourse on the part of lawyer victims.

The mobilisation of the legal profession in the context of the publication of this survey is the result of the strategy of the French Equality Body over a period of 10 years. Its actions combined statistical studies, pursuing claims, recommending reforms and fieldwork with representatives of the profession. Faced with former denials, obtaining sanctions and documenting the reality of discrimination was necessary to obtain a strong commitment by the profession.

Internet source:
https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/rapp-enq-avocats-a4-num-02.05.2018.pdf.

DE Germany

CASE LAW

Ban on wearing a headscarf during judicial functions

Religion or belief

The case concerned a trainee lawyer (Referendar) who wished to wear a headscarf due to her religious faith while conducting judicial functions. She was denied the possibility to wear a headscarf by the court's authorities. In the German legal system trainee lawyers are employed by the States (Länder) during their 2-year training period. A first instance judgement considered that the refusal to allow the trainee lawyer to wear a headscarf during judicial functions amounted to a violation of her right to freedom of belief.[31]

31 Augsburg Administrative Court (Verwaltungsgericht Augsburg, VG Augsburg), 30 June 2016, Au 2 K 15.457.

The appeal court decided that the complaint was inadmissible. It argued that there had been no sufficiently grave violation of freedom of religion. The claimant still had the opportunity to pursue her training without performing judicial functions. The decision of the court's authorities concerned only a small part of her education. In addition, she was not entitled but only allowed to perform the judicial functions in question, depending on the decision of the court she worked for.[32]

This decision reverses the findings of the case decided by the Augsburg Administrative Court that provoked a huge national debate about the presence of religious symbols worn by judges. The appeal court decided on procedural grounds and did not consider the substantive question of the permissibility of such symbols in the courtroom.

Internet source:
http://www.vgh.bayern.de/bayvgh/oeffentl/pm/.

Greece

LEGISLATIVE DEVELOPMENT

Act on gender identity

On 13 October 2017 a new Act[33] on gender identity was adopted. The first part (Articles 1 to 7) regulates the legal recognition of gender identity; it aims to ensure the rights of a person on the basis of his/her gender identity and gender characteristics in all fields.

According to Article 1, 'a person is entitled to the recognition of his/her gender identity as an element of his/her personality,' as well as 'to be respected for his/her personality according to his/her gender features.' Article 2 defines gender identity as 'the inner and personal way in which one feels about his/her gender, irrespective of the sex registered at birth according to his/her biological features.' This includes both personal feelings about one's body as well as external gender expression. The same Article further specifies that gender features include 'primary features, such as the reproductive organs, and secondary features, such as muscle mass, breast or hair development.'

In order to apply for a 'correction' of a person's 'registered sex', Article 3 requires the person in question to have full legal capacity. However, minors having reached the age of 17 may apply for sex correction, provided that the person(s) exercising parental care over them agree; for minors having reached the age of 15 a positive opinion of an interdisciplinary committee is also required. Married persons cannot request a legal sex correction. Article 3 also stipulates that no prior gender reassignment or medical examination or treatment related to the bodily or mental health of the applicant is required.

According to Article 4, a 'correction of the registered sex' is made by virtue of a judicial decision which is registered in such a way that the confidentiality of the 'correction' and of the original birth entry is ensured *erga omnes*. Public services that register the person's identity must issue new documents or make new entries under the corrected sex, name and family name. Mention of the sex correction is not allowed in any case. The new birth certificate can only be changed once according to the same procedure and subject to the same conditions.

32 Bavarian Administrative Appeal Court (BayerischerVerwaltungsgerichtshof), 7 March 2018, Az. 3 BV 16.2040.
33 Act 4491/2017, 'Legal recognition of gender identity' and other provisions, OJ A 152/13.10.2017.

Article 5 states that sex correction by a judicial decision applies *erga omnes*. Rights and obligations predating the sex correction and tax and social security registration numbers of the person are maintained. If he/she has children, their birth registration does not change, and parental care rights and obligations are not affected. Article 6 further establishes strict confidentiality rules regarding sex correction.

In its opinion on the bill, the Scientific Service of Parliament (SSP), which controls the compatibility of bills with the Constitution, EU law and international conventions, welcomed *inter alia* the non-requirement of gender reassignment (Article 3), quoting the European Court of Human Rights (ECtHR), which held that this conflicts with Articles 8 and 3 ECHR. The SSP also recalled that, according to the same judgment (§139-142), a prior psychodiagnosis is required by a large majority of Council of Europe Member States and this does not affect a person's physical integrity; it aims to safeguard one's interests by preventing an erroneous engagement in a gender correction procedure and does not contravene the ECHR (*A.P., Garçon and Nicot v France,* 6 April 2017, § 139-141).

Internet source:
The SSP opinion as well as the final text of the Act are available on Parliament's website (in Greek): https://www.hellenicparliament.gr/Nomothetiko-Ergo/Katatethenta-Nomosxedia?law_id=75d1ff53-879c-4dcb-bfff-a7f20108f665.

Unequal treatment based on ethnic origin regarding access to insurance coverage and medico-pharmaceutical care for third country nationals

The new Law 4529/2018, which was published on 23 March 2018, imposes additional conditions for the recognition of benefits regarding access to insurance coverage and medico-pharmaceutical care to protected family members of insured third country nationals.[34]

Racial or ethnic origin

Before the entry into force of the new law, all third country nationals (not only long-term residents) had access to insurance and medical care. By contrast, the new law stipulates that the beneficiaries should fall within the category of 'long-term residents' and that their family members should 'meet the conditions of Presidential Decree 150/2006 (Directive 2003/109/EC) which specifies the legal status of long-term residents permanently residing in Greece.' Therefore, insurance and medical benefits are only recognised for foreigners who are long-term residents. Other legal third country nationals, who are not 'long-term residents', are excluded from its scope.

Greeks and legally residing foreigners should have equal rights in the fields of employment and social welfare care according to the Code of Immigration and Social Integration (Law 4251/2014, as modified and put into effect by Law 4332/2015). It is also worth noting that the Greek Ombudsman considered that the right to insurance coverage and medico-pharmaceutical care should be guaranteed to the family members of all directly insured third country nationals under the same conditions as for family members of a Greek or an EU Member State citizen.[35]

The current legal framework raises the issue of unequal treatment based on ethnic origin regarding access to insurance coverage and medico-pharmaceutical care. The new Law differentiates between the family members of Greek nationals, EU citizens and third country nationals who are long-term residents, on the one hand, and the family members of third country nationals (without the status of being long-term residents), on the other.

34 Greece, Law 4529/2018 on the transposition of Directive 2014/104/EC concerning rules on lawsuits of reparation for a violation of the provisions on fair competition and other provisions (Νόμος 4529/2018, "*Ενσωμάτωση στην ελληνική νομοθεσία της Οδηγίας 2014/104/ΕΕ, σχετικά με κανόνες που διέπουν τις αγωγές αποζημίωσης για παραβάσεις των διατάξεων του δικαίου ανταγωνισμού και άλλες διατάξεις*")(OJ 56 A/ 23.03.2018).

35 Ombudsman, Opinion No. 224709/2017.

Internet source:
https://www.e-nomothesia.gr/kat-emporeio/nomos-4529-2018-phek-56a-23-3-2018.html.

Abolition of the age limit for the position of a specialist doctor in the National Health System

Age

Article 4 of Law 4528/2018, which entered into force in March 2018, has repealed Article 2 para. 2 of Law 4368/2016 that provided for a maximum age limit of 50 years old to apply for a position of a specialist doctor for the grade of Deputy B' in the Greek National Health System (NHS).

Therefore, the Ministry of Health and subsequently Parliament took into account a previous advisory opinion of the Ombudsman, which had investigated a prior individual complaint in the context of his duties as an actor responsible for the supervision and the promotion of the equal treatment principle in both the public and private sector (according to anti-discrimination Law 4443/2016). This advisory opinion states that the specific age limit for having access to the position of a specialist doctor constitutes direct discriminatory treatment on the ground of age, since it does not seem to be justified.

More in particular, as the Ombudsman mentioned, when the age limit is a prerequisite for access to the work, then it must be proven that it is a characteristic of substantial importance linked with the ability to exercise the specific professional activity. Therefore, it must be proven that an age limit requirement in a specific context is proportionate and necessary to attain a legitimate aim. The necessity test requires to demonstrate that there are no less restrictive methods to achieve the legitimate aim in question. Thus, all regulatory provisions setting a maximum age limit for access to specific sectors or to obtain specialist qualifications must fulfil all the above-mentioned criteria.

The Ombudsman held that even if the legitimate aim of the use of the age limit is to ensure that patients will not be exposed to risks related to a possible incapacity due to the advanced age of doctors, this aim cannot justify the strict nature of this measure or the fact that the age limit constitutes a characteristic this is so substantial for the exercise of duties related to the specific position.

The provision of Law 4368/2016 which prescribed a maximum age limit of 50 years old for the position of a specialist doctor for the grade of Deputy B' in the NHS, and that was subsequently repealed by Law 4258/2018, was problematic, since it had introduced a direct discriminatory treatment on the ground of age without justification. It cannot be concluded that it serves a specific aim and it does not seem to be in line with the principle of proportionality.

Internet source:
https://www.forin.gr/laws/law/3647/nomos-4528-2018.

Ratification of the Istanbul Convention by Greece

Gender

The Council of Europe's Istanbul Convention on preventing and combating violence against women and domestic violence (IC), signed by Greece in May 2011, was sanctioned by the Greek Parliament by virtue of Article 1 Act 4531/2018 (OJ A 62/05.04.2018). Article 2 Act 4531/2018 amended the Penal Code (PC) to align it with the IC. In particular:

- Customs and traditions including religion followed by the perpetrator cannot mitigate a penal sentence.
- A new Article 315B has been added to the PC (in accordance with Article 38 IC) providing that anyone who causes or incites a woman to undergo genital mutilation and anyone who publicly encourages it is punished with imprisonment.

- The intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage is criminalised and categorised as human trafficking (Article 37 IC).
- Stalking is criminalised for the first time by Article 333(1) PC, which implements Article 34 IC. Stalking is defined as the causing of fear or uneasiness to another person, whom the perpetrator repeatedly follows or watches, i.e. in particular by aiming at constant contact through a telephone or an electronic device or by repeated visits to her/his family, social or working environment, contrary to her/his explicitly expressed will. This provision does not presuppose the threat of violence or other illegal acts or omissions.
- The anachronistic provision of Article 339(3) PC, which provided that penal persecution stops or does not start if the perpetrator of the crime of the seduction of a minor under 15 years marries the victim, has been repealed. It had been widely criticised by NGOs and national and international bodies for the protection of human rights.

Article 3 Act 4531/2018 has amended Act 3500/2006 'on domestic violence' (OJ A 232/24.10.2006). In particular:

- The concept of the 'family' has been widened so as to include the current and former parties to a life partnership provided by Act 4356/2015 (OJ A 181/24.12.2015);
- Cohabitation with the victim is no longer a prerequisite for the application of Act 3500/2006 in the case of former spouses and their children (Article 3 IC).
- Article 11(2b) Act 3500/2006 has been amended to ensure the effective compliance of the perpetrator with the procedure of penal mediation. In the case of the perpetrator not completing the special consultative therapeutic programme organised by a public entity, the Public Prosecutor will interrupt the penal mediation with retrospective effect and the penal prosecution continues.
- Following Article 56 Act 3500/2006, when the victim is a minor, the statute of limitations for the offence of domestic violence is suspended until the victim reaches the age of majority and for one year thereafter in the case of a misdemeanour and for three years thereafter in the case of a felony (Article 58 IC);
- Restraining or protection measures can be imposed by the Public Prosecutor to safeguard the physical and psychological health of the victim and the choice of the most adequate measures is left to the discretion of the competent judicial authorities. Their violation is punished by imprisonment.
- The imposed restraining measure can be repealed, replaced or amended following a petition by the victim or by the person on whom it was imposed or *ex officio*, if required; the hearing of both parties has to take place beforehand.

Article 4 Act 4531/2018 has amended various pieces of legislation to harmonise them with the IC. More specifically:

- Act 3811/2009 (OJ A 231/17.12.2009) provides an indemnity to the victims of crimes of violence who request it with the Hellenic Authority for Indemnity, under the Ministry of Justice (Article 30 IC).
- Act 2168/1993 (OJ A 147/03.09.1993) provides that firearms should not be granted to persons who have been prosecuted for domestic violence, as provided by Act 3500/2006, and to persons who have been irrevocably convicted of a misdemeanour as provided by Act 3500/2016, irrespective of the sanction imposed (Article 51 IC).
- Victims of domestic violence, who are third country nationals, are protected against deportation or return even before they lodge a petition for a residence permit.
- Article 21(6) Act 4251/2014 (OJ A 80/01.04.2014) has been amended so as to ensure the continuous validity of the residence permits of third country nationals who, following their transfer abroad to enter into a forced marriage, have lost their residence rights (Article 59(4) IC).
- The General Secretariat for Gender Equality has been designated as the coordinating body monitoring the application of the Istanbul Convention (Article 10 IC). The Observatory operating within the General Secretariat for Gender Equality is competent for data collection and research (Article 11 IC).

Greece has expressed reservations as to the application of Articles 44(1e), 44(3) and 44(4) IC, following the reluctance of the Greek Government to accept the drastic extension of the State's international penal jurisdiction. The legislator found that this issue is premature and should be approached in a more global and systematic way. Following the entry into force of Act 4531/2018 on 5 April 2018, the IC came into force in Greece on 1 October 2018, three months after its ratification.

Internet source:
https://www.e-nomothesia.gr/oikogeneia/nomos-4531-2018-phek-62a-5-4-2018.html.

CASE LAW

Compliance of the notice of competition held by the Ministry of Foreign Affairs with equality legislation

Racial or ethnic origin

Age

Disability

The Greek Ombudsman assessed the lawfulness of the notice of competition held by the Ministry of Foreign Affairs[36] on the recruitment of five experts which excludes the following categories of participants:

(a) persons who have become Greek citizens through the process of naturalization, but who have not completed three years after the acquisition of Greek nationality;
(b) persons who are under 33 years of age;
(c) persons who suffer from serious cardiovascular or serious respiratory or nephrology or contagious diseases or serious disorders of the nervous system.

The Ombudsman emphasised that differential treatment, on the basis of the protected grounds (disability, race and age), is only allowed if the characteristic constitutes a substantive professional requirement for the nature of the specific professional activities and subject to the condition that the aim is legitimate, and the requirement adopted is proportional.

The Ombudsman considered that the imposition of a 3-year condition after the acquisition of Greek nationality and the minimum age limitation were not justified. To the same extent, regarding the exclusion on grounds of specific diseases, the Ombudsman held that the physical suitability of the candidate should be the outcome of an ad hoc medical assessment, according to the procedure prescribed under the Staff Code. Against this background, the Ombudsman requested an immediate review of the terms of the notice of competition in order for them to be in compliance with the legislation on equal treatment.

The Ministry responded that it would take these remarks into account in the context of the ongoing amendment of the provisions of its organic law.[37]

Internet source:
https://www.synigoros.gr/resources/docs/20180328-synopsi.pdf.

36 Advisory Opinion No. 236691/52486/2017, which was published on its website on 28/3/2018.
37 This amendment concerns the legal framework regarding the internal regulation of the Ministry's office, its structure and all conditions regarding its staff.

HU Hungary

CASE LAW

Discrimination against a pregnant employee

Gender

This case before the Equal Treatment Authority (ETA) concerns an employer who refused to pay for a pregnant employee's training and subsequent examination fees after learning that the employee was pregnant. The employer refused to pay her costs despite the fact that a contract was concluded between the parties which obliged the employer to pay for the expenses of the training.

During the settlement of the case, the employee provided proof of her pregnancy, disclosed the content of her employment and training contract and the amount of training bills which remained unpaid by her employer. The employer was not able to prove that his action was not discriminatory. In his defence, the employer stated that he believed that attending the training, and especially taking the examinations, would be more difficult for the employee than going to work because of the pregnancy. Therefore, he suspended the payment of the training expenses temporarily, until the parties would discuss the issue. On 17 December 2017, the parties agreed, under the guidance of the ETA,[38] that the employer will pay for the training fees.

The approach of the ETA was to reach an agreement which redresses the harm caused by the respondent. If no agreement could have been reached, the ETA could have applied sanctions such as a fine or the publication of the decision, which does not provide any redress for the claimant but punishes the employer.

Internet source:
EBH/392/2017. The report is not available on the EBH anymore.

Discrimination against an LGBTQ sports club on the basis of its members' sexual orientation and gender identity

Sexual orientation

Gender

Atlasz Sports Club provides an LGBTQ-friendly environment to practice sport activities. In January 2017, the Club contacted a swimming pool and sports complex to request the rental of two lanes of the swimming pool for their event, the Annual Atlasz Sports Day. The company confirmed the availability of the two lanes via an email, but it withdrew the confirmation when it found out that Atlasz was an LGBTQ sports club.

With the legal assistance of the Háttér Society (an NGO protecting the rights of LGBTQ people), Atlasz sports club initiated an administrative procedure before the Equal Treatment Authority, the Hungarian equality body. The company argued that the refusal was not based on sexual orientation or gender identity associated with Atlasz Sports Club. The pool was instead overbooked and Atlasz insisted on bringing in its own swimming instructor, which was not allowed by the pool's house rules.[39]

The Equal Treatment Authority found that neither the pool's occupancy nor ticket sales data supported the company's argument concerning overbooking. It also found that the house rules had been modified to exclude outside swimming instructors only after the proceeding before the equality body had already commenced. Therefore, the Equal Treatment Authority held that the company had discriminated against the sports club on the basis of its members' sexual orientation and gender identity. It imposed a fine of

38 The decision was published in May 2018 by the ETA.
39 Summary based on Háttér's report on the case.

HUF 1 000 000 (approximately EUR 3 250) on the company and ordered its decision to be published on both the Authority's and the company's websites.

The Hungarian Equal Treatment Authority does not have many cases concerning discrimination against LGBTQ people. This is the highest fine that the Authority has ever imposed as a sanction for discrimination on the grounds of sexual orientation and gender identity.

This case represents a promising sign that shows the Authority's willingness to combat discrimination based on sexual orientation and gender identity.

Internet source:
http://en.hatter.hu/news/highest-ever-fine-imposed-on-swimming-pool-discriminating-against-lgbtq-sports-club-in-hungary.

Ministry of Education found guilty of failing to take effective action against the segregation of Roma children in elementary schools

In 2009, the Chance for Children Foundation (CFCF) initiated an *actio popularis* lawsuit against the Ministry of Education and Culture as the entity ultimately responsible for a failure to take effective action against the segregation of Roma children in 28 elementary schools.

On 18 April 2018, the Court found that the Ministry had violated the requirement of equal treatment in relation to Roma pupils in 28 elementary schools by having maintained their school-level segregation starting from the 2003/2004 school year. It also ordered the Ministry to instruct the entities managing the schools to prepare a desegregation plan aimed at assisting the integration of the pupils.[40]

Racial or ethnic origin

The Ministry denied responsibility for a violation of the requirement of equal treatment on the basis that, due to the regulations pertaining to the protection of sensitive personal data, the Ministry is not allowed to collect data on the ethnic origin of pupils and cannot take action against ethnically-based segregation.

The Court however concluded that the Ministry should have been sufficiently aware of the situation, because the CFCF expressly referred to research commissioned by the predecessor of the Ministry, which concluded that there were 44 schools where the proportion of Roma pupils exceeded 50 % (in some schools 80 %), and this number was on the increase.

The Court decided on the high amount of the public purpose fine[41] (EUR 158 000) after considering the prolonged nature of the violation and the severe consequences for those pupils who were impacted by the segregation.

This judgment concludes that the Ministry of Education and Culture is the entity that is ultimately responsible for public education, and is ultimately liable for segregation in the public-school system.

Internet source:
http://cfcf.hu/sites/default/files/23675-2015-84-I%20ítélet%20Esélyt%20a%20Hátrányos%20-%20Nemzeti%20Erőforrás%20_.pdf.

40 Fővárosi Törvényszék (Budapest Regional Court), judgment No. 40.P.23.675/2016/84, 18 April 2018.

41 A public purpose fine is similar in its function to punitive damages, with the exception that it is not paid to the plaintiff, but is assigned for a public purpose. It has now been eliminated from the Hungarian legal system, but the old Civil Code – on the basis of which this particular proceeding was conducted – allowed for this.

Harassment during a physical examination of a transgender person

Gender

In May 2018, the Equal Treatment Authority (ETA) published a case concerning a male-born transgender woman who had requested an expert opinion from a urologist stating that there was no medical reason to preclude gender transformation surgery. Such a medical opinion is required by law for the procedure to change one's gender and name in the registry.

The urologist did not issue the medical opinion, and after the examination, he addressed the claimant with inappropriate statements relating to her gender identity. According to the applicant, the physician had directly discriminated against and harassed her, because he did not issue the legally required medical opinion, and made humiliating remarks concerning her sexual identity.

Recent case law shows that the ETA has transformed its legally stipulated authority to approve the parties' agreement to a quasi-mediation function. In this case, the parties agreed to act together with the aim of fundamentally improving the quality of urological services provided to transgender people.

At the hearing, the following was agreed:

- The office apologized to the applicant for the behaviour of the urologist.
- The office agreed to publish an informational leaflet containing general guidelines on how to deal with transgender people, and to provide general guidance to urologists and healthcare workers in respect of the human dignity of transgender people. The leaflet has been written by the parties together and published on the website of the medical office.
- The office would submit the jointly written guidelines to a prestigious urological journal for publication, of which it would bear the costs.

Internet source:
Equal Treatment Authority, EBH/36/2018 http://www.egyenlobanasmod.hu/hu/jogeset/ebh362018.

POLICY DEVELOPMENT

Publication of a volume of studies on segregation in the education system

Racial or ethnic origin

On 9 May 2018, a comprehensive volume containing a series of studies on segregation in the Hungarian education system was launched. The volume *Mea Culpa. State of affairs in educational segregation*[42] provides analyses and studies on several aspects of segregation, including: (i) the impact of the free choice of school on segregation; (ii) the role of denominational schools in segregation; (iii) individual case studies (including the cases of Csobánka, Nyíregyháza and Tiszavasvári); and (iv) desegregation strategies.[43]

The introductory chapter provides a good outline of the developments of the past decade and contains useful data showing how the extent of segregation has been on the increase, and how local and central policies and legal changes have contributed to this trend. For instance, between 2008 and 2016, the proportion of 'ghetto' schools (i.e. schools where the ratio of Roma pupils is 50 % or higher) had increased from 10.2 % to 14 %. It is also explained how the legal definitions of 'disadvantaged' and 'especially disadvantaged' pupils were made narrower in 2013, thus restricting the scope of pupils who are eligible for the forms of support that children falling under these categories are entitled to (including financial

42 Fejes, József Balázs – Szűcs, Norbert: Én vétkem. helyzetkép az oktatási szegregációról. Motiváció Oktatási Egyesület, Szeged, 2018. Available at: https://motivaciomuhely.hu/wp-content/uploads/2018/05/%C3%89n-v%C3%A9tkem_online.pdf.

43 The study was published with financial assistance from the Open Society Institute Budapest Foundation by Motiváció Oktatási Egyesület, a CSO working for the improvement of the Hungarian educational system and making it more equitable.

support for the families, free textbooks, free meals, participation in programmes aimed at improving skills and competences). The percentage of disadvantaged children fell from 18.6 in the 2013-14 academic year to 5.8 in the 2017-18 academic year, while the ratio of especially disadvantaged children dropped from 8.8 to 6.7 in the same period. The chapter also briefly analyses how the increasing number of denominational schools has contributed to an increase in the degree of segregation, and what changes in educational policies have had negative impacts on the issue. The next chapters of the book elaborate further on these – and other relevant – topics, and also provide suggestions for moving forward towards a more integrated educational system.

The volume is a very useful resource in understanding the trends in segregation within the Hungarian system of public education (including denominational schools) as well as the underlying issues and ways to potentially address the problems.

Internet source:
https://motivaciomuhely.hu/wp-content/uploads/2018/05/%C3%89n-v%C3%A9tkem_online.pdf.

Iceland

IS

LEGISLATIVE DEVELOPMENTS

New Icelandic law on Equal Pay Certification entered into force on January 1, 2018

Gender

On 1 January 2018, a law entered into force mandating that all companies and employers with 25 or more employees are required to obtain equal pay certification, on an annual basis, of their equal pay systems and the implementation thereof. The purpose of this obligatory certification is to enforce the current legislation (Gender Equality Act No. 10/2008, Art. 19 on Equal Pay).[44]

This legislative development makes Iceland the first country in the world to require companies with 25 or more employees to obtain certification on the basis of requirements of a management standard to prove that they offer equal pay for work of equal value regardless of gender. The Equal Pay Standard, on which the certification requirements are based, does this by assessing a company's pay policies, the classification of jobs according to equal value and wage analysis on the basis of the classification, as well as formalizing policies and processes related to pay decisions.

The equal pay standard describes the process that companies and public institutions can follow in order to ensure equal pay within their organization. A company adopting the standard would start with an assessment of its current pay policies, classify jobs according to equal value and conduct a wage study on the basis of this classification, as well as formalizing policies and processes related to pay decisions. These changes will need to be reviewed regularly, as well as being checked and validated by management. Once the company has implemented these changes it can apply for the certification of its pay system.[45]

In view of the time that it will take to meet the requirements and adopt equal pay management systems, employers receive a period of grace in which to acquire the certification. For this, different periods are allowed according to the size of the workplace. Employers with 250 or more employees need to have implemented the equal pay standard by 31 December 2018; employers with 150-249 employees by 31 December 2019; employers with 90-149 employees by 31 December 2020; and employers with 25-89 employees by 31 December 2021. However, all state ministries need to have undergone their first

44 Act on the Equal Status and Equal Rights of Women and Men, No. 10/2008 as amended by Act No. 162/2010, No. 126/2011, No. 62/2014 and No. 79/2015, No. 117/2016, and No. 56/2017.
45 http://www.kvenrettindafelag.is/wp-content/uploads/2015/03/The-Equal-Pay-Standard-ÍST-85-www.vel_.is_.pdf.

certification by 31 December 2018, and state institutions and companies owned by the state with 25 or more employees by 31 December 2019.

Iceland's Equal Pay Standard ÍST 85 is the first to be deliberately developed according to international ISO standards,[46] allowing it to be translated and adopted across the globe. The Centre for Gender Equality will grant workplaces that have acquired certification on the basis of the audits performed by accredited auditors the right to use a special equal pay symbol in recognition of this.

In cases where a workplace either has not acquired equal pay certification or has failed to renew it by the deadline, the organisations of the social partners will be able to report it to the Centre for Gender Equality. The Centre can issue a formal demand to rectify the situation by a certain deadline. Rectification measures can involve, for example, the provision of information and the release of materials or the drawing up of a scheduled plan of action on how the workplace intends to meet the requirements of the Equal Pay Standard. If the workplace fails to act on instructions of this type, the Centre for Gender Equality is authorised to impose per diem fines.

Iceland is spearheading the move as part of its target to eradicate the country's gender gap by 2022, which would make it the first country in the world to achieve this.

Internet source:
https://www.government.is/news/article/2018/01/04/New-Icelandic-law-on-Equal-Pay-Certification-entered-into-force-on-January-1-2018/.

Adoption of new legislation on services for disabled people with long-term support needs

Disability

The Icelandic Parliament has adopted a new act in the field of disability in May 2018,[47] which will replace the current Act on the Affairs of People with Disabilities No. 59/1992 on 1 October 2018.

The purpose of the act is to provide disabled people with the best services available at any given time to meet their specific support needs. The service shall aim at providing the necessary support so that people with disabilities can enjoy full human rights equal to others and create the conditions for independent life on their own terms. In implementing services, respect for human dignity, autonomy and independence should be respected and services based on individual needs and circumstances, wishes and other relevant aspects such as sex, gender, age, ethnic origin, religion, etc. Furthermore, the obligations under the CRPD shall be respected, as well as the CRC; in relation to children with disabilities, and consultations with stakeholders will take place.

The act clarifies several important terms in the field of disability, most importantly the concept itself. Disability: *The result of impairments which in interaction with various barriers may hinder the full and effective participation of people with disabilities in society on an equal basis with others. The impairment is long-term and the barriers are of such a nature as to lead to discrimination based on physical, psychological, intellectual or sensory impairment.* The terms *disabled people, support needs, reasonable accommodation,* among others, are also defined.

46 According to the International Organization for Standardization (ISO), the so-called 'international management system standards [...] help organizations improve their performance by specifying repeatable steps that organizations consciously implement to achieve their goals and objectives, and to create an organizational culture that reflexively engages in a continuous cycle of self-evaluation, correction and improvement of operations and processes through heightened employee awareness and management leadership and commitment.' See https://www.iso.org/management-system-standards.html for more information.

47 Act on Services for Disabled People with Long-Term Support Needs No. 38/2018, 9 May 2018 *[Lög um þjónustu við fatlað fólk með langvarandi stuðningsþarfirnr. 38/2018 frá 9. maí 2018].*

The act sets out the rights to services and the service support framework for people with disabilities in all spheres of life as well as provisions on reasonable accommodation in relation to rehabilitation, training, education and employment. The right to positive measures for people with disabilities in the public labour market is upheld and various support measures in relation to special workplaces, rehabilitation and training are set out as well as in relation to housing and individual service agreements.

Internet source:
www.althingi.is/altext/stjt/2018.038.html.

Adoption of non-discrimination legislation in the labour market

The Icelandic Parliament has adopted a new act prohibiting direct and indirect discrimination on the grounds of race, ethnic origin, religion/belief, disability, diminished work ability, age, sexual orientation, gender identity, biological gender characteristics and gender expression in the labour market in June 2018.[48] The legislation is in line with Directive 2000/78/EC. The act will enter into force on 1 September 2018, except for provisions on differential treatment based on age, which will enter into force on 1 July 2019.

All grounds

The act defines the concepts of discrimination, instructions to discriminate, harassment, and victimisation in accordance with the provisions of Directive 2000/78/EC. It also sets out definitions of race, ethnic origin, religion/belief, disability, diminished work ability, age, sexual orientation, gender identity, biological gender characteristics and gender expression.

The legislation applies to both the public and the private sector in relation to:

- conditions of access to employed or self-employed activities, including selection criteria and recruitment conditions and including promotion;
- vocational guidance and training;
- employment and working conditions (including dismissals and pay);
- membership of and involvement in an organisation of employers or workers and the benefits provided by such organisations.

The act does not cover differences in treatment based on nationality or statelessness or payments of any kind made by the State's social security or social protection schemes, e.g. unemployment benefits, parental leave payments and municipal social services. Measures for public security, order, the prevention of crime and the protection of health and the rights and freedoms of others are exempt and justified differences in treatment on the ground of age are permitted.

Employers are obliged to provide reasonable accommodation for disabled persons or people with diminished work ability and positive action is permitted.

The Centre for Gender Equality will monitor the implementation of the legislation.

Individuals, corporations, institutions and non-governmental organisations can bring complaints to the Gender Equality Complaints Committee, because of alleged violations the against them or their members, either for their own behalf or in support of the complainant. The respondent bears the burden of proof. Violations may be punishable by fines unless heavier penalties are prescribed in other statutes. The act also provides for pecuniary and non-pecuniary compensation.

Internet source:
www.althingi.is/altext/148/s/1258.html.

48 Act on Equal Treatment in the Labour Market No. 86/2018, 25 June 2018 *[Lög um jafna meðferð á vinnumarkaði nr. 86/2018 frá 25. júní 2018].*

Adoption of non-discrimination legislation on the grounds of race/ethnic origin in all areas of life except the labour market.

Racial or ethnic origin

The Icelandic Parliament has adopted a new act on equal treatment irrespective of race or ethnic origin in all spheres of life in June 2018,[49] except for the labour market, *cf.* Act No. 86/2018 on Equal Treatment in the Labour Market. The act does not cover differences in treatment based on nationality or statelessness or apply to rights predicated on residence. Furthermore, the act does not apply to the sphere of private and family life. The legislation is in line with Directive 2000/43/EC. The act will enter into force on 1 September 2018. Furthermore, the act obliges the Minister of Welfare to present a bill extending the scope of the act to also cover religion/belief, disability, diminished work ability, age, sexual orientation, gender identity, biological gender characteristics and gender expression before 1 September 2019.

The act defines and prohibits both direct and indirect discrimination, harassment, instructions to discriminate and victimisation in accordance with the provisions of Directive 2000/43/EC. Discriminatory provisions in contracts shall be deemed null and void and discriminatory advertising is prohibited. Positive action is permitted.

The legislation applies to both the public and the private sector in relation to:

- access to social security and protection, and to healthcare;
- education;
- social advantages;
- access to and the supply of goods and services, including housing.

The Centre for Gender Equality will monitor the implementation of the legislation.

Individuals, corporations, institutions and non-governmental organisations can bring complaints to the Gender Equality Complaints Committee, because of alleged violations the against them or their members, either for their own behalf or in support of the complainant. The respondent bears the burden of proof. Violations may be punishable by fines unless heavier penalties are prescribed in other statutes. The act also provides for pecuniary and non-pecuniary compensation.

Internet source:
www.althingi.is/altext/148/s/1257.html.

POLICY DEVELPOMENT

Narrowing the gender pay gap

Gender

An analysis of the gender pay gap, carried out by Statistics Iceland in cooperation with an action group on equal pay appointed by the government and the social partners, shows a narrowing gender pay gap during the period 2008-2016.[50]

The adjusted gender pay gap measured 6.6 % in 2008 but was down to 4.5 % in 2016. By using the whole dataset, a less biased estimate can be decomposed into an explained and unexplained pay gap. The unexplained pay gap means that it must be attributable to pay discrimination by employers, while the explained pay gap may be due to factors such as seniority, full-time vs part-time employment,

49 Act on Equal Treatment Irrespective of Race or Ethnic Origin No. 85/2018, 25 June 2018 *[Lög um jafna meðferð óháð kynþætti og þjóðernisuppruna nr. 85/2018 frá 25. júní 2018].*

50 Statistics Iceland, 'Analysis on Gender Pay Gap 2008–2016', *Statistical Series*, 7 March 2018, Vol. 103, Issue 9, available at: https://www.statice.is/publications/publication-detail?id=59402 accessed 25 August 2018.

employment sectors etc. The unexplained gap in pay differences was estimated to be 4.8 % for the years 2008-2016, while the explained gap was 7.4 %.

If the whole period is broken down into three-year periods, the unexplained gender pay gap has decreased from 4.8 % in the years 2008-2010 to 3.6 % in the years 2014-2016.

Internet source:
https://www.statice.is/publications/news-archive/wages-and-income/analysis-on-gender-pay-gap-2008-2016/.

Ireland

LEGISLATIVE DEVELOPMENT

Gender Pay Gap

On 26 June 2018, the Government approved the General Scheme of the Gender Pay Gap Information Bill. The proposed legislation will be cited as the Gender Pay Gap Information Act 2018. The Employment Equality Act 1998 will be amended by the insertion of a number of sections to include the 'gender pay gap information'. The Minister will make regulations requiring employers to publish information related to the pay of their employees for the purpose of showing whether there are differences in the pay of male and female employees and, if so, the scale of such differences.

The Minister will also have regard to the cost of complying with such regulations. These regulations will not apply to employers having fewer than 50 employees. It is proposed that for the first two years of the legislation, it shall apply to employers having over 250 employees, and then within three years that upper limit shall become 150 employees. The regulations may prescribe classes of employer to which the regulations shall relate including by reference to the number of employees; classes of employee; how to calculate the number of employees; how to calculate the pay of employees; and the form and manner in which and the frequency with which information is to be published under the proposed regulations. The regulations will foresee the publication of the hourly rate of pay for men and women in respect of each category of employee; the proportions of male and female employees who are paid bonus pay and benefits; and also whether the employees are permanent, on fixed-term contracts or part-time employees. The mean and median rate(s) of pay shall be published for each group of employees. It is proposed that such information shall be published each year.

The Irish Human Rights and Equality Commission (IHREC) may make applications to the court if there is an alleged breach of the proposed legislation. There will also be additional enforcement powers and access to the Workplace Relations Commission if an employee considers that there has been a breach of the legislation.

Regulations may require the employer to publish information in respect of each Department of State, each scheduled office within the meaning of the Public Service Management Act 1997 (various state bodies), An Garda Síochána (the police), and the Defence Forces.

Internet source:
http://www.justice.ie/en/JELR/Pages/PR18000210.

POLICY DEVELOPMENT

Ireland ratifies the UN Convention on the Rights of Persons with Disabilities

Disability

On 20 March 2018, Ireland became the last EU Member State to ratify the UN Convention on the Rights of Persons with Disabilities (UNCRPD).

A motion was passed in Dáil Éireann (the main chamber of Parliament) on 7 March, enabling the government to sign and deposit the instrument of ratification with the United Nations. Ireland has not, however, ratified the Optional Protocol to UNCRPD and has entered reservations and declarations on Articles 12 (in relation to legal capacity), 14 (liberty and security of the person) and 27 (employment). The reservation on Article 27(1) accepts the provisions of the Convention, subject to the understanding that none of the obligations relating to equal treatment in employment and occupation shall apply to the admission into or service in any of the Defence Forces, An Garda Síochána (the police), the Prison Service, the fire brigade, the Irish Coastguard and the ambulance service.

Ireland is a dualist State and the ratification of international treaties has no direct impact within the domestic legal system. However, several legislative measures have been enacted in recent years to align national law with the Convention.

The primary proposed changes to anti-discrimination legislation are pending. A revised text of the Disability (Miscellaneous Provisions) Bill 2016 will be published in 2018. Section 4 of that Bill aims to amend the current legal provision on reasonable accommodation for people with disabilities in accessing goods and services (section 4, Equal Status Acts 2000-2015). Specifically, the 'disproportionate burden' standard that applies in the employment field will also apply to the provision of services by public sector bodies and certain private sector commercial entities, replacing the current lower threshold of 'nominal cost'. The Bill is also expected to confer a formal monitoring function on Ireland's national equality body, the Irish Human Rights and Equality Commission, in accordance with Article 33 UNCRPD.

Internet source:
http://www.justice.ie/en/JELR/Pages/PR18000083;
http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail20180307000038#VV01200;
https://www.oireachtas.ie/viewdoc.asp?DocID=34322&&CatID=59.

IT Italy

CASE LAW

A case regarding indirect pay discrimination on the ground of gender

Gender

This case is one of the few cases in Italy concerning indirect pay discrimination on the ground of gender. The Court of Appeal of Turin confirmed the judgment of the Tribunal on 10 January 2018,[51] which deemed a clause of a collective agreement at the enterprise level to be discriminatory as it infringed Arts 3 and 37 of the Constitution, 25 para. 2bis of Decree N. 198/2006 and Art. 3 of Decree N. 151/2001.[52] The clause sets a 'real presence at work' as a criterion in order to be eligible to receive additional remuneration, without regarding family-related leave (including compulsory maternity leave and parental leave) and

51 Tribunale di Torino, Sentenza n.1858, 26 October 2016, published in Rivista Italiana di Diritto del Lavoro 2017, 2, II, 278.
52 Corte di Appello di Torino, Sentenza 937/2017, 10 January 2018.

sick leave. Even though the criterion is formally neutral, it results in indirect pay discrimination on the ground of gender since a higher percentage of female workers than male workers take family-related leave. Moreover, no permissible justification had been provided regarding the requirement of a 'real presence at work'.

The employer was ordered to (1) cease the discrimination by regarding such leave as actual work with the aim of providing remuneration as an incentive, (2) to pay the additional remuneration incentive to the plaintiffs, and (3) to enhance a plan to remove the discrimination where the change of the criteria mentioned above had to be included in future collective bargaining at the enterprise level. The latter was promoted by the intervention of the Regional Equality Adviser as it was a case of collective discrimination.

This is an important judgement because previous cases mainly concerned the negative effects of parental leave on wage progression. It actually concerns both direct and indirect discrimination, as the exclusion of the compulsory maternity leave involves a differential treatment which is directly based on gender, but the reasoning of the Court concerns mainly indirect discrimination.

In particular, the enforcement and the effectiveness of the partial reversal of the burden of proof is evident in this judgement. In fact, the plaintiff claimed that the clause of the collective agreement was discriminatory by providing data on the proportionally disadvantageous effect of the criteria which excluded maternity and parental leave. The company tried to justify the criterion of a real presence at work by referring to the link between the productivity objectives and the concrete and profitable work performed by employees. Nevertheless, the judge rejected this justification.

The Court of Appeal also underlined that the discrimination is not excluded by the fact that it arises from the enforcement of a collective agreement, because the employer (and also trade unions) must pursue a working organization which aims to mitigate or remove unequal treatment between male and female workers.

Internet source:
Court of Appeal of Turin 10 January 2018, published in https://www.wikilabour.it/public/Segnalazioni/58bb7d01-7ef7-4ef8-916a-6e9d9cf27608/20180110_CdA-Torino.pdf.

POLICY DEVELOPMENT

Draft agreement between the National Labour Inspectorate and the National Equality Adviser

The Draft Agreement between the National Labour Inspectorate and the National Equality Adviser signed on 6 June 2018 updated the agreement of 2007, after the recent reform of the Labour Inspectorate by Decree No. 149/2015. The Agreement is expressly aimed at promoting equal opportunities and combating gender discrimination, in particular as regards working parents.

With this Agreement, both parties committed themselves to increase cooperation in fighting gender discrimination through various action points including: the prompt investigation of cases reported by Equality Advisers; the exchange of statistical data; the joint examination of biannual reports on working conditions (including hiring process, professional training, pay, career, dismissal and pensions) in enterprises employing more than 100 workers; the exchange of good practices and measures to fight discrimination and the monitoring of the results; the organization of professional training on gender equality for both local equality advisers and labour inspectors; the promotion of meetings at the national or local level to examine specific cases to remove discrimination or remarkable situations of inequality with the possibility for workers, unions, employers' representatives, and the Department of the Minister of Labour to participate.

Both the National Labour Inspectorate and the National Equality Adviser are committed to disseminate the agreement and to invite local equality advisers and local labour inspectorates to contribute to the initiative by signing operative agreements which take the local situation into consideration.

On the whole the Agreement is quite detailed, especially regarding the exchange of data, and it strengthens continuous cooperation between the two institutions. In particular, the exchange of good practices and the joint examination of specific cases could prove to be successful in fighting discrimination. Unfortunately, the Agreement lacks references to specific instruments such as, for instance, a selection of case law and operating examples and other instruments on equality issues (such as specific software to facilitate this kind of inspections), aimed at supporting the intervention of labour inspectors, which were mentioned in the previous Agreement

Internet source:
Draft Agreement between the National Labour Inspectorate and the National Equality Adviser signed on 6 June 2018, http://www.lavoro.gov.it/notizie/Documents/Protocollo-del-06062018-INL-CNP.pdf.

LV Latvia

CASE LAW

Decision of the Supreme Court on the Principle of equivalence and the effectiveness of the procedural time limits

Gender

On 6 June 2018, the Supreme Court delivered a decision in an unequal pay case. The decision highlights the questionable issue of the compliance of time limits under Latvian law for bringing discrimination claims (including claims regarding unequal pay) with the EU law principles of equivalence and the effectiveness of national procedural measures.

In its decision, the Supreme Court upheld the decisions of the court of first instance and the appeal court which ruled that a claim for damages was not admissible because the claimant had missed the three-month time limit which is applicable to discrimination claims. The court of appeals did however consider the applicant's claim for non-pecuniary damages to be admissible arguing that this falls under a two-year time limit in accordance with other cases regarding labour law. The Supreme Court overruled this last part of the judgment and decided that the claim for compensation for non-pecuniary damages is also subject to the three-month time limit in cases of discrimination. The Court explained that the right to compensation for non-pecuniary damage is dependent on establishing discrimination in the first place, which is subject to a three-month time limit, hence the subsequent claim for non-pecuniary damages falls under the same time limit.

The decision of the Supreme Court highlights the possible non-compliance of the time limits under Latvian law for bringing discrimination claims in comparison to all other claims (except claims of unfair dismissal) with the principles of equivalence and effectiveness under EU law. In particular, there is no clear explanation as to why discrimination claims must be brought before a court within three months from the moment a claimant has learned about the discrimination while other claims concerning breaches of employment law are subject to a two-year time limit (the Labour Law – Articles 60(3) and 95(5) and Article 31(1) respectively). The Supreme Court referred in its decision to the case law of the CJEU on the interpretation of the principles of equivalence and effectiveness. However, the Court did not analyse the issue before it in substance, in particular whether different (shorter) time limits for discrimination claims comply with the principle of equivalence. The Supreme Court only referred to the CJEU decision in *Bulicke*

C-246/09 where it was established that a two-month time limit for bringing discrimination claims to the courts complies with the principle of effectiveness.

Internet source:
The decision of the Supreme Court in case No. 79/2018 (6 June 2018), ECLI:LV:AT:2018:0606. C31247015.1.S.
The Labour Law (*Darba likums*), Official Gazette No. 105, 6 July 2001, available in Latvian at https://likumi.lv/doc.php?id=26019.

Lithuania

LT

POLICY DEVELOPMENT

Different pricing for women and men may be regarded as a violation of the principle of equality in the light of Directive 2004/113/EC

On the occasion of the International Women's Day (8 March), the Office of the Equal Opportunities Ombudsperson in Lithuania (the national institution responsible for the implementation of the principle of equal treatment with regard to sex and other grounds) launched the campaign entitled 'Price Has No Gender'. The aim of the campaign is to raise awareness about the fact that in certain sectors the same services are priced differently for women and men, and to put these practices into line with equality legislation.

Gender

The first act of discrimination was detected in car wash services after a car wash company announced on its Facebook page that women could wash their car with a 20 % discount every Wednesday. The company claimed that it aimed to attract women to use the newly opened car wash centres. According to the company 'Ainava', the aim was to spread the news about the new service and to demonstrate that such car-washing machines are easy and convenient to use. In the view of Ombudsperson, the company did not provide any justification as to why the discounts for the same services only applied to women. Discounting based on sex cannot be considered an appropriate instrument to demonstrate the benefits of a new service according to the Office. Upon the detection of discrimination, the company discontinued its the discount for women.

Another area where possible discrimination was detected was in the beauty and hairdressing service sector. The Ombudsperson's Office discovered during a pilot study that in most hairdressing salons the cutting of women's hair is 23 %-43 % more expensive than for men, while a manicure is usually more expensive for men. For a manicure, men pay 10 % more than women, and for a pedicure prices are up to 40 % higher for men. Hairdressers have now been asked to set the prices for the cutting of hair according to the products that are necessary for a particular haircut, style and the complexity of the haircut, the instruments used and so on.

The Office aims to change the habits of 'gender pricing' and to ensure that a client's gender no longer affects the price of a service received. The beauty companies labelled the demands of the Office as 'nonsense'[53] saying that the required single elimination of the words 'masculine' or 'feminine' in the pricelists will not change the existing pricing.

53 Available at https://www.15min.lt/verslas/naujiena/finansai/kirpejai-nesutinka-suvienodinti-kainu-skirtingos-paslaugos-turi-kainuoti-skirtingai-662-993222 (in Lithuanian).

Internet source:
http://www.lygybe.lt/en/news/price-has-no-gender-awareness-raising-campaign-to-change-different-pricing-for-men-and-women-/915.
http://www.lygybe.lt/lt/automobiliu-plovykla-diskriminavo-vyrus.

MK The former Yugoslav Republic of Macedonia

LEGISLATIVE DEVELOPMENTS

Ratification of the ILO C171 Night Work Convention

The Macedonian Parliament ratified the International Labour Organization's Night Work Convention (C171) in January 2018.[54] The Government hoped that by ratifying this Convention it would further facilitate women in working night shifts which could have a positive impact on their participation in the labour market whilst protecting pregnancy and maternity rights.

The ratification of this Convention will most likely entail amendments to the law; yet the Law on Labour Relations, which is a basic act in this area, has not been mentioned at all in this context.[55]

Gender

It is dubious whether the ratification of this Convention would have immediate effects either on the legislation in this area or in the practice itself. The vast majority of the institutions envisaged in the Convention are already incorporated in Macedonian legislation, and in the Law on Labour Relations there are a number of articles regulating this issue, some of which even go beyond the regulations of the Convention.[56]

However, the Convention stipulates suitable first-aid facilities for workers performing night work (Article 5), and ensuring an alternative to night work for female workers, including protection in cases where this is not possible and including a guarantee concerning benefits regarding status, seniority and access to promotion (Article 7), which are completely omitted in Macedonian law. These provisions are really welcomed, and will be in accordance with Council Directive 92/85/EEC of 19 October 1992 (Article 7).

Internet source:
http://sobranie.mk/materialdetails.nspx?materialId=5bf51126-fd05-4a64-a413-23861355e4f6.

POLICY DEVELOPMENT

A proposal for a new anti-discrimination law in compliance with EU law standards

All grounds

In January 2018, the Ministry of Labour and Social Policy (MLSP), with the support of the Organisation for Security and Cooperation in Europe (OSCE), started a round of public debate on a draft proposal for a new Law on the Prevention of and Protection against Discrimination, which would replace the 2010 law.[57] The

54 http://sobranie.mk/materialdetails.nspx?materialId=5bf51126-fd05-4a64-a413-23861355e4f6, accessed 9 February 2018.
55 On 7 July 2018, a legal provision was introduced for the payment of a food allowance of 20% of the average net salary per worker in the Republic of Macedonia for night workers in proportion to the days when the worker is working at night. (Official Gazette of RM No. 120/2018 (from 7 July 2018).
56 Articles: 106, 127-131, 164, 175, 180, Law on labour relations, Official Gazette No. 74/2015 concerning the length of night shifts and the mandatory health checks of employees.
57 Law on the Prevention of and Protection against Discrimination (Закон за спречување и заштита од дискриминација) Official Gazette of the Republic of Macedonia Nos 50/10, 44/2014, 150/2015, 31/2016, Constitutional Court Decision: U.no.82/2010.

proposed text of the law was put up on the online consultation platform during the spring of 2018. After the consultation closed, the draft was further amended and the Government (via the Ministry of Labour and Social Policy) proposed it to Parliament in June 2018.[58] The proposal has not yet been discussed.[59] During the discussions, experts and NGOs highlighted the necessity of adopting key changes in relation to the provision on the discrimination grounds (currently Article 3), such as the express recognition of 'sexual orientation' as a protected ground. This change was required in order to meet the obligations of the country under the EU approximation process, and the demands of NGOs working with the LGBTIQ community which is exposed to both harsh discriminatory practices and hate crime. Another crucial change 'concerned gender identity' as a protected ground. The government has indeed recently ratified the Istanbul Convention, but research findings demonstrate a serious situation in terms of discrimination and violence in relation to gender identity. The third change recommended is the amendment of the definition of disability in order to include different types of impairments (such as sensory or psycho-social impairments) under the scope of the legislation. Finally, experts and NGOs proposed to change the wording of the current open-ended provision. The current provision provides for 'any other ground' to encompass 'grounds arising from another national law or a ratified international treaty'. The new law should provide for 'any other ground' which would make the open-ended provision somewhat wider.'

The new draft law proposal submitted to Parliament includes all the suggested novelties., but it excludes gender identity. However, the representative of the MLSP clarified that gender identity will be added in the final version which will be proposed to Parliament.

Experts and NGOs' analysis of the 2010 law also outlined the importance of adopting several changes in relation to the different forms of discrimination: i) a simplification of the definition of direct discrimination and the introduction of the full definition from the EU Directives; ii) the inclusion of segregation as a form of discrimination and traditional practices that are harmful to women and girls as a particular form of discrimination; iii) the removal of 'discrimination in access to goods and services' as a separate form of discrimination;[60] iv) an explicit recognition of intersectional discrimination as a grave form of discrimination.

The new draft law enshrines the proposed changes, including but it ignores intersectional discrimination, but it ignores harmful traditions and traditional practices.

The new draft law also addresses the main controversial issues that characterise the functioning of the equality body under the 2010 law. The draft law improves the criteria for the appointment of the Commissioner and proposes seven years of working experience in the field of human rights and five years of experience in equality and non-discrimination. In addition, the Commission will have full-time employees and will have a professional administrative support service.

The draft law will also put in place new effective and proportionate sanctions in compliance with EU standards.

Internet source:
Akademik, Public debate on the new Law on the prevention of and protection against discrimination [Јавна дебата за новиот закон за спречување и заштита од дискриминација], *akademik.mk*, http://www.akademik.mk/javna-debata-za-noviot-zakon-za-sprechuvane-i-zashtita-od-diskriminatsija/, Last accessed on: 31.12.2017.

58 The draft proposal can be found at: https://www.sobranie.mk/materialdetails.nspx?materialId=d364c285-1319-4d6f-82b4-e46ab25965e1.

59 Law on the Prevention of and Protection against Discrimination (Закон за спречување и заштита од дискриминација) Official Gazette of the Republic of Macedonia Nos. 50/10, 44/2014, 150/2015, 31/2016, Constitutional Court Decision: U.no.82/2010

60 The Law on the Prevention of and Protection against Discrimination contains a Chapter on 'Forms of discrimination'. It discusses direct discrimination, indirect discrimination, reasonable accommodation, multiple discrimination etc. That chapter had an article which included 'discrimination in access to goods and services' as a separate form of discrimination.

Draft proposal submitted to Parliament in June 2018, https://www.sobranie.mk/materialdetails.nspx?materialId=d364c285-1319-4d6f-82b4-e46ab25965e1.

NHRI's annual reports

All grounds

The two national Human Rights institutions (NHRI) with competences in equality and protection against discrimination – the Commission for Protection against Discrimination (CPAD) and the Ombudsperson – published their annual reports for 2017.[61] The number of cases of discrimination received by the CPAD appears to be similar to the previous year.

In 2017, the CPAD received 59 cases (60 in 2016). Compared to the previous year, there has been a drop in the number of cases received by the CPAD. In fact, the CPAD received 70 cases in 2015 and 106 cases in 2014.

The CPAD reports the distribution of cases per discrimination ground in percentages and does not provide the full list. It gives the following information: '19 % on sex and gender, ethnicity 18 %, political affiliation 17 %, health status 16 %, sexual orientation and gender identity 16 %, personal or other social status 16 %, age 8 %, social origin 7 %, and education 7 %.' For the first time, sex and gender[62] top the list. Also, it is the first time that the CPAD has provided a breakdown of cases per ground which includes sexual orientation and gender identity. The alleged discrimination per field is presented in the same manner. The reported distribution per field is as follows: 41 % in employment and labour relations, 25 % in access to goods and services, 22 % in public information and the media, 14 % in education, science and sport, and 10 % in social security, including social protection and pension and disability insurance, health insurance and health protection. Although the 'judiciary and administration' featured more prominently in the previous years, it is not even reported in the 2017 report of the CPAD. It should also be noted that according to the CPAD report, in 2017, 25 % of the applicants were women while 34 % were men.

According to the Ombudsperson's report, 70 cases were filed as non-discrimination and equitable representation cases which represent 2.17 % of the total number of cases. This is the highest representation of this category of cases since the Ombudsperson started to report these cases separately (including higher than 69 cases or 1.83 % reported in 2016, 53 cases and 1.2 % reported in 2015, and 66 cases or 1.55 % reported in 2014). However, this percentage has to be read through the prism of the overall number of cases, which shows a substantial fall compared to previous years. Namely, the overall number of cases filed with the Ombudsperson continues to drop. In 2017, the institution reports having received 3 224 cases. This is a further drop from 2016 when it received 3 775 cases, which was already a drop from 4 403 cases in 2015.

Under the separate category of cases on 'persons and children with disabilities', it reports having received 5 cases or 0.16 %, which is a substantial drop from 15 cases or 0.4 % in 2016. As was the case in the previous year, the Ombudsperson did not publish detailed statistics on the grounds and fields in which the cases were filed. However, it noted a continuing trend with the previous years in terms of the dominant field still being employment, but it also reports a much higher number of cases of harassment and three cases of hate crime.

61 The reports were submitted to Parliament, pursuant to both NHRIs' reporting obligations. The Ombudsperson also published the report on its website and held a press conference for the occasion. CPAD's report can only be found on Parliament's website. It is not up on the equality body's own website as the site has already been down for a few months (the CPAD notes this in the report).

62 These are separate grounds under the law, but CPAD presents a summary number for both, with an unknown reason. Given this and the fact that it presents a separate percentage for 'sexual orientation and gender identity', and in lieu of a separate ground of 'gender identity', it is not clear under which ground it considered the 'gender identity' cases or whether this was done under the open-ended provision.

The Report does not contain data on cases regarding violations of women's rights or discrimination based on sex/gender. The only mention of sex is with regard to the statistical overview of the employees of the Office of the Ombudsperson and the implemented research on 'sex and the educational structure of employees of the institutions.' There are no data concerning the results of this research.

Both reports are an opportunity for the public to become familiar with the work of these institutions, which is otherwise not communicated to the public during the year. However, the way in which the reporting obligation is fulfilled points to mere formal compliance with the legal duty to report. The reports do not offer sufficient data for analysing the situation of discrimination in the state. They do offer, however, data on the work of these two institutions and their perception of their role in fighting discrimination.

Internet source:
Ombudsperson (*Народен правобранител*) 2017 Annual Report. Official Website of the Ombudsperson. http://ombudsman.mk/upload/Godisni%20izvestai/GI-2017/GI-2017.pdf. All hyperlinks last accessed: 04.04.2018.
Commission for Protection Against Discrimination (*Комисија за заштита од дискриминација*) 2017 Annual Report. Official Website of Parliament. http://www.sobranie.mk/materialdetails.nspx?materialId=b28f88cc-070d-4343-bfb4-810af9bec684.

Malta MT

LEGISLATIVE DEVELOPMENT

New Act on Gender-Based Violence and Domestic Violence

On 30 April 2018, Act 13 of the 2018 Gender-Based Violence and Domestic Violence Act was published. It repeals the Domestic Violence Act and the Istanbul Convention (Ratification) Act, and includes the Istanbul Convention as a Schedule to the Act stipulating that this Convention shall be enforceable as part of the Laws of Malta. In case an ordinary law is inconsistent with rights set out in the Convention, the latter shall prevail and such ordinary law shall, to the extent of the inconsistency, be void. However, in case an ordinary law confers a higher degree of protection and/or further rights than those set out in the Convention, that ordinary law shall apply. Moreover, the Act introduces additional protection for those at risk of violence both in the public and private sphere.

All grounds

The definition of domestic violence includes acts or omissions including verbal, physical, sexual, psychological or economic violence causing physical and/or moral harm or suffering, including threats of such acts or omissions, coercion or arbitrary deprivation of liberty, that occur within the family or domestic unit, whether or not the perpetrator shares or has shared the same residence with the victim, and includes children who are witnesses of violence within the family or domestic unit.

The definition of a family or domestic unit has been widened to include civil union partners or cohabitants as well as persons in an informal relationship. The definition of 'gender' includes socially constructed roles, expectations, activities, behaviours and attributes that society at any given time associates with a person being either a male, female, or any other gender identity, gender expression, and/or sex characteristics.

The law includes provisions on non-discrimination and provides that the implementation of the Act shall not give rise to discrimination on any ground such as age, association with a national minority, belief, creed or religion, colour, ethnic origin and/or race, disability, family responsibilities and/or pregnancy, family and/or civil status, gender expression and/or gender identity, genetic features, health status, language, migrant or refugee status, national or social origin, political or other opinion, property, sex

or sex characteristics, sexual orientation or any other status. Moreover, the law stipulates that special measures that are deemed necessary to prevent and protect persons who are particularly vulnerable to violence due to their gender shall not be considered discriminatory.

The Act introduces State obligations including that of creating and adopting an Action Plan which includes effective, measurable, comprehensive and co-ordinated policies encompassing all relevant measures to prevent and combat all forms of gender-based violence and domestic violence, to ensure the implementation of the said Action Plan, review it periodically and publish a report at least once every three years. The Act also sets up the Commission on Gender-Based Violence and Domestic Violence and gives it a wide range of powers.

Internet source:
http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=29057&l=1.

NL The Netherlands

LEGISLATIVE DEVELOPMENT

Parliament's upper chamber approves a ban on wearing face-covering clothing

Religion or belief

On 26 June, the First Chamber adopted a legislative proposal which prohibits face-covering clothing in educational facilities,[63] on public transport, in public buildings and in healthcare. The prohibition may be sanctioned by the imposition of a fine of up to EUR 400.

The law does not apply in the case of face-covering clothing that is necessary for reasons of health and safety or requirements connected to the performance of a job or sport, or that is appropriate to participate in festive and cultural events.

The prohibition on wearing face-covering clothing is formulated in a neutral way, but it will mainly target Muslim women. The number of Muslim women that would be affected by the ban is estimated to be around 400.[64]

Internet source:
https://www.eerstekamer.nl/wetsvoorstel/34349_wet_gedeeltelijk_verbod.

CASE LAW

Judgment of the District Court of The Hague on compensation for not extending an employment contract because of pregnancy

Gender

On 21 March 2018, the District Court of The Hague ruled on a case regarding pregnancy discrimination. The case concerned an employee with an employment contract for the duration of six months. Before her contract had come to an end, she received a message from her manager through WhatsApp, stating that it had been decided not to extend her contract because of her absence of 17 weeks due to her pregnancy

63 The text of the Act does not specify whether it also applies to private education facilities, and neither does the explanatory memorandum, but in the Dutch context (where the greatest majority of non-public schools are funded by public money) they are included by implication.

64 https://www.volkskrant.nl/nieuws-achtergrond/het-boerkaverbod-na-4-571-dagen-wordt-wilders-wil-wet-in-de-zorg-het-openbaar-vervoer-en-op-scholen~b3b87713/.

for which the company would not be able to pay the costs. Subsequently, one of the directors of the company informed the employee that it was not her pregnancy, but a reduction in the work that was the reason for not extending her contract. The manager was not authorised to send the WhatsApp message. The employee subsequently applied for so-called 'fair compensation'.

The District Court ruled that the employee had sufficiently demonstrated from the facts that it could be presumed that her contract had not been extended because of her pregnancy. The statement by her employer that the manager was not authorised to decide on the termination of the employment contract, failed to convince the Court, as the employee need not have been aware of this. Since discrimination can be qualified as 'serious misconduct', the employee was entitled to fair compensation.

The court subsequently ruled that the compensation ought to act as a deterrent, as prescribed by EU law, but should not provide for a sum that exceeded the actual damage. According to the court, there was no indication that the employment agreement would have been extended if the employee had not been pregnant. Therefore, the employee was not entitled to compensation for the loss of income. Non-pecuniary damages were not awarded either, as it was not clear, according to the court, to what extent the employee had suffered because of the discrimination. The employee was however entitled to compensation because of the serious blame on the part of the employer and because the employee should not have to tolerate such treatment during her pregnancy. Based on the above-mentioned reasons and the duration of her employment, the District Court awarded compensation of EUR 3 000 (gross).

This is a relevant judgment, because it is the first of its kind. Since 1 July 2015 employees are entitled to so-called transitional compensation when their employment agreement ends, provided that they have been employed for two years or longer. Besides this, an employee may have a right to fair compensation, but this only applies in exceptional cases in which serious misconduct by the employer can be established. This is the first case in which it has been determined that an employee is entitled to fair compensation because her contract has not been extended due to her pregnancy.

The compensation awarded was however rather disappointing. One would expect that, after the court had established that discrimination had taken place, it would have been the task of the employer to prove that the employment agreement would not have been extended without the employee's pregnancy. In this case the court had very easily accepted that this would not have been the case. Also, it should not be necessary for an employee, in order to qualify for non-pecuniary damages, to prove that she had suffered serious damage because of the discrimination. This requirement applies in cases of mental injury, but discrimination can be seen as a wrong in itself and should therefore provide a right to damages, in addition to the reparation of the suffering that it caused.

Internet source:
http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2018:3423.

Debate in Parliament on the bill on statutory protection for transgender and intersex persons and a court decision on the registration of people with an intersex condition

Gender

On 16 January 2017 three Members of Parliament submitted a bill to Parliament in order to change the General Equal Treatment Act (GETA) so as to explicitly include a prohibition on discrimination on the ground of sex characteristics, gender identity and gender expression. The MPs stated that they recognize that discrimination on these grounds is already covered by the general prohibition on sex discrimination, but they wish to make more explicit that the law applies to the entire spectrum of variations that are covered by this ground, not only to discrimination based on belonging to the male or female sex. According to the MPs, passing this bill would ensure that discrimination because of being transgender, having an intersex condition or not fitting into the man-woman dichotomy, is prohibited. They also aim to strengthen the position of this group of people in society and to make them more visible.

The bill was debated for the first time in the House of Parliament on 5 June 2018. Most political parties were positive, but some took a critical stance. The MPs will now answer the questions put to them by the House, after which the debate will continue.

In the meantime, the District Court of Roermond ruled, on 28 May 2018, that a claimant who has an intersex condition has the right to change the sex registration on her birth certificate from 'female' to 'sex could not be established'. The sex of the applicant could not be established at birth, and the parents then decided to register the child as a boy. During his adolescence the child decided that he wanted to be a woman and he had surgery to change his gender characteristics. However, the gender 'female' did not fit him/her either. Therefore, a request was made to the court to allow for a third category: neither man nor woman.

The court ruled that, in view of legal and social developments, the time has come to accept such a third category. Not accepting this is an infringement on the private life of the person concerned, the right to self-determination and the right to personal autonomy. However, it was not possible for the court to introduce this third category (neither man, nor woman), as for this the law will have to be changed. It is however possible to register on the birth certificate that the sex of the claimant could not be established.

The court judgment is actually more important than the bill to change the GETA. The inclusion in the GETA of the prohibition on discrimination on the ground of sex characteristics, gender identity and gender expression is mainly symbolic, since this type of discrimination is currently already forbidden by law. The court judgment may lead in the future to a change in the Civil Code (on family law) in order to introduce a third category, apart from male and female. The category that was used in the judgment – the sex could not be established – is meant as a temporary 'solution' for the birth certificates of newborn children whose sex identity is not yet clear.

Internet source:
https://www.eerstekamer.nl/wetsvoorstel/34650_initiatiefvoorstel_bergkamp (bill).
https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBLIM:2018:4931 (court decision).

NIHR has competence to receive complaints regarding the duty of realising accessibility for persons with disabilities

Disability

The claimant was a deaf man who had rented a video film that did not have subtitles. The rental shop did not fulfil his request to provide subtitles, because of intellectual property law and disproportionate technical costs. As a consequence, the applicant brought two complaints to the Netherlands Institute for Human Rights (NIHR),[65] the Dutch Equality Body, claiming a violation of the Act on Equal Treatment on the Ground of Disability or Chronic Illness (DDA) due to discrimination on the ground of disability.[66]

The NIHR addressed the complaint under Article 2a DDA which entails a general duty to gradually realise accessibility for persons with disabilities and concluded that the company had not violated the DDA. The NIHR emphasised that Article 2a DDA requires a gradual realisation of the duty to provide accessibility and the distributor cannot be considered to have violated this provision as subtitling became available some months later.

This Opinion is highly significant from a procedural perspective, as it means that persons with disabilities can bring complaints regarding a wide range of general accessibility issues to the NIHR. The competence of the NIHR in this area is not self-evident, as Article 12 of the DDA only recognises that the NIHR has

65 The NIHR is a quasi-judicial body which issues non-binding Opinions. Its opinions are followed by the conventional courts in the majority of cases.
66 NIHR, Opinion 2018-56 and Opinion 2018-55.

competence to receive complaints regarding the duty of reasonable accommodation, but it does not mention Article 2a DDA which sets out the general duty to gradually realise accessibility.

Internet source:
NIHR Opinion 2018-55 and 2018-66 can be found at:
https://www.mensenrechten.nl/nl/oordeel/2018-55,
https://www.mensenrechten.nl/nl/oordeel/2018-66.

Poland PL

CASE LAW

The Family 500-plus programme: discrimination against children of unmarried parents and families where both parents are working

Gender

The City Council in Nysa adopted a resolution which provided a privilege in receiving so-called 'care vouchers', among others to children from married families and families in which only one parent works. On 27 February 2018 the District Administrative Court in Opole (case no. II SA/Op 67/17) decided that the above-mentioned resolution was unlawful and therefore invalid. The procedure had been initiated by two women living in Nysa (supported by the Commissionaire for Human Rights) against the provisions of the resolution which grant priority in receiving the voucher to natural or adoptive parents raising children together in a marital relationship, and granting preferential treatment to families in which only one parent (as opposed to both) is professionally active. A claim in cassation against this ruling was lodged by the conservative organization the 'Ordo Iuris' Foundation (Institute for Legal Culture) at the Supreme Administrative Court (NSA). The case is currently pending.

During the procedure the City Council argued that the priority rules were needed in light of the limited funds that were available. The claimant and the Commissionaire argued that some of the resolution's provisions violate the constitutional right to equal treatment (Article 32 of the Constitution). They also claimed that those provisions violate the prohibition of discrimination against children born and raised outside marriage (provided for in the UN Convention on the Rights of the Child). In their opinion the category of privileged subjects was determined according to criteria which are irrelevant to the purpose and general wording of the Law on Family Benefits, as well as to the values, rules or constitutional norms that condition the admissibility of differential treatment for similar subjects. In its ruling the Court recognised those arguments and, in addition, explicitly noted that it does not question the possibility of granting priority in access to the benefit (for example, granting priority to families who are in the most need of support). Nevertheless, the conditions for such priority may not be of a discriminatory nature. On the contrary, according to the claim in cassation put forward by Ordo Iuris, the City Council was entitled to determine the criteria for privileged treatment, which it deemed to be in accordance with Polish constitutional values, encouraging the achievement of a stable standard of living within the 'constitutionally preferred family model, based on marriage.'

Internet source:
http://orzeczenia.nsa.gov.pl/doc/D145493A0C, accessed 15 June 2018.
https://www.rpo.gov.pl/pl/content/rpo-za-utrzymaniem-wyroku-o-niewaznosci-„bonu-wychowawczego"-500-z-nysy, accessed 15 June 2018.
https://www.rpo.gov.pl/sites/default/files/Odpowiedź%20RPO%20na%20skargę%20kasacyjną%20ws.%20bonu%20z%20Nysy.pdf, accessed 15 June 2018.
https://www.ordoiuris.pl/rodzina-i-malzenstwo/opinia-w-sprawie-uchwaly-rady-miejskiej-w-nysie-w-sprawie-wprowadzenia-bonu, accessed 15 June 2018.

Supreme Court upholds the verdict that found a company guilty of a refusal to print a roll-up banner for an LGBT initiative.

The case concerned a small printing company's refusal, due to religious beliefs or convictions, to print a roll-up banner for the Civil Society Organization 'LGBT Business Forum'.

Sexual orientation

The *Lodz-Widzew* District Court imposed a fine of EUR 45 (PLN 200) on the company.[67] The case has attracted the attention of the Minister of Justice/Prosecutor General, who criticised the judgement arguing that the freedom of thought and the freedom of economic transaction should not be restrained by the prohibition of non-discrimination.[68] The Minister of Justice/Prosecutor General therefore challenged the final 2nd instance court decision before the Supreme Court.[69]

The Supreme Court clarified that freedom of conscience and religious beliefs may justify a refusal to provide a service, but a balance between freedom of conscience and religious beliefs and the prohibition of discrimination should always be found in the light of the circumstances of the case.[70] The Supreme Court highlighted that the printing company lacked any legitimate reason for refusing to perform the service. The task required was purely reproductive and only involved the performance of technical activities. In the court's opinion, the refusal to provide the service would be justified, for example, if the service implies a specific work that would create a conflict with the artist's religious values.

The decision at issue was firmly criticised by the Minister of Justice/Prosecutor General, Z. Ziobro, who commented that 'the Supreme Court in this case spoke against freedom, the Supreme Court took part in the state's violence, in the service of the ideology of homosexual activists. Against the freedom guaranteed in the Polish Constitution to every citizen, regardless of their political beliefs".[71] The Minister of Justice/Prosecutor General decided to challenge the law before the Constitutional Tribunal.[72]

Internet source:
The first and second instance court verdicts are not available.
Supreme Court verdict – information about the verdict from the Supreme Court website (the written justification is not yet available):
http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=229-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach.
The verdict with justification: http://www.sn.pl/sites/orzecznictwo/orzeczenia3/ii%20kk%20333-17.pdf.
Pending constitutional complaint (K16/17):
http://trybunal.gov.pl/sprawy-w-trybunale/art/10008-kodeks-wykroczen-odmowa-swiadczenia-uslugi-klauzula-sumienia/.
Motions submitted in the constitutional complaint case (K16/17): complaint of the Prosecutor General; position of the Ombud opposing the complaint; position of Parliament supporting the complaint:
https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2016/17.

67 A procedure where there is no hearing. The sanction is only based on a motion filed by the police. Sąd Rejonowy dla Łodzi-Widzewa (Lódź-Widzew District Court); July 2016; *Police v Printing house*.
68 For more detailed information on the position taken by different actors in society, see the previous News Report FR 082-PL-ND-2017.
69 Supreme Court, 14 June 2018; II KK 333/17.
70 Based on the Supreme Court website: http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=229-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach.
71 Publication quoting the Polish Press Agency report: https://www.rmf24.pl/fakty/polska/news-ziobro-sad-najwyzszy-ws-drukarza-wypowiedzial-sie-przeciwko-,nId,2594196.
72 Publication quoting the Polish Press Agency report: https://www.rmf24.pl/fakty/polska/news-ziobro-sad-najwyzszy-ws-drukarza-wypowiedzial-sie-przeciwko-,nId,2594196.

Disclosing the type of disability has been found to be unconstitutional by the Polish Constitutional Tribunal

Disability

The claimant obtained a disability certificate containing a symbol representing the type of his disability (mental illness). He demanded the removal of this symbol to protect his privacy and requested that his disability be classified as 'general developmental disorder' which is less stigmatised.

These arguments were rejected by the disability assessment body and the courts at two instances.[73] They decided that the symbol does not affect his sphere of privacy, but it is necessary to trigger the rights contained in the Act on Vocational Rehabilitation.

The complainant and the Ombud filed a complaint in order for the Ordinance of the Minister of Economy, Labour and Social Policy, which requires the mandatory insertion of a symbol representing the type of disability in the decisions of the bodies assessing the degree of disability, to be declared unconstitutional.

The Ombud argued that the obligatory disclosure to the employer of information about the illness suffered by the employee may result in discrimination against such persons on the labour market. This requirement mainly affects persons with 'invisible' disabilities such as mental illness, epilepsy and intellectual disability. According to the Ombud, an alternative solution could be the indication of the necessary adjustments needed at the workplace for persons with these disabilities.

The Constitutional Tribunal considered the challenged provision of the Ordinance to be incompatible with Art. 47 of the Constitution and Art. 51 paras 1, 2 and 5 of the Constitution of the Republic of Poland. The Tribunal underlined that the role of the legislator is to decide on the necessary means to support persons with disabilities in the labour market, while respecting their right to privacy and taking into account the interests of employers (CT decision, 19 June 2018, SK 19/17). As a result, the disability assessment body deciding on the degree of disability lost the right to insert the symbol '02-P' (mental illness) in their decisions.

Internet source:
Information about the case on the website of the Constitutional Tribunal:
http://trybunal.gov.pl/postepowanie-i-orzeczenia/wokanda/art/10142-ujawnianie-przyczyny-niepelnosprawnosci-w-orzeczeniu-o-stopniu-niepelnosprawnosci/.
Information about the case on the website of the Ombud, who joined the case: https://www.rpo.gov.pl/pl/content/trybunal-konstytucyjny-rozporzadzenie-ministra-o-ujawnianiu-przyczyny-niepelnosprawnosci-niekonstytucyjne.
Information about the case on the website of the CSO the Helsinki Foundation for Human Rights which tried the case: – http://www.hfhr.pl/ujawnianie-przyczyny-niepelnosprawnosci-na-orzeczeniu-o-stopniu-niepelnosprawnosci-wyrok-tk/.

POLICY DEVELOPMENT

The 'Family 500-plus' Programme and the employment situation of women

Gender

Since 2016 the governing party Prawo i Sprawiedliwość (PiS) has introduced a special monthly benefit for each second and subsequent child, which applies to all families with the exception of the poorest families (who are already entitled to the benefit for their first child). The benefit amounts to PLN 500 (EUR 117)

73 Miejski Ośrodek d.s. Orzekania o Niepełnosprawności w L. (Municipal Centre for Adjudication on Disability in L.), decision of April 2015; Wojewódzki Zespoł ds. Orzekania o Niepełnoprawności w L. (Provincial Team for Adjudication on Disability in L.), decision of May 2015; Sąd Rejonowy w L., Wydział Pracy i Ubezpieczeń Społecznych (District Court in L., Department of Labour and Social Security), verdict, May 2015; Sąd Okręgowy w L., Wydział Pracy i Ubezpieczeń Społecznych (Regional Court in L., Department of Labour and Social Security), final verdict, October 2016.

and is called the 'Family 500-plus programme'. This initiative was highly criticized by the opposition, which considers it as a means to 'buy votes' in elections and to promote the demographic growth of society by preserving the traditional family model. The programme in fact discriminates against single parents. This is because the programme foresees that an entitlement to social benefits is based on a threshold that is calculated in relation to the household's monthly income per capita divided by the number of family members. In a two-parent household, this corresponds to the monthly income per capita divided by three (the two parents and the child). By contrast, in single-parent households the calculation is made based on the monthly income per capita divided by two (the parent and the child). This often overcomes the maximum limit that conditions an entitlement to social benefits, which would not be exceeded in the case of a two-parent household with the same monthly per capita income. Since in most cases single-parent households are headed by women, this rule could amount to indirect sex discrimination. In addition, in two-parent households it discourages women from engaging in work so as to maintain the family's entitlement to social benefits through keeping the monthly income per capita under the maximum threshold.

When this programme was introduced, objections were raised because it was feared that it would incentivise many mothers from families with multiple children, especially those who receive lower wages, to give up their economic activity. A survey of the impact of the 500-plus programme, conducted in 2018, has provided evidence that this might have been the case. The authors of the survey refer to data from the GUS (the main Statistical Office) which indicates that in the third quarter of 2017, the professional activity of women aged 25-34 had dropped to the lowest level since 2003, amounting to 74.2 %. In their opinion, this might be the effect of the 'Family 500-plus' programme. However, the Ministry of Family, Labour and Social Policy contests this explanation and puts forward an alternative hypothesis, namely that women have resigned from work because of the improvement in the earning conditions of their working partners.

Internet source:
https://businessinsider.com.pl/finanse/makroekonomia/efekty-500-plus-podsumowanie-programu-500-plus/r8kwrhn, accessed 2 June 2018.
https://stat.gov.pl/badania-gospodarstw-domowych-i-rolnicze/badanie-aktywnosci-ekonomicznej-ludnosci-bael/, accessed 27 July 2018.

PT Portugal

POLICY DEVELOPMENT

National Strategy for Equality and Non-Discrimination (the ENIND Programme)

Gender

Sexual orientation

The Portuguese Government has approved Resolution No. 61/2018 of 21 May 2018, implementing the National Strategy for Equality and Non-Discrimination (Estratégia Nacional para a Igualdade e Não Discriminação – Portugal + Igual – ENIND), for the period covering 2018-2030. This National Plan is focused on three main fields: equality between men and women (IMH); violence against women, gender violence and domestic violence (VMVD); and discrimination on the grounds of sexual orientation, gender identity, transgender and sexual characteristics (OIEC).

The Government policy defined in this Plan is intended to combat discriminatory practices and to promote effective equality in the above-mentioned fields throug specific plans of action established for each one of the fields.

In relation to the first pillar (equality between men and women – IMH), the main goals of this Plan are to insert the gender dimension at all levels of public governance. Furthermore, the Plan aims to: strengthen its action in the promotion of gender equality in access to education; combat gender stereotypes in the field of access to health services; eradicate gender stereotypes in communication and the media; and integrate the sex dimension in the fight against poverty and social exclusion.

In relation to the second pillar (violence against women, gender violence and domestic violence – VMVD), the Plan aims to prevent and eradicate the social tolerance of violence against women and domestic violence by promoting a culture of non-violence and tolerance, to enlarge the protection already granted to the victims of such violence, and to combat practices such as genital mutilation and forced marriages involving children.

Finally, in relation to the third pillar (discrimination on the grounds of sexual orientation, gender identity, transgender and sexual characteristics – OIEC), the Plan intends to promote the mainstreaming of non-discrimination issues related to LGBTI persons and to combat all forms of violence.

Internet source:
Official Journal (Diário da República), www.dre.pt.

Romania

RO

LEGISLATIVE DEVELOPMENT

Draft bill amending the Education Law prohibits the face being covered in educational institutions

A total of 26 MPs tabled draft bill PLX-580/2017 to amend the Romanian Education Law and received a positive advisory opinion from the Economic and Social Council on 9 January 2018.[74]

Religion or belief

The bill prohibits the covering of one's face in educational institutions and contains the following amendments to Art. 7 of the Education Law: 'with the purpose of facilitating the identification of persons in educational units, institutions and all spaces used for education and professional training, it is prohibited to cover one's face with any materials which impede the recognition of the face, with the exception of medical situations. The infringement of these provisions amounts to a reason for denying access at the perimeter of the educational units, institutions and spaces for education and professional training.' The sanction imposed for covering one's face is a fine from RON 5 000 to 50 000 (approx. EUR 1 100 to 11 000) to be imposed by the police.

The explanatory note accompanying the proposed bill underlines that it aims to tackle violence in schools in general and the risk of terrorism. It does not however mention any case of violent incidents provoked by persons masking their faces and fails to assess whether there are any pupils or students covering their faces for religious reasons in Romanian educational institutions.[75]

The proposed prohibition seems to be *prima facie* neutral, but the language of the explanatory note clarifies the actual intent to ban the burqa, headscarves and veils in educational institutions. The proposed measure may disproportionately affect the Muslim community and sends a signal of stigmatization towards those Muslim women covering their faces.

74 The draft law is available at: http://www.cdep.ro/proiecte/2017/500/80/0/pl730.pdf.
75 The explanatory note accompanying the bil is available at: http://www.cdep.ro/proiecte/2017/500/80/0/em730.pdf.

The sanctions are also disproportionate, as they can lead to the expulsion of the pupil or student from the school and the imposition of huge fines. This law may violate the religious freedom of Muslim women and deny the right to education for students who might want to cover their face.

After receiving favourable opinions from the Legislative Council and the Economic and Social Council, the draft bill was rejected by the Chamber of Deputies on 18 April 2018 and it is currently pending before the Senate.

Internet source:
Legislative history of the bill can be followed in Romanian at: http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=16761.

CASE LAW

The level of education criterion limits access to social housing for the Roma community

Racial or ethnic origin

In 2016, the National Council for Combating Discrimination (NCCD) initiated an *ex officio* investigation against several mayors and county councils to assess the legality of the criteria adopted for accessing social housing. The NCCD found that the criteria established by local councils *de facto* limited the access of vulnerable categories of individuals to social housing.

In the particular case of Reghin municipality, the NCCD found that the municipality had adopted a mechanism based on the level of education of the person to determine who is eligible for social housing. It held that the points awarded for a certain level of education were not proportionate with the goal to be achieved and that they resulted in the exclusion of persons with a low level of education, which led to indirect discrimination against Roma. As a result, the NCCD fined the municipality RON 2 000 (approx. EUR 400) and imposed an obligation to publish a summary of the decision on its website.[76]

Reghin municipality appealed against the NCCD decision arguing that the 'level of education' criterion did not amount to indirect discrimination against Roma and pursued the purpose of 'stimulating social inclusion and professional inclusion.' Also, it was argued that deciding on the priority criteria for social housing falls within 'the margin of appreciation and the discretionary powers' of the local authorities.

Târgu Mureș Court of Appeal[77] took into consideration statistical data provided by the NCCD showing that more than 50 % of the Roma population did not graduate, compared to Romanians or Hungarians (15 %). Moreover, statistical data on the living conditions of Roma show that more than 50 % live in spaces of less than four sqm per person, as compared to 10 % in the case of other ethnic groups.

The Court of Appeal rejected the appeal against the NCCD decision and concluded that the 'level of education criterion limits access to social housing for persons with a lower level of education.' The court highlighted that 'based on the statistical data of the Romanian census regarding the level of education of the different ethnic communities, granting an increasing number of points in proportion to the higher level of education leads to negative consequences in relation to the Roma community, amounting to indirect discrimination.'

The court's judgment was based on statistical data that demonstrate the specific nature of the education and housing conditions of the Roma minority. The court also stated that 'the public authorities' right of appreciation does not entail the possibility of acting in an abusive, arbitrary manner, without legal

76 NCCD, decision No. 511 of 20 July 2016.
77 Târgu Mureș Court of Appeal decision No. 30/2017 of 17 March 2017.

justifications and escaping any control, the exercise of such powers being subject to the principle of proportionality.'

Internet source:
NCCD decisions are not public and are only communicated to the parties. The decision is available in Romanian with the national expert.

NCCD jurisprudence on ensuring the accessibility of public transportation for persons with disabilities has been overturned

Disability

The claimant complained against the lack of accessible buses in the three municipalities of Bucharest, Brașov and Pantelimon. The Steering Board of the National Council for Combating Discrimination (NCCD) decided on 9 May 2018 that the public authorities' failure to ensure the accessibility of public transportation for people with disabilities does not amount to discrimination.

This decision[78] contradicts a well-established line of jurisprudence by the NCCD on the accessibility of public transportation for people with disabilities. In 2014, the NCCD sanctioned 39 Mayors of the main cities in Romania as well as the relevant national authority, the National Agency for Payments and Social Inspection, for a failure to ensure access to public transportation for persons with disabilities.

The NCCD held that the claimant had failed to provide evidence of the relevant facts. However, the claimant had provided the specific numbers of the busline in question to support the claim. Moreover, the equality body did not consider the systemic failure of the authorities to ensure the accessibility of public transportation for persons with a disability.

It is worth noting that members of the NCCD publicly stated that this was a political decision as the majority of the Steering Board's members had been appointed by the governing coalition and they refused to issue another decision sanctioning the Mayor of Bucharest who is a key political leader of the Social Democrat Party.

Internet source:
NCCD decisions are not public and are only communicated to the parties. The decision is available in Romanian with the national expert.
No recent decision of the NCCD is available on the internet but the decisions are communicated to the parties.

POLICY DEVELOPMENT

National equality body publishes its annual activity report for 2017

All grounds

The National Council for Combating Discrimination (NCCD), the equality body in Romania, has a duty to present an annual activity report[79] to Parliament every year. This report includes statistical data on the petitions received in 2017, an outline of the remedies provided by the NCCD, information on court cases, examples of cases and awareness-raising activities, as well as personnel and budgetary information. Of the 652 petitions received in 2017, the largest number were on the ground of belonging to a social category (114) and the smallest numbers were on the grounds of race (2) and HIV status (8). Also relevant is the number of petitions on grounds of religion (18), language (12), age (31), nationality (64), sexual orientation (17), disability (74), and ethnicity (53). As for the fields covered: 273 petitions were on access to employment, 154 concerned access to public services, 144 were on personal dignity,

78 NCCD decision 170 of 9 May 2018, *SR v Bucharest Mayo*.
79 The report is not published on the NCCD website and is therefore not available.

51 concerned access to education, 6 related to housing, while 27 were with regard to access to public spaces.

The NCCD found discrimination in 117 cases (a similar number to the amount of cases in which discrimination was found in 2016, i.e. 112 cases). In 2017 it imposed 65 fines and issued 51 warnings, 47 recommendations, 3 decisions to continue monitoring the situation and in 40 cases the perpetrators were ordered to publish a summary of the NCCD decision in the media. The highest fine imposed in a case was RON 50 000 (approx. EUR 14 000) The 65 fines imposed in 2017 amounted to RON 239 000 (approx. EUR 44 000) as compared to the 2016 amount which was three times higher (RON 687 000 (approx. EUR 152 000)).

The report also provides information regarding those cases in which its decisions had been challenged before the courts according to Article 20 (9-10) of Governmental Ordinance 137/2000. In 2017, the NCCD had to defend its decisions before the administrative courts in 423 cases and in 130 cases the courts decided in favour of the NCCD, while they found against the NCCD in 35 cases, with 365 cases still pending at the time the report was written. This indicates that the NCCD had a success rate of 80 % in 2017, compared to 86 % in 2016.

Given the legal obligation of the NCCD to participate as an expert institution in civil cases on the grounds of the anti-discrimination legislation according to Article 27 of Governmental Ordinance 137/2000, the institution reports participation in 723 civil cases on moral damages and 712 cases filed under other claims (employment conflicts). While not providing information on the resolution of these civil cases, the report mentions that 714 civil complaints had been admitted and 870 were dismissed by the courts. The workload in 2016 was similar: 750 cases.

In 2017, the annual budgetary allocation was RON 5 856 000 (approx. EUR 1 301 000) compared to RON 5 318 000 (approx. EUR 1 175 380) in 2016. The executed budget was of RON 5 424 000 (approx. EUR 1 205 000). Out of the 89 staff positions needed, only 70 were budgeted but the institution had to function with only 67 employees, a situation similar to 2015 and 2016 when the institution had 62 and 63 employees, respectively, in spite of the same estimated needs and allocation of resources.

Compared with previous years, the activity report indicates a similar situation regarding the number of petitions received and the decisions issued. There is a significant increase in the executed final budget spending.

Internet source:
Report available in Romanian and English upon request.

Constitutional Court revokes the mandate of a member of the Steering Board of the equality body

All grounds

According to Art. 23 (4) of GO 137/2000, when appointing new members for the Steering Board of the National Council for Combating Discrimination (NCCD), Parliament should ensure that a minimum of two thirds of the members have a law degree.

However, in 2015, 2017 and 2018 the ratio of 2/3 was not complied with and currently, for example, four out of the nine members of the NCCD Steering Board do not have a law degree. The failure to comply with the above legal requirement has been criticised by NGOs and political parties as it leads to the politicisation and a de-professionalisation of the national equality body.

As a result, the Liberal Party and the NGO Anti-discrimination Coalition challenged the last decision that appointed members to the NCCD Steering Board before the Constitutional Court and they invoked the

failure to observe this requirement, as well as the requirement of having prior relevant experience in the human rights or anti-discrimination field.

On 21 June, the Constitutional Court of Romania found that there had been a violation of the law in the appointment decision made in 2018 due to a lack of compliance with the 2/3 ratio of law graduates.[80] The Court annulled the parliamentary decision and revoked the mandate of one NCCD member.

The reasoning of the Court is not yet publicly available, but the key argument seems to be that the requirement of having two thirds of the members being law graduates is a legal obligation that aims to ensure the effectiveness and legitimacy of the equality body.

Internet source:
https://www.ccr.ro/files/products/434.pdf.
https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-313.

Serbia RS

LEGISLATIVE DEVELOPMENT

New laws concerning protection against discrimination for asylum seekers and migrants

All grounds

In March 2018, two laws were adopted concerning asylum and migration: The Law on Asylum and Temporary protection[81] and the Law on Foreigners.[82]

The Law on Asylum and Temporary Protection contains several articles which introduce a more gender-sensitive asylum procedure. Article 7 guarantees the principle of the prohibition of discrimination on any ground, and particularly on the ground of race, colour, sex, gender, gender identity, sexual orientation, nationality, social or similar status, birth, religion, political or other conviction, property, culture, language, age or disability. In addition, Article 16 introduces the principle of gender equality. This entails that an asylum seeker has the right to be examined by an officer of the Asylum Office of the same sex, and of the aid of an interpreter of the same sex. This right also applies to body-searches, physical examinations and other actions in the asylum process that involve physical contact with an asylum seeker. In addition, female asylum seekers can submit their asylum application and can be examined separately from their male companions. The Law explicitly states that belonging to a social group, which is one of five recognized grounds for persecution, shall include groups based on common characteristics of sex, gender, gender identity and sexual orientation (Article 26, para. 2). The Law defines further acts of persecution and expressly states in Article 28, para. 2. section 1 that they include physical and psychological violence, including sexual and gender-based violence.

The Law on Foreigners recognizes groups of vulnerable migrants, among which are pregnant women, victims of rape, victims of domestic violence and victims of human trafficking. The Law recognizes the right to temporary residence for victims of human trafficking (Article 62). If a person has been identified as a victim of human trafficking, the Centre for the Protection of Victims of Human Trafficking

80 Constitutional Court of Romania, Decision No. 434 of 21 June 2018 on the notification of unconstitutionality regarding the Decision of the Romanian Parliament No. 21 / 2018 concerning the appointment of a member of the Steering Board of the National Council for Combating Discrimination. Available at: https://www.ccr.ro/files/products/434.pdf. Press release available at: https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-313.

81 The Law on Asylum and Temporary Protection, '*The Official Gazette of the Republic of Serbia*', No. 24/2018 from 26 March 2018, entered into force on 3 June 2018.

82 The Law on Foreigners, '*The Official Gazette of the Republic of Serbia*', No. 24/2018, from 26 March 2018, entered into force on 3 October 2018.

shall assess the situation and the needs of the victim, and will inform him/her about the conditions for granting temporary residence and other rights. This status will help the victim to recover and to freely decide on further cooperation with the Centre, the court, the prosecutor's office or the police. During this period, no return decision can be made.

Internet source:
The Law on Asylum and Temporary Protection, https://www.paragraf.rs/propisi/zakon-o-azilu-i-privremenoj-zastiti.html.
The Law on Foreigners, http://www.parlament.gov.rs/upload/archive/files/lat/pdf/zakoni/2018/3791-17%20lat.pdf.

CASE LAW

First discrimination case relating to autism before the national equality body

Disability

The reported case is the first case dealing with discrimination against people with autism that has been submitted to the Commissioner for the Protection of Equality (CPE).

The complainant's son was an 11-year old boy with autism who had been denied access to an aircraft because he was considered to be unfit to travel. The airline company claimed that the boy 'was very agitated and started to behave more aggressively while waiting in the check-in line.' The airport doctor assessed that it was not possible for him to travel and the ground staff were then obliged to act in accordance with the regulations and established procedures. This incident has been described as discriminatory and condemned by the media and the public.

The complainant submitted a complaint to the CPE that released its decision on 29 January 2018.[83] By taking into account the rule on the shifting of the burden of proof under Article 45 of the Law on the Prohibition of Discrimination, the practice of the European Court of Human Rights and numerous studies on the situation of persons with autism, the CPE's opinion stated that the airport ground staff had violated Article 12 of the Law on the Prohibition of Discrimination.[84] In this regard, the ground staff had failed to prove that the procedure carried out by the authorities to assess the ability of the complainant's son to travel was not humiliating and degrading.

According to air traffic regulations, a doctor is authorized to give an opinion on the condition of passengers and to assess their suitability for the flight. However, the CPE relied on the *Guberina* case,[85] where the ECtHR found that stricter scrutiny applies if the restriction concerns a particularly vulnerable group, such as people with disabilities. The CPE underlined that vulnerable groups have traditionally been exposed to prejudices with long-lasting consequences, which ultimately resulted in their marginalization.[86]

The CPE found discrimination on the ground of health status and concluded that the airport doctor did not provide sufficient assistance to prepare the boy to travel on that day. The CPE emphasised that discrimination can occur even if the relevant procedures and regulations are followed, but the conduct is based on stereotypes and prejudices. It is worth noting that the CPE clarified that discrimination against persons with autism is considered in the jurisprudence of the ECtHR to be discrimination on the ground

83 Č. A. v AD A.N.T.B. ADVS A.S. doo ASGS, No. 07-00-343/2017-02, 29 January 2018.
84 Article 12 of the LPD prohibits harassment and humiliating treatment, prescribing the following: 'It is forbidden to expose an individual or a group of persons, on the basis of his/her or their personal characteristics, to harassment and humiliating treatment aiming at or constituting violation of his/her or their dignity, especially if it induces fear or creates a hostile, humiliating or offensive environment.'
85 *Guberina v Croatia*, App. No. 23682/13, judgment of 22 March 2016.
86 The CPE here relied on *Glor v Switzerland*, App. No. 13444/04, 30 April 2009.

of disability, while the Law on the Prohibition of Discrimination also recognises health status as a ground of discrimination, under which this case was primarily classified.

Moreover, the CPE recommended that the ground staff should take appropriate action to ensure additional training for employees and to improve the support system for persons with health problems and disabilities.

Internet source:
http://ravnopravnost.gov.rs/rs/misljenje-na-prituzbu-c-a-protiv-ad-a-n-t-b-advs-a-s-d-o-o-asgs-zbog-diskriminacije-na-osnovu-zdravstvenog-stanja-prilikom-pruzanja-javnih-usluga/.

Case on an unsuccessful application for employment, despite relevant and applicable positive action measures for Roma

Racial or ethnic origin

The claimant was a medical technician of Roma origin who, for seven years, could not find a job in his profession. In 2016 and 2017, he had applied for the post of a medical technician at the O. B. S. hospital on six occasions Although he was sufficiently qualified and had fulfilled the conditions for all of these posts, he was never selected for any job.

The Commissioner for the Protection of Equality recalled the relevant legal framework to assess whether such a situation amounted to discrimination. The Republic of Serbia recognises positive measures for Roma as the Constitution in Article 21, para. 4 allows for special measures to be introduced in order to achieve complete equality for individuals or groups of individuals who are in a substantially unequal position compared to other citizens. Article 21 of the Law on the Protection of the Rights and Freedoms of National Minorities also prescribes that in respect of employment in public services, attention shall be paid to the national composition of the population.[87] In the National Action Plan for Employment adopted for 2017, Roma are considered as categories who have priority in active employment policy measures.

In this case,[88] the Commissioner found that the hospital had not provided sufficient justifications for not giving the claimant priority over other candidates. The hospital disregarded the fact that one of the applicants was of Roma origin and failed to assess his qualifications. The Commissioner particularly underlined the difficult situation of Roma in Serbia, as identified in the Strategy for the Social Inclusion of Roma (2016-2025)[89] and the Strategy for the Prevention of and Protection from Discrimination (2014-2018).[90] The Commissioner highlighted that the post of a medical technician would have given the claimant the opportunity to make direct contact with the general population and contribute to the elimination of prejudices about the work potential of Roma.

Against this background, the Commissioner found indirect discrimination, and recommended that the hospital should eliminate discrimination towards the claimant, without precisely stating how this should be done, as well as paying attention to members of minorities.

Internet source:
http://ravnopravnost.gov.rs/prituzba-z-d-protiv-o-bolnice-s-zbog-diskriminacije-na-osnovu-nacionalne-pripadnosti-u-postupku-zaposljavanja/.

87 The Law on the Protection of Rights and Freedoms of National Minorities, The Official Gazette of the SRY, No. 11/2002, the Official Gazette of the SCG, No. 1/2003, *The Official Gazette of the Republic of Serbia*, No. 72/2009, 97/2013.
88 Commissioner for the Protection of Equality, Opinion No. 07-00-263/2017-02 from 17 October 2017.
89 The Strategy for the Social Inclusion of Roma, *The Official Gazette of the Republic of Serbia*, No. 22/2016.
90 The Strategy for the Prevention of and Protection from Discrimination, *The Official Gazette of the Republic of Serbia*, No. 60/2013.

POLICY DEVELOPMENT

Publication of the national equality body's Annual report for 2017

All grounds

In her Annual Report for 2017 the Commissioner for the Protection of Equality (CPE) underlined that while some positive improvements in the area of anti-discrimination in Serbia have been made, discrimination is still present in Serbian society and some additional measures are necessary in order to improve the position of certain vulnerable groups.

In 2017, the Commissioner received 532 complaints and issued 501 recommendations. Apart from this, the CPE issued opinions in 51 cases, finding discrimination in 32 cases. General recommendations and recommendations contained in opinions were, in the majority of cases (83.73 %), followed by the respondents to whom they were addressed.[91] Most of the complaints submitted in 2017 referred to discrimination based on disability (18 %), age (11.8 %) and sex (11.2 %), followed by complaints of discrimination based on health status (10.1 %), ethnic origin (9.8 %) and marital and family status (7.6 %). As in previous years, the majority of the complaints referred to discrimination in recruitment and in the workplace, in proceedings before the public authorities, and in access to public services and facilities. In addition to the recommendations and opinions issued on the basis of the complaints received, the CPE provided 41 opinions on draft laws and general acts. The CPE also initiated three lawsuits for strategic cases (civil procedure), three criminal charges (criminal procedure), as well as one misdemeanour charge (misdemeanour procedure), and it issued 13 warnings[92] and made 20 announcements.[93] The Report also contains findings in relation to discrimination against the most vulnerable groups in Serbia. Thus, the CPE finds that persons with a disability are among the most discriminated groups in Serbia, facing many problems such as: access to buildings, services and information, employment and the lack of reasonable accommodation in the workforce, access to education and vocational training, and the limited number of medical and social services.

Also, age discrimination is present to a great extent, especially in relation to citizens aged 50 to 65 years in the area of employment, and senior citizens aged above 65.

Gender equality has still not been achieved, and discrimination against women is very much present in the business sector due to their family status gender-related care duties. However, in 2017, many complaints were submitted by both women and men against the opinions of centres for social work and court judgments on the exercise of parental rights concerning the decision to whom the child is assigned to parental care.

Overall, the CPE has concluded that Serbia has established a satisfactory legal and strategic framework for combating discrimination and achieving equality. However, it has also identified a margin for further improvement, and has proposed several recommendations to public authorities and other social actors in order to efficiently combat discrimination.[94]

91 In a complaint procedure, the Commissioner issues an 'opinion', finding whether discrimination has occurred or nor, and issuing recommendations to the discriminator on how to correct the situation. Therefore, some opinions contain specific recommendations issued in concrete cases of discrimination. However, the Commissioner can also issue a general 'recommendation', mostly issued to public authorities. These are of a general nature, e.g. issued to all centres for social work, to all courts, etc.

92 The Commissioner uses 'warnings' when she wants to draw attention to dangerous phenomena, such as misogynic and sexist statements, cases of murder as a consequence of domestic violence, etc.

93 The Commissioner uses 'announcements' in order to inform the public about some changes in the law and practice, and about the position of certain groups on particularly relevant dates (e.g. International Women's Day).

94 For further information on the recommendations provided, see European Equality Law Network, Flash Report *Serbia – Commissioner for Protection of Equality's regular Annual Report for 2017*, published in June 2018. Available at: https://www.equalitylaw.eu/downloads/4611-serbia-commissioner-for-protection-of-equality-s-regular-annual-report-for-2017-pdf-295-kb.

Internet source:
http://ravnopravnost.gov.rs/izvestaji/.

Slovakia

SK

CASE LAW

The Regional Court has upheld a decision by the District Court in favour of a Roma woman who had been discriminated against in access to employment

Racial or ethnic origin

In 2011, the claimant sued the town of Spišská Nová Ves ('the town') for discriminating against her by not selecting her for one of three vacant positions as a terrain social worker, financed by the Social Development Fund. When compared with the applicant, the persons selected for the positions were less qualified, had less experience with terrain social work and less training, did not speak the Roma language, and were of non-Roma origin. Experience with terrain social work, speaking the Roma language and being of Roma origin were deemed to be advantages in the selection process (although the latter two were listed as advantages by the Social Development Fund only).

In 2012, the District Court of Spišská Nová Ves dismissed the complaint as being manifestly ill-founded and its decision was confirmed in 2013 by the Regional Court in Košice. The claimant subsequently lodged a complaint with the Constitutional Court. On 1 December 2015, the Constitutional Court ruled that the regional court had violated the complainant's right to a fair trial as well as her right to an effective remedy. It quashed the regional court's decision and ordered the national general courts to deal with the case again.

The Regional Court in Košice subsequently quashed the first instance court decision from 2012 and the case returned before the District Court in Spišská Nová Ves[95] that on 23 March 2017 ruled that the respondent had discriminated against the claimant on the ground of her Roma ethnic origin and ordered the respondent to send her a written apology, to pay non-pecuniary damages to the amount of EUR 2 500 and to refund 50 % of her legal costs. The court partially dismissed the claim for non-pecuniary damages, as the claimant had requested a total amount of EUR 5 000.[96] Both the respondent and the claimant appealed against the decision. The claimant appealed against the parts of the decision whereby the district court partially dismissed her claim for non-pecuniary damages and only awarded her 50 % of her legal costs.

On 7 February 2018 the Regional Court in Košice fully upheld the decision of the District Court in all parts. It confirmed that the respondent had discriminated against the claimant on the ground of her Roma ethnic origin and the respondent was obliged to send her a written apology, to pay non-pecuniary damages to the amount of EUR 2 500 and to refund 50 % of her legal costs. The Regional Court reiterated the conclusions of the first instance court. It concluded that the respondent had not submitted any evidence proving that it did not discriminate against the claimant. In addition, no reasonable arguments were provided as to why the advantages listed by the Social Development Fund – speaking the Roma language and being of Roma origin – were not included in the selection process set by the respondent. It concluded that the respondent had not explained why the respondent's other employees, who were not members of the selection commission, had been included in the selection process (such as asking questions during the job interview).

95 Decision No. 9 Co 54/2016 – 462 of 24 August 2016.
96 Decision No. 8 C 268/2016 – 523 of 23 March 2017.

The Regional Court also fully confirmed the reasoning of the court of first instance concerning financial satisfaction for the claimant. It concluded that the court of first instance had taken into account all the circumstances that were relevant for assessing financial compensation and that the amount of EUR 2 500 was adequate.

The decision of the Regional Court is final and cannot be appealed against.

The legal representation of the claimant was supported by the Slovak NGO Centre for Civil and Human Rights (Poradna) within its strategic litigation programme.

This decision is the first final decision in favour of a Roma claimant in a case of racial discrimination in access to employment and in this regard, it can be considered as a landmark decision. However, the financial compensation awarded in this case is not effective, proportionate and dissuasive and as such is contrary to Council Directive 2000/43/EC. The decision proves that the national courts in Slovakia remain reluctant to award adequate financial compensation in cases of discrimination.

Internet source:
The decision in the Slovak language can be found at:
https://www.poradna-prava.sk/sk/dokumenty/rozsudok-odvolacieho-sudu-v-pripade-diskriminacie-romskej-zeny-v-pristupe-k-zamestnaniu/.

The Constitutional Court has awarded compensation for backlogs in court proceedings in discrimination cases

Racial or ethnic origin

In 2017, the claimant – the Slovak NGO Centre for Civil and Human Rights (Poradna) -submitted a complaint to the Slovak Constitutional Court claiming a violation of its right to a fair trial within a reasonable period of time by the Bratislava III District Court in proceeding file n. 14 C 288/2013.

The claimant argued that in December 2013 it filed an *actio popularis* complaint to the Bratislava III District Court against the State, represented by the Ministry of Health and a State-run hospital, in a case involving the segregation of Roma women in maternity wards. Since then the case had been pending before the first instance court with only one hearing being held and no decision on the merits being issued. The claimant argued that in a case of discrimination against a large group of Roma women, when the interference in their human dignity by discriminatory treatment still persists, the court must proceed without delay. The claimant requested the Constitutional Court to order the District Court to proceed with the case without any delays and also to award non-pecuniary damages of EUR 4 000.

On 7 March 2018 the Constitutional Court decided that there had been a violation of the claimant's right to a fair trial within a reasonable period of time guaranteed as laid down by Article 48 para. 2 of the Slovak Constitution and Article 6 para. 1 of the European Convention on Human Rights. The Constitutional Court ordered the District Court to proceed with the case without delay, awarded the claimant non-pecuniary damages of EUR 3 000 and the refunding of the claimant's legal costs to amount of EUR 312,34, all to be paid by the District Court.

The Constitutional Court rejected the argumentation of the District Court that the delays had been caused by the court's insufficient personnel capacities (a lack of judges) and the court's overcrowded agenda and it concluded that it is the State's obligation to manage the court system so that the principle of a fair trial within a reasonable period of time is respected.

As for the amount of the non-pecuniary damages awarded, the Court stated that it (among other things) reflects the subject of the court proceeding (discrimination) and its meaning for the group concerned (Roma women segregated in maternity wards).

The delays in court proceedings also in cases of discrimination are a reality in Slovakia and as such are one of the serious barriers to access to justice in these cases. It is therefore important that the Constitutional Court addresses this problem and awards adequate financial compensation for such a violation. This violation in the proceeding does indeed have an important meaning for the group submitting the *actio popularis*.

Internet source:
The decision in the Slovak language can be found at: https://www.ustavnysud.sk/vyhladavanie-rozhodnuti#!DecisionsSearchResultView.

The placement of a Roma child in a special class for children with an intellectual disability is not discriminatory

Racial or ethnic origin

In 2014, the claimant, represented by his father, sued the elementary school in Plavecký Štvrtok for discriminating against him on the ground of his Roma ethnic origin because he had been placed in a special class for intellectually disabled children following a psychological assessment. The claimant also sued the Slovak Republic claiming that the state policy of placing Roma children in special classes and schools is discriminatory.

On 17 May 2018, the District Court of Malacky dismissed the claim in all parts because the claimant had not proved that he had been discriminated against.[97] According to the court, it had been proven during the proceedings that the claimant could not speak the Roma language and had a proper knowledge of the Slovak language. The court also dismissed a claim that his placement in the 'zero grade' and in special classes constituted segregation because the school was only attended by Roma children.

The decision of the District Court is not final and can be appealed against. However, it is worth noting that it is the first decision of a national court regarding the placement of Roma children in special schools and classes based on a psychological assessment in Slovakia. The court omitted any reasoning regarding the claim of indirect discrimination. Although there was evidence that the claimant had been misdiagnosed, the court concluded that the school cannot be responsible as it only proceeded in line with valid legislation. The District Court's decision seems to breach domestic antidiscrimination legislation, EU directives and ECtHR case law (*D.H. and others v Czech Republic, Horvath and Kiss v Hungary).*

Internet source:
The decision in the Slovak language has not yet been published.

The Public Defender of Rights has published a report assessing the implementation of her previously proposed measures against the discrimination of Roma children in education by the Ministry of Education

Racial or ethnic origin

In May 2018, the Public Defender of Rights published a report reviewing progress in the implementation of the measures proposed by her office between 2013-2015 in order to improve the protection and observance of individuals' basic rights and freedoms in education. The report specifically assesses the implementation of measures concerning the prevention of discrimination against Roma children by the Ministry of Education in recent years.[98]

97 *X.Y. joined by the third party European Roma Rights Center v Elementary school in Plavecký Štvrtok and the Ministry of Education of the Slovak Republic*, 17 May 2018, n. 5C/212/2014.

98 Office of the Public Defender of Rights, *Report by the public defender of rights on the progress in the implementation of the measures proposed in 2013, 2014 and 2015 in the educational process in Slovakia to improve the protection and observance of individuals' basic rights and freedoms*, May 2018. Available at: http://www.vop.gov.sk/files/EN_SPRAVA_VOP_vn%C3%BAtorny_audit_skolstvo.pdf.

The report provides an overview of the measures addressing systemic discrimination against and the segregation of Roma children in education that have been proposed by the Public Defender of Rights in previous years and assesses to what extent these measures have been implemented by the Ministry of Education. It particularly focuses on the assessment of the most important measures having been taken by the responsible government authorities in response to pending infringement proceedings at the European Commission concerning discrimination against Roma children in education, which were initiated in April 2015.[99] The main purpose of the measures proposed by the Public Defender of Rights was to ensure that the prohibition of discrimination in education, and segregation in particular, is enforced in practice, and to specify particular entities responsible for this illegal conduct, along with applicable sanctions.

The report also includes an overview of the investigations or fact finding conducted by the Office of the Public Defender of Rights itself concerning the given problem in previous years.

The report generally states that since the initiation of the EC infringement proceedings, the Ministry of Education has been continuously working on introducing steps to improve the fulfilment of the right to education for all children and pupils, with a special focus on children and pupils with a certain type of disadvantage, irrespective of whether that disadvantage is due to health, social or other reasons. Some of the steps have been translated into arrangements adopted in the form of generally binding regulations, the Ministry's instructions or guidelines, while others have the form of short or long-term projects to support inclusive education in practice. However, the Public Defender of Rights concludes that these steps have not led to obvious progress and calls on the government authorities to introduce and implement desegregation measures that should be as specific and sustainable as possible.

The report further stresses that legal prohibition of discrimination and segregation in education cannot itself prevent and remove these practices from everyday school practice and relevant legislative amendments addressing these issues from recent years must be duly implemented in practice in order to bring desirable changes.

Internet source:
The report is available in an English translation: http://www.vop.gov.sk/files/EN_SPRAVA_VOP_vn%C3%BAtorny_audit_skolstvo.pdf.

Final court decision in the case of the residential segregation of Roma

Racial or ethnic origin

The claimants in this case were of a Roma ethnic minority and brought an action against the town of Sabinov for being illegally relocated from rental apartments owned by the town in a central area to new rental apartments of a lower standard, built by the town outside the built-up areas and far from the town's infrastructure. As only tenants of Roma ethnic origin had been moved, this led to their segregation. They simultaneously sued the Ministry of Transport and Construction for subsidising this building project despite its discriminatory nature and for not preventing the segregation of Roma tenants.

The claimants filed the lawsuits with the District Court in Prešov in 2007 and it ruled in 2010 that the defendants had breached the principle of equal treatment and the duty to adopt measures to prevent discrimination. The District Court emphasised the application of the outdated concept of formal equality and the need for a strict scrutiny test for a 'suspicious criterion' consisting of ethnicity. The court awarded each claimant financial compensation of EUR 1 000 (dismissing the remainder of their claims).[100] However, following an appeal by the defendants, the claimants' case was completely dismissed by the

99 Infringement proceedings of the European Commission against Slovakia on non-conformity with Directive 2000/43/EC on Racial Equality – Discrimination of Roma children in education, initiated on 29 April 2015, Infringement number: 20152025.

100 Slovakia, Prešov District Court Decision No. 25C197/2007 – 585 of 15 June 2009. For further information, see European Anti-Discrimination Law Review, Issue 12 (July 2011), pp. 70-71.

Regional Court in Prešov in 2010. The legal representative of the Roma claimants referred the case to the Supreme Court of the Slovak Republic which, in 2012, overturned the decision of the Regional Court and referred the case back to it for further proceedings.[101] In 2012, the court of first instance (the District Court in Prešov) issued a new decision and confirmed its original decision. The defendants again appealed against the ruling by the court of first instance and a new decision was issued by the Regional Court in Prešov in March 2014, again dismissing their complaint. Following the appeal by the claimants, the Supreme Court overturned the decision of the Regional Court for the second time and referred the case back to it for further proceedings.[102]

The Regional Court confirmed the decision of the first instance court from October 2012 and upheld its reasoning.

In line with the legal opinion of the upper Supreme Court, the Regional Court concluded that only Roma where moved to rental apartments in the segregated area of the town, so they were treated differently from the other inhabitants thus facing discriminatory treatment on ground of their ethnic origin for which the town was responsible.

The Regional Court ruled, in line with the court of first instance, that the claimants had been entitled to claim their rights as protected by the antidiscrimination laws, even though they did not claim that the termination of their rental agreements by the town had been illegal. According to the court it was up to the claimants to choose which legal measures to protect their rights they would use. The Regional Court further stated that the implementation of antidiscrimination legislation by the state authorities and municipalities is not sufficient in practice. In this context the Ministry of Transport as a state authority has the duty to protect human rights not only in theory, but also in practice. It has to respect all the obligations determined by international treaties. According to the court, the Ministry of Transport was obliged to examine circumstances under which the subsidy was supposed to be used in a broader context and to consider whether using the subsidy would eventually lead to the segregation of the Roma minority. In line with the decision of the Supreme Court, the Regional Court pointed to the positive obligation of the state authorities to prevent discrimination.

As for the amount of the non-pecuniary damages, the Regional Court concluded that the amount of EUR 1 000 awarded to each of the eight claimants was adequate for the violations that had occurred. The Regional Court therefore decided in line with the legal opinion of the upper Supreme Court fully recognising the responsibility of the Government institutions to prevent the residential segregation of the Roma minority. In its key conclusions, the decision is in line with the EU Racial Equality Directive and international human rights law as such.

The claimants in this case were legally represented by a lawyer cooperating with the NGO Via Iuris and the decision is final.

Internet source:
The decision is published in Slovak only at:
https://obcan.justice.sk/infosud-registre/-/isu-registre/i-detail/rozhodnutie/000da3d2-a41f-4fb9-b469-3760918f4d16%3Ab2e5d9d7-e6e6-43c5-af46-aac5bb1ebcb5?_isufrontreg_WAR_isufront_parentDetailPart=rozhodnutia&_isufrontreg_WAR_isufront_parentEntityPk=155.

101 For more information on previous developments in this case, refer to the Law Review 2018/1 of the European Equality Law Network (p. 112), accessible at: https://www.equalitylaw.eu/downloads/4639-european-equality-law-review-1-2018-pdf-1-086-kb.

102 Slovakia, Prešov District Court Decision No. 25 C 197/2007 – 585 of 15 June 2009; Prešov Regional Court Decision No. 13 Co/44/2009 – 655 of 13 May 2010; Decision of the Supreme Court of the Slovak Republic No. 5 Cdo 257/2010 of 22 February 2012; Prešov District Court Decision No. 25C 1/12 – 33 of 22 October 2012. Prešov Regional Court Decision No. 2 Co/11/2013-134 of 11 March 2014, Supreme Court of the Slovak republic Decision No. 5 Cdo 18/2015 – 202 of 19 April 2017.

SI Slovenia

POLICY DEVELOPMENT

Second Annual Report by the Equality Body

All grounds

In April 2018 the Advocate of the Principle of Equality, the new equality body in Slovenia, released its Annual Report for 2017 to be submitted to the National Assembly.[103] The report illustrates the main findings of the work carried out by the Advocate during the last year.

The Report emphasises that the lack of clarity of the procedure described in the law has in practice refrained the Advocate from issuing decisions in discrimination cases. The Protection against Discrimination Act sets out that the Advocate first conducts an administrative procedure to examine the discrimination complaint and then issues a decision following this procedure. After both final acts have been issued in the two procedures, further legal remedies can be used. The law requires that two procedures are conducted by one body and may therefore hinder the assessment of discrimination cases.

Statistics show that in 2017 the Advocate received 79 complaints. Most of the 2017 complaints referred to disability (11), followed by race/ethnic origin (10), religion (10), gender (10), sexual orientation (4), age (3), while 31 complaints referred to other grounds either not covered by the directive or the ground was not specified.

The Advocate has been very active in gathering information from other State bodies on their work related to the prevention of discrimination, carrying out consultations with civil society organisations, conducting public opinion polls, promoting awareness-raising events and promotional activities. The Advocate found that there is a great need for systemic data collection on discrimination cases by all relevant institutions. Furthermore, the report presents the results of a survey conducted by the Advocate, showing that at least 30 % of respondents in Slovenia are not satisfied with the fight against inequality. Roughly 20 % stated that they have been discriminated against during the last 12 months.

This is the second Advocate report released after 2012 and underlines that the complete autonomy of the equality body is undermined by the lack of sufficient human and financial resources.

Internet source:
http://www.zagovornik.si/porocilo/redno-letno-porocilo-za-leto-2017/.

Human Rights Ombudsman's Annual Report

All grounds

On 10 April 2018, the Human Rights Ombudsman of the Republic of Slovenia released the Ombudsman's Annual Report for 2017.[104] In line with Article 34 of the Human Rights Ombudsman Act the Ombudsman reports to the National Assembly on the previous year by 30 September of each year at the latest.

The 434-page report contains a 38-page section dedicated to various forms of discrimination and intolerance. In 2017 the Ombudsman dealt with 68 complaints of alleged discrimination compared to 65 complaints in 2016. In 2017, 27 processed complaints were related to ethnic origin, 3 to gender, 7 to sexual orientation, 11 to disability, 16 to other grounds (the report does not specify them) and 4 complaints related to discrimination in employment and work, but the report does not specify on which

103 http://www.zagovornik.si/wp-content/uploads/2018/04/Redno-letno-poročilo-Zagovornika-načela-enakosti-za-leto-2017.pdf.
104 http://www.varuh-rs.si/publikacije-gradiva-izjave/letna-porocila-priporocila-dz-odzivna-porocila-vlade/.

grounds. Out of the complaints received, 56 were resolved and in 10 of these cases discrimination was found (6 were related to ethnic origin, 1 to gender, 2 to disability and 1 to other grounds).

The substantive part of the report extensively addresses several persisting discrimination issues, such as the difficult living conditions of some Roma families, the lack of infrastructure and sanitation in non-regularised Roma settlements and the fact that the responsibility to resolve Roma settlement issues should not be exclusively for the municipalities, but also for the State.

The section dealing with discrimination based on sexual orientation illustrates that, while more complaints have been dealt with in 2017 (7) compared to 2016 (3), in none of the cases was discrimination found in 2017.

The section on discrimination on the ground of disability shows that there has been a steady decrease in complaints filed in the last few years (14 in 2016, 11 in 2017). In 2017 discrimination was found in 2 cases. Despite the decline in the number of complaints based on disability the Ombudsman continued to pay particular attention to the specific issue of students with disabilities who are not entitled to reasonable accommodation in relation to education and studies, as required by the Equal Opportunities for People with Disabilities Act (e.g. disability is not one of the conditions for which studies could be extended and due to their disability students have problems due to the non-availability of appropriate transport to universities).[105] It was found that there is a delay of two years in the adoption of the appropriate legislation (i.e. the planned new Higher Education Act) that would provide for the elimination of problems in this field. Moreover, the Ombudsman highlighted that the Directorate for People with Disabilities was found to be unsatisfactory in its performance. While this is probably due to the Directorate being understaffed, underfinanced, and therefore not able to operate in complete autonomy, the Ombudsman encouraged the Directorate to make more concrete efforts in its endeavours.

On the systemic level an important reform has taken place with regard to the status of the Human Rights Ombudsman. In 2017, with the amendments to the Human Rights Ombudsman Act,[106] this institution has been granted additional responsibilities which will allow it to be upgraded from status 'B' to status 'A' to become a National Human Rights Institution under the Paris Principles. This implies that, in addition to the existing core responsibility of examining complaints, the Ombudsman now also has the mandate of raising awareness, promotion and the prevention of rights violations which will be carried out by a Human Rights Council of the Ombudsman (comprised of representatives of the government, academia and civil society) and a special Human Rights Centre organised within the Ombudsman Office.

This is the Ombudsman's twenty-third annual report. The Ombudsman's annual reports serve as an important source of information in the field of human rights in Slovenia, including in the field of discrimination. The fact that in 2017 this institution was upgraded to status 'A' and is now responsible both for dealing with complaints OF human rights violations and for raising awareness on issues connected with human rights and human rights violations is an important step forward. The value of the report is that it provides wide information addressing various audiences.

Internet source:
http://www.varuh-rs.si/publikacije-gradiva-izjave/letna-porocila-priporocila-dz-odzivna-porocila-vlade.

105 Human Rights Ombudsman Annual Report for 2017, p. 130.
106 Zakon o dopolnitvah Zakona o varuhu človekovih pravic (ZVarCP-B), Official Gazette of the Republic of Slovenia, No. 54/17, http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7515.

ES Spain

LEGISLATIVE DEVELOPMENT

New bill on equal pay

Gender

The Congress of Deputies has admitted the first bill on equal pay in the history of Spain. Spain has not yet transposed the Recommendation of the European Commission on pay transparency of 7 March 2014, and there is no definition of work of equal value provided by current Spanish law. Article 28 of the Workers' Statute[107] states that '*[t]he employer is obliged to pay its employees the same remuneration for work of equal value, whether it is paid directly or indirectly, regardless of the nature of the work which includes income that is not considered to be a salary by Spanish legislation, without discrimination on the basis of sex.*' Article 22 of the Basic Statute of the Public Worker[108] states basically the same for the public sector. Besides these two provisions, there are currently no other references to equal pay in Spanish legislation.

On 24 October 2017 the 'Podemos' party (the third largest party since the last elections) registered a bill in the Congress of Deputies, the main objective of which was to transpose the 2014 European Commission Recommendation on pay transparency. The content of the bill is quite ambitious and intends to remove various obstacles in Spanish legislation in order to attain equal pay for women and men. On 22 February 2018, the bill was admitted in Congress and will be discussed over the next few months. All parties in Congress supported the admission of the bill except the Government party which abstained. As the bill was presented by an opposition party, its adoption and potential amendments are still uncertain. If approved, the bill would be an effective implementation of the Recommendation of 7 March 2014 for the following reasons:

a) It provides a definition of work of equal value and stipulates how the value of the work must be evaluated and compared using objective criteria such as educational requirements and professional training, qualifications, effort and responsibility as well as other factors strictly related to the skills of the worker and the conditions under which the work is developed. All collective agreements will be obliged to expressly refer to the criteria that they use to evaluate work positions.
b) The bill presents three systems for wage transparency. Deterrent sanctions apply if these obligations are not fulfilled: (i) Each worker in companies of more than 10 employees would have the right to be informed about average remuneration according to each category of employee or position, broken down by gender, including all kinds of payments (even complementary or variable components). The employer would have to give this information to the workers in their wage documents; (ii) The employer would have to inform the company representatives about average remuneration according to each category of employee or position, broken down by gender including all kinds of payments; (iii) Companies of more than 250 employees would be obliged to carry out pay audits.
c) The functions of the Institute for Women and Equal Opportunities are to be increased so that there is greater control over pay discrimination. In particular, the Institute will have to issue a report on all legal proceedings concerning indirect discrimination on the basis of sex.
d) The Labour Inspectorate will have specialized units in the field of equality between men and women in each province.
e) The proposed bill is rather ambitious and applies to both private companies and public administrations. The most important feature of the bill is the right to information on pay that it guarantees to workers and their representatives. Moreover, the bill increases institutional control through the Institute

107 Royal Legislative Decree 2/2015 of 23 October 2015, https://www.boe.es/buscar/act.php?id=BOE-A-2015-11430&p=20151024&tn=2, accessed 6 March 2018.
108 Royal Legislative Decree 5/2015 of 30 October, https://www.boe.es/buscar/act.php?id=BOE-A-2015-11719, accessed 6 March 2018.

for Women and Equal Opportunities and specialized gender discrimination bodies in the Labour Inspectorate.

Internet source:
Bill for equal pay between women and men http://www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-171-1.PDF.

CASE LAW

The annulment of a dismissal based on indirect discrimination on the ground of disability

The claimant had been employed as a cleaner by 'Ferroser Servicios Auxialiares SA' since 1993 and was dismissed by his employer in 2015 following several periods of absence from work due to sickness. The claimant sought to have his dismissal annulled on the ground that it constitutes discrimination based on disability.

In 2014 the claimant had been recognised by the competent authority as having a disability, but he had never informed his employer of this fact. According to the diagnosis of the Public Health Medical Services, these health problems which led to the recognition of the claimant's disability were the cause of his absence from work. The claimant argued that there was a direct link between those periods of absence and his disability.

The Spanish Workers' Statute (Article 52), which concerns the termination of an employment contract on objective grounds, provides that the labour contract may be terminated 'for absences from work, albeit justified but intermittent, that amount to 20 % of working hours in two consecutive months provided that the total absences in the previous 12 months amount to 5 % of working hours, or 25 % of working hours in four non-continuous months within a 12-month period' (paragraph d).

Social Court No. 1, in Cuenca, Spain (Juzgado de lo Social No. 1 de Cuenca), decided to submit a preliminary ruling to the CJEU and asked whether Directive 2000/78 precludes the application of a provision of national law under which an employer is entitled to dismiss an employee on objective grounds for intermittent absences from work. The Court emphasised that workers with disabilities are more exposed to the risk of being dismissed under Article 52.d of the Workers' Statute than other workers, regardless of whether or not the employer has knowledge of the disability.

The Judgment of the CJEU of 18 January 2018 (C-270/16, *Ruiz Conejero v Ferroser*) concluded that Directive 2000/78/EC must be interpreted 'as precluding national legislation under which an employer may dismiss a worker on the grounds of his intermittent absences from work, even if justified, in a situation where those absences are the consequence of sickness attributable to a disability suffered by that worker.'[109]

After the decision of the CJEU, Social Court 1 of Cuenca issued a judgment on 7 March 2018 (case 171/2018) and declared the claimant's dismissal null and void for discrimination on the ground of disability. The judge held that there had been indirect discrimination against the claimant, as an apparently neutral business decision caused a situation of a particular disadvantage to a person with a disability with respect to other workers, because the absences from work were due to illnesses derived from his officially recognised disability.

109 CJEU, case C-270/16, Judgment of the Court of 18 January 2018, ECLI:EU:C:2018:17. For further information, see above, p. 95.

This case clarifies the application of Directive 2000/78 in the field of indirect discrimination. Moreover, the Spanish Parliament is now called upon to modify Article 52.d of the Workers' Statute and to adapt it to Directive 2000/78 in order to avoid a situation where indirect discrimination may occur against workers with disabilities.

Internet source:
http://ignasibeltran.com/wp-content/uploads/2018/03/SJS-1-Cuenca-7.3.18-Ruiz-Conejero..pdf.

A recent ruling by the Provincial Court of Navarra demonstrates inconsistencies between the Spanish Criminal Code and the Istanbul Convention

Gender

On 27 April 2018, the Provincial Court of Navarra published its Judgment 38/2018 of 20 April 2018 which was awaited with great expectation. The facts of the case took place during the 2016 San Fermin festival (in Pamplona), when an 18 year-old woman reported that she had been raped by five men. The assault was carried out and recorded by the men, who called themselves 'La Manada' ('The flock') and frequently shared their sexual activities on social networks. The recording was used as decisive evidence during the trial. The judgment stated that the complainant was clearly subjected to the will of the accused. The judgment further stated that the woman never accepted to have sex with the five men, and that she always maintained a passive and submissive attitude. It was proven that she was pushed into the hall of a building and was assaulted by the five men whom she had just met, without any physical resistance on the part of the woman.

The public prosecutor considered that the woman had been the victim of a sexual assault (or rape) which, according to Articles 177, 179, 179 and 180 of the Criminal Code, should be punished with 18 years' imprisonment for each of the perpetrators. According to these articles, a sexual assault exists when a person is forced to have sex with the use of violence or intimidation. The defendants considered that there was no sexual assault because the complainant consented to the sexual activity.

Two magistrates in this case held that the complainant did not consent to having sex with the defendants, but also stated that there was no evidence of violence or intimidation. Therefore, they held the men guilty of sexual abuse instead of rape, which resulted in a sentence of nine years' imprisonment for each of them. However, a third magistrate disagreed with this interpretation and was of the opinion that the accused should have been acquitted. According to his view, both parties had consented to sexual relations, given that the woman did not expressly oppose or offer clear resistance.

The Judgment has been appealed by both the complainant and the defendants. This Judgment has triggered an important social reaction, and spontaneous and massive demonstrations took place in many Spanish cities.[110] The media have extensively reported on this state of social unrest, and the Government is considering amending the Criminal Code.[111] Many associations have drafted communications against the Judgments, including the Association of Female Judges.[112]

Despite the fact that Spain has signed and ratified the Istanbul Convention, this judgment illustrates that the Spanish Criminal Code does not yet comply with the Istanbul Convention, under which sex without mutual consent is considered to be rape. The current Criminal Code does not consider that every sexual assault without the consent of the victim is rape, but only those acts that have been perpetrated with violence or intimidation.

110 https://www.lainformacion.com/espana/sentencia-manada-reacciones-indignacion/6347071, accessed 28 April 2018.
111 https://www.elperiodico.com/es/politica/20180427/gobierno-violacion-codigo-penal-la-manada-6788534, accessed 28 April 2018.
112 http://www.mujeresjuezas.es/2018/04/28/nuestro-comunicado-sobre-la-sentencia-de-la-audiencia-p-del-caso-la-manada/, accessed 28 April 2018.

Internet source:
The judgment is still not available in the Spanish official repertoire of jurisprudence, but the media has made the sentence public. https://www.eldiario.es/norte/navarra/DOCUMENTO-sentencia-integra-manada_0_765024296.html, accessed 28 April 2018.

Sweden

SE

CASE LAW

NGO addresses inadequate accessibility as discrimination in relation to the provision of services

Disability

LW was refused service on a bus due to his wheelchair. The bus driver pointed out that even though the bus was equipped with a step lift, he was not trained to use it. The Discrimination Act includes inadequate accessibility as a form of discrimination according to Chapter 1 § 4 pt 3 and EU Regulation No. 181/2011 concerning the rights of passengers in bus and coach transport and point out that people with disabilities, just like other people, should have comparable accessibility. Therefore, LW asserted that the refusal of service constituted discrimination. A complaint was submitted to the Swedish Equality Ombudsman (DO). Although concluding that discrimination may have occurred, the DO chose not to pursue the case. The precise reasons for the DO's lack of action are unclear. However, as pointed out in general on the DO's website – the DO decides which cases will be given priority based, for example, on whether the case involves an issue that can lead to a change in the case law or if it is of principal importance and if it determines that the case can otherwise lead to a judgment that is of broader importance. The DO also pointed out that it can often be more effective with a non-compulsory supervisory decision as opposed to taking a case to court. LW then turned to the DHR (Delaktighet, Handlingskraft, Rörelsefrihet – a disability organisation). DHR determined that they would take on the case as an NGO on behalf of LW. This also meant that they would take on the cost risks in case the case was lost.

The District Court determined that the facts shown by DHR were sufficient to shift the burden of proof to the Region (the regional government responsible for bus traffic).[113] The Region was unable to show that discrimination had not occurred and was thereby found to have violated the Discrimination Act. The compensation for discrimination ordered by the court amounted to SEK 16 000 (8 000 for the violation of integrity and 8 000 as a preventive addition). The parties had until 2 July 2018 to appeal.

The key issue in this particular case was the initiative and courage shown by a civil society organisation (DHR) in taking the case even though the Swedish Equality Ombudsman (DO) was unwilling to act. The risks would have been even greater for LW. Civil society has little tradition of enforcing civil laws in Sweden. DHR's success may contribute to the increasing interest of civil society in enforcement as part of a new tradition concerning advocacy.

Internet source:
Labour court's website http://www.arbetsdomstolen.se/pages/page.asp?lngID=4&lngNewsID=1668&lngLangID=1.
The whole case is at http://www.arbetsdomstolen.se/upload/pdf/2018/42-18.pdf.
https://lagensomverktyg.se/wp-content/uploads/sites/4/2018/06/Gävle-TR-T-240-16-Dom-2018-06-11.pdf.

113 Gävle District Court judgment. 2018-06-11 (Mål nr T 240-16).

Indirect disability discrimination in working life

Disability

AA (represented by the Swedish Equality Ombudsman – the DO) had applied several times to be included in a job pool for temporary workers and/or a temporary job. She was told that in order to be eligible she had to have a separate main employment (basically constituting a job that meant employment of at least 50 %). The employer said that she was ineligible since her sickness benefit of 50 % due to diminished work capacity was not considered to be a main employment, referring among other things to the terms of the relevant collective agreement concerning temporary employment concluded by the employer's organisation and the union. The case was referred to the Labour Court which decided in June 2018[114] that the use of this eligibility requirement, given the facts of the case, constituted indirect discrimination on the ground of disability. Even though the eligibility requirement of a separate main employment had been agreed upon by the labour market parties through a collective agreement, and the requirement was considered to have a legitimate purpose, its application in this case involved indirect discrimination against persons with a disability.

The goal of the collective agreement was avoiding a situation where employers abused the possibilities related to temporary employment. Nevertheless, the effect of the implementation of the separate main employment requirement was not shown to be suitable and appropriate, thus leading to the judgment of indirect disability discrimination.

Internet source:
Labour court's website http://www.arbetsdomstolen.se/pages/page.asp?lngID=4&lngNewsID=1668&lngLangID=1.
The whole case is at http://www.arbetsdomstolen.se/upload/pdf/2018/42-18.pdf.

POLICY DEVELOPMENT

Ministry of Social Affairs presents reports with suggestions on regulations regarding medical procedures for a sex change and a change of sex in the population register

Gender

In 2014, a Government committee suggested that anyone who wishes to change their legal gender as it appears in the population registry should be free to do so. Furthermore, the committee suggested that all indirect or direct requirements of medical assessment or treatment that need to be met before a change of sex registration should be abolished.[115] In May 2017, it announced that a legislative proposal on the matter would be presented during the course of 2018, whereby the current Act concerning the recognition of gender in certain cases (SFS 1972:119) would be replaced with two new acts, decoupling the legal and the medical sides of the process from each other.

In April and May 2018, the Ministry of Social Affairs presented two reports: one with a draft proposal for an act on medical procedures for a sex change, and the other with a draft proposal for an act on a change of gender in the national population register.[116]

Applications for medical procedures on sexual organs are reviewed by the Judicial Council of the National Board of Health and Welfare Under the current law, a person must be at least 18 years of age, and meet three further requirements in order to be eligible to undergo medical procedures for a sex change. The applicant must, over a long period of time, have felt that he or she belongs to the other gender, presented him/herself for a period of time in accordance with this gender identity, and the person must be expected to live in accordance with this gender identity also in the future. The Judicial Council of the National

114 Labour Court decision 2018-06-20 (AD 2018 No. 42).
115 Government Report SOU 2014:91.
116 Ministry Publications Series DS 2018:11 and Ministry Publications Series DS 2018:17.

Board of Health and Welfare requires as proof a statement from a medical expert, and in most cases also a statement from a psychiatrist and a report produced by a social worker.[117] In practice, this means that an application cannot be approved until the applicant has passed an assessment period at a gender clinic. The assessment period usually takes two years.

The first report proposes an act regarding medical procedures for a sex change. The report suggests that the requirement of having presented him/herself to the outside world in the preferred identity should be removed, as such a requirement may impose present ideas concerning gender behaviour.[118] The report also suggests that the review by the Judicial Council of the National Board of Health and Welfare should be abolished, leaving the final decision to the treating physician. If a person is denied medical assistance, the decision may be appealed to the Judicial Council of the National Board of Health and Welfare. The third important change suggested by the Ministry is to repeal the age limit of 18 years. The report does not propose any lower age limit, instead all applications by persons under 18 years of age shall be subject to a review by the Judicial Council of the National Board of Health and Welfare (as is currently the case with applications from adult persons), which may only approve an application if there are extraordinary reasons. The report suggests that children over 15 years of age may file their own applications, without the consent of their parents.

The other report puts forward a legislative proposal on the administrative change of gender and the assignment of a new social security number or coordination number. The starting point of the proposed act is that a change of gender in public records should be simple, quick and transparent, and that the individual's self-determination should be given priority as far as possible. In line with these ambitions, the proposed act does not require the applicant to present any evidence regarding the change of gender identity. Nor does the act address a specific group (such as transgender persons) but applies to every person over 12 years of age. For children between 12 and 15 years of age, the application is to be made by their custodians, and the child's consent is required. In a case where the custodians cannot agree, the municipal social welfare committee may permit the application to be filed if that is necessary with respect to the best interests of the child. A child who is over 15 years of age may apply for an administrative change of gender independently of his/her custodians. In these cases, the custodians shall be informed once the application has been approved. The requirement of a simple, quick and transparent process, as well as the emphasis on the individual's self-determination, shall apply irrespective of the applicant's age.

The reports are only preparatory documents that must be followed up by actual legislative proposals. The plan of the Government is to present a legislative proposal in the early autumn of 2018, so that the acts can enter into force in July 2019. In respect of this plan, it should be noted that Sweden will hold general elections on 9 September 2018, and that the outcome of the elections may have implications for the process.

Internet source:
https://www.regeringen.se/4990f8/contentassets/313687fc78b643e7be24a8ab994477e5/vissa-kirurgiska-ingrepp-ds-2018_11.pdf.
https://www.regeringen.se/49b48e/contentassets/7a67fe76fe0a44c1b2f3c8d5ed8fa6d1/andring-av-det-kon-som-framgar-av-folkbokforingen-ds-2018-17.pdf.

117 Judicial Council of the National Board of Health and Welfare, Recommendations regarding assessments in matters concerning recognition of gender in certain cases // Rekommendationer angående utlåtanden i ärenden gällande lagen om fastställande av könstillhörighet i vissa fall, July 18, 2017, Registration Number 10.2-25178/2016.

118 Ministry Publications Series DS 2018:11, p. 65.

TR Turkey

POLICY DEVELOPMENT

Mobile ballot boxes in shelter homes during elections

Gender

The chair of the Parliamentary Human Rights Commission submitted a written request to the Ministry of Justice requesting measures in order to protect the right to vote for women staying in shelter homes. There are currently 142 shelter homes in Turkey with a total capacity of 3 444 places. In response, the Ministry of Justice offered mobile ballot boxes in shelter homes to enable women to make use of their right to vote free of any fear.

Mobile ballot boxes are originally envisaged to accommodate those confined to bed because of disability or sickness.[119] An amendment to Law no. 298 on Basic Rules on Elections and Electoral Rolls (register of electors) has to be made in order for them to be made available to shelter homes. If legislated, it will be put in practice for the first time during the local (municipality) elections in March 2019.

Women in shelter homes may be afraid to use their right to vote at officially designated ballot boxes. The provision of mobile ballot boxes for these women in shelter homes could be a solution to the problem.

Internet source:
www.resmigazete.gov.tr (official site of the Official Gazette).

UK United Kingdom

CASE LAW

Repeated requests to work longer hours can amount to a provision, criterion or practice which places a disabled person at a disadvantage

Disability

The claimant was an analyst in an independent brokerage and research firm. Following a cycling accident, the claimant experienced serious symptoms of dizziness, fatigue and headaches, and as a result was not able to work the same hours as before. Although on his return to work he worked shorter hours, over time he was asked to work later in the evenings and an expectation began to develop that he would continue to do so. Eventually the claimant resigned, claiming, among other things, disability discrimination.

The Employment Tribunal (ET) held that there was no discrimination as there had only been an expectation that the claimant should work long hours, it had not been required by the employer. However, the Employment Appeal Tribunal (EAT) overturned the ET decision, finding that the approach to disability discrimination based on a provision, criterion or practice, had been too narrow: the term 'requirement' did not necessarily assume 'coercion' but might only represent a strong form of request.

The Court of Appeal (CA) upheld the decision of the EAT and clarified that the claimant was expected to work long hours by a pattern of repeated requests, and this had created pressure on him to agree. This

119 Art. 14 of Law No. 298 on Basic Rules on Elections and Electoral Rolls *(Seçimlerin Temel Hükümleri ve Seçmen Kütükleri Hakkında Kanun),* Official Gazette, 2 May 1961, No. 10796, as amended by Law No. 7102 (Official Gazette, 16 March 2018, No. 30362).

could amount to a provision, criterion or practice and thus amounted to a requirement for the purposes of the disability discrimination claim.[120]

The case confirms that tribunals should not adopt a narrow approach in considering whether a provision, criterion or practice applies in a disability discrimination case. In addition, employers should be aware that repeated requests to work in a particular way, such as working longer hours, can lead to pressure on employees to comply, and that this can amount to a provision, criterion or practice which places a disabled person at a disadvantage.

Internet source:
http://www.bailii.org/ew/cases/EWCA/Civ/2018/323.html, accessed 5 March 2018.

A causal link between unfavourable treatment and disability is sufficient to give rise to a discrimination claim

Disability

The claimant was a teacher employed by the respondent. He had cystic fibrosis and was employed by the respondent who was aware of his condition, and the need for reasonable adjustments to accommodate his disability. He began to experience stress at work due to an increase in his workload which led to conduct which resulted in dismissal for gross misconduct. He had shown an 18-rated film to a class of 15-16-year-old students. The claimant accepted that this was the result of an error of judgement resulting from stress which was linked to his disability. The respondent did not accept that the misjudgement was due to stress or disability and so dismissed the claimant. The respondent claimed that the dismissal could not amount to disability discrimination because the employer was not aware that the disability was linked to the misconduct and had therefore not dismissed because of disability.

The Employment Tribunal (ET) accepted that the claimant's disability meant that the time and energy available to enable him to adapt to significant increases in workload was reduced, which led to an increase in his stress. The dismissal was due to an error of judgment that had occurred as a result of his impaired mental state that had been caused by stress. The Employment Tribunal found that the dismissal was an act of disability-related discrimination, a decision upheld by the Employment Appeal Tribunal.

The Court of Appeal (CA) confirmed that the decision to dismiss the claimant was clearly an act of unfavourable treatment and that this was causally linked to the disability. The treatment was therefore less favourable treatment arising in connection to the disability and amounted to disability discrimination.[121]

The case confirms that a disability discrimination claim may arise when there is a causal link between the unfavourable treatment of the claimant and disability, regardless of whether or not the employer is aware of the link between disability and misconduct.

Internet source:
http://www.bailii.org/ew/cases/EWCA/Civ/2018/1105.html, accessed 16 May 2018.

Supreme Court ruling on worker status for protection under the Equality Act 2010

All grounds

The claimant was a plumbing and heating engineer who claimed to be discriminated against on grounds of disability. In order to bring his claim under the Equality Act, the claimant had to prove that he was working under a contract of employment, a contract of apprenticeship or a contract to personally perform the work (section 83(2)(a) Equality Act 2010). This provision implies that if claimants are not deemed to have the correct employment status, then they cannot fall under the scope of the Equality Act.

120 Court of Appeal ruling on disability discrimination; *United First Partners Research v Carreras* [2018] EWCA Civ 323.
121 Court of Appeal ruling on disability discrimination; [2018] EWCA Civ 1105.

His employment contract did not exactly specify his employment status. However, the employment tribunal held that he had been in employment for the purposes of section 83(2)(a) Equality Act 2010. The Appellants unsuccessfully appealed this decision to the Employment Appeal Tribunal[122] and then to the Court of Appeal.[123] They then appealed to the Supreme Court.

The Supreme Court[124] confirmed that the claimant was employed within the meaning of the term in the Equality Act 2010, as he was contracted to personally perform his work or services. The case is important for those who work under contracts which are drafted in terms of self-employment, in particular in the 'gig' economy. For instance, those workers who have contracts stating that they are self-employed may risk being denied protection from discrimination.

The Court focused on all the contractual terms and the practice of the parties in order to assess the employment status of the claimant. For example, the contract allowed to substitute a different person to perform the work, but in practice the claimant was limited in the extent to which he could appoint a different person to perform the job. Similarly, although the contract stated that as a self-employed person the claimant was free to reject work, in practice his company retained close control of his work. These practices show that the claimant was not an independent contractor, but instead was employed under a contract personally to do work, and therefore covered by the provisions of the Equality Act 2010.

Internet source:
http://www.bailii.org/uk/cases/UKSC/2018/29.html, accessed 19 June 2018.

122 Employment Appeal Tribunal, *Pimlico Plumbers Ltd and Mr C. Mullins v Mr G. Smith,* Appeal No. UKEAT/0495/12/DM of 21 November 2014. Available at: https://assets.publishing.service.gov.uk/media/595a553bed915d0baa00010b/1__Pimlico_Plumbers_Ltd_2__Mr_C_Mullins_UKEAT_0495_12_DM.pdf.

123 England and Wales Court of Appeal, *Pimlico Plumbers Ltd & Anor v Smith* [2017] EWCA Civ 51 of 10 February 2017. Available at: http://www.bailii.org/ew/cases/EWCA/Civ/2017/51.html.

124 UK Supreme Court, *Pimlico Plumbers Ltd and another (Appellants) v Smith (Respondent*) [2018] UKSC 29 of 13 June 2018. Available at: http://www.bailii.org/uk/cases/UKSC/2018/29.html.

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